CARSWELL

ONTARIO SMALL CLAIMS COURT PRACTICE

2022

Hon. MARVIN A. ZUKER
Ontario Court of Justice (Retired)

J. SEBASTIAN WINNY
Small Claims Court
Deputy Judge (Retired)

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PREFACE

Suspension of Court Operations

As we prepared last year's edition of this work, the COVID-19 pandemic and lockdown in Ontario was about one month old. Normal court operations had been suspended for the Small Claims Court effective March 16, 2020. Initially, the only matters being heard during the suspension were any matters which were vetted and approved by a judge as urgent. One assumes there were few such matters. To the litigants, suspension of the court's normal operations starting in March 2020 was essentially a complete shutdown. The fact that the government needed to legislate a suspension of procedural deadlines and substantive limitation periods is a testament to that reality.

The lockdown started as an exceptional emergency measure intended to "flatten the curve" — that is, to contain or delay the spread of illness so as to avoid overwhelming the medical system and significantly increased mortality given finite intensive care resources and particularly ventilators. But relatively soon into the lockdown, governments decided instead to manage the pandemic through to the end. Almost a year after the emergency measures started, the end of COVID-19 and the government measures has yet to be seen.

The suspension of normal court operations continues and as yet there is no specific timeline for a resumption of normal operations. Unlike other trial courts which during the past year made early attempts to conduct trials by videoconference, whether in part or entirely, no such attempts occurred in Small Claims Court until almost the one-year anniversary of the suspension of operations. Litigants in our court have been left with no possibility of trial going ahead (or continuing) since March 16, 2020. The future effect (if any) of the dramatic technological changes now being implemented in the Superior Court of Justice on proceedings in the Small Claims Court, and whether and at what expense such measures might be considered desirable to impose on litigants in the Small Claims Court, is a matter of speculation.

All matters scheduled to be in court from March 16, 2020 forward were adjourned to no specific date. Eventually the court issued a practice direction adjourning all matters to November 2, 2020. That adjournment was theoretical only, to give the litigants a sense that their cases had not been forgotten. No one was to appear in court on the new date and the only potential outcome of that date would be a new date. The theoretical November 2, 2020 date was then rescheduled, first to January 4, 2021 or such other date as the court might determine and then to March 1, 2021 or such other date as the court might determine and most recently to July 5, 2021 or such other date as the court might determine.

The combination of all matters scheduled for hearing on March 16, 2020 forward and all new matters needing a hearing has generated an unprecedented backlog, which continues to accumulate.

As a branch of the Superior Court of Justice, the Small Claims Court uses courtrooms from that court's allotment and relies on courtroom staff drawn from the same staffing pool which supports both the Superior Court of Justice and the Ontario Court of Justice. The suspension of normal operations in both trial courts means that the enormous backlog is a reality for both courts, including Small Claims Court. In the resulting contest for the modest number of courtrooms opened for use starting in July 2020 (courtrooms made subject to intensive anti-COVID-19 measures), the Small Claims Court was given no courtroom time at all. This reflects the usual prioritization of criminal, family and civil cases, in that order, with small civil cases given the lowest priority — roughly on par with provincial offences matters in the Ontario Court of Justice.

Therefore the disaster for Small Claims Court litigants is not only the suspension of normal operations and the lengthy and ongoing duration of that suspension, but also the prospect that once the court system starts to address in earnest the enormous overall backlog generated since March 2020, Small Claims Court is likely to maintain its traditional position as about the lowest priority among all cases in the court system. One can only speculate on how long it will be before Small Claims Court operations return to anything approaching normal

To try and address the stagnation of the system, starting in July 2020 the court implemented a pilot project for settlement conferences to be heard virtually where requested on consent. The roughly-improvised system did not permit the judges to have access to the court file, nor could the litigants file the usual List of Proposed Witnesses with attached documents to be relied on at trial. Later the pilot project was expanded from consent requests for conferences to include requests not made on consent (so long as all parties had the required tech), and remote hearing of certain motions and assessment hearings was arranged. But most fundamentally the suspension of in-person hearings continues and there is no timeframe or even an estimated timeframe for a resumption of in-person trials in the Small Claims Court.

Effective February 23, 2021, the court began a process for scheduling the continuation of trials started but not completed as of March 16, 2020, provided that the continuations would be by videoconference. To date no process or timeframe for scheduling of new trials has been announced, nor has any timeframe for resumption of in-person hearings been announced.

Keeping in mind the number and frequency of legal changes during the pandemic so far, any comments made today concerning COVID-19 and the measures taken in response to COVID-19 are likely to be out of date in the near future. For current information from and the date of publication of this work, please refer to the official notices which may be found on the website of the Superior Court of Justice at ontariocourts.ca: see the Consolidated Notice to the Profession and Public Regarding the Small Claims Court (dated March 16, 2020, as amended February 23, 2021 and subject to any further amendments), and the Continued suspension of Small Claims Court operations due to COVID-19 (dated June 4, 2021, subject to any further amendments). Those any many other notices are organized on the website under the heading "Notices and Orders — COVID-19".

Unsurprisingly, the suspension of Small Claims Court operations has reduced the number of reported decisions to almost nothing since mid-March 2020. Review of the CanLII database reveals the number of reported decisions of the Ontario Small Claims Court from March 16, 2020 to December 31, 2020 was only four, three of which were judgments reserved prior to March 16, 2020 and one was a costs ruling on a matter decided before that date. This indicates that the number of new matters heard during COVID-19 (excluding settlement conferences and any motions or assessment hearings heard remotely) was nil.

A number of Small Claims Court appeals which were already pending as at March 16, 2020, were heard remotely during COVID-19 and produced reported Divisional Court decisions. These and other pertinent appellate decisions since last year's edition are reviewed below in the section entitled Survey of Recent Case Law Affecting Small Claims Court.

The anticipated ruling of the Supreme Court of Canada on the constitutional limits on increased Small Claims Court monetary jurisdiction was delayed by the suspension of that court's operations: the hearing of the appeal in *Reference re article 35 of the Code of Civil Procedure*, 2019 QCCA 1492, 2019 CarswellQue 8040, 2019 CarswellQue 10358, EYB 2019-316229 (C.A. Que.), which had been scheduled for April 2020 was rescheduled and heard on September 24, 2020 (SCC docket 38837), and decision reserved. One could estimate release of that decision in mid-2021. It may define the limits of potential future increases to the monetary jurisdiction in Ontario.

Preface

In last year's edition we ended the preface with a prayer for a speedy return to normalcy. Sadly, that prayer seems in hindsight to have been unrealistic or unsuccessful. From the perspective of the present, let us hope that things improve reasonably soon.

Marvin A. Zuker
Toronto, Ontario
March 2021

J. Sebastian Winny
Kent, United Kingdom
March 2021

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CHAPTER 1 — HOT TOPICS

CURRENT OPERATIONS

Effective March 16, 2020, regular operations of the Small Claims Court were suspended due to the COVID-19 pandemic. That suspension continues as of June 2021 and it is impossible to predict how long it may continue and what changes implemented during the suspension may become permanent.

Over time since March 2020, the court has started to hear an expanding number of specific matters, but remotely rather than in person. The current state of operations is defined by practice directions issued from time to time by the Chief Justice and Associate Chief Justice of the Superior Court of Justice of which the Small Claims Court is a branch.

As of June 2021, the most recent versions of the two relevant practice directions are dated February 23, 2021 and February 26, 2021, and are reproduced in their entirety below.

Readers are cautioned that practice directions can be changed at any time and over the past year, the practice directions relevant to the Small Claims Court have in fact been amended approximately once a month on average. Therefore it is important for readers to verify the current status of operations by checking the most recent versions of the practice directions on the official website of the Superior Court of Justice at www.ontariocourts.ca.

Subject to any more recent changes, the current state of operations as provided under the *Consolidated Notice to the Profession and Public Regarding the Small Claims Court* (as amended June 4, 2021), may be summarized as follows:

- in-person hearings have been suspended since March 16, 2020
- scheduling of new trials has been suspended since March 16, 2020
- urgent motions and urgent garnishment hearings can be requested, and where approved will be heard by teleconference or videoconference
- motions to set aside a noting in default or default judgment are being scheduled on request, to be heard by teleconference or videoconference
- without notice motions are being scheduled on request, to be heard by teleconference or videoconference
- requests for clerk's default judgments are being processed
- assessment hearings are being scheduled on request, to be heard by teleconference or videoconference
- settlement conferences are being scheduled on request, to be heard by teleconference or videoconference
- starting February 23, 2021, re-scheduling of trial continuations (trials which were started but not completed as at March 16, 2020) has begun but provided that the continuations would proceed by videoconference only

The practice direction sets out the process for electronic filing of court documents, including the naming protocol for electronic filings. Court documents may also be filed in person or by mail.

As of June 2021, there remains no official estimate of when in-person hearings may be expected to resume in the Small Claims Court.

PRACTICE DIRECTIONS — COVID-19

For ease of reference we reproduce below the two current practice directions dealing with the nature and extent of Small Claims Court operations during the suspension of normal operations effective March 16, 2020. Readers are cautioned that these practice directions have been amended frequently and indeed almost monthly during the period March 2020 to March 2021. Readers should check for up-to-date versions on the official website of the Superior Court of Justice at www.ontariocourts.on.ca under "Notices and Orders — COVID-19".

CONSOLIDATED NOTICE TO THE PROFESSION AND PUBLIC REGARDING THE SMALL CLAIMS COURT

March 16, 2020; last amended June 4, 2021

Parties are encouraged to use the Small Claims Court E-Filing Service portal or the Small Claims Court Submissions Online portal to file forms and documents online without going to court, where possible. For more information on filing documents online, please see section 11 (Filing) below.

Since the suspension of sittings of the Ontario Small Claims Court in March 2020 due to the COVID19 pandemic, the Court has progressively expanded the matters that it will hear remotely.

The Small Claims Court will continue to monitor the situation and, as possible, will further expand the types of matters and hearings that will be heard during these extraordinary times.

Important: Please note that hearings will only be scheduled if a request for a hearing is submitted in accordance with the instructions below.

Notice of amendments

- Effective June 4, 2021:
  - The process for requesting a motion on notice has changed. Please see sections 3 (Urgent Matters) and 5 (Motions on Notice to Other Parties) for more information.
  - Further information about the scheduling process appears in sections 3 through 7.
  - Section 11.1 is amended to indicate which documents in support of default judgment may now be filed through the Small Claims Court E-Filing Service portal.
- Effective April 12, 2021:
  - The Small Claims Court will stop using request forms under this notice. Hearings can be requested using the processes explained in this notice.
  - The processes for requesting urgent matters has changed. Please see section 3 for more information.
  - Section 12 (Public and Media Access to Small Claims Court Remote Hearings) is added.

1. — Assistance with Small Claims Court Matters

If you require legal advice on a Small Claims Court issue, you may seek assistance through Pro Bono Ontario's Free Legal Advice Hotline (1-855-255-7256).

2. — Remote Hearing Platform and Etiquette

All hearings will be conducted over Zoom, a videoconferencing platform, unless a party indicates that they are unable to participate by Zoom. The Court will make the arrangements for Zoom and will advise the parties of the connection arrangements.

A device with a camera and a microphone (e.g. smartphone, tablet, laptop), plus access to WiFi/an internet connection, will be required for participation by video conferencing.

Where a party is unable to participate by Zoom, the hearing may be conducted by use of a teleconference line.

Hearing participants should have an appropriate technical set-up and observe etiquette appropriate to the nature of remote hearings. Some guidance on these points can be found here on the Superior Court of Justice website.

3. — Urgent Matters

The Small Claims Court will continue to hear urgent matters during the COVID-19 emergency period. These will be heard by telephone or videoconference. Urgent matters may include:

1. Cases in which a judgment debtor has an outstanding warrant for arrest issued in relation to a Small Claims Court proceeding; or
2. Time-sensitive cases that would result in **immediate and serious** financial hardship if there were no hearing.

If you require legal advice in seeking an urgent hearing, you may seek assistance through Pro Bono Ontario's Free Legal Advice Hotline (1-855-255-7256).

To request an urgent hearing, please email your notice of motion and supporting affidavit (Form 15A) to the email address for the Small Claims Court location where the action is based. Please indicate in your email to court staff that the matter is urgent. Your email must comply with the requirements in sections 11.3, 11.4 and section 11.5 (Communicating with Court Staff by Email) below.

After filing, please wait for court staff to contact you (or your representative, if you have one) to:

- obtain a contact email address, if you did not already provide one; and
- provide:
  - the hearing date, time and coordinates; and
  - a document with instructions for responding parties (if applicable).

If your request is for a motion on notice, then you must follow the steps set out in sections 5.2, 5.3 and 5.4 of this notice once court staff provide you with the hearing date.

All documents to be filed for the urgent hearing shall be filed in accordance with section 11 (Filing) below.

4. — Settlement Conferences

The Small Claims Court is no longer accepting request forms to schedule settlement conferences under this Notice as of Monday, April 12, 2021. Court staff will process request forms received before this date.

As of Monday, April 12, 2021, the Court will schedule a settlement conference in an action after a defence is filed. Please note that the Court is prioritizing the scheduling of settlement conferences in actions where a defence was filed before April 12, 2021. Court staff might not be able to provide a date immediately. Once a defence is filed, you do not need to take any action to have a settlement conference scheduled. Court staff will contact you. Please remain courteous when interacting with court staff about your settlement conference.

If a defence in your action was filed with the Court before April 12, 2021, and no request form was submitted before that date, then court staff will be contacting the parties and representatives individually to collect email addresses where one has not already been provided.

Due to high volume, it may take some time before court staff contact you about your settlement conference, even if all parties and representatives have already provided email addresses.

You do not need to take any action to have a settlement conference scheduled until you are contacted by court staff.

For information on how to file materials, please see section 11 (Filing) of this Notice.

5. — Motions on Notice to Other Parties

The Court is accepting requests to schedule motions on notice. Examples of these motions include: motions to set aside a noting in default or a default judgment, motions to strike out or amend a document and motions for a consolidation order.

Steps to seek a motion on notice

5.1 — Filing notice of motion and supporting affidavit

You must file your notice of motion and supporting affidavit (Form 15A) in accordance with section 11 (Filing) below.

You do not need to put the date, time or hearing coordinates on the Form 15A before you file it. Court staff will give you this information later.

After filing, please wait for court staff to contact you (or your representative, if you have one) to:

- obtain a contact email address (if one has not yet been provided); and
- provide a motion date, time and hearing coordinates, and a document with instructions (provided by court staff) for responding parties.

Due to a high volume of requests, it may take some time before court staff contact you (or your representative) about your motion. Court staff might not be able to provide a date immediately. Once all required materials are filed, you do not need to take any action to have a motion on notice scheduled. Court staff will contact you. Please remain courteous when interacting with court staff about your motion.

If your motion is urgent, please email your Form 15A to the email address for the Small Claims Court location where the action is based. Please indicate in your email to court staff

that the motion is urgent. Your email must comply with sections 11.3, 11.4 and 11.5 (Email Filing Format, Naming Documents and Communicating with Court Staff by Email) below.

5.2 — Serve responding parties

After court staff give you the hearing information and document with instructions for responding parties, you must serve:

- the notice of motion and supporting affidavit (Form 15A), providing the hearing date and details, in accordance with the *Rules of the Small Claims Court*; and
- the document with instructions (provided by court staff) for responding parties.

5.3 — File proof of service

You must then file

- proof of service and
- the notice of motion and supporting affidavit (Form 15A) that you served on the responding party

in accordance with section 11 (Filing) below.

A responding party may:

- serve a responding affidavit (Form 15B) in accordance with the *Rules of the Small Claims Court*; and
- file it, and proof of service, in accordance with section 11 (Filing) below.

If a responding party is filing a responding affidavit less than five days before the motion date, then they should file it as described in section 11 (Filing) below.

5.4 — Serve and file any supplementary affidavits

In response to a responding affidavit, the moving party may:

- serve a supplementary affidavit (Form 15B) in accordance with the *Rules of the Small Claims Court*; and
- file it, and proof of service, in accordance with section 11 (Filing) below.

If a moving party is filing a supplementary affidavit less than five days before the motion date, then they should file it as described in section 11 (Filing) below.

6. — Motions in Writing without Notice

Motions in writing without notice to any other party include motions in writing for an assessment of damages, for substituted service, for validation of prior service and for other relief.

If your motion in writing was filed with the Court before April 12, 2021, and no request form was submitted before that date, then court staff will be contacting you (or your representative, if you have one) to collect a contact email address where one has not already been provided. Due to high volume, it may take some time before court staff contact you or your representative about your motion in writing, even if an email address was already provided.

To request a motion in writing without notice on or after April 12, 2021, you must file the notice of motion and supporting affidavits (Form 15A) with the Court. The motion materials must include the claim and affidavit(s) of service of the claim.

The materials must be filed in accordance with section 11 (Filing) below.

Please note that the Court is prioritizing motions in writing without notice that were filed before April 12, 2021.

7. — Requests to Clerk for an Assessment Hearing

If your request to clerk was filed with the Court before April 12, 2021, and no request form was submitted before that date, then court staff will be contacting you (or your representative, if you have one) to collect a contact email address where one has not already been provided. Due to high volume, it may take some time before court staff contact you or your representative about your assessment hearing, even if an email address was already provided.

The Court will schedule an assessment hearing only if the following materials have been filed:

- the claim;
- the Affidavit(s) of Service of the claim;
- the request to clerk (Form 9B); and
- any documentation that you intend to rely on at the assessment hearing.

For information on how to file materials, please see section 11 (Filing) below.

Please note that the Court is prioritizing the scheduling of assessment hearings requested before April 12, 2021. Court staff might not be able to provide a date immediately. Once all required materials are filed, you do not need to take any action to have an assessment hearing scheduled. Court staff will contact you. Please remain courteous when interacting with court staff about your assessment hearing.

8. — Trial Continuations

The Court is rescheduling dates in Small Claims Court trials that had been started but were interrupted when in-person operations were suspended in March 2020.

These trial continuations will be by videoconference.

Court staff are contacting parties and representatives individually regarding scheduled dates and arrangements for these trials.

Due to high volume, it may take some time before court staff contact you about your trial continuation.

You do not need to take any action to reschedule your trial until you are contacted by court staff.

9. — Reopening of Counter Service in Small Claims Court

The Ministry of the Attorney General advises that counter services at Small Claims Court locations continue to be offered from 9:00 a.m. to 11:00 a.m. and from 2:00 p.m. to 4:00 p.m, until further notice.

Counsel/representatives and parties are discouraged from physically attending courthouses to file documents in person. The Court strongly encourages anyone wishing to file a Small Claims Court document to do so electronically. Court documents can be filed in accordance with section 11 (Filing) below.

If you require legal advice to assist you in filing a claim, you may seek assistance through Pro Bono Ontario's Free Legal Advice Hotline (1-855-255-7256).

10. — Unsworn Affidavits

Where a judge authorizes a party to email materials to the court for an urgent hearing and it is not possible to email a sworn affidavit, unsworn affidavits will be accepted on the condition that a sworn affidavit is provided prior to the hearing or the person is available at the hearing to swear or affirm of the affidavit.

11. — Filing

11.1 — Plaintiff's claims and documents in support of default judgment

Most plaintiff's claims can be filed online through the Small Claims Court E-Filing Service portal. You can learn more about the portal at: www.ontario.ca/page/file-small-claims-online/.

If you filed your plaintiff's claim through this portal but have not served it yet, then you may also file your amended plaintiff's claim (including the attachments) through this portal.

If the plaintiff's claim was issued through this portal, and none of the defendants file a defence in the action, then the plaintiff can also file these documents through the Small Claims Court E-Filing Service portal to seek default judgment:

- Affidavit of service (Form 8A) of the claim;
- Request to clerk (Form 9B) to:
  - note a defendant in default; or
  - seek an assessment hearing;
- Affidavit for jurisdiction (Form 11A);
- Default judgment (Form 11B);
- Notice of motion and supporting affidavit (Form 15A) requesting a motion in writing for an assessment of damages;
- Any documents relevant to this motion; or
- Notice of discontinued claim (Form 11.3A).

The document naming convention protocol in section 11.4 (Naming Documents) does **not** apply to documents filed through this portal. Instead, the following requirements apply:

- File names may only contain letters and numbers. A file name and its extension (e.g. ".pdf" or ".jpg") combined must be 30 characters or less.
- The document name must indicate the following information:
  - Document type (e.g. "plaintiff's claim" or "PC");
  - Name of the party submitting the document, and
  - Date on which the document was created or signed, in the format DDMMMYYYY (e.g. 13MAR2021).

Below are sample document names:

- PC Johnson 13MAR2021.pdf
- SchedA Acme 13MAR2021.jpg

11.2 — Other documents

11.2.1 — Documents for hearings more than 5 business days away

The Ministry of the Attorney General advises that most other Small Claims Court documents can be filed through the Small Claims Court Submissions Online portal. You can learn more about the portal at: www.ontario.ca/page/file-small-claims-online. You cannot submit a plaintiff's claim through this portal unless you have, or wish to apply for, a fee waiver certificate. Please see the portal for a list of documents that can be filed there.

Documents must be named in accordance with section 11.4 (Naming Documents) below, and must be in searchable PDF format. The portal will only accept documents smaller than 10 MB.

11.2.2 — Documents for hearings 5 business days away or less

You cannot submit documents using Small Claims Court Submissions Online:

- for a court date that is five business days away or fewer (for example, if your court date is on Tuesday, February 9, you cannot submit documents online after Monday, February 1); or
- if you are legally required to submit documents by a deadline that is five business days away or fewer.

If your court date or submission deadline is five days or fewer away, the Small Claims Court will accept the documents by e-mail at the specific e-mail addresses indicated on the Email Accounts for Small Claims Court Locations page. See sections 11.3, 11.4 and 11.5 (Email Filing Format, Naming Documents and Communicating with Court Staff by Email) below for more information on email filing requirements.

Where representatives and parties deliver materials by email, subject to direction from the Court, they undertake to file the same materials in paper format, and pay the requisite filing fee, at the court when regular court operations resume.

Where a document may not be accepted online or by email, parties are encouraged to file by mail. In-person attendance at a courthouse is strongly discouraged unless it is absolutely necessary.

11.3 — Email Filing Format

Emailed filings must be submitted in searchable PDF format, ensuring each document is a separate attachment.

To file by email a prescribed form (available at www.ontariocourtforms.on.ca) that must be signed, you may do either of the following:

- Apply an electronic signature to a .DOC version of the form, convert the form to PDF then submit the PDF file; or
- Print the form, sign it manually, scan it then submit it as a PDF.

Any photographs must be submitted in PDF format.

Each email sent to the court, including attachments, must not exceed 35 MB.

Unless a matter is proceeding *ex parte* (i.e. without notice to responding parties), filed materials must indicate when and how service on responding parties was made (i.e. affidavit of service).

11.4 — Naming Documents

NOTE: This section does **not** apply to plaintiff's claims or amended plaintiff's claims that are filed through the Small Claims Court E-Filing Service Portal. Please see section 11.1 for information on naming those documents.

When documents are submitted to the Small Claims Court in electronic format, the document name must indicate the following information:

- Document type;
- Type of party or person submitting the document (e.g. plaintiff, defendant, moving party, litigation guardian);
- Name of the party submitting the document (including initials if the name is not unique to the case); and
- Date on which the document was created or signed, in the format DD-MMM-YYYY (e.g. 12-JAN-2021).

Below are sample document names:

Notice of Motion — Moving Party — Acme Inc. — 13-MAR-2021

Settlement Conference Request Form — Plaintiff — A. Smith — 21-NOV-2021

Consent to Act as Litigation Guardian — Litigation Guardian — B. Williams — 12-JAN-2021

Affidavit — Responding Party — XYZ Ltd. — 5-MAY-2021

11.5 — Communicating with Court Staff by Email

The below direction should be followed when communicating by email with court staff:

I. To ensure the email is received and processed by the appropriate court office, **the subject line** should include the following information:

- LEVEL OF COURT (SCC)
- TYPE OF MATTER
- FILE NUMBER (indicate NEW if no court file number exists)
- TYPE OF DOCUMENT (e.g., Defence, Notice of Discontinued Claim, etc.)

II. The body of the email should include the following information if applicable:

- court file number (if it is an existing file)
- short title of proceeding
- list of documents attached (note: **attachments cannot exceed 35 MB**)
- type of request (filing or hearing request)
- name, role (i.e. lawyer/representative, party, etc.,) and contact information (i.e. email address) of all parties.

11.6 — Filing Fees

Parties and representatives filing documents using the Small Claims Court E-Filing Service or the Small Claims Court Submissions Online portals can pay the applicable filing fees through those portals.

Where parties and representatives deliver materials by email, they undertake to file the same materials in paper format, and pay the requisite filing fee, at the court counter when regular court operations resume.

12. — Public and Media Access to Small Claims Court Remote Hearings

Any member of the media or the public who wishes to hear/observe a remote proceeding may email their request to the Small Claims Court location in advance of the hearing (email addresses for each location can be found here). The person requesting access should advise of the hearing they wish to hear/observe, and their contact information. Every effort will be made to provide the requestor with information on how they may hear/observe the proceeding.

Certain proceedings are closed to the media and public by legislation or court order.

Section 136 of the *Courts of Justice Act* restricts the recording of court hearings.

13. — More Information

The Ontario Small Claims Court continues to monitor the COVID-19 situation. As circumstances permit, the Court will gradually resume regular operations and reschedule matters.

You may wish to also consult the Ministry of Health's website at Ontario.ca/coronavirus for further information on how to protect yourself.

While the Ontario Small Claims Court is an important source of timely access to justice in Ontario, the health and safety of those who use and work in the Small Claims Court is our priority.

Thank you very much for your understanding and co-operation during this extraordinary time.

Sincerely,

Geoffrey B. Morawetz

Chief Justice

Superior Court of Justice

Revised: March 16, 2020; May 4, 2020; June 2, 2020; August 10, 2020; August 26, 2020; October 8, 2020; October 28, 2020; November 30, 2020; January 11, 2021; January 14, 2021; January 26, 2021; February 23, 2021; March 15, 2021; April 12, 2021; June 4, 2021.

CONTINUED SUSPENSION OF SMALL CLAIMS COURT OPERATIONS DUE TO COVID-19

DATE: 2021-05-31

SUPERIOR COURT OF JUSTICE

SMALL CLAIMS COURT

RE: Continued suspension of Small Claims Court operations due to COVID-19

ORDER OF: Associate Chief Justice Faye McWatt

Order

[1] An earlier Notice to the Profession and the Public, dated March 13, 2020, suspended until further notice the Small Claims Court's operations, except for urgent motions and certain other hearings.

[2] By order dated April 28, 2021, the Court further adjourned all Small Claims Court proceedings that

> (a) were, as of March 13, 2020, scheduled for a hearing between March 16, 2020 through May 31, 2021, and
>
> (b) are not assigned a new date between March 16, 2020 and May 31, 2021,

to June 1, 2021, or to such other date as determined by the Court.

[3] I have determined that a further period of adjournment is necessary, and I now make the following order:

All Small Claims Court proceedings that:

> (a) were, as of March 13, 2020, scheduled for a hearing between March 16, 2020, through July 2, 2021, and
>
> (b) are not assigned a new date between March 16, 2020, and July 2, 2021,

are adjourned to July 5, 2021, or to such other date as determined by the Court.

[4] I direct the administrative staff for the Superior Court, Small Claims Court to record this order on every Small Claims Court proceeding that was, as of March 13, 2020, scheduled between March 16, 2020 through July 2, 2021.

[5] Any Small Claims Court proceedings filed since March 16, 2020 and not yet provided a court date shall, unless assigned a date between March 16, 2020 and July 2, 2021, be adjourned to July 5, 2021 or such other date as determined by the Court.

[6] Attendance in court on July 5, 2021 by any party to a Small Claims Court action **is not required**. The court will notify you on or after July 5, 2021 advising you of the next hearing date for your proceeding.

Associate Chief Justice Faye McWatt

LEGISLATIVE DEVELOPMENTS

Monetary Jurisdiction Increased to $35,000

As noted in last year's edition the monetary jurisdiction was increased to $35,000 effective January 1, 2020, by O.Reg. 343/19. The minimum appealable limit was increased to $3,500.

Practice Direction — COVID-19

Effective March 16, 2020, normal operations of the Small Claims Court were suspended and all hearings adjourned until further notice. The suspension continues as at March 2021. In April 2020, Chief Justice Morawetz issued a practice direction respecting what limited operations would occur, remotely, during the suspension. That practice direction has been amended from time to time (about once a month on average) during the ensuing 12 months and is published in its current form on the court's official website.

Several amendments to the *Rules of the Small Claims Court* were made by O.Reg. 108/21, in force March 1, 2021. These are summarized below.

Electronically-Issued Documents

As part of the expansion of electronic document usage, rule 1.05.1 of the *Rules of the Small Claims Court* was amended by O.Reg. 108/21, effective March 1, 2021. The restriction on documents which may be issued electronically has been removed. All documents which may be issued by the clerk may now be issued electronically. Previously only specified documents could be issued electronically. Note that the expansion of documents which may be issued by the clerk electronically has not expanded the documents which may be filed by the parties electronically.

Email Communication by Clerk

Any documents required to be served or given by the clerk to the parties, and any communication by the clerk to the parties, may now be sent by email: see rule 1.05.2 as amended by O.Reg. 108/21.

The contact information for a self-represented party or representative required to be provided in a claim or defence has been expanded to include an email address (if any): see subrules 7.01(2)1, 9.02(1)1 and 10.01(4)1, as amended by O.Reg. 108/21.

Service by Email Replaces Service by Fax

Consistent with the same policy change made under the *Rules of Civil Procedure*, service of documents by facsimile transmission has been abolished in favour of service by email. See rule 8.08 of the *Rules of the Small Claims Court* as amended by O.Reg. 108/21, effective March 1, 2021.

Alternative Service by Email on Certain Government Offices

Rule 8.03 has been amended to direct that alternative service on the Crown in right of Ontario, the Children's Lawyer or the Public Guardian and Trustee shall be by email: see subrules 8.03(9), (10) & (11) as amended by O.Reg. 108/21.

Removal from the Record

Rule 1.09 has been added by O.Reg. 108/21 to the *Rules of the Small Claims Court*, requiring that where a representative ceases to represent a party, the representative shall notify the court in writing of specified contact information for the party.

Limitation Periods Suspended During COVID-19

As part of the state of emergency and associated suspension of court operations, there arose the concern that limitation periods could unjustly prejudice claimants who were unable to commence legal proceedings. The Ontario government therefore suspended limitation periods by regulation enacted under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9.

O.Reg. 73/20 temporarily suspended limitation periods effective March 16, 2020. The regulation was later revoked effective September 14, 2020, by O.Reg. 457/20.

In *Attorney General for Ontario v. Persons Unknown*, 2020 ONSC 6974, 2020 CarswellOnt 16834 (Ont. S.C.J.), the Ontario government sought to clarify apparent uncertainty over whether the period of suspension should be counted in proceedings commenced after the revocation. Justice Myers declined to decide the point on the basis that declaratory relief was inappropriate in the absence of any factual dispute. His reasons helpfully review the legislation and the basic arguments either way, but tend to suggest that the suspension will toll the running of limitation for future cases. As yet there is no appellate pronouncement on this issue.

SURVEY OF RECENT CASE LAW

Constitutionality of Increased Small Claims Court Monetary Limit

Readers may expect a decision of the Supreme Court of Canada in the appeal from *Dans l'affaire : Renvoi à la Cour d'appel du Québec portant sur la validité constitutionnelle des dispositions de l'article 35 du Code de procédure civile qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec*, 2019 QCCA 1492, 2019 CarswellQue 8040, 2019 CarswellQue 10358, EYB 2019-316229 (C.A. Que.), to be released soon and perhaps in about April 2021, having been heard and reserved on September 24, 2020 (SCC docket 38837). The case involves the extent to which the civil jurisdiction of superior courts under the *Constitution Act, 1867* can be re-assigned to the provincially-appointed Small Claims Courts.

Jurisdiction over Residential Tenancy Disputes

In last year's edition we addressed a recent Divisional Court decision holding that the Small Claims Court lacked jurisdiction over claims for arrears of rent and for damage to rental units: *Kiselman v. Klerer*, 2019 ONSC 6668, 2019 CarswellOnt 18949 (Ont. Div. Ct.). The decision conflicts with two Divisional Court decisions holding to the contrary: *Brydges v. Johnson* (June 12, 2016) (Ont. Div. Ct.) [unreported]~~;~~; affirming (January 8, 2016), Doc. 10-156, 10-156-D1, [2016] O.J. No. 609 (Ont. Sm. Cl. Ct.); further proceedings [2017] O.J. No. 6473 (Div. Ct.); affirming [2017] O.J. No. 754 (Sm. Cl. Ct.); and *Capreit L.P. v. Griffen*, [2016] O.J. No. 7338 (Div. Ct.).

Leave to appeal in *Kiselman v. Klerer* was sought by the landlord and granted by the Court of Appeal for Ontario on September 1, 2020 (File M51366). A decision on that appeal will presumably settle the jurisdictional conundrum presented by those conflicting authorities.

Right of Corporation to have an Individual Representative Present for Trial

The appellate decision in *Narayan et al. v. Dhillon*, 2020 ONSC 7273, 2020 CarswellOnt 17321, 153 O.R. (3d) 721 (Ont. Div. Ct.), reaffirmed a corporate party's right to be present at trial through the physical attendance of an officer, director or employee of its choice. The trial judge erred in law by excluding the corporation's instructing agent, an employee, merely because she was also a personal defendant and in that capacity had been noted in default. As the corporation's chosen agent she should have been exempted from the trial judge's order excluding witnesses.

Repair and Storage Liens Act Procedure Clarified

Mr. Towing Inc. v. Mercedes-Benz Financial (Canada) Inc., 2020 ONSC (Div. Ct.), adds to the relatively modest number of appellate decisions explaining procedure under the somewhat technical *Repair and Storage Liens Act*. It holds that the towing company which received possession of the motor vehicle from the police had a positive obligation to determine the identity of the owner. Failure to do so could not displace the statutory limit on storage charges which could be levied as a lien against the value of the motor vehicle. The towing company which, without the owner's knowledge or consent, had kept possession long after it could have initiated a sale process under the Act which would have required notice to the owner, was not entitled to claim ongoing storage fees in excess of the limit.

Court's Right to Question Plaintiff's Choice of Venue

In *620369 Ontario Inc. v. Borroto*, [2020] O.J. No. 5128 (Div. Ct.), a motions judge questioned the plaintiff's choice of venue at the hearing of what was scheduled as a motion for default judgment. The judge found that the plaintiff had deliberately ignored the venue rule and relevant caselaw, thereby abusing the process of the court. The action was dismissing and two other actions by the same plaintiff (which were not on the day's list) were provisionally stayed on the court's own motion pending submissions as to venue for those actions. On appeal those orders were set aside on the basis that the plaintiff had not been afforded proper due process. The appeal judge held that the motions judge's concern for abuse of process triggered the procedure under rule 12.02(3) for notice and submissions where the court is concerned that an action on its face may be an abuse of process.

No Claim for Credit Reporting after Limitation Period Expires

In last year's edition we noted that the decision in *Harvey v. Capital One Bank (Canada Branch)*, [2019] O.J. No. 3982 (Sm. Cl. Ct.), was under appeal. The trial judge had dismissed a claim for damages arising from truthful reporting of unpaid credit card debt after the limitation period to sue on the debt had expired. A recent case management endorsement indicates that the appeal remains pending and if pursued is likely to be heard soon: 2021 ONSC 1180, 2021 CarswellOnt 1828 (Ont. Div. Ct.).

CHAPTER 2 — A SELF-HELP OVERVIEW[1]

How to Proceed in Small Claims Court

The Basics

The Small Claims Court, like other Ontario courts, is established under the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The most relevant specific sections dealing with the jurisdiction and process of the Small Claims Court are sections 22 through 33.1 of the *Courts of Justice Act*. Since 1990, the Small Claims Court has been defined as a branch of the Superior Court of Justice. The vast majority of Small Claims Court proceedings are presided over by deputy judges appointed by the Regional Senior Justices of the eight judicial regions of the Superior Court of Justice.

On January 1, 2020 the Small Claims Court limit increased from $25,000 to $35,000. Claims for $35,000 or less that may have been started in the Superior Court of Ontario are not automatically transferred to the small claims court. The parties may agree to such a transfer or a motion may be brought in the Superior Court to seek the transfer.

Procedure in Small Claims Court is defined by the *Rules of the Small Claims Court*, O.Reg. 258/98, which by virtue of rule 1.01 may be cited as the *Small Claims Court Rules*.

The Small Claims Court uses its own court forms as adopted by the Civil Rules Committee. The most frequently-used forms are the Plaintiff's Claim (Form 7A) and the Defence (Form 9A). The Forms may be accessed on the CM-Rom which accompanies this publication and at www.ontariocourtforms.on.ca.

There are three basic steps in a Small Claims Court action: (i) pleadings; (ii) settlement conference; and (iii) trial. Most cases which proceed to trial should be completed in under 12 months. Most trials are fairly brief, requiring up to one day. Trial procedure is generally the same as in other courts although the rules of evidence are relaxed. Substantive law is the same as in other courts and the rules of natural justice apply as in other courts.

Parties may represent themselves or may be represented by a lawyer, paralegal or student-at-law. Like other civil courts in Canada the Small Claims Court has a loser-pay system, by which unsuccessful parties are generally ordered to pay compensation to successful parties for their costs of the proceeding. The court fees remain modest: the court fee to issue a claim is $102, to file a defence is $73, and to obtain a trial date is $290. For further information see Chapter 4 — Court Fees.

Monetary Jurisdiction

The monetary jurisdiction of the Small Claims Court is $35,000. Under *Courts of Justice Act* s. 23(1)(a), this means that the court has jurisdiction in any action for the payment of money, or damages, up to and including $35,000. That figure does not include claims for prejudgment interest or costs. It is only a limit on the amount of damages that may be claimed by a plaintiff and awarded by the court. Interest and costs can be claimed in addition to any damages claimed.

Section 23(1)(b) also gives the Small Claims Court jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed $35,000.

Parties alleging damages in excess of $35,000 may elect to proceed in Small Claims Court if the amount claimed is limited to $35,000. Many plaintiffs will choose to limit the damages

[1] The Self-help Overview reflects the court as it is today and how it has been historically.

claimed to $35,000, even if the actual loss alleged is a higher amount, so as to take advantage of the streamlined Small Claims Court process compared to that in the Superior Court of Justice. There is no limit on the amount of damages that may be alleged or proved in Small Claims Court: the limit is on the amount that may be claimed and awarded: *Tabingo v. Bitton*, 2006 CarswellOnt 1774, 36 C.C.L.I. (4th) 121 (Ont. Sm. Cl. Ct.). Therefore the amount of damages claimed may be up to $35,000 after any deduction for contributory negligence or a statutory deductible.

Certain statutes also confer jurisdiction on the Small Claims Court. For example an application under Part IV of the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25, may, by virtue of s. 25 of that Act, be brought in the Small Claims Court where that is the court with the appropriate monetary jurisdiction for the case. Section 55 of the *Condominium Act, 1998*, S.O. 1998, c. 19, provides that an action may be brought in the Small Claims Court to recover damages for breach of certain disclosure obligations imposed on condominium corporations under that section. Section 8(1) of the *Forestry Workers Liens for Wages Act*, R.S.O. 1990, c. F.28, provides that a lien under that Act over logs or timber may be enforced by action in the Small Claims Court where the claim does not exceed its monetary jurisdiction. Section 2(1) of the *Parental Responsibility Act, 2000*, S.O. 2000, c. 4, provides that an action to recover damages from a parent for the taking, damaging or destruction of property by a child may be brought in the Small Claims Court where the claim does not exceed its monetary jurisdiction.

A plaintiff can file a small claims court case and pay the required court fees online. The plaintiff must provide a ServiceOntario account, credit card, the legal name of the person or business address suing and the current address or business address of the defendant, scanned and saved documents and the rate of interest on money owed to the plaintiff. The fees to be paid depends on how often you file a claim, i.e. being a frequent claimant, 10 or more claims, or not. It is important to NOTE that the FEE WAIVER does not apply to online **filing.** The court-stamped Plaintiff's claim will be returned by email. The plaintiff must deliver a copy to each defendant.

Starting a Case

To start a case in Small Claims Court, the plaintiff must prepare a Plaintiff's Claim (Form 7A) and have it issued by the court clerk upon payment of the applicable court fee. The claim needs to set out the material facts relied on for the claim. If the claim is based on a document (such as a contract), a copy of the document must be attached to the claim. The other requirements for the claim's contents are set out in rule 7.01(2). The Plaintiff's Claim may be issued in the traditional paper format or electronically under rule 7.02. Electronic issuance can be accomplished through the Service Ontario website at www.ontario.ca/page/file-small-claims-online.

The plaintiff cannot start the case anywhere in Ontario but must choose the court location for the claim in accordance with rule 6.01. That will generally be where the defendant, or any one defendant where there are several defendants, resides or carries on business. Alternatively, it may be where the cause of action arose: see the commentary under rule 6.01.

Once issued, a copy of the claim must be served on each defendant either by personal service or alternative service under rule 8.03. The recognized methods of personal service are listed in rule 8.02 and those for alternative service in rule 8.03. If prompt service is impractical the plaintiff may make a motion to a judge for permission to effect service by a substituted method under rule 8.04. For further discussion of service see the commentary under rule 8.01.

Defending a Case

Once served, a defendant who intends to defend the claim has 20 days to serve and file a Defence (Form 9A), with an Affidavit of Service (Form 8A) and the applicable court fee.

Alternatively, a defendant who admits all or part of the claim may serve and file a Defence proposing terms of payment under rule 9.03. Those terms may then be accepted or contested by the plaintiff, and if contested, the matter proceeds to a terms of payment hearing.

In some cases a defendant may make a claim against a plaintiff and/or another person under rule 10. Such claims are called Defendant's Claim (Form 10A). They must be issued by the court clerk within 20 days after the Defence is filed, upon payment of the applicable court fee, and served under rule 10.02. The plaintiff or other party named as a defendant in the Defendant's Claim may then serve and file a Defence (Form 9A) with an Affidavit of Service (Form 8A) and the applicable court fee.

Default Proceedings

Any defendant to a Plaintiff's Claim or Defendant's Claim who fails to file a Defence within the time allowed may be noted in default. To note default, the plaintiff must file an Affidavit of Service (Form 8A), a Request to Clerk (Form 9B), and, if a defendant was served outside the territorial division of the court office, an Affidavit for Jurisdiction (Form 11A).

Once a defendant is noted in default, the plaintiff may seek a default judgment under Rule 11. If the claim has been pleaded as a liquidated demand, such as a claim based on agreed charges in an invoice for goods or services rendered, default judgment may be requested from the clerk under rule 11.02. For other claims, default judgment must be requested from a judge under rule 11.03, either by filing a motion or by asking the clerk to schedule an assessment hearing (also known as an undefended trial). For further discussion of default proceedings see the commentaries under Rule 11.

A defendant may ask the court to set aside the noting in default and default judgment. If that request is consented to, the clerk may make that order under rule 11.2.01(1). If a formal motion is required, the defendant must satisfy the test under rule 11.06. Motion procedure is governed by Rule 15.

When a defendant has been noted in default the plaintiff can ask the court to order the defendant(s) to pay the money owed. There is a Default Judgment form at the court office where the action was commenced. If the claim was filed online, the request can be made through the online application. If the amount in dispute may be as a result of damages to be assessed, a motion in writing may be brought or the plaintiff can request an assessment hearing before a deputy judge.

Settlement Conference

A settlement conference under Rule 13 is mandatory in every action where a Defence has been filed, and shall be held within 90 days after the first Defence is filed. The parties and their representatives are required to attend in person, or by telephone conference if permission has been granted under rule 1.07. At least 14 days before the conference, each party must serve and file a List of Proposed Witnesses (Form 13A), with copies of any documents to be relied on a trial (unless they are already attached to the party's claim or defence).

The primary purpose of the settlement conference is a frank discussion about potential settlement of the case. The settlement conference judge may provide his or her views of the merits of the case and may make recommendations for settlement.

The settlement conference judge may make a variety of orders under rule 13.05. Most commonly such orders may include directions for the parties to produce further documents. The parties should assist the judge in making an accurate estimate of the time required for trial,

for use by the court office in scheduling matters and to avoid over-or under-booking court lists.

For claims under $3,500, parties who cannot settle or agree to settle at the settlement conference may ask the court to decide the case at the settlement conference.

Offers to Settle

Most civil cases settle and settlements can occur at any time. Offers to settle are almost always made by parties to civil cases and they may be made at any time. Offers may be discussed at the settlement conference and many cases can be settled at the conference.

Outside the settlement conference, Offers to Settle are generally best made in writing (Form 14A). This reduces the chance of disagreement over the terms of settlement that were offered or accepted. Offers to Settle and related settlement negotiations cannot be disclosed to the court until after judgment has been delivered. Offers can have a significant effect on costs, under rule 14.07, by opening up the possibility that a double-costs award could be made if the result at trial is the same as or better than the terms of an Offer to Settle. To qualify for those cost consequences the offer must have been made in writing at least seven days before trial and must have remained open for acceptance until the start of trial. Double-cost orders are available to both plaintiffs and defendants under rules 14.07(1) and 14.07(2) respectively if they have made an appropriate Offer to Settle.

Trial Scheduling

After a settlement conference has been held, any party may set the action down for trial by filing a Request to Clerk (Form 9B) and paying the applicable court fee.

It is desirable for parties to communicate with each other and the court office about trial scheduling when the action is being set down for trial. They may file a letter that has been approved by all parties, advising of any constraints on scheduling. Failing such advice the clerk will simply select a date and send out a Notice of Trial.

If a date is fixed that turns out to be problematic, an adjournment may be sought under rule 17.02. However adjournments are discretionary, which means the court could grant or deny that request. It is always better to avoid scheduling problems before they occur, through communication between the parties and advising the court clerk of any scheduling constraints, before a date is fixed.

Trial Preparation

Each party must decide what evidence that party needs to present at trial and prepare accordingly.

In Small Claims Court, documentary evidence is often admitted without any in-person witness, under rule 18.02. As long as copies of documents have been served on the other parties at least 30 days before trial with the details required by rule 18.02(3), the documents are admissible under rule 18.02(1) unless the court orders otherwise. A party served with documents under rule 18.02 then has the right to summons the authors of the documents for cross-examination under rule 18.02(4). But with or without cross-examination, documents that are qualified under rule 18.02 are almost always accepted by the court as admissible evidence. Rule 18.02 can be used to tender expert reports without calling the expert to testify in person, and can also be used to tender witness statements without summonsing the witness to testify in person.

A party who needs to serve a Summons to Witness (Form 18A) to compel a witness to attend at trial should refer to rule 18.03 for that procedure. The overall number of in-person wit-

nesses required for Small Claims Court trials tends to be modest and the general rule is that most trials are started and finished on a single day.

Parties should consider preparing document briefs if there are a number of documents to be relied on at trial. A properly-organized brief can streamline trial presentation effectively. The same is true of casebooks if the parties intend to refer to several legal authorities.

Trial

Trial procedure is generally the same as in other civil courts except that the rules of evidence are substantially relaxed. Under the *Courts of Justice Act* s. 27, the Small Claims Court may admit and act upon any evidence including evidence that would be inadmissible at common law or in other courts (except evidence that is protected by privilege or inadmissible by statute).

The rules of natural justice apply in Small Claims Court, which is duty-bound to hear each case impartially and without bias whether real or apprehended. In practice, given the incidence of self-represented parties, judges of the Small Claims Court may sometimes ask questions during a trial more frequently than in other courts, to try and clarify issues, focus the parties and properly understand the evidence and positions presented. However the limit on judicial interjections is the same as applies in other courts and undue interference or the appearance of bias or lack of impartiality can be a ground of appeal. The most important function of the judge is to listen.

Starting with the plaintiff, each side may make a brief opening statement. The plaintiff then calls the first witness for examination-in-chief and that witness may be cross-examined by the defence subject to re-examination by the plaintiff. Once the plaintiff's witnesses are completed, the defence has the same right to call its own additional witnesses. In unusual cases there may be reply evidence from the plaintiff. Any documentary evidence is usually introduced early in the trial (often as one or two bound briefs of documents) and individual documents may be tendered during the course of witness examinations.

Closing arguments are brief and usually no more than 5 to 15 minutes for each side. Judgment is usually given orally at the conclusion of trial. Occasionally judgment may be reserved or written reasons may be delivered at a later time if the judge requires further time to consider his or her verdict, or if the trial was completed at the end of a day.

Costs

Costs compensation is usually awarded to the successful party, payable by the unsuccessful party. The general rule is that a costs order, exclusive of disbursements, cannot exceed 15% of the amount claimed: see *Courts of Justice Act* s. 29.

The amount of costs awarded, subject to s. 29, will generally depend on the amount in dispute, the result, the duration of trial and importantly, offers to settle. The costs items allowed in Small Claims Court are listed under rule 19 and will generally consist of a representation fee (if the successful party was represented at trial by a lawyer, paralegal or student-at-law) plus reasonable disbursements. In appropriate cases the costs (other than disbursements) may be doubled if a party has made an Offer to Settle which triggers rule 14.07(1) or 14.07(2) cost consequences.

The amount of disbursements may be assessed by the clerk under rule 19.01(2). However the current and best practice is for the judge to fix the costs, including the disbursements.

Costs submissions are usually very brief and a matter of up to five minutes for each side. In rare cases the court may direct written costs submissions, for example if judgment was reserved.

For further discussion about costs, see the commentary and cases under s. 29, and under rules 14.07 and 19.

Enforcement

If a judgment is unsatisfied, the judgment creditor will need to consider the enforcement options under rule 20. Most commonly those may include garnishment of employment income or bank accounts, judgment-debtor examinations, and writs of seizure and sale of land or personal property owned by the judgment-debtor. The contempt power is available in the event a judgment-debtor fails to comply with his or her obligations on a judgment-debtor examination.

After judgment, if the debtor has not paid what is owing, the party owed the money may ask the court to conduct a hearing to find out about the debtor's financial situation. This is done by filing a Notice of Examination form and an Affidavit for Enforcement Request with the court and serving them on the debtor. The deputy judge may order payments to be made failing which Garnishment proceedings, and, or the seizure and sale of personal property or land may be available.

Appeal

The right of appeal is defined under *Courts of Justice Act* s. 31. Only final orders may be appealed, but subject to the minimum appealable limit: the final order must have been made in action for the payment of money in excess of $3,500, exclusive of costs. If the amount claimed, inclusive of prejudgment interest but exclusive of costs, was for $3,500 or less, there is no right of appeal.

Appeals from the Small Claims Court are to a single judge of the Divisional Court. The standard of appellate review is the same as applies to appeals generally. Given the deferential standard of review applicable to findings of fact, the reality is that most appeals are dismissed. In addition the cost of appeals tends to be disproportionate to the amount or issues in dispute, so that appeals from the Small Claims Court are comparatively unusual.

For further discussion on appeals, see Chapter 7 — Appeals, and the commentary and case under s. 31.

CHAPTER 3 — COURTS OF JUSTICE ACT

COURTS OF JUSTICE ACT
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COURTS OF JUSTICE ACT

Summary of Contents

COURTS OF JUSTICE ACT

An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario

R.S.O. 1990, c. C.43, as am. S.O. 1991 (Vol. 2), c. 46; 1993, c. 27, Sched. (Fr.); O. Reg. 922/93 [Amended O. Reg. 441/97]; 1994, c. 12, ss. 1–48 [s. 9 not in force at date of publication. Repealed 1999, c. 12, Sched. B, s. 5.]; 1994, c. 27, s. 43; 1996, c. 25, ss. 1, 9; 1996, c. 31, ss. 65, 66; 1997, c. 19, s. 32; 1997, c. 23, s. 5; 1997, c. 26, Sched.; 1998, c. 4, s. 2; 1998, c. 18, Sched. B, s. 5, Sched. G, s. 48; 1998, c. 20, s. 2, Sched. A; 1999, c. 6, s. 18; 1999, c. 12, Sched. B, ss. 4, 5; 2000, c. 26, Sched. A, s. 5; 2000, c. 33, s. 20 [Not in force at date of publication. Amended 2002, c. 18, Sched. A, s. 6(8). Repealed 2009, c. 11, s. 21.]; 2001, c. 9, Sched. B, s. 6 [Not in force at date of publication. Repealed 2006, c. 21, Sched. F, s. 10.1(1).]; 2002, c. 13, s. 56; 2002, c. 14, Sched., s. 9; 2002, c. 17, Sched. F, s. 1; 2002, c. 18, Sched. A, s. 4; 2004, c. 17, s. 32, Table; 2005, c. 5, s. 17; 2006, c. 1, s. 4; 2006, c. 19, Sched. D, s. 5; 2006, c. 21, Sched. A, Sched. C, s. 105, Sched. F, ss. 106, 136(1), Table 1; 2006, c. 35, Sched. C, s. 20; 2009, c. 11, ss. 19, 20; 2009, c. 33, Sched. 2, s. 20, Sched. 6, s. 50; 2015, c. 23, ss. 1–3; 2015, c. 27, Sched. 1, s. 1(1) (Fr.), (2)–(9), (10) (Fr.), (11) (Fr.), (12)–(14); 2016, c. 5, Sched. 7; 2017, c. 2, Sched. 2, ss. 1–19; 2017, c. 14, Sched. 4, s. 10; CTS 25 JL 17 - 1; 2017, c. 20, Sched. 2, ss. 3–6, Sched. 11, s. 7; 2017, c. 24, s. 75; 2017, c. 34, Sched. 46, s. 10; 2018, c. 8, Sched. 15, s. 8; 2018, c. 17, Sched. 10; 2019, c. 7, Sched. 15; 2020, c. 11, Sched. 5, ss. 1–11 [s. 6(1)–(3) not in force at date of publication.]; 2020, c. 25, Sched. 1, s. 27, Sched. 2, ss. 1–3; 2021, c. 4, Sched. 3, ss. 1–16 [ss. 1, 2, 5–16 not in force at date of publication.].

[Editor's note: please see transitional provision from Courts Improvement Act, 1996 *regarding court name changes below*

> *10.* Transition, seals and forms *— (1) A reference in a court seal or printed court form to the name of a court or the title of an official changed by section 8 does not prevent the form or seal from being used during the one year period following the date the change to the name or title becomes effective.*
>
> *(2) This section applies only to court seals and printed court forms in existence on the date the changes to the names of the courts and the titles of the officials becomes effective.]*

Court of Appeal for Ontario

The Court of Appeal is the highest court in Ontario. It rarely hears Small Claims Court matters, which can only reach it after the Divisional Court has first dealt with the case, and only if the Court of Appeal grants leave to appeal from the Divisional Court under *Courts of Justice Act* s. 6(1)(a).

Divisional Court

The Divisional Court is an intermediate appellate court and hears appeals from the Small Claims Court, under *Courts of Justice Act*, s. 31. Most appeals to Divisional Court are heard by three judges but appeals from the Small Claims Court may be heard by one judge under *Courts of Justice Act*, s. 19(2)(b).

The Divisional Court also hears applications for judicial review under the *Judicial Review Procedure Act*. Interlocutory orders of the Small Claims Court may be the subject of judicial review, but limited to questions of jurisdiction or natural justice: *Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.).

Small Claims Court

Since 1990, the Small Claims Court has been defined as a branch of the Superior Court of Justice. It is usually presided over by the deputy judges appointed by the Regional Senior Justices of the Superior Court of Justice. It can also be presided over by judges of the Superior Court of Justice and judges of the former Provincial Court (Civil Division). It is a statutory court of inferior jurisdiction. The maximum monetary jurisdiction of the court was increased to $35,000 effective to January 1, 2020.

The Small Claims Court's mandate is to hear and determine matters in a summary way. The court has its own rules of evidence which are significantly more flexible than those which apply in other courts. The costs which may be awarded in Small Claims Court are also subject to a specific limit.

Small Claims Court litigants may be represented by a lawyer or paralegal. Many litigants are self-represented and the court's process is intended to be accessible to self-represented parties.

The basic steps in a Small Claims Court proceeding are pleadings, settlement conference and trial. Most trials are relatively short and do not require more than one day for hearing, although longer trials do occur in some cases depending on complexity and the number of witnesses. Most Small Claims Court proceedings should be completed within one year from commencement to trial.

Sections 22 to 33.1 of the *Courts of Justice Act* deal specifically with the Small Claims Court. The procedural code for Small Claims Court is the *Small Claims Court Rules* enacted in 1998.

1. (1) Definitions — In this Act,

"action" means a civil proceeding that is not an application and includes a proceeding commenced by,

- **(a) claim,**
- **(b) statement of claim,**
- **(c) notice of action,**
- **(d) counterclaim,**
- **(e) crossclaim,**
- **(f) third or subsequent party claim, or**
- **(g) divorce petition or counterpetition;**

"application" means a civil proceeding that is commenced by notice of application or by application;

"defendant" means a person against whom an action is commenced;

"hearing" includes a trial;

"motion" means a motion in a proceeding or an intended proceeding;

"order" includes a judgment or decree;

"plaintiff" means a person who commences an action;

"region" means a region prescribed under section 79.1.

Proposed Addition — 1(1.1)

(1.1) Interpretation, judge not to include associate judge — A reference made to a judge under this Act does not include a reference to an associate judge.

2021, c. 4, Sched. 3, s. 1 [Not in force at date of publication.]

(2) Application to other Acts — This section applies to all other Acts affecting or relating to the courts and the administration of justice.

2006, c. 21, Sched. A, s. 1, Sched. F, s. 106

1.1 References to former names of courts — (1) In English — A reference in the English version of an Act, rule or regulation to a court or official by the former name of that court or the former title of that official set out in Column 1 of the following table or by a shortened version of that name or title is deemed, unless a contrary intention appears, to be a reference to the new name of that court or the new title of that official set out in Column 2.

TABLE

Column 1 Former names and titles	Column 2 New names and titles
Ontario Court of Justice	Court of Ontario
Ontario Court (General Division)	Superior Court of Justice
Ontario Court (Provincial Division)	Ontario Court of Justice
Chief Justice of the Ontario Court of Justice	Chief Justice of the Superior Court of Justice
Associate Chief Justice of the Ontario Court of Justice	Associate Chief Justice of the Superior Court of Justice
Associate Chief Justice (Family Court) of the Ontario Court of Justice	Associate Chief Justice (Family Court) of the Superior Court of Justice
Chief Judge of the Ontario Court (Provincial Division)	Chief Justice of the Ontario Court of Justice
Associate Chief Judge of the Ontario Court (Provincial Division)	Associate Chief Justice of the Ontario Court of Justice
Associate Chief Judge-Co-ordinator of Justices of the Peace	Associate Chief Justice Co-ordinator of Justices of the Peace
Accountant of the Ontario Court	Accountant of the Superior Court of Justice

(2) In French — A reference in the French version of an Act, rule or regulation to a court or official by the former name of that court or the former title of that official set out in Column 1 of the following table or by a shortened version of that name or title is

deemed, unless a contrary intention appears, to be a reference to the new name of that court or the new title of that official set out in Column 2.

TABLE

Column 1 Former names and titles	Column 2 New names and titles
Cour de justice de l'Ontario	Cour de l'Ontario
Cour de l'Ontario (Division générale)	Cour supérieure de justice
Cour de l'Ontario (Division provinciale)	Cour de justice de l'Ontario
Juge en chef de la Cour de justice de l'Ontario	Juge en chef de la Cour supérieure de justice
Juge en chef adjoint de la Cour de justice de l'Ontario	Juge en chef adjoint de la Cour supérieure de justice
Juge en chef adjoint (Cour de la famille) de la Cour de justice de l'Ontario	Juge en chef adjoint (Cour de la famille) de la Cour supérieure de justice
Juge en chef de la Cour de l'Ontario (Division provinciale)	Juge en chef de la Cour de justice de l'Ontario
Juge en chef adjoint de la Cour de l'Ontario (Division provinciale)	Juge en chef adjoint de la Cour de justice de l'Ontario
Juge en chef adjoint-coordonnateur des juges de paix	Juge en chef adjoint et coordonnateur des juges de paix
Comptable de la Cour de l'Ontario	Comptable de la Cour supérieure de justice

(3) Newer references to Ontario Court of Justice — Subsections (1) and (2) do not apply to references to the Ontario Court of Justice enacted or made on or after April 19, 1999.

1996, c. 25, s. 9(1); 2017, c. 20, Sched. 11, s. 7

PART I — COURT OF APPEAL FOR ONTARIO (SS. 2–9)

2. (1) Court of Appeal — The Court of Appeal for Ontario is continued as a superior court of record under the name Court of Appeal for Ontario in English and Cour d'appel de l'Ontario in French.

(2) Idem — The Court of Appeal has the jurisdiction conferred on it by this or any other Act, and in the exercise of its jurisdiction has all the powers historically exercised by the Court of Appeal for Ontario.

3. (1) Composition of court — The Court of Appeal shall consist of,

(a) the Chief Justice of Ontario, who shall be president of the court;

(b) the Associate Chief Justice of Ontario; and

(c) fourteen other judges.

(2) Idem — The Lieutenant Governor in Council may by regulation increase the number of judges of the Court of Appeal who are in addition to the Chief Justice and the Associate Chief Justice.

(3) Additional judges — There shall be such additional offices of judge of the Court of Appeal as are from time to time required, to be held by Chief Justices of Ontario and Associate Chief Justices of Ontario who have elected under the *Judges Act* (Canada) to perform only the duties of a judge of the Court of Appeal.

(4) Supernumerary judges — There shall be such additional offices of supernumerary judge of the Court of Appeal as are from time to time required, to be held by judges of the Court of Appeal who have elected under the *Judges Act* (Canada) to hold office only as a supernumerary judge of the court.

4. (1) Assignment of judges from Superior Court of Justice — The Chief Justice of Ontario, with the concurrence of the Chief Justice of the Superior Court of Justice, may assign a judge of the Superior Court of Justice to perform the work of a judge of the Court of Appeal.

(2) Superior Court of Justice judges — A judge of the Superior Court of Justice is, by virtue of his or her office, a judge of the Court of Appeal and has all the jurisdiction, power and authority of a judge of the Court of Appeal.

1996, c. 25, s. 9(14), (17)

Case Law: *Stamm Investments Ltd. v. Ryan*, 2016 ONSC 6293, 2016 CarswellOnt 16237 (Ont. Div. Ct.).

The Divisional Court has the jurisdiction to judicially review decisions of the Small Claims Court, section 2(5) of the CJA makes clear that the Court retains discretion to refuse to grant any such relief. He obviously erred in stating that there is no "judicial review" of the judgment of the Small Claims Court. Motion to a panel of the Divisional Court to set aside or vary a decision of refusing to make an order transferring an application for judicial review commenced in Kitchener to the Divisional Court in Hamilton. Section 21(5) of the *Courts of Justice Act* permits a panel of the Divisional Court, on motion, to set aside or vary the decision of a judge who hears and determines a motion pursuant to s. 21(3). The standard of review on such a motion was recently considered by this Court in *Children's Aid Society of Ottawa v. F. (L.)*, 2016 ONSC 4044, 2016 CarswellOnt 10839 (Ont. Div. Ct.). The purpose of the Small Claims Court, which was continued as a branch of the Superior Court of Justice by s. 22(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"), is to provide an expeditious and low cost means to settle small monetary disputes. The legislature sought to accomplish this in several ways. First, s. 23(1) of the CJA limits the jurisdiction of the Small Claims Court to actions for the payment of money where the amount claimed does not exceed the prescribed amount, currently $25,000 (See s. 1 of Ontario Regulation 626/00). Next, and importantly, s. 25 of the CJA provides that the Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience. With respect to appeals, s. 31 provides for an appeal to the Divisional Court only from a final order of the Small Claims Court, and then only if the order is in respect of an amount in excess of the prescribed amount, currently $2,500 (see s. 2 of Ontario Regulation 626/00). While proceedings in the Divisional Court are usually heard and determined by a panel of three judges (s. 21(1) of the CJA) an appeal from a decision of a judge of the Small Claims Court is ordinarily heard and determined by one judge (s. 21(2)(b) of the CJA). The *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("JRPA") does not preclude judicial review from decisions of judges of the Small Claims Court. A Small Claims Court judge derives jurisdiction from a statute (the CJA), and exer-

cises a statutory power of decision. By virtue of s. 2 of the JRPA, the Divisional Court has the power to grant relief in relation to jurisdictional errors and errors of law on the face of the record made by Small Claims Court judges. See, *Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.), *Pardar v. McKoy*, 2011 ONSC 2549, 2011 CarswellOnt 3059, [2011] O.J. No. 2092 (Ont. Div. Ct.) and *R. v. Casalese* (March 16, 1981), [1981] O.J. No. 1332, Reid J. (Ont. H.C.). The judicial review at issue is nothing more than a disguised appeal in a situation where the legislature has denied any such right to the moving party. Motion dismissed without costs.

5. (1) Powers and duties of Chief Justice — The Chief Justice of Ontario has general supervision and direction over the sittings of the Court of Appeal and the assignment of the judicial duties of the court.

(2) Absence of Chief Justice — If the Chief Justice of Ontario is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by the Associate Chief Justice of Ontario.

(3) Absence of Associate Chief Justice — If the Chief Justice of Ontario and the Associate Chief Justice of Ontario are both absent from Ontario or for any reason unable to act, the powers and duties of the Chief Justice shall be exercised and performed by a judge of the Court of Appeal designated by the Chief Justice or Associate Chief Justice.

6. (1) Court of Appeal jurisdiction — An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except,

(i) an order referred to in clause 19(1)(a) or (a.1), or

(ii) an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1.

(1.0.1) Leave not required for second appeal — Despite clause (1)(a), leave of the Court of Appeal is not required in the case of an order of the Divisional Court on an appeal under Part V or VIII of the *Child, Youth and Family Services Act, 2017*.

(1.1) Leave required for second appeal — Despite clause (1)(b), a final order of a judge of the Superior Court of Justice made on a first appeal from an order described in subsection (1.2) may be appealed to the Court of Appeal only with leave from the Court of Appeal, as provided in the rules of court.

(1.2) Same — The orders mentioned in subsection (1.1) are orders of the Ontario Court of Justice under any of the following statutes or statutory provisions:

1. The *Change of Name Act*.

2. The *Children's Law Reform Act*, except sections 59 and 60.

3. Section 6 of the *Marriage Act*.

(2) Combining of appeals from other courts — The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

(3) Idem — The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2).

Case Law: *Laczko v. Alexander*, 2012 ONCA 803, 2012 CarswellOnt 14480, Weiler J.A. (Ont. C.A. [In Chambers]); additional reasons 2012 ONCA 872, 2012 CarswellOnt 17256 (Ont. C.A.).

The moving parties seek an order to extend the time for filing a notice of appeal from an order striking out their statement of defence.

In deciding whether to extend the time, the following factors are relevant: (1) whether the moving parties formed an intention to appeal within the relevant period; (2) the length of and explanation for the delay; (3) any prejudice to the responding party; (4) the merits of the appeal; and (5) whether the justice of the case requires it: *Kefeli v. Centennial College of Applied Arts & Technology*, 2002 CarswellOnt 2539, 23 C.P.C. (5th) 35, [2002] O.J. No. 3023 (Ont. C.A. [In Chambers]); additional reasons 2002 CarswellOnt 6212, 20 C.P.C. (6th) 25 (Ont. C.A. [In Chambers]).

An order striking out a statement of defence is final for purposes of appeal: *Four Seasons Travel Ltd. v. Laker Airways Ltd.*, 1974 CarswellOnt 876, 6 O.R. (2d) 453 (Ont. Div. Ct.).

Court prepared to accept moving parties formed intention to appeal within the time for bringing an appeal, and that a satisfactory explanation for the delay in filing a notice of appeal has been given.

A solicitor is an agent of his client: *Birjasingh v. Coseco Insurance Co.* (1999), 1999 CarswellOnt 3899, 182 D.L.R. (4th) 751, [2000] I.L.R. I-3822, [1999] O.J. No. 4546 (Ont. S.C.J.) at para. 11. This principle is often invoked in support of a lawyer's capacity to act on behalf of his or her client. However, it also means that, vis-a-vis the other party, it is generally the client who is responsible for the actions of the client's lawyer. This is not an overly harsh approach, especially in the circumstances of this case. As noted by this court in *Machacek v. Ontario Cycling Assn.*, 2011 ONCA 410, 2011 CarswellOnt 3624, [2011] O.J. No. 2379 (Ont. C.A.) at para. 10, "the appellants are not left without a remedy as they still have recourse through an action in solicitor's negligence.".

To grant the relief requested by the moving parties would cause prejudice to the responding party. There is little merit to the appeal, and justice of the case does not require that leave be granted. Accordingly, motion to extend the time to appeal dismissed.

Massoudinia v. Volfson, 2013 ONCA 29, 2013 CarswellOnt 256 (Ont. C.A. [In Chambers]), Weiler J.A.

On a motion for an extension to file a notice of motion for leave to appeal from the judgment of Justice M. McKelvey, sitting as a single judge of the Divisional Court, dated September 19, 2012.

Moving party formed a *bona fide* intention to appeal within the prescribed appeal period. I also accept her explanation for the delay. However, the appeal has no merit.

Appellate courts recognize that oral reasons ordinarily cannot be as thorough and detailed as written reasons. As Carthy J.A. said, in *R. v. Richardson*, 1992 CarswellOnt 830, 9 O.R. (3d) 194, 74 C.C.C. (3d) 15, 57 O.A.C. 54, [1992] O.J. No. 1498 (Ont. C.A.) at para. 13, "[i]n moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result.".

Baldwin v. Baldwin, 2013 BCCA 35, 2013 CarswellBC 455, 333 B.C.A.C. 148, 571 W.A.C. 148 (B.C. C.A.).

Ms. Baldwin appeals the dismissal of her application for judicial review of the decision of a Provincial Court judge dismissing her small claims action against her brother, Mr. Baldwin.

The jurisprudence of this Court is clear that litigants may seek judicial review of decisions made by Provincial Court judges in small claims actions that may not be appealed under s.5: see, for example, *Shaughnessy v. Roth*, 2006 BCCA 547, 2006 CarswellBC 2963, 61 B.C.L.R. (4th) 268, 233 B.C.A.C. 212, 386 W.A.C. 212, [2006] B.C.J. No. 3125 (B.C. C.A.), which involved an order transferring an action from the Provincial Court to the Supreme Court, and *Hubbard v. Acheson*, 2009 BCCA 251, 2009 CarswellBC 1439, 93 B.C.L.R. (4th) 315, 271 B.C.A.C. 215, 458 W.A.C. 215 (B.C. C.A.), which involved an order dismissing an application to set aside a default judgment.

Although delay is a factor that may be taken into account in judicial review proceedings, there is no specific deadline for the bringing of such a proceeding.

It is preferable for the judicial review to be conducted by the Supreme Court.

Appeal allowed and remit petition to the Supreme Court.

Enbridge Gas Distribution Inc. v. Froese, 2013 ONCA 131, 2013 CarswellOnt 2423, 114 O.R. (3d) 636 (Ont. C.A.).

A motion for an extension of time to seek leave to appeal from an order of the Divisional Court, allowing an appeal from the Small Claims Court, was denied. In general, the Divisional Court's determination of an appeal is intended to be final. A further appeal is exceptional. In this case the court found the proposed further appeal was largely fact-based and raised no legal issue of public importance.

(4) Transition — This section, as it read immediately before the day subsection 1(1) of Schedule 2 to the *Moving Ontario Family Law Forward Act, 2020* came into force, continues to apply to,

(a) any case in which a notice of appeal was filed before that day; and

(b) any further appeals or proceedings arising from a case described in clause (a).

1994, c. 12, s. 1; 1996, c. 25, s. 9(17); 2015, c. 23, s. 1; 2020, c. 25, Sched. 2, s. 1

7. Composition of court — (1) Hearings — A proceeding in the Court of Appeal shall be heard and determined by not fewer than three judges sitting together, and always by an uneven number of judges.

(2) Motions — A motion in the Court of Appeal and an appeal under clause 6(1)(c) shall be heard and determined by one judge.

(3) Idem — Subsection (2) does not apply to a motion for leave to appeal, a motion to quash an appeal or any other motion that is specified by the rules of court.

(4) Idem — A judge assigned to hear and determine a motion may adjourn the motion to a panel of the Court of Appeal.

(5) Idem — A panel of the Court of Appeal may, on motion, set aside or vary the decision of a judge who hears and determines a motion.

Case Law: *RBC Direct Investing Inc. v. Noorani*, [2017] O.J. No. 2264 (Ont. C.A.).

A panel of the court dismissed an appeal from a chambers judge refusing an extension of time to file a notice of motion for leave to appeal from an order of the Divisional Court dismissing an appeal from the Small Claims Court.

8. (1) References to Court of Appeal — The Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration.

(2) Opinion of court — The court shall certify its opinion to the Lieutenant Governor in Council, accompanied by a statement of the reasons for it, and any judge who differs from the opinion may certify his or her opinion and reasons in the same manner.

(3) Submissions by Attorney General — On the hearing of the question, the Attorney General of Ontario is entitled to make submissions to the court.

(4) Idem — The Attorney General of Canada shall be notified and is entitled to make submissions to the court if the question relates to the constitutional validity or constitutional applicability of an Act, or of a regulation or by-law made under an Act, of the Parliament of Canada or the Legislature.

(5) Notice — The court may direct that any person interested, or any one or more persons as representatives of a class of persons interested, be notified of the hearing and be entitled to make submissions to the court.

(6) Appointment of counsel — If an interest affected is not represented by counsel, the court may request counsel to argue on behalf of the interest and the reasonable expenses of counsel shall be paid by the Minister of Finance.

(7) Appeal — The opinion of the court shall be deemed to be a judgment of the court and an appeal lies from it as from a judgment in an action.

2006, c. 21, Sched. A, s. 2

9. (1) Meeting of judges — The judges of the Court of Appeal shall meet at least once in each year, on a day fixed by the Chief Justice of Ontario, in order to consider this Act, the rules of court and the administration of justice generally.

(2) [Repealed 2009, c. 33, Sched. 2, s. 20(1).]

2009, c. 33, Sched. 2, s. 20(1)

PART II — COURT OF ONTARIO (SS. 10–53)

10. (1) Court of Ontario — The Ontario Court of Justice is continued under the name Court of Ontario in English and Cour de l'Ontario in French.

(2) Divisions — The Court of Ontario shall consist of two divisions, the Superior Court of Justice (formerly the Ontario Court (General Division)) and the Ontario Court of Justice (formerly the Ontario Court (Provincial Division)).

(3) President — The person who is the Chief Justice of the Superior Court of Justice shall also be the president of the Court of Ontario.

1996, c. 25, s. 9(2)

Superior Court of Justice

11. (1) Superior Court of Justice — The Ontario Court (General Division) is continued as a superior court of record under the name Superior Court of Justice in English and Cour supérieure de justice in French.

Commentary

(2) Idem — The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.

1996, c. 25, s. 9(3), (17)

12. (1) Composition of Superior Court of Justice — The Superior Court of Justice consists of,

(a) the Chief Justice of the Superior Court of Justice who shall be president of the Superior Court of Justice;

(b) the Associate Chief Justice of the Superior Court of Justice;

(c) a regional senior judge of the Superior Court of Justice for each region.

(d) the Senior Judge of the Family Court; and

(e) such number of judges of the Superior Court of Justice as is fixed under clause 53(1)(a).

(1.1) [Repealed 1998, c. 20, Sched. A, s. 1(2).]

(1.2) [Repealed 1998, c. 20, Sched. A, s. 1(2).]

(1.3) [Repealed 1998, c. 20, Sched. A, s. 1(2).]

(2) Additional judges — There shall be such additional offices of judge of the Superior Court of Justice as are from time to time required, to be held by Chief Justices of the Superior Court of Justice, Associate Chief Justices of the Superior Court of Justice and regional senior judges of the Superior Court of Justice who have elected under the *Judges Act* (Canada) to perform only the duties of a judge of the Superior Court of Justice.

(3) Supernumerary judges — There shall be such additional offices of supernumerary judge of the Superior Court of Justice as are from time to time required, to be held by judges of the Superior Court of Justice who have elected under the *Judges Act* (Canada) to hold office only as a supernumerary judge of that court.

1994, c. 12, s. 2; 1996, c. 25, s. 9(4), (14), (15), (17); 1998, c. 20, Sched. A, ss. 1, 22

13. (1) Assignment of judges from Court of Appeal — The Chief Justice of Ontario, with the concurrence of the Chief Justice of the Superior Court of Justice, may assign a judge of the Court of Appeal to perform the work of a judge of the Superior Court of Justice.

(2) Court of Appeal judges — A judge of the Court of Appeal is, by virtue of his or her office, a judge of the Superior Court of Justice and has all the jurisdiction, power and authority of a judge of the Superior Court of Justice.

1996, c. 25, s. 9(14), (17)

14. Chief Justice, Associate Chief Justice and regional senior judges of Superior Court of Justice; Senior Judge of Family Court — (1) Powers and duties of Chief Justice — The Chief Justice of the Superior Court of Justice shall direct and supervise the sittings of the Superior Court of Justice and the assignment of its judicial duties.

Case Law: *Webb v. 3584747 Canada Inc.*, 2004 CarswellOnt 325, [2004] O.J. No. 215, 183 O.A.C. 155, 69 O.R. (3d) 502, 41 C.P.C. (5th) 98 (Ont. C.A.).

Appeal whether Divisional Court erred when it held that the motion judge exercised the power reserved to the Chief Justice under s. 14(1) of the *Courts of Justice Act* when he appointed judicial officers to conduct references under s. 25(1)(b) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

(2) Regional senior judges — A regional senior judge of the Superior Court of Justice shall, subject to the authority of the Chief Justice of the Superior Court of Justice, exercise the powers and perform the duties of the Chief Justice in respect of the Superior Court of Justice in his or her region.

(3) Delegation — A regional senior judge of the Superior Court of Justice may delegate to a judge of the Superior Court of Justice in his or her region the authority to exercise specified functions.

(4) Absence of Chief Justice — If the Chief Justice of the Superior Court of Justice is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by the Associate Chief Justice of the Superior Court of Justice.

(5) Senior Judge of Family Court — The Senior Judge of the Family Court shall,

(a) advise the Chief Justice of the Superior Court of Justice with regard to,

(i) the education of judges sitting in the Family Court,

(ii) practice and procedure, including mediation, in the Family Court,

(iii) the expansion of the Family Court, and

(iv) the expenditure of funds budgeted for the Family Court;

(b) meet from time to time with the community liaison committees and community resources committees established under sections 21.13 and 21.14; and

(c) perform other duties relating to the Family Court assigned to the Senior Judge of the Family Court by the Chief Justice.

(5.1) Small Claims Court Administrative Judge — The Chief Justice of the Superior Court of Justice may delegate to the Small Claims Court Administrative Judge appointed under section 87.2 his or her powers and duties under subsection (1) in respect of the Small Claims Court, subject to such conditions or restrictions as he or she may specify.

(6) Absence of regional senior judge or Senior Judge of Family Court — The powers and duties of a regional senior judge of the Superior Court of Justice and the Senior Judge of the Family Court when he or she is absent from Ontario or is for any reason unable to act shall be exercised and performed by a judge of the Superior Court of Justice designated by the Chief Justice of the Superior Court of Justice.

(7) Meetings with Associate Chief Justice, regional senior judges and Senior Judge of Family Court — The Chief Justice of the Superior Court of Justice may hold meetings with the Associate Chief Justice, the regional senior judges and the Senior Judge of the Family Court in order to consider any matters concerning sittings of the Superior Court of Justice and the assignment of its judicial duties.

1994, c. 12, s. 3; 1998, c. 20, Sched. A, s. 22(3); 2017, c. 2, Sched. 2, s. 1

15. (1) Judges assigned to regions — The Chief Justice of the Superior Court of Justice shall assign every judge of the Superior Court of Justice to a region and may reassign a judge from one region to another.

(2) At least one judge in each county — There shall be at least one judge of the Superior Court of Justice assigned to each county and district.

(3) High Court and District Court judges — No judge of the Superior Court of Justice who was a judge of the High Court of Justice or the District Court of Ontario before the 1st day of September, 1990 shall be assigned without his or her consent to a region other than the region in which he or she resided immediately before that day.

(4) Idem — Subsections (1) to (3) do not prevent the temporary assignment of a judge to a location anywhere in Ontario.

1996, c. 25, s. 9(14), (17)

16. Composition of court for hearings — A proceeding in the Superior Court of Justice shall be heard and determined by one judge of the Superior Court of Justice.

1996, c. 25, s. 9(16), (17)

17. Appeals to Superior Court of Justice — An appeal lies to the Superior Court of Justice from,

(a) an interlocutory order of a master or case management master;

(b) a certificate of assessment of costs issued in a proceeding in the Superior Court of Justice, on an issue in respect of which an objection was served under the rules of court.

1996, c. 25, ss. 1(1), 9(17)

Divisional Court

18. (1) Divisional Court — The branch of the Superior Court of Justice known as the Divisional Court is continued under the name Divisional Court in English and Cour divisionnaire in French.

(2) Same — The Divisional Court consists of the Chief Justice of the Superior Court of Justice, who is president of the Divisional Court, the associate chief justice and such other judges as the Chief Justice designates from time to time.

(3) Jurisdiction of judges — Every judge of the Superior Court of Justice is also a judge of the Divisional Court.

1994, c. 12, s. 5; 1996, c. 25, s. 9(14), (17); 1998, c. 20, Sched. A, s. 3

19. (1) Divisional Court jurisdiction — An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(a.1) a final order of a judge of the Family Court made only under a provision of an Act or regulation of Ontario;

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master or case management master.

Proposed Amendment — 19(1)(c)

(c) a final order of a master, case management master or associate judge.

Proposed Amendment — 19(1)(c)

(c) a final order of an associate judge.

2021, c. 4, Sched. 3, s. 2(2) [Not in force at date of publication.]
2021, c. 4, Sched. 3, s. 2(1) [Not in force at date of publication.]

Commentary: An amendment has been made to Part IV of the Consolidated Practice Direction for Divisional Court, including the addition of Section C.1 (Motions for Leave to Appeal). The court encourages parties to file electronic versions of their factums, transcripts, motion records and books of authorities in motions for leave to appeal from an interlocutory order of a judge under Rule 62.02 of the *Rules of Civil Procedure*. This amendment was made January 25, 2016 and was in effect February 1, 2016. An amendment was made to Part III B of the Consolidated Practice Direction, amending paragraph 49 to indicate that all motions to transfer a civil proceeding should be brought at the court location to which the moving party seeks to have the proceeding transferred.

Case Law: *Sepe v. Monteleone*, 2006 CarswellOnt 234, 262 D.L.R. (4th) 105, 78 O.R. (3d) 676, 207 O.A.C. 38, 22 C.P.C. (6th) 323 (Ont. C.A.).

The *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 19(1)(a), provided that appeal lay to Divisional Court for an award or dismissal of a claim for a single payment of not more than $25,000. The Divisional Court held that the combination of payments ordered and claims dismissed totalled more than $25,000. Amount beyond jurisdiction of Divisional Court and should be appealed to the Ontario Court of Appeal. The plaintiff appealed to the Ontario Court of Appeal.

Matter within the jurisdiction of the Divisional Court. Appeal allowed.

Shuter v. Toronto Dominion Bank (2007), 2007 CarswellOnt 8302 (Ont. Div. Ct.), Jennings J.

Orders for security for costs treated as being interlocutory. See, *e.g.*, *Valu Healthcare Realty Inc. v. Zellers Inc.*, 2004 CarswellOnt 5039, [2004] O.J. No. 4939 (Ont. S.C.J.) and *Padnos v. Luminart Inc.*, 1996 CarswellOnt 4860, [1996] O.J. No. 4549, 35 C.P.C. (4th) 202, 21 O.T.C. 155, 32 O.R. (3d) 120 (Ont. Gen. Div.).

Security for costs provided for in Rule 56.01. See *Websports Technologies Inc. v. Cryptologic Inc.*, [2005] O.J. No. 1320, 2005 CarswellOnt 1327, 15 C.P.C. (6th) 340 (Ont. Master). The order from which the appeal is taken was interlocutory, court has no jurisdiction to entertain appeal.

2265535 Ontario Inc. v. Vijayant Sood, 2017 ONSC 4738, 2017 CarswellOnt 12111 (Ont. Div. Ct.).

The Divisional Court provided some timely guidance to lawyers as to how costs will be granted under its new process. The Court found going forward the "normal expectation" is that costs arising from motions for leave to appeal will be around $5,000. As of July 1, 2017, the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 were amended to significantly change the process by which motions for leave to appeal are determined in the Divisional Court. One change is that motions for leave to appeal are now heard and determined by a panel of the Divisional Court as opposed to a single judge. The other change is that the requirement for reasons to be given, if leave is granted, is removed. Consequently, the Divisional Court, like the Court of Appeal and the Supreme Court of Canada, will now not normally provide reasons for the granting or refusal of leave to appeal.

Haggart v. Cooper, 2018 ONSC 6036, 2018 CarswellOnt 17165 (Ont. Div. Ct.). Regional Senior Justice H. S. Arrell.

Application for judicial review of three orders of the Small Claims Court. There is limited scope for an application for judicial review. Although the Divisional Court has jurisdiction to

review a Small Claim's Court decision, it generally will not do so unless the decision is made without jurisdiction or in breach of principles of natural justice: *Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.); *Stamm Investments Ltd. v. Ryan*, 2016 ONSC 6293, 2016 CarswellOnt 16237 (Ont. Div. Ct.) at paras. 14–16. Applicant has not shown an error of jurisdiction or procedural fairness sufficient to justify this court exercising its discretion to grant a remedy in an application for judicial review. The other issue raised are, in essence, an appeal, and cannot be pursued on this application. Application for judicial review dismissed.

(1.0.1) Same — Clauses (1)(a) and (b) do not apply to orders made under section 137.1.

(1.1) Same — If the notice of appeal is filed before October 1, 2007, clause (1)(a) applies in respect of a final order,

(a) for a single payment of not more than $25,000, exclusive of costs;

(b) for periodic payments that amount to not more than $25,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

(1.2) Same — If the notice of appeal is filed on or after October 1, 2007, clause (1)(a) applies in respect of a final order,

(a) for a single payment of not more than $50,000, exclusive of costs;

(b) for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

(2) Combining of appeals from Superior Court of Justice — The Divisional Court has jurisdiction to hear and determine an appeal that lies to the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Divisional Court.

(3) Idem — The Divisional Court may, on motion, transfer an appeal that has already been commenced in the Superior Court of Justice to the Divisional Court for the purpose of subsection (2).

(4) Appeal from interlocutory orders — No appeal lies from an interlocutory order of a judge of the Superior Court of Justice made on an appeal from an interlocutory order of the Ontario Court of Justice.

(5) Transition — This section, as it read immediately before the day subsection 2(1) of Schedule 2 to the *Moving Ontario Family Law Forward Act, 2020* came into force, continues to apply to,

(a) any case in which a notice of appeal was filed before that day; and

(b) any further appeals or proceedings arising from a case described in clause (a).

1994, c. 12, s. 6; 1996, c. 25, ss. 1(2), 9(17), (18); 2006, c. 21, Sched. A, s. 3; 2009, c. 33, Sched. 2, s. 20(2), (3); 2015, c. 23, s. 2; 2020, c. 25, Sched. 2, s. 2

20. Place for hearing — (1) Appeals — An appeal to the Divisional Court shall be heard in the region where the hearing or other process that led to the decision appealed from took place, unless the parties agree otherwise or the Chief Justice of the Superior Court of Justice orders otherwise because it is necessary to do so in the interests of justice.

Commentary: This subsection is amended to require Divisional Court appeals to take place in the region where the *trial or hearing* took place, rather than where the decision was made. It is also amended to permit the Chief Justice of the Superior Court of Justice to order the appeal to be held other than in the region where it is necessary to do so in the interests of justice.

(2) Other proceedings — Any other proceeding in the Divisional Court may be brought in any region.

1994, c. 12, s. 7; 1996, c. 25, s. 9(14)

21. (1) Composition of court for hearings — A proceeding in the Divisional Court shall be heard and determined by three judges sitting together.

(2) Idem — A proceeding in the Divisional Court may be heard and determined by one judge where the proceeding,

(a) is an appeal under clause 19(1)(c);

(b) is an appeal under section 31 from a person referred to in subsection 24(2) presiding over the Small Claims Court; or

(c) is in a matter that the Chief Justice of the Superior Court of Justice or a judge designated by the Chief Justice is satisfied, from the nature of the issues involved and the necessity for expedition, can and ought to be heard and determined by one judge.

(3) Idem, motions — A motion in the Divisional Court shall be heard and determined by one judge, unless otherwise provided by the rules of court.

(4) Idem — A judge assigned to hear and determine a motion may adjourn it to a panel of the Divisional Court.

(5) Idem — A panel of the Divisional Court may, on motion, set aside or vary the decision of a judge who hears and determines a motion.

1996, c. 25, s. 9(14); 2017, c. 2, Sched. 2, s. 2

Commentary: Appeals from deputy judges of the Small Claims Court under s. 31 are heard and determined by one judge of the Divisional Court, under s. 21(2)(b).

The power of a panel of the Divisional Court to review a motion decision by one judge of the Divisional Court under s. 21(5) does not confer a right to have an appeal decision by one judge of the Divisional Court re-heard or reconsidered by a panel of that court: *Parbattie v. Rooplall*, [2017] O.J. No. 1804 (Ont. Div. Ct.). The only further recourse from an appeal

decision of the Divisional Court under s. 31 is a further appeal, with leave, to the Court of Appeal for Ontario under s. 6(1)(a).

The review power under s. 21(5) can only be used to review a motion decision, such as an order dismissing a motion to extend the time to appeal: *Damallie v. Malik*, [2014] O.J. No. 5410 (Ont. Div. Ct.).

MacLean v. Askew, 2021 ONSC 63, 2021 CarswellOnt 14, Swinton, Penny, and Kristjanson JJ. (Ont. Div. Ct.)

Motion pursuant to s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*") seeking to set aside the order of Corbett J. dated February 3, 2020 that dismissed motion to extend the time to file a notice of appeal. Appeal arises from judgment in the Small Claims Court dated September 30, 2019.

MacLean did not attend the trial. The trial judge struck the Defence pursuant to Rule 17.01(2)(b) of the *Rules of the Small Claims Court* and allowed Ms. Askew to prove her claim. MacLean is not an unsophisticated litigant. He is a lawyer.

Delay in bringing motion to set aside in a timely manner is reason enough to dismiss the motion. There is no merit to his motion to set aside. A lack of merit in the proposed appeal can be a sufficient reason to refuse the motion.[2]

Motion to set aside dismissed with costs fixed at $3,000.

Family Court

21.1 (1) Family Court — There shall be a branch of the Superior Court of Justice known as the Family Court in English and Cour de la famille in French.

(2) Unified Family Court — The Unified Family Court is amalgamated with and continued as part of the Family Court.

(3) Same — The Family Court has the jurisdiction conferred on it by this or any other Act.

(4) Jurisdiction — The Family Court has jurisdiction in the City of Hamilton and in the additional areas named in accordance with subsection (5).

(5) Proclamation — The Lieutenant Governor in Council may, by proclamation, name additional areas in which the Family Court has jurisdiction.

1994, c. 12, s. 8; 1996, c. 25, s. 9(17); 2002, c. 17, Sched. F

21.2 (1) Composition of Family Court — The Family Court consists of,

(a) the Chief Justice of the Superior Court of Justice, who shall be president of the Family Court;

(b) the Associate Chief Justice;

(c) the Senior Judge of the Family Court.

(d) the five judges and one supernumerary judge of the Superior Court of Justice assigned to the Unified Family Court on June 30, 1993;

(e) the judges of the Superior Court of Justice appointed to be members of the Family Court, the number of whom is fixed by regulation under clause 53(1)(a.1);

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[2] See, for example, *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2015 ONCA 5, 2015 CarswellOnt 3225 (Ont. C.A.) at paras. 6-7.

(f) the judges of the Superior Court of Justice assigned to the Family Court by the Chief Justice from time to time.

(2) Supernumerary judges — There shall be such additional offices of supernumerary judge of the Superior Court of Justice and member of the Family Court as are from time to time required, to be held by judges referred to in clauses (1)(d) and (e) who have elected under the *Judges Act* (Canada) to hold office only as supernumerary judges.

(3) Jurisdiction of judges — Every judge of the Superior Court of Justice is also a judge of the Family Court.

(4) Temporary assignments — The Chief Justice of the Superior Court of Justice may, from time to time, temporarily assign a judge referred to in clause (1)(d) or (e) to hear matters outside the jurisdiction of the Family Court.

(5) [Repealed 1998, c. 20, Sched. A, s. 4(2).]

(6) [Repealed 1998, c. 20, Sched. A, s. 4(2).]

1994, c. 12, s. 8; 1996, c. 25, s. 9(14), (17); 1998, c. 20, Sched. A, ss. 4, 22(4)

21.3 (1) Transitional measure — All proceedings referred to in the Schedule to section 21.8 or in section 21.12 that are pending in the Superior Court of Justice or the Ontario Court of Justice in an area named under subsection 21.1(5) as an area in which the Family Court has jurisdiction shall be transferred to and continued in the Family Court.

(2) Same — If a judge sitting in the Ontario Court of Justice is seized of a matter in a proceeding that is the subject of a transfer under subsection (1), the judge may complete that matter.

1994, c. 12, s. 8; 1998, c. 20, Sched. A, ss. 5, 22(5)

21.4 [Repealed 1998, c. 20, Sched. A, s. 5.]

21.5 [Repealed 1998, c. 20, Sched. A, s. 5.]

21.6 [Repealed 1998, c. 20, Sched. A, s. 5.]

21.7 Composition of court for hearings — A proceeding in the Family Court shall be heard and determined by one judge.

1994, c. 12, s. 8; 2009, c. 33, Sched. 2, s. 20(4)

21.8 (1) Proceedings in Family Court — In the parts of Ontario where the Family Court has jurisdiction, proceedings referred to in the Schedule to this section, except appeals and prosecutions, shall be commenced, heard and determined in the Family Court.

(2) Motions for interlocutory relief — A motion for interim or other interlocutory relief in a proceeding referred to in the Schedule that is required or permitted by the rules or an order of a court to be heard and determined in a part of Ontario where the Family Court has jurisdiction shall be heard and determined in the Family Court.

(3) Same — A motion for interim or other interlocutory relief in a proceeding referred to in the Schedule that is required or permitted by the rules or an order of the

Family Court to be heard and determined in a part of Ontario where the Family Court does not have jurisdiction shall be heard and determined in the court that would have had jurisdiction if the proceeding had been commenced in that part of Ontario.

Schedule

1. Proceedings under the following statutory provisions:

Change of Name Act

***Child, Youth and Family Services Act, 2017*, Parts V, VII and VIII**

***Children's Law Reform Act*, except sections 59 and 60**

***Civil Marriage Act* (Canada)**

***Divorce Act* (Canada)**

***Family Law Act*, except Part V**

***Family Homes on Reserves and Matrimonial Interests or Rights Act* (Canada)**

Family Responsibility and Support Arrears Enforcement Act, 1996

Interjurisdictional Support Orders Act, 2002

***Marriage Act*, section 6**

1.1 [Repealed 2009, c. 11, s. 19.]

2. Proceedings for the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement, paternity agreement, family arbitration agreement or family arbitration award.

3. Proceedings for relief by way of constructive or resulting trust or a monetary award as compensation for unjust enrichment between persons who have cohabited.

4. Proceedings for annulment of a marriage or for a declaration of validity or invalidity of a marriage.

5. Appeals of family arbitration awards under the *Arbitration Act, 1991*.

6. Proceedings under First Nation laws made under,

i. the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (Canada), or

ii. the *First Nations Land Management Act* (Canada), with respect to the effect of relationship breakdown on matrimonial real property.

7. Any other family law proceedings that may be prescribed by the regulations.

1994, c. 12, s. 8; 1996, c. 31, s. 65; 1999, c. 6, s. 18(1); 2002, c. 13, s. 56; 2002, c. 14, Sched., s. 9; 2005, c. 5, s. 17(1); 2006, c. 1, s. 4; 2009, c. 11, s. 19; 2015, c. 27, Sched. 1, s. 1(2), (3); 2017, c. 14, Sched. 4, s. 10(1)

21.9 Other jurisdiction — Where a proceeding referred to in the Schedule to section 21.8 is commenced in the Family Court and is combined with a related matter that is in the judge's jurisdiction but is not referred to in the Schedule, the court may, with leave of the judge, hear and determine the combined matters.

1994, c. 12, s. 8

21.9.1 [Repealed 2020, c. 25, Sched. 2, s. 3.]

21.10 (1) Orders of predecessor court — The Family Court may hear and determine an application under an Act to discharge, vary or suspend an order made by the Provincial Court (Family Division), the Ontario Court of Justice, the Superior Court of Justice or the Unified Family Court.

(2) Same — The Family Court may enforce orders made by the Provincial Court (Family Division), the Ontario Court of Justice, the Superior Court of Justice or the Unified Family Court.

1994, c. 12, s. 8; 1996, c. 25, s. 9(17), (18)

21.11 (1) Place where proceeding commenced — Proceedings referred to in the Schedule to section 21.8 may be commenced in the Family Court if the applicant or the respondent resides in a part of Ontario where the Family Court has jurisdiction.

(2) Custody and access — An application under Part III of the *Children's Law Reform Act* in respect of a child who habitually resides in a part of Ontario where the Family Court has jurisdiction may be commenced in the Family Court in that part of Ontario.

(3) Transfer to other court — A judge presiding over the Family Court may, on motion, order that a proceeding commenced in the Family Court be transferred to the appropriate court in a place where the Family Court does not have jurisdiction if, in the judge's opinion, the preponderance of convenience favours having the matter dealt with by that court in that place.

(4) Transfer from other court — A judge of a court having jurisdiction in a proceeding referred to in the Schedule to section 21.8 in an area where the Family Court does not have jurisdiction may, on motion, order that the proceeding be transferred to the Family Court in a particular place if, in the judge's opinion, the preponderance of convenience favours having the matter dealt with by that court in that place.

(5) Directions — A judge making an order under subsection (3) or (4) may give such directions for the transfer as are considered just.

1994, c. 12, s. 8; 2020, c. 25, Sched. 1, s. 27(1)

21.12 (1) Enforcement of orders — A judge presiding over the Family Court shall be deemed to be a judge of the Ontario Court of Justice for the purpose of prosecutions under Part V (Child Protection) and Part VIII (Adoption and Adoption Licensing) of the *Child, Youth and Family Services Act, 2017*, the *Children's Law Reform Act*, the *Family Law Act* and the *Family Responsibility and Support Arrears Enforcement Act, 1996*.

(2) [Repealed 2009, c. 33, Sched. 2, s. 20(5).]

(3) [Repealed 2009, c. 33, Sched. 2, s. 20(5).]

1994, c. 12, s. 8; 1996, c. 31, s. 66; 1998, c. 20, Sched. A, ss. 7, 22(6); 2009, c. 33, Sched. 2, s. 20(5); 2017, c. 14, Sched. 4, s. 10(2)

21.13 (1) Community liaison committee — There shall be one or more community liaison committees, as determined by the Chief Justice of the Superior Court of Justice, or by a person he or she designates for the purpose, for each area in which the Family Court has jurisdiction.

(2) Composition — A community liaison committee consists of judges, lawyers, persons employed in court administration and other residents of the community, ap-

pointed by the Chief Justice of the Superior Court of Justice or by a person he or she designates for the purpose.

(3) Function — A community liaison committee shall consider matters affecting the general operations of the court in the municipality and make recommendations to the appropriate authorities.

1994, c. 12, s. 8; 1998, c. 20, Sched. A, ss. 8, 22(7); 2009, c. 33, Sched. 2, s. 20(6)

21.14 (1) Community resources committee — There shall be one or more community resources committees, as determined by the Chief Justice of the Superior Court of Justice, or by a person he or she designates for the purpose, for each area in which the Family Court has jurisdiction.

(2) Composition — A community resources committee consists of judges, lawyers, members of social service agencies, persons employed in court administration and other residents of the community, appointed by the Chief Justice of the Superior Court of Justice or by a person whom he or she designates for the purpose.

(3) Function — A community resources committee shall develop links between the court and social service resources available in the community, identify needed resources and develop strategies for putting them in place.

1994, c. 12, s. 8; 1998, c. 20, Sched. A, ss. 9, 22(8); 2009, c. 33, Sched. 2, s. 20(7)

21.15 Dispute resolution service — A service for the resolution of disputes by alternatives to litigation may be established, maintained and operated as part of the Family Court.

1994, c. 12, s. 8

Small Claims Court

22. (1) Small Claims Court — The Small Claims Court is continued as a branch of the Superior Court of Justice under the name Small Claims Court in English and Cour des petites créances in French.

(2) Idem — The Small Claims Court consists of the Chief Justice of the Superior Court of Justice who shall be president of the court and such other judges of the Superior Court of Justice as the Chief Justice designates from time to time.

(3) Jurisdiction of judges — Every judge of the Superior Court of Justice is also a judge of the Small Claims Court.

1996, c. 25, s. 9(14), (17)

Commentary: The Small Claims Court was continued in 1990 as a branch of the Superior Court of Justice. Previously it had been a branch of the provincial court known as the Provincial Court (Civil Division). Small Claims Court hears a variety of civil claims up to a maximum monetary limit set by regulation under s. 23(1). Effective January 1, 2020, the monetary limit was increased to $35,000.

Small Claims Court is designed to provide a quick, easy and affordable means for litigants to resolve civil matters falling within its jurisdiction. It is sometimes referred to as the "People's Court". Many litigants represent themselves, while others retain lawyers, articling students or paralegals to represent them. Court fees are lower than in other courts: see Chapter 4 — Court Fees.

The court's mandate is to conduct summary proceedings under s. 25. The three basic stages of a Small Claims Court action are pleadings, settlement conference and trial.

Procedure in Small Claims Court is prescribed under the *Small Claims Court Rules*, O.Reg. 258/98: see Chapter 3 — Small Claims Court Rules, and Chapter 5 — Court Forms in Small Claims Court. Generally it is intended that defended cases in Small Claims Court, if not settled, will proceed to trial within about 8 months after the claim is issued. Undefended cases may produce a default judgment within under two months. For defended cases trials are brief, generally requiring only a half-day to a day of court time.

The Small Claims Court has its own rules of evidence which are highly flexible and informal, to the point of permitting evidence which would be inadmissible in other courts, under s. 27. It also has its own costs rules including a *prima facie* limit on the costs compensation which may be payable by the unsuccessful party, under s. 29.

The Small Claims Court has only one full-time judicial officer and that is the Small Claims Court Administrative Justice appointed under s. 87.2, the Honourable Justice Laura S. Ntoukas, based in Toronto. The great majority of Small Claims Court proceedings are presided over by deputy judges appointed under s. 32. There are currently about 360 deputy judges across Ontario.

23. (1) Jurisdiction — The Small Claims Court,

(a) has jurisdiction in any action for the payment of money where the amount claimed does not exceed the prescribed amount exclusive of interest and costs; and

(b) has jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed the prescribed amount.

Commentary

Jurisdiction of the Small Claims Court

General Principles

Unlike the Superior Court of Justice of which it as a branch, the Small Claims Court is a statutory court without general inherent or equitable jurisdiction: *Polewsky v. Home Hardware Stores Ltd.*, 2003 CarswellOnt 2755, 66 O.R. (3d) 600, 34 C.P.C. (5th) 334, 229 D.L.R. (4th) 308, 109 C.R.R. (2d) 189, 174 O.A.C. 358, [2003] O.J. No. 2908 (Ont. Div. Ct.); leave to appeal allowed 2004 CarswellOnt 763, [2004] O.J. No. 954 (Ont. C.A.). As a statutory court, the Small Claims Court must find its jurisdiction in a statute: *Bruyea v. Canada (Veteran Affairs)*, 2019 ONCA 599, 2019 CarswellOnt 11601, 147 O.R. (3d) 84, 439 D.L.R. (4th) 193, [2019] O.J. No. 3847 (C.A.). The powers of a statutory court may be expressly conferred or may be implied where they are required as a matter of practical necessity for the court to accomplish its purpose: *Ontario v. 974649 Ontario Inc.*, *(*sub nom. *R. v. 974649 Ontario Inc.))* 2001 SCC 81, 2001 CarswellOnt 4251, 2001 CarswellOnt 4252, REJB 2001-27030, *(*sub nom. *R. v. 974649 Ontario Inc.)* [2001] 3 S.C.R. 575, *(*sub nom. *R. v. 974649 Ontario Ltd.)* 56 O.R. (3d) 359 (headnote only), *(*sub nom. *R. v. 974649 Ontario Inc.)* 159 C.C.C. (3d) 321, 47 C.R. (5th) 316, *(*sub nom. *R. v. 974649 Ontario Inc.))* 206 D.L.R. (4th) 444, *(*sub nom. *R. v. 974649 Ontario Inc.)* 88 C.R.R. (2d) 189, *(*sub nom. *R. v. 974649 Ontario Inc.))* 279 N.R. 345, *(*sub nom. *R. v. 974649 Ontario Inc.)* 154 O.A.C. 345, *(*sub nom. *R. v. 974649 Ontario Inc.)* [2001] S.C.J. No. 79 (S.C.C.) at para. 71.

The Small Claims Court hears civil cases, limited by a monetary jurisdiction. Effective January 1, 2020 the prescribed monetary jurisdiction was increased from $25,000 to $35,000.

Under s. 23(1)(a), the court's jurisdiction over civil actions in general is confirmed, subject to the prescribed limit over the maximum amount of damages which may be claimed.

Under s. 23(1)(b), the court also has jurisdiction over claims for the recovery of possession of personal property, so long as the value of the personal property does not exceed the monetary limit. In such cases the remedy sought by the plaintiff is not an order for payment of

money damages but an order for the recovery of possession of personal property (formerly known as a writ of replevin).

Nature of the Monetary Limit

The monetary limit is a limit on the amount of damages which may be claimed and awarded, but does not limit the amount which may be alleged and proved. In other words plaintiffs may allege and prove any amount, but must waive the excess as the amount actually claimed.

If a plaintiff claims more than the monetary limit, the court has no jurisdiction over the action. Therefore if the court proceeds with a trial of such a matter, the judgment is a nullity even if the amount awarded is within the monetary limit: *Helsberg v. Sutton Group Achievers's Realty Inc.*, 2002 CarswellOnt 4640, 165 O.A.C. 122, [2002] O.J. No. 2311 (Ont. Div. Ct.). Instead if a claim is made which exceeds the monetary limit, the court should inquire whether the plaintiff wishes to amend the claim to come within the court's jurisdiction. Unless such an amendment is allowed, the court has no jurisdiction to hear the matter. Such an action could be dismissed for want of jurisdiction, or subject to the court's discretion, could be transferred to the Superior Court of Justice under *Courts of Justice Act* s. 110(1): see *Alexandrov v. Csanyi*, 2009 CarswellOnt 1325, 247 O.A.C. 228, [2009] O.J. No. 1030 (Ont. Div. Ct.).

It is well-established that an award of damages must be reduced, for example due to contributory negligence or a statutory deductible, the reduction applies to the total damages established at trial. The effect of the monetary limit is that the net award cannot exceed that limit: *Burkhardt v. Beder*, 1962 CarswellOnt 78, [1963] S.C.R. 86, 36 D.L.R. (2d) 313 (S.C.C.). There the court approved the dissenting reasons of Orde J.A. in *Anderson v. Parney*, 1930 CarswellOnt 161, [1930] 4 D.L.R. 833, 66 O.L.R. 112 (Ont. C.A.), dealing specifically with an appeal from the Division Court (as the Small Claims Court was then known). Therefore the reasoning process by which an award of damages is determined is not affected by the monetary limit. Rather, the limitation is on the net amount claimed.

For more recent appellate authority to the same effect, see *2146100 Ontario Ltd. v. 2052750 Ontario Inc.*, 2013 ONSC 2483, 2013 CarswellOnt 5148, 115 O.R. (3d) 636, 308 O.A.C. 8 (Ont. Div. Ct.); *Dunbar v. Helicon Properties Ltd.*, 2006 CarswellOnt 4580, 213 O.A.C. 296, [2006] O.J. No. 2992 (Ont. Div. Ct.); *Bohatti & Co. v. DeBartolo*, 2003 CarswellOnt 4887, [2003] O.J. No. 5045 (Ont. Div. Ct.).

The monetary limit does not prevent several plaintiffs from joining in a single action and each claiming up to the monetary limit: *Lock v. Waterloo (Regional Municipality)*, 2011 CarswellOnt 15974, [2011] O.J. No. 4898 (Ont. Sm. Cl. Ct.); *McCruden v. Nead*, [2018] O.J. No. 6731 (Sm. Cl. Ct.). Were it not so, two or more plaintiffs having the same dispute against a defendant would have to commence two separate actions, as occurred in *Kent v. Conquest Vacations Co.*, 2005 CarswellOnt 335, 194 O.A.C. 302, [2005] O.J. No. 312 (Ont. Div. Ct.); additional reasons 2005 CarswellOnt 1312, [2005] O.J. No. 1311 (Ont. Div. Ct.). There it was held that despite the commencement of two actions, the plaintiffs had separate causes of action and could have joined in a single proceeding, by analogy to Rule 5 of the *Rules of Civil Procedure*.

Conversely, several defendants may each be sued in a single action for up to the monetary limit. There should be no need for several actions arising from related facts, as occurred in *KNP Headwear Inc. v. Levinson*, 2005 CarswellOnt 7346, 205 O.A.C. 291, [2005] O.J. No. 5438 (Ont. Div. Ct.); additional reasons 2006 CarswellOnt 3464 (Ont. Div. Ct.). There it was held that separate claims against two defendants did not amount to splitting a single cause of action contrary to rule 6.02 of the *Small Claims Court Rules*. This would imply that the matter could have proceeded as a single action as against the two defendants. Recently it was held that a representation order could be made in Small Claims Court, so that a single defen-

dant would defend the action on behalf of an unincorporated association of individuals: *Kelava v. Spadacini* (2019), 2019 ONSC 6314, 2019 CarswellOnt 17707, [2019] O.J. No. 5578 (Div. Ct.).

The monetary limit in no way prevents defendants from making their own claim(s) by way of Defendant's Claim, for up to the monetary limit. In such cases the court can determine the Plaintiff's Claim and Defendant's Claim in a single trial. Equally, several related claims made by way of separate actions can be heard together in a single trial. In both scenarios the court hears cases having a real value exceeding the monetary limit, but no single claim exceeds the limit and hence there is no violation of s. 23(1)(a).

It must be acknowledged the reference in s. 23(1)(a) to the limit as applying to any "action" may be seen as ambiguous if one considers that term to include counterclaims as has been held under the *Rules of Civil Procedure*. However the Small Claims Court legislation treats separate claims within a single court file as separate actions. For purposes of the minimum appealable limit under s. 31, a Plaintiff's Claim and Defendant's Claim are treated as separate actions: *McClellan's Sand & Gravel Ltd. v. Rueter*, 1982 CarswellOnt 536, 39 O.R. (2d) 797, 31 C.P.C. 146, 140 D.L.R. (3d) 679 (Ont. Div. Ct.). Similarly the limit on costs orders under s. 29 is applied separately to a Plaintiff's Claim and Defendant's Claim: *Gowing v. Baxter*, 2015 CarswellOnt 8410, [2015] O.J. No. 2882 (Ont. Sm. Cl. Ct.).

Remedial Jurisdiction — Final Orders

Apart from the monetary limit, the court's jurisdiction may be analyzed by reference to the remedies claimed. Section 23(1), by giving jurisdiction over actions for the payment of money and actions for recovery of possession of personal property, limits the remedial powers of the Small Claims Court.

For example, unless otherwise provided, the jurisdiction to grant equitable relief such as injunctions or mandatory orders is reserved to the Court of Appeal and the Superior Court of Justice under *Courts of Justice Act* s. 96(3). The Small Claims Court has no jurisdiction to order the publication of a retraction and apology in a defamation case: *Moore v. Canadian Newspapers Co.*, 1989 CarswellOnt 423, 69 O.R. (2d) 262, 37 C.P.C. (2d) 189, 60 D.L.R. (4th) 113, 34 O.A.C. 328, [1989] O.J. No. 948 (Ont. Div. Ct.). Nor can it order the performance of remedial work: *Vinet c. Campbellton (Ville)* (1991), 1991 CarswellNB 540, [1991] A.N.-B. No. 32 (C.A.). In *Bennett v. Fresh Air Inc.* (2019), 2019 ONSC 3469, 2019 CarswellOnt 10139, [2019] O.J. No. 3287 (Div. Ct.), the trial judge ordered the defendant to perform certain services, and deliver goods and a price reduction to the plaintiff, failing which the contract would be rescinded. On appeal it was held that the Small Claims Court had no jurisdiction to make such an order.

The Small Claims Court has jurisdiction to grant equitable relief within the limits of its jurisdiction to make orders for the payment of money or for the return of personal property. Therefore it has jurisdiction to determine claims for damages based on the equitable doctrine of unjust enrichment: *Hodgins v. Grover*, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins))* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.) at para. 31; ; leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.).

Consistent with *Courts of Justice Act* s. 97, the Small Claims Court has no jurisdiction to grant declaratory relief: *Giannaris v. Toronto (City)*, 2012 ONSC 5183, 2012 CarswellOnt 11747, [2012] O.J. No. 4460 (Ont. Div. Ct.).

In *Hradecky v. Hydro One Networks Inc.*, 2014 CarswellOnt 3316, [2014] O.J. No. 1249 (Ont. Sm. Cl. Ct.), a debtor sued his creditor for a determination of the true amount owing,

which he alleged was less than that claimed by the creditor. It was held that in substance this was a claim for declaratory relief, over which the court lacked jurisdiction.

The Small Claims Court has no jurisdiction to grant corporate oppression remedies under s. 248(1) of the *Business Corporations Act*, R.S.O. 1990, c. B.16: because the "court" to which application may be made is defined as the Superior Court of Justice, and because such remedies are traditionally viewed as equitable remedies: *BCE Inc., Re*, 2008 SCC 69, 2008 CarswellQue 12595, 2008 CarswellQue 12596, *(*sub nom. *BCE Inc. v. 1976 Debentureholders)* [2008] 3 S.C.R. 560, 52 B.L.R. (4th) 1, 71 C.P.R. (4th) 303, *(*sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 301 D.L.R. (4th) 80, *(*sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 383 N.R. 119, [2008] S.C.J. No. 37 (S.C.C.) at para. 58; and see *Courts of Justice Act* s. 96(3). However an oppression claim was entertained by the court in *Glenmont Ltd. v. Mitman Financial & Investments Ltd.* (2019), 2019 CarswellOnt 20523, [2019] O.J. No. 6419 (Sm. Cl. Ct.).

The Small Claims Court has no jurisdiction to order an accounting: *Bemjapipatkul v. Rungruangwong* (January 13, 2014), Doc. SC-12-16636-0000, [2014] O.J. No. 119 (Ont. Sm. Cl. Ct.) at para. 30.

Remedial Jurisdiction — Interlocutory Orders

The *Small Claims Court Rules* make various provisions for interlocutory orders, being orders which do not finally determine a claim or defence and typically procedural in nature. Examples are rules 13.05 (orders at settlement conference) and 17.02 (adjournment of trial).

Occasionally requests are made for interlocutory orders which are mentioned nowhere in the *Small Claims Court Rules*. Caselaw deals addresses whether such remedies are available.

The Court of Appeal for Ontario addressed jurisdiction in *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.); additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.). It held that motions for summary judgment under Rule 20 of the *Rules of Civil Procedure* are not available in Small Claims Court, which instead has the motion procedure under rule 12.02 of the *Small Claims Court Rules*.

In *Elguindy v. St. Joseph's Health Care London*, 2016 ONSC 2847, 2016 CarswellOnt 8374, [2016] O.J. No. 2742 (Ont. Div. Ct.), it was held that that Small Claims Court has no jurisdiction to order third parties to produce documents under rule 30.10 of the *Rules of Civil Procedure*.

In *Riddell v. Apple Canada Inc.*, 2016 ONSC 6014, 2016 CarswellOnt 14847, [2016] O.J. No. 4934 (Ont. Div. Ct.); affirmed 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.); leave to appeal refused *Matthew Riddell v. Apple Canada Inc.*, 2018 CarswellOnt 9253, 2018 CarswellOnt 9254, [2017] S.C.C.A. No. 470 (S.C.C.), it was held that the Small Claims Court had jurisdiction to make an order for pretrial inspection of personal property under Rule 32 of the *Rules of Civil Procedure*. Such jurisdiction is to be used sparingly and only where it is demonstrated that justice cannot be done without such relief.

In *Bruyea v. Canada (Veteran Affairs)* (2019), 2019 ONCA 599, 2019 CarswellOnt 11601, 147 O.R. (3d) 84, 439 D.L.R. (4th) 193 (C.A.), it was held that deputy judges have no jurisdiction to hear anti-SLAPP motions under *Courts of Justice Act* s. 137.1.

In *Kelava v. Spadacini* (2019), 2019 ONSC 6314, 2019 CarswellOnt 17707, [2019] O.J. No. 5578 (Div. Ct.), it was held that the Small Claims Court has jurisdiction to make a representation order under rule 12.07 of the *Rules of Civil Procedure*.

Statutory Jurisdiction

A miscellany of statutory provisions confer jurisdiction in the Small Claims Court to determine specific types of cases. These include the following:

Commercial Tenancies Act, R.S.O. 1990, c. L.7: section 32(3) provides that in cases of illegal distraint of goods and chattels by a commercial landlord, a subtenant may sue for the return of the goods and chattels in any court of competent jurisdiction, which would be the Small Claims Court if the value of the goods and chattels did not exceed its monetary limit.

Condominium Act, 1998, S.O. 1998, c. 19: section 55(9) provides that an action against a condominium corporation for breach of the record disclosure obligation under s. 55 may be claimed by action in the Small Claims Court. The amount that may be claimed is limited by O.Reg. 48/01, s. 13.11(6) to a maximum of $5,000.

Parental Responsibility Act, 2000, S.O. 2000, c. P.10: section 2(1) provides that where a child takes, destroys or damages property, an owner or person entitled to possession of the property may bring an action in the Small Claims Court against a parent of the child for damages not in excess of the monetary jurisdiction of that court. Liability of the parent and the onus of proof are addressed by subsection 2(2).

Repair and Storage Liens Act, R.S.O. 1990, c. P.38: section 25 provides that an application under Part IV may be brought "in any court of appropriate monetary jurisdiction." This means that if the value of the article that is the subject-matter of the claim for lien does not exceed the monetary jurisdiction of the Small Claims Court, that court has jurisdiction over applications for determination of rights under s. 23(1) and over the process relating to possessory liens under s. 24. Note that specific forms have been prescribed for such proceedings: see O.Reg. 111/18.

Enforcement Jurisdiction

Several statutes also provide for the enforcement of orders made by other courts or tribunals through the Small Claims Court system. These are purely enforcement mechanisms and do not require or permit the issuance of fresh claims in Small Claims Court (which would then be subject to the requirements for service, defence, settlement conference and trial). Instead such provisions permit orders made by another court or tribunal to be filed in Small Claims Court and then enforced in the same ways as an order of the Small Claims Court.

The most common example of this is seen in the enforcement of the monetary aspects of orders made by the Landlord and Tenant Board. Such orders may be filed with the Superior Court of Justice pursuant to section 19(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. In practice those orders are filed with the Small Claims Court branch of that court, where the amount ordered to be paid falls within its monetary jurisdiction. Note that s. 19(1) applies to orders made by any "tribunal" as defined in s. 1(1) exercising a statutory power of decision.

Similar enforcement provisions are found in the *Forest Fires Prevention Act*, R.S.O. 1990, c. F.24, s. 35(2.1)(enforcement of certain amounts which may be awarded by the Ontario Court of Justice upon conviction under s. 35(1)) and the *Trespass to Property Act*, R.S.O. 1990, c. T.21, s. 12(6) (enforcement of restitution order or private prosecution costs order made by Ontario Court of Justice where person convicted under s. 2).

Jurisdiction in Family Law Matters

The Small Claims Court does not have jurisdiction over family law as such. However the fact that a dispute arises from a family context does not in itself determine whether the matter falls beyond the jurisdiction of the Small Claims Court. It is necessary to consider the specific issue and remedy sought to be raised in Small Claims Court.

Divorce falls beyond the jurisdiction of the Small Claims Court because under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 1(1) only the Superior Court of Justice has jurisdiction

to grant divorces. Deputy judges also lack jurisdiction to solemnize marriages under the *Marriage Act*, R.S.O. 1990, c. M.3, because they are not included among the classes of judges and other persons authorized to do so.

Child support and spousal support fall beyond the jurisdiction of the Small Claims Court because that court is not included within the definition of courts under any of the relevant statutes: *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 1(1), *Family Law Act*, R.S.O. 1990, c. F.3, s. 1(1) and *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 1(1).

Property claims under Part I of the *Family Law Act* all beyond the jurisdiction of the Small Claims Court, because the Superior Court of Justice or, where applicable, the Family Court of the Superior

Court of Justice are given jurisdiction over such claims: see ss. 1(1) and 4(1). It should be noted that property claims under s. 5(1) are available only to "spouses" as defined under s. 1(1), which does not include common law relationships.

Accordingly, it is clear that any party claiming a divorce, child support, spousal support, or equalization of net family property in Small Claims Court is seeking relief which the court has no jurisdiction to grant. Such claims would be dismissed for want of jurisdiction, stayed, or in appropriate cases, transferred to the applicable court under *Courts of Justice Act* s. 110(1).

Debt claims are occasionally asserted in Small Claims Court between former spouses or common law partners. Such cases require careful consideration to determine whether they fall within or beyond the court's jurisdiction. A series of considerations may be identified from experience with these cases:

(i) Is the alleged debt in substance a claim for spousal or child support? If so, the Small Claims Court has no jurisdiction to make orders for support under any of the relevant family law statutes, and in addition such claims are channelled to the family courts by virtue of rule 1(2)(a) of the *Family Law Rules*, O.Reg. 114/99.

(ii) Have there been any prior family court proceedings between these parties? If so, depending on the nature of what is now claimed, the claim could be:

(a) barred as an impermissible indirect attack on the prior order by virtue of *res judicata*, collateral attack or abuse of process; or

(b) an attempt to change or vary the family court order, which the Small Claims Court lacks jurisdiction to do, consistent with rule 1(2)(a) of the *Family Law Rules*.

(iii) Is there a domestic contract between these parties? If so, is the debt claim channelled to the family courts under rule 1(2)(b) of the *Family Law Rules*, which channels cases "for the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement . . ." to the family courts.

The leading case dealing with the jurisdiction of the Small Claims Court over debt claims arising from a family law background is *Pilon v. Lavigne*, 2016 ONSC 1965, 2016 Carswell-Ont 4362, [2016] O.J. No. 1469 (Ont. Div. Ct.). There the unmarried couple had cohabited for under three years before separating and entering into a separation agreement. The plaintiff later sued in Small Claims Court for a specific debt of $12,000 and succeeded at trial. On appeal the jurisdiction of the Small Claims Court was challenged, unsuccessfully.

Other family law matters may occasionally reach the Small Claims Court in a form not expressly labelled as a claim for child support or equalization or other expressly family law remedies.

Jurisdiction in Residential Tenancy Matters

The intersection between the jurisdiction of the Small Claims Court and that of the Landlord and Tenant Board can be a challenging subject. Many different factual cases routinely arise and each case must be analyzed to determine whether the court has jurisdiction.

The starting point is s. 168(2) of the *Residential Tenancies Act, 2006*, S.O. 2006 c.17, which provides that the jurisdiction of the Landlord and Tenancy Board is exclusive jurisdiction. It provides as follows:

> (2) The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.

Therefore it is clear — at least as a general proposition — that the jurisdiction of the court is not concurrent to the jurisdiction of the board. As a matter of law, the board's exclusive jurisdiction, where triggered, ousts the jurisdiction of the civil courts. In addition s. 168(2) indicates that the board's exclusive jurisdiction applies not only to applications brought under the Act but also with respect to all matters in which jurisdiction is conferred by the Act.

The basic appellate decision dealing broadly with exclusive jurisdiction in this context is *Beach v. Moffatt*, 2005 CarswellOnt 1693, *(*sub nom. *Fraser v. Beach))* 75 O.R. (3d) 383, *(*sub nom. *Fraser v. Beach)* 252 D.L.R. (4th) 1, 33 R.P.R. (4th) 193, *(*sub nom. *Fraser v. Beach)* 197 O.A.C. 113, [2005] O.J. No. 1722 (Ont. C.A.). That case confirmed that the jurisdiction of the Superior Court of Justice may be limited by statute. There the landlord had applied to evict the tenants before the board, but the application was denied. The neighbours then sought and obtained an order from the Superior Court of Justice requiring the tenants to vacate based on certain activities amounting to nuisance. On appeal that order was set aside on the basis that it was made without jurisdiction. Only the board could order eviction by virtue of its exclusive jurisdiction. The fact that the claimants were neither the tenant nor the landlord did not prevent that conclusion.

More recently the appellate decision in *Efrach v. Cherishome Living*, 2015 ONSC 472, 2015 CarswellOnt 812, [2015] O.J. No. 293 (Ont. Div. Ct.), developed the question of jurisdiction in the context of a Small Claims Court proceeding. There the tenant sued the landlord for damages in negligence after the apartment was entered by a third party who stole the tenant's personal property. The alleged negligence consisted of leaving the adjacent unit unlocked, which gave access to the third who crossed to the tenant's balcony and gained access to her unit. On motion, a deputy judge ruled that the board's exclusive jurisdiction ousted the court's jurisdiction because the essential character of the dispute was expressly or inferentially governed by the Act.

The deputy judge applied *Luu v. O'Sullivan*, 2012 CarswellOnt 9897, [2012] O.J. No. 3185 (Ont. Sm. Cl. Ct.), which in turn applied *Mackie v. Toronto (City)*, 2010 ONSC 3801, 2010 CarswellOnt 4757, [2010] O.J. No. 2852 (Ont. S.C.J.), and approved *Devries v. Green*, 2012 CarswellOnt 4154, [2012] O.J. No. 1507 (Ont. Sm. Cl. Ct.). In *Devries v. Green, Deputy Judge Bale preferred Mackie v. Toronto (City) to Crooks v. Levine*, 2001 CarswellOnt 2541, 148 O.A.C. 44, [2001] O.J. No. 2781 (Ont. Div. Ct.), while in *Luu v. O'Sullivan* the deputy judge observed that *Crooks v. Levine* was inconsistent with *Swire v. Walleye Trailer Park Ltd.*, 2001 CarswellOnt 2832, 203 D.L.R. (4th) 402, 44 R.P.R. (3d) 120, 149 O.A.C. 108, [2001] O.J. No. 3227 (Ont. Div. Ct.).

On the appeal in *Efrach v. Cherishome Living*, Justice C.J. Horkins agreed with Deputy Judge McNeely that the exclusive jurisdiction of the board ousted the court's jurisdiction. Specifically, Justice Horkins agreed that jurisdiction is not determined by the label used by the claimant — in that case, negligence. Rather the essential character of the claim had to be determined. Her Honour concluded that the essential character of the claim was based on the landlord's maintenance duty under s. 20(1) of the Act, which a tenant or former tenant can

seek to remedy before the board by way of an application under s. 29(1.3). The remedy can include an award of damages under s. 30 in an amount up to the monetary limit of the Small Claims Court.

The appeal court further held that the fact that a limitation period for the tenant to bring such an application under the Act had expired, did not change the jurisdictional analysis.

Therefore *Efrach v. Cherishome Living*, *supra*, stands as the leading authority on the line between the exclusive jurisdiction of the Landlord and Tenant Board and that of the Small Claims Court — at least in cases where the claim is framed as a common law cause of action and not as a traditional landlord and tenant matter. The decision of Justice Perell in *Mackie v. Toronto (City)*, *supra*, was specifically approved in *Efrach* and therefore His Honour's decision is a key if not the key component of the analysis. The other cases cited in *Efrach v. Cerishome Living* may also be of some assistance.

Jurisdiction over Claims for Residential Rent Arrears

A common form of residential tenancy matter seen in Small Claims Court is the landlord's claim for arrears of rent.

It should be noted immediately that often such claims proceed before the Landlord and Tenant Board, and produce an order of the board for payment of the arrears, generally with an order terminating the tenancy and for payment of per diem rent up to the date of vacant possession. Those orders can be filed with the court and enforced as orders of the court, under *Statutory Powers Procedure Act* s. 19(1) (see above under Statutory Jurisdiction). In those cases, the court file is merely an enforcement file and no Plaintiff's Claim is ever issued nor is there any Defence filed.

In *Stamm Investments Ltd. v. Ryan*, 2015 CarswellOnt 12774, [2015] O.J. No. 4444 (Ont. Sm. Cl. Ct.) at para. 13; ; application for judicial review dismissed [2016] O.J. No. 5275 (Div. Ct.), it was held that where the board has made an order for payment of rent arrears, the court has no jurisdiction to entertain a fresh claim for the arrears. The order is simply enforced under s. 19(1) using the court's enforcement procedures.

Rental arrears claims also occur without any prior proceeding before the Landlord and Tenant Board, for example if the tenant has given notice and moved out but owes a balance. Such claims by landlords are routinely brought in Small Claims Court.

Recently the Divisional Court held that the Small Claims Court has no jurisdiction over claims for rental arrears: *Kiselman v. Klerer* (2019), 2019 ONSC 6668, 2019 CarswellOnt 18949, [2019] O.J. No. 5857 (Div. Ct.). In that case the landlord's claim for rental arrears (and also for damage to the rental unit) was brought after the tenant vacated and a deputy judge dismissed the action, holding that it was a residential tenancy matter within the exclusive jurisdiction of the Landlord and Tenant Board. On appeal, the Divisional Court agreed, citing *Mackie v. Toronto (City)*, *supra*, and *Efrach v. Cherishome Living*, *supra*. It was held that whether the tenant is in possession when the claim is made, is immaterial to jurisdiction.

With respect it is submitted that *Kiselman v. Klerer* conflicts with the language of the Act and with existing Divisional Court authorities, and should not be followed. The decision in *Kiselman v. Klerer* wrongly extends the application of *Mackie* and *Efrach* — both of which involved negligence claims by tenants — to landlords' claims for rental arrears.

Section 87(1)(b) of the *Residential Tenancies Act, 2006*, provides that a landlord may apply to the board for payment of rental arrears "if the tenant is in possession of the unit."

Section 89(1) of the *Residential Tenancies Act, 2006*, provides that a landlord may apply to the board for compensation for damage to the rental unit "if the tenant . . . is in possession of the rental unit."

Based on those express provisions, the Landlord and Tenant Board loses jurisdiction over potential claims for rental arrears and for damage to the unit once the tenant ceases to be in

possession of the unit. It cannot have been the legislature's intention that on leaving the unit, the legal liability of tenants in arrears of rent and for damage to the unit is expunged. No support for such a result can be found in the Act. The result in *Kiselman v. Klerer*, with respect, represents an untenable interpretation of the legislation.

Prior authority from the Divisional Court confirms the relevance of the tenant's possession of the rental unit to the question of jurisdiction.

In *Lorini v. Lombard*, 2001 CarswellOnt 5380, [2001] O.J. No. 3108 (Ont. Div. Ct.), on appeal from the board MacFarland J. (as she then was), writing for the court, held that the board's jurisdiction ended upon termination of the tenancy, except as provided under s. 32 of the *Tenant Protection Act, 1997*, S.O. 1997, c.24, which permitted a "tenant or former tenant" to seek a remedy for various matters. Section 29 of the current Act is the equivalent provision.

In *O'Shanter Development Corp. v. Separi*, 1996 CarswellOnt 1701, [1996] O.J. No. 1589 (Ont. Div. Ct.), on appeal from the Small Claims Court, it was held that a landlord's application to the board for arrears of rent could only be made while the tenant was in possession. Steele J. cited the earlier decision in *Sam Richman Investments (London) Ltd. v. Riedel*, 1974 CarswellOnt 367, 6 O.R. (2d) 335, 52 D.L.R. (3d) 655 (Ont. Div. Ct.).

More recent Divisional Court authority confirms that the board's jurisdiction over landlords' claims for arrears of rent ends once the tenant is no longer in possession, based on s. 87(1)(b) of the *Residential Tenancies Act, 2006*: see *Brydges v. Johnson* (2017), 2017 ONSC 7410, 2017 CarswellOnt 19607, [2017] O.J. No. 6473 (Div. Ct.).

Unfortunately most of those Divisional Court authorities do not appear to have been referred to the court in *Kiselman v. Klerer*, *supra*.

Jurisdiction over Claims for Undue Damage to the Rental Unit

Section 89(1) of the *Residential Tenancies Act, 2006*, provides that a landlord may apply to the board for compensation for damage to the rental unit "if the tenant . . . is in possession of the rental unit." This suggests that if the tenant is in possession when the landlord's application to the board is issued, the board has jurisdiction, but once possession ends, the landlord's remedy lies with the civil courts.

In *Capreit L.P. v. Griffen* (2016), 2016 ONSC 5150, 2016 CarswellOnt 22161, [2016] O.J. No. 7338 (Div. Ct.), the tenancy was terminated by order of the board due to arrears of rent. About two weeks after the tenant vacated the landlord conducted an inspection of the unit and discovered damage for which it then sought compensation in a Small Claims Court proceeding. About ten days after the damage was discovered, the board made an order dismissing application brought by the tenant. A deputy judge dismissed the Small Claims Court action for want of jurisdiction, holding that the damage issued could have been put to the board by the time the tenant's applications were dismissed. On appeal, the Divisional Court reversed the deputy judge's decision. Justice Fragomeni referred to s. 89(1) of the *Residential Tenancies Act, 2006*, and held that s. 89(1) makes it clear that a landlord's application for compensation for damage to the unit can only be made to the board if the tenant is in possession. Once the tenant ceases to be in possession, the civil courts have jurisdiction over such a claim.

Brydges v. Johnson (June 24, 2016) (Ont. Div. Ct.) [unreported]~~;~~; affirming (January 8, 2016), *Kerlertas D.J.*, [2016] O.J. No. 609 (Ont. Sm. Cl. Ct.), is to the same effect as *Capreit L.P. v. Griffen*, *supra*.

As discussed above, it is submitted the *Kiselman v. Klerer*, *supra*, conflicts with a number of other Divisional Court authorities holding that the board's jurisdiction over landlords' applications ends once the tenant is evicted or gives up vacant possession, and should not be followed.

In *Izumi v. Skilling*, [2020] O.J. No. (Sm. Cl. Ct.), the court noted the conflicting Divisional Court decisions and chose to follow *Capreit L.P. v. Griffen and Brydges v. Johnson over Kiselman v. Klerer*.

Jurisdiction of Tenants' Claims for Loss Personal Property on Eviction

The court occasionally sees claims by former tenants arising from the alleged loss of or damage to property during the eviction process. The question of the court's jurisdiction is addressed by several decisions including one from the Court of Appeal for Ontario.

The *Residential Tenancies Act, 2006* creates a process to deal with a tenant's personal property upon eviction. In most cases, tenants facing eviction will leave of their own accord rather than be physically evicted. But when evictions are conducted, it is usually impossible for the tenant to simply leave with all his or her possessions immediately. Section 41 provides that the landlord shall not sell, retain or otherwise dispose of the property for 72 hours after enforcement of an eviction order, and shall make the property available for the tenant to retrieve during those 72 hours.

Section 41(6) permits a "former tenant" to apply to the board for a remedy for alleged breach of the landlord's obligations. Therefore the board's jurisdiction over such a matter survives the termination of the tenancy and eviction of the tenant.

In *Spirleanu v. Transglobe Property Management Service Ltd.*, 2015 ONCA 187, 2015 CarswellOnt 3633, [2015] O.J. No. 1336 (Ont. C.A.), the former tenant sued for alleged loss of personal property incidental to eviction. His Small Claims Court action was dismissed but he sued again in the Superior Court of Justice. That claim was dismissed on the basis that it was an attempt to relitigate and because his claim fell within the exclusive jurisdiction of the Landlord and Tenant Board. The Court of Appeal agreed that the disposition of his belongings following eviction fell within the board's exclusive jurisdiction.

Two decisions from the Small Claims Court are to the same effect: *Heafy v. Craig*, [2020] O.J. No. 1142 (Sm. Cl. Ct.); *Tuka v. Butt*, 2014 CarswellOnt 2035, [2014] O.J. No. 852 (Ont. Sm. Cl. Ct.).

Jurisdiction over Claims for Abatement of Rent

As held in *Efrach v. Cherishome Living*, 2015 ONSC 472, 2015 CarswellOnt 812, [2015] O.J. No. 293 (Ont. Div. Ct.), discussed above, s. 29(1) of the Act permits a tenant or former tenant's claim for abatement of rent to be brought before the Landlord and Tenant Board and the one-year limitation period applicable to such applications under s. 29(2) does not give the court jurisdiction over such matters. Therefore it appears that claims for an abatement of rent, regardless of the label used in the Plaintiff's Claim, fall within the exclusive jurisdiction of the board.

For a recent application of that principle, see *Tobar v. Wilstar Management Ltd.*, [2019] O.J. No. 2950 (Sm. Cl. Ct.), where a former tenant's claim against the management company for failure to repair a garage was dismissed for want of jurisdiction.

Case Law: *In the matter: Dans l'affaire: Renvoi à la Cour d'appel du Québec portant sur la validité constitutionnelle des dispositions de l'article 35 du Code de procédure civile qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec*, 2019 QCCA 1492, 2019 CarswellQue 8040, 2019 CarswellQue 10358, EYB 2019-316229 (C.A. Que.).

Quebec Superior Court's civil jurisdiction. On Sept. 12, the appellate court released its decision in *Dans l'affaire* : *Renvoi à la Cour d'appel du Québec portant sur la validité constitutionnelle des dispositions de l'article 35 du Code de procédure civile qui fixent à moins de 85 000 $ la compétence pécuniaire exclusive de la Cour du Québec*, 2019 QCCA 1492, 2019 CarswellQue 8040, 2019 CarswellQue 10358, EYB 2019-316229 (C.A. Que.).

"Article 35 *C.C.P.* violates section 96 of the *Constitution Act, 1867* because it infringes on the core jurisdiction of the Quebec Superior Court to adjudicate certain substantial civil disputes," the seven-member panel of the court unanimously held.

"In order to respect section 96 of the *Constitution Act, 1867*, the maximum limit for the civil jurisdiction of the Court of Québec must fall between $55,000 and $70,000, but must not exceed the latter amount, subject, of course, to future updates," said the 141-page ruling, which gave the National Assembly one year to amend the *Code of Civil Procedure* and set the monetary limit.

The government asked the appellate court whether article 35 of Quebec's *Code of Civil Procedure* giving the provincial Court of Québec "exclusive jurisdiction to hear and determine applications in which the value of the subject matter of the dispute or the amount claimed," is less than $85,000, is "valid with regard to section 96 of the *Constitution Act, 1867*, given the jurisdiction of Quebec over the administration of justice under paragraph 14 of section 92 of the *Constitution Act, 1867*."

To determine an appropriate threshold, the court relied on experts to calculate, in 2017 dollars, what the civil jurisdiction limit would be based on the $100 cap on civil cases Quebec's provincial court would have heard in 1867. The updated amount was determined to be less than $85,000, and no higher than $70,000 and no lower than $55,000. Quebec presented a reference to the Appeal Court, which unanimously found the limit increase to be unconstitutional (*Renvoi concernant la constitutionnalité de la Cour de magistrat*, [1965] B.R. 1).

Bruyea v. Canada (Veteran Affairs), 2019 ONCA 599, 2019 CarswellOnt 11601, 147 O.R. (3d) 84, 439 D.L.R. (4th) 193 (Ont. C.A.)

The court invited the parties to address the issue whether a deputy judge of the Small Claims Court has jurisdiction to make an order under s. 137.1.

Section 137.1 was added to the *CJA* to address concerns arising from the use of litigation to interfere with freedom of expression. The section was added to the *CJA* to provide "a pretrial procedure designed to quickly and inexpensively identify and dismiss those unmeritorious claims that unduly entrenched on an individual's right to freedom of expression on matters of public interest". See *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 2018 CarswellOnt 14179, 142 O.R. (3d) 161, 46 Admin. L.R. (6th) 70, 50 C.C.L.T. (4th) 173, 23 C.P.C. (8th) 312, 426 D.L.R. (4th) 233, 79 M.P.L.R. (5th) 179 (Ont. C.A.) at para. 29; ; additional reasons 2018 ONCA 853, 2018 CarswellOnt 17537, 50 C.C.L.T. (4th) 211, 23 C.P.C. (8th) 350, 80 M.P.L.R. (5th) 181 (Ont. C.A.); affirmed 2020 CSC 22, 2020 SCC 22, 2020 CarswellOnt 12650, 2020 CarswellOnt 12651, 72 Admin. L.R. (6th) 1, 68 C.C.L.T. (4th) 1, 55 C.P.C. (8th) 1, 449 D.L.R. (4th) 1, 6 M.P.L.R. (6th) 1, [2020] S.C.J. No. 22 (S.C.C.). This was a new process to permit the summary dismissal of a proceeding that was not otherwise available to a party under the *CJA* or the *Rules of Civil Procedure*, R.R.O.1990, Reg. 194.

The Small Claims Court is a statutory court and it must find its jurisdiction in a statute. All of the parties accept that neither the Small Claims Court nor the deputy judges have any inherent jurisdiction. If either are to exercise any jurisdiction, it must be found in a statute, principally, the *CJA*. In response to these issues, the parties refer to the decisions in *Ontario Deputy Judges Assn. v. Ontario*, 2006 CarswellOnt 3137, 80 O.R. (3d) 481, 28 C.P.C. (6th) 1, 268 D.L.R. (4th) 86, *(*sub nom. *Ontario Deputy Judges' Assn. v. Ontario (Attorney General))* 141 C.R.R. (2d) 238, 210 O.A.C. 94, [2006] O.J. No. 2057 (Ont. C.A.) and *Hodgins v. Grover*, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v.*

Hodgins) 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.). Neither of those decisions assist the parties.

In the *Grover* case, the court was dealing with the interpretation to be given to s. 96 of the *CJA*. Based on the words "unless otherwise provided" that appear in s. 96(3), the court found that a narrow jurisdiction existed in the Small Claims Court to grant equitable relief as limited by s. 23 of the *CJA*, that is, for claims of "a monetary payment under the limit of $25,000 or the return of personal property valued within that limit", *Grover* at para. 49. Again, that decision provides little assistance in arriving at the proper interpretation of "judge" in s. 137.1. Although, the court in *Grover* did conclude that the fact that the Small Claims Court had become part of the Superior Court of Justice "did not alter the court's jurisdiction", at para. 44.

Absent express statutory authority, the Small Claims court has no jurisdiction. The other is that not all of those sections expressly exclude relief from the Small Claims Court. Sections 101 and 140 do not do so, for example. And, contrary to the thrust of the Attorney General's submission, the wording of s. 96(3) was expressly relied upon by this court in *Grover* to find jurisdiction in the Small Claims Court to grant equitable relief, albeit in very limited situations.

Deputy judges of the Small Claims Court do not have authority to grant orders under s. 137.1 of the *CJA*.

Kelava v. Spadacini, 2019 ONSC 6314, 2019 CarswellOnt 17707, Leitch J. (Ont. Div. Ct.)

The substance and nature of the respondent, Mr. Spadacini's claim is within the jurisdiction of the Small Claims Court. However, he wished to sue a trade union, an unincorporated association. See *Lawrence v. IBEW, Local 773*, 2017 ONCA 321, 2017 CarswellOnt 5650, 138 O.R. (3d) 129, 17 C.P.C. (8th) 289, 420 D.L.R. (4th) 4, 2017 C.L.L.C. 220-039, [2017] O.J. No. 1944 (Ont. C.A.) at para. 16; ; affirmed *International Brotherhood of Electrical Workers (IBEW) Local 773 v. Lawrence*, 2018 CSC 11, 2018 SCC 11, 2018 CarswellOnt 4370, 2018 CarswellOnt 4371, [2018] 1 S.C.R. 267, 16 C.P.C. (8th) 1, 420 D.L.R. (4th) 1, 2018 C.L.L.C. 220-030 (S.C.C.), "the proper way to sue a trade union is to obtain a representation order pursuant to Rule 12.07 of the *Rules of Civil Procedure*, authorizing one or more members of a union to defend a proceeding on behalf of all other members".

The Deputy Judge referenced Rule 1.03(2) of the *Small Claims Court Rules* that states: "that if such rules do not cover a matter adequately, the court may make any order that is just and the practice shall be decided by analogy to the *Small Claims Court Rules*, by reference to the *Courts of Justice Act*, and if the court considers it appropriate by reference to the *Rules of Civil Procedure*. The Deputy Judge relied on Rule 12.07 the *Rules of Civil Procedure* and granted the representation order in issue. The Deputy Judge noted that David Kelava, an executive member of the union, was already named as a defendant.

The Deputy Judge did not err in making the representation order in issue because in our view the legislature **did not intend to omit** from the *Small Claims Court Rules* any reference to representation orders. There is no principled reason why the legislature would seek to prohibit a trade union from suing or being sued in the Small Claims Court. The *Small Claims Court Rules* contain a "gap", a gap that the Small Claims Court has jurisdiction to fill under Rule 1.03(2) by reference to the *Rules of Civil Procedure*. Application dismissed.

Schafer v. Wagner, 2016 CarswellOnt 19892, Deputy Judge J. Sebastian Winny (Ont. S.C.J.)

The Court commented that the case law has established that the Small Claims Court has no jurisdiction to entertain motions under Rules 30.10 and 32 of the Rules of Civil Procedure, although *Riddell m*ay have opened the door to some degree for Rule 32 motions (i.e., inspection of property). Nevertheless, the Court held that because the property in question was no

longer owned by the plaintiff, to grant the order sought by the defendants the Court would, in effect, have to order inspection of property of a non-party to the action.

The Court confirmed that the Small Claims Court has no jurisdiction to make such an order. The Court further held that even if the court had jurisdiction, the relief sought was unwarranted in this instance. Jurisdiction to order discovery is available in very limited circumstances only as between the named parties to the action in the context of a settlement conference when justice cannot possibly be done between the parties without such discovery.

In situations where a party to an action seeks production of property or documents from a non-party to the action, dealt with under Rule 30.10 in Superior Court, the jurisprudence has established that the Small Claims Court does not have jurisdiction to make such an order.

(2) Transfer from Superior Court of Justice — An action in the Superior Court of Justice may be transferred to the Small Claims Court by the local registrar of the Superior Court of Justice on requisition with the consent of all parties filed before the trial commences if,

(a) the only claim is for the payment of money or the recovery of possession of personal property; and

(b) the claim is within the jurisdiction of the Small Claims Court.

Case Law: *Korlyakov v. Riesz*, 2020 ONSC 6622, 2020 CarswellOnt 15782, Master Jolley (Ont. S.C.J.)

Court has authority pursuant to section 23(2) of the *Courts of Justice Act* to transfer an action to small claims court, unless there is prejudice that cannot be remedied.[3]

Defendants opposed the transfer to small claims court. They argue that they are prejudiced because of the delay COVID-19 has caused small claims court actions. Principles set out by Master Muir in *Mehrabi v. Colangelo*[4] applied.

Motion to transfer the action to small claims court granted, conditional on the plaintiff paying each defendant $500 for their costs thrown away.

(3) Idem — An action transferred to the Small Claims Court shall be titled and continued as if it had been commenced in that court.

1996, c. 25, s. 9(17)

24. (1) Composition of court for hearings — A proceeding in the Small Claims Court shall be heard and determined by one judge of the Superior Court of Justice.

(2) Other judicial officials who may preside — Despite subsection (1), a proceeding in the Small Claims Court may also be heard and determined by,

(a) a provincial judge who was assigned to the Provincial Court (Civil Division) immediately before the 1st day of September, 1990;

(b) a deputy judge appointed under section 32; or

(c) the Small Claims Court Administrative Judge appointed under section 87.2.

(3) Where deputy judge not to preside — A deputy judge shall not hear and determine an action,

(a) for the payment of money in excess of the prescribed amount; or

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[3] *Ali v. Schrauwen*, 2011 ONSC 2158, 2011 CarswellOnt 3201, 18 C.P.C. (7th) 425, [2011] O.J. No. 1671 (Ont. S.C.J.)

[4] 2019 ONSC 7208, 2019 CarswellOnt 20350 (Ont. S.C.J.)

(b) for the recovery of possession of personal property exceeding the prescribed amount in value.

1996, c. 25, s. 9(17); 2017, c. 2, Sched. 2, s. 3

Case Law: *Lippé c. Charest*, [1991] S.C.J. No. 128, 1990 CarswellQue 98, *(*sub nom. *R. v. Lippé)* 61 C.C.C. (3d) 127, *(*sub nom. *R. c. Lippé)* [1991] 2 S.C.R. 114, 5 M.P.L.R. (2d) 113, 5 C.R.R. (2d) 31, *(*sub nom. *Lippé v. Québec (Procureur général))* 128 N.R. 1 (S.C.C.); *R. v. Lippé* (1990), 1991 CarswellQue 45, REJB 1990-95652, 64 C.C.C. (3d) 513 (S.C.C.).

Does the Quebec system of permitting part-time Municipal Court Judges to practise law infringe the guarantee of judicial impartiality under s. 11(d) of the *Canadian Charter of Rights and Freedoms* and s. 23 of the Quebec *Charter of Human Rights and Freedoms*? The Supreme Court of Canada said no by a vote of 7-0 and issued two concurring judgments.

That Judges were part-time did not per se raise a reasonable apprehension of bias on an institutional level, but certain activities or professions in which they engaged might be incompatible with their duties as Judges and raise such a bias.

The occupation of practising law was per se incompatible with the function of a Judge because it gave rise to a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases. However, having regard to the safeguards in place, the risk of bias had been minimized. The safeguards included the oath sworn by the Judges, the Code of ethics to which they were subject and the restrictions set out in s. 608.1 of the *Cities and Towns Act*, R.S.Q. c. C-19. The safeguards all combined to alleviate the apprehension of bias. A person reasonably well-informed about the Quebec Municipal Court system should not have an apprehension of bias in a substantial number of cases.

Lupton v. Tamin (2000), 2000 CarswellOnt 218 (Ont. S.C.J.).

The question was whether a deputy judge had erred by recommending to unrepresented plaintiffs that they amend their claim to include alternate claim for damages for tile repair. The appeal was dismissed. The plaintiffs were not legally trained. It is important that the Small Claims Court judge ensures that issues are decided on merits and not on procedural technicalities.

Webb v. 3584747 Canada Inc., 2002 CarswellOnt 2125, *(*sub nom. *Webb v. 3574747 Canada Inc.)* 161 O.A.C. 244, *(*sub nom. *Webb v. 3574747 Canada Inc.)* 24 C.P.C. (5th) 76 (Ont. Div. Ct.); affirmed 2004 CarswellOnt 325, [2004] O.J. No. 215, 183 O.A.C. 155, 69 O.R. (3d) 502, 41 C.P.C. (5th) 98 (Ont. C.A.); leave to appeal refused [2004] S.C.C.A. No. 114, 2004 CarswellOnt 2988, 2004 CarswellOnt 2989, 331 N.R. 399 (note) (S.C.C.).

In a class action proceeding, the managing judge directed that certain claims be heard before deputy judges of the Small Claims Court who consented to conduct hearings. The defendant in action obtained leave to appeal on the issue of whether, in making the order, the managing judge had exercised the power reserved to the Chief Justice under section 14(1) of the *Courts of Justice Act* to direct and supervise the sittings of the Superior Court of Justice and the assignment of its judicial duties. The Ontario Divisional Court allowed the appeal. The direction could not stand. If the deputy judges were appointed as persons, whose attributes included that holding of an office, then they could not bring with them their court staff, offices or support, or the right to remuneration as if sitting in court. The Divisional Court commented that "whether a Deputy Judge of the Small Claims Court is an officer of the Superior Court, or is a judge of the court within Rule 54.03, was not argued before us and we can express no final opinion on such an issue. However, we have serious reservations about both propositions.".

Reference re Territorial Court Act (Northwest Territories) (1997), 1997 CarswellNWT 24, 152 D.L.R. (4th) 132, 12 C.P.C. (4th) 7, [1998] 1 W.W.R. 733, [1997] N.W.T.R. 377 (N.W.T. S.C.).

Constitutional validity of appointment of deputy Territorial Judge full-time or part-time, for a fixed period of two years or less. Interesting 38-page decision, unlimited discretion reposed in executive to appoint or reappoint deputy judges incompatible with the principles of independence, both individual and institutional leads to the perception of a lack of impartiality. It results in deputy judges being subject to different legislative regime than full territorial judges. Results in two classes of judges. *Lippé c. Charest*, [1991] S.C.J. No. 128, 1990 CarswellQue 98, *(*sub nom. *R. v. Lippé)* 61 C.C.C. (3d) 127, *(*sub nom. *R. c. Lippé)* [1991] 2 S.C.R. 114, 5 M.P.L.R. (2d) 113, 5 C.R.R. (2d) 31, *(*sub nom. *Lippé v. Québec (Procureur général))* 128 N.R. 1 (S.C.C.). While the Charter does not prohibit part-time judges, it does not guarantee they will not engage in activities incompatible with their duties as a judge distinguished. There are a few professions that if engaged in by part-time judges, may raise an apprehension of bias on an institutional level.

Dolmage v. Erskine, 2003 CarswellOnt 161, 23 C.P.R. (4th) 495 (Ont. S.C.J.).

Pursuant to provisions of *Copyright Act*, R.S.C., 1985, c. C-42 the Plaintiff claimed declarations, a permanent injuntion *inter alia*. Small Claims Court has jurisdiction to hear claim for damages for infringement of copyright or moral rights. See Section 37 of *Copyright Act* See also: Section 20(2) of the *Federal Court Act* R.S.C. 1985, c.F-70 as amended. Damages assessed at $3,000 for indignation and diminution of reputation.

Liu Estate v. Chau, 2004 CarswellOnt 442, 69 O.R. (3d) 756, 236 D.L.R. (4th) 711, 182 O.A.C. 366 (Ont. C.A.).

Trial judge excluded female defendant (Chau) from the courtroom while the male defendant (Chau's husband) testified. Trial judge breached *Civil Procedure Rule 52.06(2)* which provided, in part, that an order for exclusion of witnesses could not be made in respect of a party. Although a serious procedural error, the court denied a new trial, holding no substantial wrong or miscarriage of justice.

Hubley v. Nissan, 2003 NSSC 236, 2003 CarswellNS 490, 219 N.S.R. (2d) 165, 692 A.P.R. 165 (N.S. S.C.).

Denial of adjournment to beef farmer unable to attend for trial during calving season denial of natural justice.

Boer v. Cairns (2003), 2003 CarswellOnt 5455, [2003] O.J. No. 5466, 21 C.C.L.T. (3d) 95 (Ont. S.C.J.).

Plaintiff obtained judgment for $5,000. Defendant made initial offer under Rule 49 of *Rules of Civil Procedure* (Ont.) to pay $20,000 to settle action. Defendant's subsequent offer to pay $56,000 was not *Rule 49* offer. Second offer could not constitute implied revocation of *Rule 49* offer. Costs consequences triggered by initial offer.

Cloverdale Paint Inc. v. Duchesne, 2003 CarswellBC 2181, 2003 BCSC 1375 (B.C. S.C.).

Defendant served with default judgment on February 11th. Defendant applying to set judgment aside on April 10th. Application dismissed. Defendant failing to take steps without good reason. No justifiable reason for delay.

Ibranovic v. Advanced Servo Technologies (2003), 2003 CarswellOnt 3565 (Ont. S.C.J.).

Plaintiff obtaining judgment for $916.75 more than offer to settle amount. Entitled to substantial indemnity costs from date of offer to settle. In the absence of special circumstances, the entitlement to increased costs pursuant to *Rule 49.10* for an offer to settle applied to an action governed by simplified procedure under *Rule 76*.

O'Brien v. O'Brien (2003), 2003 CarswellOnt 2761 (Ont. S.C.J.).

Unrepresented litigant sought costs of $45,000. Litigant successful. $10,000 paid into Court earlier. Costs limited to $10,000 paid into Court.

Michalakis v. Nikolitsas, 2002 CarswellBC 3258, 2002 BCSC 1708 (B.C. S.C.).

Settlement conference was to take place but petitioner ill and could not attend, so rescheduled. Petitioner did not attend rescheduled settlement conference because he did not receive notice of it. Settlement judge noted petitioner in default. Petitioner applied to set aside default judgment. Application granted.

Children's Aid Society of Niagara Region v. P. (D.) (2002), 2002 CarswellOnt 4418, 62 O.R. (3d) 668, 16 O.F.L.R. 145 (Ont. S.C.J.).

Test for allowing representation by unpaid, non-lawyer agent-friend. Agent, like self-represented litigant, must act, with courtesy and respect towards all and not create undue delay in proceedings. Representation by unpaid, non-lawyer agent-friend does not violate s. 50(1) (*Solicitors Act*).

Korhani v. Bank of Montreal (2002), 2002 CarswellOnt 4223, [2002] O.J. No. 4785 (Ont. S.C.J.).

Claim against self-represented Defendant dismissed as part of settlement of action by other parties. Defendant not employed and not entitled to compensation for her time spent, or that of husband who assisted her. However, defendant entitled to generous disbursements of $6,990 including fees paid to solicitors who assisted, travel costs for obtaining documents, and child care costs for attendance times, payable jointly by plaintiff and other defendant.

Ravka v. Ravka (2002), 2002 CarswellOnt 3081, 165 O.A.C. 44, 35 R.F.L. (5th) 176 (Ont. C.A.).

Judge intervened 101 times in 218 pages of transcript, during presentation of parties' case in application for variation of spousal support. Intervention excessive. Decision set aside.

Sidlofsky v. Crown Eagle Ltd. (2002), 2002 CarswellOnt 3620, [2002] O.J. No. 4152 (Ont. S.C.J.).

Plaintiffs purchased vacation package in Ontario from Defendant S, Ontario corporation. Accommodation was at Holiday Inn in Jamaica. Holiday Inn was Tennessee corporation. Plaintiff fell and was injured at hotel. Ontario had both jurisdiction and was *forums conveniens*.

Petrella v. Westwood Chev Olds (1993) Ltd., 2004 CarswellOnt 364, [2004] O.J. No. 491 (Ont. S.C.J.).

Motion to have the defendant's counsel removed from case because he was a Deputy Judge in Toronto. Motion to be heard by Superior Court Judge, because any Deputy Judge would have a pecuniary interest in the motion, thereby creating a reasonable apprehension of bias? Deputy Judge exceeded his jurisdiction when he ordered application to be heard by a Judge of the Superior Court. Deputy Judges do not have inherent jurisdiction. The Small Claims Court is a branch of the Superior Court of Justice, s. 22(1) of the *CJA*.

Ontario Deputy Judges Assn. v. Ontario, 2005 CarswellOnt 6638, 18 C.P.C. (6th) 324, 78 O.R. (3d) 504, 139 C.R.R. (2d) 38 (Ont. S.C.J.).

Deputy Judges are judges by history, appointment, function and jurisdiction. They are referred to as "Your Honour" by virtue of a Ministry of the Attorney General directive. They swear the same oath of office as every other judge of a court in Ontario. They have judicial immunity. Proceedings of the Small Claims Court commence with a formal opening read by the Clerk. The Small Claims Court is a court of record.

Salaries of the Deputy Judges of the Small Claims Court have fallen below a minimum acceptable level. They do not have sufficient financial security to meet the legal test for judicial independence.

Respondents shall, within six months of the release of this judgment, provide recourse to the Deputy Judges of the Small Claims Court to a commission for determining judicial remuneration that is independent, efficient and objective.

Ontario Deputy Judges Assn. v. Ontario, 2006 CarswellOnt 3137, 268 D.L.R. (4th) 86, 28 C.P.C. (6th) 1, 80 O.R. (3d) 481, 210 O.A.C. 94, *(*sub nom. *Ontario Deputy Judges' Assn. v. Ontario (Attorney General))* 141 C.R.R. (2d) 238 (Ont. C.A.).

Remuneration of Deputy Judges of Small Claims Court. Application judge found appropriate order that Commission be struck to advise Governor in Council of appropriate remuneration package. Attorney General appealed. Appeal allowed in part; aspects of order dealing with constitutional minimum set aside; Attorney General ordered to establish independent, effective and objective process within four months.

Roskam v. Rogers Cable (2008), [2008] O.J. No. 2049, 2008 CarswellOnt 2958, *(*sub nom. *Roskam v. Rogers Cable (A Business))* 173 C.R.R. (2d) 157 (Ont. Div. Ct.).

Deputy Judges are allowed to practice law while adjudicating claims and this does not infringe Appellants Charter rights either in respect of section 15 or section 11(d) of the Charter.

Provincial courts do not have jurisdiction to review abuse of licence issue (here, broadcasting licence) which is regulatory matter and thus, shall be decided by a specialized body.

Prefontaine v. Minister of National Revenue (2001), 257 W.A.C. 369, 293 A.R. 369, 97 Alta. L.R. (3d) 37, [2001] A.J. No. 1444, [2002] 1 W.W.R. 647, 13 C.P.C. (5th) 230, *(*sub nom. *Prefontaine v. M.N.R.)* 88 C.R.R. (2d) 373, 2001 CarswellAlta 1508, 2001 ABCA 288 (Alta. C.A.).

Rule 505(6) of Alberta Rules of Court, which prevents judgment given or order made by one justice of appeal from being subject to any appeal, except by leave of justice giving judgment or making order violated section 7 of the *Canadian Charter of Rights and Freedoms*. Notwithstanding the presumption of neutrality and the oath of office taken by judges, a reasonable person would apprehend bias on the part of a judge called upon to decide whether his or her judgment should be appealed.

Ontario Deputy Judges Assn. v. Ontario, 2009 CarswellOnt 3976, 251 O.A.C. 241, 98 O.R. (3d) 89 (Ont. Div. Ct.), Swinton J.; additional reasons at 2010 ONSC 3570, 2010 CarswellOnt 5012 (Ont. Div. Ct.).

Application made by the Ontario Deputy Judges Association to quash Ontario government's response to recommendations made by the First Deputy Judges Remuneration Commission. Application dismissed. The standard of review applicable to the government's response was rationality. The government provided legitimate reasons for departing from the Commissioner's recommendations. There was no evidence the government's response was based on political or discriminatory considerations or any improper motive. It properly relied on economic data that the Commission had ignored.

Ontario Deputy Judges Assn. v. Ontario (Attorney General), 2011 ONSC 6956, 2011 CarswellOnt 13192, 108 O.R. (3d) 429 (Ont. S.C.J.); affirmed 2012 ONCA 437, 2012 CarswellOnt 7932, 23 C.P.C. (7th) 1, [2012] O.J. No. 2865 (Ont. C.A.).

An application as to whether deputy judges ("DJs) in the Ontario Small Claims Court (the "OSCC") are sufficiently independent.

Grant v. Stockey, 2016 ONSC 7935, 2016 CarswellOnt 20129 (Ont. Div. Ct.): There are no limitations on deputy judges of the Small Claims Court appearing as counsel before other courts or tribunals in Ontario.

Barry v. Barry, 2020 ONSC 120, 2020 CarswellOnt 1034, Tobin J. (Ont. S.C.J.)

Applicant argues that the Superior Court of Justice, Family Court and I, as a judge of this court, have the jurisdiction to grant the relief requested. She relies on:

> (1) *Rules of the Small Claims Court*, O. Reg. 258/98, r. 12.02(3), which allows a court to dismiss a claim on motion; and

(2) *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 22(1), which states that the Small Claims Court is a branch of the Superior Court of Justice, and s. 22(3), which provides that every judge of the Superior Court of Justice is also a judge of the Small Claims Court.

In *Petrella v. Westwood Chev Olds (1993) Ltd.*, 2004 CarswellOnt 364, [2004] O.T.C. 75, [2004] O.J. No. 491, Durno R.S.J. (Ont. S.C.J.), held, at para. 20:

> For a Superior Court judge to preside in Small Claims Court, the Chief Justice or the Regional Senior Judge must designate the judge to preside in that branch of the Superior Court of Justice, s. 22(2) of the *Court of Justice Act*. Once that designation is made, the judge exercises his or her jurisdiction as a judge of the Small Claims Court, s. 24 (3) of the *Courts of Justice Act*.

The Family Court and the Small Claims Court are different branches of the Superior Court of Justice. The procedure to transfer a Small Claims Court proceeding to the Superior Court of Justice is found in s. 107 of the *Courts of Justice Act*. This procedure requires the consent of the plaintiff in the Small Claims Court proceeding: s. 107(2). The plaintiff has not consented to such a transfer. The steps needed to transfer the case to the Superior Court of Justice have not been taken. Though s. 107 does not mention the transfer of a Small Claims Court case to the Family Court, there is authority to do so. See *Aguila v. Steingart*, 2010 CarswellOnt 928 (Ont. Div. Ct.).

The applicant's request to dismiss the Small Claims Court case is dismissed without prejudice to the applicant initiating such other proceeding or process as may be proper, including addressing the matter at first instance in the Small Claims Court. The applicant's request to dismiss the Small Claims Court case is dismissed without prejudice to the applicant initiating such other proceeding or process as may be proper, including addressing the matter at first instance in the Small Claims Court.

25. Summary hearings — The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.

Commentary: The Small Claims Court's mandate is to hear and determine matters in a summary way. Pretrial procedures are minimized and there is no discovery process akin to the process provided in Rules 30 to 35 of the *Rules of Civil Procedure*. The three basic steps in a Small Claims Court action are pleadings, settlement conference and trial.

Trials in Small Claims Court tend to be quite short and usually not more than half a day. Trial procedure is generally the same as in other courts although the rules of evidence under significantly relaxed, under s. 27 of the *Courts of Justice Act*.

The court's mandate to hear and determine cases in a summary way and to make such order as appears just and agreeable to good conscience does not change its nature as a court of law. Decisions of the court must be made in accordance with applicable legal principles; the fact that a case is in the Small Claims Court does not change the substantive law which applies to that case. A number of appellate cases have consistently held that it is an error for the Small Claims Court to fail to apply the substantive law: see *Sereda v. Consolidated Fire & Casualty Insurance Co.*, 1934 CarswellOnt 37, [1934] O.R. 502, [1934] 3 D.L.R. 504, [1934] O.W.N. 394 (Ont. C.A.); *Smith v. Galin*, 1956 CarswellOnt 253, 3 D.L.R. (2d) 302, [1956] O.W.N. 432 (Ont. C.A.); *Travel Machine Ltd. v. Madore*, 1983 CarswellOnt 901, 143 D.L.R. (3d) 94 (Ont. Div. Ct.); *R. v. Bennett*, 1992 CarswellOnt 1108, 8 O.R. (3d) 651, 54 O.A.C. 321 (Ont. Div. Ct.); *O'Shanter Development Corp. v. Separi*, 1996 CarswellOnt 1701, [1996] O.J. No. 1589 (Ont. Div. Ct.); *Grant v. V & G Realty Ltd.*, 2008 NSSC 180, 2008 CarswellNS 303, 272 N.S.R. (2d) 3, 58 C.P.C. (6th) 26, 869 A.P.R. 3 (N.S. S.C.).

A motion for a non-suit can be made at trial in Small Claims Court; however, the plaintiff who wants such a motion decided at the conclusion of the plaintiff's case must elect, as in

other civil courts, to call no evidence if the motion is dismissed: *Consumers' Gas Co. and Pierce (c.o.b. Beard Bulldozing and Grading), Re* (September 19, 1980), [1980] O.J. No. 1326, Cromarty J. (Ont. Div. Ct.); *Fine Art Painting and Decorating Inc. v. Rob Piroli Construction Inc.*, 2013 CarswellOnt 4681, 29 C.L.R. (4th) 329, [2013] O.J. No. 1789 (Ont. Sm. Cl. Ct.); *Bu v. Xie*, 2013 ONSC 6365, 2013 CarswellOnt 14577, [2013] O.J. No. 4761 (Ont. Div. Ct.). It is an error of law for the court to entertain a non-suit motion before the plaintiff's case is completed and without putting the defence to its election: *Halton Regional Pound Facility v. Holland*, 2014 ONSC 3776, 2014 CarswellOnt 8776, 323 O.A.C. 116 (Ont. Div. Ct.).

The court should not decide cases based on a party's oral motion for judgment at the start of trial, but should hear evidence and submissions in the normal course: *Oakes v. Stevenson* (October 7, 2008), Doc. 129/07, [2008] O.J. No. 5842 (Ont. Div. Ct.); *Bear v. Pitvor*, 2010 CarswellOnt 11081, [2010] O.J. No. 3690 (Ont. Sm. Cl. Ct.). In *Lettieri v. CIBC Mortgages Inc.*, 2015 ONSC 7265, 2015 CarswellOnt 17793, 343 O.A.C. 132 (Ont. Div. Ct.), an unpleaded limitations defence was determined by the trial judge as a preliminary issue and the claim was dismissed. On appeal, the judgment was set aside on the basis that the limitation issue should not have been decided "in a truncated fashion without the benefit of a full record." After a second trial, the claim was dismissed both on liability and limitation, which result was upheld on appeal: [2016] O.J. No. 5297 (Div. Ct.). These cases illustrate the potential danger in taking too summary an approach to hearings in Small Claims Court.

In *Chanachowicz v. Winona Wood Ltd.*, [2016] O.J. No. 37 (Div. Ct.), the trial judge's attempts to speed the trial along included the erroneous exclusion of witness statements and an expert report which were qualified for admission under Rule 18.02, and a refusal to allow the self-represented plaintiff to make closing submissions. On appeal those errors were found to justify a new trial. While proceedings in the Small Claims Court are intended to be summary in nature, litigants are entitled to a proper hearing in accordance with the rules of natural justice.

The rules of natural justice apply in Small Claims Court. Proceedings may be summary in nature but it was unfair and legally wrong for a judge to dismiss part of a plaintiff's claim in chambers, on the court's own initiative and without notice to the parties: *Rizvi v. Urban Studio Inc.*, [2018] O.J. No. 319 (Ont. Div. Ct.). It was wrong for a trial judge to dismiss a claim partway through the plaintiffs' witnesses, without calling for submissions and without knowing what further evidence the plaintiffs still had to call: *Bilyk v. Breen*, [2017] O.J. No. 169 (Ont. Div. Ct.).

Case Law: *Field v. Menuck* (1985), 2 W.D.C.P. 219 (Ont. Prov. Ct.).

Although the Rules of this Court do not deal with notices of withdrawal or discontinuance, the *Courts of Justice Act* does reserve the use of discretion for the court with respect to its own procedure. A plaintiff cannot withdraw an action at whim or with immunity, where notice is served two days before trial. Leave or consent is necessary. The defendants were prepared for trial and thus an order as to costs is proper. See also Rule 20.

Amendments to the *Line Fences Act*, S.O. 1986, c. 47, ss. 1 to 13, were proclaimed in force on July 1, 1988. As a result, appeals that were formerly heard by a Small Claims Court Judge are now referred to a referee appointed by the Lieutenant Governor in Council. Notices of appeal filed with the Civil Division prior to July 1, 1988, will have been referred to a Small Claims Court Judge for disposition. In the event that any notice or appeal was filed on or after July 1, 1988, you should be aware of the procedural change. Any party who may have been served in error with a notice of hearing by a Small Claims Court should realize that it has been cancelled and any deposit that may have been paid should be refunded.

Smith v. Harbour Authority of Port Hood, 1993 CarswellNS 59, 16 C.P.C. (3d) 192, *(*sub nom. *Smith v. Port Hood Harbour Authority)* 123 N.S.R. (2d) 225, *(*sub nom. *Smith v. Port Hood Harbour Authority)* 340 A.P.R. 225 (N.S. S.C.).

Since the claim here was based on the provisions of the *Fishing and Recreational Harbours Act*, R.S.C. 1985, c. F-24, a Federal statute and there was no implied contract to pay, the Small Claims Court did not have jurisdiction over the matter. See also *Jumbo Motor Express Ltd. v. Hilchie*, 1988 CarswellNS 224, 89 N.S.R. (2d) 222, 227 A.P.R. 222 (N.S. Co. Ct.) where the court held that the Small Claims Court had no jurisdiction to deal with a claim for wages based on a Federal statute (*Canada Labour Code*), because this was a statutory right.

Ontario (Attorney General) v. Pembina Exploration Canada Ltd., [1989] 1 S.C.R. 206, 57 D.L.R. (4th) 710, 92 N.R. 137, *(*sub nom. *William Siddall & Sons Fisheries v. Pembina Exploration Can. Ltd.)* 33 O.A.C. 321 (S.C.C.).

Provided that actions are brought within the monetary limits of the Small Claims Court, this court has jurisdiction to deal with admiralty or maritime matters.

Grant v. Sehdev (1987), 3 A.C.W.S. (3d) 421 (Ont. Prov. Ct.).

The Provincial Court (Civil Division) does not have jurisdiction to hear cases where the amount of alleged damages exceeds the monetary jurisdiction of the court, notwithstanding that the amount claimed is within the court's monetary jurisdiction.

Dalhousie University v. Chapman (1988), 88 N.S.R. (2d) 439, 225 A.P.R. 439 (N.S. Co. Ct.).

The relationship between a university and its students is one of licensor and licensee and not landlord and tenant, and therefore this action falls within the jurisdiction of the small claims court.

Minielly v. Kristjanson (1989), 34 C.P.C. (2d) 120, 75 Sask. R. 317 (Sask. Q.B.).

The Provincial Court trial judge heard a motion for non-suit without explaining its meaning to the plaintiffs. The plaintiffs were, therefore, not given their day in court having regard to the spirit of the legislation.

R. v. Bennett (1992), 8 O.R. (3d) 651, 54 O.A.C. 321 (Ont. Div. Ct.).

The *Public Authorities Protection Act* limitation period, R.S.O. 1990, c. P.38, s. 7(1) applies to Small Claims Court actions. See also *Kim v. Smarte* summarized at 28 A.C.W.S. (3d) 505 and ~~Dowson v. Yaworski(1985),~~ 12 Admin. L.R. 133, 8 O.A.C. 344 (Ont. Div. Ct.).

Span-Co. Mechanical & General Contractors v. Kournetas (November 16, 1992), Greer J. — The judgment at trial was set aside on the basis that the trial judge made findings of fact inconsistent with the evidence.

Todd v. Canada (Solicitor General) (1993), 4 W.D.C.P. (2d) 506.

An action against the Queen in right of Canada can be maintained in the Small Claims Court. Section 23(1) of the *Crown Liability & Proceedings Act*, R.S.C. 1985, c. C-50 as amended does not affect the jurisdiction of the Small Claims Court in spite of the words "superior court" since the Small Claims Court is a branch of the General Division. Reference was made to the decision in *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, 57 D.L.R. (4th) 710, 92 N.R. 137, *(*sub nom. *William Siddall & Sons Fisheries v. Pembina Exploration Can. Ltd.)* 33 O.A.C. 321 (S.C.C.), where it was held that an admiralty law matter that was otherwise within the monetary jurisdiction of this Court could be heard.

Haas v. Grinyer (September 13, 1994), Doc. Kitchener 1192/94 (Ont. Gen. Div.).

Motion to strike out pleadings allowed. All matters raised clearly an attempt to relitigate issues, proceedings abuse of process. *Trendsetter Developments v. Ottawa Financial Corp.*

(1989), 33 C.P.C. (2d) 16 (Ont. C.A.) followed. Rules 21.01(3)(d) and 25.11 of *Rules of Civil Procedure* applied.

Subadar v. Manerowiski (January 29, 1997), Doc. 95-CU-90990CM (Ont. Gen. Div.).

Defendants sought to have plaintiff's action dismissed for failure to pay costs previously ordered. Plaintiff admitted there had never been order made in his favour for costs payable forthwith by any defendant. Action dismissed.

R. v. Lord Chancellor, [1997] 2 All E.R. 781, [1998] Q.B. 575, [1998] 2 W.L.R. 849 (Eng. Q.B.).

Applicant wished to bring proceedings in the court but could not afford to pay the applicable court fees. He applied for judicial review, asking for a declaration that the Act which set forth the fee schedule was *ultra vires* and unlawful on the ground that it breached the implied limitation in that section that fees could not be prescribed in such a way as to deprive a citizen of his constitutional right of access to the courts. Court held that a citizen's right of access to the courts is a common law constitutional right which could only be abrogated by specific statutory authority which specifically conferred the power to abrogate that right. In this instance, the effect was to bar many persons from seeking justice in the courts, and as such the provision was held to be unlawful.

Breeze v. Ontario (Attorney General) (December 10, 1997) (Ont. Gen. Div.).

The court held that the Lieutenant Governor in Council, pursuant to the *Administration of Justice Act*, R.S.O. 1990, c. A.6, and its regulations, has the power to make regulations requiring the payment of fees in respect of proceedings in any court and to prescribe the amount thereof. For this reason, the applicant's argument that a filing fee of $75.00 to file a motion in Landlord and Tenant Court should not be required was rejected.

Mattick Estate v. Ontario (Minister of Health) (1999), 46 O.R. (3d) 613, 1999 CarswellOnt 4271 (Ont. S.C.J.); reversed (2001), 195 D.L.R. (4th) 540, 52 O.R. (3d) 221, 139 O.A.C. 149, 2001 CarswellOnt 1, [2001] O.J. No. 21, 8 C.P.C. (5th) 39 (Ont. C.A.).

A claim was statute-barred because notice was given 55 days before the claim was issued and not at least 60 days. See s. 7(1) of *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27. Earlier letter from plaintiff to Ministry expressing concern over care given to the deceased did not constitute notice of claim.

The recent decision of the Supreme Court in *R. v. Starr*, 2000 SCC 40, 36 C.R. (5th) 1, 147 C.C.C. (3d) 449, 190 D.L.R. (4th) 591, [2000] 11 W.W.R. 1, 148 Man. R. (2d) 161, 224 W.A.C. 161, 258 N.R. 250, [2000] 2 S.C.R. 144, 2000 CarswellMan 449, 2000 CarswellMan 450 (S.C.C.) dramatically changes the approach to hearsay and exceptions to the hearsay rule. *Starr* arises in a criminal context, but the analysis is not limited to criminal law. Justice Iacobucci makes it clear that Starr applies to both civil and criminal matters. The decision in Starr would tend to suggest the hearsay exclusionary rule is alive and well in both civil and criminal contexts.

Garry v. Pohlmann, 2001 CarswellBC 1893, [2001] B.C.J. No. 1804, 2001 BCSC 1234, 12 C.P.C. (5th) 107 (B.C. S.C.).

Requirements of Small Claims process involving unrepresented litigants compelled trial judge to play somewhat more interventionist role in proceedings. Specific interventions by trial judge intended to control proceedings to prevent argument and direct parties away from irrelevant considerations.

Newell v. Ziegemen, 2003 SKPC 159, 2003 CarswellSask 899, 242 Sask. R. 273 (Sask. Prov. Ct.). The Plaintiffs' claim was for the cost of removal and replacement of carpets in a house purchased from the Defendant in Prince Albert in October 2002.

In *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, 1992 CarswellNat 15, 1992 CarswellNat 659, *(*sub nom. *Peel (Regional Municipality) v. Ontario)* 144 N.R. 1, 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, 59 O.A.C. 81, 55 F.T.R. 277 (note) (S.C.C.), McLachlin J., quoting the American Restatement of the Law of Restitution, 1937 as follows:

> A person who has been unjustly enriched at the expense of another is required to make restitution to the other. Where the legal tests for recovery are clearly not met, can recovery be rewarded on the basis of justice or fairness alone? If courts can grant judgment on the basis on justice alone, does justice so require in this case?

The first question, on a review of authorities, was answered in the negative. Courts have chosen a "middle course" between the extremes of inflexible rules and case by case "palm tree justice." Recovery cannot be based upon a bare assertion that "fairness" so requires. There must in addition be at least a general congruence with accepted legal principle.

There does not appear to be any justification in law or equity to allow claim. Claim dismissed.

Polewsky v. Home Hardware Stores Ltd. (2003), [2003] O.J. No. 2908, 2003 CarswellOnt 2755, 229 D.L.R. (4th) 308, 174 O.A.C. 358, 66 O.R. (3d) 600, 109 C.R.R. (2d) 189, 34 C.P.C. (5th) 334 (Ont. Div. Ct.); leave to appeal allowed 2004 CarswellOnt 763, [2004] O.J. No. 954 (Ont. C.A.).

Appeal from motion whereby Judge dismissed motion for a declaration that the Small Claims Court tariff fees are unconstitutional. Fees are contained in the regulations established by the *Administration of Justice Act*, R.S.O. 1990, c. A.6, s. 5c. The regulations set the fees and *Rule 13.01(7)* of the *Small Claims Court Rules* O. Reg. 258/98, r. 1.01, compels the payment of the prescribed fee to set a matter down for trial.

Neither the *Administration of Justice Act* nor Ontario Regulation 432/93 (*Small Claims Court — Fees and Allowances*) make any provision for the waiving of the prescribed fees in any circumstances.

There is a common law constitutional right of access to the Small Claims Court. It must be subject to the exercise of judicial discretion on issues of merit and financial circumstances that trigger the right to proceed in *forma pauperis*. There will have to be a statutory adendment to give effect to the findings of this Court. It should be done within a reasonable period of time and not later than 12 months. Appellant would not have met the requirements because of the evidentiary deficiencies. Appeal allowed in accordance with reasons.

Larabie v. Montfils (2004), 2004 CarswellOnt 186, 44 C.P.C. (5th) 66, *(*sub nom. *J.-P.L. v. Montfils)* 181 O.A.C. 239 (Ont. C.A. [In Chambers]).

Defendants moved for Order staying action because of non-payment of cost Orders made against the Plaintiff in prior proceedings related to same allegations *and* for an Order for security for costs respecting the appeal. Motion dismissed. Courts are reluctant to deprive a worthy but impecunious litigant of the opportunity to have his or her claim adjudicated when it is not plainly devoid of merits. This should apply in appeals as well as in the lower courts.

Qualico Developments (Vancouver) Inc. v. Scott, 2004 CarswellBC 162, 2004 BCSC 108 (B.C. S.C.).

Plaintiff in small claims proceeding awarded $10,000. Defendant appealing to Supreme Court. Appeal successful. Defendant entitled to costs and double costs from date of formal offer.

Ring Contracting Ltd. v. PCL Constructors Canada Inc., 2003 CarswellBC 2276, 2003 BCCA 492 (B.C. C.A.).

Appellant's lawyer retiring. Appellant seeking adjournment of appeal. Application granted. Appellant should have acted with more diligence to find other counsel but no prejudice to Respondent.

Travel Machine Ltd. v. Madore, 1983 CarswellOnt 901, 143 D.L.R. (3d) 94 (Ont. H.C.).

Judge bound to apply statutes and ordinary rules of law notwithstanding provisions of s. 57 of Act. *Small Claims Court Act*, R.S.O. 1980, c. 476, s. 57. Provisions of s. 57 of Act empowering a Judge to "make such order or judgment as appears to him just and agreeable to equity and good conscience" does not mean that a Judge acting under the Act is not required to apply the rules of law, or that he can decide an issue contrary to law.

Canada (Attorney General) v. Strachan, 2006 CarswellNat 888, 2006 CarswellNat 3240, 348 N.R. 302, 2006 FCA 135, 2006 CAF 135 (F.C.A.).

Rule 45 gave court discretion to order that an inmate be physically brought before the court. Judge made order under rule 45 that an inmate seeking judicial review of his mandatory release revocation be physically brought before the court to argue his application. Federal Court of Appeal held trial judge erred in exercising her discretion by stating that inmate had a right to be physically present and placing an onus on Crown to establish that interests of justice did not require physical attendance.

Gardiner v. Mulder (2007), 2007 CarswellOnt 1411 (Ont. Div. Ct.); additional reasons at (2007), 2007 CarswellOnt 2829, 224 O.A.C. 156 (Ont. Div. Ct.).

Appeal by Plaintiff from a Small Claims Court judgment arising from dismissal of Plaintiffs' claims against the Defendants collectively for breach of contract and damages.

Although these are not proceedings where parties not totally self-represented, see s. 25 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which applies to both represented and unrepresented parties. See Heeney J. in *936464 Ontario Ltd. v. Mungo Bear Ltd.*, [2003] O.J. No. 3795, 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754 (Ont. Div. Ct.) in reference to precise pleadings relative to claimed relief. See *Popular Shoe Store Ltd. v. Simoni*, 1998 CarswellNfld 48, [1998] N.J. No. 57, 163 Nfld. & P.E.I.R. 100, 503 A.P.R. 100, 24 C.P.C. (4th) 10 (Nfld. C.A.) at 106 (Nfld. & P.E.I.R.).

Even where there is a failure of the Plaintiff to properly plead and frame claim, it is for the court "to make such order as is considered just and agreeable to good conscience" and the evidence. This principle is subject, however, to the considerations of fairness, surprise and amendment if required.

Appeal allowed in part for damages relative to the hot tub. Issue of costs awarded to the Defendants set aside.

Histed v. Law Society (Manitoba) (2007), 2007 CarswellMan 504, [2007] M.J. No. 460, 165 C.R.R. (2d) 137, 287 D.L.R. (4th) 577, 225 Man. R. (2d) 74, 419 W.A.C. 74, 49 C.P.C. (6th) 257, [2008] 2 W.W.R. 189, 2007 MBCA 150 (Man. C.A.); leave to appeal refused (2008), 2008 CarswellMan 206, 2008 CarswellMan 207, 387 N.R. 380 (note) (S.C.C.).

Appellant, a lawyer, whom the Disciplinary Committee of the Law Society of Manitoba found had breached the Code of Professional Conduct by sending a letter to opposing counsel in which he called a judge a "bigot," claimed that the letter should have not been admitted as evidence to settlement privilege.

Appeal dismissed. The letter was not part of a settlement negotiation and was in the hands of the Law Society with the consent of the letter's recipient. In this case, the purpose of the letter was not to attempt to effect a settlement and thus, settlement privilege did not attach to the letter.

Lawyers are not precluded from criticizing judiciary; however lawyers are required to avoid use of abusive or offensive statements, irresponsible allegations of partiality ad communications that are abusive, offensive or inconsistent with proper tone of communication.

Rose v. Roderick, 2009 CarswellBC 2178, 2009 BCPC 253 (B.C. Prov. Ct.), Morgan Prov. J.

Matter dismissed on basis that parties' unreasonable conduct in refusing to bridge the minor monetary gap resulted in the matter becoming both frivolous and an abuse of Court's settlement process. The claimant's conduct towards defendant during settlement conference condescending, disrespectful and counterproductive. Parties refused to bridge $25.00 gap in proposed settlement of $275.00. To allow the parties to consume full day of court time over such a minor gap counter to legislative directive set out in s. 2 of *Small Claims Act*.

United States v. Bari, Docket No. 09-1074-cr (decided March 22, 2010).

A recent decision by the U.S. Second Circuit Court of Appeals raises questions about the propriety of trial court judges using the Internet to confirm their "hunches" when taking judicial notice.

In *United States v. Bari*, the Second Circuit Court of Appeals held it was not reversible error for the district court to consider information it confirmed through its own Internet search in deciding to revoke a defendant's supervised release.

To emphasize the similarities between the hat found in the garage and the one worn by the robber, the court said "[o]ne can Google yellow rain hats and find lots of different yellow rain hats." The district court judge also noted that he had done a Google search to confirm this observation.

Bari argued that the district court judge's observations from an Internet search violated the Federal Rule of Evidence 605, which prohibits a judge presiding over a trial from testifying in the trial as a witness.

On appeal, the Second Circuit disagreed. It reasoned that "if a fact is of a kind that a judge may properly take judicial notice," the judge is not improperly testifying by noting the fact.

"If, after all, a judge was improperly testifying at trial each time he took judicial notice of a fact, it would be effectively impermissible to take judicial notice of any fact," the Second Circuit opined.

The district court's Internet search "served only to confirm [a] common sense supposition," the Second Circuit concluded.

"Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all rain hats are alike," the Second Circuit observed. "Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search," the court said.

"[W]ith so much information at our fingertips (almost literally), we all likely confirm hunches with a brief visit to our favorite search engine that in the not-so-distant past would have gone unconfirmed," the court said. "As the cost of confirming one's intuition decreases, we would expect to see more judges doing just that," the court opined.

"As Gen-X and Gen-Y lawyers are appointed to the bench, is it inevitable that judges will be turning to the Internet as they ponder questions of judicial notice? Internet searches are a prime method for gathering information. We all have to learn how to verify that information." See *United States v. Bari*, Docket No. 09-1074-cr (decided March 22, 2010).

Huma v. Mississauga Hospital, 2020 ONCA 644, 2020 CarswellOnt 14815 (Ont. C.A.).

In *Huma v. Mississauga Hospital*, the plaintiffs commenced a medical malpractice action. The Statement of Claim stated that the plaintiffs were self-represented.

The defendants inquired as to whether the plaintiffs were willing to dismiss the action on a without costs basis in exchange for a release. Counsel for the defendants provided a release, consent, and draft order, and asked the plaintiffs to return signed copies of same. The plaintiffs then retained counsel, and subsequently refused to proceed with the settlement. The

defendants moved, under Rule 49.09 of the *Rules of Civil Procedure*, to enforce the settlement.

The motions judge, Justice Sossin, considered in part that he had the discretion to refuse to enforce the settlement based on the test set out in *Milios v. Zagas*[5] he did not consider the settlement unconscionable.

On appeal, the court noted that the conduct of the parties must be viewed objectively to determine whether a contract had been made.[6] There was no evidence that the settlement agreement was conditional on the respondents obtaining a release with only the proposed provisions.[7] Further, a parties' proffering of an overly broad release does not repudiate an existing settlement agreement unless, after discussion, the party refuses to proceed without it being signed.[8]

While Courts tent to bend over backwards to assist self-represented plaintiffs, this case considers enforcement of settlements.

26. Representation — A party may be represented in a proceeding in the Small Claims Court by a person authorized under the *Law Society Act* to represent the party, but the court may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of the party if it finds that such person is not competent properly to represent the party, or does not understand and comply at the hearing with the duties and responsibilities of an advocate.

1994, c. 12, s. 10; 2006, c. 21, Sched. C, s. 105(1)

Commentary: The provision in subsection 50(1) of the *Law Society Act*, R.S.O. 1990, c. L.8, prohibiting others from acting as a barrister, is prefaced by the words "Except where otherwise provided by law." Even a magistrate's court has the "inherent" discretionary authority to allow lay persons to present a case on behalf of a party; *O'Toole v. Scott*, [1965] A.C. 939, [1965] 2 All E.R. 240, [1965] 2 W.L.R. 1160 (New South Wales P.C.).

Law Society (Prince Edward Island) v. Nova Collections (P.E.I.) Ltd. (1998), *(*sub nom. *Law Society of Prince Edward Island Society v. Nova Collections (P.E.I.))* 170 Nfld. & P.E.I.R. 62, *(*sub nom. *Law Society of Prince Edward Island Society v. Nova Collections (P.E.I.) Ltd.)* 522 A.P.R. 62, 26 C.P.C. (4th) 326 (P.E.I. T.D. [In Chambers]) — The application by the Prince Edward Island Law Society was for an injunction to restrain the respondent collection service from practicing law in Small Claims Court and in particular, from performing certain services within the domain of barristers and solicitors, for a fee. The application was granted.

Law Society of Ontario v. Harry Kopyto, 2020 ONSC 35, 2020 CarswellOnt 62, Justice Edward P. Belobaba (Ont. S.C.J.)

Application by the Law Society of Ontario (the "Society") for a permanent injunction under s. 26.3 of the *Law Society Act* (the "*Act*").

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[5] 1998 CarswellOnt 810, 38 O.R. (3d) 218, 18 C.P.C. (4th) 13, 108 O.A.C. 224, 56 O.T.C. 45, [1998] O.J. No. 812 (Ont. C.A.).

[6] *Olivieri v. Sherman*, 2007 ONCA 491, 2007 CarswellOnt 4207, 86 O.R. (3d) 778, 284 D.L.R. (4th) 516, 225 O.A.C. 227, [2007] O.J. No. 2598 (Ont. C.A.).

[7] *Hodaie v. RBC Dominion Securities*, 2011 ONSC 6881, 2011 CarswellOnt 14418, 108 O.R. (3d) 140, [2011] O.J. No. 5282 (Ont. S.C.J.) at para. 18~~.~~; additional reasons 2012 ONSC 7555, 2012 CarswellOnt 4141, [2012] O.J. No. 5428 (Ont. S.C.J.); affirmed 2012 ONCA 796, 2012 CarswellOnt 14482 (Ont. C.A.)

[8] *Kuo v. Kuo*, 2017 BCCA 245, 2017 CarswellBC 1718, 31 E.T.R. (4th) 1 (B.C. C.A.) at para. 41

Kopyto is a former lawyer who was disbarred in 1989. After a lengthy hearing, the Society eventually rejected Kopyto's application in 2015 on the basis that he failed to meet the good character requirement in the *Act* and that he was "ungovernable" because of his avowed refusal to follow the rules of the profession. See *Kopyto v. Law Society of Upper Canada*, 2015 ONLSTH 29, [2015] L.S.D.D. No. 22 (L.S. Tribunal) at para. 44. Mr. Kopyto's appeal to the Appeal Division of the Law Society Tribunal was dismissed: *Kopyto v. Law Society of Upper Canada*, 2016 ONLSTA 3 (L.S. Trib. App. Div.). His application for judicial review was also dismissed: *Kopyto v. Law Society of Upper Canada*, 2016 ONSC 7545, 2016 CarswellOnt 19807, [2016] L.S.D.D. No. 15 (Ont. Div. Ct.).

Since his paralegal licence was denied, Kopyto continued to provide legal services to clients. A permanent injunction as authorized by s. 26.3 of the *Act* is necessary and just.

Paralegals in Court

The *Law Society Act* [as amended by the *Access to Justice Act*] and Law Society by-laws 4 and 7 require, with exceptions, one to have a licence to appear or act for another in the Ontario Court of Justice. Paralegals with a licence and those within the exceptions may appear in *Provincial Offences Act* proceedings and *Criminal Code* summary conviction matters, including those subject to maximum terms of imprisonment longer than six months: s. 6(2) by-law 4. Please see <http://www.lsuc.on.ca> regarding the paralegal licencing process and the Rules of Professional Conduct.

Exceptions

"Grandfather Provision": The experience of paralegals operating prior to May 1, 2007 is recognized in two ways.

1. Licensed: s. 11(1) by-law 4.

   Provided legal services on a full-time basis for a total of three years in the five years prior to May 1, 2007.

   Applied prior to November 1, 2007, and

   Passed the licensing examination.

2. Unlicensed: s. 30(1) para. 8 by-law 4, s. 30(2) by-law 4.

   Providing legal services prior to May 1, 2007 [no minimum period] and

   Applied by October 31, 2007.

   May continue to operate without a licence until the earlier of

   April 30, 2008

   Final denial of application for a licence.

Articling students when acting under supervision of an approved licensed lawyer: s. 34 by-law 4.

Lawyers' employees may set dates: s. 5(1)(b) by-law 7.1.

Exceptions outside legal profession: s. 30(1) by-law 4.

1. In-house legal services provider
2. Legal clinics
3. Student legal aid services societies
4. Not-for-profit organizations
5. Acting for family, friend or neighbour
6. Constituency assistants

7. Other — occasional provision of legal services only as ancillary part of occupation and member of
   a) Human Resources Professionals Association of Ontario,
   b) Ontario Professional Planners Institute,
   c) Board of Canadian Registered Safety Professionals, or
   d) Appraisal Institute of Canada.

Criminal Code *Summary Conviction Proceedings*

A licence is required for summary conviction proceedings where the maximum prison term is over six months: s. 802.1.

However, the *Code* has no restrictions as to who may appear as agent for other summary conviction matters.

Provincial Offences Act *Proceedings*

Only those in compliance with the new licensing regime are permitted to appear: s. 1(1) and 50(1) *POA*. No obligation is placed on presiding judicial officer to ascertain whether agent is in compliance.

Unlicensed agents appearing pursuant to one of the exceptions remain subject to the court's jurisdiction to bar them for

Incompetence, s. 50(3), 94

Contempt, s. 91(7).

Paralegals are permitted to practice in previously permitted areas of practice, in matters before Small Claims Court and administrative tribunals, and Boards, such as the Financial Services Commission and the Workplace Safety Insurance Board.

Paralegals are not permitted to represent someone in Family Court.

Unpaid Paralegal Accounts

Would a claim by a paralegal for his or her own outstanding account be dealt with in Small Claims Court as would a lawyer's account? One of the types of claims that may be filed in Small Claims Court is claims for money owed under an agreement. An example of such a claim includes unpaid accounts for services delivered, but only solicitors have authority to bring applications for assessment for their unpaid accounts under the *Solicitor's Act*. Paralegals may file a Plaintiff's Claim for their unpaid accounts under the Rules of the Small Claims Court.

MOL Orders Issued Pursuant to the ESA, 2000

Ministry of Labour orders judgments made under the *Employment Standards Act, 2000* can be filed and enforced in the courts.

Bankruptcy and Default Judgment

Pursuant to s. 69.3(2) of the BIA, the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his/her security in the same manner as he/she would have been entitled to realize or deal with it if there were no stay, unless the court orders otherwise. In these circumstances, where the claim is for recovery of possession of land only by a secured creditor, the requisition for default judgment can be processed as though there was no stay. Leave of the court is not required.

Fitness Orders

Can a fitness order made under the *Real Estate and Business Brokers Act* be filed for enforcement purposes? In Accordance with the *Statutory Powers Procedures Act*, a certified copy of a monetary fines order made under the *Real Estate and Business Brokers Act* may be filed in the Superior Court of Justice/Small Claims Court by the Real Estate Council of

Ontario or by a party and on filing shall be deemed to be an order of that court and once entered/filed is enforceable as such.

Representation of A Party

While rule 15 of the *Rules of Civil Procedure* speaks to representation by lawyer in civil matters (in particular, change in representation), there is no such rule in small claims matters. A new paralegal/lawyer should file a letter (which originates from the party) indicating that he/she is now the paralegal/lawyer with carriage of the file, instead of a previously identified paralegal/lawyer.

A Collection Agency, which acts as an agent for a party, should provide a letter indicating the name of the new paralegal/lawyer with carriage of the file(s), along with a Direction & Authorization from the party. Collection agencies (unlicensed under LSUC) may represent a party if the collection agencies provide a letter indicating that they have the authority to represent the party.

A motion may also be brought allowing the court to make an order if there is dispute as to representation of a party. Where more than one file is involving the same collection agency, only one motion would be required to address the same representation issues on multiple files.

Unlicensed Representation of Party

May a friend and/or neighbor act for a party in a small claims matter?

Section 26 of the *Courts of Justice Act* provides the following:

> A party may be represented in a proceeding in the Small Claims Court by a person authorized under the *Law Society Act* to represent the party, but the court may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of the party if it finds that such person is not competent properly to represent the party, or does not understand and comply at the hearing with the duties and responsibilities of an advocate.

The Law Society of Upper Canada By-Law 4, Part V allows certain unlicensed representatives to provide legal services in a Small Claims Court proceeding, including individuals acting for a friend or neighbour:

> **Acting for a friend or neighbour**
>
> 5. An individual,
>
> i. whose profession or occupation is not and does not include the provision of legal services or the practice of law,
>
> ii. who provides the legal services only for and on behalf of a friend or a neighbour;
>
> iii. who provides the legal services in respect of not more than three matters per year, and
>
> iv. who does not expect and does not receive any compensation, including a fee, gain or reward, direct or indirect, for the provision of the legal services.

Lawyers and paralegals in Ontario are self-governing. This means that lawyers and paralegals oversee their own regulation through the Law Society in accordance with the *Law Society Act* and its regulations, passed by the Ontario government.

Litigation Guardian

In a civil case, a child under the age of 18 cannot sue or be sued in his or her own name. One exception to this rule is in Small Claims Court cases for $500 or less. A litigation guardian is an adult who makes decisions on behalf of a child in a court case. A litigation guardian is authorized to take all steps that the child would be able to take in the proceeding if the child were an adult. See Rule 7.05(1) of the Rules of Civil Procedure.

A litigation guardian must protect the child's interest and take all necessary steps to do so. See: Rules of Civil Procedure, Rule 7.05(2). A litigation guardian must be represented by a lawyer. See: Rules of Civil Procedure, Rules 7.05(3) and 15.01(1).

If the Small Claims Court claim is for an amount of $500 or less, a child does not need a litigation guardian to sue or to be sued. If the Small Claims Court claim is for an amount between $501 and $25,000, a litigation guardian is required for a child. In a Small Claims Court case a litigation guardian does not need to be represented by a lawyer. However, the litigation guardian may be responsible to pay the legal costs awarded against a minor.

The court may make an order to appoint the Children's Lawyer as litigation guardian for a defendant child who is under the age of 18. If you want to ask the court to appoint the Children's Lawyer as litigation guardian for a child, you must serve specific materials on the Children's Lawyer. See Rules of Civil Procedure, Rule 7.03(9) and (10).

If you want to hire a lawyer, you can contact the Law Society Referral Service. This service will provide a name of a lawyer in your area. You can call toll free at 1-800-268-8326 or 416-947-3330 in the Greater Toronto Area.

For a list of lawyers in Ontario, see the Law Society of Upper Canada website: <http:www.lsuc.on.ca/find-a-lawyer-or-paralegal>. See also the Ministry of the Attorney General's Justice Ontario website: <https: www.attorneygeneral.jus.gov.on.ca>. You can also reach Justice Ontario by telephone, toll free, at 1-866-252-0104.

Broda v. Broda, 2001 ABCA 151, 2001 CarswellAlta 865, 286 A.R. 120, 253 W.A.C. 120, [2001] A.J. No. 800 (Alta. C.A.)| Dealing with self-represented litigants (SRL)

What is the obligation of the court in dealing with the self-represented litigant (SRL)?

The earlier attitude towards SRLs is illustrated by the Alberta Court of Appeal in *Broda v. Broda*, wherein the court stated: "[U]nrepresented litigants are entitled to justice, but they are not entitled to command disproportionate amounts of court resources to remedy their inability or unwillingness to retain counsel. If they seek free lunch, they should not complain of the size of the helpings."

In *Pintea v. Johns*,[9] plaintiff was injured in a motor vehicle accident and initially had the assistance of counsel in advancing his case. He finished as an SRL, disabled, and spoke English as his second language.

The plaintiff failed to inform the court and the defendants of his change of address and as a result did not get notice of case management meetings that he should have attended. He was found to be in contempt of court for missing the meetings, his claim was struck, and he was assessed over $80,000 in costs against him. The Supreme Court found that he could not be held in contempt, restored his action and removed the cost award.

In *Girao v. Cunningham*,[10] the SRL used a Spanish interpreter throughout a complex 20-day personal injury trial. The appellate court ordered a new trial, saying that it was "one of those rare civil cases in which a new trial should be ordered because 'the interests of justice plainly require that to be done'". It was no longer sufficient for a judge "to simply swear a party in and then leave it to the party to explain the case, letting the party flounder and then subside into unhelpful silence." The judge had special duties to acquaint the SRL with courtroom procedure and the rules of evidence.

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[9] 2017 CSC 23, 2017 SCC 23, 2017 CarswellAlta 680, 2017 CarswellAlta 681, [2017] 1 S.C.R. 470, [2017] S.C.J. No. 23 (S.C.C.)

[10] 2020 ONCA 260, 2020 CarswellOnt 5363, 2 C.C.L.I. (6th) 15 (Ont. C.A.)

If the SRL is sophisticated in the sense that they are "not a neophyte in the civil justice system" the rules may be strictly applied. In *Clark v. Pezzente*,[11] the SRL was found to be sophisticated in that he had made articulate and well-informed submissions to the court and the transcripts of previous proceedings revealed he was quite capable of advancing his arguments. His application to restore his appeal was therefore denied following his failure to post security for costs within the time stipulated.

Case Law: *Re Milligan* (1991), 1 C.P.C. (3d) 12 (Ont. Gen. Div.).

The inherent right to control one's own process does not carry with it the right of a trial judge to choose which counsel were to appear before him.

Fortland Realty Inc. v. London Life Insurance Co. (September 19, 1995), Doc. 95-CU-877-91 (Ont. Gen. Div.).

Leave granted to allow non-lawyer to present case on behalf of plaintiff subject to the defendant's being at liberty to seek the intervention of the court. Case involved several million dollars. See *419212 Ontario Ltd. v. Astrochrome Crankshaft Toronto Ltd.* (1991), 3 O.R. (3d) 116 at 120 (Master).

Jackson v. Ontario (Attorney General) (April 12, 1995), Doc. 463/94 (Ont. Gen. Div.).

But for the authority granted by statute, the applicant, a paralegal, would be unable to appear on behalf of a litigant in the Ontario Court, General Division. Finding having regard to Rule 15 of the Rules of Civil Procedure, s. 1 of the *Solicitors Act*, R.S.O. 1990, c. S.15, and s. 50(1) of the *Law Society Act*, R.S.O. 1990, c. L.8. It is not unconstitutional that applicant cannot appear on behalf of client in the Divisional Court.

R. v. Gregoire (November 18, 1994) (Ont. Prov. Div.).

Client, charged with an offence under the *Highway Traffic Act*, was represented in Provincial Court by HK, a former lawyer who had been disbarred for dishonesty. On behalf of HK, client's mother appeared before the court requesting an adjournment, as HK was not available on the date set for appeal. The judge refused to entertain the application for an adjournment, stating the client was free to be represented by any type of agent, but that he would not allow an appearance by HK in his court. The appeal was to go ahead as scheduled unless another basis for adjournment could be found.

Manufacturer's Life v. Molyneux (January 9, 1995), Doc. 868/94 (Ont. Div. Ct.).

Application pursuant to section 114 of the *Landlord and Tenant Act* dismissed. Successful landlord, respondent on appeal represented by agent. Costs awarded in the sum of $250. See also *Bonshaw-Estates Inc. and Indrakumaran et al.*, unreported, File No. 421/92 where agent awarded $750.00 in costs (Ont. Div. Ct.).

Banyasz v. Galbraith (1996), 94 O.A.C. 75, 7 C.P.C. (4th) 307 (Ont. Div. Ct.).

Issue was right of party to be represented by agent on appeal from order made on application under the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7 (now the *Commercial Tenancies Act*). Divisional Court held that there being no statutory authority allowing parties to such an appeal to be represented by agents, a party was not permitted to appear by agent except with leave under special circumstances. No such special circumstances in this case. Divisional Court should not have heard the agent for the appellant. *Gotlibowicz v. Gillespie* (1996), 90 O.A.C. 251, 28 O.R. (3d) 402; referred to. *O'Shanter Development Corp. v. Separi* (May 7, 1996), Doc. 761/94 (Ont. Div. Ct.) found that there was no authority for an agent to appear on an appeal from the Small Claims Court.

Karach v. Karach (1995), 35 Alta. L.R. (3d) 311, [1996] 3 W.W.R. 297, 177 A.R. 100 (Q.B.).

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[11] 2017 ABCA 220, 2017 CarswellAlta 1170 (Alta. C.A.)

When a litigant asks to be represented by an untrained and uninsured agent, the court must then balance the competing objectives of protecting the litigant and society and respecting the litigant's choice. Accordingly, if a litigant wishes to be represented by someone other than a solicitor, it is reasonable to require the litigant to make application to the court, which will then have the opportunity of reviewing the public interest issues that such a request raises.

Kobetek Systems Ltd. v. Canada, [1998] 1 C.T.C. 308 (Fed. T.D.).

Application by corporation to be represented by officer of corporation denied as "special circumstances," contemplated by *Federal Court Rules* (Can.), Rule 300(2), did not exist. Officer's sole ground was that he considered himself capable. This was not "special circumstance.".

Bank of Montreal v. Gardner, 1998 CarswellOnt 89 (Ont. Sm. Cl. Ct.).

Failure by plaintiff to pay monies into court in timely manner was oversight and not deliberate act. Request for contempt relief was dismissed. Law firm did not obtain any advantage from actions of deputy judge but appearance of impartiality was required. Law firm was restrained from acting for plaintiff in this matter. Section 15 did not cover discrimination in terms of right to recover costs as between litigants represented or not represented by counsel. There was no expressed jurisdiction in *Courts of Justice Act* or Rules of Small Claims Court to award costs to litigant represented by agent nor was there expressed prohibition to make such award. Agent had sent unsolicited letter to judge while matter was before judge. Affidavit of agent contained scandalous assertions. Court sanctioned improper conduct of agent by denying defendants costs.

Kopyto v. Ontario (Attorney General) (1997), 104 O.A.C. 128, 14 C.P.C. (4th) 169, 152 D.L.R. (4th) 572 (Ont. Div. Ct.).

Kopyto, a disbarred lawyer, applied to represent client in a family law matter. Family Court Judge acting in his judicial capacity when he made order and thus s. 82 of the *Courts of Justice Act* applicable. Application is dismissed.

R. v. Lemonides (1997), 151 D.L.R. (4th) 546, 35 O.R. (3d) 611, 10 C.R. (5th) 135 (Ont. Gen. Div.).

The issue in this case was that of agents. The waiver by an accused of the right to counsel must be unequivocal and fully informed. The mere fact that an accused's legal representative refers to himself as "an agent" does not absolve the trial judge from the duty to ensure that the accused understands that he/she is entitled to be represented by counsel, and understands the inherent limitations in the agent's status. As the accused was unaware of his agent's status (*i.e.*, did not understand the agent was not a lawyer) and specifically his lack of understanding of his new agent's role, his constitutional right to counsel was infringed. A new trial was ordered.

Trillium Investment Group of Companies Inc. and Harvey Dennis and 1078105 Ontario Inc. (October 29, 1997) (Ont. Gen. Div.).

Order that 1078105 Ontario Inc. carrying on business as Citywide Paralegal Services be prohibited from appearing as agent in any court in the Province of Ontario until the amount due to the said judgment is paid and the costs of motion are paid.

Fortin c. Chrétien, 1998 CarswellQue 3769, REJB 1998-09966, [1998] Q.J. No. 4010 (Que. C.A.); affirmed 2000 CarswellQue 2211, 2000 CarswellQue 2212 (S.C.C.); additional reasons 2001 CarswellQue 1395, 2001 CarswellQue 1396, REJB 2001-25001, *(*sub nom. *Fortin v. Chrétien)* 201 D.L.R. (4th) 223, *(*sub nom. *Fortin v. Barreau du Québec)* 272 N.R. 359, 2001 SCC 45, [2001] 2 S.C.R. 500 (S.C.C.).

Section 61 of the Quebec *Code of Civil Procedure* allowed plaintiffs to sign and present applications for injunction themselves and defend their case without a lawyer. Applications

in irreceivability were incorrectly allowed. Applications for injunctions should proceed on merit.

Turner v. American Bar Association (1975), 407 F. Supp. 451.

The regulation of the practice of law by the legislature and the judicial branches is constitutionally acceptable and does not give rise to the cause of action on behalf of the plaintiff.

Strilets v. Vicom Multimedia Inc., 2000 ABQB 598, 2000 CarswellAlta 897 (Alta. Q.B.).

The agent was below the standard of an average articling student but possessed more ability and understanding than a typical lay person. Given the relatively small amount of money involved, improbable plaintiff would find lawyer to represent him. If the agent was not granted standing, the plaintiff would have no representation.

Petsinis v. Escalhorda (2000), 2000 CarswellOnt 3166, [2000] O.J. No. 3324 (Ont. S.C.J.).

Tenant Protection Act, 1997, S.O. 1997, c. 24. There was nothing in the *Tenant Protection Act* that purported to oust the application of Rules. Unclear whether agents were to appear in s. 193(2) proceedings. The former *Landlord and Tenant Act* (Ontario) expressly permitted the party to appear by agent on application authorized to be brought before the Superior Court. Provision was absent in the present Act.

Carroll v. Carroll (2000), 2000 CarswellOnt 3768, [2000] O.J. No. 3969 (Ont. C.J.).

The agent failed to show adequate understanding of court structure, procedure or case law, or ability to provide adequate representation, particularly in complex issues. Extraordinary circumstances for grant of leave under *Family Law Rules*, O. Reg. 114/99, s. 4(1)(c), not shown.

Gill v. Residential Property Management Inc. (2000), 50 O.R. (3d) 752, 2000 CarswellOnt 3507, [2000] O.J. No. 3709 (Ont. S.C.J.).

Residential tenancy matters. The *Rules of Civil Procedure* apply to proceedings under s. 193(2) of the *Tenant Protection Act, 1997* (Ontario). It is necessary for agents to seek leave to appear before the court.

Equiprop Management Ltd. v. Harris (2000), [2000] O.J. No. 4552, 2000 CarswellOnt 4398, 51 O.R. (3d) 496, 195 D.L.R. (4th) 680, 140 O.A.C. 1, 9 C.P.C. (5th) 323 (Ont. Div. Ct.).

On motion to lift stay pending appeal, an issue arose as to whether the tenants were entitled to be represented by a paralegal on appeal before the Divisional Court. The provisions did not permit representation of parties by paralegals. Representation by a paralegal was not permitted in proceedings governed by Rules.

Todd v. Chevalier (2000), 2000 CarswellOnt 5029 (Ont. S.C.J.); additional reasons at (2001), 2001 CarswellOnt 773 (Ont. S.C.J.).

Tenant's agent commenced an action in Superior Court under *Tenant Protection Act, 1997* (Ontario). The application was dismissed. Agent refused standing. *Rules of Civil Procedure* (Ontario) and not *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 applied to proceedings before the court even where the tribunal had declined jurisdiction.

Sidhu c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2000), 2000 CarswellNat 1434 (Fed. T.D.).

Immigration agent or paralegal had no authority, under Federal Court Rules, 1998, to represent the plaintiff. Application indicated that the plaintiff was represented by a consultant. Application for leave to appeal dismissed.

Bhatti c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2000), 2000 CarswellNat 1433 (Fed. T.D.).

Agent acting on the plaintiff's behalf was not qualified to represent him: *Federal Court Rules*, 1998, Rule 119.

Parmar c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2000), 12 Imm. L.R. (3d) 178, 2000 CarswellNat 1432, 2000 CarswellNat 3429 (Fed. T.D.).

Agent acting on the plaintiff's behalf was not qualified to represent him. The judicial review application was dismissed.

Skrdla v. Graham, 2000 BCSC 1613, 81 B.C.L.R. (3d) 335, 2000 CarswellBC 2188 (B.C. S.C. [In Chambers]).

The *Legal Services Society Act*, R.S.B.C. 1996, c. 256 did not provide for a definition of "services ordinarily provided by a lawyer." Implied society must exercise some discretion in determining what services it would provide. Refusal of funding was within its jurisdiction and discretion.

O'Toole v. Scott, [1965] A.C. 939, [1965] 2 All E.R. 240, [1965] 2 W.L.R. 1160 (New South Wales P.C.).

Subsection 50(1) of the *Law Society Act* prohibits any non-lawyer from acting "as a barrister or solicitor" "except where otherwise provided by law." The case sets out the common law rule that even inferior court has the 'inherent' power to give a non-barrister the right of audience.

Gotlibowicz v. Gillespie (1996), 47 C.P.C. (3d) 96, 28 O.R. (3d) 402, 90 O.A.C. 251, 1996 CarswellOnt 1283 (Ont. Div. Ct.).

Inappropriate for the court to ignore section 1 of the Solicitors Act and section 50 of the *Law Society Act* and, in effect, condone activity that legislature characterizes as contempt of court and prohibits under penalty of prosecution.

R. v. Romanowicz (1999), 26 C.R. (5th) 246, 45 M.V.R. (3d) 294, 124 O.A.C. 100, 138 C.C.C. (3d) 225, 178 D.L.R. (4th) 466, 45 O.R. (3d) 506, *(*sub nom. *R. c. Romanowicz)* 45 O.R. (3d) 532 (Fr.), 1999 CarswellOnt 2671, [1999] O.J. No. 3191 (Ont. C.A.).

Broad discretion to authorize agents to appear in this court, subject only to the court's ensuring that the party wishing to be represented has made informed decision to proceed without counsel by an agent.

R. v. Lawrie & Pointts Ltd. (1987), 59 O.R. (2d) 161, 1987 CarswellOnt 42, 48 M.V.R. 189, 19 O.A.C. 81, 32 C.C.C. (3d) 549 (Ont. C.A.).

Effect of the 1970 revision of the Statutes was to transfer control of unauthorized practice to the *Law Society Act*. Section 1 of the *Solicitors Act* is merely an ancillary provision. It does not prohibit unauthorized practice.

Smith v. Smith (2000), 43 C.P.C. (4th) 293, 2000 CarswellOnt 1182, [2000] O.J. No. 1236 (Ont. S.C.J.).

The husband brought a motion seeking leave of court pursuant to clause 4(1)(c) of the *Family Law Rules* to permit him to be represented by a person who was not a lawyer. The motion was dismissed. The husband failed to discharge the onus to establish special circumstances to permit an agent.

Wainio v. Ontario Teachers' Pension Plan Board, [2000] 2 C.T.C. 513, 24 C.C.P.B. 175, 2000 CarswellOnt 1135, [2000] O.J. No. 1175 (Ont. S.C.J.).

Endorsement — A Justice of the Peace had jurisdiction pursuant to s. 50(3) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 to bar any person from appearing as an agent under certain conditions.

Stone v. Stone (1999), 4 R.F.L. (5th) 433, 1999 CarswellOnt 4584, [1999] O.J. No. 5266 (Ont. S.C.J.).

Representation by non-lawyer. Despite pleas of poverty, the wife was not entitled to order permitting her to be represented by paralegal. *Family Court Rules*, O. Reg. 144/99, s. 4(1)(c), permitted representation of parties by non-lawyers if the court permitted.

West v. Eisner, 1999 CarswellOnt 4017, [1999] O.J. No. 4705, 48 C.C.L.T. (2d) 274, 41 C.P.C. (4th) 378 (Ont. S.C.J.).

A paralegal operating a legal clinic through a corporation admitted liability. The client was entitled to damages comprising cost of obtaining reinstatement of compensation benefits, return of fees, wasted costs, and general damages of $3,500 for emotional distress.

Szebenyi v. R., 2001 CarswellNat 2061, 2001 FCA 277, *(*sub nom. *Szebenyi v. Canada)* 215 F.T.R. 159 (note) (Fed. C.A.); leave to appeal refused (2002), 2002 CarswellNat 1167, 2002 CarswellNat 1168, *(*sub nom. *Szebenyi v. Canada)* 300 N.R. 197 (note) (S.C.C.).

On appeal from decision of Motions Judge who refused to permit S to represent his mother at trial, no error shown. Open to S to reapply before trial judge for permission to speak for mother at trial, should matter proceed. Appeal dismissed.

Nirvair Transport Ltd. v. Dhillon (2001), 2001 CarswellOnt 4424 (Ont. Master).

Master strongly condemned practice of appointing paralegal as corporate director of corporate litigant, for purpose of having the paralegal apply to court for leave to represent the corporation pursuant to Rule 15.01(2) of *Rules of Civil Procedure* on basis of financial hardship.

Law Society (British Columbia) v. Gravelle, 154 B.C.A.C. 25, 2001 CarswellBC 1103, [2001] 7 W.W.R. 15, 2001 BCCA 383, 89 B.C.L.R. (3d) 187, 200 D.L.R. (4th) 82, 252 W.A.C. 25 (B.C. C.A.); leave to appeal refused (2002), 2002 CarswellBC 11, 2002 CarswellBC 12, 286 N.R. 198 (note), 171 B.C.A.C. 46 (note), 280 W.A.C. 46 (note) (S.C.C.).

The Law Society petitioned for a declaration that a notary public engaged in the unauthorized practice of law by giving legal advice to and offering to assist a member of the public with respect to the probate or letters of administration of the estate of a deceased person for or in the expectation of a fee, gain or reward. A permanent injunction against the notary was also sought. The British Columbia Court of Appeal dismissed the appeal. The court affirmed that notaries were not probating wills in England on November 18, 1958. Therefore, the notary here engaged in the unauthorized practice of law.

Pellikaan v. R., 2001 CarswellNat 2951, [2001] F.C.J. No. 1923, 2001 FCT 1415 (Fed. T.D.).

Motion to allow lay person to act as agent or as representative of plaintiff denied. Antics and attitude and absence of any reasonable approach of proposed lay person made him untenable as lay representative.

R. v. Tran (2001), 149 O.A.C. 120, 2001 CarswellOnt 2706, [2001] O.J. No. 3056, 156 C.C.C. (3d) 1, 44 C.R. (5th) 12, 55 O.R. (3d) 161, 14 M.V.R. (4th) 1 (Ont. C.A.).

After representing himself at trial, Tran convicted on a number of charges. Tran appealed, arguing trial judge erred by failing to conduct inquiry into admissibility of evidence of his impairment. The Ontario Court of Appeal agreed. It noted that the trial judge did little to assist Tran and the *voir dires* he conducted concerning the qualifications of experts were questionable. Moreover, trial judge failed to explain the course which trial would take, knew that Tran needed an interpreter and was ignorant of the most basic stages of a trial.

Law Society (British Columbia) v. Siegel, 76 B.C.L.R. (3d) 381, 2000 CarswellBC 1182, 2000 BCSC 875 (B.C. S.C.).

Law society brought petition for declaration that notary public engages in unlawful practice of law when he or she prepares for fee, usual corporate documents and resolutions to maintain company in good standing. Petition granted. Sections 17 and 18 of *Notaries Act*,

R.S.B.C. 1996, c. 334 do not permit notaries to prepare normal corporate documents necessary to keep company in good standing.

Simmons v. Boutlier (2000), 5 R.F.L. (5th) 149, 2000 CarswellOnt 492 (Ont. S.C.J.).

Judge dismissed wife's motion to allow paralegal to represent her in family law proceedings. Rule 4(1) intended to codify existing discretion of judges to permit non-lawyers to represent parties in court in very limited circumstances, perhaps where special expertise was required. Wife applied for leave to appeal. Application dismissed.

Clarke v. Clarke (2001), 2001 CarswellOnt 3381 (Ont. S.C.J.).

Paralegal acting as a solicitor contrary to s. 50(1) of the *Law Society Act*, R.S.O. 1990, c. L.8 and s. 1 of the *Solicitors Act*, R.S.O. 1990, c. S.15. As he did not have prior permission to represent parties, "representation" of parties was in violation of s. 4 of the *Family Law Rules* (O. Reg. 144/99). The paralegal must stop his practice of preparing and processing uncontested divorces without application to the court for permission pursuant to Rule 4(1).

Leung v. Rotstein, 2002 CarswellBC 2615, 2002 BCSC 1470, 25 C.P.C. (5th) 370, 8 B.C.L.R. (4th) 385 (B.C. S.C. [In Chambers]).

No bar to lawyer representing him- or herself before court. Self-represented lawyer had to act in manner consistent with Professional Conduct Handbook. No rule of law preventing lawyer from giving evidence and continuing as counsel. No authority to compel litigant to choose alternate counsel if chosen counsel was required to give evidence in case. Litigant chose himself to act as counsel.

786372 Alberta Ltd. v. Mohawk Canada Ltd., 2002 CarswellAlta 1047, 2002 ABQB 785, 22 C.P.C. (5th) 9, 3 Alta. L.R. (4th) 380, 324 A.R. 192 (Alta. Master).

The individual plaintiff was sole shareholder and director of the corporate plaintiff. The individual plaintiff was a non-lawyer who wished to appear on behalf of corporation. The defendant sought order requiring counsel to be appointed. Application granted. The court had discretion to allow corporation to be represented by one of its officers or directors.

Law Society (British Columbia) v. Mangat (2001), 2001 CarswellBC 2168, 2001 CarswellBC 2169, [2001] S.C.J. No. 66, 2001 SCC 67, 16 Imm. L.R. (3d) 1, 205 D.L.R. (4th) 577, 157 B.C.A.C. 161, 256 W.A.C. 161, 96 B.C.L.R. (3d) 1, 276 N.R. 339, [2002] 2 W.W.R. 201, [2001] 3 S.C.R. 113 (S.C.C.).

Immigration consultants entitled to represent immigrants under *Immigration Act*, R.S.C., 1985, c. 1.2, ss. 30, 69(1), notwithstanding prohibition in section 26 of *Legal Profession Act*, S.B.C. 1987, c. 25. Non-lawyers entitled to act for fees despite a prohibition in provincial statute regulating the legal profession.

Gagnon v. Pritchard (2002), 2002 CarswellOnt 750, [2002] O.J. No. 928, 58 O.R. (3d) 557, 17 C.P.C. (5th) 297, 26 B.L.R. (3d) 216 (Ont. S.C.J.).

Grantees of powers of attorney could not act for their grantor in court proceedings pursuant to Rule 15.01(3) of *Rules of Civil Procedure*. Section 50(1) of the *Law Society Act*, R.S.O. 1990, c. L.8 stated that except where otherwise provided by law, no person other than a member should act as a lawyer or practice as a lawyer.

U.S. v. Johnson (2003), 327 F.3d 554 (U.S. 7th Circ. Ill.).

Review of NLPA National Legal Professional Associates and the unauthorized practice of law. Key among the inherent powers incidental to all courts is the authority to "control admission to its bar and to discipline attorneys who appear before it," id. at 43, 111 S.Ct. 2123 (citing *Ex parte Burr*, 22 (9 Wheat.) 529, 6 L.Ed. 152 (1824)), and, as we have noted previously, "a federal court has the inherent power to sanction for conduct which abuses the judicial process." *Barnhill v. United States*, 11 F.3d 1360(1367), 7th Cir.1993. It follows that a federal court's power to regulate and discipline attorneys extends to conduct by non-lawyers

amounting to practicing law without a license. This logical extension of the inherent powers is consistent with the Supreme Court's reasoning in *Roadway Express, Inc. v. Piper* (1980), 447 U.S. 752 and 766, 100 S.Ct. 2455, 65 L.Ed.2d 488 ("The power of a court over the members of its bar is at least as great as its authority over litigants.").

Law Society of Upper Canada v. Stoangi (2003), 2003 CarswellOnt 1112, [2003] O.J. No. 1110, 64 O.R. (3d) 122 (Ont. C.A.).

Appeal related to the definition of legal services under the Law Society Act, R.S.O. 1990, c. L.8. Appellant disbarred in 1984. Section 50(1) of the Act provides that "except where otherwise provided by law" no person other than a member of the Law Society shall act or practice as a barrister or solicitor. The exception-"where otherwise provided by law"-refers to statutes that specifically provide that agents who are not barristers or solicitors may appear and represent another person before designated adjudicative bodies and tribunals: see *R. v. Lawrie & Pointts Ltd.* (1987), 59 O.R. (2d) 161, 1987 CarswellOnt 42, 48 M.V.R. 189, 19 O.A.C. 81, 32 C.C.C. (3d) 549 (Ont. C.A.). Long-standing case law interpreting "practising as a solicitor" to include advising another on legal questions: *R. v. Mitchell* (1952), 102 C.C.C. 307, 1952 CarswellOnt 221, [1953] 1 D.L.R. 143, [1952] O.W.N. 248 (Ont. Co. Ct.); affirmed (1952), 104 C.C.C. 247, 1952 CarswellOnt 389, 1952 CarswellOnt 85, [1952] O.R. 896, [1952] O.W.N. 808, [1953] 1 D.L.R. 700 (Ont. C.A.); *R. v. Zaza* (May 1, 1974), Ont. Co. Ct.; affirmed (November 20, 1975), [1975] O.J. No. 1113 (Ont. Div. Ct.), Galligan J., Osler J., Reid J.; *R. v. Engel* (1976), 11 O.R. (2d) 343, 29 C.C.C. (2d) 135 (Ont. Prov. Ct.); *R. v. Brunet* (July 13, 1987), Doc. Ottawa 85-7202700 (Ont. Prov. Ct.). The impugned conduct must be carried out "frequently, customarily, or habitually": *R. v. Ott*, [1950] O.R. 493, 1950 CarswellOnt 60, 97 C.C.C. 302, [1950] 4 D.L.R. 426 (Ont. C.A.), at 493-503 [O.R.]; *Apothecaries Co. v. Jones*, [1893] 1 Q.B. 89, 17 Cox C.C. 588; and *R. v. Campbell* (1974), 3 O.R. (2d) 402, 17 C.C.C. (2d) 400, 45 D.L.R. (3d) 522 (Ont. Prov. Ct.).

R. v. Morden (2000), 2000 CarswellOnt 1037, [2000] O.J. No. 873 (Ont. C.J.).

Duties of justice of the peace to person represented by agent. Duty to protect administration of justice. See also *R. v. Romanowicz* (1999), 26 C.R. (5th) 246, 45 M.V.R. (3d) 294, 124 O.A.C. 100, 138 C.C.C. (3d) 225, 178 D.L.R. (4th) 466, 45 O.R. (3d) 506, (sub nom. *R. c. Romanowicz)* 45 O.R. (3d) 532 (Fr.), 1999 CarswellOnt 2671, [1999] O.J. No. 3191 (Ont. C.A.).

Ontario (Attorney General) v. Fleet Rent-A-Car Ltd., 2002 CarswellOnt 4286, 29 C.P.C. (5th) 315, [2002] O.J. No. 4693 (Ont. S.C.J.).

Motion granted to exclude Melvin Deutsch from appearing as agent before the Superior Court of Justice, Toronto Small Claims Court, pursuant to sections 25, 26, 96 and 106 of the *Courts of Justice Act*, and Rule 1.03.

Potvin v. Gionet (January 24, 2003) (Ont. S.C.J.), Nadeau J. — Is paralegal authorized to represent parties in "basket divorce" cases? Public policy best served with legal representation by those trained in the law, qualified as to academic standards and character by a governing body, and responsible and accountable as officers of the court. In this case, Tom Martin did not seek leave of the court by way of notice of motion with supporting affidavits as specified in *Equiprop Management Ltd. v. Harris* (2000), [2000] O.J. No. 4552, 2000 CarswellOnt 4398, 51 O.R. (3d) 496, 195 D.L.R. (4th) 680, 140 O.A.C. 1, 9 C.P.C. (5th) 323 (Ont. Div. Ct.). In the August 16, 2002 decision of *Clarke v. Clarke*, [2002] O.J. No. 3223, 2002 CarswellOnt 2759, 32 R.F.L. (5th) 282, [2002] O.T.C. 611 (Ont. S.C.J.), Olah J. determined that "given the absence of the Rules and Practice Directions addressing unrepresented basket divorces, what remains is the ability of the individual trial judge to exercise his or her inherent jurisdiction regarding matters of procedure and process on a case by case basis . . ." (at para. 61). The court may therefore impose further requirements pursuant to its inherent

jurisdiction, as long as requirements do not contradict applicable Rules or Practice Directions.

Fortin c. Chrétien, 1998 CarswellQue 3769, REJB 1998-09966, [1998] Q.J. No. 4010 (Que. C.A.); affirmed 2000 CarswellQue 2211, 2000 CarswellQue 2212 (S.C.C.); additional reasons 2001 CarswellQue 1395, 2001 CarswellQue 1396, REJB 2001-25001, *(*sub nom. *Fortin v. Chrétien)* 201 D.L.R. (4th) 223, *(*sub nom. *Fortin v. Barreau du Québec)* 272 N.R. 359, 2001 SCC 45, [2001] 2 S.C.R. 500 (S.C.C.).

Parties representing themselves after using disbarred advocate to draw up legal proceedings. Contract null. Invalidity of contract did not render subsequent proceedings void. *Act respecting the Barreau du Québec*, R.S.Q., c. B-1, s. 128(1)(b). *Civil Code of Quebec*, S.Q. 1991, c. 64, arts. 1411, 1417, 1438. *Code of Civil Procedure*, R.S.Q., c. C-25, art. 61. Applying the principle of simple nullity of the agreement was consistent with the intent of art. 61 of the CCP, which establishes a right of access to the courts and which cannot be rendered ineffective by the provisions of the ABQ. Recognition of the right of persons to represent themselves in legal proceedings should not be regarded as a matter of access to justice. Further, use of non-qualified persons to assist such persons may often affect their interests adversely. In contrast, advocates as officers of the court play an important role in representing the rights of litigants before the courts. It is desirable for all litigants to retain the services of an advocate.

Avance Venture Corp. v. Noram Relations Group Corp., 2002 CarswellBC 3033, 2002 BCSC 327 (B.C. S.C.).

Respondent corporation (in B.C.) sought order allowing Alberta lawyer to act for it. Alberta lawyer under suspension in Alberta. He was not director or officer of respondent. Lawyer under order dated June 1996 to disclose not licensed to practice in B.C. He failed to inform respondent. Application dismissed.

Children's Aid Society of Niagara Region v. P. (D.) (2002), 2002 CarswellOnt 4418, 62 O.R. (3d) 668, 16 O.F.L.R. 145 (Ont. S.C.J.).

Subrule 4(1)(c) of the Family Law Rules, O. Reg. 114/99, provides that a party may be represented "by a person who is not a lawyer, but only if the court gives permission in advance." "Permission in advance" means nothing more than permission in advance of the non-lawyer representation. A distinction should be made between paid, non-lawyer agents, such as paralegals, and unpaid, non-lawyer agent-friends. Neither section 1 of the Solicitors Act nor section 50(1) of the *Law Society Act* affects the inherent jurisdiction of the court to allow an unpaid, non-lawyer agent-friend to assist a litigant. The test, does the litigant honestly believe that he or she would benefit from the assistance of his friend and does that belief appear to be reasonable in all the circumstances? "Special circumstances" do not apply to unpaid, non-lawyer agent-friends.

Zenkewich v. Eremko, 2002 CarswellSask 785, 2002 SKQB 494 (Sask. Q.B.).

Appellant ordered to pay respondent $2,500. This was an appeal. Trial judge exercised discretion not to grant adjournment that he had at law and that discretion was exercised judiciously.

Leung v. Rotstein, 2002 CarswellBC 2615, 2002 BCSC 1470, 25 C.P.C. (5th) 370, 8 B.C.L.R. (4th) 385 (B.C. S.C. [In Chambers]).

Lawyer representing self in legal proceeding. Opposing party applying for order that lawyer not permitted to act as both party and advocate. Application dismissed. No rule of law preventing lawyer from representing self in legal proceedings.

Jessa v. Future Shop Ltd., 2002 CarswellBC 2639, 2002 BCSC 1531 (B.C. S.C. [In Chambers]).

Defendant applying to set aside default judgment. Defendant not having notice of trial date. Likely that Defendant would have attended trial if advised of date. Application allowed.

Lamond v. Smith, 2004 CarswellOnt 3213 (Ont. S.C.J.).

Cases decided under Subrule 15.01(2) of *Rules of Civil Procedure* that discourage granting permission for non-lawyer to represent corporation do not apply to case of small, one-man company.

Inquiry into non-lawyer's qualifications whether proposed representative of corporation could fulfil duties under rules of court was unimportant. In era when self-represented litigants abounded no sense to worry whether non-lawyer could carry out responsibilities of litigation. Absent proven mental incompetence his intelligence and litigious capabilities irrelevant.

Order made on motion. Order obtained on incomplete and misleading evidence. Where party secured order on motion by means of affidavit evidence that he knew to be materially incomplete and that had misled court, court entitled, upon learning of deception, to set order aside on its own initiative.

Law Society of Upper Canada v. Boldt, 2006 CarswellOnt 1754 (Ont. S.C.J.).

Motion for contempt against Maureen Boldt for breaching injunction Order of Bolan J. dated September 1, 2000.

Order of Bolan J. included the following terms:

1. A finding that Maureen Boldt had been acting as a barrister and solicitor in contravention of s. 50 of the *Law Society Act* in contravention of the 1998 Agreement.
2. A permanent injunction restraining Maureen Boldt from acting or practising as a barrister or solicitor.

Bolan J. relied on the definition of "acting as a solicitor" drawn from *R. v. Campbell* (1974), 3 O.R. (2d) 402, 17 C.C.C. (2d) 400, 45 D.L.R. (3d) 522 (Ont. Prov. Ct.) at 411 (O.R.):

> A person who 'acts as a solicitor' is one who conducts an action or other legal proceeding on behalf of another, or advises that other persons on legal matters, or frames documents intended to have a legal operation, or generally assists that other person in matters affecting his legal position.

The law on contempt was stated in *B.C.G.E.U., Re*, EYB 1988-67021, 1988 CarswellBC 762, 1988 CarswellBC 363, [1988] S.C.J. No. 76, *(*sub nom. *B.C.G.E.U. v. British Columbia (Attorney General))* [1988] 6 W.W.R. 577, 30 C.P.C. (2d) 221, [1988] 2 S.C.R. 214, 220 A.P.R. 93, 53 D.L.R. (4th) 1, 87 N.R. 241, 31 B.C.L.R. (2d) 273, 71 Nfld. & P.E.I.R. 93, 44 C.C.C. (3d) 289, 88 C.L.L.C. 14,047 (S.C.C.) at 234 (S.C.R.):

> Contempt . . . embraces 'where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice or show disrespect to the court's authority', 'interfering with the business of the court on the part of a person who has no right to do so' . . . The overriding concept of contempt is that of public respect for the orders of our courts.

The mediation process is not a shield for those who are illegally providing legal advice. Where individuals seek advice, they are entitled to that advice *only* from lawyers who are regulated in the public interest.

You cannot ignore an injunction simply by changing the title of a document.

Boldt in contempt of court.

Winkelman v. Parma City School District, 05-983.

On February 27, 2007, the U.S. Supreme Court heard oral arguments as to whether parents who are not lawyers have a right to represent their child with disabilities, or themselves, in a federal court action under the U.S. federal *Individuals with Disabilities Education Act*.

The appeal stems from a lawsuit by Jeff and Sandee Winkelman, two Ohio parents who challenged the appropriateness of a school's educational plan for their son, Jacob, who has autism spectrum disorder.

A non-lawyer parent can only represent himself or herself and not the parent's child, according to the U.S. Sixth Circuit. There is a three-way split among the First, Second, Third, Sixth, Seventh and Eleventh U.S. Circuit Courts of Appeal. In Ontario, of course, legal aid would not be provided as a matter of course, let alone self-representation.

Baird v. R., 2006 CarswellNat 1729, 2006 CarswellNat 3599, 2006 FCA 183, 2006 CAF 183 (F.C.A.).

Motion for order for financial aid for self-represented impecunious litigant. Impecuniosity and belief in justness of cause not sufficient grounds.

Kemp v. Prescesky, [2006] N.S.J. No. 174, 2006 CarswellNS 175, 244 N.S.R. (2d) 67, 744 A.P.R. 67, 28 C.P.C. (6th) 361, 2006 NSSC 122 (N.S. S.C.).

Small Claims Court created to provide forum for informal, simple, efficient, and independent adjudication of claims. Requirements for natural justice in Small Claims Court system have increased with increase in monetary jurisdiction. Same principles of fairness as exist in Supreme Court should apply in Small Claims Court.

Elliott v. Chiarelli, 2006 CarswellOnt 6261, 83 O.R. (3d) 226 (Ont. S.C.J.).

Appeal from judgment of Deputy Judge dismissing appellant's malpractice claim against the respondent. The appellant "hired" respondent, Vince Chiarelli, a paralegal. Claim in Small Claims Court against Chiarelli to recover money paid him, based on professional negligence and breach of contract. Appeal allowed.

Issue of standard of care applicable to a paralegal: see *West v. Eisner*, 1999 CarswellOnt 4017, [1999] O.J. No. 4705, 48 C.C.L.T. (2d) 274, 41 C.P.C. (4th) 378 (Ont. S.C.J.), Stinson J.; and *ter Neuzen v. Korn*, 1995 CarswellBC 593, 1995 CarswellBC 1146, [1995] S.C.J. No. 79, EYB 1995-67069, [1995] 10 W.W.R. 1, 64 B.C.A.C. 241, 105 W.A.C. 241, 188 N.R. 161, 11 B.C.L.R. (3d) 201, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577 (S.C.C.).

Standard of review is palpable and overriding error. Deputy Judge erred in construing relationship between parties and contract too narrowly. Standard based on common sense and ordinary understanding appropriate. Respondent's advice clearly wrong. Respondent misled appellant. Respondent acted unconscionably.

R. v. Gouchie, 2006 CarswellNS 442, 2006 NSCA 109, 213 C.C.C. (3d) 250, 248 N.S.R. (2d) 167, 789 A.P.R. 167 (N.S. C.A.).

Issues as to limitations on legal aid funding and paralegal representation.

How can someone of such disreputable antecedents be allowed to address the court? In Ontario clinics assist inmates in presenting appeals but this issue is likely to continue to be significant. Nova Scotia court adopted Ontario case law and applied it to the appeal situation. It quoted, with approval, *R. v. Romanowicz* (1999), 26 C.R. (5th) 246, 45 M.V.R. (3d) 294, 124 O.A.C. 100, 138 C.C.C. (3d) 225, 178 D.L.R. (4th) 466, 45 O.R. (3d) 506, *(*sub nom. *R. c. Romanowicz)* 45 O.R. (3d) 532 (Fr.), 1999 CarswellOnt 2671, [1999] O.J. No. 3191 (Ont. C.A.):

> Surely, representation by an agent who has been shown to be incompetent or disreputable can imperil the accused's right to a fair trial and can undermine the integrity of the proceedings just as much as if an accused who was incapable of representing himself were required to proceed without counsel . . .

Deevy v. Canada (Minister of Social Development), 2006 CarswellNat 688, 2006 CarswellNat 2268, 2006 FCA 115, 2006 CAF 115, 350 N.R. 91 (F.C.A.).

Applicant in judicial review proceedings moved for an order permitting her to be represented by Fraser who was a registered nurse and a non-lawyer. The Federal Court of Appeal, per Sexton J.A., stated that it had been recognized that court might have inherent jurisdiction required to permit representation by a non-lawyer, if the interests of justice so required. However, the court dismissed application where Fraser did not appreciate the nature of judicial review or the procedures that were to be followed.

Chancey v. Dharmadi (2007), [2007] O.J. No. 2852, 2007 CarswellOnt 4664, 44 C.P.C. (6th) 158, 86 O.R. (3d) 612 (Ont. Master).

Defendant in civil action arising out of motor vehicle action retained paralegal to defend her on *Highway Traffic Act* charges arising out of same accident. Communications between defendant and paralegal privileged on application of Wigmore criteria.

Communications between defendant and the paralegal originated in a confidence that they would not be disclosed. The confidentiality was essential to the full and satisfactory maintenance of the relation between the defendant and the paralegal. The relation was one which in the opinion of the community ought to be sedulously fostered. Paralegals fill an affordability gap in the justice system. Access to justice is a goal to be sedulously fostered.

The Government of Ontario has recognized in the *Access to Justice Act* that paralegals play a pivotal role in the justice system. The Act imposes upon the Law Society in its development of rules for the regulation of paralegals "a duty to act so as to facilitate access to justice for the people of Ontario" (*Access to Justice Act*, *supra*, s. 7; amended *Law Society Act* s. 4.2(2)). The *Paralegal Rules of Conduct* provide that the Rules be interpreted in a way that recognizes that "a paralegal, as a provider of legal services, has an important role to play in a free and democratic society and in the administration of justice" (*Paralegal Rules of Conduct*, rule 1.03(b)). The failure of the court to protect as confidential communications between paralegal and client sends a message to the public that there is a "two-tier" justice system in effect.

Rockwood v. Newfoundland & Labrador, 2007 CarswellNfld 341, 826 A.P.R. 65, 2007 NLCA 68, 287 D.L.R. (4th) 471, 271 Nfld. & P.E.I.R. 65, 46 C.P.C. (6th) 86, [2007] N.J. No. 382, *(*sub nom. *R. v. Rockwood)* 164 C.R.R. (2d) 345 (N.L. C.A.).

[A Rule of Court holding that corporations must be represented by solicitors in court actions does not violate s. 15 of the *Charter*. Corporations are not "individuals" under s. 15. In any event, nothing of human dignity or stereotype is involved in such a rule, even if the corporation is closely held. The choice of a person to claim the benefits of incorporation means the person takes the disadvantages of doing so, as well.].

Respondent had challenged a rule of court that prevented a corporation from proceeding with an action otherwise than by a solicitor as a violation of s. 15(1) of the *Charter*.

See *Kosmopoulos v. Constitution Insurance Co. of Canada*, 1987 CarswellOnt 132, 1987 CarswellOnt 1054, [1987] S.C.J. No. 2, EYB 1987-68613, 22 C.C.L.I. 296, [1987] 1 S.C.R. 2, *(*sub nom. *Constitution Insurance Co. of Canada v. Kosmopoulos)* 34 D.L.R. (4th) 208, 74 N.R. 360, 21 O.A.C. 4, *(*sub nom. *Kosmopoulos v. Constitution Insurance Co.)* 36 B.L.R. 233, [1987] I.L.R. 1-2147 (S.C.C.) at page 11 (S.C.R.). Does s. 15(1) of the *Charter* apply to corporations? See *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, EYB 1989-66926, 1989 CarswellAlta 198, 1989 CarswellAlta 623, 1989 SCC 133, [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1 (S.C.C.) in part. *Law v. Canada (Minister of Employment & Immigration)*, 1999 CarswellNat 359, 1999 CarswellNat 360, [1999] S.C.J. No. 12, 170 D.L.R. (4th) 1, *(*sub nom. *Law v. Canada (Minister of Human Resources Development))* 60 C.R.R. (2d) 1, 236 N.R. 1, [1999] 1 S.C.R. 497, 43 C.C.E.L. (2d) 49, *(*sub nom. *Law v. Minister of Human Resources Development)* 1999 C.E.B. & P.G.R. 8350 (headnote only) (S.C.C.) refers to the violation of essential human dignity and

freedom through the imposition of disadvantage, stereotyping, or political or social prejudice.

Hill v. Toronto (City), [2007] O.J. No. 2232, 2007 CarswellOnt 3578, *(*sub nom. *Toronto (City) v. Hill)* 221 C.C.C. (3d) 189, 2007 ONCJ 253, 48 M.V.R. (5th) 55 (Ont. C.J.).

Paralegal agent on appeal should only bring allegations of incompetence against trial agent after personal investigation.

Trial agent should be provided with notice of allegations and given fair opportunity to respond. Accused entitled to effective assistance of paralegal practitioner where such representation chosen. Here there was absence of proper notice to trial agents and lack of proper supporting materials in further of allegations.

Elliott v. Chiarelli, 2006 CarswellOnt 6261, 83 O.R. (3d) 226 (Ont. S.C.J.).

Plaintiff consulted defendant paralegal after receiving eviction notice for non-payment of rent. Competent legal advisor would have attempted to negotiate repayment schedule with landlord or would have advised plaintiff to use her money for first and last month's rent for new apartment. Defendant fell below standard of care of ethical and competent paralegal. Defendant liable to plaintiff in negligence.

The trial judge decided the case on contract principles, and did not consider the negligence claim. The plaintiff appealed. Appeal allowed.

The defendant was liable in both negligence and breach of contract. The defendant's advice was bad.

In *West v. Eisner*, 1999 CarswellOnt 4017, [1999] O.J. No. 4705, 48 C.C.L.T. (2d) 274, 41 C.P.C. (4th) 378 (Ont. S.C.J.), Stinson J. assessed damages for malpractice against a paralegal. He suggested it made sense to apply a standard based on common sense and ordinary understanding, relying on commentary by the Supreme Court of Canada in *ter Neuzen v. Korn*, 1995 CarswellBC 593, 1995 CarswellBC 1146, [1995] S.C.J. No. 79, EYB 1995-67069, [1995] 10 W.W.R. 1, 64 B.C.A.C. 241, 105 W.A.C. 241, 188 N.R. 161, 11 B.C.L.R. (3d) 201, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577 (S.C.C.), at p. 701 S.C.R., p. 595 D.L.R.

Christie v. British Columbia (Attorney General), [2007] S.C.J. No. 21, 2007 CarswellBC 1117, 2007 CarswellBC 1118, *(*sub nom. *British Columbia (Attorney General) v. Christie)* 2007 D.T.C. 5525 (Eng.), *(*sub nom. *British Columbia (Attorney General) v. Christie)* 2007 D.T.C. 5229 (Fr.), 240 B.C.A.C. 1, 398 W.A.C. 1, *(*sub nom. *British Columbia (Attorney General) v. Christie)* 2007 G.T.C. 1493 (Fr.), 66 B.C.L.R. (4th) 1, 361 N.R. 322, *(*sub nom. *British Columbia (Attorney General) v. Christie)* 2007 G.T.C. 1488 (Eng.), 2007 SCC 21, 280 D.L.R. (4th) 528, [2007] 8 W.W.R. 64, *(*sub nom. *British Columbia (Attorney General) v. Christie)* [2007] 1 S.C.R. 873, *(*sub nom. *British Columbia (Attorney General) v. Christie)* 155 C.R.R. (2d) 366 (S.C.C.).

Appeal allowed. The alleged right to be represented by a lawyer in legal proceedings in which legal rights or obligations are in issue is a broad right that, if recognized, would lead to a constitutionally mandated legal aid scheme for almost all legal proceedings. Recognition of such a right would involve a significant change in the delivery of legal services and would impose a considerable burden on taxpayers.

The alleged right to be represented by counsel in legal proceedings cannot be based on the rule of law contained in the preamble to the *Canadian Charter of Rights and Freedoms*. The rule of law is explicitly and implicitly a foundational principle recognized as an aspect of the rule of law and it should not be so recognized in this case.

Dublin v. Montessori Jewish Day School of Toronto, 2007 CarswellOnt 1663, [2007] O.J. No. 1062, 38 C.P.C. (6th) 312, 281 D.L.R. (4th) 366, 85 O.R. (3d) 511 (Ont. S.C.J.); additional reasons at (2007), 2007 CarswellOnt 2338 (Ont. S.C.J.); leave to appeal allowed (2007), 2007 CarswellOnt 6097 (Ont. Div. Ct.).

Appeal allowed. E-mail message between client and lawyer who was acting in his professional capacity as a lawyer, sent in the context of obtaining legal advice, and was intended to be confidential. But for its content, it would be a communication for the purpose of obtaining legal advice and would therefore be protected by solicitor-client privilege. However, there was an exception to solicitor-client privilege for communications in furtherance of an illegal purpose. This exception included communications perpetrating tortuous conduct that might become the subject of civil proceedings. The exception to privilege for communications in furtherance of unlawful conduct was applicable to the message. It should have been disclosed to the plaintiffs in the first place and did not have to be returned.

Law Society (Manitoba) v. Pollock, [2007] M.J. No. 67, 2007 CarswellMan 80, 213 Man. R. (2d) 81, 2007 MBQB 51, 37 C.P.C. (6th) 125, [2007] 5 W.W.R. 147, 153 C.R.R. (2d) 131 (Man. Q.B.); affirmed 2008 CarswellMan 238, 2008 MBCA 61, [2008] 7 W.W.R. 493, 54 C.P.C. (6th) 4, 427 W.A.C. 273, 228 Man. R. (2d) 273 (Man. C.A.).

Paralegal advertised himself as agent who could help people with their court cases for fee. Law Society brought application for declaration paralegal not entitled to practise as lawyer and for injunction preventing him from doing so. Application granted in part. Section 20(2) of *Legal Profession Act* prohibited practice of law by person not member of Law Society except as permitted under other Act. Paralegal permitted under s. 802.1 of *Criminal Code* to act as agent in summary conviction proceedings under *Code* where maximum penalty was term of six months in prison or less. Use of term "advocate" in s. 9 of *Divorce Act* did not authorize individuals not licensed as lawyers to represent individuals in divorce proceedings. *Small Claims Practice Act* permitted filing of claim by someone other than party but did not permit appearing in court on behalf of party, nor did it permit provision of legal service to small claims litigants on commercial fee basis. *Human Rights Code* did not permit paralegal to act on behalf of other claimants in human rights matters. Section 20 of *Legal Profession Act* did not breach paralegal's rights under s. 2 or 7 of *Canadian Charter of Rights and Freedoms*.

R. v. Gouchie, 2006 CarswellNS 442, 2006 NSCA 109, 213 C.C.C. (3d) 250, 248 N.S.R. (2d) 167, 789 A.P.R. 167 (N.S. C.A.).

Accused sought to have F represent him as agent on application for appointment of counsel. F in prison and not lawyer. F not qualified to represent accused on application. Fact that F was inmate did not automatically bar him from assisting accused. F admitted to perjuring himself in other proceedings. Obvious from rambling and largely irrelevant submissions advanced by F that he would be entirely ineffective as accused's agent.

R. v. Kubinski, 2006 CarswellAlta 1817, 2006 ABPC 172 (Alta. Prov. Ct.).

Agent did not have any formal legal training. Many judges refused in past to allow this agent to represent clients at trial, but this fact was not communicated to accused. Agent exhibited questionable judgment in past cases by misrepresenting facts to court. Unethical and disreputable acts could imperil accused's right to fair trial and undermine integrity of proceedings.

Christie v. British Columbia (Attorney General), [2007] S.C.J. No. 21, 2007 CarswellBC 1117, 2007 CarswellBC 1118, (sub nom. *British Columbia (Attorney General) v. Christie)* 2007 D.T.C. 5525 (Eng.), (sub nom. *British Columbia (Attorney General) v. Christie)* 2007 D.T.C. 5229 (Fr.), 240 B.C.A.C. 1, 398 W.A.C. 1, (sub nom. *British Columbia (Attorney General) v. Christie)* 2007 G.T.C. 1493 (Fr.), 66 B.C.L.R. (4th) 1, 361 N.R. 322, (sub nom. *British Columbia (Attorney General) v. Christie)* 2007 G.T.C. 1488 (Eng.), 2007 SCC 21, 280 D.L.R. (4th) 528, [2007] 8 W.W.R. 64, (sub nom. *British Columbia (Attorney General) v. Christie)* [2007] 1 S.C.R. 873, (sub nom. *British Columbia (Attorney General) v. Christie)* 155 C.R.R. (2d) 366 (S.C.C.).

Is tax on legal services unconstitutional because it infringes right to access to justice of low-income persons? Is general constitutional right to counsel in court or tribunal proceedings dealing with a person's rights and obligations?

There is no general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations. The right to access the courts is not absolute and a legislature has the power under s. 92(14) of the *Constitution Act, 1867* to impose at least some conditions on how and when people have a right to access the courts. General access to legal services is also not a currently recognized aspect of, or a precondition to, the rule of law. The fact that s. 10(b) does not exclude a finding of a constitutional right to legal assistance in other situations, notably under s. 7 of the *Charter*, does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. The right to counsel outside the s. 10(b) context is a case-specific multi-factored enquiry.

The general right to be represented by a lawyer in a court or tribunal proceedings where legal rights or obligations are at stake is a broad right. This court is not in a position to assess the cost to the public that the right would entail.

It is argued that access to justice is a fundamental constitutional right that embraces the right to have a lawyer in relation to court and tribunal proceedings. See *B.C.G.E.U., Re*, EYB 1988-67021, 1988 CarswellBC 762, 1988 CarswellBC 363, [1988] S.C.J. No. 76, *(*sub nom. *B.C.G.E.U. v. British Columbia (Attorney General))* [1988] 6 W.W.R. 577, 30 C.P.C. (2d) 221, [1988] 2 S.C.R. 214, 220 A.P.R. 93, 53 D.L.R. (4th) 1, 87 N.R. 241, 31 B.C.L.R. (2d) 273, 71 Nfld. & P.E.I.R. 93, 44 C.C.C. (3d) 289, 88 C.L.L.C. 14,047 (S.C.C.). The right affirmed in *B.C.G.E.U.* is not absolute.

General access to legal services is not a currently recognized aspect of the rule of law. The S.C.C. has repeatedly emphasized the important role that lawyers play in ensuring access to justice and upholding the rule of law. See *Andrews v. Law Society (British Columbia)*, EYB 1989-66977, 1989 CarswellBC 16, 1989 CarswellBC 701, [1989] S.C.J. No. 6, 10 C.H.R.R. D/5719, [1989] 2 W.W.R. 289, 56 D.L.R. (4th) 1, 91 N.R. 255, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 36 C.R.R. 193, [1989] 1 S.C.R. 143 (S.C.C.), at p. 187 (S.C.R.); *MacDonald Estate v. Martin*, 1990 CarswellMan 384, [1990] S.C.J. No. 41, 1990 CarswellMan 233, EYB 1990-68602, [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, *(*sub nom. *Martin v. Gray)* [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 285 W.A.C. 241 (S.C.C.), at p. 1265 (S.C.R.); *Fortin c. Chrétien*, 2001 CarswellQue 1395, 2001 CarswellQue 1396, REJB 2001-25001, *(*sub nom. *Fortin v. Chrétien)* 201 D.L.R. (4th) 223, *(*sub nom. *Fortin v. Barreau du Québec)* 272 N.R. 359, 2001 SCC 45, [2001] 2 S.C.R. 500 (S.C.C.), at para. 49; *Law Society (British Columbia) v. Mangat* (2001), 2001 CarswellBC 2168, 2001 CarswellBC 2169, [2001] S.C.J. No. 66, 2001 SCC 67, 16 Imm. L.R. (3d) 1, 205 D.L.R. (4th) 577, 157 B.C.A.C. 161, 256 W.A.C. 161, 96 B.C.L.R. (3d) 1, 276 N.R. 339, [2002] 2 W.W.R. 201, [2001] 3 S.C.R. 113 (S.C.C.), at para. 43; *R. v. Lavallee, Rackel & Heintz*, [2002] S.C.J. No. 61, 2002 CarswellAlta 1818, 2002 CarswellAlta 1819, REJB 2002-33795, 216 D.L.R. (4th) 257, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 167 C.C.C. (3d) 1, 4 Alta. L.R. (4th) 1, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 164 O.A.C. 280, 2002 SCC 61, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 96 C.R.R. (2d) 189, [2002] 11 W.W.R. 191, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* [2002] 3 S.C.R. 209, 2002 D.T.C. 7267 (Eng.), 2002 D.T.C. 7287 (Fr.), 3 C.R. (6th) 209, [2002] 4 C.T.C. 143, 292 N.R. 296, 312 A.R. 201, 281 W.A.C. 201, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 217 Nfld. & P.E.I.R. 183, *(*sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 651 A.P.R. 183 (S.C.C.), at paras. 64-68, per LeBel J. (dissenting in part but not on this point). This is only fitting. Lawyers are a vital conduit through which citizens access the courts, and the law. They help maintain the rule of law by working to ensure that unlawful private and unlawful state action in particular do no got unaddressed. The role that

lawyers play in this regard is so important that the right to counsel in some situations has been given constitutional status.

Section 10(b) does not exclude a finding of a constitutional right to legal assistance in other situations. Section 7 of the *Charter*, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected. See *Dehghani v. Canada (Minister of Employment & Immigration)*, 1993 CarswellNat 57, 1993 CarswellNat 1380, EYB 1993-67290, [1993] S.C.J. No. 38, 18 Imm. L.R. (2d) 245, 101 D.L.R. (4th) 654, [1993] 1 S.C.R. 1053, 150 N.R. 241, 14 C.R.R. (2d) 1, 10 Admin. L.R. (2d) 1, 20 C.R. (4th) 34 (S.C.C.), at p. 1077 (S.C.R.); *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, REJB 1999-14250, 1999 CarswellNB 305, 1999 CarswellNB 306, [1999] S.C.J. No. 47, 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615, 244 N.R. 276, 177 D.L.R. (4th) 124, 26 C.R. (5th) 203 (S.C.C.). But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in *New Brunswick*, the court was at pains to state that the right to counsel outside of the s. 10(b) context is a case-specific multi-factored enquiry (see para. 86).

Law Society (British Columbia) v. Bryfogle, 2007 CarswellBC 2526, [2007] B.C.J. No. 2289, 73 B.C.L.R. (4th) 237, 2007 BCCA 511, 409 W.A.C. 283, 247 B.C.A.C. 283 (B.C. C.A.).

The Law Society of British Columbia sought an order to restrain the defendant from engaging in activities that constituted the practice of law and to prevent him from acting on his own behalf or on behalf of others in litigation without leave of court. Trial judge granted the order. Defendant appealed claiming that he was entitled to appear for clients for a fee as of right pursuant to a power of attorney and in fact in some of those proceedings, he had been given permission by the court to speak on behalf of others.

Appeal dismissed. Acting pursuant to a power of attorney did not permit a person who was not a lawyer to engage in conduct which constituted the practice of law The fact that the defendant was granted right of audience before one or more judges in the past did not preclude finding that he was unlawfully engaged in the practice of law on those occasions.

Law Society (Manitoba) v. Pollock, 2008 CarswellMan 238, 2008 MBCA 61, [2008] 7 W.W.R. 493, 54 C.P.C. (6th) 4, 427 W.A.C. 273, 228 Man. R. (2d) 273 (Man. C.A.).

Appeal from judge's decision granting permanent injunction against appellant in relation to various activities determined to amount to the unauthorized practice of law.

Appellant argued that ss. 6(1) and 11(1) of the *Small Claims Practices Act* permits "another person" or "someone" to act for a party and that because statute does not expressly state a non-lawyer cannot appear for a fee, s. 20 of *The Legal Profession Act* will not prevent him from providing representation on a commercial basis.

Appellant relied on decision in *Law Society (British Columbia) v. Mangat* (2001), REJB 2001-26158, [2001] 3 S.C.R. 113, 96 B.C.L.R. (3d) 1, [2002] 2 W.W.R. 201, 276 N.R. 339, 2001 CarswellBC 2169, 2001 CarswellBC 2168, 2001 SCC 67, 205 D.L.R. (4th) 577, 16 Imm. L.R. (3d) 1, 256 W.A.C. 161, 157 B.C.A.C. 161, [2001] S.C.J. No. 66 (S.C.C.), where it stated, ". . . Had Parliament wanted to declare that 'other counsel' means only unpaid persons, it would have said so by using distinctive terms in ss. 30 and 69(1)" (at para. 65). Unlike legislation in *Mangat*, the *Small Claims Practices Act* does not contain a provision authorizing non-lawyers to appear for a fee. No provision in *The Legal Profession Act* or the *Small Claims Practices Act* that authorizes non-lawyers to appear on a commercial basis before that court. No provision in the *Small Claims Practices Act* relating to expenses for such representation.

Law Society of Upper Canada v. Canada (Minister of Citizenship & Immigration), 2008 CarswellNat 5012, 2008 CarswellNat 2487, 295 D.L.R. (4th) 488, 383 N.R. 200, 2008 CAF 243, 2008 FCA 243, 72 Imm. L.R. (3d) 26 (F.C.A.).

The Regulations were introduced by the federal government in 2004 to regulate immigration consultants. Representation of clients in matters before the Immigration and Refugee Board for a fee had been limited to lawyers, notaries, students-at-law, and members of the Canadian Society of Immigration Consultants (CSIC). The court found that the Regulations did not discriminate where they did not permit lawyers' employees, including paralegals, to provide representation as the Parliament has power to create self-governing profession through regulations.

R. v. Toutissani, 2008 CarswellOnt 1688, [2008] O.J. No. 1174, 2008 ONCJ 139, Casey J. (Ont. C.J.); leave to appeal refused (2008), 2008 CarswellOnt 5424, 2008 CarswellOnt 5425, 390 N.R. 390 (note) (S.C.C.).

Application was made by the Crown for an order removing a non-lawyer as agent for the accused. The agent acknowledged that he was not a person licensed by the Law Society to provide legal services, but submitted that ss. 800 and 802 of the *Criminal Code* permitted him to appear as agent, notwithstanding the provisions of the Act.

Ontario Court of Justice held that Parliament's purpose in enacting sections 800(2), 802(2) and 802.1 of the *Criminal Code* was to permit defendants, in summary conviction proceedings, to be represented by either by counsel or by non-lawyer agents. This purpose is not frustrated by the *Law Society Act* which attempts to ensure that non-lawyers who are hired for a fee and appear for defendants in summary conviction matters are competent and qualified. Person could comply with both provisions of Act and Code and thus, application allowed.

Warner v. Balsdon (2008), 2008 CarswellOnt 2847, 237 O.A.C. 317, 63 C.C.L.I. (4th) 293, 91 O.R. (3d) 124 (Ont. Div. Ct.).

Appeal by defendant from order refusing to strike out cross-claim. The plaintiff sued the defendant for injuries and also sued paralegal for negligence in having settled her claim against defendant. The paralegal cross-claimed against the defendant, alleging that the defendant owed the plaintiff duty of care to negotiate fairly. Cross-claim dismissed.

If the release was upheld, then by its terms the plaintiff was barred from bringing an action against anyone who might claim contribution and indemnity from the defendant. The cross-claim was moot as the only damages claimed against paralegal were the damages received had release not been executed. The paralegal breached s. 398(1) of the *Insurance Act* which prohibited anyone from negotiating a settlement of a personal injury claim on behalf of a plaintiff or potential plaintiff.

Turner v. Rogers et al., Certiorari to the Supreme Court of South Carolina. Decided June 20, 2011.

The U.S. Supreme Court decision in *Turner v. Rogers* may greatly influence the judicial handling of civil self-represented litigation.

In *Turner*, a custodial maternal grandparent asked the court to penalize the father for failure to pay child support. Neither party had counsel, nor was the state a party. The judge imposed a 12-month civil contempt order, upheld on appeal to the South Carolina Supreme Court. At the urging of the United States, as *amicus curiae*, Justice Stephen Breyer's majority opinion reversed on the ground that in the absence of counsel, the judge's failure to provide procedural safeguards *sua sponte* constituted a violation of the father's due process rights.

Law Society of Upper Canada v. Ernest Guiste, 2011 ONLSHP 24.

A hearing panel of the Law Society ruled that lawyers' conduct during the mediation process is subject to the *Rules of Professional Conduct*. The panel found that the provisions of confi-

dentiality contained in an agreement to mediate was for the benefit of the parties and was not intended to protect lawyers from allegations of misconduct.

The lawyer, who was the subject of findings of professional misconduct, was alleged to have committed six acts of professional misconduct.

The allegation with respect to the conduct during mediation is:

> 1. On June 21, 2007, during a mediation in the matter of *D.L. v. N. Ltd. et al.*, the respondent failed to be courteous, civil, and act in good faith by using sexually explicit, rude, and profane language, and raising his voice at a mediation session, contrary to Rule 4.01(6) of the *Rules of Professional Conduct*:

(6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

Sahyoun v. Ho, 2011 BCSC 567, 2011 CarswellBC 1050 (B.C. S.C.).

The plaintiffs sought state-funded counsel under section 7 of the *Canadian Charter of Rights and Freedoms*. See *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, 1999 CarswellNB 305, 1999 CarswellNB 306, REJB 1999-14250, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, 216 N.B.R. (2d) 25, 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 552 A.P.R. 25, 7 B.H.R.C. 615, 244 N.R. 276, 177 D.L.R. (4th) 124, 26 C.R. (5th) 203 (S.C.C.), in support of this assertion. Right to state-funded counsel arising under the Chapter is *R. v. Rowbotham*, 1988 CarswellOnt 58, [1988] O.J. No. 271, 25 O.A.C. 321, 35 C.R.R. 207, 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.).

In *Christie v. British Columbia (Attorney General)*, 2007 SCC 21, 2007 CarswellBC 1117, 2007 CarswellBC 1118, [2007] S.C.J. No. 21, *(*sub nom. *British Columbia (Attorney General) v. Christie)* [2007] 1 S.C.R. 873, *(*sub nom. *British Columbia (Attorney General) v. Christie)* 2007 D.T.C. 5525 (Eng.), *(*sub nom. *British Columbia (Attorney General) v. Christie)* 2007 D.T.C. 5229 (Fr.), 240 B.C.A.C. 1, 398 W.A.C. 1, *(*sub nom. *British Columbia (Attorney General) v. Christie)* 2007 G.T.C. 1493 (Fr.), 66 B.C.L.R. (4th) 1, 361 N.R. 322, *(*sub nom. *British Columbia (Attorney General) v. Christie)* 2007 G.T.C. 1488 (Eng.), 280 D.L.R. (4th) 528, [2007] 8 W.W.R. 64, *(*sub nom. *British Columbia (Attorney General) v. Christie)* 155 C.R.R. (2d) 366 (S.C.C.), in a constitutional challenge to the *Social Service Tax Amendment Act (No. 2), 1993*, S.B.C. 1993, c. 24 based upon unwritten constitutional principles such as the rule of law and "access to justice," the court said:

> 25. Section 10(b) does not exclude a finding of a constitutional right to legal assistance in other situations, Section 7 of the *Charter*, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected: see *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at p. 1077; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus, in *New Brunswick*, the Court was at pains to state that the right to counsel outside of the s. 10(b) context is a case-specific multi-factored enquiry (see para. 86).

See further *Holland (Guardian ad litem of) v. Marshall*, 2008 BCSC 1899, 2008 CarswellBC 3288 (B.C. S.C. [In Chambers]); affirmed 2010 BCCA 164, 2010 CarswellBC 912, 3 B.C.L.R. (5th) 352 (B.C. C.A.); leave to appeal refused 2010 CarswellBC 2645, 2010 CarswellBC 2646, [2010] S.C.C.A. No. 224, *(*sub nom. *Holland v. Marshall)* 410 N.R. 395 (note), *(*sub nom. *Holland v. Marshall)* 300 B.C.A.C. 320 (note), *(*sub nom. *Holland v. Marshall)* 509 W.A.C. 320 (note) (S.C.C.). See also *D. (P.) v. British Columbia*, 2010 BCSC 290, 2010 CarswellBC 571, [2010] B.C.J. No. 405, 7 B.C.L.R. (5th) 312, 82 R.F.L. (6th) 180, 210 C.R.R. (2d) 1 (B.C. S.C.).

Present action does not involve any state action or involvement. The fact that some of the defendants are bodies or individuals that represent various levels of government does not

change this. Section 7 is not engaged and provides no support for the plaintiffs' application for state-funded counsel.

Section 15(1) of the *Charter* provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Poverty is not one of the enumerated grounds listed in section 15. In *Affordable Energy Coalition, Re*, 2009 NSCA 17, 2009 CarswellNS 79, *(*sub nom. *Boulter v. Nova Scotia Power Inc.)* 275 N.S.R. (2d) 214, *(*sub nom. *Boulter v. Nova Scotia Power Inc.)* 877 A.P.R. 214, *(*sub nom. *Boulter v. Nova Scotia Power Inc.)* 307 D.L.R. (4th) 293 (N.S. C.A.), Fichaud J.A.; leave to appeal refused 2009 CarswellNS 485, 2009 CarswellNS 486, *(*sub nom. *Boulter v. Nova Scotia Power Inc.)* 293 N.S.R. (2d) 400 (note), *(*sub nom. *Boulter v. Nova Scotia Power Inc.)* 199 C.R.R. (2d) 375 (note), *(*sub nom. *Boulter v. Nova Scotia Power Inc.)* 400 N.R. 394 (note), *(*sub nom. *Boulter v. Nova Scotia Power Inc.)* 928 A.P.R. 400 (note) (S.C.C.), for the court, at paras. 32–44, determined that poverty is not an analogous ground under section 15(1).

There is no legal basis for the section 15 submission that Dr. Sahyoun seeks to advance.

Specific orders made:

i) The present action is stayed;

ii) The plaintiffs' application for state-funded counsel is dismissed;

iii) The plaintiffs' application for advance or interim costs is dismissed; and

iv) The plaintiffs' challenge to the validity of Rule 20-2(4) is dismissed.

Jacob v. Pool, 2011 ABPC 321, 2011 CarswellAlta 2282, 514 A.R. 114 (Alta. Prov. Ct.).

The case involved the purchase and sale of a property. The plaintiffs were the buyers.

Damages totalling $1,150 were awarded to the plaintiffs.

The trial took place over three days. The court observed a certain lack of decorum and courtesy between the parties. The court was required to chide both sides when each would display a lack of courtesy to the other. The plaintiffs would regularly interrupt witnesses, even their own, and would on occasion not allow the witnesses to finish their answers before purporting to ask further questions.

The court was particularly concerned with the plaintiffs' demeanour during their cross-examination of witnesses, as they would prove to be argumentative with the witnesses. Questions were often posed without the facts necessary to support the question. See Williston and Rolls in their text, *The Conduct of an Action*, (1982, Butterworths, Toronto). Pages 119 to 120 make it clear:

> . . . that a party may cross-examine any witness not called by him on all facts in issue and on all matters subsequently relevant to the credibility of the witness, and on such cross-examination, may ask the witness leading questions, but the section goes on to provide that a party shall not allege or assume facts on cross-examination unless he is in a position to substantiate them.

While self-represented non-legally-trained people will be given full access to dispute resolution by the courts, this does not mean that the trial process and the rules associated with the conduct of a trial will be waived or ignored.

The remaining claims against the defendants were dismissed.

Pardar v. McKoy, 2011 ONSC 2549, 2011 CarswellOnt 3059, [2011] O.J. No. 2092 (Ont. Div. Ct.).

The respondent commenced proceedings in Small Claims Court against the applicant. The respondent's representative was a paralegal. The applicant's motion to prevent the respon-

dent's representative from representing the respondent in proceedings was dismissed. The applicant sought judicial review. The application was dismissed. There was no breach of natural justice. Small Claims Court has jurisdiction to determine who can appear before it.

Divisional Court has jurisdiction to hear appeal from a final order of the Small Claims Court pursuant to section 31 of the *Courts of Justice Act*. Court also has jurisdiction to judicially review decisions of a Small Claims Court judge, *including* interlocutory orders. However, as *per Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.):

> [T]his Court is reluctant to interfere with a decision of a Small Claims Court judge on judicial review unless it is an order made without jurisdiction or in breach of principles of natural justice. (para. 3).

This is, in essence, an appeal.

> The purpose of Small Claims Court is to provide expeditious and low-cost settlement of monetary disputes. That purpose is reflected in the legislation that does not permit an appeal from interlocutory orders.

Application for judicial review dismissed. Costs fixed at $5,000.

Law Society of Upper Canada v. David Robert Conway, 2011 ONLSHP 33 (Ont. L.S.H.P.).

Lawyer found guilty of professional misconduct for practicing while suspended.

Fact that Lawyer had applied for a P1 licence did not allow him to continue to provide legal services as a paralegal in Small Claims Court while application pending.

By-Law 4 amendment of January 24, 2008 (Exhibit 14) which provides the following:

> Applicants for a paralegal licence may *not* also be licensed as a lawyer.

By-Law 4 amended to provide that lawyer licensees, including those whose licences are suspended, may not also be licensed as a paralegal. This reflects the new licensing regime whereby a licence to practise law (for lawyers) and a licence to provide legal services (for paralegals) are separate.

Under the new paralegal regulatory scheme, anyone who did not hold an L1 licence and who wished to provide or to continue to provide legal services was required to apply for a P1 licence. Those that applied and had no impediment to their application going forward, were granted a P1 licence. Those that declared some prior conduct that raised issues of good character were put in the good character hearing process. Those that had an impediment to even being considered, like the suspended Lawyer, were advised that their applications would not be processed unless and until they had surrendered their L1 licences.

The panel is also of the view that when the Law Society advised the suspended Lawyer of its position, his remedy was by way of Judicial Review of its refusal to process his application for a P1 licence.

Law Society of Upper Canada v. Chiarelli, 2014 ONCA 391, 2014 CarswellOnt 6275, 120 O.R. (3d) 561, 373 D.L.R. (4th) 320, 321 O.A.C. 116, [2014] O.J. No. 2328 (Ont. C.A.); leave to appeal refused 2015 CarswellOnt 1136, 2015 CarswellOnt 1137, [2014] S.C.C.A. No. 326 (S.C.C.).

Applicant, Chiarelli, operates sole proprietorship called "Landlord Services". In 2007, the *Law Society Act* was amended to provide for the regulation of paralegals by the Law Society. Prior to the change, Chiarelli operated as a paralegal. Chiarelli withdrew from the licensing process when faced with a good character hearing. In July 2011, the Law Society began an investigation after complaints about unauthorized legal services. Chiarelli had appeared on multiple occasions before the Landlord and Tenant Board. Chiarelli took the position that he fit within the definition of "landlord" under the *Residential Tenancies Act* because he acted as a "personal representative" of the landlord. The Law Society's application for a perma-

nent injunction was granted. Chiarelli was providing legal services. He was not exempt from licensing requirements found in the *Law Society Act*. The C.A. dismissed the appeal.

Barreau du Québec c. Québec (Procureure générale), 2017 CSC 56, 2017 SCC 56, 2017 CarswellQue 9479, 2017 CarswellQue 9478, *(*sub nom. *Barreau du Québec v. Quebec (Attorney General))* [2017] 2 S.C.R. 488, 26 Admin. L.R. (6th) 181, 420 D.L.R. (4th) 575, [2017] S.C.J. No. 56 (S.C.C.).

It was reasonable for the Administrative Tribunal of Québec to conclude that, under the Act respecting administrative justice, a person who is not an advocate may, in certain proceedings, do everything needed for the representation of the Minister of Employment before the tribunal's social affairs division, and this power is not in conflict with the Act respecting the Barreau du Québec.

Sauvé c. Oceania Cruises Inc., 2017 QCCQ 50 (C.Q.) & *Fortin c. Norwegian Cruise Line*, 2017 QCCQ 78 (C.Q.).

In these two cases before the Small Claims Court of Québec, the court held that the defendant cruise lines may not be represented by lawyers. Questions with respect to the application of Canadian maritime law and the interpretation of *Marine Liability Act* are not considered to be complex questions of law under section 542 of the Québec *Code of Civil Procedure*. The law requires specific circumstances before a company may be represented by a counsel before the Small Claims Court. Questions of application of Canadian maritime law of the international conventions incorporated therein are not "complex issues on a point of law", as required by the CCP. The fact that Small Claims Court judges have little or no experience with this body of law does not mean that the issues themselves are complex.

Ayangma v. Charlottetown (City) et al., 2017 PECA 15, 2017 CarswellPEI 37, 4 C.P.C. (8th) 1, 415 D.L.R. (4th) 708 (P.E.I. C.A.); leave to appeal refused *Sebastien Ayangma v. City of Charlottetown, et al.*, 2018 CarswellPEI 90, 2018 CarswellPEI 91 (S.C.C.)

The Respondents brought a motion for an order prohibiting the Applicant's father from continuing to act as agent for his son in lawsuit against Respondents. The motions judge found the father was effectively practising law and was barred from doing so. An order prohibiting his involvement was issued. The C.A. found the motions judge had made errors of law and ordered the matter be remitted back to first instance. "The application for leave to appeal dismissed with costs by the SCC" on October 4, 2018.

27. (1) Evidence — Subject to subsections (3) and (4), the Small Claims Court may admit as evidence at a hearing and act upon any oral testimony and any document or other thing so long as the evidence is relevant to the subject-matter of the proceeding, but the court may exclude anything unduly repetitious.

(2) Idem — Subsection (1) applies whether or not the evidence is given or proven under oath or affirmation or admissible as evidence in any other court.

(3) Idem — Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible by reason of any privilege under the law of evidence; or

(b) that is inadmissible by any Act.

(4) Conflicts — Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

(5) Copies — A copy of a document or any other thing may be admitted as evidence at a hearing if the presiding judge is satisfied as to its authenticity.

Commentary: Evidence law in Small Claims Court is substantially relaxed and deformalized, by virtue of *Courts of Justice Act* s. 27 (found above, in Chapter 2).

That broad discretion to admit and act upon any evidence, other than evidence rendered inadmissible by statute or by the law of privilege, is specific to the Small Claims Court. As a more specific rule of evidence, s. 27 may trump other generally-applicable rules of evidence such as the business records hearsay exception in s. 35 of the *Evidence Act*, R.S.O. 1990, c. E.23: see *VFC Inc. v. Balchand*, 2008 CarswellOnt 909, 291 D.L.R. (4th) 367, 233 O.A.C. 359 (Ont. Div. Ct.). Since hearsay may be admitted in Small Claims Court, it is almost unheard of for the court to hear argument over the common law exceptions to the hearsay rule.

Indeed the common law hearsay rule is itself reversed by s. 27(2), which specifically permits the admission of evidence whether or not the evidence would be admissible in any other court. In the often-cited decision in *Central Burner Service Inc. v. Texaco Canada Inc.*, 1989 CarswellOnt 1427, 36 O.A.C. 239, [1989] O.J. No. 1612 (Ont. Div. Ct.), it was held that s. 27 permits the court to admit hearsay evidence. However the *caveat* as explained by Steele J. is that when admitted as evidence, hearsay is normally given less weight than direct evidence. The purpose of the section is "to avoid technical procedures and the additional cost of calling extra witnesses in cases involving small claims."

Those two cases are probably the most important two cases necessary to properly understand the law of evidence in Small Claims Court under *Courts of Justice Act* s. 27. Earlier authorities to the same effect are *Rajakaruna v. Air France*, 1979 CarswellOnt 430, 25 O.R. (2d) 156, 11 C.P.C. 172 (Ont. H.C.); *Howard v. Canadian National Express*, 1980 CarswellOnt 477, 23 C.P.C. 77 (Ont. Sm. Cl. Ct.).

Despite the general rule that hearsay is given less weight than direct evidence, weight is a matter for the trier of fact. There may be the occasional case where an item of hearsay evidence may be decisive of a contested factual matter if accepted by the court: *Sathaseevan v. Suvara Travel Canada Inc.*, 1998 CarswellOnt 880, [1998] O.J. No. 1055 (Ont. Div. Ct.).

The broad discretion given to the Small Claims Court by s. 27 displaces the evidentiary rules found in the *Rules of Civil Procedure*, which as stated in subrule 1.02(1) of those rules, do not apply in Small Claims Court: see *Nicholson v. Wolanski* (2017), 2017 ONSC 7000, 2017 CarswellOnt 18548, [2017] O.J. No. 6111 (Div. Ct.) at para. 25..

The discretion to reject evidence as inadmissible remains in place even if it is exercised less frequently than in other courts. As a broad general proposition, contested evidence when ruled inadmissible often involves multiple grounds for objection. For example, hearsay evidence may be more likely to be ruled inadmissible if it is multi-layer hearsay (evidence which the witness heard from X, who heard it from Y, who perhaps heard it from somewhere else). More often in the digital age, hearsay may be offered in the form of information printed from the internet. Occasionally the information is unattributed or may be the product of any number of different and/or unknown authors, with little to no information about their qualifications or the basis for statements made. It may be impossible for the court to know what if any value the evidence may possess. Where in such situations the court can only guess at the value of tendered evidence, it may be excluded under s. 27.

Forms of Evidence

Generally there are five forms of evidence which are commonly seen in Small Claims Court:

1. **Agreed facts**. This mode of presentation is, unfortunately, underutilized. Agreed or stipulated facts always have the potential to streamline trial presentation and reduce trial time. Parties always have the option to put their heads together before trial and list the agreed facts as a Statement of Agreed Facts and tender that agreement as Exhibit 1.

However few or many the agreed facts may be, agreement avoids any need to take the in-person witnesses through those facts in any detail or at all.

2. **Documents**. These may be introduced either (i) the traditional way, by having each document identified by a relevant witness before asking that they be marked as exhibits; or (ii) under rule 18.02, without the need for the traditional identification procedure. Rule 18.02 is the presumptive tool for admission of documentary evidence, given that in the normal course most or all key documents will have been disclosed in advance of trial whether as attachments to pleadings, as part of the settlement conference process, or at least 30 days before trial.

3. **In-Person Testimony**. In-person witnesses may be called to testify by the parties, as in other courts. Witnesses other than the parties themselves may or may not need to be formally summonsed under rule 18.03. In practice third party witnesses tend to have some connection to the parties and will attend voluntarily so that the formal summons process is used much less frequently than in other courts. Witnesses may be examined in-chief, cross-examined and re-examined but all examinations are generally kept brief.

4. *Photographs and audio-visual recordings*. As with other documents these may be introduced through an in-person witness or through rule 18.02. Parties intending to rely on such evidence are responsible for the mechanics of presentation. For electronically stored material, this means having the necessary laptop or other device and ensuring it will interface with the court's equipment; in addition if the material is to be made an exhibit the party tendering the evidence must provide it in an appropriate physical format.

5. *Real or demonstrative evidence*. Occasionally a party may wish to file an object as evidence. For example in a case about the quality of wood finish, it may be appropriate to file a sample of the finished wood as an exhibit.

In-Person Testimony

To keep trials to a sensible duration, parties need to be practical about the number of in-person witnesses who may be necessary. The need for some witnesses may often be avoided through agreed facts or documents admitted under rule 18.02 including written statements or reports.

Each witness may be examined in-chief by the party tendering the witness. Examination-in-chief is required to be conducted by way of open questions and not leading questions. What are leading questions?

> Leading questions are questions that suggest an answer or assume a state of facts that is in dispute.
>
> See *R. v. W. (E.M.)*, 2011 SCC 31, 2011 CarswellNS 392, 2011 CarswellNS 393, [2011] 2 S.C.R. 542, 305 N.S.R. (2d) 1, 270 C.C.C. (3d) 464, 335 D.L.R. (4th) 89, 966 A.P.R. 1, 417 N.R. 171, [2011] S.C.J. No. 31 (S.C.C.) at para. 9, McLachlin C.J. (for the majority)

In a case where the colour of a motor vehicle is in dispute, a leading question would be: "The vehicle was red, wasn't it?" Or "Was the vehicle red?" An open question would be: "What colour was the vehicle?"

Improper leading on key points during examination-in-chief may generate successful objections. Even if the leading is not objected to, the judge may note that the witness was lead on that point and discount that evidence accordingly.

Leading one's own witness on introductory matters such as the identity, background and qualifications of the witness, and on undisputed factual matters, is not improper and often desirable to save time.

Cross-examination on the other hand is generally comprised of leading questions, which are permitted and encouraged. In traditional rule passed down by trial lawyers since the begin-

ning of time is not to ask a question on cross-examination if you don't already know what the answer will be. That is a good rule but not an absolute rule. The art of cross-examination requires judgment and instinct to be exercised by the cross-examiner. In Small Claims Court, without the benefit of pretrial examinations for discovery, cross-examiners often face a higher level of uncertainty than in other courts. Overall, cross-examinations in this court tend to be relatively brief and that uncertainty is undoubtedly one of the reasons for that reality.

Parties should never cross-examine a witness merely because they can. Rather it is essential for the cross-examiner to ask him or herself whether something is likely to be gained by asking whatever questions are under consideration. Having no questions on cross-examination does not mean that the cross-examiner accepts the in-chief evidence of that witness.

Re-examination is limited to addressing new matters raised on cross-examination. It is often unnecessary to re-examine and where necessary, it tends to be a matter of a few minutes at most.

Expert Evidence

Expert reports are specifically listed in rule 18.02(2) as documents which shall be received in evidence once served at least 30 days before trial, unless the court orders otherwise. A party served with an expert report then has the right to summons the expert for cross-examination under rule 18.02(4). This process is intended to simplify the process for admission of expert evidence, while reducing the time required at trial to hear that evidence in-person.

In *Deverett Law Offices v. Pitney* (2017), 2017 ONSC 6346, 2017 CarswellOnt 16448, [2017] O.J. No. 5513 (Div. Ct.), it was held to be an error for the trial judge to have discounted the contents of an expert report admitted under rule 18.02 on the basis that the expert was not made available for cross-examination. The trial judge's position was contrary to the terms of rule 18.02.

In *Hervieux v. Huronia Optical*, 2016 ONCA 294, 2016 CarswellOnt 8096, 399 D.L.R. (4th) 63, 348 O.A.C. 205 (Ont. C.A.), it was held that the plaintiff would be entitled to call participant expert evidence at trial despite not having served any expert report pursuant to a settlement conference judge's order. Therefore his action should not have been dismissed on motion under rule 12.02 for non-compliance with that order or because there was no expert evidence available to support his professional malpractice claim. The case deals with motions under rule 12.02 and the proper way to interpret and enforce settlement conference orders dealing with service of expert reports. But it holds that the formal requirements of rule 53.03 of the *Rules of Civil Procedure* are not mandatory in Small Claims Court: *Rill v. Adams*, [2017] O.J. No. 4644 (Div. Ct.) at para. 13~~.~~; leave to appeal denied [2018] O.J. No. 2485 (C.A.).

There have been a variety of approaches taken by trial judges on the procedure where an expert is presented to give in-person evidence in the absence of prior service of a report giving notice to the other party of the substance of his or her evidence. Unlike the *Rules of Civil Procedure* (rule 53.03) and the *Family Law Rules* (rules 23(23) & (24)) the *Small Claims Court Rules* contain no general requirement for service of an expert report as a prerequisite to presenting the expert evidence through the in-person testimony of the expert. Instead the *Small Claims Court Rules* provide in rule 18.02 that where a party intends to rely on an expert report without calling the expert to testify in person, the report must be served at least 30 days before trial.

Nordheimer J. (as he then was), writing for the panel in *Riddell v. Apple Canada Inc.*, 2016 ONSC 6014, 2016 CarswellOnt 14847, [2016] O.J. No. 5934 (Ont. Div. Ct.); affirmed 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.);

leave to appeal refused *Matthew Riddell v. Apple Canada Inc.*, 2018 CarswellOnt 9253, 2018 CarswellOnt 9254, [2017] S.C.C.A. No. 470 (S.C.C.), stated at para. 21:

> 21 . . . Unlike the *Rules of Civil Procedure*, the *Small Claims Court Rules* do not require, as a prerequisite to calling an expert witness, that an expert report be delivered to the other side: *Steckley v. Haid*, [2009] O.J. No. 2014 (Sm. Cl. Ct.); M.A. Zuker & J.S. Winny, *Ontario Small Claims Court Practice*, 2016 (Toronto: Carswell, 2016), at p. 215. To the contrary, the *Small Claims Court Rules* appear to proceed on the basis that, in the usual course, a party will not call his or her own expert but will, rather, deliver the expert's report, which is admissible on its own (r. 18.02(1)), and then leave it to the opposing party to summons the expert for purpose of cross-examination (r. 18.02(4)), if they wish to do so . . .

In dismissing the plaintiff's appeal from that decision, the Court of Appeal for Ontario specifically approved of the "clear and cogent reasons" of the Divisional Court: 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.) at para. 2; ; leave to appeal refused *Matthew Riddell v. Apple Canada Inc.*, 2018 CarswellOnt 9253, 2018 CarswellOnt 9254 (S.C.C.).

Similarly, M.R. Labrosse J. sitting as a Divisional Court in *Untinen v. Dykstra*, 2016 ONSC 4721, 2016 CarswellOnt 11985, 70 C.L.R. (4th) 202 (Ont. Div. Ct.) at para. 32, held that in the context of a Small Claims Court trial, "it would be an error to apply Rule 53.03 of the *Rules of Civil Procedure*." While it was desirable that parties serve an expert report under rule 18.02, there is no absolute requirement to do so. In that case an employee of the defendant was allowed to give opinion evidence with no expert report having been served, and no *voir dire* was conducted. The plaintiff argued on appeal that the opinion evidence should not have been entertained without prior service of a report and without a *voir dire* and formal ruling on the expert's qualifications. Justice Labrosse considered the authorities along with *Courts of Justice Act* s. 27 and rule 18.02 of the *Small Claims Court Rules*, and concluded that the trial judge made no error in admitting and acting on the opinion evidence.

The most recent discussion of this issue was in *Richard v. 2464597 Ontario Inc.* (2019), 2019 ONSC 2104, 2019 CarswellOnt 4889, [2019] O.J. No. 1625 (Div. Ct.). In that veterinary malpractice case, neither party formally tendered any expert evidence on the standard of care. However the plaintiff relied on the opinion evidence of a veterinarian who was involved in the care of the dog which gave rise to the claim. The veterinarian's evidence was not formally tendered as expert evidence and it appears he was called as a witness for the defence and that the substance of his opinion evidence emerged on cross-examination. The negligence claim succeeded at trial and the defendant appealed. The appeal was dismissed. The appeal court reviewed the law of expert evidence as applicable in Small Claims Court and made the following key findings:

- in professional negligence cases, expert evidence is generally required but the two exceptions are (i) where the matter involves non-technical matters; and (ii) where the defendant's actions are so egregious that it is obvious the standard of care has been breached even if the precise parameters of the standard are not established (citing *495793 Ontario Ltd. v. Barclay*, 2016 ONCA 656, 2016 CarswellOnt 13829, 132 O.R. (3d) 241, 31 C.C.L.T. (4th) 63, 352 O.A.C. 290, [2016] O.J. No. 4615 (Ont. C.A.) at paras. 53-57) (at para. 36 of *Richard*)

- the veterinarian was a participant expert and not an expert hired for the litigation (citing *Westerhof v. Gee Estate*, 2015 ONCA 206, 2015 CarswellOnt 3977, 124 O.R. (3d) 721, 47 C.C.L.I. (5th) 246, 384 D.L.R. (4th) 343, 77 M.V.R. (6th) 181, 331 O.A.C. 129, [2015] O.J. No. 1472 (Ont. C.A.); additional reasons 2015 ONCA 456, 2015 CarswellOnt 9294 (Ont. C.A.); leave to appeal refused *Baker v. McCallum*, 2015 CarswellOnt 16499, 2015 CarswellOnt 16500 (S.C.C.); leave to appeal refused *Gee Estate v. Westerhof*, 2015 CarswellOnt 16501, 2015 CarswellOnt 16502 (S.C.C.) (at para. 39 of *Richard*)

- the fact that the veterinarian "did not testify formally as an expert witness does not mean that the deputy trial judge erred in considering his evidence in determining the proper standard of care given the flexibility of admitting expert evidence at a Small Claims Court trial." (at para. 47)
- the trial judge retains the discretion to determine the admissibility of evidence and how expert evidence will be placed before the court (citing *Prohaska v. Howe*, 2016 ONSC 48, 2016 CarswellOnt 13, [2016] O.J. No. 13 (Ont. Div. Ct.) at para. 32 (at para. 48 of *Richard*)
- the discretion to admit evidence is found in *Courts of Justice Act* s. 27 (at para. 49)

The Divisional Court concluded its analysis of the law with the following at para. 50:

> 50 The formal requirements for the introduction of expert witnesses are not necessarily required in Small Claims Court. For example, there is no requirement that a *voir dire* take place prior to hearing expert evidence: see *Sutherland Estate v MacDonald*, [1999] O.J. No. 785 (Small Claims Ct). An expert report is not required to be filed in order for an expert to give evidence at a Small Claims Court trial: *Steckley v. Haid*, [2009] O.J. No. 2014 (Small Claims Ct.); *Prohaska v. Howe*, *supra*. Nor does a witness have to be explicitly tendered as an expert witness to give an expert opinion: see *Untinen v. Dykstra*, 2016 ONSC 4721 (Div. Ct.), at paras. 9, 29-31.

Based on these recent appellate pronouncements, it now appears clear that the admissibility of expert evidence in Small Claims Court is governed by *Courts of Justice Act* s. 27. Accordingly, it is wrong to approach the admissibility of such evidence as if at a trial in the Superior Court of Justice. Rule 53.03 of the *Rules of Civil Procedure* does not apply in Small Claims Court and there is no requirement for a formal *voir dire* and ruling on qualification before the court receives the opinion evidence. Like in the case of hearsay evidence, the common law rule has been reversed by s. 27. Opinion evidence, like hearsay evidence, is not presumptively inadmissible but rather, the court retains a general discretion over the admissibility of all evidence, under s. 27. That discretion must be exercised reasonably and with due regard for the purposes of s. 27 which are to facilitate access to justice by reducing legal technicalities and containing the costs of litigating small cases.

Case Law: *Mullins v. Morgan*, 2010 ONSC 5722, 2010 CarswellOnt 8681 (Ont. Div. Ct.).

Although hearsay may be admitted in Small Claims Court, there is no requirement that it be admitted. Section 27 gives the court a discretion to admit such evidence.

Central Burner Service Inc. v. Texaco Canada Inc. (1989), 36 O.A.C. 239 (Ont. Div. Ct.).

Section 80 permits the admission of hearsay evidence, provided it is relevant. There is no distinction between critical issues and more peripheral issues. Where the trial judge states that appropriate weight is to be given to the evidence, an appeal from the judgment was dismissed even though there was little or no other evidence to support the plaintiff's case.

Wilson, King & Co. v. Torabian, Doc. SMC 21328/89 (B.C. Prov. Ct.); reversed 1991 CarswellBC 21, 45 C.P.C. (2d) 238, 53 B.C.L.R. (2d) 251 (B.C. S.C.).

The plaintiff sued the defendant for a legal account. The court brought up the question of Solicitor/Client privilege. Provincial Judge R.S. Murro stated that the provincial court had no inherent jurisdiction to order a Solicitor's bill to be taxed. If the defendant client refuses to waive his right to privilege, the plaintiff cannot adduce evidence and therefore the claim must fail.

Sathaseevan v. Suvara Travel Canada Inc., 1998 CarswellOnt 880, [1998] O.J. No. 1055 (Ont. Div. Ct.).

Appeal from decision of Small Claims Court awarding plaintiff damages. All evidence from the plaintiff was hearsay from the people who actually booked flight. The Small Claims

Court is, pursuant to section 27 of the *Courts of Justice Act*, entitled to admit and act upon any oral testimony or document whether or not admissable in any other court. *Central Burner Service Inc. v. Texaco Canada Inc.* (1989), 36 O.A.C. 239 (Ont. Div. Ct.) held that the Small Claims Court may decide cases entirely on the basis of hearsay evidence. The test is whether the trial judge was clearly wrong. Given the power of the trial judge to rely on hearsay evidence pursuant to the Act, appeal court not satisfied that he was.

Levin, Re (1997), 217 N.R. 393 (H.L.).

Levin claimed, *inter alia*, a print-out produced respecting fraud allegedly generated from Levin's computer should not have been admitted because of hearsay. The House of Lords stated that print-outs were tendered "to prove the transfers of funds, not that such transfers took place. Evidential status of print-outs no different from that of a photocopy of a forged cheque.".

VFC Inc. v. Balchand (2007), 2007 CarswellOnt 6344, [2007] O.J. No. 3793 (Ont. Div. Ct.).

Issue of jurisdiction of Small Claims Court to admit hearsay into evidence on the central issue in dispute. Since 1989 weight of authority, commencing with Justice Steele's decision in *Central Burner Service Inc. v. Texaco Canada Inc.* (1989), 36 O.A.C. 239 (Ont. Div. Ct.), is in favour of the admissibility of hearsay in a Small Claims Court proceeding pursuant to s. 80 (now s. 27) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. See also *Sathaseevan v. Suvara Travel Canada Inc.*, 1998 CarswellOnt 880, [1998] O.J. No. 1055 (Ont. Div. Ct.).

Hearsay evidence permitted under the *Rules of the Small Claims Court*, O. Reg. 258/98. Rule 18.02(1) grants a discretion to the trial judge with respect to admitting documents or other evidence: "A document or written statement or an audio or visual record that has been served, at least 30 days before the trial date, on all parties who were served with the notice of trial, shall be received in evidence, unless the trial judge orders otherwise.".

Section 27(3)(b) of the *Courts of Justice Act* reads: "Nothing is admissible in evidence at a hearing that is inadmissible by any Act." Section 27(3)(b) would appear to qualify s. 27(1).

Section 2 of the *Evidence Act*, R.S.O. 1990, c. E-23, reads as follows: "This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction.".

The issue therefore becomes: What is the relationship between s. 2 of the *Evidence Act* and s. 27 of the *Courts of Justice Act*? Is hearsay admissible in a Small Claims Court case absent compliance with the *Evidence Act*?

Neither the appellant nor the respondent addressed this issue in their factums. They have both asked for additional time to amend their factums accordingly. A new date for the appeal to be set with concurrence of the Registrar of the Divisional Court, once factums amended.

VFC Inc. v. Balchand, 2008 CarswellOnt 909, 233 O.A.C. 359, 291 D.L.R. (4th) 367 (Ont. Div. Ct.).

Appeal to Divisional Court by defendant, now appellant, pursuant to s. 31(a) of the *Courts of Justice Act* from the judgment of the Toronto Small Claims Court.

Appeal originally came on for hearing before Archibald J. Appellant argued trial judge wrongly relied on hearsay evidence to find appellant liable to respondent under a Conditional Sales Contract. Respondent pointed to s. 27(1) of the *Courts of Justice Act* and a line of decisions commencing with judgment of Steele J. in *Central Burner Service Inc. v. Texaco Canada Inc.* (1989), 36 O.A.C. 239 (Ont. Div. Ct.). Section 27(1) permits the Small Claims Court to admit as evidence at a hearing and act upon any oral testimony and any document or other thing, so long as the evidence is relevant. In *Central Burner*, Steele J. concluded that s. 80(1) of the *Courts of Justice Act*, the predecessor of s. 27(1), allows relevant hearsay evidence to be admitted and relied upon in a Small Claims Court trial even in relation to a critical issue. His decision has been followed in a number of cases, including the

judgment of Lane J. in *Sathaseevan v. Suvara Travel Canada Inc.*, 1998 CarswellOnt 880, [1998] O.J. No. 1055 (Ont. Div. Ct.).

Archibald J. was concerned, however, that none of the cases had considered the significance of s. 27(3)(b) of the *Courts of Justice Act*. He went on to note that s. 2 of the *Ontario Evidence Act* provides, "This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction.".

Nothing in the *Ontario Evidence Act* to call into question the admissibility of hearsay at a Small Claims Court trial, even when the hearsay is contained in business records. Appeal dismissed.

Sparks v. Benteau, 2008 CarswellNS 42, 2008 NSSM 3 (N.S. Sm. Cl. Ct.).

Issue of Benteau coming to court with witnesses other than himself.

Written statements purely hearsay, second hand evidence, letters or documents stating what a person would say if he or she were in court.

The right to cross-examine a cornerstone of our system of justice, and while many self-represented litigants exercise this right sparingly, still a vital right. Having the witness in court also would allow the Adjudicator to ask pointed questions that might help decide the issue. See, *e.g.*, *L.A. Oakes Resource Systems Inc. v. Metex Corp.*, 2007 CarswellNS 471, 260 N.S.R. (2d) 186, 831 A.P.R. 186, 2007 NSSM 71 (N.S. Sm. Cl. Ct.). See also *Malloy v. Atton*, [2004] N.S.J. No. 217, 2004 CarswellNS 218, 50 C.P.C. (5th) 176, 2004 NSSC 110, 225 N.S.R. (2d) 201, 713 A.P.R. 201 (N.S. S.C.) where the Adjudicator received affidavits, with no opportunity for cross-examination. In allowing the appeal and overturning the decision, the learned Justice said:

> I interpret [the *Small Claims Court Act*] as giving an Adjudicator the discretion to admit or exclude affidavit evidence, provided there is compliance with the rules of natural justice.
>
> The Nova Scotia Civil Procedure Rules, although not directly applicable in Small Claims Court, may be consulted for guidance in the absence of an applicable Small Claims Court rule. Civil Procedure Rule 38.10 provides that the deponent of an affidavit to be used at trial may be examined, cross-examined, and re-examined.

The claim here seeks damages close to the $25,000 maximum allowed. To relax such a fundamental rule of natural justice as the right to cross-examine witnesses in a case of this size would, in my opinion, be a gross failure to provide natural justice to the claimant.

Only credible quote produced by claimant.

Aberdeen v. Langley (Township), 2006 CarswellBC 3634, 2006 BCSC 2064 (B.C. S.C.).

Plaintiff's witness made prior written inconsistent statement, which was admitted in evidence. Defendants sought to admit as evidence various police documents that were created by the police for statistical and investigative purposes and were based on hearsay discussions with the Plaintiff's witness.

Ruling was made that under principled approach, it was not necessary for police officer to introduce hearsay evidence about what was already before court in written form. Inconsistent statement was written; in such cases, Court of Appeal has held that further evidence of statement's contents is inadmissible.

Lombard Insurance Co. v. Stock Transportation Ltd., 2007 CarswellNS 607, [2007] N.S.J. No. 540, 2007 NSSM 83, 261 N.S.R. (2d) 12, 835 A.P.R. 12 (N.S. Sm. Cl. Ct.).

Issue arose as to admissibility of an unsworn recorded statement to insurance adjuster. The court held that such statement is admissible, except for parts that might have been tainted by leading questions. Although hearsay is presumptively inadmissible, functional approach and need for flexibility applies in dealing with exceptions to hearsay evidence. The fact that

author of the statement was named as defendant in actions did not detract from admissibility. Statement could be tested against others who provided evidence.

Petti v. George Coppel Jewellers Ltd. (2008), 2008 CarswellOnt 1324, 234 O.A.C. 85 (Ont. Div. Ct.).

Propriety of relying on polygraph evidence in legal proceedings. In legal proceedings, polygraph tests may be approached from three perspectives: (1) whether the taking of the polygraph test was volunteered or, if offered, rejected; (2) the questions asked and the answers given on the test; and, (3) the results of the test.

With respect to (1) above, the fact that a litigant volunteered to take a polygraph test is relevant (See *e.g.*, *R. v. B. (S.C.)* (1997), 36 O.R. (3d) 516 at para. 29 (Ont. C.A.)).

The questions and answers on a polygraph test — (2) above — may be admissible where, for example, the answers constitute an admission against interest.

The results of a polygraph test — (3) above — are not admissible in an Ontario court, as those results "usurp the very function of the trier of fact". And, if the results are tendered by a litigant who passed the test, they are tantamount to oath helping.

Appeal allowed as trial judge relied on the results of the polygraph tests, at least in part, when reaching his decision to dismiss the claim. Results of polygraph test should not be used to help decide the truth of the facts in dispute.

Boisvert v. Régie de l'assurance-maladie du Québec, 2004 CarswellQue 1341, 2004 CarswellQue 1342, REJB 2004-65745, *(*sub nom. *Bibaud v. Quebec (Régie de l'assurance maladie))* 240 D.L.R. (4th) 244, 50 C.P.C. (5th) 1, 2004 SCC 35, *(*sub nom. *Bibaud v. Quebec (Régie de l'assurance maladie))* 321 N.R. 273, [2004] 2 S.C.R. 3 (S.C.C.).

Appellant wished to intervene, pursuant to art. 208 C.C.P., to represent her husband in an action brought by him against the respondents, on the ground that he was incapable of representing himself because of his physical and mental state. Appeal dismissed. The legislative framework in the Quebec courts set out in the *Code of Civil Procedure* and in the *Act respecting the Barreau du Québec*. Representation by spouses, relatives, in-laws or friends is only allowed in cases falling within the jurisdiction of the small claims division of the Court of Québec (art. 959 C.C.P.). Representatives of other persons must themselves be represented in the courts, for acts covered by the monopoly granted to the legal profession, by members of the Barreau in good standing.

R. v. L. (G.Y.) (2009), [2009] O.J. No. 3089, 246 C.C.C. (3d) 112, 2009 CarswellOnt 4350 (Ont. S.C.J.).

Paralegal licensed and insured by the Law Society of Upper Canada may appear in the Ontario Court of Justice pursuant to a duly executed designation under s. 650. *Criminal Code* for the purpose of routine remands for indictable offences. Designation appointed lawyer as his counsel of choice, and designated his "counsel, articling student, or agent acting on his behalf to appear for all proceedings where [his] attendance is not required by law or the direction of the Ontario Court of Justice.".

Law Society (Manitoba) v. Pollock, 228 Man. R. (2d) 273, 427 W.A.C. 273, 54 C.P.C. (6th) 4, [2008] 7 W.W.R. 493, 2008 MBCA 61, 2008 CarswellMan 238 (Man. C.A.).

Appeal from judge's decision granting permanent injunction against appellant in relation to various activities determined to amount to the unauthorized practice of law. Appeal dismissed with costs.

Appellant relied on Supreme Court of Canada decision in *Law Society (British Columbia) v. Mangat* (2001), REJB 2001-26158, [2001] 3 S.C.R. 113, 96 B.C.L.R. (3d) 1, [2002] 2 W.W.R. 201, 276 N.R. 339, 2001 CarswellBC 2169, 2001 CarswellBC 2168, 2001 SCC 67, 205 D.L.R. (4th) 577, 16 Imm. L.R. (3d) 1, 256 W.A.C. 161, 157 B.C.A.C. 161, [2001]

S.C.J. No. 66 (S.C.C.), where it stated, ". . . Had Parliament wanted to declare that 'other counsel' means only unpaid persons, it would have said so by using distinctive terms in ss. 30 and 69(1)" (at para. 65).

The Supreme Court of Canada concluded in *Mangat* that the terms "counsel" and "person's own expense" found in ss. 30 and 69(1) of the *Immigration Act* were to be interpreted as authorizing non-lawyers to appear for a fee. It stated (at para. 64):

> The *Immigration Act* and the Rules and Regulations made thereunder make no distinction between barrister and solicitor who could act for a fee and other counsel who could not. If parliament had intended to limit the meaning of "other counsel" to unpaid non-lawyers, the section would have been drafted differently so as to make it clear that the phrase "at [that] person's own expense" only referred to barristers and solicitors and not to other counsel.

VFC Inc. v. Balchand, 291 D.L.R. (4th) 367, 233 O.A.C. 359, 2008 CarswellOnt 909 (Ont. Div. Ct.).

Defendant appealed judgment of Small Claims Court finding her liable under a bill of sale and conditional sales contract for purchase of motor vehicle. The only witness called by plaintiff was the supervisor of the legal department, not present when bill of sale and conditional sales contract signed but saw documents when forwarded to plaintiff.

Trial judge dismissed defendant's motion for a non-suit, bill of sale and conditional sales contract bearing apparent signature of defendant, in the absence of evidence to the contrary, established defendant was a party to the contract and liable for the amount owing. Appeal dismissed.

Nothing in the *Evidence Act*, R.S.O. 1990, c. E.23, calls into question the admissibility of hearsay at a Small Claims Court trial, even when the hearsay is contained in business records. Section 35 of the *Evidence Act* provides a statutory mechanism for the admission of business records into evidence and section 27(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, permits hearsay evidence to be admitted into evidence. A consideration of these provisions leads to the conclusion that the trial judge did *not* err in law in admitting into evidence the oral and documentary hearsay of the plaintiff's witness. See *Central Burner Service Inc. v. Texaco Canada Inc.*, 1989 CarswellOnt 1427, 36 O.A.C. 239 (Ont. Div. Ct.). Section 27(1) permits the Small Claims Court to admit as evidence at a hearing and act upon any oral testimony and any document or other thing, so long as the evidence is relevant. In *Central Burner*, Steele J. concluded that section 80(1) of the *Courts of justice Act, 1984*, S.O. 1984, c. 11, the predecessor of section 27(1), allows relevant hearsay evidence to be admitted and relied upon in a Small Claims Court trial even in relation to a critical issue. See also *Sathaseevan v. Suvara Travel Canada Inc.*, [1998] O.J. No. 1055, 1998 CarswellOnt 880 (Ont. Div. Ct.).

Section 27(1) is, by its terms, subject to subsections (3) and (4). Section 2 of the *Ontario Evidence Act*, R.S.O. 1990, c. E.23, provides, "This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction.".

Section 35 of the *Evidence Act* deals with business records.

If a party to any proceeding governed by the *Ontario Evidence Act* proposes that a business record be received in evidence pursuant to section 35(2), the proponent of the evidence must comply with the section. The record must be made in the usual and ordinary course of business as described in section 35(2), and notice must be given in accordance with section 35(3).

Prior to the liberalizing impact of the decision in *Ares v. Venner*, 14 D.L.R. (3d) 4, 73 W.W.R. 347, 12 C.R.N.S. 349, [1970] S.C.R. 608, 1970 CarswellAlta 142, [1970] S.C.J. No. 26, 1970 CarswellAlta 80 (S.C.C.), the common law rules governing the admissibility of business records were widely felt to be completely out of line with the every-increasing complexity of business organizations.

The object of section 80(1) of the *Courts of Justice Act*, the predecessor of section 27(1) of the Act, was remedial. As stated in *Central Burner*, "The object of s. 80 is to avoid technical procedures and the additional cost of calling extra witnesses in cases involving small claims.".

A *prima facie* case is one that covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent. See *Montreuil c. Forces canadiennes*, 2009 CarswellNat 5464, 2009 CarswellNat 5463, 2009 CHRT 28, 2009 TCDP 28 (Can. Human Rights Trib.), at para. 45 Deschamps (Member).

Stone's Jewellery Ltd. v. Arora (2009), 2009 ABQB 656, 2009 CarswellAlta 1883, 484 A.R. 286, 90 R.P.R. (4th) 90, 314 D.L.R. (4th) 166, [2010] 5 W.W.R. 297, 20 Alta. L.R. (5th) 50, [2009] G.S.T.C. 168, [2010] 2 C.T.C. 139 (Alta. Q.B.).

An exhibit relating to meeting between parties marked "without prejudice" should not be considered. Document stated on face it was without prejudice, providing *prima facie* evidence that meeting held on that basis. No evidentiary basis to rebut *prima facie* evidence.

Parkway Collision awarded judgment for a towing bill paid on behalf of Ryan and charges for storage of vehicle for $1,298.50. Ryan appealed, arguing trial judge erred in rejecting the evidence of bylaw tow rates in surrounding areas because bylaw not produced. Divisional Court, per Stong J., stated that: "In rejecting oral evidence of By-laws of other municipalities, which By-laws were not in fact presented to the court, the trial judge rejecting collateral and hearsay evidence the acceptance of which would have been simply opinion of a third party and not subject to cross-examination": *Parkway Collision Ltd. v. Ryan*, 2009 CarswellOnt 6266, 255 O.A.C. 74 (Ont. Div. Ct.).

Ring v. Canada (Attorney General), 2010 NLCA 20, 2010 CarswellNfld 86, [2010] N.J. No. 107, 297 Nfld. & P.E.I.R. 86, 918 A.P.R. 86, 86 C.P.C. (6th) 8, 72 C.C.L.T. (3d) 161 (N.L. C.A.); leave to appeal refused 2010 CarswellNfld 304, 2010 CarswellNfld 305, 410 N.R. 399 (note), 309 Nfld. & P.E.I.R. 362 (note), 962 A.P.R. 362 (note) (S.C.C.).

The application judge admitted affidavit of plaintiff's expert. Appeal allowed. It was error in law to admit affidavit of plaintiff's expert for purpose of proof of content of published texts or papers discussed by her. All such papers and texts remained inadmissible hearsay in absence of author of work or expert in proper field who was prepared to adopt work. Findings could not be made on basis of published scientific treatises discovered on research of judge or bibliographer.

The hearing officer erred in law in purporting to take judicial notice that combined effects of consumption of alcohol and percocets would negatively impact on an individual's ability to perceive and recall experienced events. Subject was neither notorious nor within any specialized knowledge of tribunal, and properly the subject of expert evidence: *McCormick v. Greater Sudbury Police Service*, 2010 CarswellOnt 1871, 2010 ONSC 270, 259 O.A.C. 226, 6 Admin. L.R. (5th) 79 (Ont. Div. Ct.).

. . . the plain meaning of "independent evidence" is evidence other than that of the claimant which does not emanate from a spouse or dependant relative. If the drafters of the policy intended to further reduce the categories of individuals capable of providing corroborative evidence, they could have done so. See *Pepe v. State Farm Mutual Automobile Insurance Co.*, 85 C.C.L.I. (4th) 315, 2010 CarswellOnt 3422, 2010 ONSC 2977, [2010] I.L.R. I-4996, 101 O.R. (3d) 547 (Ont. S.C.J.); affirmed 2011 ONCA 341, 2011 CarswellOnt 2889, [2011] O.J. No. 2011, 105 O.R. (3d) 794, 98 C.C.L.I. (4th) 1, 282 O.A.C. 157 (Ont. C.A.).

Canada (Privacy Commissioner) v. Air Canada, [2010] F.C.J. No. 504, 2010 CarswellNat 1052, 2010 FC 429, 367 F.T.R. 76 (Eng.), 2010 CarswellNat 2898, 2010 CF 429 (F.C.).

A passenger requested a personal file from an airline. The airline asserted privilege over reports of flight attendant, witness and other airline personnel. Privacy commissioner (PC) alleged documents were not privileged. PC brought application for order regarding privilege of documents and requiring airline to provide passenger with documents. The application was granted in part. Day-to-day work done by unlicensed paralegal under supervision of lawyer could still be privileged.

Delano v. Craig, 2010 CarswellNS 264, 2010 NSSC 60 (N.S. S.C.).

The plaintiff brought claim in small claims court concerning dispute over lawn mower. Mechanic was not present in court in spite of fact that he had been subpoenaed. The plaintiff did not want opportunity to enforce subpoena, due to circumstances making it difficult for mechanic to attend. The letter had not been provided to defendants prior to court. The adjudicator did not admit letter into evidence. The plaintiff's claim was dismissed. The plaintiff appealed. Appeal dismissed.

Fullerton v. Poirier, 2012 PECA 22, 2012 CarswellPEI 49, 329 Nfld. & P.E.I.R. 54, 1022 A.P.R. 54 (P.E.I. C.A.).

Appeal from decision dated March 23, 2012, of Justice Campbell of the Supreme Court of Prince Edward Island sitting in Small Claims Court. The trial judge dismissed the appellant's claim and awarded costs of $100. to the respondent.

We recognize that the Small Claims Court Rules of Civil Procedure may be somewhat relaxed in that any evidence that is relevant may be admitted. However, any decision relating to the admission of evidence is an exercise of discretion by the trial judge, and this court cannot intervene in the exercise of a trial judge's discretion unless the trial judge exercised his discretion arbitrarily, capriciously or upon an incorrect or inapplicable principle of law.

The trial judge found that no aspect of the claim was proven.

The trial judge assessed the evidence before him and he made findings which are amply supported by the evidence.

Appeal dismissed with costs in the amount of $500.

Untinen v. Dykstra, 2016 ONSC 4721, 2016 CarswellOnt 11985, 70 C.L.R. (4th) 202, Justice Labrosse (Ont. Div. Ct.).

Untinen appeals from the Reasons of Judgment of trial judge of the Small Claims Court arising from claim for damages from respondent Dykstra's installation of a new roof on the appellant's home. The appeal concerns decision of trial judge to allow representative of IKO to provide opinion evidence without having filed an expert report prior to trial.

Appeal allowed in part. The trial judge properly exercised his discretion with respect to the opinion evidence and in refusing to grant the Sanderson Order. Trial judge erred in his interpretation of the evidence.

After reading section 27 of the *Courts of Justice Act*, there is no absolute obligation pursuant to the *Rules of the Small Claims Court* to file a written report prior to trial and the discretion to admit opinion evidence without a report having been filed in advance of trial lies with the trial judge. Parties should comply with Rule 18.02 and file expert reports in advance. However, the Rule was not drafted to be mandatory.

Error to apply Rule 53.03 of the *Rules of Civil Procedure*. Given the nature of the proceedings in the Small Claims Court and frequent presence of self-represented litigants, appropriate to have the trial judge retain jurisdiction for the admission of evidence as provided in section 27 of the *Courts of Justice Act*.

The appellant alleges that the trial judge made an error in principle in referring to the endorsement of the settlement conference judge in his cost decision. This endorsement was provided to the trial judge during costs submissions by the respondents.

The court disagrees with the trial judge that the disclosure of the endorsement would not be a breach of Rule 13.03(4) of the *Rules of the Small Claims Court*. It does appear to disclose discussions held at a settlement conference. Also, it is irrelevant in a costs decision that a conditional settlement was not finalized following a settlement conference. However, it is apparent that the endorsement of the settlement conference judge did not directly affect the result on costs. Court substitutes the trial judge's award of $500 for the hot sealing of the affected areas with the amount of $2,000 and grant to the appellant against the respondent Dykstra in the amount of $2,250.

Commentary [S. 27(5)]: The Small Claims Court has its own rules of evidence, which are significantly more flexible than the evidence law which applies in other courts. The general rule is section 27(1) of the *Courts of Justice Act*, which provides a very broad discretion for the court to admit and act upon "any oral testimony and any document or other thing." The only categories of evidence which are not subject to the broad discretion under section 27(1), are (a) evidence that is protected by the law of privilege; and (b) evidence that is inadmissible by statute: see s. 27(3).

The most common example of how section 27 operates is hearsay evidence. By virtue of section 27(1), hearsay may be admitted as evidence in Small Claims Court proceedings: *Central Burner Service Inc. v. Texaco Canada Inc.*, 1989 CarswellOnt 1427, 36 O.A.C. 239 (Ont. Div. Ct.). If admitted, because it is less reliable, hearsay is usually entitled to less weight than other evidence. The court must decide the facts and in some cases hearsay evidence may be determinative: *Sathaseevan v. Suvara Travel Canada Inc.*, 1998 CarswellOnt 880, [1998] O.J. No. 1055 (Ont. Div. Ct.).

Section 27 applies specifically to the Small Claims Court and it may displace other rules dealing with the admissibility of evidence. For example, documents which do not qualify for admission as business records under section 35 of the *Evidence Act*, R.S.O. 1990, c. E.23, may nevertheless be admitted under section 27: see *VFC Inc. v. Balchand*, 2008 CarswellOnt 909, 233 O.A.C. 359, 291 D.L.R. (4th) 367 (Ont. Div. Ct.).

Section 27(2) provides that section 27(1) applies whether or not the evidence is given under oath or affirmation or is admissible in any other court. In *O'Brien v. Rideau Carleton Raceway Holdings Ltd.*, 1998 CarswellOnt 293, [1998] O.J. No. 500, 34 C.C.E.L. (2d) 199, 109 O.A.C. 173 (Ont. Div. Ct.), the court dismissed an appeal from a judgment after a trial at which none of the witnesses were placed under oath or affirmation. While the failure to administer the oath or affirmation is unusual and does not reflect the court's usual practice, that case illustrates the flexibility of the Small Claims Court's discretion over the admissibility of evidence.

Admission of Documents under Rule 18.02

The most commonly-used method to admit documents in the Small Claims Court is under rule 18.02. Any document or thing may be admitted under rule 18.02, if it was served at least 30 days before trial, and if certain information about the author was provided. That procedure avoids the need to introduce documents through a witness who provides the necessary background evidence to explain the nature, origin, and content of a document.

Rule 18.02 is often misinterpreted. The rule provides a procedure for the admission of documents which have been served on the other parties at least 30 days before trial, without the need for an in-person witness. It does not say that no document can be admitted at trial unless it was disclosed at least 30 days before trial: see *O'Connell v. Custom Kitchen & Vanity*, 1986 CarswellOnt 414, 56 O.R. (2d) 57, 11 C.P.C. (2d) 295, 17 O.A.C. 157 (Ont. Div. Ct.); *Parkkari v. Lakehead Aluminum Ltd.*, 2014 ONSC 4167, 2014 CarswellOnt 10930, 324 O.A.C. 8, [2014] O.J. No. 3711 (Ont. Div. Ct.). Rule 18.02 is an enabling provision and not a prohibition. It enables the admission of documents which might otherwise be

excluded as hearsay. Documents not admitted under rule 18.02 may be admitted by other means such as through an in-person witness.

Under rule 18.02(3), documents must include or have appended to them the name, telephone number, and address for service of the witness or author of the document, and, if the witness or author is to give expert evidence, a summary of his or her qualifications. If that information is not provided, then even if the document was served 30 days before trial the rule does not apply. Theoretically the trial judge could dispense with compliance with the information requirements, or could adjourn the trial if necessary.

A party who receives a document served under rule 18.02 and who wishes to cross-examine that witness or author at trial has the option to serve a summons on that person, with payment or tender of attendance money: rules 18.02(4) and (6). A copy of the summons must also be served on the other parties: rule 18.02(5).

Rule 18.02 is an enabling rule which facilitates the admission of documents which would be hearsay in the absence of a live witness to identify them. It serves to avoid the cost to the tendering parties of calling witnesses in addition to presenting the documents themselves. A party who invokes rule 18.02 effectively elects not to call the author of the document for examination-in-chief. The other party may elect to cross-examine the witness, but if so that party bears the onus and the expense to summons the person and to pay the necessary attendance money.

No Documents are Admitted Prior to Trial

Because copies of various documents are often attached to the pleadings and/or attached to the List of Proposed Witnesses (Form 13A) filed for the settlement conference, some parties assume that those copies of documents are part of the evidence at trial simply because they are already in the court file before the trial starts. That is wrong. Until the trial starts, nothing has been admitted as evidence. Documents which are intended by a party to become evidence must be tendered to the trial judge as such, and once admitted they are marked as exhibits. Documents are not evidence at trial merely because they have been placed in the court file prior to trial: see *Maguire v. Maguire*, 2003 CarswellOnt 1671, [2003] O.J. No. 1760, 38 R.F.L. (5th) 300 (Ont. Div. Ct.), dealing with an analogous point under the *Family Law Rules*, O.Reg. 114/99.

List of Proposed Witnesses

The List of Proposed Witnesses (Form 13A) that is required for the settlement conference under rule 13.03(2) does not limit a party's right to call witnesses at trial. Some parties misinterpret the rules as precluding a party from calling any witness not named on a List of Proposed Witnesses. However the *Small Claims Court Rules* contain no such limitation: see *Kungl v. Fallis*, 1988 CarswellOnt 360, 26 C.P.C. (2d) 102 (Ont. H.C.), dealing with a similar issue under the *Rules of Civil Procedure*.

Expert Evidence

See the commentary below under Rule 18 — Evidence at Trial.

Apart from rule 18.02, unlike some other procedural codes, the *Small Claims Court Rules* contain no requirement for service of an expert report in advance of trial as a prerequisite to calling the expert to give in-person opinion evidence at trial: *Steckley v. Haid*, 2009 CarswellOnt 9868, 15 C.L.R. (4th) 85, [2009] O.J. No. 2014 (Ont. Sm. Cl. Ct.). A party who wishes to present expert evidence through in-person testimony is not required to serve an expert report prior to trial; however, any potential surprise or unfairness where expert evidence is tendered without prior notice could be grounds for an adjournment request.

Note, however, that some judges consider prior service of an expert report to be a necessary precondition to admission of the in-person evidence of the expert. For example, in *Prohaska v. Howe*, 2016 ONSC 48, 2016 CarswellOnt 13, [2016] O.J. No. 13 (Ont. Div. Ct.), it was

held that the trial judge had a discretion to apply Rule 53.03 of the *Rules of Civil Procedure* in Small Claims Court.

Agreed Facts

Although the *Small Claims Court Rules* make no such provision, it is always open to the parties to agree to facts which are admitted or uncontested, so as to shorten their trial and focus the presentation of evidence — and their trial judge's attention — on the real factual issues. Agreed facts can be written out, signed by the parties, and made an exhibit. Less formally, parties may sometimes state or stipulate agreed facts at the start of trial during opening statements. Such agreements can be most helpful in ensuring a focused and expeditious trial. The quality of the parties' presentations is likely to affect the quality of the judgment that results.

Electronic Records

There is no doubt that today many documents are stored electronically. Accordingly, most of the jurisdictions have enacted specific legislation to deal with electronic documents. See the *Ontario Evidence Act*, s. 34.1.

The legislation does not create any new hearsay exception. Rather, the concern with electronic records is authenticity and maintaining confidence in the integrity of the stored information. Electronic documents, therefore, need to be admitted under existing common law and statutory hearsay exceptions. For example, a deceased's online diary — if admissible for its truth — is still hearsay. What this does mean is that business records, electronically stored, will need to comply with the business record exception, in terms of hearsay, and meet statutory or common law requirements in terms of authenticity. See, *e.g.*, *McGarry v. Co-operators Life Insurance Co.*, 2011 BCCA 214, 2011 CarswellBC 998, 18 B.C.L.R. (5th) 353, 93 C.C.E.L. (3d) 179, 96 C.C.L.I. (4th) 169, 333 D.L.R. (4th) 533, [2011] 8 W.W.R. 653, 304 B.C.A.C. 238, 2011 C.E.B. & P.G.R. 8434, [2011] I.L.R. I-5139, 513 W.A.C. 238 (B.C. C.A.) at [54–77]; ; additional reasons (2011), 2011 BCCA 272, 2011 CarswellBC 3719, 29 B.C.L.R. (5th) 356, 99 C.C.E.L. (3d) 37, 5 C.C.L.I. (5th) 267, 342 D.L.R. (4th) 685, [2012] 6 W.W.R. 429 (B.C. C.A.).

28. Instalment orders — The Small Claims Court may order the times and the proportions in which money payable under an order of the court shall be paid.

Commentary: This provision is often overlooked. The court may make an instalment order at trial. The defendant may simply ask for such an order and give his or her reasons. In some cases an instalment order may facilitate satisfaction of a judgment in a way that is preferable, from both parties' perspectives, to spending time and money on enforcement steps if such steps are not truly necessary.

29. Limit on costs — An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding.

2006, c. 21, Sched. C, s. 105(2)

Commentary: For commentary on costs in the Small Claims Court, please refer to the earlier chapter entitled A Self-Help Overview, on p. 5, and rules 14.07 and 19.

See *Kakamin v. Hasan* (2005), 2005 CarswellOnt 4066, [2005] O.J. No. 2778 (Ont. Sm. Cl. Ct.).

> Failure to accept a reasonable offer to settle, made at least seven days before trial and not withdrawn before trial, is evidence of unreasonable behaviour in the conduct of the proceeding, for which the maximum penalty is double costs: Small Claims Court Rule 14.07(1).
>
> The whole scheme is that the Small Claims Court has the authority to fix costs in its discretion (s. 131, CJA), but only to a maximum of 15% of the value of the claim (s. 29 CJA), unless there is a finding of unreasonable behaviour in the conduct of the proceeding (s. 29, CJA), of which failure to accept a reasonable offer to settle is one example (Rule 14.07), whether the award is characterized as counsel fee, compensation for inconvenience and expense, or costs (Rule 19).

See *King v. K-W Homes Ltd.* (2006), [2006] O.J. No. 5104, 2006 CarswellOnt 8358 (Ont. Sm. Cl. Ct.), N.B. Pickell, Deputy J., which dealt with the issue of costs.

Deputy Judge Pickell then turned his mind to the question of representation fee. He first looked at s. 29 and its 15 per cent limit, if it was not necessary to penalize a party, counsel or agent for unreasonable behaviour in the proceeding, and indicated that he did not find it reasonable to penalize anyone for unreasonable behaviour in the case.

He allowed the defendant a representation fee of $2,400.00.

See *Williams v. Roberge* (2007), [2007] O.J. No. 2567, 2007 CarswellOnt 4182, D.J. Lange, Deputy J. (Ont. Sm. Cl. Ct.)

Deputy Judge Lange interpreted the phrase "representation fee at trial" (in R. 19.04) to mean the daily representation fee. A reasonable representation fee at trial for this action was the $1,000.00 as submitted by the defendants.

See *Dalton v. MacKinnon* (2007), [2007] O.J. No. 1712, 2007 CarswellOnt 2766, D.J. Lange, Deputy J. (Ont. Sm. Cl. Ct.)

The objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding rather than an amount fixed by the actual costs incurred by the successful party. In his view, a reasonable representation fee at trial was $750.00 on a partial indemnity basis before a consideration of R. 14.07(1). He then went on to double the amount to $1,500.00, based upon R. 14.

See *McCallister v. Wiegand* (March 16, 2009), Doc. 0251/05, [2009] O.J. No. 1097, D.J. Lange, Deputy J. (Ont. Sm. Cl. Ct.)

There were no reasons for imposition of a penalty in this case.

He looked at Rule 57.01 of the Rules of Civil Procedure as identifying as a factor the "amount of costs that an unsuccessful party could reasonably be expected to pay." Considering the costs submission of the defendant Grace Wiegand, and the straightforward nature of the proceeding, a partial indemnity rate of $250.00 should apply, and that accordingly the total representation fee at trial was to be $500.00.

See *Georgina Collision Specialists Inc. v. Okjan* (November 8, 2007), Doc. 18084/03, 18084/03A, [2007] O.J. No. 4327, P. Gollom, Deputy J. (Ont. Sm. Cl. Ct.)

The trial had taken two and a half days. Deputy Judge Gollom fixed the Defendant's costs at $2,000.00, and allowed the Defendant's disbursements in the amount of $1,071.26.

See *Beatty v. Reitzel Insulation Co.* (2008), 2008 CarswellOnt 1364, [2008] O.J. No. 953, Winny, Deputy J. (Ont. Sm. Cl. Ct.)

Unreasonable behaviour should permit rule 14.07 to operate in tandem with the court's discretion under the proviso in section 29.

Plaintiff had sued for $10,000.00, and was awarded $200.00. The defendant's claim of $1,897.11 was allowed.

Deputy Judge Winny stated that the cost consequences of a party's failure to accept a reasonable offer should be meaningful consequences. To interpret section 29 as if it were a *de facto* bar or effective cap on the operation of rule 14.07 is undesirable and unwarranted.

Deputy Judge Winny concluded that section 29 was *not* intended to cap the costs at 15 per cent in such circumstances, and awarded costs of $1,000.00, which he then doubled to $2,000.00.

See *Biggins v. Bovan* (February 10, 2005), Doc. 1078/04, [2005] O.J. No. 1000, J.D. Searle Deputy J. (Ont. Sm. Cl. Ct.) There were three defendants represented by one counsel. The trial took three days and argument, apart from costs, a further half-day. The plaintiff was found to have brought these actions in a vindictive fashion.

Deputy Judge Searle awarded costs of $2,500.00 for counsel fee, preparation and disbursements.

Case Law: *Serodio v. White* (1994), 5 W.D.C.P. (2d) 153 (Ont. Sm. Cl. Ct.).

Section 29 of the *Courts of Justice Act* permits a Judge or a Deputy Judge of the Small Claims Court to award costs personally against a counsel or agent similar to that permitted by section 57.07 of the *Rules of Civil Procedure*.

Weiss v. Prentice Hall Canada Inc. (1995), 1995 CarswellOnt 729, [1995] O.J. No. 4188, 66 C.P.R. (3d) 417, 7 W.D.C.P. (2d) 99 (Ont. Sm. Cl. Ct.).

There is concurrent jurisdiction of provincial courts and the Federal Court: s. 37 of the *Copyright Act*. That Act of the Federal Parliament makes every provincial court a *curia designata* to enforce civil remedies provided by that Act. The application of Rule 20.03 of the Small Claims Court Rules with its maximum counsel fee $300 is inconsistent with the discretion in s. 25 of the *Courts of Justice Act*. The court referred to s. 29 of the *Courts of Justice Act*. Section 29 is in conflict with Rule 20.03 of the Small Claims Rules. Any conflict must be resolved in favour of the Act.

Manufacturer's Life v. Molyneux (January 9, 1995), Doc. 868/94 (Ont. Div. Ct.).

Application pursuant to section 114 of the *Landlord and Tenant Act* dismissed. Successful landlord, respondent on appeal represented by agent. Costs awarded in the sum of $250. See also *Bonshaw-Estates Inc. and Indrakumaran et al.*, unreported, File No. 421/92 where agent awarded $750 in costs (Ont. Div. Ct.).

Jones v. LTL Contracting Ltd., [1995] O.J. No. 4928 (Ont. Gen. Div.), Cosgrove J. — Appeal from Halabisky, Deputy Judge, where costs awarded totalled $17,730.09. Costs awarded on appeal of $4,000.

Barrons v. Hyundai Auto Canada Inc. (October 7, 1993), Doc. C14201 (Ont. C.A.); leave to appeal refused (1994), *(*sub nom. *Barrons v. Ontario Automobile Dealers Assn.)* 72 O.A.C. 239 (note), 174 N.R. 319 (note) (S.C.C.).

The inequality of resources between the parties is not a ground to deviate from the ordinary rule that costs follow the event.

Mosely v. Spray Lakes Sawmills (1980) Ltd. (1994), 33 C.P.C. (3d) 382, 26 Alta. L.R. (3d) 359, [1995] 4 W.W.R. 367, 164 A.R. 76 (Q.B.).

Financial hardship, in itself, does not justify an application to split or sever trial issues.

Brown v. McLeod (1997), [1998] 3 W.W.R. 385, 123 Man. R. (2d) 176, 159 W.A.C. 176 (Man. C.A.).

Trial judge erred in refusing adjournment unless appellant agreed to pay costs of $250. Maximum allowance for costs was $100 in absence of exceptional circumstances. Adjournment should have been granted where there was no ineptitude of counsel or prejudice to respondent. Appeal allowed and new trial ordered.

F. (J.M.) v. Chappell (1998), 106 B.C.A.C. 128, 172 W.A.C. 128 (B.C. C.A.).

Ruling respecting the entitlement to costs. The judgment awarded at trial was well below the Small Claims limit, but on appeal her award for damages for breach of privacy was increased to $18,000. The plaintiff was awarded party and party costs throughout. Both causes of action depended on the same body of evidence and costs should follow the overall outcome.

Global Experience v. 855983 Ontario Ltd. (January 30, 1998), Doc. Thunder Bay 95/0266 (Ont. Gen. Div.).

Plaintiff obtained judgment for $4,200, an amount within the jursidiction of the Small Claims Court. Application was allowed in part. The plaintiff was not entitled to any costs to the date of the first offer under Rule 57.05 since the amount recovered fell within the jurisdiction of the Small Claims Court. Matter fell within the territorial jurisdiction of the Small Claims Court in Thunder Bay under Rule 6 of the *Small Claims Court Rules*, R.R.O. 1990, Reg. 201, where the plaintiff would have been entitled to commence the action.

Breton v. Lindsey Morden Claim Services Ltd. (March 10, 1998), Doc. Kamloops 22042 (B.C. S.C.), Gill J. — This was a hearing to determine costs in connection with a wrongful dismissal action. The plaintiff, Breton, was awarded damages at trial of $6,800. This proceeding was properly brought within the Supreme Court. It was not an appropriate case for Small Claims Court. There was divided success at trial. Costs were apportioned accordingly.

Pang v. Westfair Properties Pacific Ltd. (1998), 25 C.P.C. (4th) 180 (B.C. S.C.).

Jury verdict apportioned liability 70 per cent to the plaintiff for her injuries. What percentage, if any, of her taxable costs and disbursements should the plaintiff recover? Awarded an amount below jurisdictional limit of the Small Claims Court. Justice achieved with order that plaintiff recover 30 per cent of her costs from the defendant, commensurate with the apportionment of liability.

Martin v. Heier (March 23, 1998), Doc. Edmonton 9703-24138 (Alta. Q.B.).

Necessary to provide full and fair hearing. The Civil Division is basically the only forum for which these litigants can have such a hearing. Appellant not given a full opportunity to state his case. Appeal allowed.

Ladies Dress & Sportswear Industry Advisor v. M.W. Pressing Co. (May 27, 1998), Doc. Toronto CP 07471/97 (Ont. Sm. Cl. Ct.), Thomson J. — Costs awarded against the Defendant under Rule 16 and under s. 29 of the *Courts of Justice Act*, against the Defendant's solicitor personally. Counsel has clearly ignored and delayed the orders of Court as well as the concerns of counsel throughout this matter. Costs against the Defendant in favour of the Attorney General under Rule 16.02(2) and under s. 29 of the *Courts of Justice Act* and costs to the Plaintiff under Rule 16.02(2) and s. 29 of the *Courts of Justice Act* as against the Defendant solicitor personally.

Dugas v. Page (1998), 512 A.P.R. 68, 200 N.B.R (2d) 68 (N.B. Q.B.).

The conduct of a lawyer in making a claim for that extra $1,000.00 and maintaining it until two days before the trial is so "unreasonable . . . as to attract costs under rule 75", to use the words of the Court of Appeal in *Kelly v. Markey* (1992), 130 N.B.R. (2d) 155 (N.B. C.A.) at 167. Defendant allowed costs of $250.00.

Pace v. Floral Studio Ltd. (1998), 56 O.T.C. 210 (Ont. Gen. Div.); additional reasons at (March 23, 1998), Doc. Toronto 96-CU-103670CM (Ont. Gen. Div.).

Judgment found in favour of plaintiff for $3,333.33. Defendant argued plaintiff should have commenced action in the Small Claims Court. The defendant relied on Rule 57.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to argue that plaintiff should not recover any costs and Rule 57.01(2) to seek costs awarded to the defendant. There should be no order as to costs. Plaintiff should have brought action in the Small Claims Court. The defen-

dant should also have provided the plaintiff with some quantification of costs as well as some indication of a profit margin.

MacDonald v. Huckin (March 31, 1998), Doc. Victoria 96/1921 (B.C. S.C.).

Plaintiff awarded $12,000.00 non-pecuniary damages and divided liability 50 per cent/50 per cent. Should plaintiff be denied his costs because amount of judgment fell within jurisdiction of Provincial Court (B.C. Reg. 221/90, R. 57(10))? Plaintiff should recover 50 per cent of his costs. See *Flatley v. Denike* (1997), 32 B.C.L.R. (3d) 97 at 103 (B.C. C.A.). There was sufficient reason for plaintiff to bring proceedings in Supreme Court. Estimating the amount of damages a court might award in a personal injury claim is not always easy, partly because amount of damages question of fact.

Byers v. Prince George (City) Downtown Parking Commission (1998), 111 B.C.A.C. 144, 181 W.A.C. 144, *(*sub nom. *Byers v. Prince George Downtown Parking Commission)* 98 C.L.L.C. 210-033, 38 C.C.E.L. (2d) 83, 53 B.C.L.R. (3d) 345, [1999] 2 W.W.R. 335 (B.C. C.A.).

The plaintiff who was deprived of costs at trial since action ought to have been brought in Small Claims Court in view of limited entitlement to damages for wrongful dismissal was reversed on appeal. The Appeal Court increased damages to eight months from four months' salary. The plaintiff was entitled to costs of trial and appeal.

Minhas v. Canada (Minister of Citizenship & Immigration) (September 25, 1998), Doc. IMM-3860-97 (Fed. T.D.).

Show cause hearing why costs of $2,000 should not be payable personally by solicitor, for failure to attend scheduled hearing, leaving client without representation. The agent for the solicitor indicated that he advised counsel that he was unable to attend on date scheduled. Little regard was shown for client. Arrangements were vague and uncertain. There was no valid reason why her client was not represented at the hearing, and was ordered to pay costs.

Teed v. Langlais (1999), 47 M.V.R. (3d) 85 (N.B. C.A.).

The plaintiff appealed from a Small Claims decision apportioning liability for a car accident. The judge's conclusion was unreasonable. There was no legal basis to award of costs. The appeal was allowed, and full liability was assessed against the defendant. The awards for the defendant's counterclaim and costs were set aside.

Wacowich v. Wacowich (1999), 248 A.R. 350 at 368 (Alta. Q.B.).

The plaintiff engaged in self-help remedies that created further litigation. The order for costs reflected the court's disapproval for self-help remedies and for actions tending to lengthen litigation. The plaintiff was ordered to pay the defendant's cost throughout.

Niskanen Builders Ltd. v. Rodin (1996), 3 C.P.C. (4th) 166, 10 O.T.C. 248 (Ont. Gen. Div.).

Where a client was not notified of the increase in her solicitor's hourly rate, the court held that the account was to be based on the original hourly rate.

St. Laurent v. Burchak (2000), 2000 CarswellAlta 670 (Alta. Q.B.).

The defendants made a formal offer of judgment for $2,000, which the plaintiff did not accept. The plaintiff was awarded $673. Costs were at issue. The application was granted; matter should never have come to court. As the defendants failed to pay the plaintiff her vacation pay in accordance with the law, they contributed to the matter coming to court and were not entitled to costs.

Oxford Condominium Corp. No. 16 v. Collins (2000), 2000 CarswellOnt 4060 (Ont. Sm. Cl. Ct.).

A condominium corporation succeeded in a claim against unit owners for the full amount of $267. The plaintiff was entitled to costs based on contractual relationship. Tariff of Small Claims Court was not applicable to cap the amount recoverable.

Ganderton v. Marzen Artistic Aluminum Ltd., 2000 BCSC 1726, 2000 CarswellBC 2607 (B.C. S.C.).

The plaintiff's award was within the jurisdiction of the Provincial Court. The plaintiff was entitled to costs. It was not inappropriate for the plaintiff to bring an action in Supreme Court and to take advantage of summary trial procedure.

Royal Lepage Commercial Inc. v. Achievor Recycling Services Ltd. (October 12, 2000), Doc. 99-CV-166733 (Ont. S.C.J.).

Costs claimed by the plaintiff were excessive. The total fees awarded were $9,000. Although the amount recovered at trial was less than the jurisdiction of the Small Claims Court, the judge found the Small Claims Court scale not appropriate.

Bergel & Edson v. Wolf (2000), 50 O.R. (3d) 777, 49 C.P.C. (4th) 131, 2000 CarswellOnt 3388 (Ont. S.C.J.).

Rules of Professional Conduct did not explicitly render contingency fee agreements unenforceable at common law. It was also clearly unjust to deny lawyers the right to have their bills assessed where ample evidence before the assessment officer to permit an assessment. Fees assessed at $5,000.

Carmichael v. Stathshore Industrial Park Ltd. (1999), 121 O.A.C. 289, 1999 CarswellOnt 1838 (Ont. C.A.).

Rule 57.07 of the *Rules of Civil Procedure* provide for the assessment of costs against solicitors. In *Young v. Young*, EYB 1993-67111, [1993] S.C.J. No. 112, 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703 (S.C.C.), the Supreme Court of Canada advised, *inter alia*, that courts must be extremely cautious in awarding costs personally against solicitors.

Fong v. Chan (1999), 46 O.R. (3d) 330, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.).

The Ontario Court of Appeal discussed the extent to which self-represented lawyers are entitled to recover costs in litigation to which they were parties. The court held that the firm's claim to an allowance for the salaried employees was justified by s. 36 of the *Solicitors Act* (Ontario), and that the claim for the partner's work was allowable at common law. All litigants suffer a loss of time through their involvement in the legal process. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation.

Canaccord Capital Corp. v. Clough, 2000 BCSC 410, 48 C.P.C. (4th) 359, 2000 CarswellBC 505 (B.C. S.C.).

The plaintiff obtained a judgment in Supreme Court for $8,250. The trial judge awarded the plaintiff costs on a small claims scale, including only disbursements. The plaintiff's disbursements totaled $2,279. The defendant claimed that the plaintiff should be allowed only those disbursements that would have been incurred in Small Claims Court. The plaintiff was entitled to recover the full amount. The disbursements meant money actually spent.

Brownell v. Stelter, 2001 CarswellAlta 636, 2001 ABQB 355, [2001] A.J. No. 564 (Alta. Master).

Impecunious plaintiff moved from Alberta to Ontario. Defendants' application for security for costs dismissed.

Crocker-McEwing v. Drake (2001), 2001 CarswellAlta 917, 2001 ABQB 592, [2002] 1 W.W.R. 354, 290 A.R. 365, 96 Alta. L.R. (3d) 301 (Alta. Q.B.).

Defendants awarded security for costs on a slip-and-fall lawsuit of doubtful strength where the plaintiff, who resided in Newfoundland, had no assets available sufficient to compensate

defendants in costs if action failed. Action dismissed. Plaintiff had not met the requirements of original order.

Swire v. Walleye Trailer Park Ltd. (2001), 2001 CarswellOnt 2832, 203 D.L.R. (4th) 402, 149 O.A.C. 108, 44 R.P.R. (3d) 120 (Ont. Div. Ct.).

Appellant purchased trailer from former tenant in trailer park who assigned lease in park without respondent landlord's consent. Respondent obtained judgment. Small Claims Court had no jurisdiction to deal with matter applying to mobile home tenancy in relation to tax, evidenced by s. 29 of O. Reg. 194/98 that dealt specifically with property taxes. Judgment set aside.

Polish National Union of Canada Inc. v. Dopke, 2001 CarswellOnt 2896, 55 O.R. (3d) 728 (Ont. S.C.J.).

Plaintiff granted judgment for 1.5 per cent of amount sought. Judgment against three defendants fell within monetary jurisdiction of Small Claims Court. Plaintiff did not prove fraud. Plaintiff awarded punitive damages for defendant's conduct. Plaintiff deprived of costs by Rule 76.10(2) of *Rules of Civil Procedure*. Defendant awarded costs because of wrongful conduct and award of punitive damages.

Krackovitch v. Scherer Leasing Inc. (2001), 2001 CarswellOnt 2938 (Ont. S.C.J.).

Defendant succeeded on most substantive claims, but had withdrawn settlement offer. Plaintiff recovered amount less than claimed and was within jurisdiction of Small Claims Court. No costs ordered.

Catalanotto v. Nina D'Aversa Bakery Ltd. (2001), 2001 CarswellOnt 4058 (Ont. S.C.J.).

Issues at trial not complex and matter ultimately within jurisdiction of Small Claims Court. Plaintiff acted unreasonably in not offering settlement. Failure of plaintiff to continue proceeding under simplified rules in Ontario justified that plaintiff pay defendant's party-and-party costs.

Young v. Young, EYB 1993-67111, [1993] S.C.J. No. 112, 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703 (S.C.C.).

(Per McLachlin J.) "The basic principal on which costs are awarded is as *compensation* for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court.".

Twaits v. Monk (2000), 8 C.P.C. (5th) 230, 2000 CarswellOnt 1685, [2000] O.J. No. 1699, 132 O.A.C. 180 (Ont. C.A.).

Trial judge erred in principle in awarding solicitor-client costs to the respondent. Solicitor-client costs may be ordered in cases where allegations of fraud are shown to be totally unfounded, see *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15, 1992 CarswellOnt 437, [1992] O.J. No. 3879 (Ont. Gen. Div.); additional reasons at (February 28, 1992), Doc. 18781/84 (Ont. Gen. Div.) and *Procor Ltd. v. U.S.W.A.* (1989), 71 O.R. (2d) 410, 1989 CarswellOnt 873, 65 D.L.R. (4th) 287 (Ont. H.C.); additional reasons at (1990), 65 D.L.R. (4th) 287 at 310, 71 O.R. (2d) 410 at 434 (Ont. H.C.).

While these allegations were not established at trial, they were made with some justification.

Groupe Essaim Inc. v. Village Pharmacy Minto Inc. (2000), 10 C.P.C. (5th) 364, 2000 CarswellNB 274, 227 N.B.R. (2d) 276, 583 A.P.R. 276 (N.B. Q.B.).

Costs award not appropriate since confusion was occasioned by ambiguity in wording of *Small Claims Act* (S.N.B. 1997, c. S-9.1) and Regulations.

Nuttall v. Thunder Bay (City) (2002), 163 O.A.C. 187, 2002 CarswellOnt 2113 (Ont. C.A.).

A woman sued the City for damages for personal injuries as a result of a fall on a city sidewalk. At trial she offered expert evidence. The trial judge discussed the criteria for the admission of expert evidence. The Court of Appeal affirmed the trial judge's decision to hear the expert evidence.

Stuart v. Hoffman Feeds Ltd. (2002), 2002 CarswellOnt 3255 (Ont. S.C.J.); additional reasons at (2002), 2002 CarswellOnt 3899 (Ont. S.C.J.).

Unsuccessful plaintiff's request to be relieved from award of costs due to financial hardship refused. Issues at trial difficult and there was basis for litigation, given opinions provided to plaintiff. Defendant awarded costs on party-and-party basis until date of defendant's offer to settle, and solicitor-and-client costs thereafter.

Connolly v. Canada Post Corp., 2002 CarswellNat 815, 2002 CarswellNat 1832, 2002 FCT 398, 2002 CFPI 398 (Fed. T.D.).

Lay litigant conducting unsuccessful judicial review application that resulted in extra work for respondent. Costs fixed to avoid further expense of assessment. *Federal Court Rules*, Rule 400(4).

Nelson v. Nelson, 2000 CarswellBC 2721, 2000 BCSC 1276 (B.C. S.C.).

Self-represented litigant interrupting and insulting counsel in court. Litigant ignored directions of Court to stop. Litigant persisting in rude behaviour. Special costs justified.

Spur Valley Improvement District v. Csokonay, 2001 CarswellBC 2780, 2001 BCSC 1615 (B.C. S.C.).

Proceeding focused on realty and whether one party or other owned water system. Case complex and would have been difficult to settle. Success divided. Plaintiff introduced evidence attacking defendants and prolonged case unnecessarily. Costs against plaintiff set at 15 per cent of actual costs.

Mansfield v. Hawkins, 2002 CarswellBC 3100, 2002 BCSC 1723 (B.C. S.C.).

Solicitor failed to keep time dockets. No evidence of time expended. Bill assessed on basis of quantum meruit. Solicitor not permitted to charge bonus unless client made aware of bonus at time retainer agreement entered into.

Hunt v. TD Securities Inc. (2003), 2003 CarswellOnt 4971, 43 C.P.C. (5th) 211, 40 B.L.R. (3d) 156 (Ont. C.A.).

Hunt's recovered $9,374 in damages, $2,281.86 for prejudgment interest and costs and disbursements of approximately $14,000 in the Superior Court.

Bank's contention that Hunts not entitled to any costs because amount recovered within the monetary jurisdiction of the Small Claims Court and/or because the Hunts ought to have used the simplified procedures rejected. In light of complexity and unsettled law, not reasonably known damage award would be within the monetary jurisdiction of the Small Claims Court. Moreover, some of the claims equitable in nature.

Johnson v. Hogarth, 2004 BCPC 32, 2004 CarswellBC 364 (B.C. Prov. Ct.).

Defendant sought to have the trial transferred to Victoria on Vancouver Island. Only connection anyone had to North Vancouver was that defendant Hogarth's solicitor there. Counsel for Plaintiff had business in Vancouver. Under *The Small Claims Act* (2.1) R.S.B.C. 1996 c. 430, the intent is to have claims resolved in as just and speedy and inexpensive manner as

reasonable. This includes determination on "balance of convenience" where trial will be heard.

Fair to all parties to conduct litigation nearest event that resulted in the claim, *i.e.*, the closest Court Registry to Sidney, British Columbia. File transferred to Victoria for trial.

Clark v. Canzio, 2003 NSSC 252, 2003 CarswellNS 465, 220 N.S.R. (2d) 256, 694 A.P.R. 256 (N.S. S.C.).

Clark advanced claim in Small Claims Court. Issue whether Court should exercise its discretion to extend the time for filing of the notice of appeal and serving it on the claimant.

The court is to be satisfied that (a) the Applicant had a *bona fide* intention to appeal while the right to appeal existed; (b) the Applicant had a reasonable excuse for the delay in not launching the appeal within the prescribed time; and (c) the appeal has sufficient merit in the sense of raising a reasonably arguable ground.

The Supreme Court has inherent jurisdiction to correct an error.

The Small Claims Court does not have any inherent jurisdiction except for enabling statute. The *Small Claims Court Act* does not provide for application of The *Civil Procedure Rules* to proceedings in Small Claims Court. In proceedings in the Small Claims Court, the *Nova Scotia Rules of Practice* apply except where there is a contrary intent shown by the *Small Claims Court Act*. *Bona fide* error on the part of the solicitor for the Plaintiff. Application granted for leave to extend the time.

J. Connelly Rental Ltd. v. Lefebvre (2003), 2003 CarswellOnt 4393, 178 O.A.C. 246 (Ont. Div. Ct.).

Costs in Small Claims Court trials kept to modest levels so as not to impede acces to justice at that level. When successful litigant required to defend on appeal to Divisional Court award of costs more closely approximating the litigant's actual legal costs required. Court awarded Plaintiff costs of $3,000 on substantive indemnity basis.

MacEwan v. Henderson, 2003 CarswellNS 424, 2003 NSCA 133, 219 N.S.R. (2d) 183, 692 A.P.R. 183 (N.S. C.A.).

Appeal from dismissal of appeal from Small Claims Court judgment where claim dismissed. Plaintiff claimed adjudicator in conflict of interest and should have recused himself. Application for recusal properly heard by judge being asked to withdraw. Appeal dismissed.

Koller v. Desnoyers (2003), 2003 CarswellOnt 2941 (Ont. S.C.J.).

Plaintiffs were self-represented and as such not entitled to costs. However, in early stages of litigation plaintiffs incurred legal costs from their then solicitor and those expenses should be indemnified. Total costs payable to Plaintiff awarded at $9,987.

Benlolo v. Barzakay (2003), 2003 CarswellOnt 658, 169 O.A.C. 39 (Ont. Div. Ct.); additional reasons at (2003), 2003 CarswellOnt 1260, 170 O.A.C. 115 (Ont. Div. Ct.).

Registrar did not have jurisdiction to sign default judgment where amount of claim was unliquidated sum. Defendants not required to establish meritorious defence. Appeal allowed.

Susin v. Chapman (2004), [2004] O.J. No. 123, 2004 CarswellOnt 143 (Ont. C.A.).

Appeal from Order of Bain J. dismissing appellant's action for non-payment of costs. Open to motion judge to make the finding that appellant is not impecunious. The appellant argued he is impecunious when required to pay costs but denied impecuniosity when an opposite party sought security for costs. Appeal dismissed.

Johnston v. Morris, 2004 CarswellBC 3163, 2004 BCPC 511 (B.C. Prov. Ct.).

A claimant unprepared to prove loss has no reasonable prospect of success. Costs allowed at $3,133.21 for the clients of Clee. Morris entitled to $500.

Ogoki Frontier Inc. v. All A.I.R. Ltd., 2005 CanLII 614 (Ont. S.C.J.).

Costs are at the discretion of the court. General rule that costs follow the event. Misconduct of the parties. Miscarriage in the procedure. Oppressive and vexatious conduct of proceedings.

Painter v. Waddington, McLean & Co., 2004 CarswellOnt 279 (Ont. S.C.J.).

Are self-represented lay plaintiffs entitled to costs? (2) If so, what is the appropriate measure of those costs?

The plaintiffs commenced their action on October 27, 1999, when monetary jurisdiction of the Small Claims Court was $6,000. They recovered in excess of that amount at trial. No reason to exercise discretion to award no costs on the basis of r. 57.05.

Plaintiff relied on *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464, 1997 CarswellOnt 5013, 17 C.P.C. (4th) 400 (Ont. Gen. Div.); *Fong v. Chan* (1999), 46 O.R. (3d) 330, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.); *Skidmore v. Blackmore*, 122 D.L.R. (4th) 330, 1995 CarswellBC 23, [1995] B.C.J. No. 305, 2 B.C.L.R. (3d) 201, [1995] 4 W.W.R. 524, 27 C.R.R. (2d) 77, 55 B.C.A.C. 191, 90 W.A.C. 191, 35 C.P.C. (3d) 28 (B.C. C.A.).

In *Fong*, Sharpe J.A. considered both the *Fellowes* and *Skidmore* decisions. On reviewing the case law, Sharpe J.A. found: ". . . the preponderance of modern authority supports the contention that both self-represented lawyers and self-represented lay litigants may be awarded costs and that such costs may include allowances for counsel fees." See *Fong* para. 23.

While a self-represented litigant may be entitled to costs, there is no automatic right of entitlement to recover costs. The trial judge maintains a discretion to make the appropriate costs award, including denial of costs. See *Fong* para. 27.

On the other hand, the cases show that an award to a lay litigant is not on the same basis as to the one represented by a solicitor, but is generally modest. Plaintiffs entitled to their costs throughout proceedings. Defence counsel offered to settle costs issue by only paying plaintiffs' disbursements with nothing allowed for fees. Costs awarded in the amount of $4,000, plus disbursements in the amount of $2,771.24.

TSP-Intl Ltd. v. Mills, 2005 CarswellOnt 2339 (Ont. S.C.J.).

Cost awards under the Simplified Procedures have been significantly lower than they would be under the ordinary procedure.

Costs incurred under the Simplified Procedures, and in all cases, must be reasonable and proportionate to amount recovered.

An action conducted under Simplified Procedure meant to be cost effective. As a general rule, this process not intended to be as expensive as trial by ordinary procedure.

In *Glazman v. Toronto (City)*, 2002 CarswellOnt 2280, [2002] O.J. No. 2767 (Ont. S.C.J.), Lane J. noted at para. 10 that the costs grid does not alter a judge's discretion with respect to fixing costs that are reasonable. Rule 57.01(1) continues to apply. When determining costs, the judge must take into account all of the relevant factors.

The defendants refused disclosure.

Tri Level Claims Consultant Ltd. v. Koliniotis, 2005 CarswellOnt 3528, *(*sub nom. *Koliniotis v. Tri Level Claims Consultant Ltd.)* 201 O.A.C. 282, 15 C.P.C. (6th) 241, 257 D.L.R. (4th) 297 (Ont. C.A.).

An appeal from the order of Justice John H. Jenkins of the Superior Court of Justice sitting as a single judge of the Divisional Court dismissing appeal from judgment of Deputy Judge A. Fisher of the Small Claims Court.

Whether the law permits paralegals and their clients to enter into contingency fee agreements? Can a paralegal recover in *quantum meruit* for services provided under a contingency fee agreement that is found to be champertous?

If the law prohibits paralegal contingency agreements, the prohibition lies in *An Act Respecting Champerty*, R.S.O. 1897, c. 327 ("*Champerty Act*").

Leading authority in Ontario re contingency fees is the decision of O'Connor A.C.J.O. in *McIntyre Estate v. Ontario (Attorney General)*, 2002 CarswellOnt 2880, [2002] O.J. No. 3417, 23 C.P.C. (5th) 59, 218 D.L.R. (4th) 193, 61 O.R. (3d) 257, 164 O.A.C. 37 (Ont. C.A.). Reasonableness of lawyer's fee factor for court to consider in assessing whether a contingency fee arrangement champertous.

Paralegals have an important role to play in increasing access to justice. The role of paralegals in increasing access to justice has been recognized in several reports on paralegal activity in Ontario.

There is no regulation of paralegals equivalent to that applicable to lawyers. The need for regulation to avoid the abuses inherent in contingency fees may be more pressing for paralegals.

Several factors demonstrate that an absolute bar on *quantum meruit* recovery creates an injustice that is unacceptable when considered in light of the public policy informing the statutory prohibition against champertous agreements.

The sum of $1,300 would be reasonable compensation on a *quantum meruit* basis.

Decision of Divisional Court set aside and amount awarded in judgment of Fisher D.J. reduced to $1,300.

Culligan Springs Ltd. v. Dunlop Lift Truck (1994) Inc., 2005 CarswellOnt 4301 (Ont. S.C.J.).

In recent cases, the Ontario Court of Appeal has emphasized that there is an "overriding principle of reasonableness" that must govern the judicial exercise of fixing costs. (*Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, [2004] O.J. No. 2634, (sub nom. *Boucher v. Public Accountants Council for the Province of Ontario)* 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201 (Ont. C.A.); *Moon v. Sher*, [2004] O.J. No. 4651, 2004 CarswellOnt 4702, 246 D.L.R. (4th) 440, 192 O.A.C. 222 (Ont. C.A.); *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC*, 2005 CarswellOnt 189, [2005] O.J. No. 160, 5 C.P.C. (6th) 258, 75 O.R. (3d) 638 (Ont. C.A.).).

Trial Judge exercised his discretion and assessed costs applying principles in Rule 57.01(1) as well as the cost grid and whether "the result is fair and reasonable" (para. 16). But, not plain and obvious that he applied the "proportionately" principle as detailed in the *Trafalgar* case.

Leave granted, pursuant to s. 133 of the *Courts of Justice Act* to appeal the Order awarding Defendant its costs in amount of $60,267.39.

Bird v. Ireland, 2005 CarswellOnt 6945, [2005] O.J. No. 5125, 205 O.A.C. 1 (Ont. Div. Ct.), Clark J. Appeal from Small Claims Court trial.

Appellant argued trial judge erred in part:

> . . .
>
> (iv) by fixing an amount for costs that was excessive and beyond his jurisdiction, by virtue of misapplying Rules 14.07 and 19.04 of the *Small Claims Court Rules* and section 29 of the *Courts of Justice Act*.

This was a one-day trial. Amount recovered $6,628.65, plus prejudgment interest of $1,551.84. The trial Judge awarded costs of $2,000. Purporting to apply s. 29 of the *Courts of Justice Act* ["CJA"], he took 15 per cent of $6,665, the principal amount awarded to the plaintiff at trial, namely, $994.28 and, purporting to apply Rule 14.07 of the *Small Claims*

Court Rules he doubled that amount to arrive at $1,998.56. He then rounded this figure upward to $2,000. He erred in several respects.

Power to award costs conferred by Rule 19 limited by s. 29 of the CJA. The award, before the application of Rule 14.07, would be $300. Section 29 intended by the legislature to limit the power of the Small Claims Court to award costs, not to increase it. The purpose of s. 29 is to keep costs awards in proportion to the amounts recovered. If it had been the intention of the legislature to simply impose a general rule whereby costs awards were to be 15 per cent of the amount sued for, R. 19.04 would be superfluous. The Deputy Judge used s. 29 to increase the amount of costs he could award and ignored Rule 19.04.

Appeal allowed, judgments of trial court on both liability and costs set aside.

Respondent cannot succeed on a new trial. Judgment for appellant and respondent's claim for commission dismissed.

Hodson & Hodson Construction Ltd. v. Harrison, 2005 CarswellBC 1513, 2005 BCSC 905, 14 C.P.C. (6th) 179 (B.C. S.C.).

Issue of costs that followed reasons issued May 12, 2004, 2004 CarswellBC 1087, 2004 BCSC 649 (B.C. S.C.) in which plaintiffs' claims against defendants in construction dispute dismissed save for a monetary judgment that was as a consequence of an accounting of materials charged to plaintiffs by defendants. Defendants sought special costs on basis that plaintiffs having plead but not proven fraud should be punished by such an order against them. Special costs are punitive in nature reflecting the opprobrium of the court as to a party's conduct.

See *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CarswellBC 1184, [1994] B.C.J. No. 2486, 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242, 14 C.C.E.L. (2d) 84, 41 C.P.C. (3d) 298, *(*sub nom. *Garcia v. Crestbrook Forest Industries Ltd. (No. 2))* 45 B.C.A.C. 222, *(*sub nom. *Garcia v. Crestbrook Forest Industries Ltd. (No. 2))* 72 W.A.C. 222 (B.C. C.A.) [*Garcia*] where Lambert J.A. considered the basis upon which special costs might be ordered. He reviewed *Young v. Young*, EYB 1993-67111, [1993] S.C.J. No. 112, 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703 (S.C.C.), in which the Supreme Court of Canada discussed the award of solicitor-client costs (now special costs) as being appropriate when there had been reprehensible, scandalous or outrageous conduct by a party.

Allegations of fraud as an assertion of criminal conduct in a civil case are not an automatic justification for special costs. Such an award requires a further examination of the course of conduct of the parties in the context of litigation.

Incumbent upon a party to demonstrate that he has attained "substantial success" at trial: See *Fotheringham v. Fotheringham*, 2001 CarswellBC 2148, [2001] B.C.J. No. 2083, 2001 BCSC 1321, 13 C.P.C. (5th) 302 (B.C. S.C.).

Actual time spent on an issue is but one factor to be considered along with the weight or value of an issue including the relative importance of the issues.

Rule 57(10) provides costs in cases within small claims jurisdiction.

Plaintiffs had sufficient reason to bring these proceedings in Supreme Court.

Reischer v. Insurance Corp. of British Columbia, 2006 CarswellBC 270, [2006] B.C.J. No. 235, 2006 BCSC 198 (B.C. S.C. [In Chambers]).

Plaintiff accepted offer to settle for amount within monetary jurisdiction of Small Claims Court. Master dismissed plaintiff's claim to entitlement of costs other than disbursements. Plaintiff appealed. Plaintiff could have sued in either Provincial or Supreme Court. Cost consequence as set out in Rule 37(37) of the *Rules of Court* (B.C.). Plaintiff decided to

accept offer for amount within jurisdiction of Provincial Court with respect to proceeding that could have been brought in that court.

Walford v. Stone & Webster Canada LP, 2006 CarswellOnt 6873, 217 O.A.C. 166 (Ont. Div. Ct.).

Plaintiff appealed judgment of Deputy Judge E.M. Osborne wherein she dismissed claim of Dr. Walford for damages arising out of alleged wrongful dismissal.

Appellant failed to appreciate proceeding one of appeal, not opportunity to retry case.

Trial judge's decision was a correct one.

Rule 61.03(7) applicable. Notwithstanding requirement for formal request for leave to appeal, Dr. Walford granted relief from his failure to seek leave.

The issue as to whether leave to appeal should be granted under s. 133(b) of the *Courts of Justice Act* from an order of the Small Claims Court judge not subject to Rule 62.02.

Section 29 of the *Courts of Justice Act* deals with costs awards made in the Small Claims Court.

There is no conflict between Rule 19(4) and s. 29 of the *Courts of Justice Act*.

Even if Rule amendment does not have retroactive effect, I would find that Statute takes priority over the old rule. In any event, s. 29 speaks of costs other than disbursements, whereas the old Rule 19.04 speaks of counsel fees. They are different things. In addition, Rule 19.02 now provides that "any power under this rule to award costs is subject to s. 29 of the *Courts of Justice Act*.".

An award of costs not exceeding 15 per cent of the amount claimed is not, in and of itself, an illegal award. The only issue to be considered on this appeal is whether, in all the circumstances, the award was appropriate.

No basis to substitute discretion of the trial judge with respect to her award of costs of $1,500. Appeal with respect to costs dismissed.

Cosentino v. Roiatti, 2007 CarswellOnt 104 (Ont. Div. Ct.).

Appeal heard December 6, 2006, detailed reasons for decision released on December 13, 2006. Costs determined by way of written submissions. The appellant was unsuccessful at trial before Winer D.J. to recover solicitor's fees claimed in the amount of $6,879.35. On appeal, all issues raised were decided against the appellant. See *Culligan Springs Ltd. v. Dunlop Lift Truck (1994) Inc.*, 2006 CarswellOnt 2516, [2006] O.J. No. 1667, 211 O.A.C. 65 (Ont. Div. Ct.).

In determining costs the result must be fair, reasonable and within the reasonable expectation of the parties. Determination of costs is not simply a mathematical exercise or mechanical calculation. See *Moon v. Sher*, [2004] O.J. No. 4651, 2004 CarswellOnt 4702, 246 D.L.R. (4th) 440, 192 O.A.C. 222 (Ont. C.A.) and *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, [2004] O.J. No. 2634, *(*sub nom. *Boucher v. Public Accountants Council for the Province of Ontario)* 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201 (Ont. C.A.).

Costs in favour of successful respondent of $3,500 inclusive fair and reasonable. This award gives effect to the principles of reasonableness, proportionality and reasonable expectations of the parties in my view.

Pierlot Family Farm Ltd. v. Polstra, 2006 CarswellPEI 27, 2006 PESCAD 13, 271 D.L.R. (4th) 525, 766 A.P.R. 169, 257 Nfld. & P.E.I.R. 169 (P.E.I. C.A.).

Lay litigant entitled to costs taking into account only lost opportunity, not actual hours spent, and at lower rate than counsel. Costs of trial and appeal claimed at over $14,000. Some evidence was led at trial from which one could infer that litigant lost business income by

reason of his involvement in acting as counsel. On partial indemnity basis, 40 hours of preparation reasonable, at $20 per hour, for total preparation fee of $800, plus disbursements, for total of $2,486.

Lunenburg Industrial Foundry & Engineering Ltd. v. Commercial Union Assurance Co. of Canada, 2006 CarswellNS 137, 2006 NSSC 105, 770 A.P.R. 282, 242 N.S.R. (2d) 282 (N.S. S.C.).

Successful plaintiff had discharged lawyers six months prior to trial. Defendant contended that plaintiff L was self represented and therefore not entitled to legal costs. Plaintiffs represented from time of loss until eve of trial and had paid significant legal fees up to the point they became self represented. Not appropriate to compare L with other self-represented litigants who incurred little if any legal expenses. Party and party costs payable to L.

Burchell Hayman Parish v. Sirena Canada Inc., 2006 CarswellNS 520, 2006 NSSM 28 (N.S. Sm. Cl. Ct.).

Taxation of legal fees.

Time spent as set out in two accounts totalled 44.1 hours, too high for work done. Reason lawyer spent so much time is that, as a young lawyer just starting out, she lacked the knowledge, experience and confidence of a more senior lawyer.

Client should not be required to pay for the learning experience of a junior: see *Goodman & Carr v. Tempra Management Ltd.* (1991), 25 A.C.W.S. (3d) 169 (Ont Assess. O.), and *Canada Trustco Mortgage Co. v. Homburg*, 1999 CarswellNS 354, [1999] N.S.J. No. 382, 44 C.P.C. (4th) 103, 180 N.S.R. (2d) 258, 557 A.P.R. 258 (N.S. S.C.) at paras. 17-18. Test simply whether charge for a new lawyer's time is "fair and reasonable and stand the test of taxation, if requested": *Toulany v. McInnes, Cooper & Robertson*, [1989] N.S.J. No. 99, 1989 CarswellNS 298, 90 N.S.R. (2d) 256, 230 A.P.R. 256, *(*sub nom. *Toulany, Re)* 57 D.L.R. (4th) 649 (N.S. T.D.) at p. 4.

Colosimo v. Geraci, 2005 CarswellBC 2729, 2005 BCSC 1603 (B.C. S.C.).

Plaintiff sued for over $20,000, judgment for $8,000. Plaintiff seeking costs despite fact that judgment within limits of small claims court. Application allowed. Plaintiff having case for larger amount and appropriate that trial be brought in Supreme Court.

Euteneier v. Lee, 2005 CarswellOnt 6906, 260 D.L.R. (4th) 145, 204 O.A.C. 287, 139 C.R.R. (2d) 55 (Ont. C.A.).

The case raised complex issues of general public importance relating to the standard of care owed by the police to persons whose liberty is constrained in a police lock-up facility. Plaintiff's financial resources very modest. Exceptional case where costs should not be awarded against the unsuccessful litigant.

To do otherwise in all the circumstances would visit an unfair and onerous human and financial hardship on the respondent, resulting in fundamental injustice.

Guindon v. Ontario (Minister of Natural Resources), 2006 CarswellOnt 3173, 212 O.A.C. 207 (Ont. Div. Ct.).

Divisional Court rejected applicant's assertion that no costs be awarded given the public interest nature of the litigation. Applicants had not acted solely as public interest litigants. Nevertheless, the amount fixed should be fair and reasonable and within applicants' reasonable expectations.

Triple 3 Holdings Inc. v. Jan, 2006 CarswellOnt 5373, 274 D.L.R. (4th) 741, 214 O.A.C. 301, 32 C.P.C. (6th) 193, 82 O.R. (3d) 430 (Ont. C.A.).

Trial judge awarded respondents costs on a substantial indemnity basis of $140,000. He also ordered lawyer be jointly and severally liable with his clients for those costs because he

found that lawyer's relationship with his clients placed him in conflict of interest. Lawyer appealed costs order. Appeal allowed.

Trial judge failed to find that lawyer caused costs to be incurred without reasonable cause or wasted by undue delay, negligence or other default (Rule 47.07(1)). Finding of common financial interest palpably wrong.

Williams (Litigation Guardian of) v. Bowler, 2006 CarswellOnt 3518, 81 O.R. (3d) 209 (Ont. S.C.J.).

Section 28.1(8) of the *Solicitor's Act* (Ont.) referred to. Exceptional circumstances existed where counsel assumed great responsibility and took on a very significant financial risk in a complicated personal injury action. Counsel entitled to contingency fees and legal costs.

Kerr v. Danier Leather Inc., 2005 CarswellOnt 2704, 76 O.R. (3d) 354, 18 C.P.C. (6th) 268 (Ont. S.C.J.).

Costs on party and party basis in favour of plaintiff appropriate if requested before orders finalized. Issue arose as to whether plaintiff entitled to costs in light of failure to raise issue prior to finalization of order. Rule 49.06 of *Rules of Civil Procedure* (Rules) allowed for amendment to orders, as court previously dealt not with ancillary, discrete issue costs of either motion, but with substantive issues of motions.

Bird v. Ireland, 2005 CarswellOnt 6945, [2005] O.J. No. 5125, 205 O.A.C. 1 (Ont. Div. Ct.).

Plaintiff successfully sued to recover commission. Defendant appealed. Appeal allowed. Plaintiff not entitled to claim commission. Trial judge's findings based on misapprehension of evidence. Costs award set aside. Costs awarded exceeded maximum permitted by *Small Claims Court Rules* (Ont.) and s. 29 of *Courts of Justice Act* (Ont.). Section 29 of Act was to limit powers of Small Claims Court to award costs, not to increase it.

Chinese Business Chamber of Canada v. R., 2006 CarswellNat 1311, 2006 CarswellNat 2433, 54 Imm. L.R. (3d) 1, *(*sub nom. *Chinese Business Chamber of Canada v. Canada (Minister of Citizenship & Immigration))* 349 N.R. 388, 2006 FCA 178, 2006 CAF 178 (F.C.A.).

Plaintiffs sought order staying enforcement of regulations that limited who could act for a fee in immigration matters before the Minister of Citizenship and Immigration. Motion for interim injunction denied and order for costs was made against them. Plaintiffs appealed, arguing that having regard to the nature of the application and the public importance of the issues raised, no costs should have been awarded against them. Appeal dismissed. The plaintiffs did not demonstrate that order founded on an error of principle or was plainly wrong.

R. v. Jedynack, 1994 CarswellOnt 826, [1994] O.J. No. 29, 16 O.R. (3d) 612, 20 C.R.R. (2d) 335 (Ont. Gen. Div.).

Costs order interlocutory and Appellate court had no jurisdiction to hear appeal from it under s. 830 of the *Criminal Code*.

Judge of Ontario Court (Provincial Division) had jurisdiction, as trial judge, to make order for costs against the Crown under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. Such order should only be made where the acts or failures to act amount to something beyond inadvertent or careless failure to discharge a duty.

In this case, accused put to clear-cut extra and unnecessary expense by reason of the Crown's failure to comply fully with disclosure order. The Crown failed to act with due diligence.

Dunbar v. Helicon Properties Ltd., 2006 CarswellOnt 4580, [2006] O.J. No. 2992, 213 O.A.C. 296 (Ont. Div. Ct.).

Appellants allege trial judge made two errors in assessment of damages for breach of contract.

Appellants argue that because monetary jurisdiction of the Small Claims Court is $10,000, the trial judge should have deducted the amounts set off in their favour from that amount instead of the total damages alleged by the respondent, an amount found to exceed $15,000. Appellants failed to satisfy appeal court that trial judge exceeded monetary limit of the Small Claims Court. He awarded the respondent $10,000, which complied with the applicable regulation: see O. Reg. 626/00.

Trial judge awarded respondent costs of $750 inclusive of approximately $250 in disbursements. The appellants argue that this $500 costs award exceeds the maximum provided for by way of counsel fee pursuant to R. 19.04(a) by $200. However, this provision has been interpreted as a daily counsel fee award: see *Bird v. Ireland*, 2005 CarswellOnt 6945, [2005] O.J. No. 5125, 205 O.A.C. 1 (Ont. Div. Ct.).

Appeal dismissed. Respondent awarded costs in fixed amount of $3,000.

Kennedy v. Kiss, [2006] B.C.J. No. 404, 2006 CarswellBC 453, 54 B.C.L.R. (4th) 151, 2006 BCSC 296 (B.C. S.C.).

Plaintiff self-represented lawyer in fast-track personal injury litigation. Plaintiff made offer to settle in amount of $26,000 in July 2005. Plaintiff recovered judgment at trial in October 2005 in amount of $30,007.64. Parties made submissions on costs. Plaintiff awarded double costs capped at $7,200. As self-represented lawyer, plaintiff was entitled to costs. As well, plaintiff did bring counsel to lead his evidence and that was substantial component of evidence. Trial almost one and one-half days and should be treated as two-day trial for purpose of assessing costs.

Case law supports contention that self-represented lawyers may be awarded costs: *London Scottish Benefit Society v. Chorley* (1884), 13 Q.B.D. 872, [1881-1885] All E.R. 1111, 53 L.J.Q.B. 551, 51 L.T. 100, *(*sub nom. *London Permanent Building Society v. Thorley)* 32 W.R. 781 (Eng. C.A.). See *Fong v. Chan* (1999), 46 O.R. (3d) 330, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.).

Nazir v. Western Union Financial Services (Canada) Inc., 2007 CarswellOnt 5989 (Ont. Sm. Cl. Ct.).

Judgment in the amount of $85 being $62 plus interest from October 5, 2005 at 17 per cent per annum. Plaintiff entitled to costs of $245 under Rule 19.

Defendant submitted a brief requesting costs of $3,000.

Plaintiff sued for $10,000 damages including return of $62 paid to defendant and $9,938 for contract and tort damages. Defendant made an offer after the July 2006 Settlement Conference by formally serving an Offer to Settle under Rule 14 [Form 14A].

Plaintiff presented sincere issue to court and did not engage in unreasonable behaviour. No cause to penalize the plaintiff under s. 29. The Offer to Settle required the plaintiff to sign a release drafted by the defendant. The plaintiff was self-represented. This requirement takes the offer outside the purview of Rule 14. To award costs to the defendant would be to penalize the plaintiff.

1465778 Ontario Inc. v. 1122077 Ontario Ltd., 2006 CarswellOnt 6582, [2006] O.J. No. 4248, 216 O.A.C. 339, 38 C.P.C. (6th) 1, 275 D.L.R. (4th) 321, 82 O.R. (3d) 757 (Ont. C.A.).

There should be no prohibition on an award of costs in favour of a *pro bono* counsel in appropriate cases. Costs could serve purposes other than indemnity, including objectives of encouraging settlement, preventing frivolous or vexatious litigation, and discouraging unnecessary steps. Purpose of costs awards should also include access to justice in order to encourage counsel to take on *pro bono* work. Courts have scope to respond to any potential unfairness that might arise as a result of parties' unequal abilities to pay costs. The *pro bono*

party was not paying a lawyer. Where costs were awarded in favour of a party, the costs belonged to that party.

Gook Country Estates Ltd. v. Quesnel (City), [2007] B.C.J. No. 246, 2007 CarswellBC 267, 68 B.C.L.R. (4th) 192, 2007 BCSC 171, 30 M.P.L.R. (4th) 307, 51 R.P.R. (4th) 310 (B.C. S.C. [In Chambers]).

Public interest litigation. Action dismissed. Parties made submissions on costs. Costs awarded to defendants. Criteria for refusing to award costs in public interest litigation not met.

Order eventually entered, including costs, dated September 13, 2006. Unfair to expose plaintiff to additional costs that would be payable because of rule change on January 1, 2007. Costs payable by plaintiff would likely be significantly increased under new rules. Party should not be prejudiced by actions that were entirely those of court.

Ezer v. Yorkton Securities Inc., 2006 CarswellBC 2936, 2006 BCCA 548, 233 B.C.A.C. 161, 386 W.A.C. 161 (B.C. C.A.).

Unsuccessful appellant (Ezer) ordered to pay special costs. Matter proceeded to assessment. Ezer objected to charges for computer research, asserting that counsel had to demonstrate why charges for computer research were necessary and reasonable in the circumstances. Court deleted the amounts for research that it could not link to a claim in the fees.

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency), 2007 CarswellBC 78, 2007 CarswellBC 79, [2007] S.C.J. No. 2, 2007 SCC 2, 215 C.C.C. (3d) 449, 62 B.C.L.R. (4th) 40, 53 Admin. L.R. (4th) 153, 150 C.R.R. (2d) 189, 275 D.L.R. (4th) 1, *(*sub nom. *Little Sisters Book & Art Emporium v. Canada)* [2007] 1 S.C.R. 38, *(*sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 235 B.C.A.C. 1, *(*sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 388 W.A.C. 1, *(*sub nom. *Little Sisters Book and Art Emporium v. Minister of National Revenue)* 356 N.R. 83, 37 C.P.C. (6th) 1 (S.C.C.).

"A trial judge enjoys considerable discretion in fashioning a costs award. . . . While the general rule is that costs follow the cause, this need not always be the case. . . . A judge's decision on costs will generally be insulated from appellate review. . . . In exercising their discretion regarding costs, trial judges must, especially in making an order as exceptional as one awarding advance costs, be careful to stay within recognized boundaries.

. . . . .

"Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs . . . By the same token, however, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs . . . Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously . . .".

Young v. Borzoni, 2007 CarswellBC 119, [2007] B.C.J. No. 105, 2007 BCCA 16, 388 W.A.C. 220, 277 D.L.R. (4th) 685, 235 B.C.A.C. 220, 64 B.C.L.R. (4th) 157 (B.C. C.A.).

Several paragraphs in claim alleged intolerance, deceit, harassment, intimidation, writing malicious letters, falsifying documents and, in general, disrupting the Youngs' lives. The motions judge held claim abuse of the court's process and that the Youngs were "using the court system as a plaything to harass others they do not like." The Court of Appeal affirmed findings. The court awarded Borzoni special costs. While the Youngs' frivolous and vexatious litigiousness might not amount to scandalous or outrageous conduct, it was reprehensible misconduct deserving of reproof or rebuke.

Miller v. Boxall, 2007 CarswellSask 7, 2007 SKQB 9, 30 M.P.L.R. (4th) 33, 291 Sask. R. 113, [2007] 3 W.W.R. 119 (Sask. Q.B.).

Party and party costs fixed at $5,000 awarded against applicant. Action not characterized as public interest litigation. Certain criteria did not apply in this case. In particular, proceedings did not invoke issues, importance of which extended beyond immediate interest of parties involved; applicant had as ratepayer interest in outcome of proceedings and respondents were not in clearly superior position to bear costs of proceedings.

1465778 Ontario Inc. v. 1122077 Ontario Ltd., 2006 CarswellOnt 6582, [2006] O.J. No. 4248, 216 O.A.C. 339, 38 C.P.C. (6th) 1, 275 D.L.R. (4th) 321, 82 O.R. (3d) 757 (Ont. C.A.).

In private action not involving public law or *Canadian Charter of Rights and Freedom* or similar issues of general public importance, court can make costs orders in favour of party represented by *pro bono* counsel. Court has discretion to make costs orders under s. 131 of *Courts of Justice Act* and r. 57.01 of *Rules of Civil Procedure*. Costs are to indemnify, to promote settlement, to deter frivolous actions and defences, to discourage unnecessary steps, and to promote access to justice. Litigants represented by *pro bono* counsel should not be denied access to costs regime. Losing party reimbursing *pro bono* counsel not inappropriate and not derogating from charitable purpose of volunteerism.

Clear Comfort Windows Inc. v. Newhook, 2006 CarswellOnt 8898, [2006] O.J. No. 5504 (Ont. Sm. Cl. Ct.); additional reasons to 2006 CarswellOnt 6306 (Ont. Sm. Cl. Ct.), D.J. Lange D.J. Costs in Small Claims Court.

Masih v. Janjic, 2005 CarswellOnt 9196 (Ont. S.C.J.); additional reasons to 2005 CarswellOnt 9195 (Ont. S.C.J.), Criger D.J. Costs in Small Claims Court.

Martin v. Martin (2007), 2007 CarswellOnt 1574 (Ont. S.C.J.); additional reasons to (2007), 2007 CarswellOnt 683, [2007] O.J. No. 467 (Ont. S.C.J.).

Husband ordered to pay wife's costs fixed at $40,000. Husband given much flexibility throughout trial because of his lack of legal representation and legal knowledge. Husband must have reasonably anticipated that he would be liable for wife's costs in event that he was unsuccessful in litigation.

Routhier v. Borris, 2007 CarswellOnt 1948 (Ont. S.C.J.); additional reasons to (2006), 2006 CarswellOnt 7458 (Ont. Div. Ct.), R.J. Smith J. Persons entitled to or liable for costs. Unrepresented party.

Bystedt (Guardian ad litem of) v. Bagdan, 2003 CarswellBC 812, 2003 BCSC 520 (B.C. S.C.); additional reasons to 2001 CarswellBC 2966, [2001] B.C.J. No. 2769 (B.C. S.C.).

Normal rule is that costs follow event. Defendant had to instruct counsel, attend at discovery, and testify at trial. Defendant's participation was more than being witness.

Katish v. Mergaert, 2006 CarswellAlta 1418, 2006 ABQB 794 (Alta. Q.B.); additional reasons to 2006 CarswellAlta 880, 2006 ABQB 508 (Alta. Q.B.).

Particular items of costs. Witness fee and expenses. Expert witness.

Rendek v. Dufresne, 2006 CarswellAlta 1869, 414 A.R. 371, 2006 ABQB 822 (Alta. Q.B.); additional reasons to 2006 CarswellAlta 1212, [2006] A.J. No. 1167, 2006 ABQB 663 (Alta. Q.B.).

Costs. Plaintiffs not entitled to reimbursement of personal representatives' travel costs to otherwise attend trial.

Crane Canada Co. v. Montis Sorgic Associates Inc., 2006 CarswellOnt 3051 (Ont. C.A.); affirming 2005 CarswellOnt 9989 (Ont. S.C.J.).

Defendants applied successfully for relief including transfer of claims from Small Claims Court to Superior Court of Justice. Claims more appropriately dealt with in Superior Court of Justice. Plaintiffs appealed. Appeal dismissed. Court aware of access to justice concerns

that were raised. Fact that all claims were subrogated claims brought by one insurer worthy of consideration.

MRSB Chartered Accountants v. Cardinal Packaging Ltd., [2006] P.E.I.J. No. 16, 2006 CarswellPEI 64, 46 C.P.C. (6th) 335, 773 A.P.R. 61, 256 Nfld. & P.E.I.R. 61, 2006 PESCTD 16 (P.E.I. S.C.).

Accountants brought Small Claims action for recovery of fees for accounting work done. Following pre-trial conference, plaintiff discontinued action. Section 53 of *Supreme Court Act* provides jurisdiction to Small Claims "Section" of Trial Division of Supreme Court of Prince Edward Island to award costs on substantial indemnity or partial indemnity basis. Rule 19.02 of *Small Claims Section Rules* provides that award of costs in Small Claims Section, other than disbursements, shall not exceed 15 per cent of amount claimed, unless court considers it necessary in interests of justice to penalize party, counsel or agent for unreasonable behaviour in proceeding. Rule 19.02 does not override authority in s. 53(1) of Act.

R. v. Maleki, 2007 CarswellOnt 6209, 2007 ONCJ 430 (Ont. C.J.).

Accused convicted and sentenced to fine of $7,500. Neither party awarded costs. Criteria for making costs order against Crown not met. Crown fulfilled its professional responsibilities throughout proceeding. Even if provincial court judge had jurisdiction to order costs against accused and/or his agent, case at bar not analogous to decision where court held that its inherent power gave it jurisdiction to make such award. Section 131 of *Courts of Justice Act* and ss. 809 and 840 of *Criminal Code* did not persuasively provide jurisdiction to make meaningful costs order against accused.

Milne v. Columbia Health Centre Inc., 2007 CarswellAlta 590, 2007 ABQB 299, 416 A.R. 323 (Alta. Q.B.).

Costs. Unrepresented party.

Celebre v. 1082909 Ontario Ltd. (2007), 2007 CarswellOnt 6249, 64 C.L.R. (3d) 211 (Ont. Div. Ct.).

Appeal dismissed on July 17, 2007. Appeal from Small Claims Court which had awarded the plaintiffs $9,148.58 and costs of $175 for the negligence of the defendant. After appeal launched defendant offered on March 13, 2007 to pay plaintiffs $500 for dismissal of appeal on consent and without costs. On May 14, 2007, the plaintiffs offered to accept $8,000 inclusive of costs and interest. The appeal would be dismissed and releases exchanged. Neither offer was accepted.

The plaintiffs claim partial indemnity costs up to May 14, 2007 and substantial indemnity costs thereafter, pursuant to r. 49.10. Their Bill of Costs claims for 17.7 hours charged by a lawyer of 14 years' experience at $225 if partial and $300 if substantial indemnity costs, for totals of $3,982.50 if partial and $5,310 if substantial.

Counsel for the defendant/appellant submits that:

> a) Such an award is so large as to discourage litigants from using the court system; it is unreasonable and beyond the expectations of reasonable parties that the costs should exceed half of the amount of the judgment; Small Claims Court cases should carry only very small costs: *Roach v. Adamson*, 1982 CarswellOnt 934, [1982] O.J. No. 3346, 37 O.R. (2d) 547 (Ont. Assess. O.); and
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> b) Rule 49.10 does not apply to appeals: *Niagara Structural Steel (St. Catharines) Ltd. v. W.D. LaFlamme Ltd.* (1987), 1987 CarswellOnt 440, [1987] O.J. No. 2239, 58 O.R. (2d) 773, 19 O.A.C. 142, 19 C.P.C. (2d) 163 (Ont. C.A.).

Small cases cannot carry big fees. The costs award should not be so low that it deprives the successful party of the fruits of the judgment. A fair figure, within the reasonable expecta-

tions of the parties to a litigation at the appeal level involving about $10,000, and taking into account the offers, is $4,000 all-inclusive.

Kuzev v. Roha Sheet Metal Ltd. (2007), 2007 CarswellOnt 4338, 227 O.A.C. 3 (Ont. Div. Ct.).

On March 22, 2007, court dismissed the defendant's appeal from the trial judge's award of $4,000 to plaintiff. The plaintiff sought costs on substantial indemnity scale of $7,691, or on the partial indemnity costs scale, $6,223.87. The basis for request is twofold: a) the defendant must be taken to know that the cost of responding to the appeal would be significantly more than the award; and b) the appellant's factum was unfocused which increased the cost for the respondent.

Even if a case has little merit, that alone does not justify substantial indemnity costs: *Young v. Young*, EYB 1993-67111, [1993] S.C.J. No. 112, 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703 (S.C.C.).

Is the total for fees and disbursements a fair and reasonable amount to be paid by the unsuccessful parties in the particular circumstances of this case? See *Murano v. Bank of Montreal* (1998), [1998] O.J. No. 2897, 1998 CarswellOnt 2841, 111 O.A.C. 242, 163 D.L.R. (4th) 21, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.), at page 247 (O.R.); and *Zesta Engineering Ltd. v. Cloutier*, 2002 CarswellOnt 4020, [2002] O.J. No. 4495, 21 C.C.E.L. (3d) 161 (Ont. C.A.), Nov. 27, 2002. This is the major guiding principle in the fixing of costs, as reiterated by Borins J.A. for the Court of Appeal in *Moon v. Sher*, [2004] O.J. No. 4651, 2004 CarswellOnt 4702, 246 D.L.R. (4th) 440, 192 O.A.C. 222 (Ont. C.A.), at para. 30, where he observed that the case law established that such an award must:

> . . . reflect 'more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.' This is a fundamental concept in fixing or assessing costs.

An award of $2,500 plus disbursements of $351.47 reflects these principles.

Ibrahim v. Kadhim (2007), 2007 CarswellOnt 5606, 86 O.R. (3d) 728 (Ont. S.C.J.), 2007-09-10.

The respondent sought costs in accordance with Rule 49.10 following success on an appeal of the Small Claims Court decision. The respondent requested costs of $12,940.90 plus disbursements of $637.96.

The objective of a costs order is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful party. See *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, [2004] O.J. No. 2634, (sub nom. *Boucher v. Public Accountants Council for the Province of Ontario)* 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201 (Ont. C.A.). Costs fixed at $3,000 inclusive of GST and disbursements.

Jung v. Toronto Community Housing Corp., 2008 CarswellOnt 224 (Ont. Div. Ct.).

During submissions at the appeal and in his written submissions as to costs, counsel for Jung said that he was acting on a *pro bono* basis because his client was impecunious. Relying on *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, 2006 CarswellOnt 6582, [2006] O.J. No. 4248, 216 O.A.C. 339, 38 C.P.C. (6th) 1, 275 D.L.R. (4th) 321, 82 O.R. (3d) 757 (Ont. C.A.), counsel for the respondent argued that there was never an expectation that appellant would be able to pay costs if unsuccessful on appeal.

The Court of Appeal in the above case concluded that there should be no prohibition of an award of costs in favour of *pro bono* counsel in appropriate cases because the law now recognizes that costs awards may serve purposes other than indemnity.

Such an award is not mandatory and will depend on the rule 57.01 factors, considerations of access to justice and the need to maintain a level playing field between the parties.

Walsh v. 1124660 Ontario Ltd. (2007), 2007 CarswellOnt 4459, [2007] O.J. No. 2773, 59 C.C.E.L. (3d) 238 (Ont. S.C.J.).

Jury trial resulted in verdict for defendants and action dismissed. Normal order would be defendants recover partial indemnity costs from plaintiff.

Plaintiff single mother with no employment-related skills. Costs always in discretion of court.

Myers v. Metropolitan Toronto (Municipality) Police Force, 1995 CarswellOnt 152, [1995] O.J. No. 1321, 37 C.P.C. (3d) 349, (sub nom. *Myers v. Metropolitan Toronto (Municipality) Chief of Police)* 125 D.L.R. (4th) 184, (sub nom. *Myers v. Metropolitan Toronto Chief of Police)* 84 O.A.C. 232 (Ont. Div. Ct.), paras. 19-22, determined that a rule based on impecuniosity would defy consistent application; would be difficult to administer as the court would have difficulty with the truthfulness of claims; and would allow impecunious litigants a means to ignore the rules of court. This would be even more troublesome when coupled with the contingency fee system developing in our litigation.

On the civil side, where the individual is a plaintiff, one can argue that it is a matter of choice whether to bring a particular lawsuit. Impecunious people do not have freedom of choice in the same degree that wealthy people do because they cannot afford to lose. In the case of dismissed employees or injured persons, there is often no redress without a legal action so the choice is to sue, running the unacceptable risk of a ruinous costs award, or go uncompensated. Defendants do not even have that limited degree of choice.

Not in the public interest to deter people from using their own courts for fear of costs consequences if they lose case. No order as to costs.

Paulus v. Murray (2007), 2007 CarswellOnt 1329 (Ont. Master).

Defendants' motion for security for costs under Rules 56.01(a) and (d). Paulus's evidence that he resides in Michigan.

Case law provides that impecuniosity is something more than having no assets, and in case of corporate plaintiff requires that it establish "impecuniosity beyond the mere evidence that it has no assets or income." See *Trottier Foods Ltd. v. Leblond*, 1987 CarswellOnt 549, [1987] O.J. No. 1246, 24 C.P.C. (2d) 272 (Ont. Master). Moreover, it must demonstrate that monies are not available from its shareholder or other sources by way of security. See also *1056470 Ontario Inc. v. Goh*, 1997 CarswellOnt 2434, [1997] O.J. No. 2545, 13 C.P.C. (4th) 120, 34 O.R. (3d) 92, 32 O.T.C. 225 (Ont. Gen. Div.).

See *O'Callaghan v. Lloyd's Underwriters*, 2002 CarswellOnt 3650, [2002] O.J. No. 4194 (Ont. Master), which followed *Hallum v. Canadian Memorial Chiropractic College*, [1989] O.J. No. 1399, 1989 CarswellOnt 896, 70 O.R. (2d) 119 (Ont. H.C.) at p. 125: "The plaintiff has a heavy burden to discharge in order to prove impecuniosity. He must do more than adduce some evidence of impecuniosity. He must show that he is impecunious.".

Having not proven impecuniosity, order for security for costs in the amount of $8,000 Canadian to be posted in stages considering the early stage of proceeding.

Christian Jew Foundation v. Christian Jew Outreach (2007), 2007 CarswellOnt 3446, [2007] O.J. No. 2140 (Ont. S.C.J.), Perell J., additional reasons at (2007), 2007 CarswellOnt 4580 (Ont. S.C.J.).

Defendants brought motion for leave to appeal an award of costs made by Master. At the heart of motion for leave to appeal and request court consider new evidence is allegation defendants are impecunious. Defendants' motion should be dismissed.

No appeal as of right of a Master's award. See M.M. Orkin, *The Law of Costs* (2nd ed.) (Canada Law Book: Aurora, looseleaf), para. 801.1.

Test for granting leave to appeal of discretionary costs award set out in *Rona Inc. v. Sevenbridge Developments Ltd.*, [2002] O.J. No. 3983, 2002 CarswellOnt 3361 (Ont. S.C.J.).

Section 4.02 of the *Rules of Professional Conduct* states:

> (1) Subject to any contrary provision of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.
>
> **Submission of Testimony**
>
> (2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Impecuniosity will not insulate a party from liability of costs otherwise payable and impecuniosity cannot be used as a justification for failure to obey a court order. See *Myers v. Metropolitan Toronto (Municipality) Police Force*, 1995 CarswellOnt 152, [1995] O.J. No. 1321, 37 C.P.C. (3d) 349, *(*sub nom. *Myers v. Metropolitan Toronto (Municipality) Chief of Police)* 125 D.L.R. (4th) 184, *(*sub nom. *Myers v. Metropolitan Toronto Chief of Police)* 84 O.A.C. 232 (Ont. Div. Ct.); *Abbott v. Reuter-Stokes Canada Ltd.*, 1988 CarswellOnt 520, 32 C.P.C. (2d) 161 (Ont. H.C.); *Schaer v. Barrie Yacht Club*, [2003] O.J. No. 4171, 2003 CarswellOnt 4009 (Ont. S.C.J.); *Baksh v. Sun Media (Toronto) Corp.*, 2003 CarswellOnt 24, [2003] O.J. No. 68, 63 O.R. (3d) 51 (Ont. Master); *Heu v. Forder Estate*, [2004] O.J. No. 705, 2004 CarswellOnt 729 (Ont. Master); *Scavarelli v. Bank of Montreal*, 2004 CarswellOnt 2083, [2004] O.J. No. 2175, 23 C.C.L.T. (3d) 306 (Ont. S.C.J.); *Cossette v. Gojit (Brampton) Inc.*, [2005] O.J. No. 6098 (Ont. Master); and *Kirwan v. Silver Brooke Golf Course Inc.*, 2006 CarswellOnt 2382, [2006] O.J. No. 1571, 46 R.P.R. (4th) 104 (Ont. S.C.J.).

Courts are reluctant to deprive a worthy but impecunious litigant of opportunity to have his or her claim adjudicated when it is not plainly devoid of merit. See, for example, *Rackley v. Rice*, [1992] O.J. No. 253, 1992 CarswellOnt 1092, 56 O.A.C. 349, 89 D.L.R. (4th) 62, 8 O.R. (3d) 105 (Ont. Div. Ct.); *John Wink Ltd. v. Sico Inc.*, 1987 CarswellOnt 370, [1987] O.J. No. 5, 57 O.R. (2d) 705, 15 C.P.C. (2d) 187 (Ont. H.C.); *Solcan Electric Corp. v. Viewstar Canada Inc.*, 1994 CarswellOnt 505, 25 C.P.C. (3d) 181 (Ont. Gen. Div.); *1056470 Ontario Inc. v. Goh*, 1997 CarswellOnt 2434, [1997] O.J. No. 2545, 13 C.P.C. (4th) 120, 34 O.R. (3d) 92, 32 O.T.C. 225 (Ont. Gen. Div.).

Motion for leave to appeal dismissed.

Walker v. Ritchie, 2006 CarswellOnt 6185, 2006 CarswellOnt 6186, [2006] S.C.J. No. 45, 2006 SCC 45, 353 N.R. 265, 33 C.P.C. (6th) 1, 43 C.C.L.I. (4th) 161, 43 C.C.L.T. (3d) 1, 273 D.L.R. (4th) 240, 217 O.A.C. 374, [2006] 2 S.C.R. 428 (S.C.C.).

Plaintiffs' counsel carrying lengthy personal injury litigation without remuneration because plaintiffs lacked financial resources to pay. Defendants not admitting liability. Whether plaintiffs' costs award payable by unsuccessful defendants may be increased to take into account risk of non-payment to plaintiffs' counsel. See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 49, 57.01(1).

Risk of non-payment to the plaintiffs' lawyer not a relevant factor under costs scheme in r. 57.01(1) at time costs fixed in case.

The opportunity for counsel to charge his or her own client a risk premium, or now a contingency fee, encourages competent counsel to take on the cases of impecunious clients.

Costs awards made by trial judges should be accorded a high degree of deference. See *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003), 2003 CarswellBC 3040, 2003 CarswellBC 3041, 2003 SCC 71, 43 C.P.C. (5th) 1, [2003] 3 S.C.R. 371, 313 N.R. 84, [2004] 2 W.W.R. 252, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161 (S.C.C.), at paras. 42-43; *Hamilton v. Open Window Bakery Ltd.*, [2003] S.C.J. No. 72, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, REJB 2004-54076, 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1 (S.C.C.), at para. 27. However, as LeBel J. stated in *Okanagan Indian Band*, at para. 43: "An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law." In this case, the court must look to the law governing costs in Ontario.

Legislation now permits counsel to charge contingency fees: See the *Solicitors Act* and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

MRSB Chartered Accountants v. Cardinal Packaging Ltd., [2006] P.E.I.J. No. 16, 2006 CarswellPEI 64, 46 C.P.C. (6th) 335, 773 A.P.R. 61, 256 Nfld. & P.E.I.R. 61, 2006 PESCTD 16 (P.E.I. S.C.).

Accountants brought small claims action for recovery of fees. Accountants had no grounds to claim against CM Inc., L and G. Small Claims Rule 19 and general discretion under s. 53 of *Supreme Court Act* provide jurisdiction to Small Claims Section of Trial Division of Supreme Court of Prince Edward Island to award more than usual costs in exceptional cases. Necessary in interests of justice to penalize accountants for having made unfounded allegations of fraud, deceit and acting in bad faith.

In *Biggins v. Bovan*, [2005] O.J. No. 1000 (Ont. S.C.J.) at para. 9, Searle D.J. interpreted the phrase "in the proceeding" in "unreasonable behaviour in the proceeding" to include the commencement of a proceeding. I agree with this interpretation.

Court award substantial indemnity costs against such plaintiffs to punish the plaintiffs' reprehensible conduct in making the allegations, discourage other plaintiffs from making false and harmful assertions about defendants' character, and compensate the defendants for the expense incurred in answering the baseless attack on the defendants' integrity (*Twaits v. Monk* (2000), 8 C.P.C. (5th) 230, 2000 CarswellOnt 1685, [2000] O.J. No. 1699, 132 O.A.C. 180 (Ont. C.A.) at paras. 2 to 5).

Motion by defendants for costs against plaintiff on full indemnity basis following plaintiff's discontinuance of action, and for order fixing amount of costs.

Brace v. Canada (Customs & Revenue Agency), 2007 CarswellNfld 267, 47 C.P.C. (6th) 276, 822 A.P.R. 332, 2007 NLTD 149, 270 Nfld. & P.E.I.R. 332 (N.L. T.D.).

As successful litigant, B awarded lump-sum amount of $1,750 on party and party basis. Costs awarded for hearing, all relevant pre-trial applications, and in recognition of CRA's claim for costs on two withdrawal applications and costs of current application. Costs not justified on solicitor and client scale. No evidence that any conduct had been reprehensible, scandalous or outrageous. CRA was only pursuing its statutory responsibility in instructing sheriff to make seizure. No basis for awarding costs at higher level as B was unrepresented.

Kuzev v. Roha Sheet Metal Ltd. (2007), 2007 CarswellOnt 4338, 227 O.A.C. 3 (Ont. Div. Ct.).

Small Claims Court awarded plaintiff $4,000. Plaintiff claimed costs of $7,691 on a substantial indemnity scale or, alternatively, $6,223.87 on the partial indemnity scale. Divisional Court awarded costs on partial indemnity scale in amount of $2,500 plus $351.47 for dis-

bursements. The paying party must not be faced with an award that did not reasonably reflect the amount of time and effort that was warranted by proceedings.

Even if a case has little merit, that alone does not justify substantial indemnity costs. See *Young v. Young*, EYB 1993-67111, [1993] S.C.J. No. 112, 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703 (S.C.C.).

MRSB Chartered Accountants v. Cardinal Packaging Ltd., [2006] P.E.I.J. No. 16, 2006 CarswellPEI 64, 46 C.P.C. (6th) 335, 773 A.P.R. 61, 256 Nfld. & P.E.I.R. 61, 2006 PESCTD 16 (P.E.I. S.C.).

The three defendants were awarded costs in discontinued small claims action against the plaintiff on a substantial indemnity basis in the amount of $15,000 plus taxes and disbursements. The plaintiff's allegations that the defendants were guilty of fraud, deceit and acting in bad faith were utterly false, and the court found that was necessary in interests of justice to penalize them for unreasonable behaviour.

Reimann v. Aziz, 2007 CarswellBC 2190, [2007] B.C.J. No. 2025, 47 C.P.C. (6th) 351, 286 D.L.R. (4th) 330, 246 B.C.A.C. 143, 406 W.A.C. 143, 2007 BCCA 448, 72 B.C.L.R. (4th) 1 (B.C. C.A.).

Appeal related to the costs award dismissed. While action was tried in the Supreme Court appellants submitted that the respondent should only recover his disbursements because the judgment was within the jurisdiction of the Small Claims Court. The British Columbia Court of Appeal concluded that a plaintiff did not have an ongoing obligation to assess the quantum of a claim and that the point in time for a consideration of whether a plaintiff had sufficient reason for bringing a proceeding in the Supreme Court was the time of the initiation of the action.

Harrison v. British Columbia (Information & Privacy Commissioner), 2008 CarswellBC 1542, 60 C.P.C. (6th) 58, 2008 BCSC 979, 72 C.C.E.L. (3d) 103 (B.C. S.C.).

Hearing related to assessment of plaintiff's costs flowing from successful judicial review. Self-represented plaintiff submitted bill of costs for $6,339 based on 51 units of work. Plaintiff based his bill on what would have been claimed if represented by counsel. Registrar found no requirement to discount costs because litigant was self-represented. Plaintiff was not required to demonstrate opportunity loss to claim costs. The plaintiff was awarded $4,750.

Kelly v. Aliant Telecom/Island Tel, 2008 CarswellPEI 11, [2008] P.E.I.J. No. 12, 833 A.P.R. 177, 2008 PESCTD 12, 273 Nfld. & P.E.I.R. 177 (P.E.I. T.D.).

The case involved an important issue of the assessment of costs where the amount of damages was small. Although the Rules of Civil Procedure provide that award of costs in Small Claims Section shall not exceed 15 per cent of amount claimed, the court has discretion to depart from this rule if it is in interests of justice. It was not appropriate to do so in this case, as the amount of damages was small, but there were significant and costly pre-trial proceedings, the trial was not lengthy, and the plaintiff was not successful in the majority of her claims.

Silco Electric Ltd. v. Giammaria (2008), 2008 CarswellOnt 1637 (Ont. Div. Ct.) (Ont. Div. Ct).

$1,750.00 is the amount that a party might reasonably expect to receive or have to pay, depending on the result, in a Small Claims Court appeal where the matter is uncomplicated.

Belanger v. Belanger (2005), [2005] O.J. No. 3659, 2005 CarswellOnt 3991 (Ont. S.C.J.).

> [11] I am guided, ultimately, by the Court of appeal reasoning in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), which moderated the

indemnity principle reflected in the costs grid. The court held that the computation of billable hours multiplied by a lawyer's hourly rate is but one consideration in fixing costs. Overriding principle is that the fixed costs should be fair and reasonable to the litigant required to pay them. Although the costs grid is not applicable in family law litigation, the aforesaid overriding principle that costs should be fair and reasonable is applicable universally.

Butsky-Plekan v. Plekan (2005), 2005 CarswellOnt 3084 (Ont. S.C.J.).

The objective of the court is to fix an amount for costs that is fair and reasonable for the unsuccessful party to pay in this particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant. In fixing costs, the overriding principle is reasonableness so as to not produce a result that is contrary to the fundamental objective of access to justice. (Authority: *Boucher v. Public Accountants Council (Ontario)* (2004), [2004] O.J. No. 2634, 71 O.R. (3d) 291, 188 O.A.C. 201, 2004 CarswellOnt 2521, 48 C.P.C. (5th) 56 (Ont. C.A.)).

Blake v. Chen (2009), 2009 CarswellOnt 5693, 85 C.L.R. (3d) 81 (Ont. Div. Ct.); additional reasons at (2009), 2009 CarswellOnt 6724 (Ont. Div. Ct.).

Appropriate scale of costs is partial indemnity. Most significant factor in determining quantum is amount in issue in proceeding. That said, plaintiff's Offer to Settle for $6,000 before significant appeal costs were incurred also significant. Rule 49.10 does not apply to appeals. However, Offers to Settle are the primary means by which successful Small Claims Court plaintiffs can protect themselves from Pyrrhic victories.

Datta v. Datta (2009), 2009 CarswellOnt 7650 (Ont. S.C.J.).

Claim for costs pursuant to Rule 38.08(3) of the *Rules of Civil Procedure*, where applications are abandoned or are deemed to be abandoned. Arguably, of course, costs are in the court's discretion under s. 131 of the *Courts of Justice Act*, and Rule 57.01(1) of the *Rules of Civil Procedure*.

Substantial indemnity costs rewards appropriate where party has behaved in abusive manner, brought proceedings wholly devoid of merit, and unnecessarily run up the costs of litigation; in short, where a party has misconducted himself or herself in the course of the litigation, or behaved unreasonably in the litigation. See *Standard Life Assurance Co. v. Elliot* (2007), 2007 CarswellOnt 3236, [2007] O.J. No. 2031, 86 O.R. (3d) 221, 50 C.C.L.I. (4th) 288 (Ont. S.C.J.), and *Hunt v. TD Securities Inc.* (2003), 2003 CarswellOnt 3141, [2003] O.J. No. 3245, 66 O.R. (3d) 481, 229 D.L.R. (4th) 609, 175 O.A.C. 19, 36 B.L.R. (3d) 165, 39 C.P.C. (5th) 206 (Ont. C.A.); additional reasons at (2003), 2003 CarswellOnt 4971, 43 C.P.C. (5th) 211, 40 B.L.R. (3d) 156 (Ont. C.A.); leave to appeal refused (2004), 2004 CarswellOnt 1610, 2004 CarswellOnt 1611, [2003] S.C.C.A. No. 473, 330 N.R. 198 (note), 196 O.A.C. 399 (note) (S.C.C.). Applicant behaved unreasonably. Costs awarded on a substantial indemnity basis.

Ellis v. J & J Concrete Floors Ltd. (2009), 2009 CarswellOnt 3861 (Ont. S.C.J.), D.J. Lange D.J; additional reasons to (2009), 2009 CarswellOnt 3860 (Ont. S.C.J.).

WE and BE brought unsuccessful action for amount of $4,507.82. Costs submissions were made by TJ. Costs awarded to TJ in amount of $440. TJ entitled to representation fee, determined to be $100 per hour for paralegal that attended for 3.5 hours. Additional fees were for preparation and filing.

K.N. Umlah Insurance Agency Ltd. v. Christie, 2009 CarswellNS 286, 2009 NSSM 15, 886 A.P.R. 285, 278 N.S.R. (2d) 285 (N.S. Sm. Cl. Ct.); additional reasons to 2009 CarswellNS 110, 2009 NSSM 7 (N.S. Sm. Cl. Ct.).

Plaintiff claimed $16,194. Jurisdiction of Small Claims Court increased to $25,000. Action transferred to Small Claims Court. Claim dismissed in its entirety. Word "costs" in s. 15(1)(e) meant only costs incurred in Supreme Court prior to transfer in nature of disburse-

ments and did not include costs referable to cost of retaining lawyer. Order made awarding costs of $360.73 plus whatever defendant paid in respect of discovery service's attendance and transcription costs.

McAllister v. Wiegand (2009), 2009 CarswellOnt 1529 (Ont. Sm. Cl. Ct.).

Section 29 of *Courts of Justice Act*, capping costs in Small Claims Court at 15 per cent of amount claimed, did not entitle plaintiff to maximum award. Fifteen per cent rule did not prevail over R. 19.04 of Small Claims Court Rules as regards representation fee and should not be applied as matter of course. Delays in proceeding were not undue warranting penalty under R. 19.06 and did not constitute special situation justifying 15 per cent rule. Delays mostly due to defendants, but some were *bona fide* and consented to by plaintiff without court attendance. Plaintiff's unrevoked offer to settle was more favourable to defendants than judgment. No special circumstances warranted suspension of costs consequences.

Mohamadi v. Tremblay, 2009 CarswellBC 1775, 2009 BCSC 898 (B.C. S.C.); additional reasons at 2009 CarswellBC 3120, 2009 BCSC 1583 (B.C. S.C.).

Plaintiff injured in motor vehicle accident. Defendant admitted liability. Plaintiff awarded general damages of $10,000. Plaintiff awarded special damages of $690. Plaintiff not entitled to costs. Sum plaintiff recovered within jurisdiction of Provincial Court under *Small Claims Act*.

Nazir v. Western Union Financial Services (Canada) Inc. (2008), 2008 CarswellOnt 8998 (Ont. Div. Ct.); affirming (2007), 2007 CarswellOnt 9351 (Ont. S.C.J.); additional reasons to (2007), 2007 CarswellOnt 5989 (Ont. Sm. Cl. Ct.).

Plaintiff brought action for $10,000 against defendant for return of $62 paid to Western Union, and damages of $9,938 for breach of contract. Action allowed. Plaintiff entitled to costs of $245, reflecting claim of $75, trial fee of $100, service fee of $20 and pleading fee of $50. Amount requested, totalling 30 per cent of claim twice maximum in *Courts of Justice Act*. Trial lasted one day. Awarding costs to defendant would penalize plaintiff. Defendant appealed costs order. Appeal dismissed. Trial judge not in error.

Prince Edward Island School Board, Regional Administrative Unit No. 3 v. Morin, 2009 CarswellPEI 41, 2009 PECA 18, *(*sub nom. *Morin v. Prince Edward Island Regional Administrative Unit No. 3)* 288 Nfld. & P.E.I.R. 85, *(*sub nom. *Morin v. Prince Edward Island Regional Administrative Unit No. 3)* 888 A.P.R. 85, 74 C.P.C. (6th) 8 (P.E.I. C.A.); additional reasons at 2009 CarswellPEI 45, 2009 PECA 20 (P.E.I. C.A.); leave to appeal refused 2010 CarswellPEI 7, 2010 CarswellPEI 8, *(*sub nom. *Morin v. Board of Education of Regional Unit No. 3)* 298 Nfld. & P.E.I.R. 287 (note), *(*sub nom. *Morin v. Board of Education of Regional Unit No. 3)* 921 A.P.R. 287 (note), *(*sub nom. *Morin v. Prince Edward Island Regional Administrative Unit No. 3)* 405 N.R. 394 (note) (S.C.C.).

Appellant awarded 100 per cent of his costs on partial indemnity basis as lay litigant for entire action. Costs assessed by prothonotary pursuant to R. 57.01(3.1) of Rules of Civil Procedure. Appellant claimed he was entitled to lost opportunity costs because he was unable to attain or retain employment due to burden of carrying litigation by himself. Appeal allowed in part. Appellant not employed throughout most of litigation and therefore unable to claim time spent on litigation.

Sutherland v. Manulife Financial (2009), 2009 CarswellOnt 4489 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 4991 (Ont. S.C.J.).

Plaintiff Sutherland, self-represented, had two actions dismissed by Registrar's orders. Sutherland requests that any costs against her be in the cause. She was not in a position to afford to pay any costs until her claim was heard.

Although, technically, Ms. Sutherland was successful on her motions, the motions would not have been necessary had she taken timely steps to advance her actions. Fairest order is to

make the costs of motions, $1,800 for each set of defendants, be payable to the defendants in any event of the cause.

Tripodi v. 434916 Ontario Ltd. (2009), 2009 CarswellOnt 6962 (Ont. S.C.J.), Romain Pitt J.; additional reasons at (2009), 2009 CarswellOnt 8112 (Ont. S.C.J.).

Solicitor's bill was for $10,590.67. Assessment Officer reduced it to $2,000.00. Client had changed counsel solely because the first counsel's fees were considered either beyond the client's means or not warranted by amount in issue. The lawyer should have: (a) made sure that his estimate of fees was realistic, that is, as near as possible to the actual fees; (b) kept the client constantly aware of potential increases in fees; and (c) got written instructions to proceed when it became clear that the costs would in fact be disproportionate to the amount involved in the litigation. None of these things was done.

White v. Ritchie (2009), 2009 CarswellOnt 3268 (Ont. S.C.J. [Commercial List]).

White claims disbursements and for time spent by him as a self-represented litigant dating back to October 1, 2008. White claims taxi and air expenses for his trip to Toronto. Disbursements supported by copies of invoices. Disbursements to be paid by defendants. Self-represented lay litigant may be awarded costs. Within discretion of the judge. See *Fong v. Chan* (1999), 46 O.R. (3d) 330, 128 O.A.C. 2, 181 D.L.R. (4th) 614, [1999] O.J. No. 4600, 1999 CarswellOnt 3955 (Ont. C.A.).

Self-represented litigant should not recover costs for time and effort that any litigant would have to devote to case. Lay litigants must demonstrate they devoted time and effort to do work ordinarily done by a lawyer retained to conduct litigation and therefore they incurred an opportunity cost by foregoing remunerative activity. White claimed approximately 240 hours for preparation of materials. A reasonable allowance for work done by White is Cdn. $15,000.

Wilson v. Bourbeau (2009), 249 O.A.C. 122, 2009 CarswellOnt 2583 (Ont. Div. Ct.).

Applicant sought to seal portions of record of judicial review. Motion dismissed. In general, person's discomfort must yield to strong public policy in favour of openness. Applicant's desire to protect her identity and medical information did not raise question of serious risk to important public interest. No important societal value was involved in applicant's request for sealing order.

Woolner v. D'Abreau (2009), 2009 CarswellOnt 664, 70 C.P.C. (6th) 290, 50 E.T.R. (3d) 59, [2009] O.J. No. 1746 (Ont. S.C.J.), Brown J.; reversed (2009), 2009 CarswellOnt 6479, 53 E.T.R. (3d) 18 (Ont. Div. Ct.).

Court allowed two lawyers of elderly client to keep legal fees but for only a portion of services rendered to client that resulted in value to her. It disallowed other costs incurred because lawyers breached their fiduciary duties to client which included a duty to provide client with full disclosure of all relevant and material information that pertained to her interests and, after a certain point in litigation, incurred costs without reasonable cause.

383501 Alberta Ltd. v. Rangeland Truck & Crane Ltd., 2009 CarswellAlta 201, 2009 ABQB 87, 67 C.P.C. (6th) 358 (Alta. Q.B.).

Trial judge allowed recovery for filing fee and costs of service, but declined to award full indemnity costs. Plaintiff appealed. Appeal dismissed. While award of costs need not be pleaded, there is line of authority that suggests that notice should be given, presumably in pleadings, of party's intention to seek solicitor client costs. Plaintiff entitled to costs based on its relative success at trial. Provincial Court proceeds in terms of its mandate. Exercise of discretion, in this case, appeared to accord with generally applied rules, different than those applied in Court of Queen's Bench.

Bérubé v. Rational Entertainment Ltd., 2010 ONSC 894, 2010 CarswellOnt 725 (Ont. Div. Ct.).

Bérubé appealed decision of Tierney J. of the Small Claims Court dismissing her action. Appeal was dismissed. Each party sought costs.

General rule that costs should follow the success in the cause.

Respondent claims the amount of $5,529.31 on a partial indemnity scale, inclusive of disbursements of $457.81.

Amount claimed in appellant's statement of claim was $7,200. Award of costs on the appeal must take into consideration amount in issue.

Appropriate award on a partial indemnity basis is $3,500 inclusive of GST and disbursements.

LeBlanc v. Lalonde, 2010 ONSC 927, 2010 CarswellOnt 810 (Ont. Div. Ct.).

Appeal of Small Claims Court judgment dismissed. Respondent seeking $9,052.81 in costs. The Appellant has suggested that $2,500.00 is a fair and reasonable costs award in this case. Judgment and award received in this case totalled $5,300.00. A costs award should be proportionate to the complexity and importance of the issues and to the amount involved. See also *Boucher v. Public Accountants Council (Ontario)* (2004), 2004 CarswellOnt 2521, [2004] O.J. No. 2634, 48 C.P.C. (5th) 56, 188 O.A.C. 201, 71 O.R. (3d) 291 at para. 26 (Ont. C.A.).

1465778 Ontario Inc. v. 1122077 Ontario Ltd., [2006] O.J. No. 4248, 82 O.R. (3d) 757, 275 D.L.R. (4th) 321, 2006 CarswellOnt 6582, 38 C.P.C. (6th) 1, 216 O.A.C. 339 (Ont. C.A.).

Plaintiffs' counsel was acting *pro bono* and sought costs from losing party. The defendants argued lawyers acting *pro bono* in commercial matters should not be awarded costs. The purpose of costs awards should include access to justice. There is no prohibition on award of costs to *pro bono* counsel in appropriate cases. Costs awarded. Costs could serve purposes other than indemnity, including the objectives of encouraging settlement, preventing frivolous or vexatious litigation, and discouraging unnecessary steps. In this case, plaintiffs impecunious, and it was because they were unable to pay a costs order that the case initially dismissed. No reason why the losing party should not be ordered to pay costs of the appeal.

See Major J. in a speech titled "Lawyers' Obligation to Provide Legal Services" delivered to the National Conference on the Legal Profession and Professional Ethics at the University of Calgary in 1994 (33 Alta. L. Rev. 719) where he said:

> It has long been part of the duty and tradition of the legal profession to provide services gratuitously for those who require them but cannot afford them. The profession, recognizing its commitment to the larger principle of justice, has traditionally not let such cases go unanswered merely because the individual is impecunious. Instead, the profession has collectively accepted the burden of such cases, thereby championing the cause of justice while at the same time sharing the cost that such cases entail. This is a tradition which dates to the very inception of the profession in medieval Europe in the thirteenth century.

Costs have been awarded in cases where the litigant was self-represented (*Skidmore v. Blackmore*, 122 D.L.R. (4th) 330, 35 C.P.C. (3d) 28, 90 W.A.C. 191, 55 B.C.A.C. 191, 27 C.R.R. (2d) 77, [1995] 4 W.W.R. 524, 2 B.C.L.R. (3d) 201, [1995] B.C.J. No. 305, 1995 CarswellBC 23 (B.C. C.A.)); where the winning party was a law firm represented by one of its partners who was not charging fees (*Fellowes, McNeil*); where counsel was salaried (*Solicitors Act*, R.S.O. 1990, c. S.15, s. 36); and, where the responsibility for a party's legal fees was undertaken by a third party (*Lavigne v. O.P.S.E.U.*, 1987 CarswellOnt 1074, 41 D.L.R. (4th) 86, 60 O.R. (2d) 486, 87 C.L.L.C. 14,044 (Ont. H.C.)).

Costs have also been awarded to counsel acting *pro bono* in *Charter* or public interest cases. See *Rogers v. Greater Sudbury (City) Administrator of Ontario Works*, 57 O.R. (3d) 467, [2001] O.J. No. 3346, 2001 CarswellOnt 2934 (Ont. S.C.J.).

In non-public interest cases, see *e.g.*, *Mackay Homes v. North Bay (City)*, [2005] O.J. No. 3263, 2005 CarswellOnt 3367 (Ont. S.C.J.), *Spatone v. Banks*, [2002] O.J. No. 4647, 2002 CarswellOnt 4143 (Ont. S.C.J.), and *Jacks v. Victoria Amateur Swimming Club*, [2005] B.C.J. No. 2086, 2005 CarswellBC 2300, 2005 BCSC 1378 (B.C. S.C. [In Chambers]). In *Ontario (Human Rights Commission) v. Brockie*, 2004 CarswellOnt 1231, 185 O.A.C. 366 (Ont. C.A.), court reversed a decision of the Divisional Court that denied costs to *pro bono* counsel, holding that "[s]uch a policy would act as a severe penalty to lawyers acting in the public interest by making it possible for litigants of modest means to access the courts.".

Davies v. Clarington (Municipality), 254 O.A.C. 356, 77 C.P.C. (6th) 1, 2009 CarswellOnt 6185, 2009 ONCA 722, 100 O.R. (3d) 66, [2009] O.J. No. 4236, 312 D.L.R. (4th) 278 (Ont. C.A.).

Court of Appeal stated that while fixing costs was a discretionary exercise, attracting a high level of deference, it must be on a principled basis. Judicial discretion under rr. 49.13 and 57.01 not so broad as to permit a fundamental change to the law that governed the award of an elevated level of cost (full or substantial indemnity costs). Apart from the operation of r. 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award being made.

681638 Ontario Ltd. v. UGT Ltd., 252 O.A.C. 285, 2009 CarswellOnt 4477 (Ont. Div. Ct.); additional reasons at 2009 CarswellOnt 6473 (Ont. Div. Ct.); additional reasons at 2009 CarswellOnt 8141 (Ont. Div. Ct.).

The plaintiff applied for leave to appeal costs awarded to three defendants against which the plaintiff had discontinued small claims action. The Divisional Court noted that trial judge made no reference to either of the two relevant statutory provisions, specifically, section 29 of the *Courts of Justice Act*, and r. 19.04(1) of the *Small Claims Court Rules*. Section 29 provided an award of costs, other than disbursements, was not to exceed 15 per cent of the amount claimed unless it was "necessary in the interests of justice to penalize a party . . . for unreasonable behaviour in the proceeding." The trial judge made no finding "of unreasonable behaviour" on the part of the plaintiff. Section 29, in the context of this case, limited any single award of costs to any one of the defendants to 15 per cent of $1,000, namely, $1,500. That interpretation was supported by the use of "award" (singular) in section 29 and by public policy. There was a separate issue of costs between the plaintiff and each of the defendants. The trial judge required to consider each one separately and make a separate award to *each* defendant. If a judge invoked the "unreasonable behaviour" sanction against one of several unsuccessful defendants, that should affect only the additional amount for costs that could be awarded against only that defendant. However, if unsuccessful plaintiff engaged in "unreasonable behaviour," it might be that more than one of the successful defendants could be found to be entitled to costs in excess of 15 per cent maximum.

Kurdina v. Gratzer, 2009 CarswellOnt 7700 (Ont. S.C.J.), Perell J.; was additional reasons to 2009 CarswellOnt 6772 (Ont. S.C.J.); affirmed 2010 ONCA 288, 2010 CarswellOnt 2251[2010] O.J. No. 1551 (Ont. C.A.); leave to appeal refused 2010 CarswellOnt 6875, 2010 CarswellOnt 6876, *(*sub nom. *Kurdina v. Dief)* 410 N.R. 391 (note), *(*sub nom. *Kurdina v. Dief)* 277 O.A.C. 402 (note), [2010] S.C.C.A. No. 199 (S.C.C.).

Defendant doctor's motion for summary judgment granted. The plaintiff's issue was income disability benefits. The defendant incurred legal expenses totalling $16,000, but sought costs of $500. No order for costs made. The plaintiff's experience of having to incur expenses related to expert testimony and toxicology reports provided more meaningful deterrent than nominal costs award.

A & A Steelseal Waterproofing Inc. v. Kalovski, 2010 CarswellOnt 3455, 2010 ONSC 2652 (Ont. S.C.J.).

The action commenced in January 2005 pursuant to the *Construction Lien Act*, R.S.O. 1990, as a result of the defendant's failure to pay for work done.

The plaintiff sought costs on a substantial indemnity basis in the sum of $41,661.47. The defendants submit plaintiff's costs should be on a Small Claims Court basis only, given the amount recovered at trial. Alternatively, proportionality must be considered.

Justice is best served when costs are awarded to successful litigants and the principle of indemnity is paramount: *Waterloo (City) v. Ford*, 2008 CarswellOnt 2692 (Ont. S.C.J. [Commercial List]).

Rule 57.05(1) of the *Rules of Civil Procedure*, R.R.O. 1990, provides that where a judgment is obtained which is within the jurisdiction of the Small Claims Court, the court may, in its discretion, order that the plaintiff shall not recover any costs. This is neither a proper case for the denial of costs to the plaintiff, nor for an award of costs in favour of the plaintiff on a Small Claims Court basis.

The plaintiff, while advancing a modest claim for payment of its account in the deposit amount was also required to defend a substantial counterclaim in the sum of $150,000.00. That claim was outstanding until the commencement of the trial.

The plaintiff entitled to costs in the circumstances. An award of costs on a substantial indemnity basis was appropriate.

Carleton v. Beaverton Hotel, 2009 CarswellOnt 6303, [2009] O.J. No. 2409, 96 O.R. (3d) 391, 314 D.L.R. (4th) 566 (Ont. Div. Ct.).

After ordering plaintiff to re-attend for examination for discovery and ordering production of various documents, motions judge made order for costs against solicitor personally. There is a danger in awarding costs personally against solicitor for professional misconduct as opposed to conduct that created unnecessary costs. Award of costs against solicitor personally set aside. Two-part test set out in r. 57.07. Principles in awarding costs personally against a lawyer set out in *Young v. Young*, 1993 CarswellBC 1269, 1993 CarswellBC 264, EYB 1993-67111, [1993] S.C.J. No. 112, [1993] R.D.F. 703, 56 W.A.C. 161, 34 B.C.A.C. 161, 49 R.F.L. (3d) 117, 160 N.R. 1, 84 B.C.L.R. (2d) 1, [1993] 4 S.C.R. 3, 18 C.R.R. (2d) 41, 108 D.L.R. (4th) 193, [1993] 8 W.W.R. 513 (S.C.C.) at para. 254.

See also *Walsh v. 1124660 Ontario Ltd.*, [2007] O.J. No. 639, 2007 CarswellOnt 982 (Ont. S.C.J.); additional reasons at [2007] O.J. No. 2773, 2007 CarswellOnt 4459, 59 C.C.E.L. (3d) 238 (Ont. S.C.J.), where Lane J. refused to order costs against a lawyer personally where the primary complaint was unprofessional conduct, where such conduct was unrelated to delay.

It is not the case that the mere fact that costs exceed damages awarded renders such an award inappropriate: see *Bonaiuto v. Pilot Insurance Co.*, 81 C.C.L.I. (4th) 213, 2010 ONSC 1248, 2010 CarswellOnt 1039, 101 O.R. (3d) 157, 81 C.C.L.I. (4th) 213, [2010] O.J. No. 745 (Ont. S.C.J.). As noted by Lane J. in *163972 Canada Inc. v. Isacco*, 1997 CarswellOnt 636, [1997] O.J. No. 838 (Ont. Gen. Div.): "to reduce the plaintiff's otherwise reasonable costs on this basis would simply encourage the kind of intransigence displayed by the defendants in this case.".

Sum of $41,661.47, inclusive of disbursements and GST, on a substantial indemnity basis, fair and reasonable in circumstances.

Blow v. Brethet, 92 C.C.L.I. (4th) 45, 2010 CarswellOnt 8819, 2010 ONSC 6332 (Ont. S.C.J.).

The plaintiff sought costs award of approximately $64,000 in case where he was awarded $21,218.72, including pre-judgment interest. The action began in May 2009, under the *Simplified Procedure*. The trial took place over three days in May 2010, some four months after the monetary jurisdiction of the Small Claims Court increased to $25,000. Case cried out for

immediate removal to the Small Claims Court as of January 2010. Defendants sought order of no costs to the plaintiff pursuant to r. 57.05(1). Costs to plaintiff fixed at $6,000 inclusive.

Mustang Investigations Inc. v. Ironside, 2010 CarswellOnt 5398, 2010 ONSC 3444, 267 O.A.C. 302, 321 D.L.R. (4th) 357, 103 O.R. (3d) 633, 98 C.P.C. (6th) 105, [2010] O.J. No. 3184 (Ont. Div. Ct.).

The plaintiff moved for leave to discontinue action. One of the defendants (Ironside), who was self-represented, opposed motion on the ground that he required his day in court in order to vindicate his reputation. The motions judge allowed the motion on the condition that the plaintiff pay Ironside $20,000 for counsel fee on a partial indemnity basis plus disbursements of $1,051.40. Divisional Court affirmed the award for disbursements of $1,051.40, but set aside the $20,000 award. The costs should only be awarded to self-represented litigants who demonstrated that they devoted time and effort to the work ordinarily done by a lawyer retained and that as a result they incurred an opportunity cost by foregoing remunerative activity. A self-represented litigant should only receive a moderate or reasonable allowance for the loss of time devoted to preparing and presenting the case.

Leading authority on costs to be awarded to unrepresented litigants, in *Fong v. Chan*, 46 O.R. (3d) 330, 128 O.A.C. 2, 181 D.L.R. (4th) 614, [1999] O.J. No. 4600, 1999 CarswellOnt 3955 (Ont. C.A.). *Fong* followed in *Izzard v. Goldreich*, 2002 CarswellOnt 1533, 159 O.A.C. 365 (Ont. Div. Ct.); additional reasons at [2002] O.J. No. 2931, 2002 CarswellOnt 4780 (Ont. Div. Ct.) (para. 3). *Fong* applied in *Logtenberg v. ING Insurance Co.*, 2008 CarswellOnt 2930 (Ont. S.C.J.).

See *White v. Ritchie*, 2009 CarswellOnt 3268, [2009] O.J. No. 2360 (Ont. S.C.J. [Commercial List]), Newbould J. re *Fong*, at paragraph 15 that "Mr. White has not shown that he has a current job or other income sources that he has had to forego in order to spend time preparing his case. He has not worked for some considerable period of time.".

In *Henderson v. Pearlman*, 2010 ONSC 149, 2010 CarswellOnt 75 (Ont. S.C.J.), Hennessy J., after alluding to *Fong*, agreed with Newbould J., in *White v. Ritchie* and without making reference to whether or not lost opportunity costs established, awarded unrepresented litigant 120 hours of time spent at $20 per hour.

Propane Levac Propane Inc. v. Macauley, 2010 ONSC 293, 2011 CarswellOnt 108, [2011] O.J. No. 105 (Ont. Div. Ct.).

The appeal from judgment of deputy judge awarding costs of $1,650 to respondent following trial. If the defendant had not returned the plaintiff's propane tank within 20 days, the defendant was to pay the plaintiff the sum of $2,000. The appellant argued that deputy judge erred in awarding an amount of costs that exceeds 15 per cent of the claim without directing himself to the criteria under section 29 of the *Courts of Justice Act*.

Interplay between r. 14.07 of the *Rules of the Small Claims Court* and section 29 of the *Courts of Justice Act*. See *Melara-Lopez v. Richarz*, 2009 CarswellOnt 6459 (Ont. S.C.J.); affirmed 2009 CarswellOnt 6333, 255 O.A.C. 160 (Ont. Div. Ct.), where deputy judge awarded costs in excess of 15 per cent of the amount claimed in reliance on the rejection by the plaintiff of two offers and referred to section 29 of the *Courts of Justice Act*. Rule 14.07 can be applied to award double costs, even if that amount then exceeds the 15 per cent limit under section 29. See also *Beatty v. Reitzel Insulation Co.*, [2008] O.J. No. 953, 2008 CarswellOnt 1364 (Ont. S.C.J.). Rules need to be read in a manner consistent with statute, and it is improper to hold that rule can trump statute.

Award of costs in this case does not prevent a party from proceeding to court to obtain a ruling on a legal matter. Rather it encourages litigants to have regard to the applicable law and to the principle of proportionality in their litigation, including at the Small Claims Court level. Hospital identified in its notice of motion that it was relying on r. 1.0-3 and 12.02 of

the *Rules of Small Claims Court*. Respondents were entitled to have action dismissed. The claims were waste of time within meaning of r. 12.02 because no meaningful chance of success at trial.

Transport Training Centres of Canada v. Wilson, 2010 ONSC 2099, 2010 CarswellOnt 2155, *(*sub nom. *Wilson v. Transport Training Centres of Canada)* 261 O.A.C. 301 (Ont. Div. Ct.); additional reasons at 2010 ONSC 2714, 2010 CarswellOnt 3549, *(*sub nom. *Wilson v. Transport Training Centres of Canada)* 263 O.A.C. 226 (Ont. Div. Ct.).

The trial judge awarded employee $7,000 in general damages for undue mental distress instead of claimed amount of $1,000, amending her statement of claim accordingly, and fixing her costs at $1,500. The employer appealed. Appeal allowed. The trial judge erred in awarding damages to employee. Interaction of r. 19.04(2) of *Small Claims Court Rules* and section 29 of *Courts of Justice Act* meant that award of costs with respect to employee's agent could not exceed half of statutory maximum of 15 per cent of amount claimed. No evidence of unreasonable behaviour by employer, so as to justify under section 29 of *Act* amount exceeding statutory maximum amount. Costs award exceeded trial judge's discretion and was set aside.

West End Tree Service Inc. v. Stabryla, 2010 CarswellOnt 12, 2010 ONSC 68, 257 O.A.C. 265, [2010] O.J. No. 7 (Ont. Div. Ct.).

The defendant in small claims action paid money into court pursuant to notice of garnishment. The plaintiff obtained default judgment. The defendant obtained order setting aside judgment, but garnished money had already been paid out to the plaintiff. The endorsement stated, "Provided the defendant complies with my order, then, on or before 15 February 2008, the plaintiff is ordered to return the monies to the court to be held pending trial." When trial commenced, the plaintiff had not paid the money into court. Trial judge dismissed action and awarded defendant $1,500 in costs, where the plaintiff had neither paid the money into court nor undertaken to do so. Divisional Court allowed appeal. The court stated that had it not allowed the appeal on the merits, it would have set aside the costs order. Contrary to the judge's finding, the plaintiff had indicated at the outset of trial that if it had to pay, it would do so that day. Order required payment by February 15, 2008, but not sent to the plaintiff's lawyer until February 22, 2008. Even if unreasonable behaviour, judge gave no explanation as to how he arrived at $1,500. Costs pursuant to section 29 should logically bear some relationship to costs incurred by recipient as a result of other party's unreasonable behaviour. Costs would have been $375. Even if elevated costs warranted, no principled basis to arrive at $1,500.

Vigna v. Levant, 2011 CarswellOnt 357, 2011 ONSC 629, 2011 CarswellOnt 2592 (Ont. S.C.J.).

Factors to be considered when fixing costs set out in r. 57 of the *Rules of Civil Procedure* and include, in addition to success, the amount claimed and recovered, the complexity and importance of the matter and the principle of proportionality, the conduct of any party which unduly lengthened the proceeding, whether any step was improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution, a party's denial or refusal to admit anything, any offer to settle, the principle of indemnity, scale of costs, hourly rate claimed in relation to the partial indemnity rate set out in the Information to the Profession effective July 1, 2005, the time spent, and the amount that a losing party would reasonably expect to pay.

The plaintiff claims substantial indemnity costs for the law firm of Heenan Blaikie of $26,434.54. The plaintiff claims substantial indemnity fees in the amount of $68,250 for himself as a self-represented lawyer.

Vigna is a lawyer who was called to the Bar of Québec in 1992. Vigna is not engaged in private practice and has no overhead expenses.

In *Fong v. Chan*, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 46 O.R. (3d) 330, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.), the court held that the issue the right to recover award costs to a self-represented litigant remains within the discretion of the trial judge. The Court of Appeal held that self-represented litigants, whether legally trained or not, are not entitled to costs on the same basis as those of a litigant retaining private counsel. Losing party would reasonably expect to pay the sum of $30,000 plus disbursement in costs.

Mennes v. Burgess, 2011 ONSC 5515, 2011 CarswellOnt 10570 (Ont. S.C.J.).

Mennes is an inmate at a federal penitentiary and has very limited resources with which to pay a costs award.

Notwithstanding that the applicant is, in effect, an indigent litigant and costs are effectively uncollectable, this does not mean that costs should not be ordered in a reasonable amount. The costs payable by the applicant to the Crown are in the amount of $4,000.

Macaulay appealed from the judgment of the deputy judge, which awarded costs of $1,650 to the respondent following the trial. The judge ordered that if the defendant had not returned the plaintiff's propane tank within 20 days, then the defendant was to pay the Plaintiff the sum of $2,000. The appellant says that the deputy judge erred in awarding an amount of costs that exceeds 15 per cent of the claim without directing himself to the criteria under section 29 of the *Courts of Justice Act* ("*CJA*").

The appellant argued that the leave to appeal costs award was not required because section 133 of the *Courts of Justice Act* only requires leave where the costs award has involved an exercise of discretion.

It was desirable that the court comment upon the interplay between rule 14.07 of the *Rules of the Small Claims Court* and section 29 of the *CJA*.

The appeal lies from the award of the trial judge, not from the reasons given. If the award was supportable of the facts as the judge found them to be, in accordance with the applicable statutory criteria, then it should not be set aside simply for the lack of reference to a particular section.

See *Melara-Lopez v. Richarz*, 2009 CarswellOnt 6459 (Ont. S.C.J.); affirmed 2009 CarswellOnt 6333, [2009] O.J. No. 4362, 255 O.A.C. 160 (Ont. Div. Ct.), where the deputy judge awarded costs in excess of 15 per cent of the amount claimed, in reliance on the rejection by the plaintiff of two offers, both of which were more favourable to him than the trial judgment. He referred to section 29 of the *CJA* and held that the plaintiff's failure to accept the offers was deemed to be unreasonable behaviour for the purposes of section 29 of the *CJA*. Rule 14.07 can be applied to award double costs, even if that amount then exceeds the 15 per cent limit under section 29: See *Beatty v. Reitzel Insulation Co.*, 2008 CarswellOnt 1364, [2008] O.J. No. 953 (Ont. S.C.J.). The court cannot agree with that ruling. The rules must be read in a manner consistent with the statute, and it is improper in this context to hold in effect that the rule can trump the statute. See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Canada: LexisNexis Canada Inc., 2008) at 341.

Mustang Investigations Inc. v. Ironside, 2010 ONSC 3444, 2010 CarswellOnt 5398, 103 O.R. (3d) 633, 98 C.P.C. (6th) 105, 321 D.L.R. (4th) 357, 267 O.A.C. 302, [2010] O.J. No. 3184 (Ont. Div. Ct.).

The defendant had previously worked for the plaintiff. Following the termination of the defendant's employment the plaintiff sued him, alleging that he had unlawfully taken confidential information. The plaintiff brought a motion to discontinue the proceedings. The motions judge granted the leave to discontinue proceedings and awarded the defendant costs of $21,051. The costs award could be made to the self-represented litigant if it was demonstrated that, as result of lawyer-like work put in on file, remunerative activity was foregone. The costs award was calculated based on an error in principle and was plainly wrong.

See *Fong v. Chan*, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 46 O.R. (3d) 330, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.), at para. 10 of costs endorsement, where the motions judge correctly set forth principles enunciated by the Court of Appeal in that case.

A leave to appeal a costs award is rarely granted because of the deference due to a judge in exercising his or her discretion. If the leave is granted, the standard of review to be applied is high, and the reviewing court may only set aside an award of costs if the trial judge has made an error in principle or if the costs award is plainly wrong (*Duong v. NN Life Insurance Co. of Canada*, 2001 CarswellOnt 483, [2001] O.J. No. 641, 25 C.C.L.I. (3d) 22, [2001] I.L.R. I-3963, 141 O.A.C. 307 (Ont. C.A.)). *Fong v. Chan* (*supra*) seminal case in this area of the law. See paras. 25 and 26 of reasons, Sharpe J.A.

See also *Izzard v. Goldreich*, 2002 CarswellOnt 4780, *(*sub nom. *Izzard v. Friedberg)* [2002] O.J. No. 2931 at para. 3 (Ont. Div. Ct.). Some six months later, Lane J. revisited the issue in *Korhani v. Bank of Montreal*, [2002] O.J. No. 4785, 2002 CarswellOnt 422 (Ont. S.C.J.). *Fong* applied by Gauthier J. in *Logtenberg v. ING Insurance Co.*, 2008 CarswellOnt 2930 (Ont. S.C.J.). See further *Huard v. Hydro One Networks Inc.*, 2002 CarswellOnt 3996, [2002] O.J. No. 4547, 30 C.P.C. (5th) 164 (Ont. Master).

The appeal was allowed. An award of $20,000 for counsel fees on a partial indemnity basis was set aside. The award for disbursements was confirmed at $1,541, against which may be set off the $200 awarded by the Master.

Carleton v. Beaverton Hotel, 2009 CarswellOnt 6303, [2009] O.J. No. 2409, 96 O.R. (3d) 391, 314 D.L.R. (4th) 566 (Ont. Div. Ct.).

After ordering the plaintiff to re-attend for examination for discovery and ordering production of various documents, the motions judge made an order for costs against the solicitor personally. There is a danger in awarding costs personally against solicitor for professional misconduct, as opposed to awarding costs for conduct that created unnecessary costs.

The motions judge had ordered the plaintiff to produce several records and to pay costs, but the order was not complied with. The motions judge ordered the plaintiff to re-attend for examination for discovery, and ordered the production of various documents. The defendants were awarded costs of $15,000. The motions judge made an order for costs personally against the appellant, the plaintiff's solicitor, under rule 57.07 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. An appeal was allowed. The motions judge was primarily concerned with the solicitor's professionalism and demeanour. The test, however, under rule 57.07, involved costs unreasonably incurred and not with professional conduct generally. The motions judge's observation that the solicitor had been conducting the litigation in an unreasonable manner did not permit an identification of what conduct might have contributed to delay proceedings and incur unnecessary costs.

The two-part test is as follows: In the first step, it must be tested whether the lawyer's conduct fell within rule 57.07(1) in the sense of causing costs to be unnecessarily incurred. The second step is whether, in the circumstances, the imposition of costs against the solicitor personally was warranted.

Governing principles in awarding costs personally against a lawyer were set out by the Supreme Court of Canada in *Young v. Young*, 1993 CarswellBC 264, 1993 CarswellBC 1269, EYB 1993-67111, [1993] S.C.J. No. 112, [1993] 4 S.C.R. 3, [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703 at para. 254 (S.C.C.). See also Lane J. in *Walsh v. 1124660 Ontario Ltd.*, 2007 CarswellOnt 982, [2007] O.J. No. 639 (Ont. S.C.J.); additional reasons at 2007 CarswellOnt 4459, [2007] O.J. No. 2773, 59 C.C.E.L. (3d) 238 (Ont. S.C.J.), wherein the learned judge refused to order costs against a lawyer personally where the primary complaint was unprofessional conduct, where such conduct was not related to delay.

Taucar v. University of Western Ontario, 2011 ONSC 6593, 2011 CarswellOnt 8833, [2011] O.J. No. 66 (Ont. Div. Ct.); additional reasons to 2011 ONSC 3069, 2011 CarswellOnt 5210, 336 D.L.R. (4th) 305, 281 O.A.C. 1 (Ont. Div. Ct.).

Costs. Scale and quantum of costs. Quantum of costs. The respondent university was entitled to recover costs, fixed on a partial indemnity basis at $15,000, all-inclusive, from the applicant, payable forthwith. The amount awarded was fair and reasonable having regard to general principles set out in R. 57.01(1) of *Rules of Civil Procedure*. The Application served no public benefit, but was brought only to advance the personal interests of the applicant. The applicant's counsel's approach consumed extensive time that added significantly to the costs of this litigation of the university. There was no good reason why the applicant should be spared from monetary consequences of risks that she should have taken into account before she embarked on this futile exercise.

Imineo v. Price, 2012 ONCJ 55, 2012 CarswellOnt 1036, 14 R.F.L. (7th) 235, [2012] O.J. No. 450 (Ont. C.J.).

The self-represented litigant's own time and expenses resulted in lost income-earning opportunities. The court relied on *Fong v. Chan*, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 46 O.R. (3d) 330, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.) and on *Korhani v. Bank of Montreal*, [2002] O.J. No. 4785, 2002 CarswellOnt 4223 (Ont. S.C.J.) to conclude that a self-represented litigant should not get costs for time and effort that any litigant would have had to devote to a case even if represented by lawyer. Costs should only be awarded to lay litigants who can show they have spent time and effort on work normally done by a lawyer hired to conduct the case and that, as a result, they suffered a cost by having to forego their regular remunerative activity, such as in this case where the self-represented natural father had taken days off work to prepare for the trial and had therefore lost wages. The unsuccessful mother and stepfather should compensate the natural father for some of his lost wages as a result of the unnecessary trial. The father should be reimbursed for various other out-of-pocket expenses, such as his share of the cost assessment report, the cost of process servers, the cost to summon witnesses, photocopy expenses, etc.

Hodgins v. Grover, 2011 ONCA 72, 2011 CarswellOnt 336, [2011] O.J. No. 310, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, 5 C.P.C. (7th) 33 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.).

Hodgins and Dorans commenced an action in the Small Claims Court. When the matter was heard, Hodgins and Dorans were self-represented, but Grovers had legal counsel. The deputy judge granted the claim for a one-thirteenth share of the legal fees plus additional relief. The Superior Court dismissed an appeal and a cross-appeal. The C.A. granted the Grovers' appeal but dismissed the cross-appeal.

The Application for leave to appeal to the Supreme Court of Canada was dismissed with costs.

C & F Industrial Parts Co. v. Wastecorp Pumps Canada Inc., 2011 ONSC 7499, 2011 CarswellOnt 14408 (Ont. S.C.J.).

The court granted the defendant's motion to dismiss the plaintiff's action under Rule 21.0(3)(b) of the *Rules of Civil Procedure*, on the grounds that the plaintiff was without legal capacity to commence or continue the action. The defendant sought costs of $22,926.62.

The defendant relied on the offer to settle, which was rejected by the plaintiff. The defendant submitted it was entitled to its costs on a partial indemnity scale up to July 1, 2011 and thereafter on a substantial indemnity scale, by reason of Rules 49.02(2) and 49.10 of the *Rules of Civil Procedure*.

The plaintiff submits costs sought by the defendant were not proportional to the amount of the claim made by the plaintiff and the complexity of the action, and cited Rule 1.04(1.1) of the *Rules of Civil Procedure*. A fair and reasonable amount of $12,000 was awarded.

Guelph (City) v. Wellington-Dufferin-Guelph Health Unit, 2011 ONSC 7523, 2011 CarswellOnt 15131, 97 M.P.L.R. (4th) 105 (Ont. S.C.J.).

Costs are in the absolute discretion of court. The overall objective is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant." This is a "fundamental concept in fixing or assessing costs." See *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, [2004] O.J. No. 2634, 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201 at paras. 24 and 26 (Ont. C.A.). See also *Gratton-Masuy Environmental Technologies Inc. v. Ontario (Building Materials Evaluation Commission)*, 2003 CarswellOnt 1564, [2003] O.J. No. 1658, 170 O.A.C. 388 at para. 16 (Ont. Div. Ct.).

A further objective is that, in appropriate circumstances, a costs order may be broadly described as in the public interest. See *Mahar v. Rogers Cablesystems Ltd.*, 1995 CarswellOnt 4279, [1995] O.J. No. 3711, 25 O.R. (3d) 690 (Ont. Gen. Div.) at p. 702 [O.R.]. Justice Sharpe exercised his discretion in favour of the unsuccessful applicant in a case involving the eligible capital expenditure portion of the fee charged for cable TV services. The city should be relieved of obligation to pay costs. Rule 57.01(1) sets out a non-exhaustive checklist of factors that should guide the court in this regard. Each party shall bear its own costs.

Sioufi v. Yogeswaran, 2011 ONSC 6501, 2011 CarswellOnt 12405 (Ont. S.C.J.).

The defendants were entitled to their costs of motion based on a dismissal of the plaintiff's motion. The issue was whether costs should be assessed on a substantial indemnity basis, or if they should be less than that.

Rule 20.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 allows costs to be assessed on a substantial indemnity basis.

The only ground for substantial indemnity costs would be if the plaintiff "acted unreasonably" in bringing the motion. This was not the case. The defendants were entitled to their costs, but on a partial indemnity basis.

The court considered that this was an action under the simplified rules for only $30,000, just over the present limit of the Small Claims Court. The issues were not complex but only evidentiary. It was an uncomplicated motion for a relatively minor amount. The partial indemnity costs being claimed by the defendants were excessive. The costs to the defendants of the motion were set at $3,250.

Thomas v. Advantagewon Inc., 2011 ONSC 5309, 2011 CarswellOnt 9286 (Ont. Div. Ct.).

The appellant was entitled to costs. Rule 57 of the *Rules of Civil Procedure* sets out a number of factors that the court may consider in respect of reasonableness of costs being sought. The action was properly commenced and heard in Small Claims Court. The amount claimed was $10,000. Reasonable costs were $5,000, all-inclusive. The $17,185.79 that the appellant sought was anything but reasonable or appropriate.

Asco Construction Ltd. v. Epoxy Solutions Inc., 2011 ONSC 4464, 2011 CarswellOnt 7211, 2 C.L.R. (4th) 287, Lalonde J. (Ont. S.C.J.); reversed 2013 ONSC 4001, 2013 CarswellOnt 7940, 30 C.L.R. (4th) 154, [2013] O.J. No. 2699 (Ont. Div. Ct.); reversed 2014 ONCA 535, 2014 CarswellOnt 9200, 32 C.L.R. (4th) 1 (Ont. C.A.).

Following a one-week trial, Epoxy, Plaintiff by Counterclaim, received a judgment for $23,230. Asco's claim for a breach of contract was dismissed.

In *Job v. Re/Max Metro-City Realty Ltd.*, [2000] O.J. No. 1449, 2000 CarswellOnt 1544 (Ont. S.C.J.), Mr. Justice Panet, at paras. 9 and 10, explained:

> Section 131(1) of the *Courts of Justice Act* provides that the costs of and incidental to a proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid. Rule 57.01(3) of the *Rules of Civil Procedure* provide that, in awarding costs, the court may fix all or part of the costs with or without reference to the Tariffs instead of referring them for assessment.
>
> The power to fix costs should only be resorted to when the judge, having received the parties submissions, is satisfied that he or she is in a position to do procedural and substantive justice in fixing the costs instead of directing an assessment (see *Murano v. Bank of Montreal*, [1988] O.J. No. 2897). Further, where possible, a trial judge should fix costs at the conclusion of trial or as soon thereafter as it is possible to do so. (See *Coughlin v. Mutual of Omaha Ins. Co.* (1992), 10 O.R. (93d) 787).

Zesta Engineering Ltd. v. Cloutier, 2002 CarswellOnt 4020, [2002] O.J. No. 4495, 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 held as follows:

> In our view, the costs award should reflect more what the Court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

Further, in the Divisional Court's decision in *Gratton-Masuy Environmental Technologies Inc. v. Ontario (Building Materials Evaluation Commission)*, 2003 CarswellOnt 1564, [2003] O.J. No. 1658, 170 O.A.C. 388 (Ont. Div. Ct.) at para. 17 Justices Lane, Lax, and Power noted that:

> The amount at which costs are to be fixed is not simply an arithmetic function dependant on the number of hours worked and the hourly rate employed but rather, the party paying the costs should be subjected to an order which is fair and predictable. In other words, the party required to pay costs must not be faced with an award that does not reasonably reflect the amount of time and effort that was warranted by the proceedings.

The Ontario Court of Appeal in *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, [2004] O.J. No. 2634, 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201 (Ont. C.A.) has directed that the parties engaged in litigation should pay the costs that they contemplated as being reasonable in the event one of them becomes an unsuccessful litigant. Armstrong J.S., speaking for the court, pointed out in para. 26 of the decision that:

> [T]he express language of Rule 57.03(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the Rule makes it clear that the fixing of costs does not begin and end with a calculation of hours, time and rates.

Asco had no other option but to commence an action in the Superior Court of Justice, given Epoxy's failure to dismiss its Claim for Lien. Asco was clearly successful in its declaratory relief as Epoxy finally agreed to discharge its Claim for Lien and allow the return of the security.

While costs must be fair and reasonable, it is not the case that the mere fact that costs exceed the damages awarded renders such an award inappropriate: see *Dybongco-Rimando Estate v. Jackiewicz*, *(*sub nom. *Dybongco-Rimando Estate v. Lee)* [2003] O.J. No. 534, 2003 CarswellOnt 546 (Ont. S.C.J.); see also *Monks v. ING Insurance Co. of Canada*, 2005 CarswellOnt 4155, [2005] O.J. No. 3749, 80 O.R. (3d) 609, 30 C.C.L.I. (4th) 55 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 4385, [2005] O.J. No. 3945, 30 C.C.L.I. (4th) 87 (Ont. S.C.J.); affirmed 2008 ONCA 269, 2008 CarswellOnt 2036, [2008] O.J. No. 1371, 90 O.R. (3d) 689, [2008] I.L.R. I-4694, 235 O.A.C. 1, 61 C.C.L.I. (4th) 1, 66 M.V.R. (5th) 38 (Ont. C.A.). As Lane J. wrote in *163972 Canada Inc. v. Isacco*, [1997] O.J. No. 838, 1997 CarswellOnt 636 (Ont. Gen. Div.):

> That the costs significantly exceed the amounts at stake in the litigation is regrettable, but it is a common experience and is well-known to counsel as one of the risks involved in pursuing or

> defending a case such as this to a bitter end rather than finding a compromise solution. To reduce the plaintiff's otherwise reasonable costs on this basis would simply encourage the kind of intransigence displayed by the defendants in this case.

Asco ignored Epoxy's offer to settle, and presented evidence at trial that was untrue. Epoxy had to call witnesses summoned while the trial was ongoing because Asco failed to produce documents to counter Epoxy's evidence. The documents Epoxy needed were requested months prior to trial, and Asco's failure to produce the documents definitely lengthened the trial time.

Court allowed $20,000 in fees for work before and after the Offer to Settle and $15,000 for trial counsel fees, as well as $100 for settling the judgment and $1,000 for the cost submissions.

Shakur v. Mitchell Plastics, 2012 ONSC 4500, 2012 CarswellOnt 9681 (Ont. S.C.J.).

Following a three day trial, held on February 6, 7, and 8, 2012, plaintiff awarded the sum of $12,000 in a wrongful dismissal case. Since the amount awarded was within the jurisdiction of the Small Claims Court, no costs awarded pursuant to the discretion vested in the trial judge under Rule 57.05(1) of the Rules of Civil Procedure, which permits a trial judge to deny costs to a successful plaintiff under such circumstances.

It was argued on the appellant's behalf that at the time of the institution of the plaintiff's action in August 2010, the Small Claims Court's monetary jurisdiction was only $10,000. It was increased in January 2011 to $25,000. However, this case was never transferred to the Small Claims Court.

The policy considerations underlying Ontario's legislation was expressed by Nolan J. in *Lore v. Tortola*, 2008 CarswellOnt 1054, [2008] O.J. No. 769 (Ont. S.C.J.) at para. 17 where she states that:

> The Superior Court of Justice is currently overburdened with cases. Parties should not be rewarded with costs in matters that should have been properly brought in another forum designed to handle claims of a specific magnitude or monetary value, such as the Ontario Small Claims Court.

As Steele J. put it in *Yakabuski v. Yakabuski Estate*, 1988 CarswellOnt 537, 36 C.P.C. (2d) 189, 31 O.A.C. 257, [1988] O.J. No. 2870 (Ont. Div. Ct.), leave to appeal a costs order "should be granted sparingly and only in very obvious cases". This is not such a case.

Leave to appeal denied.

Coffey v. Horizon Utilities Corp., 2012 ONSC 2870, 2012 CarswellOnt 5944 (Ont. S.C.J.).

Section 29 of the *Courts of Justice Act* refers to "unreasonable behaviour". The defendant submits that the plaintiff acted unreasonably in this action. There was unreasonable behaviour on the part of the plaintiff due to her lengthy and unproductive cross-examination of Mr. Hart. A self-represented litigant should not be expected to bear responsibility for fees of $2,100.00 per day when their claim was less than $1,000 on its best day. Costs of $300 plus HST plus $100 disbursements shall be payable to Horizon.

Dechene v. Dr. Khurrum Ashraf Dentistry, 2012 ONSC 5856, 2012 CarswellOnt 14226, 10 C.C.E.L. (4th) 57, D.A. Broad J. (Ont. Div. Ct.).

Under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, the court has discretion with respect to the costs of and incidental to a proceeding.

The overriding principle in fixing costs is fairness and reasonableness (see *L. (A.) v. Ontario (Minister of Community & Social Services)*, 2006 CarswellOnt 3283, 35 C.P.C. (6th) 55, 32 R.F.L. (6th) 390, 211 O.A.C. 247, [2006] O.J. No. 2158 (Ont. Div. Ct.)).

Court would not allow a partial indemnity hourly rate of $350, being the maximum for counsel with more than 20 years experience in the guideline published by the Rules Committee. A small claims court appeal would not attract the maximum, absent unusual circumstances.

No disbursements for document filing and travel/mileage as they are not provided for in the tariff.

Respondent's costs of the appeal, payable by the appellant $8,500.00 plus HST.

Elliot v. Waterloo Regional Police Services, 2012 ONSC 2881, 2012 CarswellOnt 5956 (Ont. S.C.J.).

In this action plaintiff successful.

The plaintiff seeks fees of $34,406.25 plus disbursements of $1,146.58.

Court must assess what a reasonable litigant would expect to pay if unsuccessful. Compensating for legal fees of 147 hours on such a relatively small claim is not reasonable. Similarly, a partial indemnity rate of $200 per hour (roughly two-thirds of a substantial indemnity rate which would therefore be approximately $300 per hour) is excessive for a lawyer with three years experience.

It is not within the reasonable expectation of an unsuccessful litigant that the trial preparation (including preparation of a factum) should be three times the actual time spent at trial for instance.

Fees of $12,500 plus disbursements and HST.

Oskar United Group Inc. v. Chee, 2012 ONSC 2939, 2012 CarswellOnt 6640 (Ont. S.C.J.).

The Plaintiffs submit that they should be awarded substantial indemnity costs throughout. Defendants submit that the Plaintiffs' costs should, at best, be limited to 15 per cent of the amount recovered since the monetary amount recovered was within the monetary jurisdiction of the Small Claims Court.

Rule 49 will not apply to an offer that includes a fixed amount for costs instead of costs as assessed, as the court should not enter into an *ad hoc* assessment of costs as of the date of the offer: see *Noyes v. Attfield*, 1994 CarswellOnt 549, 19 O.R. (3d) 319, 29 C.P.C. (3d) 184 (Ont. Gen. Div.); affirmed 1997 CarswellOnt 4658, [1997] O.J. No. 4671 (Ont. C.A.).

The wording employed results in an escalating offer, which would be different on each successive day. That being the case, it is the kind of escalating offer which the Ontario Court of Appeal rejected as being inconsistent with rule 49: see *Rooney (Litigation Guardian of) v. Graham*, 2001 CarswellOnt 887, 53 O.R. (3d) 685, 9 C.P.C. (5th) 50, 198 D.L.R. (4th) 1, (sub nom. *Rooney v. Graham)* 144 O.A.C. 240, [2001] O.J. No. 1055 (Ont. C.A.). Offers of this kind do not comply with the rule: see *Yepremian v. Weisz*, 1993 CarswellOnt 462, 16 O.R. (3d) 121, 20 C.P.C. (3d) 357 (Ont. Gen. Div.).

Conduct that is reprehensible, scandalous or outrageous, either giving rise to the action or in the proceedings themselves, is grounds for costs on a substantial indemnity basis. Breach of trust supports an award of substantial indemnity costs: see *Young v. Young*, 1993 CarswellBC 264, 1993 CarswellBC 1269, EYB 1993-67111, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 108 D.L.R. (4th) 193, 49 R.F.L. (3d) 117, [1993] 8 W.W.R. 513, 34 B.C.A.C. 161, 18 C.R.R. (2d) 41, 160 N.R. 1, [1993] R.D.F. 703, 56 W.A.C. 161, [1993] S.C.J. No. 112 (S.C.C.); *York Region Condominium Corp. No. 890 v. RPS Resource Property Services Ltd.*, 2011 ONSC 1509, 2011 CarswellOnt 1798, [2011] O.J. No. 1185 (Ont. S.C.J.). The conduct of Peter Chee was deceitful, reprehensible, scandalous and outrageous. It was that conduct which led to the action being brought.

Having considered all relevant factors under rule 57.01(1) and having regard to the Costs Summary of Fees and Disbursements filed by the Plaintiffs, I order that the Plaintiffs are entitled to costs against the Defendants fixed and payable in the amount of $50,000 (fifty

thousand dollars), inclusive of fees, HST and disbursements. That amount is payable forthwith.

1258917 Ontario Inc. v. Daimler Truck Financial, 2012 ONSC 4094, 2012 CarswellOnt 8970 (Ont. Div. Ct.).

417 Truck Centre ("417") was a successful respondent in this appeal and seeks its costs on a partial indemnity basis of $15,961.25 ($11,875.00 for fees plus disbursements of $2,250.00 plus HST of $1,836.25).

The appellant submits that the amount under appeal in this matter was only $9,129.02 and involved an appeal from a decision of the Small Claims Court. Daimler submits that it would be unfair and unreasonable to award costs in the amount of $15,961.25 based on the small amount that was in issue.

With regards to proportionality, the amount claimed for costs is greater than the amount at issue in the appeal, which was approximately $9,000.00. However, the issues involved were complex and counsel referred to approximately 12 cases, none of which had identical facts to the circumstances involved in this case.

Successful respondent on appeal should be indemnified for their reasonable costs which they were forced to incur in order to adequately respond to an appeal. An order that Daimler pay costs to 417 in the amount of $7,500.00 plus HST plus disbursements of $2,000.00 for a total of $9,500.00 plus HST.

Kipiniak v. Ontario Judicial Council, 2012 ONSC 5866, 2012 CarswellOnt 14214, 298 O.A.C. 389, [2012] O.J. No. 5299 (Ont. Div. Ct.).

This is an application for judicial review of a decision of the Ontario Judicial Council (OJC). It arises from a complaint that the applicant, Mr. Kipiniak, made to the OJC about the conduct of a Justice of the Toronto Small Claims Court.

Mr. Kipiniak's complaint was investigated by a complaint subcommittee of the OJC appointed for that purpose in accordance with the procedure mandated by the *Courts of Justice Act*, R.S.O. 1990 c. C.43 (CJA) and the OJC's Procedures Document.

Mr. Kipiniak understands that the issue raised in the application for judicial review became moot once the OJC had dealt with the complaint.

This relates to questions of law subject to appeal and is not an allegation about conduct engaging the jurisdiction of the OJC. In any event, these errors were corrected on appeal.

Court unable to grant Mr. Kipiniak any of the remedies he seeks and the application for judicial review must be dismissed. These are circumstances where Court would deny costs to the successful party. Costs to Kipiniak in the amount of $382.00 representing the filing fee of $181.00 for the judicial review application and the fee of $201.00 for perfecting the application.

Application dismissed.

Gowling Lafleur Henderson LLP v. Springer, 2013 ONSC 923, 2013 CarswellOnt 1627, [2013] O.J. No. 684 (Ont. S.C.J.).

Gowling Lafleur Henderson LLP brought action against Springer to collect unpaid accounts in the amount of $219,697.07. Springer filed a statement of defence pleading equitable set-off. Gowlings filed a reply. Gowlings now brings a motion under Rule 21.01(1)(a). Springer asks that motion be dismissed and that action proceed to trial.

The issue is whether the limitation period in the *Solicitors' Act*, R.S.O. 1990, c. S.15, applies and whether it bars a claim for equitable set-off.

The defendants argue that both proceedings are actions commenced by Gowlings to recover unpaid fees and are not applications under the *Solicitors Act* for an order referring the accounts for assessment. Counsel takes the position that the *Solicitors Act* does not apply.

16142 Yukon Inc. v. Bergeron General Contracting Ltd., 2012 YKSM 5, 2012 CarswellYukon 68 (Y.T. Sm. Cl. Ct.).

The Yukon Territorial Court, from which the Small Claims Court is constituted, is a statutory court. Its jurisdiction is defined by statute, and its costs jurisdiction is therefore limited to what is contemplated by the *Small Claims Court Act*, R.SY. 2002, c. 204 and *Regulations*.

Counsel for the defendant seeking increased counsel fees pursuant to s. 58 of the *Small Claims Court Regulations*, OIC 1995/152 as amended by OIC 2011/04.

As a general rule, where legislation fixes a new scale of costs, the scale of costs applicable is that in place at the date of the assessment: *Assn. of Professional Engineers & Geoscientists (British Columbia) v. Mah*, 1995 CarswellBC 354, 9 B.C.L.R. (3d) 224, 61 B.C.A.C. 287, 100 W.A.C. 287, [1995] B.C.J. No. 1442 (B.C. C.A.). The jurisdiction of a Small Claims Court judge to award increased legal fees in special circumstances is analogous to the broad jurisdiction of a superior court to award special costs. Rather, it means that a Small Claims Court judge may look to superior court case law relating to special costs awards for guidance in determining what may amount to special circumstances sufficient to justify an award of increased legal fees pursuant to s. 58(2).

In general, an adverse finding of credibility, alone, would be insufficient to warrant an award of special costs. See *O'Cadlaigh v. Madiuk* (1994), 33 C.P.C. (3d) 116, 1994 CarswellBC 759, [1994] B.C.J. No. 2521 (B.C. S.C.) and *Creed v. Creed*, 2003 BCSC 1425, 2003 CarswellBC 2306 (B.C. S.C.).

Cases of fabricated evidence or document falsification, particularly where intended to mislead the court, have resulted in special costs awards (see *e.g.*, *Hundley v. Garnier*, 2011 BCSC 1317, 2011 CarswellBC 2515 (B.C. S.C.)). Counsel for the plaintiff relies on *Olive Hospitality Inc. v. Woo*, 2008 BCSC 615, 2008 CarswellBC 971 (B.C. S.C.) to argue that, in order to attract a special costs award, the documents in question must be fundamental to a question at issue or create or perpetuate a dispute, and she says that the falsified documents here do not meet that threshold.

$5,000 is the appropriate amount to be awarded to the defendant pursuant to sections and 74(1) of the *Regulations*.

Panesso v. Corporate Image Building Maintenance (June 26, 2013), Doc. 11-10979, 11-10979D1 (Ont. S.C.J.).

Matters tried together.

One representation fee is appropriate, and that representation fee must reflect the general purposes and mandate of the Small Claims Court, to make orders that are "considered just and agreeable to good conscience" (*Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 25).

In reasons for Judgment, court awarded a $2,500 representation fee absent Offers to Settle, and specified a $5,000 representation fee if Offers to Settle had been made. The $5,000 award: 1) Represents 20 per cent of the amount awarded to Mr. Panesso and 2) Exceeds the 15 per cent limit imposed by Section 29 of the *Courts of Justice Act*, because 3) A valid Rule 14 Offer to Settle was made and was not accepted by the losing party.

Khan v. All-Can Express Ltd., 2014 BCSC 2066, 2014 CarswellBC 3251, 23 C.C.E.L. (4th) 227 (B.C. S.C.); leave to appeal refused 2015 BCCA 234, 2015 CarswellBC 1396, 23 C.C.E.L. (4th) 300, 372 B.C.A.C. 273, 640 W.A.C. 273 (B.C. C.A.).

This ruling deals with costs in the Plaintiff's claim for damages arising from his case being dismissed by the Defendant. The Defendant argued that the Plaintiff should not be awarded costs because the damages sought were well within the jurisdiction of the Provincial Court Small Claims Division.

The defendant relied on *Gehlen v. Rana*, 2011 BCCA 219, 2011 CarswellBC 1058, 18 B.C.L.R. (5th) 340, 304 B.C.A.C. 283, 513 W.A.C. 283 (B.C. C.A.) and *Icecorp International Cargo Express Corp. v. Nicolaus*, 2007 BCCA 97, 2007 CarswellBC 444, 38 C.P.C. (6th) 26, 236 B.C.A.C. 294, 390 W.A.C. 294 (B.C. C.A.) to support the contention that the plaintiff did not have sufficient reason to proceeding in the Supreme Court, and thus was not entitled to recover an award of costs. While this case was not a simple one, the principle legal concept in question was established and relatively straightforward. Various pre-trial measures are available when an action is brought in the Provincial Court, including pre-trial disclosure of documents, mediation services, and settlement conferences. There were no costs awarded to the Plaintiff. Pursuant to Rule 14-1(10) of the *Rules of Court*, the Plaintiff will recover total taxable disbursements, for $2, 518. 25, which includes interest. The Defendant was successful on application, and costs were set at $750.

Brander v. Backstage Bar and Grill Inc. (February 20, 2014), Doc. 12-21, 12-22, 12-22 D1 (Ont. S.C.S.M.).

Section 29 of the *Courts of Justice Act* limits an award of costs, other than disbursements. Rule 19 of the Rules Of The Small Claims Court provides for awarding a successful party reasonable broadly-defined "disbursements", reasonable "representation fees" and up to $500.00 "compensation for inconvenience and expense". The last is for the benefit of only self-represented parties. Rule 19.02 limits the power to award Rule 19 costs to the 15 *per cent* in section 29 of the *Courts of Justice Act*. The statute governs the rule in the event of conflict. Costs must be proportionate to the complexity and importance of the issues and the amount claimed. See *LeBlanc v. Lalonde*, 2010 ONSC 927, 2010 CarswellOnt 810 (Ont. Div. Ct.).

Punitive costs are usually on a substantial indemnity scale and are sometimes substantial. See *DiBattista v. Wawanesa Mutual Insurance Co.*, 2005 CarswellOnt 6604, 78 O.R. (3d) 445, [2005] O.J. No. 4865 (Ont. S.C.J.); affirmed 2006 CarswellOnt 6011, 83 O.R. (3d) 302, 43 C.C.L.I. (4th) 13, [2006] I.L.R. I-4548, 216 O.A.C. 38 (Ont. C.A.) which held that costs on a substantial indemnity scale are appropriate when allegations of fraud, dishonesty or other improper conduct seriously prejudicial to a party's character or reputation are made but not proved. Rule 1.03 of the Rules of Civil Procedure essentially defines "substantial indemnity costs" as 1.5 of partial indemnity costs.

Louws Kitchen Designs Ltd. v. France, 2016 ONSC 799, 2016 CarswellOnt 1440, 59 C.L.R. (4th) 90 (Ont. S.C.J.).

The plaintiff's claim was for approximately $38,000. The plaintiff obtained judgment in the amount of $17,142.91. The defendants' counterclaim was for approximately $58,000.00. The defendants' counterclaim was dismissed.

The plaintiff is seeking costs on a partial indemnity basis in the amount of $35,194.28 comprised of fees of $29,994.28, disbursements of $1,229.76 and HST of $3,970.24.

The defendants submit that in all of the circumstances, the court should exercise its discretion under rule 57.05(1) of the *Rules of Civil Procedure* and order no costs to the plaintiff. In the alternative, and if costs are to be awarded to the plaintiff, it is submitted the amount claimed should be substantially reduced.

It is submitted that the court should exercise its discretion to award costs payable in accordance with Rule 19 of the Small Claims Court Rule and s. 29 of the *Courts of Justice Act*. This would limit the award of costs (other than disbursements) to an amount not to exceed 15 per cent of the amount claimed unless it is necessary to penalize a party for unreasonable behaviour.

> See *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201, [2004] O.J. No. 2634 (Ont. C.A.), that objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular

proceeding rather than an amount fixed by the actual costs incurred by the successful litigant. Appropriate order is that the defendants shall pay costs of $7,200, inclusive of disbursements and HST to the plaintiff.

Rahim Hadani v. Toronto Standard Condominium Corporation No. 2095 (August 24, 2016), Doc. SC-14-00000644-0000, Deputy Judge Marr (Ont. Sm. Cl. Ct.).

The defendant seeks its costs on a full indemnity basis and its legal fees of $30,823.46, and $2,169.89 in disbursements. No written offers to settle have been exchanged by either party.

The defendant submits that the cost provisions of the declaration and *Condominium Act* must prevail over the 15% cap on costs in Small Claims Court as provided for in section 29 of the *Courts of Justice Act*.

S. 85 of *Condominium Act* does not apply to this action because this action is not an action by the defendant to enforce a lien, nor is the defendant seeking recovery of the legal expenses incurred by the condominium corporation in connection with the collection or attempted collection from a unit owner of an unpaid amount.

1) If the legislature intended the ordinary cost Rules of the Small Claims Court not to apply to actions against condominium corporations, it would have expressly said so;

2) The legislature has made a specific policy decision as reflected in the wording found in the *Courts of Justice Act* and the Small Claims Court Rules, to limit costs payable in Small Claims Court. I am obligated to adhere to the policy decision and legislative framework as set forth in the *Courts of Justice Act* and the Small Claims Court Rules. Deference must be given to the manner by the legislature to achieve its objectives (see *R. v. Beauchamp*, 2009 CarswellOnt 4197, 68 C.R. (6th) 293, 194 C.R.R. (2d) 331 (Ont. S.C.J.) at paras. 42–44;

3) Accordingly, I conclude that the usual cap on costs in Small Claims Court of 15% on the amount claimed, as provided for in Section 29 of the *Courts of Justice Act*, applies to the defendant's claim for costs.

This was a three-day trial. 15% of $16,599.68 is $2,489.95.

The defendant's witnesses were employees or contractors working for the defendant. Ordering the transcripts is not an ordinary or reasonable disbursement which the plaintiff could have anticipated paying. The costs claimed for printing, etc., totaling almost $500, are not ordinary disbursement which the plaintiff could have anticipated paying. Further, scanning is not a reasonable disbursement and not provided for in Rule 19.01(1).

Rutter v. Vadnais, 2017 BCSC 76, 2017 CarswellBC 101, Justice B. J. Brown (B.C. S.C.).

Matter went to trial before a jury in February 2016. The jury awarded $20,000 in general damages comprised of $10,000 for non-pecuniary damages, $5,000 for special damages, and $5,000 for future damages. Jury award was less than the defence offer of $50,000.

Court not persuaded by the defendant's argument that plaintiff should only receive disbursements to March 6, 2014, because she recovered damages in the range of a Small Claims' award. The offers exchanged by the parties exceed Small Claims' limit. Those offers were reasonable estimates prepared by the parties of their view of the appropriate award of damages. Additionally, the plaintiff's physician also diagnosed the injuries from the accident as not insignificant. Finally, the plaintiff's conduct was not so egregious that she would not be entitled to costs. Sufficient reason to bring the proceeding in the Supreme Court.

See *Currie v. McKinnon*, 2012 BCSC 1165, 2012 CarswellBC 2322 (B.C. S.C.) at para. 20: "While the purpose of the Rule is to encourage reasonable settlements, parties should not be unduly deterred from bringing meritorious, but uncertain, claims because of the fear of a punishing costs order."

Brough and Whicher Ltd. v. Lebeznick, 2017 ONSC 1392, 2017 CarswellOnt 2954, Lemay J. (Ont. S.C.J.)

In asserting costs, neither party was completely successful in advancing their claims. It is a general rule that costs usually are awarded to the successful party. As a result, when success is clearly divided, neither party should be entitled to costs.

The principal of proportionality applies in certain cases. See *Accurate General Contracting Ltd. v. Tarasco*, 2015 ONSC 5980, 2015 CarswellOnt 14640, 51 C.L.R. (4th) 314 (Ont. S.C.J.). The principle of proportionality should not be used to deprive a successful litigant of its costs simply because the claim is small.

The pre-litigation offer of the defendants to resolve this matter for $30,000.00 is not a Rule 49 offer (see *Scanlon v. Standish*, 2002 CarswellOnt 128, 57 O.R. (3d) 767, 24 R.F.L. (5th) 179, 155 O.A.C. 96, [2002] O.J. No. 194 (Ont. C.A.)). However, it is a factor relevant in the consideration of costs in this case because it demonstrates that, at the outset of the action, the defendants were prepared to be reasonable. It was the plaintiff in this case that acted unreasonably from the outset of the litigation. The reasonableness of the parties' positions favours a modest award of costs to the defendants.

Plaintiff should pay costs to the defendants in the sum of $15,000.00 inclusive of HST and disbursements. These costs will be set-off against the amounts owing by the plaintiff to the defendant.

Rollins v. Niagara Regional Police Service, 2017 ONSC 1214, 2017 CarswellOnt 2719, Justice P.R. Sweeny (Ont. S.C.J.).

Plaintiff awarded damages of $28,503.25. The plaintiff seeks costs of $57,131.45 on a partial indemnity basis. The defendants say that there should be no order as to costs because the plaintiff did not use the simplified procedure as set out in Rule 76 of the *Rules of Civil Procedure*. That Rule provides that if the plaintiff obtains a monetary judgment of $100,000 or less, then the plaintiff shall not recover any costs unless the action proceeds under Rule 76 at the commencement of the trial or the Court is satisfied that it was reasonable for the plaintiff to have commenced and continued the action under the ordinary procedure.

The plaintiff ought to have commenced the action under the simplified procedure and continued the simplified procedure. However, court not prepared to deny plaintiff any costs. As noted by the Court of Appeal in *Tucker v. Cadillac Fairview Corp.*, 2005 CarswellOnt 2969, 200 O.A.C. 140, [2005] O.J. No. 2921 (Ont. C.A.) at para. 28, the Court may consider that only certain procedures not available under the Simplified Procedures were utilized.

The amount awarded is only $3,305.25, over the Small Claims Court limit. The amount awarded is a factor to consider in determining the reasonableness of costs. I am also mindful of the principles of proportionality. It is fair and reasonable that the defendants pay to the plaintiff costs on a partial indemnity basis fixed in the amount of $15,000, all inclusive.

Witter v. Gong, 2016 ONCJ 722, 2016 CarswellOnt 19456, [2016] O.J. No. 6333 (Ont. C.J.).

Having succeeded in getting father's motion to vary support order, mother made claim for costs. Both parties unrepresented. Motion judge awarded mother $2,500 in costs, inclusive of disbursements and HST. Judge pointed out that, in *Fong v. Chan*, 1999 CarswellOnt 3955, 46 O.R. (3d) 330, 181 D.L.R. (4th) 614, 128 O.A.C. 2, [1999] O.J. No. 4600 (Ont. C.A.), Court of Appeal recognized that self-represented litigants could be awarded costs, but judge also noted that case law on this issue has since evolved to include the following principles:

- Cost rules are designed to encourage settlement and to discourage and sanction inappropriate behaviour by litigants: *Serra v. Serra*, 2009 ONCA 395, 2009 CarswellOnt 2475, 66 R.F.L. (6th) 40, [2009] O.J. No. 1905 (Ont. C.A.);

- Courts have recognized that without option of awarding costs to self-represented litigants, it would undermine court's ability to encourage settlements and to discourage inappropriate litigation behaviour: *Izyuk v. Bilousov*, 2011 ONSC 7476, 2011 CarswellOnt 14392, 7 R.F.L. (7th) 358, [2011] O.J. No. 5814 (Ont. S.C.J.);
- Some courts have considered lawyers' rates or costs incurred by that party in order to compensate self-represented party: *Warsh v. Warsh*, 2013 ONSC 1886, 2013 CarswellOnt 3591, [2013] O.J. No. 1474 (Ont. S.C.J.);
- Court may consider quality of work performed by self-represented as factor in costs decision: *Cassidy v. Cassidy*, 2011 ONSC 791, 2011 CarswellOnt 1541, 89 C.C.P.B. 294, 92 R.F.L. (6th) 120 (Ont. S.C.J.); and
- Amount awarded to self-represented litigant must be "reasonable, proportional and within losing party's reasonable expectation": *Jordan v. Stewart*, 2013 ONSC 5037, 2013 CarswellOnt 11295 (Ont. S.C.J.).

In applying above principles, motion judge found that mother was entirely successful, motion was very important, that father's behaviour was highly unreasonable and should be censured in costs, that mother lost vacation time, that quality of her legal work was good, and that she should be entitled to hourly rate slightly less than junior lawyer or articling student (less than $150 per hour), which ultimately resulted in cost award of $2,500.

Barrie Trim & Mouldings Inc. v. Country Cottage Living Inc., 2010 ONSC 2598, 2010 CarswellOnt 2783, 93 C.L.R. (3d) 166, [2010] O.J. No. 1836 (Ont. Div. Ct.).

The primary costs sources in the Small Claims Court Rules and *Courts of Justice Act* are R. 19 and s. 29. Section 29 was not intended to cap the costs at 15% in the circumstances of an offer that gives rise to the cost consequences outlined in R. 14.07. This seems to give meaning to the need to encourage the acceptance of reasonable settlement offers, while maintaining proportionality with the amounts in dispute and allowing the judge to consider what is fair and reasonable in all of the circumstances. Applying the factors set out in Rule 57.01(1), perhaps the most significant in this case is the fact that the Respondent's action was for recovery of $10,000 only. The sum of $5,000 inclusive of costs is fair and just in the circumstances and proportionate to the sum claimed in the proceeding.

Québec (Directeur des poursuites criminelles et pénales) c. Jodoin, 2017 CSC 26, 2017 SCC 26, 2017 CarswellQue 3091, 2017 CarswellQue 3092, [2017] 1 S.C.R. 478, 346 C.C.C. (3d) 433, 37 C.R. (7th) 1, 408 D.L.R. (4th) 581, *(*sub nom. *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin)* 380 C.R.R. (2d) 285, [2017] S.C.J. No. 26 (S.C.C.).

The Courts' power to award costs against a lawyer personally is not limited to civil proceedings, but also criminal cases and can sometimes be exercised against defence lawyers, though rare. The power to control abuse of process and the judicial process by awarding costs personally applies together with: courts' jurisdiction to punish by way of contempt of court and law societies to sanction unethical conduct. Costs against a lawyer personally is justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice.

Net Connect Installation Inc. v. Mobile Zone Inc., 2017 ONCA 766, 2017 CarswellOnt 15278, 140 O.R. (3d) 77 (Ont. C.A.).

Courts don't like it when parties lie and fabricate evidence. In rare and exceptional circumstances, where conduct is particularly egregious, full-indemnity costs might be warranted.

Cooper et al v. Wiancko et al., 2018 ONSC 1654, 2018 CarswellOnt 5020, 73 M.P.L.R. (5th) 235, Healey J. (Ont. S.C.J.); additional reasons 2018 ONSC 342, 2018 CarswellOnt 676, 73 M.P.L.R. (5th) 212 (Ont. S.C.J.).

No costs awarded where litigation properly seen as public interest. Applicants had no personal or pecuniary interest in litigation. Although unsuccessful, litigation had merit and raised important issues.

Weatherford Canada Partnership v. Addie, 2018 ABQB 571, 2018 CarswellAlta 1501, 75 Alta. L.R. (6th) 248, 26 C.P.C. (8th) 311 (Alta. Q.B.); affirmed *Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH*, 2019 ABCA 92, 2019 CarswellAlta 422, 84 Alta. L.R. (6th) 33, 45 C.P.C. (8th) 311 (Alta. C.A.) and *Remington v. Crystal Creek Homes Inc*, 2018 ABQB 644, 2018 CarswellAlta 1847, 78 Alta. L.R. (6th) 419, 26 C.P.C. (8th) 264 (Alta. Q.B.)

In both cases, the Court addressed how costs should be calculated following litigation. What are court costs? What factors inform how costs are awarded? It is very unusual for a party to be awarded all of its costs, referred to as full indemnity or solicitor-client costs. Full indemnity cost awards are rare and generally reserved for exceptional cases where a party's behaviour was dishonest, scandalous or outrageous. What strategic steps should be taken to address costs?

1586091 Ontario Ltd. v. Waffle, 2018 ONSC 3943, 2018 CarswellOnt 10466 (Ont. Div. Ct.). Swinton J.

The appellant, 1586091 Ontario Ltd., appealed judgment of deputy judge in which she dismissed its action for damages for infringement of copyright against the respondent and subsequently awarded costs that totaled $4,250. The trial judge assumed, without deciding, that the *Copyright Act*, R.S.C. 1985, c. C.-42 (the "Act") applied. The trial judge awarded 3,750 plus court costs plus $500 for the respondent as a self-represented litigant. No reasons given. Leave to appeal the costs order granted. Award excessive. The award was made in accordance with s. 29 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. That provision should be read with the rules. Rule 19.04 allows a reasonable representation fee if the successful party was represented by a lawyer, student-at-law or paralegal. Rule 19.05 allows the award of a representation fee to a self-represented party for compensation for inconvenience and expense in an amount not to exceed $500. The respondent was self-represented at trial. The trial judge erred in awarding $3,750 in addition to the $500 fee to a self-represented litigant. The trial judge failed to consider other important factors such as the real amount in issue in the case, the fact that the respondent was not represented by a lawyer and the principle of indemnity. Appeal allowed in part. Award of costs set aside, order is to go substituting an amount of $1,550 to the respondent for costs of the trial.

Falletta v. Mathews Kulanjipurakal Physiotherapy Professional Corporation, 2019 ONSC 894, 2019 CarswellOnt 3558 (Ont. Div. Ct.). Justice T. Maddalena.

In determining costs, court obligated to consider general principles enunciated in r. 57.01(1) of the *Rules of Civil Procedure*. Costs should be a reminder to parties to litigation that there are consequences to matters they choose to litigate. Taking into consideration all relevant factors, it is appropriate here to fix costs on a partial indemnity basis in favour of the respondent. Costs fixed at $13,395 all inclusive, payable within 30 days.

Baca v. Tiberi, 2018 ONSC 7282, 2018 CarswellOnt 21793, 42 E.T.R. (4th) 252, Price J. (Ont. S.C.J.); additional reasons 2020 ONSC 4051, 2020 CarswellOnt 8986, 59 E.T.R. (4th) 277 (Ont. S.C.J.)

Particular orders as to costs. *Lawyer culpable for knowing of misappropriation and advising clients to take untenable legal positions.*

Rule 57.07 of Rules of Court provides statutory jurisdiction to award costs against lawyer, as well as inherent jurisdiction as sanction for misconduct. D was culpable for knowing of misappropriation and advising clients to take untenable legal positions, as well as initiating and maintaining useless procedures resulting in more legal costs. D also misled court, per-

mitted her clients to mislead court, and facilitated clients' breaches of court orders. Costs were ordered in inclusive amount of $365,519.70, with 25% to be paid personally by solicitor, and remaining costs to be paid 75% by A and her husband and 25% by I.

Benarroch v. Fred Tayar & Associates P.C., 2019 ONCA 228, 2019 CarswellOnt 4101, 30 C.P.C. (8th) 221, 433 D.L.R. (4th) 112, Rouleau J.A. (Ont. C.A.)

Costs — Where litigant acting on own behalf. Appeal by clients from a costs award of $60,583 arising from the dismissal of an application to assess the accounts of their former lawyers. The respondents represented themselves in successfully defending the appellants' application. Thereafter, the parties provided submissions on costs. Appeal allowed. The application judge did not err in accepting that there were lost opportunity costs associated with the respondents' self-represented defence of the appellants' application based on their reply evidence.

In quantifying the respondents' costs, the application judge erred in interpreting *Fong*, the jurisprudence governing the recovery of costs by self-represented litigants. *Fong* made clear that self-represented litigants, including lawyers, were not entitled to costs on the same basis as litigants who retained counsel. By awarding the respondents costs on a partial indemnity basis, the application judge effectively treated the respondents as counsel. The costs award was set aside and replaced by an award of $20,000, all-inclusive.

Related to self-rep lawyers. See also *Couper v. Adair Barristers LLP*, 2019 ONSC 5016, 2019 CarswellOnt 14345 (Ont. S.C.J.); affirmed 2020 ONCA 372, 2020 CarswellOnt 7950 (Ont. C.A.), and look at *Dezsi v. Walker*, 2019 ONSC 3163, 2019 CarswellOnt 7954 (Ont. S.C.J.).

Peternel v. Custom Granite & Marble Ltd., 2018 ONSC 4881, 2018 CarswellOnt 13444, 49 C.C.E.L. (4th) 169, Sheard J. (Ont. S.C.J.)

Scale and quantum of costs. *Court was entitled to consider offers employee did not accept*.

Court bound by 2009 appellate decision where it was held that, other than in situation involving Rule 49.10 of Rules of Civil Procedure, elevated costs were only to be awarded on clear finding of reprehensible conduct. Employee's delays in reducing claim and responding to undertakings and frustration of preparation of document brief did not rise to level of "reprehensible" conduct attracting award of costs at enhanced rate. Court was entitled to consider offers employee did not accept although cost ramifications of R. 49 did not apply because employee recovered nothing at trial. Time spent as set out in employer's bill of costs was reasonable. Amount claimed was relatively modest. Legal issues raised by pleadings were relatively complex.

Additional reasons in *Peternel v. Custom Granite & Marble Ltd.*, 2018 ONSC 3508, 2018 CarswellOnt 9125, 48 C.C.E.L. (4th) 124, 2018 C.L.L.C. 210-061 (Ont. S.C.J.); additional reasons 2018 ONSC 4881, 2018 CarswellOnt 13444, 49 C.C.E.L. (4th) 169 (Ont. S.C.J.); affirmed 2019 ONSC 5064, 2019 CarswellOnt 13998, 58 C.C.E.L. (4th) 13, 2020 C.L.L.C. 210-003 (Ont. Div. Ct.).

Prolink Broker Network Inc. v. Jaitley, 2019 ONSC 4011, 2019 CarswellOnt 10854, 91 C.C.L.I. (5th) 163, R.F. Goldstein J. (Ont. S.C.J.)

After the original trial, endorsement where Court declined to grant costs. After the damages re-hearing, Court again declined to order costs. The parties pointed out an error made in the endorsement. Court agreed to reconsider decision. This case is one where each party should bear its own costs.

In *R. v. Malicia*, 2006 CarswellOnt 5539, 82 O.R. (3d) 772, 211 C.C.C. (3d) 449, 270 D.L.R. (4th) 280, 36 M.V.R. (5th) 1, 216 O.A.C. 252, [2006] O.J. No. 3676 (Ont. C.A.) the Court considered the circumstances under which a court could correct an error. MacPherson J.A. for the Court of Appeal found that a flexible approach could apply, especially in civil cases.

Where there is an error in expressing the manifest intention of the court, an exception could apply.

Judges enjoy a presumption of integrity. It is assumed that judges will strive to overcome their personal biases and carry out their duties to the best of their ability. See *R. v. Teskey*, 2007 SCC 25, 2007 CarswellAlta 750, 2007 CarswellAlta 751, [2007] 2 S.C.R. 267, 412 A.R. 361, 74 Alta. L.R. (4th) 1, 220 C.C.C. (3d) 1, 47 C.R. (6th) 78, 280 D.L.R. (4th) 486, [2007] 8 W.W.R. 385, 364 N.R. 164, 404 W.A.C. 361, [2007] S.C.J. No. 25 (S.C.C.) at paras. 19–21. The presumption of integrity can, however, be rebutted. As the Court of Appeal put it in *R. v. Arnaout*, 2015 ONCA 655, 2015 CarswellOnt 14643, 127 O.R. (3d) 241, 328 C.C.C. (3d) 15, 339 O.A.C. 379, [2015] O.J. No. 5050 (Ont. C.A.) at para. 19~~.~~; additional reasons 2015 ONCA 714, 2015 CarswellOnt 16198, [2015] O.J. No. 5553 (Ont. C.A.); leave to appeal refused 2016 CarswellOnt 9345, 2016 CarswellOnt 9346 (S.C.C.) (quoting from *Teskey*):

> To rebut the presumption of integrity in cases featuring post-decision reasons, the appellant must present cogent evidence showing that, in all the circumstances, an informed and reasonable observer would think that the reasons are an after-the-fact justification for the decision rather than an articulation of the reasoning that led to the decision.

To issue a new endorsement is not an *ex post facto* attempt to justify an original finding, it is the correction a factual error. See *R. v. Krouglov*, 2017 ONCA 197, 2017 CarswellOnt 3237, 346 C.C.C. (3d) 148 (Ont. C.A.). Correcting the second endorsement involved a simple factual error.

The Plaintiff argues that the offer was not "crystal clear". See *Mayer v. 1474479 Ontario Inc.*, 2014 ONSC 2622, 2014 CarswellOnt 5416, 33 C.C.L.I. (5th) 150, [2014] O.J. No. 1984 (Ont. S.C.J.). That is true, in that it did not set out details. The offer likely was not refused because it was unclear.

Rooks v. Park'N Fly (July 9, 2019), Doc. SC-16-7658-00, M. Klein, Deputy Judge (Ont. Sm. Cl. Ct.)

Cost — Offer. The "general rule" of costs is that the unsuccessful party pays the costs. Rule 19.01(1) of the *Rules of the Small Claims Court* (*Courts of Justice Act*, Ontario Regulation 258/98) ("*Rules*") states:

> A successful party is entitled to have the party's reasonable disbursements, including any costs of effecting service or preparing a plaintiff's or defendant's claim or a defence and expenses for travel, accommodation, photocopying and experts' reports, paid by the unsuccessful party, unless the court orders otherwise.

The overriding principle and the power to award costs is inherent in all courts, arising from the statutory authority given to judges as set out in section 131 *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"):

> 131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

A "limiting factor" pertaining to the Small Claims Court is found in s. 29 the *CJA* which, on the face of it, limits an award of costs:

> An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered **unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding**. [Emphasis added in bold]

S. 29 of the *CJA* should not be viewed as an "impediment," as many perceive it, but rather as a "check valve." In other words, if judges want to award costs above the 15% limit of the original claim, they can, but they must make appropriate findings. (I note that disbursements and prejudgment interest are excluded from the 15% limit.)

Rule 19.06 of the *Rules* states that if the Court is satisfied that a party has unduly complicated or prolonged an action or has otherwise acted unreasonably, the Court may order the party to pay an amount as compensation to another party.

Marshall Electrical Contracting v. Singh (c.o.b. Gem Contracting & Renos), [2017] O.J. No. 863, Small Claims Court (Hamilton), is an instructive case when dealing with the limitation on costs in s. 29 of the *CJA* and Offers to Settle under Rule 14.07 in the *Rules*. Deputy Judge Nolan stated:

> The Small Claims Court is designed to serve as a forum for parties to have their day in Court without fear of overly onerous costs consequences in the event that they are unsuccessful. Indeed, that is the very reason for the limitation prescribed by s. 29. The use of the term "penalty" in the section is intended to connote a punitive function.

Having found that the final Offer to Settle made by the Defendant in the amount of $16,500 was obviously far more favourable to the Plaintiff, then Rule 14.07 of the *Rules* ought to apply. Therefore, based on this Rule alone, the Defendant should be entitled to $7,500 in costs (Claim: $25,000 × 15% × 2).

Plaintiff demonstrated "unreasonable behaviour" within the meaning of s. 29 of the *CJA* and Rule 19.06 of the *Rules*. The Plaintiff was self-represented, with no legal costs to bear, while the Defendant expended, for this Claim alone, over $106,000; an amount that will never be compensated by this Court. Costs payable by the Plaintiff to the Defendant in the amount of $19,077 ($15,000 plus H.S.T., plus the reasonable amount claimed by the Defendant for disbursements of $2,127, inclusive of H.S.T.).

Stark v. Lewis (February 28, 2019), Doc. 18/17, Deputy Judge Koprowski (Ont. Sm. Cl. Ct.)

Court dismissed the plaintiff's claim, also assessed damages, if the plaintiff's claim had succeeded, in the amount of $2,256.11 and not the amount claimed of $9,421.66.

Costs in the Small Claims Court are governed by both the *Courts of Justice Act* R.S.O. 1990 c. 43 ("the Act") and by the Rules of the Small Claims Court ("Rules") made by Ontario Regulation 258/98, as amended from time to time, under the Act.

Counsel for the plaintiff submitted that such a double costs order was not available to the defendant in these circumstances because the plaintiff's claim was dismissed so that the plaintiff did not obtain a "judgment" that was "as favourable as or less favourable than the terms of the offer." In support of this submission, counsel relied on the decision of the Ontario Court of Appeal in *S & A Strasser Ltd. v. Richmond Hill (Town)*, 1990 CarswellOnt 435, 1 O.R. (3d) 243, 49 C.P.C. (2d) 234, 45 O.A.C. 394, [1990] O.J. No. 2321 (Ont. C.A.) ("*Strasser*"), followed in *Prohaska v. Howe*, 2016 ONSC 48, 2016 CarswellOnt 13, [2016] O.J. No. 13 (Ont. Div. Ct.) ("*Prohaska*"), a decision of the Ontario Divisional Court. The Court accepts the reasoning in *Strasser* and *Prohaska* as applicable to the case now before it. The Court, therefore, denies the defendant double the costs award under Rule 14.07(2) on the basis that the plaintiff did not obtain a "judgment", but, rather, had its case dismissed.

Counsel for the plaintiff submitted that, based on the decision in *774838 Ontario Ltd. (c.o.b. The Old Barn Polished Stone Creations) v. Rajput*, [2015] O.J. No. 6082 ("*774838 Ontario Ltd.*"), Small Claims Court, the rejection of a favourable offer was no ground for awarding more than 30 per cent of the amount claimed. At paragraph 4 of that decision, the Deputy Judge, referring to the decision in *Melara-Lopez v. Richarz*, 2009 CarswellOnt 6333, 255 O.A.C. 160, [2009] O.J. No. 4362 (Ont. Div. Ct.) ("*Melara-Lopez*"), Ontario Divisional Court, stated: ". . . I do not consider this case authority for awarding more than 30% of the amount claimed simply on the basis that a favourable offer has been rejected."

The Court must also consider proportionality and the fact that the claim was for the amount of $9,421.66 and that the action was in the Small Claims Court. Costs must be fair and reasonable, having regard to all the circumstances of each case, and must be consistent with the reasonable expectations of the parties. See *Boucher v. Public Accountants Council (On-*

tario), 2004 CarswellOnt 2521, 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201, [2004] O.J. No. 2634 (Ont. C.A.) at paras. 37-38.

Considering all of the above factors, and in the exercise of its discretion under Section 131(1) of the Act, the Court allows the above referred-to 15% of the claim in the amount of $1,413.25. As well, the Court awards costs for the plaintiff's unreasonable behavior in not accepting the defendant's reasonable offer to settle, resulting in four days of trial and for time wasted in the defendant having to pursue the issue of concealment with all four of the plaintiff's witnesses. The Court sets those costs in the additional amount of $3,000.00 for a total costs award fixed in the amount of $4,413.25 payable to the defendant, in addition to disbursements to be assessed.

M.Y.A. General Contracting Inc. v Cavé City Developers Corp. (October 2, 2020), Doc. SC-18-00150264-0000, Deputy Judge R. Conway (Ont. S.C.S.M.).

Rule 14 permits but does not mandate doubling costs. This is an appropriate case to grant double the costs. Costs of $8,367.18 ordered.

Counsel for the plaintiff sought $5,000 for unreasonable conduct in the proceeding. Rule 19.06 reads, "If a court is satisfied that a party has *unduly complicated or prolonged an action or has otherwise acted unreasonably*, the court may order the party to pay an amount as *compensation*to another party." (Emphasis added.)

Section 29 of the *Courts of Justice Act* contains a similar provision, "An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to *penalize* a party or a party's representative for *unreasonable behaviour in the proceeding*." (Emphasis added)

Court allowed $1,000 as compensation for protracting the trial and the unreasonable way in which it was conducted.

Gustafson et al. v. Johnsonetal, 2021 ONSC 536, 2021 CarswellOnt 824 (Ont. S.C.J.).

Gustafson claimed costs for himself, his corporation, and LeBrun as self-represented parties.

In *Fong v. Chan*[12] the Court of Appeal determined that self-represented litigants could recover costs, including allowances for counsel fees. At para. 22 of *Fong*, the court identified three purposes for awarding costs:

1. to indemnify successful litigants for the cost of litigation;
2. to encourage settlements; and
3. to discourage and sanction inappropriate behaviour by litigants.

A self-represented litigant is not entitled to costs on the same scale as a litigant represented by counsel. In *Mustang Investigations Inc. v. Ironside*[13] the Divisional Court cited *Fong*, holding that a self-represented litigant claiming costs must prove that he or she lost income while devoting time doing work ordinarily done by a lawyer. The court held, at para. 27, that there was no authority to award costs absent such evidence. Awarding costs is not a mathematical exercise.

T & C Holdings Limited v. Booster Juice Inc., 2020 ONSC 4887, 2020 CarswellOnt 11603 (Ont. S.C.J.).

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[12] 1999 CarswellOnt 3955, 46 O.R. (3d) 330, 181 D.L.R. (4th) 614, 128 O.A.C. 2, [1999] O.J. No. 4600 (Ont. C.A.).

[13] 2010 ONSC 3444, 2010 CarswellOnt 5398, 103 O.R. (3d) 633, 98 C.P.C. (6th) 105, 321 D.L.R. (4th) 357, 267 O.A.C. 302, [2010] O.J. No. 3184 (Ont. Div. Ct.).

Plaintiff landlord claimed $425,000.00 from the Defendant tenant but recovered judgment for only $22,976.87. The amount of the judgment is well within the monetary jurisdiction of the Small Claims Court. It therefore brings into play Rule 57.05(1), which states as follows:

> If a plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs.

Plaintiff relied on cases in which judgments within Small Claims Court limits have been granted, but Courts have awarded Superior Court costs despite Rule 57.05(1). These cases include *Hunt v. TD Securities Inc.*, 2003 CarswellOnt 4971, 40 B.L.R. (3d) 156, 43 C.P.C. (5th) 211, [2003] O.J. No. 4868 (Ont. C.A.), *Tossonian v. Cynphany Diamonds Inc.*, 2015 ONSC 766, 2015 CarswellOnt 1283 (Ont. S.C.J.) and *Singh v. Qualified Metal Fabricators Ltd.*, [2016] O.J. No. 4220. Those cases all involved complex issues of fact and law, not the situation here.

Discretion under Rule 57.05(1) to order Plaintiff not recover any costs. No costs shall be paid by or to either party.

Hilson v. Evans, 2020 ONSC 2129, 2020 CarswellOnt 4794 (Ont. S.C.J.).

Plaintiff sues for over $1.3 million but recovered a judgment for under $1,000 and claimed substantial indemnity costs fixed at $140,958 under the Mortgage, or alternatively on a partial indemnity scale. Applying r. 57.05(1) of the *Rules of Civil* Procedure, the court made no award of costs to either party.

Payne v. The Kimberley Academy Ltd., 2020 BCSC 506, 2020 CarswellBC 850, 62 C.C.E.L. (4th) 276, 2020 C.L.L.C. 210-042 (B.C. S.C.).

Any calculation of damages above the Small Claims limit at the outset would have been overly optimistic. Any court time saved by bringing this action in Supreme Court is balanced, if not outweighed, by the dispute resolution measures available in Provincial Court. As such, the plaintiff should have brought this action in Small Claims court and should therefore only be entitled to her disbursements.

1422986 Ontario Limited v. Syncor et al., 2020 ONSC 4589, 2020 CarswellOnt 13687, Nieckarz J. (Ont. S.C.J.)

Plaintiff alleged Defendants infringed its copyright interests. The Plaintiff sought declaratory relief, injunctive relief, damages, and other remedies.

Discretion of court to be exercised with consideration given to the factors provided for in Rule 57.01(1) of the *Rules of Civil Procedure*, amount claimed and recovered; the complexity of the case; the importance of the issues; the conduct of the parties that tended to shorten or lengthen unnecessarily the duration of the proceeding; whether there were unnecessary steps; and a party's denial of or refusal to admit anything that should be admitted.

A court must take care to ensure that a costs award is fair and reasonable.[14] Rule 57.05(1) is not appropriate.

The most important issue in this litigation was not damages but rather the declaratory relief sought. A fair and reasonable amount for the Defendants to pay to the Plaintiff on account of its costs incurred in this proceeding is $30,000.

Groia v. Law Society of Upper Canada, 2018 CSC 27, 2018 SCC 27, 2018 CarswellOnt 8700, 2018 CarswellOnt 8701, [2018] 1 S.C.R. 772, 34 Admin. L.R. (6th) 183, 46 C.R. (7th) 227, 424 D.L.R. (4th) 443, [2018] S.C.J. No. 27 (S.C.C.).

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[14] See *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201, [2004] O.J. No. 2634 (Ont. C.A.) at paras. 37-38, and *Andersen v. St. Jude Medical Inc.*, 2006 CarswellOnt 710, 264 D.L.R. (4th) 557, 208 O.A.C. 10, [2006] O.J. No. 508 (Ont. Div. Ct.) at para. 22;–; leave to appeal refused 2006 CarswellOnt 7749 (Ont. C.A.).

The scope of civility in the context of zealous representation in a trial has been examined be the Supreme Court of Canada in *Groia v. Law Society of Upper Canada*, as has the potential sanction of enhanced costs for incivility in court filings. Unprofessional out of the court communications are not to be policed by the courts but rather by the law societies. The Supreme Court in *Doré v. Barreau du Québec*, found that a lawyer must show "dignified restraint" in communications with opposing counsel.

30. (1) Contempt hearing for failure to attend examination — The Small Claims Court may, in accordance with the rules of court, order a debtor or other person who is required to and fails to attend an examination respecting a default by the debtor under an order of the court for the payment or recovery of money, to attend before the court for a contempt hearing.

(2) Finding of contempt — The Small Claims Court may find a person to be in contempt of court at a hearing referred to in subsection (1), if the court is satisfied that,

(a) the person was required to attend the examination;

(b) the person was served, in accordance with the rules of court, with a notice to attend the examination;

(c) the person failed to attend the examination; and

(d) the failure to attend was wilful.

(3) Power conferred — For greater certainty, the power of the Small Claims Court to order, hear and determine a contempt hearing under this section is conferred on and may be exercised by the persons referred to in clauses 24(2)(a) and (b).

(4) Limit on imprisonment in certain cases — If a contempt hearing under subsection (1) is heard and determined by a person referred to in clause 24(2)(a) or (b), the court may make such orders respecting the person in contempt as are specified by the rules of court, but the court shall not make an order that the person be imprisoned for a period of more than five days.

(5) Authority unaffected — Nothing in this section affects the authority of the Small Claims Court to order, hear and determine contempt hearings where it is otherwise authorized by law.

1994, c. 12, s. 11; 2009, c. 33, Sched. 2, s. 20(8)

31. Appeals — An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action,

(a) for the payment of money in excess of the prescribed amount, excluding costs; or

(b) for the recovery of possession of personal property exceeding the prescribed amount in value.

2009, c. 33, Sched. 2, s. 20(9), (10)

Commentary: See also Chapter 7 — Appeals

Appeal limit

2. (1) For the purposes of clause 31 (a) of the Act, the prescribed amount is $3,500. O. Reg. 317/11, s. 1.

(2) For the purposes of clause 31 (b) of the Act, the prescribed amount is $3,500. O. Reg. 317/11, s. 1.

3. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 626/00, s. 3.

The minimum appealable limit under O.Reg. 244/10, in force July 1, 2010, was amended following the decision of Justice Heeney in *Action Auto Leasing & Gallery Inc. v. Robillard*, 2011 ONSC 3264, 2011 CarswellOnt 4105, 106 O.R. (3d) 281, 22 C.P.C. (7th) 414, 335 D.L.R. (4th) 439, 278 O.A.C. 293, [2011] O.J. No. 2453 (Ont. Div. Ct.), to correct a drafting error which erroneously implied that the amount of the order or judgment in question determined the right of appeal. As s. 31 plainly states, it is the amount claimed in the action which determines whether the minimum appealable limit is met, and not the amount of the order or judgment.

It should also be noted that the minimum appealable limit is exclusive of costs. This means, looking to case law dealing with the analogously-worded right of appeal under s. 19(1.2), that the appealable limit is inclusive of the amount of prejudgment interest claimed: see *Medis Health & Pharmaceutical Services Inc. v. Belrose*, 1994 CarswellOnt 486, 17 O.R. (3d) 265, 23 C.P.C. (3d) 273, 72 O.A.C. 161, [1994] O.J. No. 457 (Ont. C.A.); *Watson v. Boundy*, 2000 CarswellOnt 905, 49 O.R. (3d) 134, 130 O.A.C. 328 (Ont. C.A.).

In *Matlin v. Crane Canada Inc.* (2004), [2004] O.J. No. 3497, 2004 CarswellOnt 3648 (Ont. S.C.J.), at para. 6, Hockin J. stated, "There is no inherent appellate jurisdiction. A right to appeal can only be provided by statute or regulation."

In *Kourtessis v. Minister of National Revenue*, EYB 1993-67101, [1993] 1 C.T.C. 301, 1993 CarswellBC 1213, [1993] S.C.J. No. 45, 1993 CarswellBC 1259, 20 C.R. (4th) 104, [1993] 4 W.W.R. 225, 45 W.A.C. 81, 27 B.C.A.C. 81, 14 C.R.R. (2d) 193, 78 B.C.L.R. (2d) 257, 81 C.C.C. (3d) 286, 102 D.L.R. (4th) 456, [1993] 2 S.C.R. 53, 153 N.R. 1, 93 D.T.C. 5137 (S.C.C.), La Forest J. explained at paras. 15-16:

> Appeals are solely creatures of statute . . . There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten.
>
> There are various policy reasons for enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice . . . This is especially applicable to interlocutory matters which can ultimately be decided at trial; see *Mills v. The Queen*, [1986] 1 S.C.R. 863. On this point, McLachlin J., speaking for the majority in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, noted that there was a valid policy concern to control the "plethora of interlocutory appeals and the delays which inevitably flow from them" (p. 641).

The Superior Court of Justice provisions are grouped in sections 11–17. The Divisional Court provisions are grouped in sections 18–21. The Small Claims Court provisions are grouped in sections 22–33.1. These groupings provide a measure of insight into what the legislature intended when they drafted the *Courts of Justice Act*. The legislature chose to deal with appeals from the Small Claims Court in its own section, namely, section 31, separate and distinct from the other appeal routes leading to the Divisional Court, namely, those contained in section 19.

See *e.g.*, *Gelber v. Allstate Insurance Co. of Canada* (1983), 1983 CarswellOnt 457, 35 C.P.C. 324, 41 O.R. (2d) 318, Krever J. (Ont. Div. Ct.)

In *Foster Printing & Lithographing v. Pack-Tech Industries Ltd.* (1997), 1997 CarswellOnt 4575, [1997] O.J. No. 4462 (Ont. Div. Ct.), MacPherson J. stated:

> By virtue of s. 31 of the *Courts of Justice Act*, the Divisional Court has jurisdiction with respect to a final order of the Small Claims Court. It cannot hear an appeal of an interlocutory order made by a judge of that court: see *Gelber v. Allstate Insurance* (1983), 41 O.R. (2d) 318 at 320 (A.C.J., per Krever J.).

In *Razavi v. Queen's University* (March 6, 2003), Doc. 02-SC-078395, 03-DV-000839, [2003] O.J. No. 903 (Ont. Div. Ct.), Kealey J. stated:

> The parties agree the order in question is interlocutory and it seems clear from a number of decisions to which I've been referred that the Divisional Court has no jurisdiction to hear an appeal from such an order.

See further *Sinardi Hair Design v. Knifton* (2003), [2003] O.J. No. 1666, 2003 CarswellOnt 1547, Lane J. (Ont. Div. Ct.)

The test of whether an order is final or interlocutory is set forth in *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580 (Ont. C.A.). The Ontario Court of Appeal stated:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties — the very subject matter of the litigation, but only some matter collateral. It may be final in the final in the sense that it determines the very question raised by the applications, but it is interlocutory if the merits of the case remain to be determined.

See further *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd. / Groupe d'assurance canadienne generale Ltée* (1998), 1998 CarswellOnt 4909, [1998] O.J. No. 5291, 42 C.L.R. (2d) 241, *(*sub nom. *Mason (V.K.) Construction Ltd. v. Canadian General Insurance Group Ltd.)* 116 O.A.C. 272, *(*sub nom. *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.)* 42 O.R. (3d) 618 (Ont. C.A.).

In *Matlin*, *supra*, Hockin J., sitting as a judge of the Small Claims Court, declined to quash an order made by Deputy Judge McDonald, also sitting in the Small Claims Court. Justice Hockin stated at para. 10, "My jurisdiction on this motion is the same jurisdiction as that of Judge McDonald; the jurisdiction of the Small Claims Court. Justice Hockin dismissed the appeal on the grounds that it lacked jurisdiction; the appeal should have been to the Divisional Court.

Judicial Bias

Lawyers do encounter judges who appear to be biased against them, their clients, or their causes. Judges are no less human than anyone else, and neither their legal training nor their best intentions can completely eliminate biases and preconceptions from their thinking. Judicial bias may be conscious or unconscious and may take many forms.

One antidote to potential judicial bias can be summed up in a single word: Listen. This is so very hard for lawyers to do, especially trial lawyers. After all, even if they are God's gift to the uninformed and the last great breed of orators, orators must know their audience if they want to be great. Many times hostile judges will signal — if not flat out tell you — what they do or do not want to happen in their court. Lawyers, however, are often too busy talking (or arguing) to pick up on these vital, and sometimes obvious, clues. Slow down and listen, and you may just learn something.

Sometimes the best victory is the one that is never fought.

There is no dishonour in reaching an agreement with the opposing side that might be better than a result you would get from the judge.

If you are not careful, however, persistence before a biased judge can turn you into the legal equivalent of the Washington Generals. You may know that the Washington Generals are the foils for the antics and victories of the Harlem Globetrotters. Each day the Washington Generals put on their uniforms, play in front of a hostile crowd, and get humiliated by the Globetrotters. This is not what any of us aspire to.

You learn from losing by focusing on what you did right, what you did wrong, how to keep doing the things you did right, and how to avoid doing the things you did wrong.

Be a professional. Be careful not to lose your integrity when you lose a hearing. Whatever you do, do not return a negative ruling or attitude from a trial judge with a negative comment or attitude. Rather, try to raise your professionalism each time the court is hostile. And self-reflection is important: what did you do right, what did you do wrong, what can you do to cure these mistakes, what other approach should you take with the court?

The Divisional Court

In the Divisional Court, you may represent yourself or be represented by a lawyer. If you wish to hire an Ontario lawyer, you can contact the Law Society Referral Service (LSRS) operated by the Law Society of Upper Canada. The Law Society Referral Service helps find someone who provides legal services in the area of law that meets specific needs. The service can also help find a legal representative who meets specific requirements, such as a lawyer or paralegal who speaks a certain language, or a lawyer who accepts Legal Aid certificates. A lawyer or paralegal who participates in LSRS will offer a free consultation of up to half an hour. This consultation may be over the phone or in person (the choice is up to him or her). The Law Society Referral Service can be reached directly at 1-855-947-5255 or 416-947-5255 (within the GTA), Monday–Friday, between 9 a.m. and 5 p.m.

If you are not in a financial position to retain the services of a lawyer, you may wish to contact the Legal Aid Ontario office closest to you to see if you qualify for legal aid. For more information, you may visit Legal Aid Ontario's website at <http://www.legalaid.on.ca.> or call 1-800-668-8258 (toll free) or 416-979-1446 (in Toronto).

For information about the rights of French-speaking individuals in the Ontario justice system, refer to the brochure Justice in Both Languages, available in French and English on the Ministry of the Attorney General website at <http://www.attorneygeneral.jus.gov.on.ca.>.

The court office will pay for "in court" interpretation in any language other than French only if you apply for and are given a fee waiver certificate.

Principle of Deference

The principle of deference means that an appellate court may substitute its own view of the evidence and draw its own inferences only if the trial judge committed a palpable and overriding error or made findings of fact or drew inferences that are unreasonable or unsupported by the evidence. See *L. (H.) v. Canada (Attorney General)*, 2005 CarswellSask 268, 2005 CarswellSask 273, REJB 2005-89538, [2005] S.C.J. No. 24, EYB 2005-89538, 2005 SCC 25, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) at para. 4.

See also *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.), *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, 1997 CarswellOnt 3270, [1997] O.J. No. 3921, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324 (Ont. C.A.), *Gottardo Properties (Dome) Inc. v. Toronto (City)*, [1998] O.J. No. 3048, 1998 CarswellOnt 3004, *(*sub nom. *Gottardo Properties (Dome) Inc. v. Regional Assessment Commissioner, Region No. 9)* 111 O.A.C. 272, 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.), and *Waxman v. Waxman*, 2004 CarswellOnt 1715, [2004] O.J. No. 1765, 44 B.L.R. (3d) 165, 186 O.A.C. 201 (Ont. C.A.). The principle of appellate deference to a trial judge's fact-finding and inference-drawing applies even when the entire trial record is in writing. Deference recognizes that even on a written record, the trial judge "lives through" the trial while a court of appeal reviews the record only through the lens of appellate review. Deference also preserves the integrity of the trial process.

Case Law: *Tailored Foam Solutions (2013) Inc v. Martindale Estate*, [2018] O.J. No. 1333 (Ont. Div. Ct.).

A motion for leave to appeal a final costs order of the Small Claims Court is properly made orally before a single judge of the Divisional Court.

Millard v. Di Carlo, 2014 ONSC 1218, 2014 CarswellOnt 2438, [2014] O.J. No. 917 (Ont. Div. Ct.).

Applicants sought a judicial review on the basis that the deputy judge "erred in law" in failing to dismiss the claim on both jurisdiction and limitations issues.

The Divisional Court has jurisdiction to hear appeals from final orders of the Small Claims Court. There were no appeals of interlocutory decisions of Court (see *Courts of Justice Act*, s. 31).

Judicial review may lie from an interlocutory decision of Small Claims Court, but only in a narrow range of circumstances as when the court acts without jurisdiction (see *Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.) and *Pardar v. McKoy*, 2011 ONSC 2549, 2011 CarswellOnt 3059, [2011] O.J. No. 2092 (Ont. Div. Ct.). An order of the deputy judge is interlocutory.

The appeal was on the basis of an alleged error of law and not a judicial review of an alleged lack of jurisdiction. The application was dismissed.

Harris v. Levine, 2014 ONCA 608, 2014 CarswellOnt 11381 (Ont. C.A.); leave to appeal refused 2015 CarswellOnt 3267, 2015 CarswellOnt 3268 (S.C.C.).

Attempt to re-litigate issue decided in previous proceedings. Collateral attack. Plaintiff convicted of criminal harassment and assault as result of parking dispute with neighbour. When his conviction appeal failed, he filed a civil claim in negligence against his criminal lawyer. Motion judge noted plaintiff would have to establish on balance of probabilities that he would have been acquitted if it were not for his lawyer's conduct. This would result in re-litigation of criminal charges which would potentially impeach integrity of adjudicative process. Judge struck plaintiff's pleadings as claim was collateral attack on criminal proceeding and abuse of process. Court of Appeal agreed and dismissed plaintiff's appeal.

Cudini v. 1704405 Ontario Inc., 2012 ONSC 6645, 2012 CarswellOnt 15146, [2012] O.J. No. 5620 (Ont. Div. Ct.), K. van Rensburg J.

This is a decision in two appeals to the Divisional Court and a separate application proceeding commenced in the Superior Court. The respondent seeks an order quashing the appeals and dismissing the application.

Section 31 of the *Courts of Justice Act* is exhaustive with respect to the rights to appeal a decision of the Small Claims Court: *Grainger v. Windsor-Essex Children's Aid Society*, 2009 CarswellOnt 4000, 96 O.R. (3d) 711 (Ont. S.C.J.) at para. 12.

The prescribed amount pursuant to O. Reg. 244/10 is $2,500.

As Granger J. concluded through his careful analysis in the *Grainger* case (at paras. 12 through 22), there is no right to appeal an order of the Small Claims Court other than pursuant to s. 31. There is no right to appeal an interlocutory order of that court, and there is no right to request leave to appeal an order of the Small Claims Court to the Divisional Court or to the Superior Court. Section 31 is the sole source of appeal jurisdiction for an order of the Ontario Small Claims Court.

The order that Ms. Cudini seeks to appeal is the order of Deputy Judge Latimer dated September 8, 2011, dismissing her motion for a new trial under rule 17.04. Mr. Smith argues that since this is not a judgment for an amount greater than $2,500 there is no right to appeal. Even if the appeal could be considered to relate to the original judgment of Deputy Judge Boguski, the amount of the judgment was only $1,155.

See *Action Auto Leasing & Gallery Inc. v. Robillard*, 2011 ONSC 3264, 2011 CarswellOnt 4105, 106 O.R. (3d) 281, 22 C.P.C. (7th) 414, 335 D.L.R. (4th) 439, 278 O.A.C. 293, [2011] O.J. No. 2453 (Ont. Div. Ct.), Heeney J. Heeney J. concluded that it was the amount at issue in the action, and not the amount of the judgment that determined the plaintiff's right of

appeal. He distinguished the decision in *Lambert v. Clarke* (1904), 7 O.L.R. 130, [1904] O.J. No. 116 (Ont. C.A.), where the defendant had sought to appeal a judgment for less than the then prescribed limit of $100, where the plaintiff had sued for a greater amount, on the basis that the only number that mattered in an appeal by a *defendant* was the amount of the judgment against him. The "matter in dispute" in the appeal was a judgment for less than the prescribed limit.

To the extent that Ms. Cudini's notices of motion and other materials filed in respect of this matter seek relief other than already addressed, her claims are dismissed. There is no basis for the interlocutory relief she has requested in the form of a "supervision order," or for an order that the two Divisional Court appeals be heard together. There is also no evidentiary foundation for an order to prevent Mr. Smith from bringing further proceedings against her.

Bougadis Chang LLP v. 1231238 Ontario Inc., 2012 ONSC 6409, 2012 CarswellOnt 14490, 300 O.A.C. 363, [2012] O.J. No. 5433, Justice Swinton (Ont. Div. Ct.).

Assuming that I have jurisdiction to grant leave to appeal a "no costs" order in the Small Claims Court pursuant to s. 133 of the *Courts of Justice Act*, R.S.0. 1990, c. C.43 ("CJA"), I would, nevertheless, refuse to grant leave to appeal.

Leave to appeal a costs order should be sparingly granted, and only if there has been an error in principle, or the costs award is clearly wrong. Moreover, the proposed appeal should raise an issue of some importance to the administration of justice that goes beyond the interests of the parties (*Poulin v. Poulin*, 2007 CarswellOnt 8268, 48 R.F.L. (6th) 196, [2007] O.J. No. 4987 (Ont. S.C.J.) at para. 22). Appeal of a final order of the Small Claims Court can be brought only if amount in dispute exceeds $2,500 excluding costs (see s. 31 of the *Courts of Justice Act*, and O. Reg. 626/00, s. 2).

The Deputy Judge should have given the parties an opportunity to make submissions on costs. However, I am not satisfied that a "no costs" award for the motion was wrong or based on an error in principle. Rule 15.07 of the *Small Claims Court Rules* provides that the costs of a motion shall be $100 exclusive of disbursements, absent special circumstances.

Proposed appeal does not raise any issue of public importance that warrants consideration on an appeal.

Accordingly, the motion for leave to appeal the costs order is dismissed.

Annis v. Barbieri, 2012 ONSC 6479, 2012 CarswellOnt 14504 (Ont. Div. Ct.), Justice Swinton.

The appellant appeals from a decision of a Deputy Judge dated June 17, 2011, which dismissed her claim for damages against the respondent Barbieri arising after she purchased a home from him.

Appeal dismissed.

Standard of review on appeal from a trial judge is correctness with respect to questions of law. Standard is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.) at paras. 8 and 10).

The respondent seeks costs of the appeal on a substantial indemnity basis because of the unproved allegations of fraud. Respondent has not been as forthright and open as he could have been.

The amount of $5,000.00 inclusive of HST and disbursements would be reasonable and fair.

Zeh v. Ricciuti, [1946] 1 W.W.R. 687 (Alta. T.D.).

The existence of a right of appeal does not oust the jurisdiction of the superior court to grant certiorari unless there are exceptional and extraordinary circumstances.

Kerr v. Raso c.o.b. Eagle Couriers (February 28, 1983) (Ont. H.C.).

The court will entertain an appeal with respect to a refusal to set aside a default judgment because "the circumstances of the case define that the issues between the parties be determined on their merits.".

Ron Robinson Ltd. v. Canadian Indemnity Co., 1984 CarswellOnt 1354, 45 O.R. (2d) 124, 2 O.A.C. 359 (Ont. Div. Ct.).

No right of appeal exists from pre-trial proceedings.

Gelber v. Allstate Insurance Co. of Canada, 1983 CarswellOnt 457, 41 O.R. (2d) 318, 35 C.P.C. 324 (Ont. Div. Ct.).

"An order adjourning a trial on terms prior to its commencement is an interlocutory order. The Divisional Court is without jurisdiction to hear an appeal from same.".

Petrofina Canada Ltd. v. Lynn, 1978 CarswellOnt 400, 19 O.R. (2d) 97, 6 C.P.C. 94, 84 D.L.R. (3d) 129 (Ont. Div. Ct.).

The right of appeal under this section is substantive rather than procedural. Accordingly, where an action had been commenced before an amendment limiting appeals to decisions in which the sum in dispute exceeded $500 (1977, c. 52, s. 10) became effective, and where the sum in dispute was less than $500, the defendant's right of appeal survived the amendment, which was not intended to have retroactive effect.

394705 Ont. Ltd. v. Moerenhout, 1983 CarswellOnt 452, 35 C.P.C. 258, 41 O.R. (2d) 637 (Ont. Co. Ct.).

An application for a new trial in an action involving $500 or less should be made to the original trial judge.

Gillman v. Vic Tanny Holdings (July 8, 1983) (Ont. Div. Ct.).

There is no appeal from an order granting a new trial, but the court will entertain an appeal from an order refusing to grant a new trial.

Savin v. McKay (1984), 44 C.P.C. 192 (Ont. Div. Ct.).

Findings of credibility are not to be disturbed on appeal as a general rule as long as there is some evidence upon which the judgment is based. Since this is an appellate court which is not designated for a retrial of the action, an error of law must be shown before the appeal will succeed.

Lawry v. Eggett (July 7, 1978) (Ont. Div. Ct.).

"What is the 'sum in dispute'? The 'sum in dispute' for the purpose of an appeal is the amount of the judgment appealed from and the amount of the original claim is immaterial whether the appeal is by the plaintiff or the defendant," per Craig J.

Buckler v. Earthwood Mfg. Ltd. (1980), 18 C.P.C. 223 (B.C. Co. Ct.).

Where to a claim for debt is added a claim for prejudgment interest, the total amount claimed must be considered in determining whether the amount claimed is within the jurisdiction of the Small Claims Court and, therefore, outside the jurisdiction of the County Court.

McClellan's Sand & Gravel Ltd. v. Rueter (1982), 140 D.L.R. (3d) 679 (Ont. Div. Ct.).

The *Small Claims Courts Act*, R.S.O. 1980, c. 476, s. 108, provides that an appeal from a judgment of the court is available only where the sum in dispute exceeds $500. In the case of a judgment in favour of the plaintiff for less than $500 for the value of work and services performed and dismissing the defendant's counterclaim for over payment for such work, the amount of the claim and counterclaim are not to be aggregated and, accordingly, no appeal lies from such a judgment.

Wager & Wager Ltd. v. Fraser (1981), 23 C.P.C. 5 (Ont. Div. Ct.).

In this case the claim for interest is totally dependent upon the success or failure of the claim for commission and it is a claim which would be in the discretion of the court. The appeal provisions of the Act do not entitle the appellant herein to engrafton the sum in dispute the interest claim in order to bring that claim within the provisions of s. 108. The sum in dispute herein does not exceed $500 exclusive of costs. To permit a claimant to engraft a claim for interest on the amount in dispute and thereby bring the matter within the appellate jurisdiction of this court would be inconsistent with the policy of the Act and the scheme thereof as evidenced by the wording of ss. 54 and 108 as amended.

Lewis v. Todd, [1980] 2 S.C.R. 694 (S.C.C.).

"This important case in part stresses the paramount role of the trial Judge in assessing damages.".

Texaco Can. v. Deganais (1983), 40 C.P.C. 64 (Ont. Div. Ct.).

For the purposes of this section, the "sum of dispute" was the amount of the judgment appealed against, where the "sum in dispute" excluded $500. Upon an appeal in garnishee proceedings, the amount was determined by reference to the actual amount of the judgment in the garnishee proceedings, not to the debt itself.

Auto Gallery Inc. v. Hook (February 4, 1994), Doc. No. Regina Q.B.350/93 (Sask. Q.B.).

Following a trial in a Small Claims Court, the respondent/plaintiff was awarded judgment. The appellant/defendant submitted in this appeal that the trial judge erred in admitting parole evidence.

The appeal was dismissed. The dispute findings were factual and supported by evidence. There was no error of law.

Faye v. Dureault's Allied Sales Ltd. (January 6, 1995), Doc. No. Regina Q.B.M. 262/94 (Sask. Q.B.).

The appeal was based on questions of facts. Determination whether a motor engine is "old" or "new" is a question of fact.

The application and appeal was dismissed. The appellant did not meet the tests for introducing new evidence on appeal, as he had failed to explain why the evidence was not adduced at trial. The issue before the trial judge was one of fact, namely whether the appellant's tractor had a new motor. The trial judge's finding on this issue should not be disturbed unless it was unreasonable.

Hiebert v. Peters (1994), 27 C.P.C. (3d) 369 (Man. C.A.).

Application for leave to appeal from an order dismissing a claim for $1,052 and bodily injury damages on two questions of law.

Application granted and appeal allowed on both questions with an order that the action be returned to the Small Claims Court for rehearing on its merits without prejudice to the Crown's right to re-argue its defence under s. 2(3). The appellant had not been permitted to give his evidence under oath on all points or to make answer to the preliminary objection concerning lack of notice.

The tendency of the law of recent times is to ameliorate the rigours of absolute rules and absolulte duty in the sense indicated as contrary to natural justice.

Roscoe Construction Ltd. v. North Hills Nursing Home Ltd. (1994), 25 C.P.C. (3d) 315 (N.S. S.C.).

The appellant had failed to comply with Regulations 17(2) and (3) with respect to service of the Notice of Appeal. In that circumstance, the court may dismiss summarily or exercise discretion and consider equities. Proceed "as may be just".

An appeal is on the basis of the "record". In Small Claims Court matters, the record consists of the summary Report of the adjudicator and, where filed, the Decision and exhibits. The appellant may have a restatement by the adjudicator added to the "record".

Popa v. Thorpe (1994), 119 Sask. R. 304 (Sask. Q.B.).

An appeal from the Small Claims Court had to accept facts as found unless a palpable and overriding error present. Appeal allowed on assessment of damages. The case was returned to the Provincial Court for a new trial to damages.

Tapscott v. Marshview Foundations & Construction Ltd. (February 15, 1994), Doc. No. SAM 2197/94 (N.S. S.C.).

Application to set aside the decision of an adjudicator. The adjudicator had estimated the amount of deficiencies in a contract for work and based his award on the estimate without giving the appellant the benefit of adducing evidence.

Application allowed. The decision was set aside on the ground that it constituted a denial of natural justice against the appellant.

Natural justice is nothing more than fair play. The parameters of natural justice must be determined in each case, having regard to the specific circumstances therein. The fact that the adjudicator did not state a time frame within which the appellant was to provide the additional documentation and the fact that the decision was rendered without further notice to the appellant resulted in a failure to follow the requirements of natural justice.

Mandel v. The Permanent (1985), 7 O.A.C. 365 (Ont. Div. Ct.).

In a small claims trial, the trial judge intervened to manage the trial where there was unacceptable conduct by a party, to elicit the party's story to enable her to obtain further legal advice if necessary, and to clarify her evidence and to assist her when she appeared in person on the second day of the trial. The Divisional Court cautioned against the intervention of a trial judge on such a scale but found nothing in this case to justify a new trial. A judge may certainly assist a party, but not be unfair to the other party at the same time.

Shanks v. J.D. Irving Ltd. c.o.b. Irving Equipment Ltd. (1986), 7 C.P.C. (2d) 96 (N.S. S.C.).

The plaintiffs sued the defendant in Small Claims Court for damages. The defendant did not defend. The plaintiffs then commenced action against the defendant in the Supreme Court, Trial Division claiming damages arising out of the same transaction. The Small Claims Court had jurisdiction over the claim and pronounced a final judgment. Accordingly, the subsequent Supreme Court action was *res judicata*.

Air Canada v. Reilly (1989), 89 N.S.R. (2d) 217 (T.D.).

The applicant was entitled to judicial review even in light of the "privative" clause contained in section 32(2) of the Nova Scotia Statute, *i.e.*, S.N.S. 1982, s. 2, which states "32(2) . . . The order or decision of the county court is final and is not subject to appeal . . .". Such clauses do not preclude review by way of judicial review by the courts.

Carrier v. Cameron, [1985] O.J. No. 1357, 1985 CarswellOnt 637, 6 C.P.C. (2d) 208, 11 O.A.C. 369 (Ont. Div. Ct.).

On an appeal, a new trial should not be directed unless some substantial wrong or miscarriage of justice has occurred. (See s. 144(6) [now s. 134(6)] of the *Courts of Justice Act*.) Having regard to the nature of this claim and the manner in which it was presented to the trial judge and his ultimate disposition thereof, it could not be said that such a miscarriage has occurred in this case. The Small Claims Court is required to provide a speedy and expeditious method for resolving claims of this nature and has a mandate to do so in a "summary way." (See *Small Claims Court Act*, R.S.O. 1980, c. 476, s. 57). While the trial judge clearly did err in failing to call on the parties for argument, that error in the circumstances of this case did not result in a substantial wrong or miscarriage of justice.

Burchill v. Yukon Travel (1997), 28 B.C.L.R. (3d) 95 (Y.T. C.A.).

Defendant appealing from small claims court judgment to Supreme Court. Supreme Court dismissing appeal. Defendant appealing to Court of Appeal. Section 2 of *Court of Appeal Act* allowing for appeal to Court of Appeal from every order of Supreme Court. Legislature not intending that appeal lie to Court of Appeal from small claims matter. Court of Appeal having no jurisdiction to hear appeal.

Mooney v. Cariboo Regional District (December 9, 1996), Doc. Quesnel 5363 (B.C. S.C.).

Plaintiff did not appear at trial some five and one-half years before and did not appeal order. Court had no jurisdiction to determine issues again. Action dismissed.

Sier Bath Deck Gear Corp. v. Polymotion Ltd. (1996), 30 O.R. (3d) 736, 1996 CarswellOnt 3873, 42 C.B.R. (3d) 1, 15 O.T.C. 323 (Ont. Gen. Div.).

Defendant appealed judgment awarding plaintiff $6,000, on ground that plaintiff, Indiana corporation, was undischarged bankrupt and had sued to recover debt created before bankruptcy. Trial judge concluded effect of order permitted action to proceed as framed. Abandonment not assignment. Small Claims Court Rules silent as to right of undischarged bankrupt to sue for recovery of property rights. Appeal allowed and claim dismissed.

De Vos v. Robertson (1997), 103 O.A.C. 231, 14 C.P.C. (4th) 105 (Ont. C.A.).

The trial judge owes it to the parties to make clear his findings of credibility and fact, and to address the issues so that each of the parties would know that his or her case has been understood and carefully dealt with. This is particularly so after judgment has been reserved for such a long time. See *R. v. Richardson* (1992), 9 O.R. (3d) 194 at 201 (Ont. C.A.), Sopinka J. in *R. v. Feeney* (1997), 212 N.R. 83 at 105–6 (S.C.C.); *Koschman v. Hay* (1977), 17 O.R. (2d) 557 (Ont. C.A.) and *Mitro v. Mitro* (1977), 1 R.F.L. (2d) 382 (Ont. C.A.); *All Nations Trading Corp. v. Lumbermen's Mutual Casualty Co.* (1982), 37 O.R. (2d) 12 (Ont. C.A.); and the decision of Sopinka J. in *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 (S.C.C.).

New Brunswick (Department of Health & Community Services) v. Clark (October 16, 1998), Doc. 281/97/CA (N.B. C.A.).

Appeal dismissed. The grounds for appeal were of findings of fact and, therefore, could not be appealed.

J.J. Nichvolodov & Co. v. Brandon (July 2, 1998), Doc. Yorkton Q.B. 397/97 (Sask. Q.B.).

Appeal by the defendant. Appellant argued that trial judge was biased in favour of the respondent due to certain remarks he made during trial and that the trial judge slept during portions of the cross-examination of the respondent. Appeal dismissed. The trial judge's interjections at trial were justified in order to keep the questions relevant. There was no evidence that the trial judge slept through portions of the trial.

Kay v. Tynio (April 28, 1998), Doc. Toronto 588/97 (Ont. Div. Ct.).

Appeal by the plaintiff from trial judgment in Small Claims Court dismissing her action against the defendant dentist. Appeal dismissed. There was evidence to support the trial judge's conclusions, and he made reference to most of the evidence before him in his reasons for judgment.

Manz v. Loewen (March 12, 1999), Doc. Regina Q.B.G. 2759/98 (Sask. Q.B.).

Manz was unrepresented by counsel at trial. Appeal dismissed. In Small Claims Court mistakes that could have been avoided in the presence of counsel did not by themselves afford a right of appeal. Nothing suggested that there would have been a different result if Manz had been specifically directed that she had an opportunity to cross-examine.

Salem v. Air Canada (January 4, 1999), Doc. S.H. 149810/98 (N.S. S.C.).

Appeal from dismissal of Small Claims Court action. Salem claimed that the adjudicator displayed bias by grimacing during the hearing. She exceeded her jurisdiction, and she failed to heed the requirements of natural justice by delivering a summary of facts and reasons outside the 30-day time limit required by the Act. Appeal dismissed. The trial judge's grimace did not necessarily indicate bias. No jurisdictional error was made, and the requirements of natural justice were met.

Kowalsky v. Baker (1998), 107 O.A.C. 297 (Ont. Div. Ct.).

Plaintiff appealed from the dismissal of small claims action, asserting judge excessively intervened in defendant's cross-examination. Defendant was self-represented. Divisional Court rejected the plaintiff's argument. The judge's interventions were for purpose of controlling the proceedings and clarifying the evidence and nature of cross-examination. The court rejected defendant's argument that it was appropriate for a trial judge to intervene to assist an unrepresented litigant. Trial judge appeared to have participated in an expectation that trial would proceed in a certain manner. Appeal allowed.

Pavlovic v. Pav's Complete Excavating & Landscaping Services Ltd. (December 10, 1998), Doc. Kamloops 26806 (B.C. S.C.).

Appellant sought order to have appeal from Small Claims Court heard by way of trial *de novo*. Courts of Appeal are generally reluctant to order new trials. See *Kralj v. Murray* (1953), [1954] 1 D.L.R. 781 (Ont. C.A.) at 784 *per* Hope J.A. The requirements for the admission of fresh evidence are: 1. That the evidence was not discoverable by reasonable diligence before the end of the trial; 2. That the evidence is wholly credible; and 3. That the evidence would be practically conclusive of an issue before the court. Appellants did not satisfy conditions. Application dismissed.

Hilson v. Richmond Chandler Investments Ltd. (1999), 117 O.A.C. 297 (Ont. C.A); reversing (1996), 25 C.C.E.L. (2d) 75, 20 O.T.C. 22 (Ont. Gen. Div.).

Interventions by the trial judge. The law is clear "that not only should justice be done, but should manifestly and undoubtedly be seen to be done". *R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 *per* Lord Hewitt at 259. *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), Martin J.A. at 232. In *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.), L'Heureux-Dubé and McLachlin J. at 503 [S.C.R.]. As said in *Sorger v. Bank of Nova Scotia*, 1998 CarswellOnt 2108, 109 O.A.C. 130, 160 D.L.R. (4th) 66, 39 O.R. (3d) 1 (Ont. C.A.) at 2: "There is a reasonable apprehension of a judicial mind which was closed to the appellant's case rather than one which addressed that case with fairness and impartiality." Appeal allowed.

Waddell v. Dover Industries Ltd. (October 29, 1998), Doc. 107/98/CA (N.B. C.A.).

Appeal refused because it was not on a question of law alone, as required by Rule 75.18 (1) of the Rules of Court, N.B. Reg. 82-73.

Smith v. Harbour Authority of Port Hood (1998), 20 C.P.C. (4th) 277, *(*sub nom. *Smith v. Port Hood Harbour Authority)* 169 N.S.R. (2d) 323, 508 A.P.R. 323 (N.S. C.A.).

Section 39 of the *Court and Administrative Reform Act*, S.N.S. 1996, c. 23, added s-s. (6) to s. 32 of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430, making a decision of the Supreme Court on appeal from the Small Claims Court final and not subject to further appeal. This section extinguishing the right of appeal was proclaimed in force by the Lieutenant Governor on April 1, 1997. The Supreme Court of Canada has ruled that a right of appeal crystallized on the day the proceedings are instituted in the lower courts and not on the day of judgment or the day on which deliberation begins. The Small Claims Court is constituted pursuant to the Province's power to legislate by virtue of s. 92(14) of the *Constitution Act,*

1982 — administration of justice in the Province — does not alone preclude that Court from hearing matters which fall within federal jurisdiction. See *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, 57 D.L.R. (4th) 710, 92 N.R. 137, *(*sub nom. *William Siddall & Sons Fisheries v. Pembina Exploration Can. Ltd.)* 33 O.A.C. 321 (S.C.C.) at 228 (S.C.R.). It is immaterial that s. 55 of the *Small Claims Court Act* of Ontario considered by the Supreme Court in *Pembina*, *supra*, conferred wider jurisdiction upon the court than does the *Small Claims Court Act* in this Province.

United Lumber & Building Supplies Co. v. 1104483 Ontario Inc. (May 27, 1998), Doc. Barrie G20769/97 (Ont. Gen. Div.).

Appeal on grounds of apprehension of bias by the deputy judge. The presumption which faced the appellant not rebutted. Court found that a reasonable person would conclude that the judge acted fairly to both sides in identifying possible conflicts of interest for the parties and proceeding only after both sides agreed to continue.

Stewart v. Strutt, 1998 CarswellBC 565, [1998] B.C.J. No. 636 (B.C. S.C.).

Appeal brought on record pursuant to Part 2 of the *Small Claims Act*, R.S.B.C. 1996, c. 430. The reasons for a new trial are not defined in the *Small Claims Act*, but I conclude that there must be more than just evidentiary oversights or omissions before the parties can be put to the expense of a new trial. Court reluctant to disturb findings of fact based on the evidence and court's assessment of the witnesses who appeared for both the claimants and the respondent.

Kendall v. Rankin (November 24, 1998), Doc. Vancouver A981638, 95-20844 (B.C. S.C.).

Appeal under the *Small Claims Act*, arises from dismissal of claim for the payment of the appellants' legal account for services rendered. Appellants' appeal relied on basis of *quantum meruit*. See *Peel (Regional Municipality) v. Canada*, *(*sub nom. *Peel (Regional Municipality) v. Ontario)* [1992] 3 S.C.R. 762 (S.C.C.). *Quantum meruit* is a category even though no contract.

Sorger v. Bank of Nova Scotia, 1998 CarswellOnt 2108, 109 O.A.C. 130, 160 D.L.R. (4th) 66, 39 O.R. (3d) 1 (Ont. C.A.).

Trial judge requested plaintiffs lead evidence that they had attempted to recover from third parties. He repeatedly commented plaintiffs' case wasting court's time. He also prejudged the credibility of the plaintiffs' key witness. His reasons for judgment were only a compilation of parties' written submissions and 29 bald findings taken verbatim from the defendants' material. No analysis of evidence and no consideration of jurisprudence. Court of Appeal held that cumulative effect of trial judge's actions raised a reasonable apprehension of bias.

Hebert v. Morris (June 30, 1998), Doc. AI 98-30-03766 (Man. C.A. [In Chambers]).

The applicant sought leave to appeal from the decision of a Queen's Bench judge on a small claims matter. The appeal was dismissed. Leave to appeal may only be granted if the question of law has been identified of such sufficient importance to warrant review by the court. Other evidence on record of a contradictory nature did not constitute error in law. At most it would be an error of fact, from which there was no right of appeal.

Tsaoussis (Litigation Guardian of) v. Baetz (1998), *(*sub nom. *Tsaoussis v. Baetz)* 112 O.A.C. 78, 165 D.L.R. (4th) 268, 41 O.R. (3d) 257, 27 C.P.C. (4th) 223 (Ont. C.A.); leave to appeal refused (1999), *(*sub nom. *Tsaoussis v. Baetz)* 236 N.R. 189 (note), *(*sub nom. *Tsaoussis v. Baetz)* 122 O.A.C. 199 (note) (S.C.C.).

A three-year-old child was injured in 1990. The settlement for $5,420 was approved in 1992. In 1994 the mother commenced an action for $2 million. The defendant relied on the settlement. Inaccuracy alone did not justify setting aside judgments. New action was based on evidence developed after the settlement, but which could have been obtained earlier.

Wan v. R.I. Van Norman Ltd. (December 7, 1998), Doc. Saskatoon Q.B.G. 1525/98 (Sask. Q.B.).

The appeal court can intervene only if the trial judge erred in law or if he or she made a palpable and overriding error in findings of fact that are not reasonably supported by evidence. The appellant failed to establish that the trial judge made an appealable error.

Saskatchewan Kodokan Black Belt Assn. v. Bergey (1999), *(*sub nom. *Saskatchewan Kodokan Black Belt Association Inc. v. Bergey)* 183 Sask. R. 270 (Sask. Q.B.).

The applicant obtained a judgment against the respondent in small claims action. The respondent appealed but neglected to requisition the transcript of evidence presented at trial. Curative provision of s. 47 of *Small Claims Act* (Saskatchewan) did not override the deemed dismissal provision in s. 39(6) when the transcript was not filed before the end of the extension period.

Higgins v. Saunders (November 24, 1998), Doc. C.A. 145737 (N.S. C.A.).

The Small Claims Court adjudicator was found to have met the requirements by simply providing copy of a seven-page decision. The decision revealed a finding of law and fact. This enabled the Supreme Court to reach a conclusion whether or not any grounds for appeal listed in s. 32(1) existed.

Specht v. Yeo, 1999 BCCA 499, 130 B.C.A.C. 12, 211 W.A.C. 12 (B.C. C.A.).

The plaintiff recovered damages less than had actually been paid to the plaintiff by the defendant's insurer prior to trial. The defendant's appeal of the trial judge's ruling on costs was allowed. The plaintiff's claim was dismissed and the defendant was entitled to costs.

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.).

The court was reluctant to interfere with findings of fact made at trial, when it was based on assessment of testimony. The appellate courts should not substitute their own findings of fact for those of the trial judge. See *Stein v. "Kathy K." (The)*, 1975 CarswellNat 385, 1975 CarswellNat 385F, [1976] 1 Lloyd's Rep. 153, 6 N.R. 359, 62 D.L.R. (3d) 1, [1976] 2 S.C.R. 802 (S.C.C.), per Ritchie J., at 808 and *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247 (S.C.C.). The policy reason underlying this rule is protection of "[t]he autonomy and integrity of the trial process": *Schwartz v. R.*, 1996 CarswellNat 422F, 1996 CarswellNat 2940, 17 C.C.E.L. (2d) 141, *(*sub nom. *Minister of National Revenue v. Schwartz)* 193 N.R. 241, *(*sub nom. *Schwartz v. Canada)* 133 D.L.R. (4th) 289, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, *(*sub nom. *Schwartz v. Canada)* [1996] 1 S.C.R. 254 (S.C.C.) at 278.

Strilets v. Vicom Multimedia Inc. (2000), [2001] 1 W.W.R. 342, 49 C.P.C. (4th) 347, 85 Alta. L.R. (3d) 168, 274 A.R. 6, 2000 CarswellAlta 946 (Alta. Q.B.).

The plaintiff applied to extend time for filing transcript. The Civil Claims division of the provincial court established to promote a cost efficient resolution of relatively minor claims. Stringent time limits would defeat the purpose of allowing parties not versed with in legal system to have their day in court. The criteria was set out in *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 26 Alta. L.R. 69, [1931] 4 D.L.R. 819, 1931 CarswellAlta 52 (Alta. C.A.).

Marchand v. Public General Hospital Society of Chatham (1993), 20 C.P.C. (3d) 68, 1993 CarswellOnt 455 (Ont. Gen. Div.).

None of the conduct complained about established judicial bias nor gave rise to reasonable apprehension of bias. The trial judge conducted the case fairly and thoroughly.

Suckling v. Peacey, 2000 BCSC 1397, 2000 CarswellBC 1933 (B.C. S.C.).

Appeal from Small Claims Court was allowed as the trial judge misapprehended facts.

Ivens v. Automodular Assemblies Inc. (2000), 2000 CarswellOnt 3146 (Ont. S.C.J.).

The plaintiff claimed $8,000 in costs after receiving a judgment of approximately $600. The claim for costs was out of proportion to the worth of the case. Costs of $2,500 were awarded. The plaintiff tried to enhance her common law damages by emphasizing human rights grounds to attract significant damages.

Brett Motors Leasing Ltd. v. Welsford (1999), 181 N.S.R. (2d) 76, 560 A.P.R. 76, 1999 CarswellNS 410 (N.S. S.C.).

An Appeal Court judge does not have the authority to go outside the facts as found by the adjudicator and determine own findings of fact.

S. (M.L.) v. Dorran, 1999 BCCA 769, 131 B.C.A.C. 187, 214 W.A.C. 187, 1999 CarswellBC 2877 (B.C. C.A. [In Chambers]); affirmed 2000 BCCA 125, 2000 CarswellBC 440 (B.C. C.A.).

The plaintiff sued the defendant in Small Claims Court for harassment. The claim was dismissed. The application for judicial review was dismissed and further application was brought to file application to extend time to appeal the dismissal. The plaintiff had no right of appeal under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

Chong v. MacKinnon (1989), 93 N.S.R. (2d) 361, 242 A.P.R. 361 (N.S. Co. Ct.).

Since the plaintiff appellant did not avail himself of the procedures available to him, his appeal failed.

G. v. B.S. Inc. and Di Paola (June 23, 1989) (Div. Ct.).

A new trial was granted where the trial judge participated too much in the examination of witnesses and denied the right of cross-examination.

Creditel of Canada Ltd. v. Hamilton Builders' Supply Inc. (May 19, 1989) (Div. Ct.).

A new trial was ordered where the trial judge erred in applying the principle of res judicata without a proper hearing of the plaintiff's case.

Furnell v. Whangarei High School Board, [1973] A.C. 660 at 679.

The denial of "natural justice" has been defined to be nothing more than "fair play in action".

Bissoondatt v. Arzadon (October 13, 1992), Doc. No. 252/92 (Ont. Div. Ct.).

An appellate court will not intervene unless it un mistakenly appears from the evidence that the trial judge has not taken proper advantage of having heard and seen the witnesses.

C.V.B.S. v. DiPaola (April 30, 1993).

The appeal was allowed on the basis that the trial judge entered into the arena and intervened too far in the examination of witnesses. He also denied the right to cross-examine.

Rivas v. Groumoutis (1994), 45 A.C.W.S. (3d) 10 (B.C. S.C.).

Appellant failed to comply with the provisions of ss. 8 and 11 of the *Small Claims Court Act* (B.C.), The Act did not contain provision which the court could apply to grant relief from strict compliance with the Act, even in extraordinary circumstances. Appeal was dismissed.

Happy Valley Mobile Home Park Ltd. v. Coutu (1994), 45 A.C.W.S. (3d) 628 (B.C. S.C.).

Judgment was granted against the company and not the principal shareholder, but the company had not been named as the defendant. Appeal by the company on the basis of lack of jurisdiction of court,was allowed. The matter was remitted to the Small Claims Court.

Ideal Concrete Ltd. v. Rhyno (1993), 118 N.S.R. (2d) 118 (N.S. Co. Ct.).

Denial of natural justice shown where defendant arrived for trial 13 minutes late and was not allowed to present its case.

Dunlop v. Anchor Towing & Recovery Ltd. (1994), 21 C.P.C. (3d) 147 (N.S. C.A.).

The respondent appellant had filed a notice of appeal to the Nova Scotia Court of Appeal from a decision of the Nova Scotia Supreme Court. The Supreme Court decision was an appeal from adjudication of the Small Claims Court action. The applicant applied to quash the notice of appeal alleging that no right of appeal existed. When the action was commenced, legislation was provided for the appeal to the County Court which was the final appeal. Subsequent to the commencement of the Small Claims Court action but prior to a decision being rendered, the *Court Reform Act*, S.N.S. 1992, c. 16, was passed, absorbing the County Court into the Supreme Court and allowing appeals from the Supreme Court to the Court of Appeal. The court held that the plaintiff's right of appeal had crystallized on the day the action was commenced and that it would not be extended by a subsequent passage of new legislation. An extension of right of appeal, apparently allowed by the new Act, was a substantive right, but could not have retroactive effect unless it was purely beneficial which it was not. The notice of Appeal was quashed.

The change in jurisdiction from the County to the Supreme Court provided by the Act was procedural in nature. The resulting extension of right of appeal in the Small Claims Court cases was a substantive right, but did not have the retroactive effect, as the charge was not purely beneficial to all parties.

Estevan Motors Ltd. v. Anderson, 1995 CarswellSask 132, 129 Sask. R. 70 (Sask. Q.B.).

Section 40 of the Saskatchewan *Small Claims Enforcement Act* permits the court (on appeal) to give judgment that the trial judge should have given. The appeal court will not retry the case, but will confine itself to correcting errors of law and reversing unreasonable findings of fact.

Currie v. Fundy Computer Services Ltd. (1994), 33 C.P.C. (3d) 359 (N.B. C.A.).

The defendant appealed from a small claims judgment on the ground that he had been denied natural justice in the conduct of the hearing. The defendant's representative at the hearing had the opportunity to conduct an examination of his witnesses and cross-examination of the plaintiff's witness, to make representations on behalf of the defendant and, in fact, had made a brief summary of the position of the defendant at the close of the hearing. The practice of swearing all prospective witnesses as a group was not a denial of a fair hearing.

32262 B.C. Ltd. v. Trans Western Express Inc. (1995), 38 C.P.C. (3d) 201 (B.C. S.C.).

Section 13 of the *Small Claims Act* (B.C.) allowed the Supreme Court of British Columbia to award costs to any party to an appeal, in accordance with the rules of court. A party who failed on an appeal should be subject to an award of costs from the appeal. A defendant who succeeded on an appeal had a moral claim to costs of the appeal, having been brought into litigation at the instance of the plaintiff. A plaintiff who has rightly chosen the Provincial Court as the proper forum for his claim but has been denied victory wrongly should, succeeding on appeal, ordinarily be entitled to an award of costs. That general rule was subject to the recognized exception where the case was won in the Supreme Court on the basis of evidence or a submission not presented in the Provincial Court.

Shoppers Mortgage & Loan Corp. v. Health First Wellington Square Ltd. (1995), 38 C.P.C. (3d) 8 (Ont. C.A.).

During examination-in-chief and cross-examination of witnesses, the trial judge intervened on numerous occasions, adopting an adversarial position inimical to the co-defendant and his counsel. The trial judge refused to hear evidence on the agency issue and refused to hear evidence from expert witnesses on the issue of mitigation, admonishing defence counsel for "wasting my time" and "clutching at straws". A reasonable litigant in the co-defendant's position or any reasonable observer would have had some apprehension as to whether the agency and mitigation issues had been prejudged and rejected before all the evidence was in.

The test was not prejudice to the co-defendant's case, but whether the image of impartiality, the absence of which deprived the court of jurisdiction, was destroyed.

Cassels v. Here & Now Picture Framing & Gallery Ltd. (January 6, 1997), Doc. No. 595/96 (Ont. Div. Ct.).

Notice of Appeal and service of same from Small Claims Court judgment did not comply with Rule 61.04(1) and Rule 16.03(5)(a) and 16.03(5)(b). Appeal quashed.

Pathak v. British Columbia (Public Service Commission) (1995), 3 B.C.L.R. (3d) 46 (B.C. S.C.); affirmed (1996), 26 B.C.L.R. (3d) 138, 83 B.C.A.C. 86, 136 W.A.C. 86 (B.C. C.A).

Appellant's counsel advised Commission appellant could not attend on scheduled date because he was on holidays. Persons who had filled positions would be prejudiced by application long after appointment. Chambers judge did not err in denying application for judicial review.

Diep v. Rollins (December 29, 1997), Doc. Nanaimo 13556 (B.C. Master).

Plaintiff appealed dismissal of Small Claims Court action for damages for personal injuries, following no evidence motion by defendant. Fact that appeal comprised new trial did not entitle defendant to serve jury notice.

Murphy v. Dennis McKay Ltd. (May 28, 1997), Doc. 25/96 (N.B. C.A.).

Appeal from small claims judgment in favour of respondent contractor. No error made by trial judge in her interpretation of written guarantee, which was for workmanship, not results.

Shewfelt v. Crawford (1997), 101 B.C.A.C. 95, 164 W.A.C. 95 (B.C. C.A. [In Chambers]).

Supreme Court Justice dismissed appeal from Small Claims Court order. Supreme Court subsequently dismissed application to reopen and reconsider judgment. Appeal from latter order dismissed. Court of Appeal had no jurisdiction to hear matter on basis that it arose out of small claims action. Appeal nullity.

Zeller v. Hetland (April 21, 1997), Doc. Melfort Q.B. 272/96 (Sask. Q.B.).

Provincial Court judge erred in allowing defendant's counterclaim where uncontradicted evidence at trial supported plaintiff's version of facts.

Ertel Manufacturing Corp. v. Florence (June 12, 1997), Doc. Peterborough 77976/97 (Ont. Div. Ct.); leave to appeal refused (October 14, 1997), Doc. CA M21021 (Ont. C.A.).

Trial judge did not err in finding that all goods were delivered as statement of defence never denied that goods were not delivered. Trial judge erred in dismissing defendant's counterclaim for set off for his additional expenses due to defective goods as trial judge misapprehended defendant's evidence.

Goudy v. Fenwick (June 5, 1997), Doc. Regina Q.B.G. 3143/96 (Sask. Q.B.).

Appeal dismissed from Small Claims Court judgment finding plaintiff driver liable for motor vehicle accident. There was no palpable error in that plaintiff's evidence was clearly inculpatory.

Hamon Design Group Inc. v. Jivov (November 15, 1996), Doc. Newmarket 37271/95 (Ont. Div. Ct.).

Trial judge failed to rule on counterclaim, nor did he make any finding of credibility on issues critical to outcome of case. Appeal allowed, judgment set aside.

Brown v. McLeod, [1997] 7 W.W.R. 553, 118 Man. R. (2d) 161 (Man. C.A.).

Small Claims Court judge refused to grant applicant's request for adjournment when his counsel was forced to withdraw during course of trial, upon realizing that he was in potential conflict position. Refusal to adjourn could, in circumstances of this case, be considered as error in law. Leave to appeal granted.

City Motors Ltd. v. Victor (1997), 9 C.P.C. (4th) 62 (N.S. S.C.).

Summary report prepared by adjudicator did not properly state findings of fact and basis for those findings. Adjudicator had apparently relied on inadmissible hearsay. Appeal was allowed and new hearing was ordered.

Foster Printing & Lithographing v. Pack-Tech Industries Ltd. (June 17, 1997), Doc. Toronto 573/96 (Ont. Div. Ct.).

Court held that the Divisional Court has jurisdiction with respect to a final order of the Small Claims Court. It cannot hear an appeal of an interlocutory order made by a judge of that court.

Madgett v. Jenkins (1997), 96 O.A.C. 396 (Ont. Div. Ct.).

Defendant sought validation of service of Notice of Appeal and other documentation. Court not prepared to exercise in favour of the applicant the discretion given to it by Rule 16.08 of the *Rules of Civil Procedure*. Court not satisfied the appellant is entitled to equitable relief.

Stein v. Sandwich West Township (1995), 25 M.P.L.R. (2d) 170, 77 O.A.C. 40 (Ont. C.A.).

The Ontario Court of Appeal discussed interventions by the trial judge in a nonjury civil trial. The case law was quite clear to the effect that the presiding judge must not deny a party the opportunity to present its full case, either by usurping the role of counsel or descending into the arena. See *Jones v. National Coal Board*, [1957] 2 All E.R. 155, [1957] 2 Q.B. 55 (Eng. C.A.); *Phillips v. Ford Motor Co. of Canada*, [1971] 2 O.R. 637 (Ont. C.A.); *Majcenic v. Natale* (1967), [1968] 1 O.R. 189 (Ont. C.A.).

Samuels v. Herald Insurance Co. (April 24, 1998), Doc. CA C22250 (Ont. C.A.).

Appeallant argues that trial judge demonstrated an appearance of bias. Interventions of trial judge justified for the proper conduct of the trial. It cannot be said that a reasonable person hearing his comments would conclude trial judge might not be impartial. See *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) at 540 [S.C.R.].

Brouse v. Factory Direct Flooring (June 12, 1998), Doc. Sudbury D.V. 309/97 (Ont. Gen. Div.).

Appeal from a judgment in the Ontario Court (Small Claims Division). Notice of appeal suggested that there has been new evidence found subsequent to the trial. There is a high onus on people wishing to produce new evidence after trials because society has an interest in putting an end to the trial process as quickly as possible. Keeping in mind the difficulties the judge had with both parties being unrepresented, trial Judge made no demonstrable error.

Larry Hart v. Investors Property Services Ltd. (June 26, 1996), Doc. 7325/94, 372/95 (Div. Ct).

The appeal was dismissed. The obvious error in addition contained in the judgment can be worked out between the parties.

Esther Tiwaah v. KLM Royal Dutch Airlines (February 24, 1998), Doc. 465/97 (Div. Ct).

There was evidence to support the findings of fact and no legal error that controlled the result. The appeal was dismissed although the costs at trial were reduced from $1,800 to the maximum allowable of $900.

Verret v. Carrier (2000), 2000 CarswellNB 220 (N.B. C.A.).

Appeal available only on question of law. Appeal dismissed.

Severson v. Nickel (Trustee of), 2000 SKQB 237, 2000 CarswellSask 357 (Sask. Q.B.).

Application by tenant to set aside writ of possession dismissed. The matter was dealt with at an earlier Small Claims Court hearing.

King v. Holker, 2000 BCSC 64, 2000 CarswellBC 1435 (B.C. S.C.).

Trial *de novo* not available to litigant simply because he or she wants to present case in a different manner second time around - *Small Claims Act* (B.C.), s.12.

Groupe Essaim Inc. v. Village Pharmacy Minto Inc. (2000), 10 C.P.C. (5th) 364, 2000 CarswellNB 274, 227 N.B.R. (2d) 276, 583 A.P.R. 276 (N.B. Q.B.).

The party was not permitted to apply under s. 37 of *Small Claims Act* (N.B.) for appeal of decision since it did not allow for the respondent to raise issues. The party was required to bring notice of appeal by trial *de novo*.

Potter v. R.W. Nelson Seed Farms Ltd., 2000 SKQB 289, 2000 CarswellSask 529 (Sask. Q.B.).

The trial judge awarded damages to the respondent. The appellant appealed. No palpable or overriding error that justified interfering with findings based on credibility.

Evans v. Bliss, 2000 SKQB 380, 2000 CarswellSask 530 (Sask. Q.B.).

The trial judge made no error in interpreting the law. Findings were supported by evidence.

Khan v. Calverley (2000), 2000 CarswellOnt 3970 (Ont. Div. Ct.).

Appeal from a Small Claims Court judgment that held the landlord liable to account to the plaintiff who owned goods seized by landlord when the tenant left premises. Despite occasional payment by the plaintiff of the share of the tenant's rent, no landlord and tenant relationship created. There was no error by the trial judge. The appeal was dismissed.

S. (R.) v. H. (R.) (2000), 195 D.L.R. (4th) 345, 52 O.R. (3d) 152, 139 O.A.C. 378, 2000 CarswellOnt 4864 (Ont. C.A.); affirming (2000), 187 D.L.R. (4th) 762, 8 R.F.L. (5th) 199, 49 O.R. (3d) 451, 2000 CarswellOnt 1994 (Ont. S.C.J.).

The interlocutory order from which there is no appeal is an order that does not determine the real matter in dispute but only some collateral matter. No pleading should be struck out unless it is obvious it discloses no reasonable cause of action or defence. The Motions Judge gave clear reasons that the statement of claim disclosed a valid cause of action but still dismissed the motion on the basis that the burden of establishing no cause of action had not been met.

Coldmatic Refrigeration of Canada Ltd. v. Atlantic Aluminum Inc. (2000), 2000 CarswellOnt 4499 (Ont. Div. Ct.).

In absence of palpable and overriding error, an appeal court should not interfere with the trial judge's findings of fact.

Walters v. MacDonald, 2001 BCCA 41, 2001 CarswellBC 85 (B.C. C.A. [In Chambers]).

The parties were lay litigants. The appellant seeking leave to extend time to appeal. The court granted application. Merit to appeal existed. The issue was whether the formal order as drawn up by parties accurately reflected the decision of the judge.

Davids v. Davids (1999), 125 O.A.C. 375, 1999 CarswellOnt 3304, [1999] O.J. No. 3930 (Ont. C.A.).

The husband appealed the divorce judgment, seeking it be set aside. A new trial was ordered. He argued that the trial was unfair and a miscarriage of justice. He argued that he could not represent himself effectively in complex litigation. Fairness demanded that he have a fair opportunity to present his case to the best of his ability. The trial judge had to treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present case.

Thoms v. Hack, 2000 SKQB 133, 2000 CarswellSask 250 (Sask. Q.B.).

Notice of appeal of a Small Claims Court decision was sent by registered mail to respondent in 18 days but not delivered. Attempts at personal service after 30-day period were unsuc-

cessful. The materials were insufficient to show arguable case on merits. Leave granted to file further material and reapply.

Pitre v. Law Society (Prince Edward Island), 2000 PESCAD 10, 187 Nfld. & P.E.I.R. 44, 566 A.P.R. 44, 8 C.P.C. (5th) 45, 2000 CarswellPEI 38 (P.E.I. C.A.).

A transcript was not required for appeal from judicial review where no evidence was given. There was a delay by the appellants acting through a non-lawyer and misunderstanding of the materials to be filed did not justify dismissal of appeal, but justified extension.

MacDonald v. Murphy (2000), 2000 CarswellNB 72 (N.B. C.A.). The court raised questions of fact. As there was no question of law involved, the appeal was dismissed.

Hamm v. Frostland Commodities Ltd. (2000), 143 Man. R. (2d) 260, 2000 CarswellMan 24 (Man. Q.B.).

The plaintiff won a small claims award against the defendant, which the defendant appealed. The defendant failed to appear at the appeal and the appeal was dismissed. The defendant brought a motion to set aside the dismissal order. The motion was dismissed on the basis that the defendant had no reasonable excuse for not appearing.

Khalil v. Ontario College of Art (1999), 183 D.L.R. (4th) 186, 129 O.A.C. 294, 1999 CarswellOnt 4413 (Ont. Div. Ct.); additional reasons at (2001), 147 O.A.C. 216, 2001 CarswellOnt 1745 (Ont. Div. Ct.).

Material in possession of appellant since 1992 did not qualify as fresh evidence, based upon three-pronged criteria prescribed by the Supreme Court. See *R. v. Palmer*, 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.).

Hunt v. Hunt, 2001 CarswellBC 999, 2001 BCSC 328 (B.C. S.C.).

Reached proposed settlement. Defendant acting in person advised by judge to seek legal advice. He decided not to settle. Plaintiff applied for order judge had disqualified himself on ground of reasonable apprehension of bias. Dismissed.

R. v. Rose (2001), 143 O.A.C. 163, 2001 CarswellOnt 955, [2001] O.J. No. 1150, 153 C.C.C. (3d) 225, 42 C.R. (5th) 183, 53 O.R. (3d) 417 (Ont. C.A.).

The Ontario Appeal Court allowed appeal, set aside convictions and ordered a new trial. Accused argued that trial judge made disparaging and unwarranted comments about defence counsel that jeopardized the appearance of impartiality and fairness of trial. Court of Appeal rejected this ground of appeal.

Smyth v. Waterfall, 2000 CarswellOnt 3324, [2000] O.J. No. 3494, 50 O.R. (3d) 481, 136 O.A.C. 348, 4 C.P.C. (5th) 58 (Ont. C.A.).

The trial judge granted the defendant's motion for summary judgment dismissing plaintiff's claim. No reasons for judgment provided. The Ontario Court of Appeal stated that "this court has emphasized the desirability of trial judges giving the meaningful reasons, however brief, for their decisions." This is a principle that also applies, to decisions rendered by motions and applications judges. Parties are entitled to know why Court reached its decision. Failure to provide a reasoned decision tends to undermine confidence in the administration of justice as the absence of reasons may give the appearance of an arbitrary decision, particularly in the eyes of the unsuccessful party.

Capilano Fishing Ltd. v. "Qualicum Producer" (The), 150 B.C.A.C. 273, 2001 CarswellBC 611, 2001 BCCA 244, 87 B.C.L.R. (3d) 154, [2001] 4 W.W.R. 752, 198 D.L.R. (4th) 267, 245 W.A.C. 273 (B.C. C.A.); additional reasons at 2001 CarswellBC 1128, 2001 BCCA 381, 198 D.L.R. (4th) 766 (B.C. C.A.); leave to appeal refused (2001), 2001 CarswellBC 2215, 2001 CarswellBC 2216, 285 N.R. 394 (note), 167 B.C.A.C. 320 (note), 274 W.A.C. 320 (note) (S.C.C.).

The British Columbia Court of Appeal held that a trial judge did not err in prohibiting the plaintiffs from calling rebuttal evidence in response to surprise defence evidence.

Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham (2000), 138 O.A.C. 201, 2000 CarswellOnt 4362, [2000] O.J. No. 4428, 51 O.R. (3d) 97 (Ont. C.A.); leave to appeal refused 2001 CarswellOnt 3412, 2001 CarswellOnt 3413, [2001] S.C.C.A. No. 66, 282 N.R. 397 (note), (sub nom. *Marchand v. Public General Hospital Society of Chatham)* 156 O.A.C. 358 (note) (S.C.C.).

The Ontario Court of Appeal dismissed plaintiff's appeal without costs. The Court noted that trial judge intervened when needed in order to control what was a difficult trial and also to understand the evidence.

King v. McLennan, 2001 CarswellSask 252, 2001 SKQB 179, 208 Sask. R. 14 (Sask. Q.B.).

The court on appeal had no power to retry case unless trial judge guilty of palpable or overriding error. Trial judge properly exercised discretion to allow respondent to proceed in negligence and bailment though bailment, not specifically pleaded.

Bruneski v. Fowell, 2001 CarswellBC 1591, 2001 BCSC 991 (B.C. Master).

Plaintiff refused to sign draft order dismissing action, alleging that consent was obtained by duress. As plaintiff had consented, plaintiff's approval of order dispensed with. Validity of consent to be determined on appeal.

Armour Group Ltd. v. Nova Scotia (Attorney General), 2001 CarswellNS 327, 2001 NSCA 135 (N.S. C.A.).

Appellant claimed judge misapprehended evidence in reaching conclusions. Judge made no error in law.

Nor-Villa Hotal Ltd. v. Maleschuk, 2001 CarswellSask 629, 2001 SKQB 433 (Sask. Q.B.).

Trial judge's findings were not so unreasonable that they should be reversed.

Prestige Closets & Cabinets Ltd. v. Finn (May 16, 2000), Doc. 634/99 (Ont. Div. Ct.).

Motion by appellant under Rule 61.16(5) to set aside order of registrar (Rule 61.13) dismissing appeal for delay. Delay can be "corrected" by interest and costs. Ten days given to perfect appeal.

Banfill Holovaci v. Zsoldos (2000), 2000 CarswellOnt 1552 (Ont. Div. Ct.); leave to appeal refused (2000), 2000 CarswellOnt 5281 (Ont. C.A.); leave to appeal refused (2001), 2001 CarswellOnt 1906, 2001 CarswellOnt 1907, 276 N.R. 393 (note), 152 O.A.C. 198 (note) (S.C.C.).

Appeal from Small Claims Court dismissed. Test of bias set out in *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) at 530 [S.C.R.] and *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434, 1976 CarswellNat 434F, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.) at 394 [S.C.R.]. No reason to interfere with trial judge. Costs of appeal fixed at $3,000.

Four Seasons Greenhouses Canada v. Matlow (2000), 2000 CarswellOnt 4817, 140 O.A.C. 293 (Ont. Div. Ct.).

Appeal dismissed. Standard of appellate renew set out in *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, 1997 CarswellOnt 3270, [1997] O.J. No. 3921, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324 (Ont. C.A.); *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 1997 CarswellNat 368, 1997 CarswellNat 369, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, 209 N.R. 20, 50 Admin. L.R. (2d) 199 (S.C.C.) and *Wilbur v. Wilbur* (1983), 41 O.R. (2d) 565, 1983 CarswellOnt 261, 33 R.F.L. (2d) 49, 147 D.L.R. (3d) 69 (Ont. C.A.).

Club Epiphany v. Robinson (March 1, 2001), Doc. 505/99 (Ont. Div. Ct.).

Appeal from Small Claims Court dismissed. Notice requirement contemplated in s. 5(1) of the *Libel and Slander Act*, R.S.O. 1990, c. L.12 must be pleaded, which it was not.

Shewan v. Canada (Attorney General) (2001), 2001 CarswellOnt 3049 (Ont. C.A.).

Impecunious appellant unable to pay for production of transcriptions and unable to provide Court with any indication when or how he could obtain funds. Application to extend time to review order dismissing appeal denied.

385268 B.C. Ltd. v. Alberta Treasury Branches, 2001 CarswellAlta 1572, 2001 ABCA 289, 29 C.B.R. (4th) 315, 299 A.R. 194, 266 W.A.C. 194 (Alta. C.A.).

Appeal dismissed as argument that findings of fact were unreasonable without merit. Complaint that case management role of Chambers Judge intruded upon adjudicative fairness without merit.

Kalevar v. Liberal Party of Canada, 2001 CarswellNat 2640, 2001 FCT 1261 (Fed. T.D.); affirmed 2002 CarswellNat 1398, 2002 FCA 246, 2002 CarswellNat 3018, 2002 CAF 246, 228 F.T.R. 159 (note) (Fed. C.A.); leave to appeal refused (2003), 2003 CarswellNat 91, 2003 CarswellNat 92, 307 N.R. 399 (note) (S.C.C.).

Prothonotary dismissed application for judicial review of lay litigant for delay. Applicant delaying over one month before appealing. Delay unjustified and appeal without merit. Rules of Court apply equally whether lay litigant or where counsel retained. Federal Court Rules, 1998 (SOR/98-106).

Oliveira v. Zhang (2000), 2000 CarswellOnt 692 (Ont. Div. Ct.).

Appeal from Small Claims Court dismissed. Ample evidence, trial judge made findings of fact. *Fletcher v. Manitoba Public Insurance Corp.*, [1990] 3 S.C.R. 191, 1990 CarswellOnt 1009, 1990 CarswellOnt 56, 5 C.C.L.T. (2d) 1, 74 D.L.R. (4th) 636, 116 N.R. 1, 44 O.A.C. 81, 1 C.C.L.I. (2d) 1, 71 Man. R. (2d) 81, 30 M.V.R. (2d) 260, 75 O.R. (2d) 373 (note), [1990] R.R.A. 1053 (headnote only), [1990] I.L.R. 1-2672 (S.C.C.) referred to.

Prentice v. Dharamshi, 6 B.C.L.R. (4th) 39, 2002 CarswellBC 2220, 2002 BCCA 490, 179 B.C.A.C. 200, 295 W.A.C. 200 (B.C. C.A.).

Action tried by judge and jury, trial judge refused to permit plaintiff's counsel to reply to jury after defendant's counsel completed his address. Plaintiff appealed, appeal allowed. Trial judge had no discretion to refuse plaintiff's right to reply, as plaintiff was "party who began." New trial ordered.

Rudd v. Hayward, 91 B.C.L.R. (3d) 227, 2001 CarswellBC 1463, 2001 BCCA 454, 12 M.V.R. (4th) 200, 156 B.C.A.C. 27, 255 W.A.C. 27 (B.C. C.A.).

Plaintiff's case did not require expert evidence, but it was logical and appropriate to allow him to call expert to reply to defendant's expert. Trial judge's decision to deny defendant opportunity to call second expert following testimony of plaintiff's expert was within his discretion. Restrictions on questioning represented proper enforcement of usual rule regarding evidence in reply.

Whitehorn v. Wallden, 90 B.C.L.R. (3d) 275, 2001 CarswellBC 1278, 2001 BCCA 419, 156 B.C.A.C. 317, 255 W.A.C. 317 (B.C. C.A.).

Defendant conceded that trial judge had erred in law by limiting plaintiff's ability to question expert witness. Properly instructed jury in possession of excluded evidence could have reached different verdict.

Law Society (British Columbia) v. Gravelle, 154 B.C.A.C. 25, 2001 CarswellBC 1103, [2001] 7 W.W.R. 15, 2001 BCCA 383, 89 B.C.L.R. (3d) 187, 200 D.L.R. (4th) 82, 252 W.A.C. 25 (B.C. C.A.); leave to appeal refused (2002), 2002 CarswellBC 11, 2002 CarswellBC 12, 286 N.R. 198 (note), 171 B.C.A.C. 46 (note), 280 W.A.C. 46 (note) (S.C.C.).

The Law Society petitioned for a declaration that a notary public engaged in the unauthorized practice of law by giving legal advice and offering to assist a member of the public with respect to the probate or letters of administration of the estate of a deceased person for, or in, the expectation of a fee, gain or reward. A permanent injunction against the notary was also sought. The British Columbia Court of Appeal dismissed the appeal. The court affirmed that notaries were not probating wills in England on November 18, 1958. Therefore, the notary here engaged in the unauthorized practice of law.

Alcorn v. Bayham (Municipality) (2002), 2002 CarswellOnt 3809, 33 M.P.L.R. (3d) 132, 166 O.A.C. 78 (Ont. Div. Ct.).

The trial judge intervened to prevent defence questioning of the hierarchical superior of a highway patrolman. Interventions not so one-sided or without reason that a reasonable and fully informed observer would conclude that trial judge had lost his judicial impartiality.

Danyluk v. Ainsworth Technologies Inc., REJB 2001-25003, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, [2001] S.C.J. No. 46, 2001 SCC 44, 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 7 C.P.C. (5th) 199, 272 N.R. 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 34 Admin. L.R. (3d) 163, [2001] 2 S.C.R. 460 (S.C.C.).

Denial of natural justice by employment standards officer did not deprive standards officer's decision of its judicial character. Errors made by standards officer rendered decision voidable, not void. Employee's decision not to apply for review by director was not fatal to employee's action for $3,000 of unpaid wages and commissions. Court of Appeal concluded that the standards officer's decision was final on the grounds that neither party exercised its right of internal appeal. It confirmed that the standards officer's decision was judicial for the purpose of issue estoppel. The standards officer's failure to observe procedural fairness did not prevent the operation of issue estoppel.

De Fehr v. De Fehr, 156 B.C.A.C. 240, 2001 CarswellBC 1716, 2001 BCCA 485, 255 W.A.C. 240, 11 C.P.C. (5th) 195 (B.C. C.A. [In Chambers]).

Husband applied for indigent status. The term "indigent" is not defined in the Rules of Court, but its meaning has been considered in a number of cases. Indigent status ought to be granted to the applicant.

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 150 O.A.C. 12, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, [2001] S.C.J. No. 61, 2001 SCC 59, 11 C.C.E.L. (3d) 1, [2001] 4 C.T.C. 139, 204 D.L.R. (4th) 542, 274 N.R. 366, 17 B.L.R. (3d) 1, 55 O.R. (3d) 782 (headnote only), 12 C.P.C. (5th) 1, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, 2002 C.L.L.C. 210-013 (S.C.C.); reconsideration refused (2001), 2001 CarswellOnt 4155, 2001 CarswellOnt 4156, 55 O.R. (3d) 782 (headnote only), 18 B.L.R. (3d) 159, 10 C.C.L.T. (3d) 292 (S.C.C.).

Trial judge refused plaintiff's motion to re-open the trial to hear evidence on the ground that the evidence in question available at trial. The plaintiff made a tactical decision not to call the owner. The Supreme Court of Canada allowed appeal from Court of Appeal and restored the trial judge's decision.

Barbeau-Lafacci v. Holmgren, 173 B.C.A.C. 280, 283 W.A.C. 280, 2002 CarswellBC 2343, [2002] B.C.J. No. 2295, 2002 BCCA 553 (B.C. C.A. [In Chambers]); additional reasons at 2003 CarswellBC 2533, 2003 BCCA 549 (B.C. C.A.).

The plaintiff applied for leave to extend the time for filing a notice of appeal. The plaintiff also sought indigent status and an order that the Crown provide her with a transcript of the summary proceedings. Court of Appeal, *per* Ryan J.A., dismissed the application. Court held that the words "lacks merit" in Rule 56(a) of the Court of Appeal Rules, which equated to "has no reasonable prospect of success.".

Vernon v. General Motors of Canada Ltd. (2002), 163 O.A.C. 182, 2002 CarswellOnt 2846 (Ont. C.A.).

The appellant moved to augment record on appeal by including a certain document. The Court of Appeal treated the motion as a motion for leave to admit fresh evidence. Even accepting, without deciding, that the appellant could not satisfy the Palmer test, the court stated that it had an overriding discretion to admit fresh evidence where the interests of justice required it. The document read to lower court judge during oral argument, though not marked as an exhibit. The court admitted the document, holding it was in the interest of justice that appellant to be permitted to rely on document.

R. v. Messenger (2002), 160 O.A.C. 193, 2002 CarswellOnt 1749, 94 C.R.R. (2d) 355, [2002] O.J. No. 2031 (Ont. C.A.).

After counsel successfully applied to be removed as solicitor of record, Messenger represented himself at his trial. On day of trial, he sought adjournment on basis that he had been unable to obtain a copy of the Crown disclosure from his former counsel. The trial judge refused his request. On the third day of trial, he applied for prohibition, arguing that his Charter right to a fair trial had been infringed by the denial of adjournment and late disclosure. The Court of Appeal held that Messenger "should have waited until the end of the trial to appeal the ruling to which he objected . . . Prerogative remedies are discretionary in nature. Only in exceptional circumstances should they be sought, or granted, during the course of a trial. The criminal trial process cannot be subject to unwarranted disruption at the unilateral election of an accused.".

Jumbo Systems Inc. v. Short (2002), 154 O.A.C. 49, 2002 CarswellOnt 30 (Ont. C.A.).

Appeal dismissed. Despite apparent unfairness to defendants from plaintiffs' omission to plead waiver, defendants were alerted to issue by trial judge's comments prior to argument. No objection was raised by the defendants' counsel and submissions were made on the question. No substantial wrong or miscarriage of justice.

Lennox v. Arbor Memorial Services Inc. (2001), 56 O.R. (3d) 795, 2001 CarswellOnt 4248, 151 O.A.C. 297, 16 C.C.E.L. (3d) 157 (Ont. C.A.).

Trial judge's conduct of the trial created an appearance of unfairness. Trial judge appeared to assist the respondent:

- redirected lines of questioning that respondent's counsel sought to pursue and which the trial judge viewed as unhelpful to the respondent and strategically ill-advised;
- engaged in extensive cross-examination of two of Arbor's witnesses and challenged their credibility;
- required production of the appellant's policy manual, not part of the pleadings or productions, and therefore not part of the case before the court as prepared and conducted by counsel;
- and sought more than an explanation or clarification of evidence brought out by counsel, by questioning two witnesses extensively about the policy manual.

Grudich v. Babington, 2002 CarswellPEI 93, 2002 PESCAD 20, 217 Nfld. & P.E.I.R. 271, 651 A.P.R. 271 (P.E.I. C.A. [In Chambers]).

Appellant from small claims decision obtained transcript but failed to serve or file. *Civil Procedure Rule* 74.19 (P.E.I.) did not set time-limit. Remedy of quashing not available. Proper remedy was to set matter for hearing, and order immediate compliance with Rule 74.19(5).

Morrison v. Rosser (Rural Municipality), 2002 CarswellMan 97, 2002 MBQB 26 (Man. C.A. [In Chambers]).

Order granting leave to appeal to two Small Claims Court actions that had been consolidated. Confirmation that order could be taken out in both proceedings not intended to have unlimited time. Time limits were specified. Supplementary reasons to decision at 2001 CarswellMan 443, 2001 MBCA 149 (Man. C.A. [In Chambers]).

Harris Floors Ltd. v. Eversen Enterprise Ltd., 2001 CarswellAlta 1602, 2001 ABQB 1013 (Alta. Q.B.).

Trial judge awarded plaintiff judgment on invoices. The defendant appealed. Appeal allowed. New trial ordered. As this appeal was a trial *de novo* defendant provided some new evidence. Defendant satisfied Court her evidence might have been inadvertently overlooked or not fully understood by trial judge.

Briand v. Coachman Insurance, 2003 NSCA 39, 2003 CarswellNS 124, [2003] N.S.J. No. 116 (N.S. C.A.).

Appeal from decision on October 10, 2002 dismissing application to extend time to file notice of appeal from July 16, 2001 decision of Small Claims Court adjudicator. No error in law resulting in an injustice, no *bona fide* intention to appeal and no reasonable cause for the delay. Hard to recreate a record after 14 months since Small Claims Court proceedings not recorded.

Sinardi Hair Design v. Knifton (2003), 2003 CarswellOnt 1547 (Ont. Div. Ct.).

By order of Judge Bromstein dated October 31, 2002, made by failure of third party (Greenwin) to attend pre-trial, Greenwin ordered to pay costs to other parties on or before December 15, 2002 or have pleading struck. It did not pay the costs. Instead, it moved to set aside the order, but did not appear on the return date. After pleadings struck, Greenwin brought a further motion for relief against the October 31 order, before Deputy Judge Libman on January 23, 2003. He ordered that Greenwin's pleadings be reinstated and that the cost order of Judge Bromstein be set aside. Order of Deputy Judge clearly an interlocutory order. Section 31 of the *Courts of Justice Act* provides for an appeal from a "final order of the Small Claims Court." No provision for an appeal from an interlocutory order of Small Claims Court. See *Gelber v. Allstate Insurance Co. of Canada*, 1983 CarswellOnt 457, 41 O.R. (2d) 318, 35 C.P.C. 324 (Ont. Div. Ct.); no appeal lies from a decision unless a right of appeal is granted by statute. There is no common law right of appeal. Motions dismissed with costs.

Kallinikos v. Wong (2003), 2003 CarswellOnt 632 (Ont. Div. Ct.).

Appeal from Thomson J. of Small Claims Court dismissed. Appeal based solely on findings of fact and no misapprehension of evidence.

Hallok v. Toronto Hydro Electric System Ltd. (2003), 2003 CarswellOnt 976 (Ont. Div. Ct.).

Appeal by Toronto Hydro and Park Lawn from decision of Deputy Judge allowed. Standard of appellate review in questions of mixed fact and law set out in *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 36-37 [S.C.J. No.]. New Trial ordered pursuant to subsections 134(1) and (6) of the CJA.

R. v. Sheppard, 2002 SCC 26, [2002] S.C.J. No. 30, 2002 CarswellNfld 74, 2002 CarswellNfld 75, 162 C.C.C. (3d) 298, 210 D.L.R. (4th) 608, 50 C.R. (5th) 68, 284 N.R. 342, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, [2002] 1 S.C.R. 869 (S.C.C.).

Reasons for judgment. Duty on trial judge to give reasons. Trial judge's generic reasons amounted to no reasons at all and precluded proper appellate scrutiny of whether verdict was unreasonable. Trial judge erred in law in failing to give functional reasons.

R. v. Brown (2003), 2003 CarswellOnt 1312, 9 C.R. (6th) 240, [2003] O.J. No. 1251, 105 C.R.R. (2d) 132, 36 M.V.R. (4th) 1, 173 C.C.C. (3d) 23, 64 O.R. (3d) 161, 170 O.A.C. 131 (Ont. C.A.).

Trial judge's conduct created reasonable apprehension of bias. Comments reflected tendency to prejudge merits of application. Reasonable observer would have felt trial judge showed antipathy, resistance to application. Trial judge unable to hear application with open, dispassionate mind. Evidence before trial judge capable of supporting finding of racial profiling. Racial profiling can be demonstrated through circumstantial evidence.

Kutsogiannis v. Saskatoon Ceramic Tile (1984) Ltd., 2002 CarswellSask 731, 2002 SKQB 476, 226 Sask. R. 214 (Sask. Q.B.).

Appeal pursuant to section 39(1) of the *Small Claims Act*, 1997, S.S. 1997, c. S-50.11, as amended. Appeal dismissed. The court not entitled to substitute its view of findings of fact of trial judge. Evidence before trial judge upon which he could reach conclusions that he did. The trial judge did not commit an error of law or make some palpable or overriding error in the process.

Ali v. Triple 3 Holdings Inc. (2002), 2002 CarswellOnt 3986 (Ont. C.A.).

Reasons of trial judge silent as to the burden of proof. Appeal dismissed. An appellate court should not presume that the judge of the first instance was not aware of or failed to apply the appropriate legal test (*i.e.*, fraudulent misrepresentation) merely because the test was not explicitly set out in the judge's reasons.

Earthcraft Landscape Ltd. v. Clayton, 2002 CarswellNS 497, [2002] N.S.J. No. 516, 2002 NSSC 259, 210 N.S.R. (2d) 101, 659 A.P.R. 101 (N.S. S.C.).

Adjudicator failing to advise unrepresented party that letter tendered in evidence would have less weight than oral testimony and that party had right to secure attendance of letter writer to provide oral evidence. Failure to advise party of this constituted denial of natural justice. [New hearing ordered in Small Claims Court.].

Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc. (2003), 62 O.R. (3d) 647, 2003 CarswellOnt 18, [2003] O.J. No. 6, 167 O.A.C. 159, 28 C.P.C. (5th) 258 (Ont. C.A.); additional reasons at (2003), 2003 CarswellOnt 2476 (Ont. C.A.).

Judgment on merits and judgment with respect to costs separate appealable judgments. Different procedures for appeal of judgment on merits and appeal with respect to costs. Judgment on merits effective from time pronounced unless substantial matter remaining to be determined. Judgment as to costs collateral and not substantial matter that extends time for delivering notice of appeal. Judgment on merits appealable before court makes judgment as to costs. Leave may be granted to extend time for appeal. *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 6(1)(a), (b), 131(1) and 133(b). *Rules of Civil Procedure*, R.R.O. 1990. Reg. 194, Rules 61.03.1(1), (16), (17), (18) and 61.04(1).

Welna v. Nolting (1999), 1999 CarswellNWT 104 (N.W.T. S.C.).

Appeal of judgment issued in Small Claims Court. Defendant did not appear and alleged on appeal that he did not receive Notice of Trial until after judgment issued and sheriff seized his goods. Defendant had filed defence to claim indicating intention to defend matter. Judgment set aside. Appellant to pay $5,400 in Court pending matter reheard in Territorial Court.

Dancovich v. Rast (2002), 2002 CarswellAlta 1298, 2002 ABQB 907, [2003] 2 W.W.R. 557, 8 Alta. L.R. (4th) 368 (Alta. Q.B.).

Rast, the plaintiff, respondent on the appeal, fell within the exception to the general rule that a party cannot recover what he has given another party under an illegal contract, in this case, a pyramid scheme. Appeal dismissed. Standard of review on appeal one of correctness on a

question of law. Standard of review on a question of fact demonstrable unreasonableness. Not found in this case.

Antoniuk v. Edmonton (City), 2002 ABQB 918, 2002 CarswellAlta 1281, 33 M.P.L.R. (3d) 138, 325 A.R. 286 (Alta. Master).

Eighteen-month delay alone is sufficient application to appeal. Test seeking more time (i.e., beyond 30 days as set out in section 46(1) of the *Provincial Court Act*) not met by the plaintiff. Orders are decisions just as much as judgments are decisions. That is when 30-day appeal time period applies.

Addison v. Naqvi (2003), 2003 CarswellOnt 1775 (Ont. Div. Ct.). Appeal of judgment of Small Claims Court.

No transcript of the assessment on that date was filed by the *Appellant*. None was ordered by the *Appellant*. Appeal dismissed. For adequate reasons, the trier of fact may depart from requirement for payment of interest as per section 130(1) of The *Courts of Justice Act*. Given Applicant did not file transcripts of proceedings, reasons for judgment not available for review by Court.

Marta v. Francis Home Environment Centre (2004), 2004 CarswellOnt 61 (Ont. Div. Ct.).

Appeal dismissed. Respondent entitled to award of costs. A litigant who loses in the Small Claims Court and takes his opponent on appeal to the Divisional Court, must expect to pay more substantial costs if unsuccessful. Award of $1,500 payable to the Respondent in addition to costs at trial appropriate.

Atlantic Auto Body v. Boudreau, 2004 CarswellOnt 649 (Ont. Div. Ct.). Issue whether Court has jurisdiction to hear motion to have appeal dismissed for delay.

February 28th, 2003 — Appellant served with copy of notice of examination by registered mail. March 13th, 2003 — Motion to be set aside dismissed. April 10th, 2003 — Notice of Appeal filed. January 21st, 2004 — Notice of Motion by Respondent to dismisss appeal for delay filed, returnable January 29th, 2004. January 27th, 2004 — Service of factum, book of authorities, and appeal book by Appellant.

Appellant, in responding to the motion, took position that a dismissal for delay of an appeal to the Divisional Court from the Small Claims Court is to be heard on motion to the Registrar under Rule 61.13(1)(b). An appeal from a decision made by the Registrar lies to this Court under Rule 61.16(5). Court does not have jurisdiction at this stage. Motion must be heard before the Registrar of the Divisional Court. See Rule 61.13(1). See *McGlynn v. McGlynn*, [2002] O.J. No. 2047, 2002 CarswellOnt 5795 (Ont. Div. Ct.).

Under *Rule 61* Appellant must perfect his appeal and if not Respondent may move to the Registrar to have appeal dismissed for delay.

Bruvels v. Miller, 2004 CarswellOnt 1180 (Ont. Div. Ct.). Appeal from judgment of Justice Tierney in Ottawa dated June 17, 2002.

Plaintiff initiated proceedings before the Ontario Residential Housing Tribunal. These failed for want of jurisdiction.

Divisional Court has jurisdiction to hear appeal based on s. 31 of the *Courts of Justice Act*. The standard of review for appeals from the Order of a judge is widely accepted to be whether the decision of judge was "clearly wrong". Standard applies to both to findings of fact and to legal principles.

Even when no oral evidence heard, and judge's findings not based on credibility, still entitled to deference from an Appellate Court. See *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, 1997 CarswellOnt 3270, [1997] O.J. No. 3921, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324 (Ont. C.A.) per Laskin J.A.

Judicial descretion should not be interfered with unless apparent trial judge applied erroneous principles that rendered the result "clearly wrong". On questions of law, standard of review is correctness. Appeal dismissed, save and except no award for punitive damages.

Painter v. Waddington, McLean & Co., 2004 CarswellOnt 279 (Ont. S.C.J.). Self-represented Plaintiffs successful at trial recovering judgment against the Defendants in the amount of $6,384.50 plus prejudgment and postjudgment interest as prescribed by the *Courts of Justice Act*. Are self-represented lay Plaintiffs entitled to costs?

Plaintiffs commenced action when monetary jurisdiction of Court was $6,000. They recovered in excess of that amount at trial. No reason to no costs on the basis of r. 57.05 of the *Rules of Civil Procedure*.

Plaintiffs relied upon: *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464, 1997 CarswellOnt 5013, 17 C.P.C. (4th) 400 (Ont. Gen. Div.); *Fong v. Chan* (1999), 46 O.R. (3d) 330, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.); *Skidmore v. Blackmore*, 122 D.L.R. (4th) 330, 1995 CarswellBC 23, [1995] B.C.J. No. 305, 2 B.C.L.R. (3d) 201, [1995] 4 W.W.R. 524, 27 C.R.R. (2d) 77, 55 B.C.A.C. 191, 90 W.A.C. 191, 35 C.P.C. (3d) 28 (B.C. C.A.).

Cases show award to lay litigant not on same basis as to party represented by a solicitor, but generally modest.

Plaintiffs entitled to their costs.

Trafalgar Industries of Canada Ltd. v. Pharmax Ltd. (2003), [2003] O.J. No. 1602, 2003 CarswellOnt 1535, 64 O.R. (3d) 288 (Ont. S.C.J.). Judgment for $26,978.84.

Plaintiff prepared a Bill of Costs requesting $63,710.55 for fees and disbursements. Simplified procedures introduced to promote affordable access to justice.

Costs incurred under the Simplified Procedures, *and in all cases*, must be reasonable *and* proportionate to the amount recovered. These principles underpin the important issue of access to justice. See: *Vokey v. Edwards* (1999), [1999] O.J. No. 2304, 1999 CarswellOnt 1919 (Ont. S.C.J.), *Rakoon Impex v. Nasr Foods Inc.* (1999), [1999] O.J. No. 3360, 1999 CarswellOnt 2855 (Ont. S.C.J.), and *McLean v. 721244 Ontario Ltd.* (2000), [2000] O.J. No. 3507, 2000 CarswellOnt 3305 (Ont. S.C.J.). *Rule 57.01(1)* provides guidance in imposing costs.

Costs to Applicant fixed at $12,000.

Sable Offshore Energy Inc. v. Bingley, 2003 NSSC 20, 2003 CarswellNS 46, 211 N.S.R. (2d) 15, 662 A.P.R. 15, [2003] N.S.J. No. 33 (N.S. S.C.). Appeal from decision of adjudicator in Small Claims Court.

Nova Scotia Civil Procedure *Rule 62.23(2)* states that:

> The powers of the Court may be exercised in respect of all or any part of the judgment or proceedings appealed from, notwithstanding that the notice of appeal states that only part of the judgment is complained of.

Duty owed by adjudicator to examine the pleadings and determine whether a cause of action exists. Despite informality of Small Claims Court, neither party should be held to have waived their rights to rely on arguments not raised in their pleadings. Adjudicator erred in law by awarding damages *without* considering these issues.

Small Claims Court here is not a court of record and there are no transcripts to provide a record of the evidence of what transpired at trial. The hearing is an appeal and thus it is not place of Court to consider the new evidence that will undoubtedly be presented. I must find an error in law and I am restricted by section 32(1) of the *Small Claims Court Act*.

Surrette Battery Co. v. McNutt, 2003 NSSC 6, 2003 CarswellNS 15, [2003] N.S.J. No. 20, 211 N.S.R. (2d) 294, 662 A.P.R. 294, 29 C.P.C. (5th) 215 (N.S. S.C.).

Claimant appealed decision of adjudicator denying its request for a quick judgment pursuant to s. 23(1) of *The Small Claims Act*, and s. 14 of *The Small Claims Court Forms* and *Procedures Regulations*.

The standard of review is correctness. There is no requirement that evidence be adduced under oath or otherwise in proof of the claim where the Defendant does not appear nor is it necessary that a hearing or a trial be held. Where an assessment of damages is required undoubtedly it would be necessary for an adjudicator to hear evidence under oath.

Court found, based on documentary evidence accompanying claim, that claim would result in judgment if a trial held consistent with invoices, etc., and supporting affidavit on application. Quick Judgment to the Plaintiff.

Hubley v. Nissan, 2003 NSSC 236, 2003 CarswellNS 490, 219 N.S.R. (2d) 165, 692 A.P.R. 165 (N.S. S.C.). Appeal of Small Claims Court decision, where adjudicator refused appellant's request for a 4-month adjournment.

On the morning of June 13, 2003, the date of hearing, Plaintiff sought adjournment. By fax, he notified adjudicator he was unable to attend hearing because his cows were in labour.

Appeal subject to section 32(1) of *The Small Claims Court Act*, R.S.N.S. 1989, c. 430 as amended ("*Small Claims Court Act*"). It was in the interests of justice to adjourn the hearing. New hearing Ordered.

MacEwan v. Henderson, 2003 NSSC 120, 2003 CarswellNS 195 (N.S. S.C.); affirmed 2003 CarswellNS 424, 2003 NSCA 133, 219 N.S.R. (2d) 183, 692 A.P.R. 183 (N.S. C.A.). Appeal from Order of Small Claims Court.

No pre-trial disclosure process provided in *Act*. No requirement for Defendant at any stage to give disclosure of documents.

No requirements for filing pre-trial briefs and, accordingly, no established time limits for filing of briefs or for service on opposing party.

Appeal dismissed. Statutory $50 limit.

Benard v. New Brunswick, 2004 NBQB 3, 2004 CarswellNB 1 (N.B. Q.B.).

Plaintiff learned that there were certain exemptions under the Regulations to the *Family Income Security Act*, S.N.B. 1994, c. F-2.01, ("the Act"). He requested a review of his social assistance payments and specifically the deduction of the $105.98 per month.

Bernard filed claim against Province in Small Claims Court claiming $5,087.04 plus costs and interest against the Province for withholding a portion of his income assistance.

The Small Claims Act does not provide Court with. Claim dismissed.

MacIntyre v. Nichols, 2004 CarswellNS 76, 221 N.S.R. (2d) 137, 697 A.P.R. 137, 2004 NSSC 36 (N.S. S.C.).

Appeal from decision of adjudicator, in Small Claims Court, allowing respondents' claim for negligent misrepresentation. Appellants argued that no basis for finding of negligent misrepresentation, as it was not pleaded, and fraudulent misrepresentation was not found.

If a Claimant by his or her pleading or evidence states facts which, if accepted by the trier of fact, constitute a cause of action known to the law, the Claimant should *prima facie* be entitled to the remedy claimed if that is appropriate to vindicate that cause of action.

A Small Claims Court judge has a duty, on being presented with facts that fall broadly within the umbrella of the circumstances described in the Claim, to determine whether those facts constitute a cause of action known to the law, regardless of whether Claimant has asserted that or any other particular cause of action. Appeal dismissed with costs.

Auto List of Canada Inc. v. Sumner, 2004 CarswellMan 169, 184 Man. R. (2d) 155, 318 W.A.C. 155, 2004 MBCA 59 (Man. C.A. [In Chambers]).

Applicant sought leave to appeal decision of Queen's Bench. Respondent had filed a small claim against Applicant, claiming the maximum permitted under *The Court of Queen's Bench Small Claims Practice Act*, C.C.S.M. c. C285 (the Act) of $7,500 plus interest and costs.

The Applicant served but failed to appear. The Act provides in s. 15 that party may, with leave, appeal to the Court of Appeal on question of law only. Motion for extension of time to file application for leave to appeal granted, and leave to appeal is granted.

Bay One Glass Distributors Ltd. v. Funk, 2004 BCSC 516, 2004 CarswellBC 830 (B.C. S.C.). Defendants appealed the decision of Small Claims Court.

Applicable law with respect to court's function sitting as an appellate court, pursuant to the provisions of the *Small Claims Act*, set out by Supreme Court of Canada in *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.). There is limited scope for appellate review when findings of fact, and inferences drawn from those facts, are challenged on appeal.

Presumption underlying the structure of court system is that a trial judge is competent to decide the case before him or her. Where trial judge mistaken then appellant must demonstrate mistake played essential part in the reasoning process resulting in liability being found. Appeal dismissed with costs.

Webb v. 3584747 Canada Inc., 2004 CarswellOnt 325, [2004] O.J. No. 215, 183 O.A.C. 155, 69 O.R. (3d) 502, 41 C.P.C. (5th) 98 (Ont. C.A.); leave to appeal refused [2004] S.C.C.A. No. 114, 2004 CarswellOnt 2988, 2004 CarswellOnt 2989, 331 N.R. 399 (note) (S.C.C.).

In a class action proceeding, the managing judge directed certain issues be determined by way of references conducted by a deputy judge of the Small Claims Court, *inter alia*, "Absent a direction from the Chief Justice, the consent of individual judicial officers to serve in the manner specified in the Order did not satisfy the requirements of s. 14(1) of *The Courts of Justice Act*.".

Markham School for Human Development v. Ghods (2002), 165 O.A.C. 173, 2002 CarswellOnt 2672, [2002] O.J. No. 3153, 216 D.L.R. (4th) 202, 60 O.R. (3d) 624, 23 C.P.C. (5th) 279 (Ont. Div. Ct.).

Appeal raised issue of effect of tendering postdated cheque in repayment of debt on commencement of limitation period. Defendants acknowledged debt when they provided four postdated cheques to the Plaintiff and the Defendants again acknowledged the debt by part payments on each of the dates. Action brought within limitation period.

Mitchell v. Noakes (2003), 2003 CarswellOnt 143, 167 O.A.C. 347 (Ont. Div. Ct.).

Small claims trial. Judge requested written submissions. No specific directions given for written submissions No submissions filed on behalf of Defendant. Submissions should have been submitted within a reasonable time.

Brandt v. Armour (Township) (2002), 167 O.A.C. 308, 2002 CarswellOnt 2629 (Ont. Div. Ct.).

Rule 21(3) of the *Courts of Justice Act* provided motion in Divisional Court should be heard and determined by one judge, unless otherwise provided *Rule 1.03* defined "motion" as a motion in a proceeding or an intended proceeding.

Farrar v. Farrar (2003), 167 O.A.C. 313, 2003 CarswellOnt 195, [2003] O.J. No. 181, 32 R.F.L. (5th) 35, 222 D.L.R. (4th) 19, 35 C.C.P.B. 14, 63 O.R. (3d) 141 (Ont. C.A.).

The trial judge's intervention usurped the function of counsel and was impermissible. Additional evidence requested by trial judge could only benefit the husband, husband represented

by counsel. No basis for the trial judge to intervene on his behalf. Equalization payment raised.

Magnish v. Steeves (2002), 167 O.A.C. 202, 2002 CarswellOnt 3074 (Ont. C.A.).

Defendants moved to amend their defence. The motions judge refused leave to amend defence. No basis upon which to refuse leave to amend under *Rule 26.01 of Civil Rules*.

Hilton v. Norampac Inc. (2003), 176 O.A.C. 309, 2003 CarswellOnt 3111, 26 C.C.E.L. (3d) 179, 2004 C.L.L.C. 210-030 (Ont. C.A.); leave to appeal refused (2004), 2004 CarswellOnt 1608, 2004 CarswellOnt 1609 (S.C.C.).

Before Plaintiff cross-examined, the trial judge gave parties "some comments" on what he had heard so far. Comments would have been far better left unsaid but they did *not* show he had prejudged the case. Views tentative and he had *not* closed his mind to the employer's position.

Khan v. Metroland Printing, Publishing & Distributing Ltd. (2003), 178 O.A.C. 201, 2003 CarswellOnt 4087, 68 O.R. (3d) 135, 44 C.P.C. (5th) 110 (Ont. Div. Ct.); additional reasons at (2004), 2004 CarswellOnt 564, 183 O.A.C. 317 (Ont. Div. Ct.); leave to appeal allowed (2004), 2004 CarswellOnt 1403 (S.C.C.).

Motions judge ordered Plaintiffs to post security for costs under *Civil Procedure Rule 56*. Section 12 of *Libel and Slander Act* provided for security for costs in libel actions *Rule 1.02(1)3* provided that the Rules did not apply if a statute provided for a different procedure. Court rejected argument that the *Rules* could supplement s. 12.

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2003), 175 O.A.C. 312, 2003 CarswellOnt 3425, 43 C.P.C. (5th) 236, 47 C.B.R. (4th) 136 (Ont. Div. Ct.).

Defendants appealed, asserting, *inter alia*, that: the Practice Direction should not take precedence over The *Rules of Civil Procedure*. Argued Practice Direction conflicted with *Rule 37.03*. Appeal dismissed.

Polewsky v. Home Hardware Stores Ltd. (2003), [2003] O.J. No. 2908, 2003 CarswellOnt 2755, 229 D.L.R. (4th) 308, 174 O.A.C. 358, 66 O.R. (3d) 600, 109 C.R.R. (2d) 189, 34 C.P.C. (5th) 334 (Ont. Div. Ct.); leave to appeal allowed 2004 CarswellOnt 763, [2004] O.J. No. 954 (Ont. C.A.).

The Ontario Superior Court, in a decision reported at [1999] O.T.C. 109, 1999 CarswellOnt 3500, [1999] O.J. No. 4151, 68 C.R.R. (2d) 330, 40 C.P.C. (4th) 330 (Ont. S.C.J.), held the Small Claims court did not have discretion to waive fees. Further, the court held no constitutional right to unrestricted access to civil courts. Divisional Court allowed the appeal. Court affirmed that Small Claims Court did not have a discretion to waive the fees. Plaintiff failed to establish a breach of the *Charter*. However, the court held common law constitutional right to access to the Small Claims Court. Court ordered statutory amendment within 12 months to provide for such discretion. The plaintiff failed to meet the requirements to proceed in *forma pauperis* because of evidentiary deficiencies.

Currie v. Halton Regional Police Services Board (2003), 179 O.A.C. 67, 2003 CarswellOnt 4674, [2003] O.J. No. 4516, 233 D.L.R. (4th) 657 (Ont. C.A.).

Motions judge dismissed action under Rule 21.01 (3)(d) on basis it was frivolous, vexatious and an abuse of process of the court. Any action for which there is clearly no merit may qualify for classification as frivolous, vexatious or an abuse of process.

Obsessions Dress Designs Ltd. v. Tully (2004), 2004 CarswellOnt 868 (Ont. C.A.).

Self-represented defendants appealed on grounds of failure to grant adjournment to obtain counsel, and failure to impress that evidence from counsel table not admissible. Adjournment not requested, and warnings as to evidence given. Appeal dismissed.

Stabile v. Milani Estate (2004), 2004 CarswellOnt 831 (Ont. C.A.).

Proper procedure for dealing with issue of alleged bias was appeal from judgment. Comments by trial judge unfortunate but made in dealing with costs after giving judgment. Appeal dismissed.

Brooks v. Preckel, 2004 CarswellBC 402, 2004 BCCA 93 (B.C. C.A. [In Chambers]).

Respondent in family law appeal self-represented. Child of parties very ill. Respondent caring for child on daily basis. Appropriate to grant adjournment of appeal. Difficult for mother to focus on appeal.

Barrett v. Layton (2003), 2003 CarswellOnt 5602, 69 O.R. (3d) 384 (Ont. S.C.J.) summarized procedures at outset.

Reminded her of matters during Defendant's cross-examination and pointed to certain issues in defence. Adversarial system required modification in case of one party being unrepresented by counsel on principle that trial must be fair and must appeal to be fair. Conduct of judge met duty of fairness without overstepping bounds of adversarial process.

Jeffrys v. Veenstra, 2004 CarswellMan 26, 2004 MBCA 6 (Man. C.A. [In Chambers]).

Default judgment entered in small claims court. Leave to appeal refused on ground that Defendant willfully failed to appear. Defendant raised arguable issue of law that Court erred in failing to consider whether meritorious defence was raised. Leave granted.

Petrella v. Westwood Chev Olds (1993) Ltd., 2004 CarswellOnt 364, [2004] O.J. No. 491 (Ont. S.C.J.).

Plaintiff brought motion at start of trial in Small Claims Court to have Defendant's counsel removed from case. Deputy Judge did not have jurisdiction to order Superior Court Judge to hear application to remove counsel. Superior Court Judge did not have to hear application.

Rogacki v. Belz, [2003] O.J. No. 3809, 2003 CarswellOnt 3717, 232 D.L.R. (4th) 523, 177 O.A.C. 133, 67 O.R. (3d) 330, 41 C.P.C. (5th) 78 (Ont. C.A.); additional reasons at (2004), 2004 CarswellOnt 785, 236 D.L.R. (4th) 87, 183 O.A.C. 320 (Ont. C.A.).

Conviction of contempt of Court set aside. Violation of confidentiality agreement not an order of the court that could be punished by a contempt of court order pursuant to *Rule 60*. A contempt of court order based on the court's inherent jurisdiction available.

Insurance Corp. of British Columbia v. Phung, 2003 CarswellBC 2602, 2003 BCSC 1619, 7 C.C.L.I. (4th) 48 (B.C. S.C. [In Chambers]).

Plaintiff obtained default judgment against defendant. Defendant applying to set judgment aside. Application dismissed. Defendant failed to show any meritorious defence.

Schaer v. Barrie Yacht Club, 2003 CarswellOnt 2531, [2003] O.J. No. 2673 (Ont. S.C.J.).

Self-represented plaintiff used status to support arrogant and vexatious manner of conducting action. Conduct justified award of $10,000 costs, based on substantial indemnity claim of $12,298.

Heartland Credit Union v. Lamping, 2003 CarswellSask 109, 2003 SKCA 15 (Sask. C.A.).

Solicitor refused to consent to adjournment. Order requiring solicitor to refresh himself as to normal courtesies had no jurisdictional or substantive basis. Appeal allowed. Order struck out.

Roberts v. R. (2003), 2003 SCC 45, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2003] S.C.J. No. 50, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 231 D.L.R. (4th) 1, 19 B.C.L.R. (4th) 195, *(*sub nom. *Wewayakum Indian Band v. Canada)* 309 N.R. 201, [2004] 2 W.W.R. 1, *(*sub nom. *Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2004] 1 C.N.L.R. 342 (S.C.C.).

A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias. The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude.

Larabie v. Montfils (2004), 2004 CarswellOnt 186, 44 C.P.C. (5th) 66, *(*sub nom. *J.-P.L. v. Montfils)* 181 O.A.C. 239 (Ont. C.A. [In Chambers]).

Larabie, a non-resident of Ontario, had insufficient assets in Ontario to pay costs or costs of pending appeal. Outstanding costs totalled $27,495.26. Ample authority for proposition that courts are reluctant to deprive a worthy but impecunious litigant of opportunity to have his or her claim adjudicated when not plainly devoid of merit. No good reason to believe that Larabie's appeal is frivolous and vexatious.

Larabie permitted to proceed with appeal without having to post security for costs. Motion dismissed.

Hansen v. Purdue, 2005 CarswellBC 582, 2005 BCSC 352 (B.C. S.C.).

Costs of appeals from Small Claims Court acknowledge general rule that costs follow the event often applied. Statutory discretion in s. 13 of the *B.C. Act* and in Rule of *Supreme Court Rules*. Each party to bear own costs. S. 12 of the Act provides expressly that an appeal not be heard as a new trial unless this court orders such.

Respondents at liberty to amend their notice of claim and are not required to abandon the part of their claim exceeding $10,000. *Rules of Supreme Court* apply.

Poitras v. Bossé, 2005 CarswellNB 115, [2005] N.B.J. No. 90 (N.B. C.A.).

Appellant sought to appeal decision of Court of Queen's Bench dismissing appeal by trial *de novo* of small claims action. Appeal to Court of Appeal grounded solely on questions of fact. Section 38 of Regulation 98-84 under *Small Claims Act*, S.N.B. 1997 c. S-9.1 provides that decision of Court of Queen's Bench following trial *de novo* may only be appealed with leave on question of law alone. Leave to appeal denied.

Shaw Cablesystems Ltd. v. Er-Conn Development Inc., 2004 CarswellBC 2381, 203 B.C.A.C. 262, 332 W.A.C. 262, 2004 BCCA 542 (B.C. C.A. [In Chambers]).

Based on s. 13(2) of the *B.C. Act*, clear Court has no jurisdiction to hear appeal from order made by a Supreme Court judge when appeal brought from order made in Small Claims Court after a trial. Appeal sought was appeal of order made in Supreme Court on a procedural matter arising under s. 12(b) of Act, that is, whether appeal ought to be heard as a new trial.

No purpose served by granting leave to appeal. Leave dismissed.

Mitchell v. Schonmann, 2005 CarswellNB 51 (N.B. C.A.).

Leave to appeal decision of judge of Court of Queen's Bench refusing application to extend time to appeal a small claims adjudicator's decision and, if leave granted extension of time to file a Notice of Appeal. In *Naderi v. Strong*, [2005] N.B.J. No. 67, 2005 CarswellNB 89, 2005 CarswellNB 90, 280 N.B.R. (2d) 379, 734 A.P.R. 379, 2005 NBCA 10 (N.B. C.A.), rendered January 27, 2005, Court decided small claims appeal concerning refusal of Queen's Bench judge to extend time to appeal (the same issue as here) without leave to appeal having been first obtained.

Intended Appellants formed intention to appeal within time prescribed and had been misinformed about procedure they had to follow. Extension of time necessary to do justice: see *Naderi v. Strong*, paras. 12 and 13.

1029822 Ontario Inc. v. Smith, 2005 CarswellOnt 906 (Ont. C.A.).

Appeal from Superior Court Justice Power's dismissal of Superior Court action. Dismissal determined that action abuse of process because it raised the same *lis* already determined in earlier Small Claims Court action. Issues not identical, not substantially the same. Appeal allowed. Dismissal of Superior Court action set aside.

Matlin v. Crane Canada Inc., 2004 CarswellOnt 3648 (Ont. S.C.J.).

Motion by defendant Crane on grounds Small Claims Court lacks jurisdiction and Court at Stratford not *forum conveniens*. Motion to Judge of Superior Court sitting as a Judge of the Small Claims Court. On December 15, 2003 Crane moved by Notice of Motion before Deputy Judge H. McDonald for identical relief when Judge McDonald, for written reasons, dismissed motion. This motion dismissed. Order of Judge McDonald is a final order. See *M.J. Jones Inc. v. Kingsway General Insurance Co.*, 2003 CarswellOnt 4594, [2003] O.J. No. 4388, 178 O.A.C. 351, 68 O.R. (3d) 131, 233 D.L.R. (4th) 285, 41 C.P.C. (5th) 52 (C.A.), Sharpe J.A. See also *Morguard Investments Ltd. v. DeSavoye*, EYB 1990-67027, 1990 CarswellBC 283, 1990 CarswellBC 767, [1990] S.C.J. No. 135, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077 (S.C.C.); *McNichol Estate v. Woldnik*, 2001 CarswellOnt 3342, [2001] O.J. No. 3731, 150 O.A.C. 68, 13 C.P.C. (5th) 61 (Ont. C.A.); *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, 2002 CarswellOnt 1756, [2002] O.J. No. 2128, 213 D.L.R. (4th) 577, 160 O.A.C. 1, 13 C.C.L.T. (3d) 161, 26 C.P.C. (5th) 206 (Ont. C.A.); compare *Lemmex v. Bernard*, 2002 CarswellOnt 1812, [2002] O.J. No. 2131, 213 D.L.R. (4th) 627, 160 O.A.C. 31, 60 O.R. (3d) 54, 13 C.C.L.T. (3d) 203, 26 C.P.C. (5th) 259 (Ont. C.A.). There is no inherent appellate jurisdiction. A right to appeal can only be provided by statute or regulation. See *Gelber v. Allstate Insurance Co. of Canada*, 1983 CarswellOnt 457, 41 O.R. (2d) 318, 35 C.P.C. 324 (Ont. Div. Ct.) at p. 319 *per* Krever J. Jurisdiction on motion same as that of Judge McDonald; the jurisdiction of the Small Claims Court. Court cannot sit in appeal of a judge at the same level or jurisdiction.

Gerhardt v. Scotia Best Christmas Tree Ltd., 2004 CarswellNS 83, 221 N.S.R. (2d) 227, 697 A.P.R. 227, 2004 NSSC 53 (N.S. S.C.).

Appellants claimed there was not a fair hearing because they were not given an opportunity to cross examine witness who testified for the Plaintiff.

No official record of what happened at the Small Claims Court hearing. The right to cross examine is a fundamental part of the trial process. When citizens participate in Small Claims Court proceedings without counsel as self-represented litigants, they should not be expected to know the procedure or to realize that they have a right to cross examine, unless they are so advised.

Appeal allowed. New hearing.

Malloy v. Atton, [2004] N.S.J. No. 217, 2004 CarswellNS 218, 50 C.P.C. (5th) 176, 2004 NSSC 110, 225 N.S.R. (2d) 201, 713 A.P.R. 201 (N.S. S.C.).

Affidavit filed by Mr. Atton to supplement oral testimony given by Ms. Atton. Adjudicator received affidavit without cross examination. No official record of what happened at Small Claims Court hearing. Cases involving up to $15,000 are very important to litigants. The right to cross examine is a fundamental part of the trial process. There will be situations where affidavit evidence will be accepted without cross examination, such as where the affidavit has been provided to the opposing party in advance and the affiant is not requested to attend, where the evidence is not disputed or does not address a crucial issue. Denial of natural justice at Small Claims court hearing. Appeal allowed. New hearing.

Jeffrys v. Veenstra, 2004 CarswellMan 26, 2004 MBCA 6 (Man. C.A. [In Chambers]).

Application for leave to appeal to court from decision of Queen's Bench Judge in a small claims proceeding.

Question to be argued must be limited to one of law, as required by Statute. Question must also be one of sufficient public importance to warrant the attention of court. Applicant has an arguable case that the default judgment against her was for much too large an amount.

As a general rule, no appeal lies from a denial of leave to appeal. Another exception to the general rule is where, on a proper construction of the statute under which leave sought, the Legislature did not intend a denial of leave to be unappealable. Leave to appeal granted.

Bhaduria v. National Post, 2005 CarswellOnt 827, [2005] O.J. No. 809 (Ont. C.A.).

Appellant appeals from summary judgment dismissing his claim that respondents defamed him. Appellant failed to raise any evidence on motion for summary judgment to support his position that there was genuine issue for trial. Appeal dismissed.

Dzourelov v. T.B. Bryk Management & Development Ltd., 2004 CarswellOnt 4052, 190 O.A.C. 321, 40 C.L.R. (3d) 301 (Ont. Div. Ct.).

Ground of appeal raised in relation to Deputy Judge's decision not to consider *quantum meruit* and unjust enrichment because they had not been pleaded. Not a case where party taken by surprise or failed to develop an evidential record to address the issue: see *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada*, 1998 CarswellOnt 4255, [1998] O.J. No. 4466, 41 O.R. (3d) 528, (sub nom. *Kalkinis v. Allstate Insurance Co. of Canada)* 117 O.A.C. 193 (Ont. C.A.). The evidence at trial in this case would have been no different had there been specific reference to these doctrines in the pleadings by name. Pleadings not prepared by counsel. Subject to considerations of fairness and surprise to the other side, if a cause of action has been established, the appropriate remedy, within the subject-matter jurisdiction of the court, ought to be granted. Appeal allowed. Plaintiff's claim dismissed, finding for the defendants.

Furlong v. Avalon Bookkeeping Services Ltd., 2004 CarswellNfld 237, 2004 NLCA 46, 243 D.L.R. (4th) 153, 49 C.P.C. (5th) 225, 6 M.V.R. (5th) 79, 239 Nfld. & P.E.I.R. 197, 709 A.P.R. 197 (N.L. C.A.).

Central issue on appeal whether trial Judge erred in law applying doctrine of *res judicata* to facts of this case. No evidence, in the Small Claims action, Furlong elected to abandon her claim either in whole or in part. Nothing in Claim that Furlong had submitted her claim to the Small Claims Court subject to the $3,000 limit on damages by the *Small Claims Act*. Clear case where cause of action in the Supreme Court same as Provincial Court.

Trial Judge erred in not striking Furlong's claim. Appeal allowed, claim struck.

Fraser v. Woodland Building Supplies Ltd., 2004 CarswellNS 78, 222 N.S.R. (2d) 84, 701 A.P.R. 84, 2004 NSSC 44 (N.S. S.C.).

In rejecting evidence of Claimant because it was not expert evidence or supported by expert evidence, Adjudicator committed legal error. Referred back to Small Claims Court for rehearing before different Adjudicator.

Trull v. Midwest Driveways Ltd., 2004 CarswellSask 857, [2004] S.J. No. 800, 2004 SKQB 528, 4 C.P.C. (6th) 324, 256 Sask. R. 314 (Sask. Q.B.).

Midwest does not take issue with the judgment but wants the opportunity to present a defence. Under new provisions, application to set aside judgment must be made to the Provincial Court, not Queen's Bench Court. Although Midwest brought an appeal, it is in essence an application to set aside the "default" judgment so that Midwest can present its defence at a new trial. Appeal dismissed.

Harpestad v. Hughes Agencies Ltd., 2005 CarswellSask 151, 2005 SKQB 121 (Sask. Q.B.).

Trial Judge erred in law in taking "judicial notice" of key finding of fact. Only evidence led at trial was that it was not common for this to occur. Supreme Court of Canada had occasion as to the standard of appellate review; see *Housen v. Nikolaisen*, REJB 2002-29758, 2002

CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.).

2304606 Nova Scotia Ltd. v. Taylor, 2004 CarswellNS 456, 2004 NSSC 218 (N.S. S.C.).

Applicant sought extension of time to file notice of appeal from decision of Small Claims Court. "Ultimately, it comes down to question of whether or not justice requires that discretion be exercised in favour of granting application": *Hanna v. Maritime Life Assurance Co.*, 1995 CarswellNS 284, 150 N.S.R. (2d) 34, 436 A.P.R. 34 (N.S. C.A. [In Chambers]) at para. 17. Applicant had *bona fide* intention to appeal adjudicator's decision. Illness of applicant's solicitor, a sole practitioner, sufficient excuse for delay. Application granted.

Atlantic Auto Body v. Boudreau, 2004 CarswellOnt 649 (Ont. Div. Ct.).

Issue whether court has jurisdiction to hear motion to have the appeal dismissed for delay. Appellant, in responding to motion, took position dismissal for delay of appeal to the Divisional Court from the Small Claims Court to be heard on motion to the Registrar under Rule 61.13(1)(b). Court does not have jurisdiction at this stage. See also, *McGlynn v. McGlynn*, [2002] O.J. No. 2047, 2002 CarswellOnt 5795 (Ont. Div. Ct.).

Auto Trim Shop v. Preston, 2005 CarswellOnt 577 (Ont. S.C.J.).

Two issues on appeal. Whether trial Judge erred when he so intervened to give the appearance of bias? Trial ignored aspect of claim and provisions of the *Consumer Protection Act* S.O. 2002 and, if so, the effect of same? See *Garry v. Pohlmann*, 2001 CarswellBC 1893, [2001] B.C.J. No. 1804, 2001 BCSC 1234, 12 C.P.C. (5th) 107 (B.C. S.C.) as to the nature of Small Claims proceedings, "appellate courts have recognized that the role of trial judges in small claims court is often, by necessity, more interventionist. . .," and *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) set out the grounds for a successful apprehension of bias at paragraph 113. Appeal denied with costs.

Strikaitis v. RBC Travel Insurance Co., 2005 CarswellBC 202, 2005 BCSC 103 (B.C. S.C.).

Principles governing awarding of punitive damages, particularly in the context of an insurance claim, found in *Whiten v. Pilot Insurance Co.*, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] S.C.J. No. 19, 2002 SCC 18, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595 (S.C.C.) and *Fidler v. Sun Life Assurance Co. of Canada*, 2004 CarswellBC 1086, 239 D.L.R. (4th) 547, 13 C.C.L.I. (4th) 25, 27 B.C.L.R. (4th) 199, [2004] 8 W.W.R. 193, 196 B.C.A.C. 130, 322 W.A.C. 130, 2004 BCCA 273, [2004] I.L.R. I-4299 (B.C. C.A.). Not justified on the basis of a mere denial. The conduct of the insurer must be significantly improper or egregious. Award of punitive damages set aside.

Reynolds v. Spence, 2004 CarswellNS 499, 228 N.S.R. (2d) 199, 2004 NSSC 233 (N.S. S.C.).

Appeal as to whether denial of natural justice on ground bias or a reasonable apprehension of bias on the part of adjudicator? "Bias goes to the jurisdiction of the tribunal. In other words, if an Adjudicator is biased then the Adjudicator loses jurisdiction." See *R. v. Curragh Inc.*, [1997] S.C.J. No. 33, 1997 CarswellNS 88, 1997 CarswellNS 89, 113 C.C.C. (3d) 481, 159 N.S.R. (2d) 1, 144 D.L.R. (4th) 614, [1997] 1 S.C.R. 537, 5 C.R. (5th) 291, 209 N.R. 252, 468 A.P.R. 1 (S.C.C.) at paragraph 6.

See also *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.).

Test for reasonable apprehension of bias set out by de Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434, 1976 CarswellNat 434F, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.). Though he wrote dissenting reasons, de Grandpré, J's articulation of test for bias has been consistently endorsed by this Court in the intervening decades: see, for example, *R. v. Valente (No. 2)*, 1985 CarswellOnt 948, 1985 CarswellOnt 129, [1985] S.C.J. No. 77, *(*sub nom. *Valente v. R.)* [1985] 2 S.C.R. 673, *(*sub nom. *Valente v. R.)* 37 M.V.R. 9, 64 N.R. 1, 14 O.A.C. 79, *(*sub nom. *Valente v. R.)* 23 C.C.C. (3d) 193, *(*sub nom. *Valente v. R.)* 19 C.R.R. 354, 52 O.R. (2d) 779, *(*sub nom. *Valente c. R.)* [1986] D.L.Q. 85, *(*sub nom. *Valente v. R.)* 24 D.L.R. (4th) 161, *(*sub nom. *Valente v. R.)* 49 C.R. (3d) 97 (S.C.C.); *Lippé c. Charest*, [1991] S.C.J. No. 128, 1990 CarswellQue 98, *(*sub nom. *R. v. Lippé)* 61 C.C.C. (3d) 127, *(*sub nom. *R. c. Lippé)* [1991] 2 S.C.R. 114, 5 M.P.L.R. (2d) 113, 5 C.R.R. (2d) 31, *(*sub nom. *Lippé v. Québec (Procureur général))* 128 N.R. 1 (S.C.C.); *Ruffo c. Québec (Conseil de la magistrature)*, 1995 CarswellQue 183, 1995 CarswellQue 184, [1995] S.C.J. No. 100, *(*sub nom. *Ruffo v. Conseil de la magistrature)* 190 N.R. 1, *(*sub nom. *Ruffo v. Conseil de la magistrature)* [1995] 4 S.C.R. 267, 35 Admin. L.R. (2d) 1, *(*sub nom. *Ruffo v. Conseil de la magistrature)* 130 D.L.R. (4th) 1, *(*sub nom. *Ruffo v. Conseil de la magistrature)* 33 C.R.R. (2d) 269 (S.C.C.). Appeal dismissed.

MacIntyre v. Nichols, 2004 CarswellNS 76, 221 N.S.R. (2d) 137, 697 A.P.R. 137, 2004 NSSC 36 (N.S. S.C.).

Appeal from decision of adjudicator in Small Claims Court, allowing respondents' claim for negligent misrepresentation in purchase of a house. Appeal in part that adjudicator erred in law in deciding case on basis of negligent misrepresentation when claim made on basis of fraudulent misrepresentation. Appellants referred to decision of Newfoundland Court of Appeal in *Popular Shoe Store Ltd. v. Simoni*, 1998 CarswellNfld 48, [1998] N.J. No. 57, 163 Nfld. & P.E.I.R. 100, 503 A.P.R. 100, 24 C.P.C. (4th) 10 (Nfld. C.A.). Subject to considerations of fairness and surprise to the other side, if cause of action established, appropriate remedy, within the subject matter jurisdiction of the court, ought to be granted. Appeal dismissed with costs.

Auto List of Canada Inc. v. Sumner, 2004 CarswellMan 169, 184 Man. R. (2d) 155, 318 W.A.C. 155, 2004 MBCA 59 (Man. C.A. [In Chambers]).

Applicant sought leave to appeal decision of Queen's Bench judge and extension of time to file application for leave to appeal.

Person seeking extension of time must demonstrate: (1) continuous intention to appeal from a time within the period when the appeal should have been commenced; (2) that there is a reasonable explanation for the delay; and (3) arguable grounds of appeal. (See *Bohemier v. CIBC Mortgages Inc.*, 2001 CarswellMan 504, 2001 MBCA 161, 160 Man. R. (2d) 39, 262 W.A.C. 39 (Man. C.A.).) Leave to appeal granted.

Moffatt v. Sanchez, 2004 CarswellOnt 599, [2004] O.J. No. 558, 42 B.L.R. (3d) 96, 182 O.A.C. 361 (Ont. Div. Ct.).

Appeal by Sanchez from judgment of Deputy Judge awarding plaintiff $10,000 in damages plus prejudgment interest and costs for breach of a non-competition agreement. Reasonable basis not to reduce damage award on basis of $509 counterclaim. Appeal dismissed with costs.

Boodhoo v. Monaghan, 2004 CarswellSask 754, 2004 SKQB 460, 9 M.V.R. (5th) 128, 255 Sask. R. 103 (Sask. Q.B.).

Appeal from judgment of Moxley P.C.J. under provisions of the *Small Claims Act*, 1997, S.S. 1997, c. S-50.11.

Appellate function of court not to retry case, but to confine itself to correcting errors of law and reversing unreasonable findings of fact. See *Estevan Motors Ltd. v. Anderson*, 1995 CarswellSask 132, 129 Sask. R. 70 (Sask. Q.B.). Findings of fact by trial judge on evidence adduced so clearly wrong as to make the decision unreasonable. Appeal allowed.

Greywall v. Sekhon, 2005 CarswellBC 169, 2005 BCSC 101 (B.C. S.C.).

Appeal of small claims matter. Appellants argued that trial judge erred by accepting evidence from witnesses who were present in courtroom during portion of respondent's testimony at trial.

Issue of evidence from witness who had seen another person testify is a question of weight, not admissibility. Trial judge carefully canvassed the evidence adduced at trial, and made findings of credibility and weight based on his observation of the witnesses on the stand. Appeal dismissed with costs.

Wilde v. Fraser Milner Casgrain LLP, 2004 CarswellOnt 4026 (Ont. S.C.J.).

Wilde's legal costs for defending an appeal concerning a $7,000 judgment he won in Small Claims Court amounted to close to $35,000. Application for an order referring the cost accounts for assessment.

Wilde had $20,000 at risk on the appeal, including the $7,000 judgment he was awarded, the $3,000 costs judgment that had been separately appealed by way of an Amended Notice of Appeal and the Counterclaim for $10,000. Wilde retained Mr. de Vries whose hourly rate was $400 at the time.

Decision to refer a bills of costs for assessment must be considered in the context of sections 4(1) and 11 of the *Solicitors Act*. Preliminary determination must be made concerning nature of first four accounts. See *Enterprise Rent-A-Car Co. v. Shapiro, Cohen, Andrews, Finlayson*, 1998 CarswellOnt 707, [1998] O.J. No. 727, 157 D.L.R. (4th) 322, *(*sub nom. *Shapiro, Cohen, Andrews, Finlayson v. Enterprise Rent-A-Car Co.)* 107 O.A.C. 209, 38 O.R. (3d) 257, 80 C.P.R. (3d) 214, 18 C.P.C. (4th) 20 (Ont. C.A.). Reference of last two bills to be made for assessment. Application allowed in part.

PIN Services Ltd. v. Oehler, 2004 CarswellSask 775, 2004 SKQB 470 (Sask. Q.B.).

Notice of appeal filed by the self-represented plaintiff. The conclusions explicitly and implicitly reached by trial judge clearly supported by facts he found and law he applied and his judgment does not disclose reversible error.

Moslitho Inc. v. 1293423 Ontario Inc., 2004 CarswellOnt 1434 (Ont. S.C.J.).

Moslitho recovered a judgment for an amount only slightly in excess of the monetary jurisdiction of the Small Claims Court, $11,500. Moslitho's claim was for $57,351. One Twenty Nine advanced a counterclaim for $65,169. Moslitho awarded one half of its costs on a partial indemnity basis.

967686 Ontario Ltd. v. Burlington (City), 2005 CanLII 9334 (Ont. Div. Ct.).

An appeal from judgment of Deputy Judge. Supreme Court of Canada in *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) has set out the standards of appellate review.

(1) The standard of review for questions of law is correctness; (2) The standard of review for findings of fact and inferences from such findings is that of palpable and over-riding error; (3) Findings of mixed fact and law are also accorded deference and, absent legal error or palpable and over-riding factual error, are not to be disturbed on appeal.

Appeal against liability dismissed. Appeal as to damages award allowed, in part. Trial costs awarded by Deputy Judge be set off in their entirety against costs of appellant fixed at $350, plus court costs.

Maple View Building Corp. v. Tran, 2004 CarswellOnt 1811 (Ont. S.C.J.).

Plaintiff's appeal order of Deputy Judge. Appeal dismissed. Costs fixed at $2,500 to the respondents.

Deonarine v. Lachman, 2004 CarswellOnt 1807 (Ont. S.C.J.).

In accordance with Rule 49.10(1), Plaintiff entitled to costs on a partial indemnity scale. While costs awarded Lachman in jurisdiction of Small Claims Court, not a case where Plaintiff should be penalized under Rule 57.05(1), as claim against Frank Lachman tied to claims against Rajpatty Lachman, within the jurisdiction of this court, and he was a necessary party. Similarly, the cost penalty in Rule 76.13(3) should not be applied in the circumstances for the same reasons.

Air France v. Ogbeide, 2005 CarswellOnt 1222 (Ont. Div. Ct.).

Sections 6(1) and 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 are discretionary. No reason shown why matter should not proceed to trial. Application dismissed.

Kent v. Conquest Vacations Co., 2005 CarswellOnt 1312 (Ont. Div. Ct.).

On February 1, 2005, reasons released dismissing the defendant, appellant's appeals in each of two actions heard together. Submissions as to costs considered.

Only minor differences in positions of husband and wife, arising largely from fact only wife gave evidence. The major point was legal one: had the plaintiffs split one case into two to avoid the limit on claims in the Small Claims Court, or were they two parties with separate causes of action?

Respondents sought a premium over the docket amount of their costs. They referred to *Dube v. Penlon Ltd.*, 1992 CarswellOnt 3359, 10 O.R. (3d) 190 (Ont. Gen. Div.) where Zuber J. awarded substantial indemnity costs. This case not similar to *Dube*. Costs to respondents fixed at $4,500 for each appeal for a total of $9,000.

Liu Estate v. Chau, 2004 CarswellOnt 442, 69 O.R. (3d) 756, 236 D.L.R. (4th) 711, 182 O.A.C. 366 (Ont. C.A.).

Trial judge directing female defendant to leave courtroom while her husband was testifying because credibility was in issue. Direction contrary to Rule 52.06(2) of *Rules of Civil Procedure*. Party's inherent right to be present at trial may be curtailed only in exceptional circumstances which did not exist here. Breach of Rule 52.06(2) not entitling defendants to new trial as order did not occasion substantial wrong or miscarriage of justice. See *Changoo v. Changoo*, [1999] O.J. No. 865, 1999 CarswellOnt 831, 45 R.F.L. (4th) 194, 33 C.P.C. (4th) 86 (Ont. Gen. Div.) and *Baywood Paper Products Ltd. v. Paymaster Cheque-Writer (Canada) Ltd.*, 1986 CarswellOnt 465, [1986] O.J. No. 2076, 13 C.P.C. (2d) 204, 57 O.R. (2d) 229 (Ont. Dist. Ct.) at p. 239 O.R.

R. v. Ricci, 2004 CarswellOnt 4136, 190 O.A.C. 375, [2005] 1 C.T.C. 40 (Ont. C.A.).

Appellant complaining that pre-trial judge failed to advise appellant of distinction between agent and lawyer. Appellant made informed choice to be represented by agent. No miscarriage of justice occurred.

R. v. Snow, [2004] O.J. No. 4309, 2004 CarswellOnt 4287, 191 O.A.C. 212, 190 C.C.C. (3d) 317, 73 O.R. (3d) 40 (Ont. C.A.).

A trial judge is not a mere observer who must sit by passively allowing counsel to conduct the proceedings in any manner they choose. It is well recognized that a trial judge is entitled to manage the trial and control the procedure to ensure that the trial is effective, efficient and fair to both sides.

Defence counsel frequently refused to abide by rulings and this understandably provoked further interventions from the trial judge.

Bruvels v. Miller, 2004 CarswellOnt 1180 (Ont. Div. Ct.).

Appeal from judgment of Justice T.C. Tierney of the Ontario Court of Justice (Small Claims) in Ottawa. Appellant sought new trial in part with respect whether there was a mediated agreement that both parties were bound by.

Jurisdiction to hear appeal based on s. 31 of the *Courts of Justice Act*. Standard of review for appeals from the order of judge whether judge was "clearly wrong"? Standard applies both to findings of fact and to the application of legal principles.

Even when no oral evidence heard, and a judge's findings not based on credibility, still entitled to deference from an Appellate Court. See *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, 1997 CarswellOnt 3270, [1997] O.J. No. 3921, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324 (Ont. C.A.) *per* Laskin J.A. and *Schwartz v. R.*, 1996 CarswellNat 422F, 1996 CarswellNat 2940, 17 C.C.E.L. (2d) 141, *(*sub nom. *Minister of National Revenue v. Schwartz)* 193 N.R. 241, *(*sub nom. *Schwartz v. Canada)* 133 D.L.R. (4th) 289, 96 D.T.C. 6103, 10 C.C.P.B. 213, [1996] 1 C.T.C. 303, *(*sub nom. *Schwartz v. Canada)* [1996] 1 S.C.R. 254 (S.C.C.) at 303-6 (D.L.R.).

Appeal dismissed. Learned judge's original award was for $11,600. Deducting the $2,000 award for punitive damages, the final award and judgment $9,600 with interest. Not a proper case for costs.

Bechaalani v. Hostar Realty Ltd., 2004 CarswellOnt 2153, 187 O.A.C. 268 (Ont. Div. Ct.).

Appeal from Deputy Judge A. Doyle of the Ottawa Small Claims Court. Rule 7.01(2) of the *Small Claims Court Rules*, O. Reg. 258/98 sets out the requirement of what plaintiff's Claim is to contain.

Fundamental principle of civil litigation that parties entitled to have dispute between them resolved on basis of the issues joined in the pleadings. (*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada*, 1998 CarswellOnt 4255, [1998] O.J. No. 4466, 41 O.R. (3d) 528, *(*sub nom. *Kalkinis v. Allstate Insurance Co. of Canada)* 117 O.A.C. 193 (Ont. C.A.) at 533-534 (O.R.); *460635 Ontario Ltd. v. 1002953 Ontario Inc.*, 1999 CarswellOnt 3428, [1999] O.J. No. 4071, 127 O.A.C. 48 (Ont. C.A.) at para. 9; *Rodaro v. Royal Bank*, 2002 CarswellOnt 1047, [2002] O.J. No. 1365, 22 B.L.R. (3d) 274, 157 O.A.C. 203, 49 R.P.R. (3d) 227, 59 O.R. (3d) 74 (Ont. C.A.) at para. 60.).

Procedure in Small Claims Court matters is simplified. There is no formal discovery process. The defendant's knowledge of the case to be met comes from the pleadings and from the mandatory pre-trial conference. Had there been any uncertainty on the part of Hostar as to what was being referenced in the Claim, a Demand for Particulars could have been served, or the issue could have been canvassed at the pre-trial conference. Hostar chose neither.

Standard of appellate review regarding findings of fact explained by Laskin J.A. in *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, 1997 CarswellOnt 3270, [1997] O.J. No. 3921, 40 M.P.L.R. (2d) 107, 103 O.A.C. 324 (Ont. C.A.) at 333 (O.R.). See also *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 1997 CarswellNat 368, 1997 CarswellNat 369, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, 209 N.R. 20, 50 Admin. L.R. (2d) 199 (S.C.C.). Appeal dismissed.

2304606 Nova Scotia Ltd. v. Taylor, 2004 CarswellNS 456, 2004 NSSC 218 (N.S. S.C.).

Applicant sought extension of time to file notice of appeal from decision of Small Claims Court. The applicant defendant in matter heard in Smalls Claims Court.

See *Spence v. Nantucket Investor Group*, 1998 CarswellNS 224, [1998] N.S.J. No. 258, 169 N.S.R. (2d) 176, 508 A.P.R. 176 (N.S. C.A. [In Chambers]); *Tibbetts v. Tibbetts*, 1992 CarswellNS 517, 90 D.L.R. (4th) 719, 112 N.S.R. (2d) 173, 307 A.P.R. 173 (N.S. C.A.) and *Briand v. Coachman Insurance*, 2003 NSCA 39, 2003 CarswellNS 124, [2003] N.S.J. No. 116 (N.S. C.A.) at para. 10.

Does justice require discretion be exercised in favour of granting the application (*Hanna v. Maritime Life Assurance Co.*, 1995 CarswellNS 284, 150 N.S.R. (2d) 34, 436 A.P.R. 34 (N.S. C.A. [In Chambers]) at para. 17)?

Application granted to extend time to file the Notice of Appeal.

Palmer v. Van Keulen, 2005 CarswellAlta 399, 2005 ABQB 239 (Alta. Q.B.).

Appeal by Van Keulen from decision of Provincial Court Judge.

The *Provincial Court Act*, R.S.A. 2000, c. P-31 ("Act"), Section 53, permits a party to appeal a decision from a Provincial Court Judge. The decision of the Court of Queen's Bench is final and cannot be further appealed.

Section 51 of the Act stipulates that an appeal from Provincial Court is an appeal on the record unless a party applies to have the matter heard *pro novo*. The parties have made no such application.

Standard of review applied by a civil appellate court outlined by Wittmann J.A., as he then was, in *Schoff v. Royal Insurance Co. of Canada*, 2004 CarswellAlta 687, 348 A.R. 366, 321 W.A.C. 366, 3 M.V.R. (5th) 69, 27 Alta. L.R. (4th) 208, [2004] I.L.R. I-4313, 13 C.C.L.I. (4th) 237, [2004] 10 W.W.R. 32, 2004 ABCA 180 (Alta. C.A.).

The standard of review that applies to factual inferences is palpable and overriding error: See *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) at para. 25.

Was Palmer's pleading at trial so deficient that no finding of fraud could have been made by trial judge?

Pleading of Palmer was a Civil Claim filed in Provincial Court and not a Statement of Claim filed before Court of Queen's Bench. As a general rule, parties to a Provincial Court civil action are "confined to the particulars set out in the civil claim and dispute note": s. 34(1) of the Act. However, a Provincial Court trial judge is also granted a significant degree of discretion in determining how a particular claim will be heard. Specifically, see section 8 of the Act.

Litigants in Provincial Court are largely self-represented, and unfamiliar with the law and intricacies of our courts' practice and procedure. As such self-represented litigant pleadings. See *Deyell v. Siroccos Hair Co.*, 1999 CarswellAlta 378, 245 A.R. 294 (Alta. Q.B.) at para. 18.

Pleadings sufficient to support the allegation of fraud. Appeal dismissed.

Chuang v. Royal College of Dental Surgeons (Ontario), 2005 CarswellOnt 3707, 77 O.R. (3d) 280 (Ont. Div. Ct.).

For Dr. Chuang to obtain an extension of time to perfect his appeal, he must satisfy the court of the "justice of the case". In considering the "justice of the case," the court examines the following:

(a) the existence of a *bona fide* intention to appeal with the time period;

(b) the length of the appellant's delay in pursuing the appeal; and,

(c) the merits of the appeal. See *Miller Manufacturing and Development Co. v. Alden*, 1979 CarswellOnt 461, [1979] O.J. No. 3109, 13 C.P.C. 63 (Ont. C.A.).

If there is no merit to the appeal, inquiry ends. Lack of merit, in itself, sufficient to deny the extension of time (*Miller*, *supra*).

Court will not grant security for costs of an appeal simply because the appellant has not paid the costs awarded by the order under appeal. See *Toronto Dominion Bank v. Szilagyi Farms Ltd.*, 1988 CarswellOnt 429, [1988] O.J. No. 1223, 28 C.P.C. (2d) 231, 65 O.R. (2d) 433, 29 O.A.C. 357 (Ont. C.A. [In Chambers]).

Dr. Chuang has until 4:30 in the afternoon on Monday, September 19, 2005, to perfect his appeal.

967686 Ontario Ltd. v. Burlington (City), 2005 CanLII 9334 (Ont. Div. Ct.).

Appeal by Corporation of City of Burlington (the appellant) from the judgment of Deputy Judge King, Burlington Small Claims Court.

The Supreme Court of Canada in *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.), set out the standard of appellate review.

Appeal against liability dismissed. Appeal as to the damages award is allowed, in part.

Liu v. Toronto Police Services Board, 2005 CarswellOnt 2492 (Ont. Div. Ct.).

The Appellant/Plaintiff appeals under s. 31 of the *Courts of Justice Act*, from judgment of Deputy Judge M. Wolfe, in the Small Claims Court at Toronto, granting Respondents' motion for non-suit.

Standard of review as to whether or not non-suit should or should not have been granted by trial judge is a question of law, standard is one of correctness: See *Mallet v. Alberta (Administrator of the Motor Vehicle Accident Claims Act)*, 2002 CarswellAlta 1623, [2002] A.J. No. 1551, 39 M.V.R. (4th) 228, 330 A.R. 1, 299 W.A.C. 1, 15 Alta. L.R. (4th) 231, 2002 ABCA 297, [2003] 8 W.W.R. 271 (Alta. C.A.), at para. [35]; *Ontario v. O.P.S.E.U.*, 1990 CarswellOnt 711, [1990] O.J. No. 635 pp. 10-11, 37 O.A.C. 218 (Ont. Div. Ct.); and *Hall v. Pemberton*, 1974 CarswellOnt 873, 5 O.R. (2d) 438, 50 D.L.R. (3d) 518 (Ont. C.A.). See s. 134(6) of the *Courts of Justice Act*:

> A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

No substantial wrong or miscarriage of justice in this case.

Findlay v. Sand, 2005 CarswellOnt 2402 (Ont. Div. Ct.).

Appeal from Order of Deputy Judge Libman, of Small Claims Court. The Order was an interim order that defendant pay money to satisfy a judgment during the adjourned period of a contempt of court show cause hearing.

Section 31 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43 (CJA) governs appeals from the Small Claims Court. It does *not* provide for an appeal of an interlocutory order. By Notice of Abandonment the appellant/defendant "abandoned" her appeal. The plaintiff/respondent seeking costs on abandoned appeal. Plaintiff, Findlay, awarded costs of abandoned "appeal" at $1,687.57, plus costs of attending, fixed at $300.

Lacambra v. Richtree Markets Inc., 2005 CarswellOnt 4380 (Ont. Div. Ct.).

Lacambra appeals from decision of Deputy Judge Levine in which he dismissed claim for two weeks' pay in lieu of notice. See *Minott v. O'Shanter Development Co.*, 1999 CarswellOnt 1, [1999] O.J. No. 5, 99 C.L.L.C. 210-013, 40 C.C.E.L. (2d) 1, 168 D.L.R. (4th) 270, 117 O.A.C. 1, 42 O.R. (3d) 321 (Ont. C.A.), where Laskin J.A. discussed concept of issue estoppel in context of wrongful dismissal action, where Board of Referees had already determined employee dismissed for misconduct.

Deputy Judge failed to properly apply principles relating to issue *estoppel*, appeal is allowed, decision is set aside. Matter referred back to the Small Claims Court for determination.

Mak v. TD Waterhouse Canada, 2005 CarswellOnt 1909 (Ont. Div. Ct.).

Appeal from decision of Deputy Judge Wolfe dismissing plaintiff's claim.

Both plaintiff and defendant were unrepresented at trial. Main argument of Mrs. Mak that she was denied a fair trial. I agree.

Trial Judge faced with difficult situation. The plaintiff has no legal knowledge and very limited ability to communicate in English. Where both parties unrepresented, common, and often necessary, for trial judge to intervene. See *Garry v. Pohlmann*, 2001 CarswellBC 1893, [2001] B.C.J. No. 1804, 2001 BCSC 1234, 12 C.P.C. (5th) 107 (B.C. S.C.) and cases referred to therein; *E. Manoni Construction Ltd. v. Kalu*, [1997] O.J. No. 5880 (Ont. Gen. Div.). Intervention by trial judge went beyond what was necessary. He virtually took over the examination of witnesses.

Trial judge also unduly antagonistic towards Mr. Moore, agent for Mrs. Mak.

The trial judge never properly explained the process to Mr. Moore. Had trial been conducted in the Superior Court of Justice clear right to cross-examine witnesses. See Rule 53.07(4) and Rule 53.07(5). Trial judge committed fundamental error in declaring a non-suit on his own motion without giving plaintiff an opportunity to make submissions: *Felker v. Felker*, 1946 CarswellOnt 172, [1946] O.W.N. 368 (Ont. C.A.); *Carrier v. Cameron*, [1985] O.J. No. 1357, 1985 CarswellOnt 637, 6 C.P.C. (2d) 208, 11 O.A.C. 369 (Ont. Div. Ct.).

Appeal allowed, the decision of the trial judge is set aside and a new trial is directed. The plaintiff entitled to reasonable costs for this appeal. Moore sought costs of $1,500.

If plaintiff successful in her second trial, she shall be entitled to costs from the first trial as well.

Palmer v. Van Keulen, 2005 CarswellAlta 399, 2005 ABQB 239 (Alta. Q.B.).

Appeal from decision of Provincial Court Judge.

The *Provincial Court Act*, R.S.A. 2000, c. P-31 ("Act") permits a party to appeal a decision from a Provincial Court Judge. Section 53 of the Act reads:

> 53. Hearing of appeal — (1) The Court of Queen's Bench shall
>
> (a) hear and determine an appeal,
>
> (b) give its judgment, and
>
> (c) make an order awarding costs, if any, to the parties, including costs of all proceedings previous to the appeal.
>
> (2) The decision of the Court of Queen's Bench is final and cannot be further appealed.

Section 51 of the Act stipulates that an appeal from Provincial Court is an appeal on the record unless a party applies to have the matter heard *de novo*. No such application in this case.

The standard of review that applies to factual inferences is palpable and overriding error: *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) at para. 25. An appellate court may intervene where the inference made by the trial judge is not supported by the evidence.

Was Palmer's pleading at trial so deficient that no finding of fraud could have been made by the trial judge?

The Alberta *Rules of Court*, A.R. 390-68, *inter alia*, govern the content and form of pleadings in this Province.

> 115. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, particulars (with dates and items, if necessary) shall be stated in the pleading.

A self-represented litigant, as Mr. Palmer was during trial, is generally granted a greater degree of latitude with their pleadings. This approach is consistent with the purpose of our Provincial Court System. See *Deyell v. Siroccos Hair Co.*, 1999 CarswellAlta 378, 245 A.R. 294 (Alta. Q.B.) at para. 18.

Appeal dismissed.

Legrady v. Custom House Currency Exchange Ltd., 2005 CarswellBC 1305, 2005 BCSC 802 (B.C. S.C.).

Appeal from judgment of the Provincial Court of B.C., Small Claims Division. Appeal dismissed.

Applicable standard of review found in judgment of Supreme Court of Canada in *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.). See also standard applied in *R. v. Clark*, EYB 2005-83102, 2005 CarswellBC 137, 2005 CarswellBC 138, [2005] S.C.J. No. 4, [2005] 1 S.C.R. 6, 2005 SCC 2, 25 C.R. (6th) 197, 329 N.R. 10, 193 C.C.C. (3d) 289, 249 D.L.R. (4th) 257, 208 B.C.A.C. 6, 344 W.A.C. 6, 8 M.P.L.R. (4th) 289 (S.C.C.). Judgment does *not* provide a detailed analysis of the evidence in question however, this type of analysis is not necessary nor prudent in an oral judgment. See *Garda v. Osborne*, 1996 CarswellBC 418, [1996] B.C.J. No. 442, 72 B.C.A.C. 101, 119 W.A.C. 101 (B.C. C.A.) where at para. 31, Goldie J.A. stated:

> One does not expect to find in oral reasons the depth of analysis displayed in a reserved judgement. This does not mean that evidence was overlooked or misunderstood. For there to be such an error, its presence must be demonstrated with particularity.

In civil cases, not fundamental to the integrity of process that a party be present at trial or be fully aware of the evidence being presented provided that the party is represented by counsel. That is not the rule in criminal cases. Where a party to a civil action is present, is represented by counsel, and makes no complaint about his inability to hear the evidence at the time of the trial, he cannot be heard to argue on appeal that his inability to hear the evidence somehow invalidates the proceeding in the trial court.

Stockbrugger v. Spark, 2005 CarswellSask 247, 2005 SKQB 183 (Sask. Q.B.), Sandomirsky J. Appeal from Judge of Provincial Court of Saskatchewan.

Jurisdiction of Court described by former Justice Halvorson in decision *Estevan Motors Ltd. v. Anderson*, 1995 CarswellSask 132, 129 Sask. R. 70 (Sask. Q.B.). See paragraphs 4 and 5:

> [4] There is no uncertainty in the law respecting small claims appeals. Section 40 of the *Small Claims Act*, S.S. 1988-89, c. S-50.1, permits the Court, among other remedies to ". . . give the judgment that the judge who made the judgment which is appealed should have given. . .". This seemingly broad discretion has been circumscribed however, by case law. The appeal court will not retry the case, but will confine itself to correcting errors of law and reversing unreasonable findings of fact (see *Ruth Hartridge v. Tri-Fanta Industries*, Sask. Q.B. No. 1695/90, J.C. Saskatoon, September 25, 1990, Baynton, J. (unreported); *Coleman v. Saskatoon Car Town Ltd.*, 1986 CarswellSask 536, 45 Sask. R. 308 (Sask. Q.B.); and *Kitzul v. Ungar*, 1991 CarswellSask 485, 90 Sask. R. 239 (Sask. Q.B.)).
>
> [5] When this Court reviews evidence to determine the appropriateness of the findings by the trial judge, an approach is taken which is similar to that in summary conviction appeals. Where the findings are not supported by the evidence they may be reversed. Likewise, where the

> conclusions reached by the trial judge are so clearly wrong as to make the decision unreasonable, the judgment may be varied.

Appellant wishes to raise on appeal issues not raised at small claims trial conducted. Appeal dismissed.

Er-Conn Development Inc. v. Shaw Cablesystems Ltd., 2005 CarswellBC 740, 2005 BCSC 478 (B.C. S.C.).

("Shaw") appeals from decision of judge of Provincial Court Small Claims Division. Shaw also applies for leave to adduce new evidence on the appeal.

The first question is whether there is jurisdiction to receive new evidence on an appeal from a Small Claims decision.

Application to lead new evidence does not amount to a collateral attack on the order denying a new trial.

Bidart v. MacLeod, 2005 CarswellNS 288, 2005 NSSC 100, 234 N.S.R. (2d) 20, 745 A.P.R. 20 (N.S. S.C.), Frank Edwards J. Appeal from decision by Adjudicator of Small Claims Court.

Parties unrepresented.

Procedural fairness must be assessed in the context of the *Small Claims Court Act* which provides that claims are to be ". . . adjudicated informally and inexpensively but in accordance with established principles of law and natural justice." (S. 2) Adjudicator is required to maintain fairness and appearance of fairness at hearing.

Court does *not* have transcript of Small Claims Court hearing. Quality of party's right of appeal dependent upon content of Summary Report and written decision.

Appeal allowed, new hearing before different Adjudicator.

Hodgson v. Walker, 2005 CarswellBC 2952, 2005 BCSC 1658 (B.C. Master).

Application brought by plaintiff for costs in Supreme Court proceeding.

Counsel for the plaintiff argued costs in Supreme Court, from date of commencement, up to and including the application to transfer to Provincial Court.

Plaintiff found to be 50 per cent at fault, damages $1,500, total recovery of $1,800, the low end of Court scale limit of $10,000.

Onus on plaintiff to show, or justify, decision to proceed in Supreme Court. See *Garcia v. Bernath*, 2003 CarswellBC 1903, 18 B.C.L.R. (4th) 389, 2003 BCSC 1163 (B.C. Master).

Object of rule of 57(10) is to encourage actions to be brought in proper forum. Where limited expectation of any monetary recovery, appropriate it be done in the Provincial Court.

Application dismissed.

Classic Super Seamless Exteriors (1988) Ltd. v. Kaushik, 2005 CarswellSask 754, 2005 SKQB 457, 48 C.L.R. (3d) 101 (Sask. Q.B.).

Classic appeals small claims judgment alleging trial judge not impartial and that decisions respecting report and invoice.

Appeal matter brought pursuant to s. 39(1) of the *Small Claims Act, 1997*. Pursuant to s. 42 of the Act, a judge of the Court of Queen's Bench, on hearing an appeal pursuant to s. 39, can do one of three things, as follows:

> 42 . . .
>
> (a) allow the appeal and give the judgment that the trial judge should have given;
>
> (b) dismiss the appeal; or
>
> (c) order that the action be returned to the court for a new trial.

As regards counterclaims, s. 12 of the Act is relevant. Pursuant to s. 40, an appeal under the Act is to take form of an appeal on the record.

The trial judge should have allowed Mryglod to proceed with his counterclaim upon oral request as litigants are entitled to do. Mryglod believed he was entitled to transcripts of evidence of prior testimony before proceeding with his case. Litigants do not have a right to receive transcripts which was explained by the trial judge. If Mr. Mryglod wanted immediate transcripts he could have arranged for his own court reporter to be present to transcribe the evidence.

Trial judge not unfair throughout.

Many of the arguments resulted from Mryglod not being familiar with the law and rules of evidence. Trial judge empowered to make rulings throughout a trial. Litigants must respect rulings when made and continue on. Appeal dismissed.

Myrowsky v. Smith, 2005 CarswellSask 246, 12 C.P.C. (6th) 85, 2005 SKQB 177 (Sask. Q.B.).

Appeals from judgment under the *Small Claims Act, 1997*, S.S. 1997, c. S-50.11, as amended.

Court has no power to rehear or retry a case; it is limited to correcting errors of law and reversing unreasonable findings of fact. Trial judge is in privileged position as trier of fact because he has the benefit of seeing and hearing the witnesses: *Lensen v. Lensen*, 1987 CarswellSask 391, 1987 CarswellSask 520, 23 C.P.C. (2d) 33, [1987] 2 S.C.R. 672, 44 D.L.R. (4th) 1, 79 N.R. 334, [1988] 1 W.W.R. 481, 64 Sask. R. 6 (S.C.C.).

See also *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.).

Appeal dismissed.

Manji v. Ashton, 2005 CarswellBC 1409, 2005 BCSC 832 (B.C. S.C.).

Manji appealed to B.C. Supreme Court.

Decision final and conclusive.

Manji filed a notice of motion setting out the relief sought inter alia, that the hearing of this matter be re-opened to admit fresh evidence and an error of law and to consider the facts and the claim in light thereof.

Criteria for the admission of fresh evidence well settled: See *R. v. Palmer*, 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.); *H. (C.R.) v. H. (B.A.)*, 2005 CarswellBC 1174, [2005] B.C.J. No. 1121, 13 R.F.L. (6th) 302, 42 B.C.L.R. (4th) 230, 212 B.C.A.C. 262, 350 W.A.C. 262, 2005 BCCA 277 (B.C. C.A.). Those four criteria are, in short, that:

(a) the evidence is credible in the sense that it is reasonably capable of belief;

(b) the evidence could not have been obtained by the exercise of due diligence prior to trial;

(c) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue; and

(d) it must be such that if believed it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

New evidence proffered by Manji did not meet the test for admission. Not received.

Smith v. Krieger, 2005 CarswellSask 500, 2005 SKQB 308 (Sask. Q.B.), Allbright J. Trial judge dismissed the plaintiff's action and plaintiff appealed.

At the commencement of trial, the judge indicated the following:

> I have a problem here. I just realized that I know Mr. Krieger on a sort of collegial basis. We both used to work for the city of Saskatoon. And while I don't think I'm prejudice in any way, you have the right to object to me hearing this case.

Court familiar with Krieger and at the outset of proceedings brought this to attention of the parties. Parties had a right to object to him hearing the case. Both agreed that it would be appropriate for him to hear case.

Appeal dismissed.

Anderson v. Excel Collection Services Ltd., 2005 CarswellOnt 4829, 260 D.L.R. (4th) 367, 204 O.A.C. 43 (Ont. Div. Ct.).

Appeal from 135 A.C.W.S. (3d) 761.

Collection agency appealed judgment against it for damages for mental suffering arising from harassment of putative debtor, who was not in debt to putative creditor. Court below did not err in finding that agency's actions were contrary to *Collection Agencies Act*, R.S.O. 1990, c. C.14 and regulations and therefore fell below standard of reasonable care. However, court erred in awarding damages for mental distress where there was no evidence of psychiatric or medical problems.

Appeal allowed but with no costs, in light of actions of collection agency and public interest in bringing case forward.

Corral v. Aquarium Services Warehouse Outlets, 2006 CarswellOnt 15 (Ont. S.C.J.).

Appeal by plaintiff of decision by Deputy Judge McCabe sitting as a Small Claims Court judge.

Plaintiff had sought to enter Internet document as evidence. The request was refused on the grounds plaintiff failed to give notice to defendant until very day of trial. Issue whether learned trial judge erred in law as to application of the balance of probability test and he failed to allow plaintiff to file a document from the Internet on Koi disease even when that information was public knowledge and available to defendant. Appeal dismissed. Judge did adjourn case at which time Internet document filed as exhibit. Solely within purview of trial judge's discretion to determine appropriate amount of weight to give to document. Reasoning legally correct. Deference should be given to findings of fact.

Ron Robinson Ltd. v. Canadian Indemnity Co., 1984 CarswellOnt 1354, 45 O.R. (2d) 124, 2 O.A.C. 359 (Ont. Div. Ct.).

Small Claims Court dismissing action on basis of *res judicata*. Plaintiff's appeal dismissed. Divisional Court having no jurisdiction to hear appeal. S. 108 of Act not providing for appeal from order made *before* trial even if determinative of issue. *Small Claims Courts Act*, R.S.O. 1980, c. 476, s. 108.

Gelber v. Allstate Insurance Co. of Canada, 1983 CarswellOnt 457, 41 O.R. (2d) 318, 35 C.P.C. 324 (Ont. Div. Ct.).

Interlocutory order made prior to trial postponing trial date. Divisional Court without jurisdiction to entertain appeal. *Small Claims Courts Act*, R.S.O. 1980, c. 476, s. 108.

Morton v. Harper Gray Easton, 1995 CarswellBC 306, [1995] B.C.J. No. 1356, 8 B.C.L.R. (3d) 53 (B.C. S.C.).

The conduct of trial on appeal governed by the Rules of the Small Claims Court. Section 3(1)(a) of the Act empowered the Supreme Court, on appeal, to make any order which could have been made in the small claims court.

Since plaintiff could not have pursued her claim for punitive damages in Small Claims Court, she could not claim them on appeal. Neither could factual information in plaintiff's

written argument be received in Small Claims Court, as all oral evidence had to be given under oath or affirmation.

Matlin v. Crane Canada Inc., 2004 CarswellOnt 3648 (Ont. S.C.J.).

Defendant in Small Claims Court action moved before Superior Court of Justice to stay action on ground that Small Claims Court lacked jurisdiction over subject matter of action. Motion dismissed. Appeal of final order of Small Claims Court is to single judge of Divisional Court pursuant to s. 31 of *Courts of Justice Act*. Superior court judge had no inherent appellate jurisdiction in case.

Er-Conn Development Inc. v. Shaw Cablesystems Ltd., 2005 CarswellBC 740, 2005 BCSC 478 (B.C. S.C.); reversing 2004 CarswellBC 2449 (B.C. Prov. Ct.).

Judge concerned with lack of jurisdiction to hear appeal since more than 40 days had elapsed between time judgment signed and when appeal filed, contrary to s. 6 of *Small Claims Act*. Tenant granted extension of time for filing notice of appeal pursuant to s. 15 of the Act.

Lambert v. Clarke (1904), 7 O.L.R. 130 (Ont. C.A.).

Where the jurisdiction of an appellate court is dependent upon a certain sum in dispute, it is the amount recovered in the court below and not the amount of the original claim which must be relied upon to give jurisdiction.

Affordable Car Co. v. McCarthy, 2006 CanLII 5129 (N.B. C.A.).

Affordable seeks leave to appeal decision of judge of Court of Queen's Bench dismissing an application under *Small Claims Act*.

Application sought to have judgment against Affordable set aside on grounds Affordable had not been named as a party to the small claims action, had not been given notice of the proceedings and had not had an opportunity to be heard.

Nothing in either the *Small Claims Act* or *Regulation* to empower judge of Court of Appeal to grant leave to appeal a decision made under the *Small Claims Act* or *Regulation* other than decision made by judge of Court of Queen's Bench following a trial *de novo*.

Leave dismissed. As interpreted in *Naderi v. Strong*, [2005] N.B.J. No. 67, 2005 CarswellNB 89, 2005 CarswellNB 90, 280 N.B.R. (2d) 379, 734 A.P.R. 379, 2005 NBCA 10 (N.B. C.A.), no award of costs.

Levy v. Sherman Hines Photographic Ltd., 2006 CarswellNS 102, 2006 NSSC 77 (N.S. S.C.).

Small Claims Court awarded claimant judgment and costs totalling $6,537.50. The respondent (defendant) appealed the decision partially on basis of failures by adjudicator to follow requirements of natural justice.

See *Laura M. Cochrane Trucking Ltd. v. Canadian General Insurance Co.*, 1995 CarswellNS 270, 148 N.S.R. (2d) 200, 429 A.P.R. 200 (N.S. S.C.), at para. 3:

> Indeed, the Small Claims Court is not a court of record and there is no record of the evidence presented at the hearing or trial. No transcript of the evidence for the appeal court to examine or review. Appeal court obliged to accept as fact, without question, the findings of fact made by the Adjudicator as set out in the stated case.

See also *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76, 560 A.P.R. 76, 1999 CarswellNS 410 (N.S. S.C.).

Appeal dismissed.

Nelson v. Stebbings, 2006 CarswellNB 236, 2006 CarswellNB 237, 2006 NBCA 44 (N.B. C.A.).

Pursuant to s. 19 of *Act*, S.N.B. 1997, c. S-9.1, a party can appeal an adjudicator's decision to Court of Queen's Bench; section 35(2) of *New Brunswick Regulation 98-84* under the

Small Claims Act provides that such an appeal is by trial *de novo* and that a request for appeal must be filed within 30 days after the date the adjudicator's decision is filed. Application for extension of time by judge of Court of Queen's Bench dismissed. See *Atlantic Pressure Treating Ltd. v. Bay Chaleur Construction (1981) Ltd.*, 1987 CarswellNB 29, [1987] N.B.J. No. 528, 65 C.B.R. (N.S.) 122, 81 N.B.R. (2d) 165, 205 A.P.R. 165 (N.B. C.A.), Ryan J.A. at para. 7. Appeal allowed. Application judge failed to consider all the relevant factors.

Appeal allowed.

Duke v. King, 2006 CarswellNfld 79, 2006 NLTD 41 (N.L. T.D.).

Duke appealed Small Claims Court decision to award damages to King for breach of contract. Duke took no steps to perfect his appeal for almost 18 months. Application allowed. Appeal had no merit.

R. v. Alessi-Severini, 2006 CarswellMan 75, 2006 MBCA 31 (Man. C.A. [In Chambers]).

Applicant seeks leave to appeal decision of Queen's Bench judge, made in a small claims matter. Leave to appeal granted only on a question of law. See Iacobucci J. in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 1997 CarswellNat 368, 1997 CarswellNat 369, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, 209 N.R. 20, 50 Admin. L.R. (2d) 199 (S.C.C.) (at para. 35).

Under s. 3(1) of the Act a claim may be filed for an amount of money not exceeding $7,500. The judge awarded almost $1,000 over that amount. The applicant asserts that the judge exceeded his jurisdiction, and in doing so committed an error in law. Leave granted to the applicant to appeal the decision of judge on the following question: Did the judge err in law in awarding an amount in excess of $7,500?

Bentley v. Humboldt Society for Aid to the Handicapped, 2006 CarswellSask 164, 2006 SKQB 125 (Sask. Q.B.).

Appellant appeals judgment. Standard of appellate review found in *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.).

Jurisdiction of appellate court, acting under provisions of the *Small Claims Act, 1997*, is not to retry the case or rehear the case. Judgment reflects findings of fact. There was evidence before the trial judge upon which she could reach the conclusions she did. Appeal dismissed.

Pearce v. UPI Inc., [2006] O.J. No. 1836 (Ont. Div. Ct.).

Appellant ("UPI") appeals Master Beaudoin's order.

UPI's appeal of the Master's order refusing to dismiss Plaintiff's claim not proper before a single judge of the Divisional Court under s. 19(1)(c) of the *Courts of Justice Act*, because order interlocutory; see *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd./Groupe d'assurance canadienne generale Ltée*, 1998 CarswellOnt 4909, [1998] O.J. No. 5291, 42 C.L.R. (2d) 241, *(*sub nom. *Mason (V.K.) Construction Ltd. v. Canadian General Insurance Group Ltd.)* 116 O.A.C. 272, (sub nom. *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.)* 42 O.R. (3d) 618 (Ont. C.A.). Appeal should have been brought under s. 17(a) of the *Courts of Justice Act* before a Superior Court judge, as required by Rule 62.01. The Master's order also dismissed UPI's third party claim against Kemar, a final order which is properly before this court. Because a third party claim is not technically part of the same "proceeding" as the main action, s. 19(2) of the *Courts of Justice Act* does *not* confer jurisdiction to transfer the interlocutory appeal to the Divisional Court to be heard together with the appeal from the Master's final order.

Appeal dismissed against the Master's order whereby he refused the Appellant UPI's motion for summary judgment dismissing the Plaintiffs' claim. Appeal allowed and the Master's order is set aside to the extent that he granted summary judgment to the Respondent Kemar, dismissing UPI's third party claim against Kemar.

Sepe v. Monteleone, 2006 CarswellOnt 234, 262 D.L.R. (4th) 105, 78 O.R. (3d) 676, 207 O.A.C. 38, 22 C.P.C. (6th) 323 (Ont. C.A.).

Plaintiff appealing both dismissal of claim and award of judgment on defendant's counterclaim. Each amount under $25,000 but total amount over $25,000. Appeal falling within monetary jurisdiction of Divisional Court. Word "or" in s. 19(1)(a) of *Courts of Justice Act* to be given its ordinary disjunctive meaning. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 19(1)(a).

Kaur v. Deopaul, 2006 CarswellOnt 6388, 216 O.A.C. 247 (Ont. Div. Ct.).

Deputy Judge Iacono dismissed Plaintiff's action as being statute barred.

Plaintiff appealed that judgment be set aside and matter set down for trial.

Three issues in appeal:

1. Is motion for summary judgment permissible in the Small Claims Court?
2. When did the limitation period start to run?
3. Did the Defendant waive the limitation period?

There is no rule in the *Small Claims Court Rules* that allows a motion for summary judgment.

See *Clayton v. Zorn*, Claim No. T96340/04, a medical malpractice action, commenced 20 months after expiry of the limitation period. The court said:

> There is no provision in the Rules of the Small Claims Court to bring a motion for summary judgment. See *Wolf v. Goldenberg*, [2003] O.J. No. 3067, Maefs, Deputy Judge set out the interrelationship between Rules 1.03(2) and 12.02(2) of the Rules of the Small Claim Court and Rule 21.01(1) dismissing an action on a point of law.
>
> Defendant should be able to bring a motion for summary judgment similar to Rule 20.01(3) of the *Rules of Civil Procedure* for summary judgment.

Jurisdiction in Small Claims Court to dismiss the action, notwithstanding the absence of a specific provision, if the limitation period has clearly expired.

Small Claims Court action out of time. No waiver or estoppel. Claim dismissed.

Elliott v. Chiarelli, 2006 CarswellOnt 6261, 83 O.R. (3d) 226 (Ont. S.C.J.).

Appeal from judgment of Deputy Judge dismissing appellant's malpractice claim against the respondent. The appellant "hired" respondent, Vince Chiarelli, a paralegal. Claim in Small Claims Court against Chiarelli to recover money paid him, based on professional negligence and breach of contract. Appeal allowed.

Issue of standard of care applicable to a paralegal: see *West v. Eisner*, 1999 CarswellOnt 4017, [1999] O.J. No. 4705, 48 C.C.L.T. (2d) 274, 41 C.P.C. (4th) 378 (Ont. S.C.J.), Stinson J.; and *ter Neuzen v. Korn*, 1995 CarswellBC 593, 1995 CarswellBC 1146, [1995] S.C.J. No. 79, EYB 1995-67069, [1995] 10 W.W.R. 1, 64 B.C.A.C. 241, 105 W.A.C. 241, 188 N.R. 161, 11 B.C.L.R. (3d) 201, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577 (S.C.C.).

Standard of review is palpable and overriding error. Deputy Judge erred in construing relationship between parties and contract too narrowly. Standard based on common sense and ordinary understanding appropriate. Respondent's advice clearly wrong. Respondent misled appellant. Respondent acted unconscionably.

Bird v. Ireland, 2005 CarswellOnt 6945, [2005] O.J. No. 5125, 205 O.A.C. 1 (Ont. Div. Ct.).

Plaintiff successfully sued to recover commission. Defendant appealed. Appeal allowed. Plaintiff not entitled to claim commission. Trial judge's findings based on misapprehension of evidence. Costs award set aside. Costs awarded exceeded maximum permitted by *Small Claims Court Rules* (Ont.) and s. 29 of *Courts of Justice Act* (Ont.). Section 29 of Act was to limit powers of Small Claims Court to award costs, not to increase it.

Dunbar v. Helicon Properties Ltd., 2006 CarswellOnt 4580, [2006] O.J. No. 2992, 213 O.A.C. 296 (Ont. Div. Ct.).

Appellants allege trial judge made two errors in assessment of damages for breach of contract.

Appellants argue that because monetary jurisdiction of the Small Claims Court is $10,000, the trial judge should have deducted the amounts set off in their favour from that amount instead of the total damages alleged by the respondent, an amount found to exceed $15,000. Appellants failed to satisfy appeal court that trial judge exceeded monetary limit of the Small Claims Court. He awarded the respondent $10,000, which complied with the applicable regulation: see O. Reg. 626/00.

Trial judge awarded respondent costs of $750 inclusive of approximately $250 in disbursements. The appellants argue that this $500 costs award exceeds the maximum provided for by way of counsel fee pursuant to R. 19.04 by $200. However, this provision has been interpreted as a daily counsel fee award: see *Bird v. Ireland*, 2005 CarswellOnt 6945, [2005] O.J. No. 5125, 205 O.A.C. 1 (Ont. Div. Ct.).

Appeal dismissed. Respondent awarded costs in fixed amount of $3,000.

Boyle, Re, 2006 CarswellAlta 1004, 2006 ABQB 585, 24 C.B.R. (5th) 252 (Alta. Q.B.).

Judge presided over bankruptcy proceedings and contempt hearings. Debtor brought application for removal of judge for bias. Application dismissed. Reasonable observer would not find likelihood of bias.

Ghalamzan v. Aslani, 2006 CarswellBC 2938, 2006 BCSC 1778 (B.C. S.C.).

Appeal and a cross-appeal from the decision of Honourable Judge Bagnall of the Provincial Court of British Columbia of July 18, 2006.

Section 12 of the *Small Claims Act*, R.S.B.C. 1996, c. 430 reads:

> An appeal to the Supreme Court under this Act
>
> (a) may be brought to review the order under appeal on questions of fact and on questions of law, and
>
> (b) must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that court as a new trial.

The appropriate standard of review in *King v. Holker*, 2000 BCSC 64, 2000 CarswellBC 1435 (B.C. S.C.). On an appeal (which is not an appeal by way of trial *de novo*) to this court from judgment of Small Claims Division of Provincial Court, issue must be decided same basis and same criteria as appeal to Court of Appeal from a judgment of this court in a civil action (see *Stewart v. Strutt*, 1998 CarswellBC 565, [1998] B.C.J. No. 636 (B.C. S.C.) at para. 10). See also *Gomes v. Insurance Corp. of British Columbia*, [1998] B.C.J. No. 280, 1998 CarswellBC 164, 33 M.V.R. (3d) 110, 45 B.C.L.R. (3d) 206 (B.C. C.A.).

No error of fact or law. Appeal and the cross-appeal dismissed.

Canadian Kawasaki Motors Inc. v. Freedom Cycle Inc., 2006 CarswellNS 512, 2006 NSSC 347, *(*sub nom. *Freedom Cycle Inc. v. Canadian Kawasaki Motors Inc.)* 792 A.P.R. 268, *(*sub nom. *Freedom Cycle Inc. v. Canadian Kawasaki Motors Inc.)* 249 N.S.R. (2d) 268 (N.S. S.C.).

Appeal from findings of Small Claims Court adjudicator who found appellant Canadian Kawasaki Motors Inc. liable in negligence.

Appellant relied on *Stein v. "Kathy K." (The)*, 1975 CarswellNat 385, 1975 CarswellNat 385F, [1976] 1 Lloyd's Rep. 153, 6 N.R. 359, 62 D.L.R. (3d) 1, [1976] 2 S.C.R. 802 (S.C.C.). In *Stein*, the court was a court of record. In Small Claims Court there is no transcript of the proceeding. Incumbent on adjudicator to expressly state findings of fact and basis for findings.

With respect to alternate pleadings the appellants rely on *Malloy v. Atton*, [2004] N.S.J. No. 217, 2004 CarswellNS 218, 50 C.P.C. (5th) 176, 2004 NSSC 110, 225 N.S.R. (2d) 201, 713 A.P.R. 201 (N.S. S.C.) in which Murphy J. found that in the absence of *Small Claims Court Rules* the *Civil Procedure Rules* may be consulted for guidance. They also rely on *R. Llewellyn Building Supplies Ltd. v. Nevitt*, 1987 CarswellNS 319, [1987] N.S.J. No. 262, 80 N.S.R. (2d) 415, 200 A.P.R. 415 (N.S. Co. Ct.) where the court found that *CPR*s' 14.20 and 16 could inform s. 25 of the *Small Claims Act*, with respect to the adjudicator's authority to "order the counterclaim to be excluded or tried separately." A pleading in the alternative can be supported.

Appeal dismissed.

Sussex Insurance Agency.Com Inc. v. Insurance Corp. of British Columbia, 2006 CarswellBC 2074, 60 B.C.L.R. (4th) 230, 2006 BCSC 1269 (B.C. S.C.).

Issue as to appropriate test determining whether to reopen civil trial based on new evidence. Defendants asserted binding authority recent Supreme Court of Canada judgment in civil matter (civil case) which states that trial can only be reopened if new evidence would probably change result. Plaintiff relied on judgment of Supreme Court of Canada in criminal matter (criminal case) where Court adopted two-part test for reopening trial which only requires that there be "reasonable possibility" that verdict would be different. Civil case binding authority. See *R. c. Taillefer*, [2003] S.C.J. No. 75, 2003 CarswellQue 2765, 2003 CarswellQue 2766, *(*sub nom. *R. v. Taillefer)* [2003] 3 S.C.R. 307, *(*sub nom. *R. v. Taillefer)* 114 C.R.R. (2d) 60, *(*sub nom. *R. v. Taillefer)* 179 C.C.C. (3d) 353, *(*sub nom. *R. v. Taillefer)* 233 D.L.R. (4th) 227, *(*sub nom. *R. v. Taillefer)* 313 N.R. 1, 2003 SCC 70, 17 C.R. (6th) 57 (S.C.C.) in which the court adopted a two-part test derived from another criminal case, *R. v. McQuaid*, [1997] N.S.J. No. 20, 1997 CarswellNS 129, *(*sub nom. *R. v. Dixon)* 156 N.S.R. (2d) 81, *(*sub nom. *R. v. Dixon)* 461 A.P.R. 81 (N.S. C.A.).

Two years before *Taillefer* was decided, the Supreme Court of Canada considered this issue in the context of a civil case in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2001), 150 O.A.C. 12, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, [2001] S.C.J. No. 61, 2001 SCC 59, 11 C.C.E.L. (3d) 1, [2001] 4 C.T.C. 139, 204 D.L.R. (4th) 542, 274 N.R. 366, 17 B.L.R. (3d) 1, 55 O.R. (3d) 782 (headnote only), 12 C.P.C. (5th) 1, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, 2002 C.L.L.C. 210-013 (S.C.C.). *Sagaz* followed.

Edwards Dean & Co. v. University of Kings College, 2006 CarswellNS 507, 2006 NSSC 341, *(*sub nom. *University of Kings College v. Edwards Dean & Co.)* 249 N.S.R. (2d) 222, *(*sub nom. *University of Kings College v. Edwards Dean & Co.)* 792 A.P.R. 222 (N.S. S.C.).

Appeal by University of Kings College from an order made by adjudicator of Small Claims Court. No transcript of proceedings. Must be a palpable and overriding error. See *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76, 560 A.P.R. 76, 1999 CarswellNS 410 (N.S. S.C.). Adjudicator committed an error of law. Remitted back for hearing before another adjudicator.

Rébéré v. Van Horlick, 2006 CarswellSask 20, 2006 SKQB 20, 274 Sask. R. 212 (Sask. Q.B.).

Trial judge denied appellant opportunity to call witnesses from church mediation where agreement was allegedly reached. By denying appellant opportunity to call witnesses, trial

judge committed error in law. Appellant should be afforded opportunity to have court hear issue of whether agreement was reached and effect of agreement.

Gidda v. Malik Law Office, 2006 CarswellOnt 6506, *(*sub nom. *Gidda v. Malik)* 216 O.A.C. 241 (Ont. Div. Ct.).

Appeal from decision of Deputy Judge McCrea dated March 7, 2005 dismissing plaintiff's claim.

The Deputy Judge suggested to parties that case proceed on an agreed statement of facts.

Appeal dismissed. Trial judge found negligence and then proceeded to find that the action should be dismissed as damages not proven. As such, he did not address causation. On agreed facts, plaintiff has not established that the negligence of the law firm caused his damage.

Cosentino v. Roiatti, 2006 CarswellOnt 7944, 219 O.A.C. 66 (Ont. Div. Ct.).

Dispute over payment of solicitor's account issued November 6, 1998. Deputy Judge accepted the evidence of both Roiattis over that of Cosentino.

Judge not required to demonstrate that he or she knows the law and that he or she has considered all aspects of the evidence. If judge states his or her conclusions and conclusions supported by evidence, judgment should not be overturned. See *R. v. Sheppard*, 2002 SCC 26, [2002] S.C.J. No. 30, 2002 CarswellNfld 74, 2002 CarswellNfld 75, 162 C.C.C. (3d) 298, 210 D.L.R. (4th) 608, 50 C.R. (5th) 68, 284 N.R. 342, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, [2002] 1 S.C.R. 869 (S.C.C.) para. 32.

Appeal dismissed.

Meyknecht-Lischer Contractors Ltd. v. Stanford, 2006 CarswellOnt 6806, 57 C.L.R. (3d) 145 (Ont. Div. Ct.).

Appeal from judgment of Deputy Judge. *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) referred to. Standard of review for questions of law that of correctness; for findings of fact that of palpable and overriding error. The standard of palpable and overriding error also applies to the inference of fact drawn by the trial judge. Issues raised in appeal of mixed fact and law.

Appeal dismissed on all grounds.

Brown v. Edwards, 2006 CarswellOnt 5472 (Ont. Div. Ct.).

Appeal proceeded on sole grounds that Deputy Judge, while acknowledging the correct standard of care, applied a higher standard in his specific findings.

Correct standard to apply to defendant was that of a simple bailee. Deputy Judge's fact-findings must not be disturbed. He was correct in finding that ordinary standard of care applicable to bailees applied.

Appeal allowed, action dismissed.

Antra Electric (1998) Ltd. v. Faema Corp. 2000 Ltd., 2006 CarswellOnt 1190 (Ont. Div. Ct.).

F unrepresented at trial and plaintiff was represented by paralegal. F's principal called as witness by plaintiff and was cross-examined by plaintiff and judge before putting his case in. Trial judge made no effort to assist him with court process. F not fluent in English. Trial judge ruled that F's only witness could not give evidence. Trial conducted in unfair manner which justified setting judgment aside. Appeal allowed.

Routhier v. Borris, 2006 CarswellOnt 7458 (Ont. Div. Ct.).

Appellants appealled from decision of Deputy Judge Houle. They alleged he erred by finding that the words "new roof in 2002" constituted a misrepresentation. Deputy Judge made a finding of mixed fact and law, and according to *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.), should be given great deference.

Findings of Deputy Judge required for responsibility for a negligent misrepresentation as set out in *Queen v. Cognos Inc.*, 1993 CarswellOnt 801, 1993 CarswellOnt 972, EYB 1993-67486, [1993] S.C.J. No. 3, 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) are mixed findings of fact and law and therefore entitled to great deference.

Appeal dismissed.

Carreau v. Turpie, 2006 CarswellOnt 6513 (Ont. Div. Ct.).

Appeal from judgment of Deputy Judge Houlahan, Ottawa Small Claims, February 9, 2006.

Trial judge did not misapprehend the evidence.

Trial judge stated correctly the legal definition of "fraudulent misrepresentation" as stated by Leitch J. in *Morlani v. McCormack*, 1999 CarswellOnt 1430, [1999] O.J. No. 1697 (Ont. Gen. Div.), and as approved by the Supreme Court of Canada in *Nesbitt v. Redican*, 1923 CarswellOnt 92, [1923] S.C.J. No. 47, [1924] 1 W.W.R. 305, [1924] S.C.R. 135, [1924] 1 D.L.R. 536 (S.C.C.).

Appeal dismissed.

Oberoi v. R., 2005 CarswellNat 5588, 2005 CarswellNat 5849, 2006 TCC 293, 2006 D.T.C. 3110 (Eng.), [2006] 4 C.T.C. 2316, 2006 CCI 293 (T.C.C.).

Counsel for both parties signed out-of-court settlement. No evidence appellant forced to sign. No ground to annul out-of-court settlement.

Drzemczewska v. Grigorescu, 2006 CarswellOnt 5720, 216 O.A.C. 119 (Ont. Div. Ct.).

Appeal from decision of Deputy Judge denying claim and granting counterclaim. Appellants allege words or actions of presiding judge give rise to a reasonable apprehension of bias. Hodson also alleges that the fact that he is hearing impaired was a factor which coloured the progress of the trial.

The test for finding a reasonable apprehension of bias set out by Cory J. in *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.). See also *Sorger v. Bank of Nova Scotia*, 1998 CarswellOnt 2108, 109 O.A.C. 130, 160 D.L.R. (4th) 66, 39 O.R. (3d) 1 (Ont. C.A.).

In the case of *Garry v. Pohlmann*, 2001 CarswellBC 1893, [2001] B.C.J. No. 1804, 2001 BCSC 1234, 12 C.P.C. (5th) 107 (B.C. S.C.), cited in *Auto Trim Shop v. Preston*, 2005 CarswellOnt 577 (Ont. S.C.J.), the court stated that, "appellate courts have recognized that the role of trial judges in Small Claims Court is often, by necessity, more interventionist." An appellate court must consider interventions in context of the Small Claims Court proceedings and in this case, with fact neither party legally represented. No evidence of any inappropriate conduct or remarks related to the appellant's hearing impairment.

Three contextual factors that must be considered by an appeal court are:

(a) The fact that this is a Small Claims Court proceeding and proceedings are more informal;

(b) The parties were self represented and appeared to be unaware of how to enter evidence, exhibits, prove damages, etc.; and

(c) The nature of the case, namely a fact-based construction dispute involving what work was done, was it done properly or not, and the value of the work performed.

Appeal dismissed.

R. v. Shiwram, 2006 CarswellOnt 8424, [2006] O.J. No. 4206 (Ont. C.J.).

Unrepresented defendant not given fair opportunity to cross-examine officer. Trial justice interrupted defendant, then asked him questions which went to the heart of his defence and did not allow him to finish his response. Trial was not fair or had the appearance of fairness to objective observer.

Bhaduria v. National Post, 2005 CarswellOnt 827, [2005] O.J. No. 809 (Ont. C.A.).

Appellant appealled from summary judgment dismissing his claim that respondents defamed him.

A Small Claims Court judge had made a finding that the appellant "did acknowledge that he had said that he had a LL.B. when he did not." Appellant did not file transcripts to support assertion nor evidence that he had attempted to obtain such transcripts. Appeal dismissed.

Esbin Realty Corp. v. Dauson Properties Ltd. & Noik Group of Cos., 2006 CanLII 20089 (Ont. Div. Ct.).

Dauson Properties Ltd. & Noik Group of Companies appeals from judgment of Justice D. Godfrey dated June 30, 2005. Ordered Dauson to pay plaintiff $9,223.40 plus interest and costs.

Appeal involved interpretation of listing agreement.

No reason to interfere with trial judge's determination that plaintiff entitled to its commission.

Appeal dismissed.

Pleasant Developments Inc. v. Iyer, 2006 CanLII 10223 (Ont. Div. Ct.).

Appeal by Pleasant from judgment of Deputy Judge Kilian of Small Claims Court awarding the Respondents refund of $9,300 of deposit of $10,000.

Trial judge erred in awarding Respondents relief from forfeiture of deposit.

Appeal allowed.

Ferguson v. Birchmount Boarding Kennels Ltd., 2006 CarswellOnt 399, 207 O.A.C. 98, 79 O.R. (3d) 681 (Ont. Div. Ct.).

Plaintiffs sued defendants for damages relating to loss of their dog. After trial in Small Claims Court, Deputy Judge awarded plaintiffs $2,527.42 in damages plus prejudgment interest and costs. The court dismissed the plaintiff's claim as against two named defendants.

Applicable standard of review on question of law that of correctness. Factual findings not to be reversed unless it can be established that trial judge made a palpable and overriding error: see *Housen v. Nikolaisen*, REJB 2002-29758, 2002 CarswellSask 178, [2002] S.C.J. No. 31, 2002 SCC 33, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.).

Decision well supported by evidence.

Appeal dismissed.

Piacente v. Zeppieri & Associates, 2006 CarswellOnt 3097 (Ont. Div. Ct.).

Appellant, Zeppieri & Associates, appealed from judgment of Deputy Judge Skolnik in which he ordered appellant to pay damages to plaintiff, Piacente, of $6,000.

Issue whether Deputy Judge made palpable and overriding error.

Deputy Judge made findings with respect to credibility of all the witnesses.

Appeal dismissed.

Brown v. Godfrey, 2006 CarswellOnt 3091, 210 O.A.C. 156 (Ont. Div. Ct.).

Appeal from decision of Tierney J. in which he awarded damages to Brown, $8,723.07, and costs of $150.

Trial judge erred in awarding damages for mental distress. No reference in the claim for such damages. Plaintiff cannot recover for claims not pleaded, since defendants did not have proper notice of issue to be able to respond adequately. See *Rodaro v. Royal Bank*, 2002 CarswellOnt 1047, [2002] O.J. No. 1365, 22 B.L.R. (3d) 274, 157 O.A.C. 203, 49 R.P.R. (3d) 227, 59 O.R. (3d) 74 (Ont. C.A.).

Such damages rarely awarded for breach of contract. Not an appropriate case to award them. See also *Turczinski Estate v. Dupont Heating & Air Conditioning Ltd.*, 2004 CarswellOnt 4532, *(*sub nom. *Turczinski v. Dupont Heating & Air Conditioning Ltd.)* 191 O.A.C. 350, 38 C.L.R. (3d) 123, 246 D.L.R. (4th) 95 (Ont. C.A.).

Trial judge erred in awarding damages for costs incurred in contemplation of litigation. The costs recoverable matter of procedural law governed by the *Small Claims Court Rules* and the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Pursuant to s. 134(1) of the *Courts of Justice Act*, Appellate court may make any order or decision that ought to or could have been made by the court appealed from.

Appeal allowed. Award of $8,723.07 set aside, order to go awarding the respondent $5,000.

Stebbings v. Nelson, 2006 CarswellNB 314, 2006 NBQB 195 (N.B. Q.B.).

Defendant brought application to extend time to file appeal for a trial *de novo*. Notes taken by defendant after asking questions on appeal process to person at clerk's office established intention to appeal from time defendant received decision. Defendant understood that clerk's office would send necessary form for appeal. Defendant received demand for payment from plaintiffs. Defendant went to clerk's office to inquire about status of appeal and learned of time-limit. In the interests of justice to grant application to extend time for filing request to appeal.

Wan v. Wan, 2005 CarswellOnt 5637 (Ont. Div. Ct.).

Deputy Judge erred in setting aside default judgment granted to plaintiff. Deputy Judge noted that there were number of actions in Small Claims Court between same parties and became concerned about monetary jurisdiction of that court because claims could not be divided to come within $10,000 limit. However, no motion existed to set aside default judgment. Plaintiff had no notice that her judgment was at risk. Order made without jurisdiction. Appeal allowed.

936464 Ontario Ltd. v. Mungo Bear Ltd., [2003] O.J. No. 3795, 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754 (Ont. Div. Ct.).

On appeal of small claims court judgment, appellant asserted judge lacked jurisdiction to award damages on *quantum meruit* basis because *Courts of Justice Act* (Ont.) s. 96(3) provided equitable remedies to be available in Superior Court of Justice. Word "court" in s. 96(1) not defined and hence includes small claims court and court's jurisdiction over monetary amounts of $10,000 or less also contemplated equitable remedies.

Dhillon v. Dhillon, 2005 CarswellBC 2541, 28 C.P.C. (6th) 308, 2005 BCCA 529 (B.C. C.A. [In Chambers]).

Appellant appealed for leave to forgo the filing of transcript of the trial or at least some part of it. The respondent did not agree. *Held*: Application dismissed. Section 10(2) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, of sufficient breadth that a judge of the court may dispense with a transcript if he or she thought interests of justice required it.

Union des producteurs agricoles c. Rocheleau, EYB 2005-92512, 2005 CarswellQue 4703, 2005 QCCA 666 (Que. C.A.). Reasons in French.

Certain comments made in course of proceeding that R should obtain legal counsel were made in interest of justice and did not reflect biased attitude. Application dismissed.

CAA Insurance Co. v. Botsis, 2006 CarswellOnt 5087, 214 O.A.C. 323, 82 O.R. (3d) 379, [2006] I.L.R. I-4535 (Ont. Div. Ct.).

CAA appealed from decision of Deputy Judge Winer granting judgment to respondent in sum of $8,075.

Deputy Judge held appellant estopped from relying on the one-year limitation period.

See *Maddix v. White*, [2002] O.J. No. 230, 2002 CarswellOnt 309 (Ont. C.A.).

Test for promissory estoppel set out in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] S.C.J. No. 43, 1991 CarswellOnt 450, 1991 CarswellOnt 1019, EYB 1991-67614, [1991] I.L.R. 1-2728, 125 N.R. 294, 80 D.L.R. (4th) 652, 47 O.A.C. 333, *(*sub nom. *Travellers Indemnity Co. of Canada v. Maracle)* [1991] 2 S.C.R. 50, 50 C.P.C. (2d) 213, 3 C.C.L.I. (2d) 186, 3 O.R. (3d) 510 (note) (S.C.C.).

Appeal allowed. Judgment in favour of respondent set aside. Action dismissed.

Bourbonnais c. Canada (Procureur général), 2006 CarswellNat 1030, 2006 CarswellNat 318, *(*sub nom. *Bourbonnais v. Canada (Attorney General))* 348 N.R. 28, 2006 FCA 62, [2006] 4 F.C.R. 170, 2006 CAF 62, *(*sub nom. *Bourbonnais v. Canada (Attorney General))* 267 D.L.R. (4th) 120, 46 Admin. L.R. (4th) 70 (F.C.A.).

Former member asked IRB to assume responsibility for the legal costs incurred in defending himself. The IRB refused to do so, stating that the member had not established, as required by art. 7.2 of the Treasury Board's *Policy on the Indemnification of and Legal Assistance for Crown Servants*, that he had "acted honestly and without malice within his . . . scope of duties or employment and [had] met reasonable departmental expectations.".

No reasonable and informed person would perceive that judicial independence was compromised because Superior Court judges had to bear the legal costs of their defence against such charges unless there is evidence that the government attempting to punish particular judge.

Walters v. Walters, 2006 CarswellOnt 4137, 212 O.A.C. 77 (Ont. C.A.).

Parties were unrepresented.

Court of Appeal allowed husband's appeal and ordered new trial. Because husband was unrepresented, unfair to discourage him from preparing proper documents and to require him to proceed without prior formal notice of, and without an explicit statement of, the wife's claims. Proceeding to trial amounted to denial of natural justice.

Somerleigh v. Polhill, [2005] O.J. No. 4367, 2005 CarswellOnt 5005, 203 O.A.C. 1 (Ont. Div. Ct.).

Divisional Court had no jurisdiction to hear appeal except as provided for by statute. Appeal from final order of Superior Court Judge to be heard by Court of Appeal. Party sought to appeal order dismissing motion to set aside certificate of costs of $6,908. Appeal not in respect of single payment or not more than $25,000. Appeal ordered transferred to Ontario Court of Appeal.

Ellis v. MacPherson, 2006 CarswellPEI 7, 21 C.P.C. (6th) 258, 2006 PESCAD 3, 253 Nfld. & P.E.I.R. 345, 759 A.P.R. 345, 40 R.P.R. (4th) 246 (P.E.I. C.A.).

Appeal Court reconsidered its reasons for judgment with respect to award of costs to appellant. Formal order not taken out. Appellant's claim for counsel fee on hearing of appeal accidentally overlooked. Fee ordered paid by respondent to appellant together with other costs awarded to her by reasons for judgment.

Lipcsei v. Trafalgar Insurance Canada, 2006 CarswellOnt 1104, *(*sub nom. *Lipcsei v. Trafalgar Insurance Co. of Canada)* 207 O.A.C. 387, 36 C.C.L.I. (4th) 288 (Ont. Div. Ct.).

Lipcseis sued insurer and contractor. Deputy judge dismissed claim. Lipcseis appealed. They argued oral reasons of deputy judge so brief as to be inadequate under the circumstances. The Divisional Court, per Greer J., allowed the appeal. Reasons two and one half pages in length. Judges owed an obligation to all parties to give reasons for their decision. The deputy judge had not followed that reasoning.

R. v. Alessi-Severini, 2006 CarswellMan 75, 2006 MBCA 31 (Man. C.A. [In Chambers]).

Small claims court judge found that applicant terminated her employment prior to agreement being signed, requiring her to return $8,497 Recruitment/Retention Allowance. Small claims court's monetary jurisdiction of $7,500. Leave to appeal was granted on question of whether judge erred in law in awarding amount in excess of $7,500.

Pirner v. Pirner, 2005 CarswellOnt 6878, 22 R.F.L. (6th) 291, 208 O.A.C. 147 (Ont. C.A.).

Trial judge asked party to call certain witness but withdrew his request when he realized that he should have left the conduct of the trial to counsel. Court of Appeal held that trial judge's intervention did not amount to an impermissible usurpation of the function of counsel nor did it raise a reasonable apprehension of partiality.

Thompson v. Consolidated Fastfrate Inc., 2006 CarswellSask 416, [2006] 9 W.W.R. 414, 378 W.A.C. 1, 285 Sask. R. 1, 2006 SKCA 75 (Sask. C.A.).

New trial ordered. Corporation did not receive fair trial. Employee failed to show that counsel's misconduct did not affect jury verdict. Several comments of employee's counsel inappropriate and intended to invite and encourage jury to make its determination based on irrelevant considerations including emotion and sympathy for employee instead of evidence.

Liu Estate v. Chau, 2004 CarswellOnt 442, 69 O.R. (3d) 756, 236 D.L.R. (4th) 711, 182 O.A.C. 366 (Ont. C.A.).

Trial judge directing female defendant to leave courtroom while husband testifying. Direction contrary to rule 52.06(2) of *Rules of Civil Procedure*. Party's inherent right to be present at trial to be curtailed only in exceptional circumstances. See *Baywood Paper Products Ltd. v. Paymaster Cheque-Writer (Canada) Ltd.*, 1986 CarswellOnt 465, [1986] O.J. No. 2076, 13 C.P.C. (2d) 204, 57 O.R. (2d) 229 (Ont. Dist. Ct.) at p. 239 O.R., "[t]he presence of a party at the examination for discovery, like the presence of a party at trial, is consistent with due process and the right to protect his or her interests by observing the conduct of the examination.".

Thiessen v. British Columbia (Attorney General), 2006 CarswellBC 2194, 2006 BCCA 388, 230 B.C.A.C. 199, 380 W.A.C. 199 (B.C. C.A. [In Chambers]).

Thiessen applied for indigent status and for an extension of time for bringing an appeal. Not the court's practice to make an order granting such status if the judge concluded that the proposed appeal had no possibility of success. No possibility of success. Therefore, not appropriate to grant indigent status.

Peart v. Peel Regional Police Services Board, [2006] O.J. No. 4457, 2006 CarswellOnt 6912, 39 M.V.R. (5th) 123, 43 C.R. (6th) 175, 217 O.A.C. 269 (Ont. C.A.).

Trial judges are not required to vet each and every step in their fact-finding analysis with counsel. Counsel cannot reasonably claim to be taken by surprise when a trial judge factors the failure to produce potentially supportive evidence into his or her consideration of the weight to be assigned to certain evidence offered at trial.

Walford v. Stone & Webster Canada LP, 2006 CarswellOnt 6873, 217 O.A.C. 166 (Ont. S.C.J.).

Plaintiff appealed dismissal of his action and subsequent costs. Divisional Court, per Power J., held that Rule 61.03(7) of the *Rules of Civil Procedure* applied, request for leave to appeal costs award must be included in notice of appeal respecting the dismissal of the action or supplementary notice of appeal. Issue as to whether leave to appeal should be granted under s. 133(b) of the *Courts of Justice Act* not subject to criteria for leave to appeal in Rule 62.02.

Matthews v. Royal & SunAlliance Canada, 2007 CarswellNfld 30, 2007 NLTD 11, 45 C.C.L.I. (4th) 138, *(*sub nom. *Matthews v. Royal & Sun Alliance Insurance)* 798 A.P.R. 255, *(*sub nom. *Matthews v. Royal & Sun Alliance Insurance)* 263 Nfld. & P.E.I.R. 255 (N.L. T.D.).

Appeal of decision of Provincial Court denying request for postponement to retain counsel. No error committed.

Appeal also on ground trial judge did not exclude respondent's only witness from court during appellant's testimony. There had been no request for exclusion.

Judge's decisions discretionary in nature.

Trial judge noted that it was usual that parties in Small Claims Court are not represented by counsel, appellant had represented himself throughout the proceedings and that he had drafted his own documents in an adequate manner.

Ibrahim v. Kadhim (2007), 2007 CarswellOnt 6 (Ont. S.C.J.); additional reasons at (2007), 2007 CarswellOnt 5606, 86 O.R. (3d) 728 (Ont. S.C.J.).

Appeal by plaintiffs, defendants by counterclaim, from judgment of Deputy Judge. Deputy Judge dismissed Kadhim's and granted Ibrahim's (the "respondent") counterclaim.

Interventions did not result in unfair trial or created reasonable apprehension of bias. Nature of Small Claims Court proceedings by necessity results in trial judges being more interventionist. See *Garry v. Pohlmann*, 2001 CarswellBC 1893, [2001] B.C.J. No. 1804, 2001 BCSC 1234, 12 C.P.C. (5th) 107 (B.C. S.C.), at page 12 and *Wil v. Burdman*, [1998] O.J. No. 2533, 1998 CarswellOnt 2541 (Ont. Div. Ct.). Appeal dismissed.

Levy v. Sherman Hines Photographic Ltd., 2006 CarswellNS 102, 2006 NSSC 77 (N.S. S.C.).

Defendant appealed judgment against it rendered by adjudicator of small claims court. No record transcribed and appeal limited to summary report prepared by adjudicator. Appellate court required to accept facts related therein as true. None of defendant's grounds of appeal which related to procedural fairness borne out by summary report. Appeal denied.

Cymbalski v. Alcorn, 2006 CarswellOnt 1498, 209 O.A.C. 47 (Ont. Div. Ct.).

Ontario Housing Rental Tribunal allowed landlord's application to terminate a tenancy. The tenants appealed. No transcript or tape recording was available for the proceedings due to a mechanical malfunctioning of recording equipment.

In the absence of transcript, the court could not determine issues raised on the appeal. Court allowed appeal, set aside the decision, and directed that matter be remitted to Tribunal.

Gemmell v. Reddicopp, 2005 CarswellBC 3041, 48 B.C.L.R. (4th) 349, 2005 BCCA 628, 220 B.C.A.C. 219, 362 W.A.C. 219 (B.C. C.A.).

Reasonable apprehension of bias. King represented Gemmell. During cross-examination, trial judge made comments to King regarding legal education and King's conduct.

Court of Appeal dismissed appeal. Trial judge's interjections might have been intemperate but had not risen to level necessary to establish reasonable apprehension of bias. The trial obviously difficult. Objective observer would not have considered judge to be biased.

Armstrong v. McCall, 2006 CarswellOnt 3134, [2006] O.J. No. 2055, 28 C.P.C. (6th) 12, 213 O.A.C. 229 (Ont. C.A.).

Physicians successfully brought third motion to dismiss action for delay or for failure to comply with court orders and were awarded $13,500 for costs of action and motion to dismiss. Plaintiff appealed. Appeal allowed. Although there was considerable delay, plaintiff rebutted presumption of prejudice and physicians failed to provide convincing evidence of prejudice that they would be unable to have fair trial.

Royal Bank v. Goebel, 2006 CarswellAlta 612, 30 C.P.C. (6th) 141, 2006 ABQB 369 (Alta. Q.B.).

Defendants brought application in June 2000 and application was adjourned on consent until May 2006. Application granted. Defendants failed to move promptly almost six years ago. Since consent adjournment there were three cross-examinations on male defendant's affidavit and undertakings, scheduling delays, and delays of 12 months and 15 months regarding undertakings. Delay had been wilful or that defendants failed to move promptly.

2878852 Canada Inc. v. Jones Heward Investment Counsel Inc., 2007 CarswellOnt 90, [2007] O.J. No. 78, 2007 ONCA 14 (Ont. C.A.).

Trial judge's decision to incorporate parts of parties' written argument into reasons ill-advised and unfortunate. Reasons should be comprehensive on their own. Nevertheless, trial judge adequately explained his credibility finds.

Appeal dismissed. Reasons sufficient to meet test in *R. v. Sheppard*, 2002 SCC 26, [2002] S.C.J. No. 30, 2002 CarswellNfld 74, 2002 CarswellNfld 75, 162 C.C.C. (3d) 298, 210 D.L.R. (4th) 608, 50 C.R. (5th) 68, 284 N.R. 342, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, [2002] 1 S.C.R. 869 (S.C.C.), as discussed in a civil context in *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.*, [2002] O.J. No. 2125, 2002 CarswellOnt 1759, 214 D.L.R. (4th) 121, 26 B.L.R. (3d) 180, 35 C.B.R. (4th) 197, *(*sub nom. *MacDonald v. BF Realty Holdings Ltd.)* 160 O.A.C. 72 (Ont. C.A.).

Keays v. Honda Canada Inc., 2006 CarswellOnt 5885, [2006] O.J. No. 3891, 216 O.A.C. 3, 82 O.R. (3d) 161, 274 D.L.R. (4th) 107, 2006 C.L.L.C. 230-030, 52 C.C.E.L. (3d) 165 (Ont. C.A.).

Trial judge used several colourful metaphors. However, evidence sustained findings of bad faith and outrageous and high-handed conduct, some strong judicial language could not be avoided. Nor could it be said to reflect a want of fairness or impartiality in coming to those conclusions.

This ground of appeal failed.

P. (M.N.) (Next Friend of) v. Whitecourt General Hospital, 2006 CarswellAlta 1071, [2006] 12 W.W.R. 397, 397 A.R. 333, 384 W.A.C. 333, 2006 ABCA 245, 64 Alta. L.R. (4th) 1 (Alta. C.A.).

Appellant denied opportunity to test on cross-examination or rebut with evidence the proposition advanced by the trial judge. Issue did not arise during course of evidentiary portion of trial.

See *Rodaro v. Royal Bank*, 2002 CarswellOnt 1047, [2002] O.J. No. 1365, 22 B.L.R. (3d) 274, 157 O.A.C. 203, 49 R.P.R. (3d) 227, 59 O.R. (3d) 74 (Ont. C.A.) at 93:

> It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in *460635 Ontario Ltd. v. 1002953 Ontario Inc.*, 1999 CarswellOnt 3428, [1999] O.J. No. 4071, 127 O.A.C. 48 (Ont. C.A.) at para. 9:
>
> > . . . The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot

> stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. . . .

New trial confined to theory of causation not tested at first trial.

R. v. Ertmoed, 2006 CarswellBC 2253, 2006 BCCA 365, 229 B.C.A.C. 168, 379 W.A.C. 168, 211 C.C.C. (3d) 49 (B.C. C.A.).

Accused appealed his conviction, submitting 1) that his lawyer was incompetent and rendered ineffective assistance at trial and 2) right to a fair trial prejudiced by trial judge's disparagement of defence counsel and defence advanced by him. Appeal dismissed.

Judge has duty to control trial process and to protect witnesses from repetitious and irrelevant questions. Judge's patience sorely tried, but nothing he said, either in isolation or collectively, could reasonably be said to have prejudiced a fair trial.

Baltruweit v. Rubin, 2006 CarswellOnt 3886 (Ont. C.A.), Cronk, Blair JJ.A. and Then J. (ad hoc). Appeal from 2005 CarswellOnt 3017 (Ont. S.C.J.) dismissed.

Trial judge producing outcome unfavourable to appellant did not mean trial judge biased against him or that he chose to disbelieve appellant based on prohibited stereotypical reasoning.

Atlantic Chemex Ltd. v. B. & D. Welders & Auto Repairs Ltd., 2006 CarswellNS 286, 2006 NSSC 198 (N.S. S.C.).

On appeal from decision of Small Claims Court adjudicator, inadequate record made it impossible for court to make determination as to whether there was error of law. Reasons brief and no transcript of proceedings. New hearing before new adjudicator was ordered.

Rando Drugs Ltd. v. Scott, 2007 CarswellOnt 4888, [2007] O.J. No. 2999, 42 C.P.C. (6th) 23, 2007 ONCA 553, 284 D.L.R. (4th) 756, 229 O.A.C. 1, 86 O.R. (3d) 641, *(*sub nom. *Rando Drugs Ltd. c. Scott)* 86 O.R. (3d) 653 (Ont. C.A.); leave to appeal refused (2008), 2008 CarswellOnt 353, 2008 CarswellOnt 354, 384 N.R. 398 (note), 249 O.A.C. 39 (S.C.C.).

The issue is whether circumstances give rise to reasonable apprehension of bias because of prior involvement of trial judge's former firm in litigation. Test to be applied set out in the Supreme Court of Canada. *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434, 1976 CarswellNat 434F, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.), *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) and *Roberts v. R.* (2003), 2003 SCC 45, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2003] S.C.J. No. 50, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 231 D.L.R. (4th) 1, 19 B.C.L.R. (4th) 195, *(*sub nom. *Wewayakum Indian Band v. Canada)* 309 N.R. 201, [2004] 2 W.W.R. 1, *(*sub nom. *Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2004] 1 C.N.L.R. 342 (S.C.C.).

The accepted test for reasonable apprehension of bias is found at pp. 394-95 S.C.R. of de Grandpré J.'s dissenting reasons in *Committee for Justice & Liberty*:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . that test is 'what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'
>
> . . . . .
>
> The grounds for this apprehension must, however, be substantial and I . . . [refuse] to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience.'

In *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, [1999] E.W.J. No. 5918, [2000] Q.B. 451, [2000] 1 All E.R. 65 (Eng. C.A.), the court held, at para. 58, that there is no inflexible rule governing the disqualification of a judge and that, "[e]verything depends on the circumstances.".

Diamond Auto Collision Inc. v. Economical Insurance Group, 2007 CarswellOnt 4196, [2007] O.J. No. 2551, 2007 ONCA 487, 50 C.C.L.I. (4th) 213, 227 O.A.C. 51 (Ont. C.A.).

Appeal dismissed. The standard for measuring the adequacy of reasons derived from *R. v. Sheppard*, 2002 SCC 26, [2002] S.C.J. No. 30, 2002 CarswellNfld 74, 2002 CarswellNfld 75, 162 C.C.C. (3d) 298, 210 D.L.R. (4th) 608, 50 C.R. (5th) 68, 284 N.R. 342, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, [2002] 1 S.C.R. 869 (S.C.C.). The three functions of reasons for judgment at trial are: (1) explaining to the losing party why he or she lost; (2) enabling informed consideration as to whether to appeal; and (3) enabling interested members of the public to see whether justice has been done. Reasons that fulfill functional requirements are, in short, reasons that permit meaningful appellate review.

Standing alone, the trial judge's reasons make meaningful appellate review difficult. In the result, however, even if the appellants are correct in their submission that the trial judge's reasons do not fulfill the functional requirement of reasons as they ought to, having regard to the record, the basis for her rejection is patent and the appellants have been told why they lost.

FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd., 2007 CarswellOnt 3697, 2007 ONCA 425, 85 O.R. (3d) 561, 46 C.P.C. (6th) 23, [2007] O.J. No. 2297 (Ont. C.A.).

No miscarriage of justice even though party denied opportunity to make closing argument where party has fully argued case. Principle of appellate deference to trial judge's fact-finding and inference-drawing applies even when entire trial record is in writing. Trial judge must dismiss motion if plaintiff puts forward some evidence on all elements of its claim. Appeal dismissed.

The principle of appellate deference to a trial judge's fact-finding and inference-drawing applies even when the entire trial record is in writing. The principle of deference applies to the trial judge's finding that Prudential failed to establish that the transfers were fraudulent. That finding was based on inferences that the trial judge drew from the factual record.

Saylor v. Madsen Estate, [2007] S.C.J. No. 18, 2007 CarswellOnt 2754, 2007 CarswellOnt 2755, *(*sub nom. *Saylor v. Brooks)* 360 N.R. 327, 42 C.P.C. (6th) 1, 2007 SCC 18, 32 E.T.R. (3d) 61, *(*sub nom. *Saylor v. Brooks)* 224 O.A.C. 382, 279 D.L.R. (4th) 547, *(*sub nom. *Madsen Estate v. Saylor)* [2007] 1 S.C.R. 838 (S.C.C.).

Powers of appellate court. Trial judge failing to consider all evidence. Matter outstanding for nine years and amount in issue relatively small. Interests of justice for appellate court to consider evidence and make final determination rather than send matter back for new trial.

Roeder v. Lang Michener Lawrence & Shaw, [2007] B.C.J. No. 501, 2007 CarswellBC 544, 238 B.C.A.C. 164, 393 W.A.C. 164, 2007 BCCA 152, [2007] 7 W.W.R. 639, 67 B.C.L.R. (4th) 301, 280 D.L.R. (4th) 294 (B.C. C.A.).

Appeal untenable because there is no action in law for damages for breach of duty of fairness. Remedy for such a breach lies in administrative law by way of judicial review. Typically, remedy is a rehearing, but the court has right to refuse relief if no substantial wrong or miscarriage of justice has occurred. Plaintiff conceded on appeal that the result of the 1994 proceedings would have been the same without the alleged misconduct on the part of the lawyers.

Wiseman's Sales & Services Ltd. v. Atlantic Insurance Co., 2007 CarswellNfld 82, 45 C.C.L.I. (4th) 192, 264 Nfld. & P.E.I.R. 86, 801 A.P.R. 86, 2007 NLCA 15, [2007] I.L.R. I-4585, 280 D.L.R. (4th) 47 (N.L. C.A.).

Appeal allowed. On appeal, the court can consider new issue of law if it can do so without procedural prejudice to other party and if refusal to do so would lead to an injustice. The application for an order permitting it to adduce further evidence dismissed. No credible and relevant evidence that could reasonably be expected to have affected the result at trial, had it been adduced there.

Hanna v. Abbott, 2006 CarswellOnt 4937, *(*sub nom. *W.H. v. H.C.A.)* [2006] O.J. No. 3283, 82 O.R. (3d) 215, 219 O.A.C. 73, *(*sub nom. *Hanna (Litigation Guardian of) v. Abbott)* 272 D.L.R. (4th) 621, 31 C.P.C. (6th) 207 (Ont. C.A.).

Trial judge held, although father's convictions were *prima facie* proof of alleged abuse, that the father's evidence (sons' testimony) rebutted that proof. The Ontario Court of Appeal allowed the plaintiff's appeal. The doctrine of abuse of process ought to have precluded the father from contesting the underlying facts of his convictions.

Cosentino v. Roiatti, 2006 CarswellOnt 7944, 219 O.A.C. 66 (Ont. Div. Ct.).

A lawyer commenced a small claims action against former clients for payment of his outstanding account. Deputy judge dismissed the action based the parties' agreement, estoppel and the lawyer's unreasonable delay in bringing the action. The lawyer appealed. The Ontario Divisional Court dismissed the appeal. The judge's finding respecting the parties' agreement left only the lawyer's equitable claim (*quantum meruit*) for the further fees. The evidence supported the conclusion that the lawyer's delay in initiating the action for almost six years (just before limitation period expired) caused the clients to not proceed with their application to assess the lawyer's account and permitted a situation to arise which would be unjust to disturb in the circumstances.

Niagara North Condominium Corp. No. 125 v. Waddington, [2007] O.J. No. 936, 2007 CarswellOnt 1486, 222 O.A.C. 66, 52 R.P.R. (4th) 230, 2007 ONCA 184 (Ont. C.A.).

Application dismissed by Superior Court of Justice not appealed. Another Superior Court judge dismissed the application on the ground that it was an abuse of process, where the same facts and issues were involved, and a corporation employee had even sworn the affidavit in the original application. The corporation appealed. The Court of Appeal dismissed the appeal.

Steward v. Berezan, 2007 CarswellBC 542, 238 B.C.A.C. 159, 393 W.A.C. 159, 2007 BCCA 150, 64 B.C.L.R. (4th) 152, [2007] B.C.J. No. 499 (B.C. C.A.); additional reasons at 2009 CarswellBC 3136, 2009 BCCA 524, 99 B.C.L.R. (4th) 156 (B.C. C.A.).

Duty of appellate court where trial judge fails to give or gives inadequate reasons for judgment. The failure to discuss a relevant factor in depth, or even at all not itself a sufficient basis for an appellate court to reconsider the evidence. The omission only a "material error" if it gave rise to the "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affect [the] conclusion.".

Walford v. Stone & Webster Canada LP, 2006 CarswellOnt 6873, 217 O.A.C. 166 (Ont. S.C.J.).

Small Claims Court judge dismissed employee's action for wrongful dismissal and awarded costs in favour of employer fixed at $1,500 plus disbursements of $1,299.33. Employee appealed and subsequently amended notice of appeal to include appeal from costs award. Appeal dismissed. Pursuant to s. 31 of *Courts of Justice Act*, because employee claimed damages in excess of $10,000, he had to appeal as of right to Divisional Court with respect to dismissal of his action. Section 31 of Act silent as to appeal from costs applied and therefore leave to appeal costs award should have been included in notice of appeal or supplementary

notice of appeal. Leave to appeal granted. However, appeal dismissed as award was reasonable for two-day trial with extensive documentation which was followed by written submissions.

Strudwick v. Lee, 2007 CarswellSask 43, [2007] S.J. No. 25, 2007 SKCA 11, 382 W.A.C. 269, 289 Sask. R. 269 (Sask. C.A.); leave to appeal refused (2007), 2007 CarswellSask 371, 2007 CarswellSask 372, 375 N.R. 393 (note), 314 Sask. R. 319 (note), 435 W.A.C. 319 (note) (S.C.C.).

Chambers judge's description of defendant as "self-styled advocate" and her comments such as "he purportedly received," "he relishes an opportunity," did not indicate that she was biased in fact; nor did they in any way raise reasonable apprehension of bias.

Gallop v. Jaegar (2007), 2007 CarswellOnt 6292 (Ont. Div. Ct.).

What is the obligation of a Small Claims Court judge to provide reasons in dismissing a plaintiff's statement of claim and in granting the defendant's counterclaim? The Supreme Court's ruling in *R. v. Shepherd* is clear that a modicum level of analysis should be provided. Both parties desire additional time to amend their factums. A new date will be set by the Registrar once the parties have addressed the issue of the adequacy of the reasons.

Brooker v. Silver (2007), 2007 CarswellOnt 7790, 232 O.A.C. 83, 67 C.L.R. (3d) 306 (Ont. Div. Ct.).

Pursuant to s. 134(1) of the *Courts of Justice Act*, the court may make any order or decision that ought to or could have been made by the court appealed from or order a new trial. Pursuant to s. 134(4) of the *Courts of Justice Act*, the court may, in a proper case, draw inferences of fact from the evidence. Appeal granted. Independence Way Inc. ordered to return deposit in the sum of $10,000, recognizing the limit of the Small Claims Court jurisdiction. Brookers entitled to disbursements, including court costs for appeal and cost of transcript.

Bookman v. U-Haul Co. (Canada) Ltd. (2007), 2007 CarswellOnt 5714, 229 O.A.C. 194 (Ont. Div. Ct.); additional reasons at (2007), 2007 CarswellOnt 6275 (Ont. Div. Ct.), 2007-09-13, Fedak J.

The appellant, U-Haul Co. (Canada) Ltd., appeals from the judgment of Deputy Judge at the Superior Court of Justice (Small Claims Court) in Hamilton, Ontario dated November 28, 2006.

Clear from reasons Deputy Judge did not consider either depreciation or betterment in the award of damages. Neither counsel for the plaintiffs nor defendants raised the issue with her. The law clear that depreciation or betterment is a necessary factor to consider in awarding damages. Accordingly Deputy Judge erred. Judgment of Deputy Judge set aside and judgment granted in the amount of $4,951.18. Original costs awarded of $750 remain unchanged. Disbursements of $259.84 inclusive of GST remain the same.

Elliott v. Ritins International Inc. (2007), 2007 CarswellOnt 4640 (Ont. Div. Ct.).

Motion for order directing Registrar not to dismiss the appellant's appeal until 60 days after transcripts completed. Appellant attempted to obtain the consent of respondent to an extension of time to perfect appeal to 30 days after the transcripts prepared. Respondent did not consent, motion brought.

No prejudice to respondent who had benefit of judgment and prejudgment interest. To dismiss the appeal would cause serious prejudice to the appellant. Court satisfied appellant has demonstrated a firm intention to appeal and provided a reasonable explanation for failing to observe time limits. Principles for granting relief satisfied. See *Frey v. MacDonald*, [1989] O.J. No. 236, 1989 CarswellOnt 343, 33 C.P.C. (2d) 13 (Ont. C.A.) and *Langer v. Yorkton Securities Inc.*, 1986 CarswellOnt 479, 14 C.P.C. (2d) 134, 57 O.R. (2d) 555, 19 O.A.C. 394 (Ont. C.A.).

Motion should have been consented to or at least unopposed. Reasonable explanation offered for failure to perfect appeal within applicable time limits.

Lowry v. Kushnir (2007), 2007 CarswellOnt 3214 (Ont. S.C.J.); additional reasons at (2007), 2007 CarswellOnt 5655 (Ont. S.C.J.).

Applicant sought leave to appeal to the Divisional Court from order of case conference judge who ordered action be stayed until significant legal costs awarded in earlier matrimonial litigation between the same parties paid by applicant to respondent.

Rule 2(4) of the *Family Law Rules* specifically states that the primary objective of the Rules is to allow each case to be determined justly.

Test to grant leave to appeal has been met and applicant granted leave to appeal the order of the presiding judge at the case conference to the Divisional Court.

Petti v. George Coppel Jewellers Ltd. (2008), 2008 CarswellOnt 1324, 234 O.A.C. 85 (Ont. Div. Ct.).

Plaintiff appealed final order of deputy judge of Small Claims Court dismissing his claim at trial.

Appeal raised propriety of relying on polygraph evidence in legal proceedings. At opening of appeal, court confirmed Coppel had not filed responding materials. He requested adjournment for that purpose. Court declined request on the basis that his failure fell within the minimal level of self-education required of self-represented litigants.

Trial judge intervened during trial. "Let us adjourn this and why do you not do a lie detector test? . . . because the credibility issue now is 50-50 and, my goodness, if we have a chance to have this resolved by this scientific or quasi-scientific means, why not do it?".

The trial judge referred to the polygraph test results.

Some authority making this narrowly relevant, in both criminal and civil cases, the fact that a litigant volunteered to take a polygraph test. See *R. v. B. (S.C.)*, 1997 CarswellOnt 3907, [1997] O.J. No. 4183, 10 C.R. (5th) 302, 119 C.C.C. (3d) 530, 36 O.R. (3d) 516, 104 O.A.C. 81 (Ont. C.A.), a criminal case at para. 29 and *Whiten v. Pilot Insurance Co.*, [1999] O.J. No. 237, 1999 CarswellOnt 269, [1999] I.L.R. I-3659, 42 O.R. (3d) 641, 170 D.L.R. (4th) 280, 117 O.A.C. 201, 58 O.R. (3d) 480 (note), 32 C.P.C. (4th) 3 (Ont. C.A.). *Whiten* was reversed by the Supreme Court of Canada at 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] S.C.J. No. 19, 2002 SCC 18, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595 (S.C.C.) on the issue of punitive damages but, as to the polygraph, the court stated, uncritically, at para. 24:

> [24] . . . the Whitens, in an attempt to satisfy Pilot that they did not set the fire, offered to take a polygraph test administered by an expert selected by Pilot. This was apparently accepted by the jury as a good faith offer made to allay Pilot's suspicions. Pilot refused, without giving any reasons.

Trial judge relied on results of polygraph tests, at least in part, when reaching his decision to dismiss claim. Results used to help decide truth of the facts in dispute, reversible error even though parties consented to tests. The court should not delegate its jurisdiction, even on consent. Appeal allowed and, pursuant to s. 134(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, new trial ordered.

Abdallah v. Snopek (2008), 2008 CarswellOnt 997, 290 D.L.R. (4th) 234, 234 O.A.C. 15, 63 C.C.L.I. (4th) 266, 89 O.R. (3d) 771 (Ont. Div. Ct.).

Action dismissed. The plaintiff appealed from dismissal, arguing that defence counsel's address to jury so improper and inflammatory that to allow the verdict to stand could result in a substantial miscarriage of justice.

Three mistakes made at trial: the first by defence counsel, when he included in his address comments that were inflammatory, irrelevant and improper; the second by plaintiff's counsel, when he failed to immediately object to opposing counsel's address; the third mistake was by the trial judge, when he failed to intervene to prevent an injustice. This court ought not to compound those mistakes by denying a new trial because of the failure of counsel to object (compounding the second mistake) or by deferring to the discretion of the trial judge (compounding the third mistake). "The appellant now asks this court to correct these mistakes made at the first by ordering a new trial. In my opinion, such a disposition is the only way to achieve justice for the appellant." Appeal allowed and new trial ordered. Gans J. (dissenting).

Rando Drugs Ltd. v. Scott, 2007 CarswellOnt 4888, [2007] O.J. No. 2999, 42 C.P.C. (6th) 23, 2007 ONCA 553, 284 D.L.R. (4th) 756, 229 O.A.C. 1, 86 O.R. (3d) 641, *(*sub nom. *Rando Drugs Ltd. c. Scott)* 86 O.R. (3d) 653 (Ont. C.A.); leave to appeal refused (2008), 2008 CarswellOnt 353, 2008 CarswellOnt 354, 384 N.R. 398 (note), 249 O.A.C. 39 (S.C.C.).

Appeal from judgment of Justice Patterson of the Superior Court of Justice, dated September 27, 2005, dismissing counterclaim of plaintiff by counterclaim, Lena B.D. Scott, with costs, and further order of Justice Patterson, dated June 30, 2006, refusing to set aside his judgment of September 27, 2005 and not restoring action to trial list, with costs.

Allegations of bias against judge. More than 10 years before trial, trial judge, Justice Patterson, was partner of firm that had once represented one of the defendants by counterclaim.

Test to be applied explained in several cases from the Supreme Court of Canada, most notably, *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434, 1976 CarswellNat 434F, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.); *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.); and *Roberts v. R.* (2003), 2003 SCC 45, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2003] S.C.J. No. 50, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 231 D.L.R. (4th) 1, 19 B.C.L.R. (4th) 195, *(*sub nom. *Wewayakum Indian Band v. Canada)* 309 N.R. 201, [2004] 2 W.W.R. 1, *(*sub nom. *Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2004] 1 C.N.L.R. 342 (S.C.C.).

It would have been better for the appellant to have accepted the ruling, presented case and, if she lost, to have raised issue on appeal. See David Mullan's statement of law in *Administrative Law* (Toronto: Irwin Law, 2001) at 348 to be correct:

> . . . the party [who raised the bias issue] need not abandon the proceeding in the sense of refusing to take part. Indeed, not only does the law not require this but it is also very dangerous . . .

The peril Mullan cautions against occurred here. By withdrawing from the courtroom, the appellant abandoned her case. She cannot rely on an unknown fact that might have affected the course of the proceedings had she remained.

Appeals dismissed with costs.

Volzhenin v. Haile, 2007 CarswellBC 1272, 243 B.C.A.C. 108, 70 B.C.L.R. (4th) 15, 401 W.A.C. 108, 2007 BCCA 317 (B.C. C.A.); leave to appeal refused (2008), 2008 CarswellBC 317, 2008 CarswellBC 318, 454 W.A.C. 319 (note), 270 B.C.A.C. 319 (note), 385 N.R. 391 (note) (S.C.C.).

Plaintiff appealed, arguing trial judge failed to ensure that plaintiff had a fair trial, that excessive interventions by the trial judge gave rise to a reasonable apprehension of bias, that trial judge made numerous factual errors, trial judge erred in finding regarding the plaintiff's credibility, and trial judge failed to correctly apply *Athey v. Leonati* (S.C.C.). Appeal dismissed.

Vuong v. Toronto East General & Orthopaedic Hospital (November 4, 2002), Doc. CA C38078 (Ont. C.A.).

The plaintiffs appealed the decision of the trial judge dismissing the appellants' statement of claim by acceding to the defendant's motion without providing any reasons. Plaintiff appealed. Appeal allowed. Litigants are entitled to know the reasons why a judge has allowed a motion and dismissed an entire statement of claim.

MacEwan v. Henderson, 2003 CarswellNS 424, 2003 NSCA 133, 219 N.S.R. (2d) 183, 692 A.P.R. 183 (N.S. C.A.).

Appellant appealed the dismissal of her motion by the judge of the Supreme Court of Nova Scotia based on apprehension of bias. Nova Scotia Court of Appeal dismissed the appeal and held that the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. (See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31).

Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold." The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

Seminatore v. Banks (July 5, 2006), Doc. 53/06/CA (N.B. C.A.).

Appellant appealed the decision of trial judge on the ground that he was not allowed to cross-examine the party-witness. Appeal allowed as trial judge failed to discharge duty to provide a fair and impartial process when she invited one of the self-represented parties to cross-examine the other party, but did not reciprocate with such an invitation when the party-witness roles were reversed.

Naderi v. Strong, 2005 CarswellNB 89, 2005 CarswellNB 90, [2005] N.B.J. No. 67, 2005 NBCA 10, 280 N.B.R. (2d) 379, 734 A.P.R. 379 (N.B. C.A.).

Appeal concerning the factors to be considered by a trial judge of the Court of Queen's Bench when assessing an application to extend the time for an appeal by trial *de novo*.

The basic rule to be followed in dealing with an application to extend time for appeal is that leave should be granted if justice requires that it be given. Thus, factors to be considered include: (a) an intention to appeal within the time prescribed; (b) explanation given by the proposed appellant for missing the limitation period; (c) evidence of actual prejudice the delay would cause to the other party; (d) whether or not there is a serious issue to be appealed by trial *de novo*; or (e) the matter is frivolous or vexatious.

Appeal allowed as the application judge erred when he refused to receive any information that would have enabled him to determine if the proposed appeal by trial *de novo* raised a serious issue or whether it was frivolous or vexatious.

Appellant appealed the decision of trial judge on the ground that he was not allowed to cross-examine the party-witness. Appeal allowed as trial judge failed to discharge duty to provide a fair and impartial process when she invited one of the self-represented parties to cross-examine the other party, but did not reciprocate with such an invitation when the party-witness roles were reversed.

Polgrain Estate v. Toronto East General Hospital (2007), 2007 CarswellOnt 6280, 47 C.P.C. (6th) 186, 87 O.R. (3d) 55, 286 D.L.R. (4th) 265 (Ont. S.C.J.); reversed 2008 CarswellOnt 3103, 293 D.L.R. (4th) 266, 90 O.R. (3d) 630, 60 C.R. (6th) 67, 2008 ONCA 427, 53 C.P.C. (6th) 297, 238 O.A.C. 1 (Ont. C.A.).

Plaintiff sought to relitigate the facts underlining an acquittal for sexual assault. The motion judge dismissed the action and concluded that it would be an abuse of process to allow the relitigation of the determination that the assaults did not occur. Plaintiff appealed. Appeal allowed.

Criminal acquittal of the respondent's staff member on sexual assault charge meant the staff member was legally, not factually, innocent. Appellant had no right of appeal from verdict in criminal proceedings. However, civil action against the respondent was not an abuse of process.

Volzhenin v. Haile, 2007 CarswellBC 1272, 243 B.C.A.C. 108, 70 B.C.L.R. (4th) 15, 401 W.A.C. 108, 2007 BCCA 317 (B.C. C.A.), (2008), 2008 CarswellBC 317, 2008 CarswellBC 318, 454 W.A.C. 319 (note), 270 B.C.A.C. 319 (note), 385 N.R. 391 (note) (S.C.C.).

The trial judge declined to award certain damages to the plaintiff. The plaintiff appealed arguing that excessive interventions by the trial judge destroyed the impression of a hearing before a disinterested and impartial court.

Appeal dismissed as the British Columbia Court of Appeal Court of did not find an "inappropriate crossing of the line" with respect to the trial judge's interventions. While one interjection had the appearance of counseling the lawyer for the defendants, in the context of the case it did not reflect bias, or give the appearance of bias such as to render the trial unfair. Language difficulties, or cultural differences, did not render the trial unfair or fatally undermine the trial judge's assessment of the appellant's credibility and the findings of fact.

Baradaran v. Taberner (2008), 2008 CarswellOnt 4413 (Ont. Div. Ct.).

Appellant raised claim in *quantum meruit* for the first time on appeal. Ontario Divisional Court dismissing the appeal assumed that it was "appropriate for this Court to entertain this claim which was neither pleaded nor argued at trial," but found that there was no evidence raised to support the claim.

Beard v. Suite Collections Canada Inc. (2008), 2008 CarswellOnt 4222, 68 C.C.E.L. (3d) 310 (Ont. Div. Ct.).

The general rule is that where the issue on appeal involves a question of mixed fact and law and the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

The appellant asked, in effect, to retry the case. On appeal to the Divisional Court no palpable or overriding error in the judge's findings of fact, and no error in principle or in her application of the law was found. Appeal dismissed as the trial judge's decision was well-reasoned and amply supported by the evidence.

Beitel v. Simone (2008), 2008 CarswellOnt 1678 (Ont. Div. Ct.).

Appeal related to the validity of the retainer, raised for the first time on the appeal dismissed. Appeals to the Ontario Divisional Court should not be devoid of merit.

Black v. Mastrachuk, 2008 CarswellSask 339, 2008 SKQB 225, *(*sub nom. *Mastrachuk v. Black)* 316 Sask. R. 95 (Sask. Q.B.).

Appellant appealed decision of trial judge who allegedly accepted the evidence of the plaintiff every time when there was any disagreement between parties in relation to evidence. Appellate court should not interfere with factual findings of the trial judge absent some clearly demonstrated factual error. Findings of fact may be appealed if they are not reasonably supported by the evidence or if there is a palpable or overriding error. Here, the appellant could not demonstrated a basis to set aside such findings and conclusions, where there was clearly evidence before the trial judge such as to enable her to come to reach such conclusions.

Blattgerste v. Heringa, 2008 CarswellBC 856, [2008] 11 W.W.R. 47, 2008 BCCA 186, 254 B.C.A.C. 292, 426 W.A.C. 292, 82 B.C.L.R. (4th) 62 (B.C. C.A.).

Appeal by defendant from order winding up two companies allowed. Order set aside and matter remitted to trial court for new hearing. Judge who heard matter died before signing reasons for judgment he prepared. Reasons ultimately released by Chief Justice. Reasons for judgment are not final and complete unless signed by judge who wrote them. Until reasons were signed they were a work in progress subject to being revised or abandoned. As judge had not signed reasons it could not be said that he had completed his judicial consideration of matter.

Boone v. Advantage Car & Truck Rentals Ltd (2008), 2008 CarswellOnt 6234 (Ont. Div. Ct.).

Extension of time to serve the Notice of Appeal and file the appeal. Extension of time may be granted under Rule 3.02(1) and (3)1 on just terms. It was held that such factors as defendant's clear intention to appeal, the attempt to serve the Notice of Appeal within time, the good faith filing of the appeal, the payment and ordering of the transcript, the delay was a matter of days, due to inadvertence, and the plaintiff was not prejudiced by the delay allowed to extend the time to serve the Notice of Appeal.

Brunt v. Yen (2008), 2008 CarswellOnt 3832, 239 O.A.C. 289 (Ont. Div. Ct.); additional reasons at (2008), 2008 CarswellOnt 5952 (Ont. Div. Ct.).

Plaintiff sent bank draft to solicitors for purchase of shares in corporate client. Action dismissed. Plaintiff appealed. Appeal dismissed. No basis existed for interfering with trial judge's factual findings that plaintiff did not communicate with solicitors to establish role protecting interests and that solicitors did not receive funds subject to any conditions.

Standard of review: On a pure question of law, the trial judge is required to be correct. However, findings of fact are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error." In particular, findings of credibility made by a trial judge are entitled to considerable deference.

There is a functional distinction between a trial and appellate tribunal, namely the trial court's responsibility is to find facts. Given that the trial judge has had the advantage of seeing and hearing the witnesses and assessing demeanour, the appellate courts traditionally treat all findings of fact made by the trial judge with deference.

Channan v. Hamilton (City) (2008), 2008 CarswellOnt 1260, 234 O.A.C. 81 (Ont. Div. Ct.); additional reasons at (2008), 2008 CarswellOnt 5452 (Ont. Div. Ct.).

The deference on the trial judge's *findings of fact* stays unless the appellate court is satisfied that a finding was the result of "a palpable and overriding error." A palpable error is one that is obvious, plain to see or clear. (See The Supreme Court of Canada in *H.L. v Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401 at para. 55);

With respect to a *question of law*, the standard is "correctness." A decision will be incorrect if it is based on an erroneous interpretation of a statute or an erroneous application of a legal principle.

For questions of *mixed fact and law*, the same standard applies as to questions of fact; namely "palpable and overriding error" unless the trial judge made an inextricable error in principle with respect to the characterization of a standard or its application, in which case the error may amount to an error in law. (See *Ontario (Ministry of Labour) v. Modern Niagara Toronto Inc.*, [2006] O.J. 3684 at para. 20, citing to *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235).

Cogliano v. Patel (2008), 2008 CarswellOnt 5630 (Ont. Div. Ct.).

The appellant submitted that the trial judge made findings of credibility and findings of fact not supported by the evidence. Appeal dismissed. Ontario Divisional Court found that trial judge was alive to the inconsistencies in the evidence and had the opportunity to observe the witnesses. "Findings of credibility are within the purview of the trial judge, and in our view, there was evidence to support her findings of fact." No palpable or overriding error was committed by the trial judge.

Dias v. RD Group International (2008), 2008 CarswellOnt 2473 (Ont. Div. Ct.).

Trial Judge committed palpable and overriding error in assuming that the Respondent's new company was a successor of BH Company, which was in breach of contractual obligations before the appellant. There was no evidence whatsoever that the Respondent's company was a successor to BH, nor that it had bound itself to the contracts of BH.

Emmanuel v. Capparelli (2008), 2008 CarswellOnt 5191 (Ont. Div. Ct.).

Appellant claimed that trial judge made erroneous findings of fact. Appeal dismissed. It is not the role of an appellate court to reconsider the evidence and substitute its own opinion for that of the trial judge. The trial judge weighed the evidence on a balance of probabilities and made no error that could be described as being clearly wrong.

Flegel v. Wirachowsky, 2008 CarswellSask 251, 2008 SKQB 189 (Sask. Q.B.).

On appeal, the appellant claimed that the other party failed to provide him a witness list before trial and also he got no notice of expert. Appeal dismissed. No notice of expert is required for the Small Claims Court.

If appellant was unprepared to deal with an expert, he should have indicated that to the trial judge and an adjournment may have been considered. Appellant was aware that adjournments were possible. Each party must come prepared for the possibility that an expert may testify or to speak.

Freedland v. Polten & Hodder (2008), 2008 CarswellOnt 6036 (Ont. Div. Ct.).

Moving party brought a motion alleging that a court reporter or a Deputy Judge excised portions of transcript that were evidencing a reasonable apprehension of bias against him. Based on this allegation it requested for extension of time to perfect his appeal.

Motion dismissed as: (1) there was no good reason to doubt accuracy of the transcript as required under s. 48(2) of the *Evidence Act*, R.S.O. 1990, c. E.23; (2) comments that allegedly were made by the Deputy Judge, but not transcribed, would not support allegations of reasonable apprehension of bias; (3) the alleged comments were irrelevant to the trial judge's behavior towards the moving party; (4) some comments were made during submissions and submissions are not transcribed routinely in civil cases.

Henderson v. Canada (2008), 2008 CarswellOnt 2279, 238 O.A.C. 65, 37 C.E.L.R. (3d) 306, 292 D.L.R. (4th) 114 (Ont. Div. Ct.).

Respondent sought leave to appeal the trial judge's award of costs, and if leave be given, sought costs of the trial at a higher amount than was fixed by the trial judge. Defendant at trial level had not been asked for submissions as to costs. On appeal, the court found that the defendant was entitled to be heard on this issue. Failing to give him that opportunity was a breach of natural justice and fairness. Defendant entitled to recover the full amount of his disbursements, and as he had done an extraordinary amount of work to prepare his case, was entitled to increase the costs from $175 to $645.

Holden v. ACE Aviation Holdings Inc. (2008), 2008 CarswellOnt 4748, 296 D.L.R. (4th) 233, *(*sub nom. *ACE Aviation Holdings Inc. v. Holden)* 240 O.A.C. 184 (Ont. Div. Ct.).

Appeal related to the interpretation of the word "passenger" in Article 22 of the Montreal Convention. In construing the meaning of the word "passenger" in Article 22 of the Montreal Convention, recourse must be made to the canons of interpretation of international trea-

ties and to the *Vienna Convention on the Law of Treaties*: regard should be had for the grammatical meaning, the logical interpretation, the teleological interpretation, and the historic context of the provision.

Appeal allowed as the construction of the word "passenger" advanced by the appellant was consonant with the purposes of uniformity, certainty and predictability and avoid the potential for exposure to an uncertain quantum of liability and exposure to an uncertain number of claimants.

Kissell v. Milosevic (2008), 2008 CarswellOnt 3300 (Ont. Div. Ct.).

Appeal involving two decisions of the Ontario Rental Housing Tribunal. The Tribunal failed to make the necessary finding in fact and erred in law. The decision of the Tribunal was set aside, and the application is remitted to the Tribunal for a rehearing, should the party seek to pursue the application.

Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Ltd. Partnership, 2008 CarswellOnt 3475, 2008 ONCA 463, 237 O.A.C. 81, 90 O.R. (3d) 561 (Ont. C.A.); leave to appeal refused (2008), 2008 CarswellOnt 7205, 2008 CarswellOnt 7206, 392 N.R. 391 (note) (S.C.C.).

Oral arguments:

The defendants appealed a judgment against them, arguing that the trial judge did not hear oral argument before releasing his decision. The defendants also sought to introduce fresh evidence showing that the trial judge fell asleep at times during the trial. Appeal dismissed.

Trial judge's failure to give counsel opportunity to make oral submissions before releasing judgment not resulting in any substantial wrong or miscarriage of justice where counsel had opportunity to submit full written submissions.

The fresh evidence related to the validity of the trial process can be admitted on appeal level. However, in this case counsel was obliged to bring trial judge's inattention home to him at time. Not having done so and deciding to wait and see what happened, they could not later raise inattention for first time as ground of appeal on either substantive or contextual basis.

Leonard v. Dunn (2008), 2008 CarswellOnt 3085 (Ont. Div. Ct.).

Appeal involving assessment of special damages for dental work in personal injury case. The defendant argued that the plaintiff's witness did not have the expertise to opine as to the nature, scope and cost of future dental work. Ontario Divisional court found that the witness had been a dentist for ten years at the time she testified and had the expertise necessary to give opinion evidence in the area of post, core and crown restoration, the basis upon which damages were calculated. The fact that rest of the restorative work is yet to be done is irrelevant.

McGowan v. Toronto (City), 2008 CarswellOnt 2175, 45 M.P.L.R. (4th) 128 (Ont. Div. Ct.); reversed [2010] O.J. No. 2029, 2010 ONCA 362, 2010 CarswellOnt 3224, 70 M.P.L.R. (4th) 193 (Ont. C.A.).

Motion judge dismissed action commenced by the Plaintiff against city and police services as an abuse of process and as attempt at re-litigation. Plaintiff appealed. Appeal allowed. Ontario Divisional Court found that Deputy judge erred in his determination that plaintiff sought to re-litigate when Plaintiff's allegation was that he should not have been charged. "Plaintiff was not attempting to set aside any convictions" or "a judicial finding, which is the essence of abuse of process.".

Other issues:

- Whether the deputy judge erred in his finding that there was no reasonable cause of action against Toronto Police Services Board. Deputy judge found that, because prerequisite of *proximity* was not met, it was *plain and obvious* that direct liability claim

against board could not succeed. Kiteley J found that in making conclusions regarding proximity, Deputy judge drew inference of fact and law that was not warranted. However, while motion judge's reasoning was incorrect, conclusion was correct.

Mehta v. Natt (2008), 2008 CarswellOnt 3112 (Ont. Div. Ct.).

The appellant/tenant, appeals from the order of the Landlord and Tenant Board dismissing the tenant's application for a rent reduction. An appeal related to question of law alone. The standard of review on a question of law alone is correctness. The findings by the Landlord and Tenant Board represent a misapprehension of the evidence. It is a palpable and overriding error and as such constitutes an error in law.

Monks v. ING Insurance Co. of Canada, [2008] O.J. No. 1371, 2008 CarswellOnt 2036, 2008 ONCA 269, [2008] I.L.R. I-4694, 90 O.R. (3d) 689, 235 O.A.C. 1, 61 C.C.L.I. (4th) 1, 66 M.V.R. (5th) 38 (Ont. C.A.).

Successful plaintiff was awarded aggravated damages of $50,000, interest and costs while her counsel was awarded a $75,000 risk premium. On appeal defendant claimed that there was judicial bias in favour of the plaintiff. Appeal allowed in part.

The risk premium awarded to plaintiff's counsel was set aside because of subsequent Supreme Court of Canada decisions concluding risk premiums could not be passed on to unsuccessful defendants as part of a costs award. However, there was no evidence of judicial bias. Although the judge used harsh language in expressing his findings, he was justified in doing so, and his comments did not constitute judicial bias.

Toshi Enterprises Ltd. v. Coffee Time Donuts Inc. (2008), 2008 CarswellOnt 7954, *(*sub nom. *Coffee Time Donuts Inc. v. Toshi Enterprises Ltd.)* 246 O.A.C. 17 (Ont. Div. Ct.).

Appeal by defendant from order granting judgment to plaintiff in amount of $4,378 allowed. Defendant found vicariously liable for fire found to have been started through the negligence in one of its franchises. Trial judge erred in making erroneous inference of negligence from franchisee's absence at trial when there was no evidence to otherwise support a finding that the franchisee had been negligent.

Walsh v. 1124660 Ontario Ltd., 2008 CarswellOnt 3809, 2008 ONCA 522 (Ont. C.A.).

Respondents entirely successful at trial. The trial judge made no order as to costs given the appellant's impecuniousity. The respondents, to their credit, did not challenge that exercise of the trial judge's discretion. The appellant chose to pursue an appeal. Once again, the respondents were totally successful. The respondents incurred further legal costs. They should not be deprived of their costs a second time.

Welwood v. Ecclesiastical Insurance Office Plc. (2008), 2008 CarswellOnt 1132 (Ont. Div. Ct.).

Moving party brought a motion for leave to appeal the order of the deputy judge striking the party's claim for failing to provide material facts and particulars in respect of bald allegations. Appeal dismissed as there was no good reason to doubt correctness of motions judge's order. In addition, proposed appeal did not involve matters of such importance that leave to appeal should have been granted.

Respondent sought costs on substantial indemnity. Appellant's motion came perilously close to being frivolous and devoid of any merit such that costs might arguably have been awarded on a substantial indemnity basis. Ontario Divisional court held that this was not an exceptional case for awarding substantial indemnity costs. Employee's current unemployment and principle of access to justice did not provide basis for deferring payment of costs until after trial.

Young v. Ewatski, 2008 CarswellMan 267, [2008] 11 W.W.R. 332, 56 C.P.C. (6th) 376, 2008 MBQB 148, 56 C.C.L.T. (3d) 111, 177 C.R.R. (2d) 167, 234 Man. R. (2d) 293 (Man.

Q.B.); affirmed (2008), 2008 CarswellMan 621, 2008 MBCA 150, [2009] 1 W.W.R. 385, 62 C.P.C. (6th) 246 (Man. C.A.).

Plaintiff argued that, since the master sustained the pleading at the first hearing, the defendant is estopped from raising essentially the same issue on summary judgment. Assuming, without deciding, that issue estoppel may be applied to interlocutory orders, for the doctrine to apply, the issues would have to be identical, not almost identical. The motion to strike could not bar a trial on the merits whether on *viva voca* evidence or by affidavit evidence. Equally, it cannot bar a motion for summary judgment.

1541094 Ontario Inc. v. Crangle (2008), 2008 CarswellOnt 2069 (Ont. S.C.J.) (Ont. S.C.J.).

The moving party sought an extension of the time for filing a Notice of Appeal with respect to the decision of Deputy Judge. Motion dismissed.

Moving party argued that although he brought (unsuccessfully) a motion in the Small Claims Court for a new trial, he always had reserved his right to appeal.

The court after consideration of argument (including claims that his counsel was confused and didn't appreciate the significance of an appeal versus a new trial motion) found that the moving party did not satisfy the test enunciated in *Frey v. MacDonald*, [1990] O.J. No. 280.

Jeffrys v. Veenstra, 2004 CarswellMan 393, 2004 MBCA 150 (Man. C.A.).

Application for leave to appeal dismissed. Defendant intentionally attempting to evade service and, therefore, had no excuse for failing to appear at initial hearing. Wilful delay on part of defendant.

Friesen v. Hepworth, 2008 MBCA 69, 2008 CarswellMan 291 (Man. C.A.).

Appellants appealed unsuccessful motion for extension of time to file motion for leave to appeal small claims matter. Appeal dismissed because appellants failed to show chambers judge committed any error. Appellants didn't point out any question of law arising from factual dispute, nor provide court with any good reason for not complying with court-mandated deadlines which would justify granting extension of time.

Jimenez v. Azizbaigi, 2008 BCSC 1465, 2008 CarswellBC 2302 (B.C. S.C. [In Chambers]); affirming 2008 CarswellBC 189, 2008 BCPC 12 (B.C. Prov. Ct.).

Plaintiff commenced action, in which he succeeded in claim for payment of debt owed for work performed. Defendant succeeded in her counterclaim for damages. Claims set off and defendant awarded $1,698. Plaintiff appealed and sought order for retrial on basis of trial unfairness. Appeal dismissed. Plaintiff failed to demonstrate palpable and overriding errors in trial judge's finding of fact. Plaintiff could not meet burden on party seeking to introduce new evidence. No basis for allegation that trial judge was biased against plaintiff as self-represented litigant. Interventions were for the purpose of ensuring both trial efficiency and trial fairness. Trial judge's interventions within permissible limit.

Cleeve v. Gregerson, 445 W.A.C. 184, 264 B.C.A.C. 184, [2009] 5 W.W.R. 28, 89 B.C.L.R. (4th) 67, 2009 CarswellBC 11, 2009 BCCA 2, 65 C.P.C. (6th) 303 (B.C. C.A.); additional reasons at (2009), [2010] 2 W.W.R. 103, 98 B.C.L.R. (4th) 260, 77 C.P.C. (6th) 17, 2009 BCCA 545, 2009 CarswellBC 3233 (B.C. C.A.); additional reasons at 67 C.P.C. (6th) 378, 2009 CarswellBC 1098, 2009 BCCA 190, 90 B.C.L.R. (4th) 296 (B.C. C.A.).

Judge gave judgment for plaintiff. Defendant's appeal allowed. New trial ordered. Submissions of counsel had not been recorded and affidavits of counsel differed on what words had been used. Decision to remove case from jury must be exercised judicially. Applicant for mistrial bears heavy onus to prove prejudice that cannot be remedied by court. None of impugned submissions amounted to misstatements of evidence. Any misstatement could have been remedied by direction from trial judge of clarification from defence counsel.

Grainger v. Windsor-Essex Children's Aid Society (2009), 96 O.R. (3d) 711, 2009 CarswellOnt 4000, [2009] O.J. No. 2872 (Ont. S.C.J.).

Motion by defendant for summary judgment dismissing a Small Claims Court action dismissed on grounds that there was a genuine issue for trial. Leave to appeal that decision to the Divisional Court was granted by a judge of the Superior Court of Justice. Appeal should be quashed.

No right of appeal from an interlocutory order of a Small Claims Court judge. Section 31 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, dealing with appeals to the Divisional Court from Small Claims Court orders, applies only to final orders. No basis for looking outside s. 31 to find alternative means of appealing an interlocutory order of the Small Claims Court. Section 31 only section that governs appeals from the Small Claims Court.

See also *Matlin v. Crane Canada Inc.* (2004), [2004] O.J. No. 3497, 2004 CarswellOnt 3648 (Ont. S.C.J.), at para. 6, Hockin J. stated, "There is no inherent appellate jurisdiction. A right to appeal can only be provided by statute or regulation" and *Kourtessis v. Minister of National Revenue*, EYB 1993-67101, [1993] 1 C.T.C. 301, 1993 CarswellBC 1213, [1993] S.C.J. No. 45, 1993 CarswellBC 1259, 20 C.R. (4th) 104, [1993] 4 W.W.R. 225, 45 W.A.C. 81, 27 B.C.A.C. 81, 14 C.R.R. (2d) 193, 78 B.C.L.R. (2d) 257, 81 C.C.C. (3d) 286, 102 D.L.R. (4th) 456, [1993] 2 S.C.R. 53, 153 N.R. 1, 93 D.T.C. 5137 at paras. 15-16 (S.C.C.), La Forest J. See also, *Gelber v. Allstate Insurance Co. of Canada* (1983), 1983 CarswellOnt 457, 35 C.P.C. 324, 41 O.R. (2d) 318 (Ont. Div. Ct.).

Moskaleva v. Laurie, 459 W.A.C. 164, 272 B.C.A.C. 164, 2009 CarswellBC 1489, 2009 BCCA 260, [2009] 8 W.W.R. 205, 94 B.C.L.R. (4th) 58, 79 M.V.R. (5th) 28 (B.C. C.A.).

Trial judge's questions did not restrict direct examination. Trial judge's questions and interjections during testimony of economists were directed at understanding their evidence and did not carry negative connotations suggested by defendant.

Papadopoulos v. Borg, 2009 ABCA 201, 2009 CarswellAlta 770 (Alta. C.A.).

Plaintiff's action dismissed on basis that plaintiff failed to call any evidence. Plaintiff appealed. Appeal dismissed. Plaintiff given every opportunity to present his case, and was treated fairly throughout. Trial judge discharged responsibility to assist self-represented litigant. Plaintiff advised well before trial that it would be prudent to retain counsel.

Pavlis v. HSBC Bank Canada, 2009 CarswellBC 1727, 2009 BCCA 309 (B.C. C.A. [In Chambers]), Kirkpatrick J.; affirmed (2009), 2009 CarswellBC 2775, 98 B.C.L.R. (4th) 72, [2010] 1 W.W.R. 208, 2009 BCCA 450, 469 W.A.C. 105, 277 B.C.A.C. 105 (B.C. C.A.).

Appellant brought motion for extension of time to file notice of appeal, declaration of indigent status and directions with respect to ordering of trial transcripts. Motion granted in part. Factors for indigent status established. Application for order that Supreme Court order transcripts of trial dismissed. Indigent status did not relieve appellant from costs of putting together appeal materials.

Park v. Lee, 98 O.R. (3d) 520, 2009 ONCA 651, 254 O.A.C. 52, 2009 CarswellOnt 5293 (Ont. C.A.).

Appellant, acting in person at trial, advanced claims in three actions. Appellant ill-prepared for trial. Appellant refused trial judge's offer to adjourn case. Trial judge on his own motion dismissed all three actions. He found appellant's evidence incoherent and incapable of proving case on balance of probabilities.

The trial judge should have adopted course suggested by counsel after trial judge indicated that he was considering the dismissal of the claim. Counsel stated:

> It appears that there is no choice but to let Mr. Park complete his case and then proceed with cross-examination of him and then for us to call Dr. Lee and Mr. Belitz as witnesses.

Failure to take this course amounted to denial of appellant's right to a fair trial.

Appeal allowed, new trial ordered.

Winter v. Chao, 2010 CarswellOnt 407, 2010 ONSC 464 (Ont. Div. Ct.).

Appeal by defendants from the decision of Godfrey J. of the Small Claims Court dated March 3, 2009. Godfrey J. awarded judgment to plaintiff in amount of $5,209.00 plus costs and interest based on her evidence at trial.

Significant gaps in evidence at trial. Appropriate remedy, new trial. Defendants entitled to recover $400.00 interpreter fee as a disbursement. Additional costs of $1,000.00 of appeal. Reduced counsel fee appropriate. Court took into account equities between parties and overall allocation of costs.

944936 Ontario Inc. v. Nanji (2010), 2010 ONSC 771, 2010 CarswellOnt 724 (Ont. Div. Ct.).

Appeal from trial decision. Appeal attempt to re-litigate matter. Trial judge's findings of fact entitled to deference on appeals. See *MacLeod v. MacLeod* (2003), 2003 CarswellOnt 4501, [2003] O.J. No. 4331 (Ont. C.A.).

Trial judge's reasons for judgment adequately explain his conclusions, and provide sufficient basis for meaningful appellate review. See *Chippewas of Mnjikaning First Nation v. Ontario*, 2010 CarswellOnt 273, [2010] O.J. No. 212, 2010 ONCA 47, *(*sub nom. *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* [2010] 2 C.N.L.R. 18, 265 O.A.C. 247 (Ont. C.A.); additional reasons at 2010 ONCA 408, 2010 CarswellOnt 3730 (Ont. C.A.); leave to appeal refused 2010 CarswellOnt 4919, 2010 CarswellOnt 4920, [2010] S.C.C.A. No. 91, *(*sub nom. *Chippewas v. Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* 276 O.A.C. 398 (note), *(*sub nom. *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* 409 N.R. 396 (note) (S.C.C.); *R. v. Sheppard*, 2002 CarswellNfld 74, 2002 CarswellNfld 75, [2002] S.C.J. No. 30, REJB 2002-29516, 50 C.R. (5th) 68, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, 210 D.L.R. (4th) 608, 284 N.R. 342, [2002] 1 S.C.R. 869, 2002 SCC 26, 162 C.C.C. (3d) 298 at para. 55 (S.C.C.); *R. v. Braich*, REJB 2002-29528, [2002] 1 S.C.R. 903, 285 N.R. 162, 162 C.C.C. (3d) 324, 2002 CarswellBC 552, 2002 CarswellBC 551, 2002 SCC 27, 268 W.A.C. 1, 164 B.C.A.C. 1, 210 D.L.R. (4th) 635, [2002] S.C.J. No. 29, 50 C.R. (5th) 92 at paras. 40-41 (S.C.C.); *R. v. M. (R.E.)*, 260 B.C.A.C. 40, 439 W.A.C. 40, [2008] S.C.J. No. 52, 380 N.R. 47, 297 D.L.R. (4th) 577, 60 C.R. (6th) 1, 235 C.C.C. (3d) 290, 2008 SCC 51, 2008 CarswellBC 2038, 2008 CarswellBC 2037, [2008] 3 S.C.R. 3, 83 B.C.L.R. (4th) 44, [2008] 11 W.W.R. 383 at paras. 52-57 (S.C.C.). Appeal dismissed.

Stoneforest International Canada Inc. v. Chan (2010), 2010 CarswellOnt 1770, 2010 ONSC 1715 (Ont. Div. Ct.).

Respondents moved for security for costs of appeal on grounds appeal frivolous and vexatious and appellant company has insufficient assets in Ontario to pay the respondent's costs.

Appellant succeeded at trial but awarded only $536.55 plus $175.00 costs by Deputy Judge. Appellant appeals on ground Deputy Judge should have awarded higher damages.

Appeal not frivolous.

No evidence amount of costs will be anything but modest in any event. No evidence appellant company has no assets of any kind to cover costs of respondents. Motion dismissed.

Action Auto Leasing & Gallery Inc. v. Robillard, 2011 ONSC 3264, 2011 CarswellOnt 4105, 106 O.R. (3d) 281, 22 C.P.C. (7th) 414, 335 D.L.R. (4th) 439, 278 O.A.C. 293, [2011] O.J. No. 2453 (Ont. Div. Ct.), Heeney J.; *Action Auto Leasing & Gallery Inc. v. Robillard*, 2011 ONSC 3264, 2011 CarswellOnt 4105, 106 O.R. (3d) 281, 22 C.P.C. (7th) 414, 335 D.L.R. (4th) 439, 278 O.A.C. 293, [2011] O.J. No. 2453 (Ont. Div. Ct.).

Appeals from Small Claims Court. Section 31(a) of the *Courts of Justice Act (Ont.)* provided that "An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action, (a) for the payment of money in excess of the prescribed amount." The "prescribed amount" was defined in Regulation 244/10 as follows: "2. A final order of the Small Claims Court may be appealed to the Divisional Court if the order is for, (a) the payment of money in excess of $2,500." Judgment granted for $1,500. The plaintiff sought judgment for the full amount of $7,551.12. Divisional Court, *per* Heeney J., held that no leave to appeal was necessary. There was a conflict between section 31 of the Act and section 2 of the Regulation. Statute prevailed (presumption of coherence). Since $7,551.12 was more than the prescribed amount of $2,500, the plaintiff had a right of appeal from the final order.

The motion was granted.

Martinek v. Dojc, 2011 ONSC 3795, 2011 CarswellOnt 5616, 282 O.A.C. 305 (Ont. Div. Ct.).

The appellant, on appeal, argued that the deputy judge had erred by exceeding his role as an impartial arbiter in raising the defence of qualified privilege, which was not pleaded by the respondent or raised during the trial by either party. The appellant submits that the deputy judge made unreasonable assumptions on the evidence, and that he incorrectly applied the test of qualified privilege.

The opportunity for parties to adduce evidence and make submissions in respect of an issue is fundamental to the right to be heard. A denial of natural justice may occur if such an opportunity is not afforded to the parties: See *e.g.*, *Canadian Imperial Bank of Commerce v. Prasad*, 2010 ONSC 320, 2010 CarswellOnt 108 at para. 10 (Ont. S.C.J.).

See *Brighton Heating & Air Conditioning Ltd. v. Savoia*, 2006 CarswellOnt 340, [2006] O.J. No. 250, 79 O.R. (3d) 386, 49 C.L.R. (3d) 235, 207 O.A.C. 1 (Ont. Div. Ct.), where Quinn J. concluded that the trial judge had unfairly awarded a form of relief that had not been pleaded.

Justice Quinn made the following observations at para. 40:

> I agree with the proposition that, in Small Claims Court, a liberal, non-technical approach should be taken to pleadings. Therefore, unpled relief may be granted (and an unpled defence allowed) so long as supporting evidence is not needed beyond what was adduced at trial, or what reasonably should have been adduced, in support of the relief (or defence) that was pled; and, of course, provided that, in all of the circumstances, it is not unfair to grant such relief (or allow such a defence).

The appellant had no opportunity to call evidence of malice to rebut the defence, if it in fact applied. The appropriate remedy was to have the matter sent back for a new trial pursuant to sections 134(1)(b) and 134(6) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

The matter is to be sent back for a new trial before a different judge. The trial judge decided the matter on the basis of a defence not pleaded, an unfairness that is a substantial wrong or miscarriage of justice.

Lum v. Jiang, 2011 ONSC 3608, 2011 CarswellOnt 4724, 3 C.L.R. (4th) 160 (Ont. S.C.J.).

The appeal from the judgment of Small Claims Court Deputy Judge Gilbert dated June 28, 2009, was dismissed.

The standard of review set out in *Plan Group v. Bell Canada*, 2009 ONCA 548, 2009 CarswellOnt 3807, [2009] O.J. No. 2829, *(*sub nom. *Bell Canada v. The Plan Group)* 96 O.R. (3d) 81, 81 C.L.R. (3d) 9, 62 B.L.R. (4th) 157, 252 O.A.C. 71 (Ont. C.A.) at para. 129 states:

> As my colleague noted, historically, interpretation of a contract was treated as a question of law, reviewable on a standard of correctness. However, *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 dictates that a more nuanced approach be taken by reviewing courts. Questions of fact are reviewable on a standard of palpable and overriding error, or the "func-

> tional equivalents" of "clearly wrong," "unreasonable" or "not reasonably supported by the evidence": *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24 at para. 110. Questions of mixed law and fact, however, lie along a spectrum, with some questions being more akin to questions of law and others being more akin to questions of fact.

Fazari v. Simpson, 2011 ONSC 5953, 2011 CarswellOnt 10738 (Ont. Div. Ct.); additional reasons at 2011 ONSC 6948, 2011 CarswellOnt 13328 (Ont. Div. Ct.).

The deputy judge conducted a trial, demonstrated by the transcript, in a manner showing patience and considerable skill in instructing the litigants as to procedure, accommodating their lack of experience, maintaining an unbiased and impartial attitude, and explaining his reasons as required.

Perfect justice is unlikely to arise from an imperfect presentation.

Chaos accounts for an error in the deputy judge's comments on the evidence in his Reasons for Judgment. The trial judge's reasons were incomplete but not incorrect.

An appeal was granted. The judgment was set aside and replaced with a judgment for the plaintiff (respondent herein) against the defendant (appellant herein), Silvano Fazari, in the amount of $1,480, with costs of $400.

Ha v. Arista Homes (Boxgrove) Inc., 2011 ONSC 4561, 2011 CarswellOnt 9084, 10 R.P.R. (5th) 202, 285 O.A.C. 89 (Ont. Div. Ct.).

The deputy judge awarded the plaintiffs $2,147.64.

The applicable standard of review on an appeal was expressed by Swinton J. in *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 4724, 2010 CarswellOnt 6695, [2010] O.J. No. 3762, 103 O.R. (3d) 659, 267 O.A.C. 317, 85 C.C.E.L. (3d) 9, 90 C.P.C. (6th) 281, 323 D.L.R. (4th) 376, 2010 C.L.L.C. 210-049 (Ont. Div. Ct.); reversed 2012 ONCA 444, 2012 CarswellOnt 7956, 111 O.R. (3d) 501, 100 C.C.E.L. (3d) 81, 21 C.P.C. (7th) 223, 2012 C.L.L.C. 210-040, 293 O.A.C. 248 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 3154, 2013 CarswellOnt 3155, 452 N.R. 394 (note), 314 O.A.C. 402 (note), [2012] S.C.C.A. No. 379 (S.C.C.):

> [36] On appeal, the standard of review on a question of law is correctness. The standard of review for findings of fact is palpable and overriding error, while questions of mixed fact and law are on a spectrum. If a legal question can be separated out, it will be reviewed on s standard of correctness. Otherwise, questions of mixed fact and law will not be overturned absent palpable and overriding error (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 at paras. 8, 10 and 36-37).

This standard also applies to appeals from the decision of a deputy judge of the Small Claims Court: *Meyknecht-Lischer Contractors Ltd. v. Stanford*, 2006 CarswellOnt 6806, [2006] O.J. No. 4360, 57 C.L.R. (3d) 145 at para. 17 (Ont. Div. Ct.); additional reasons at 2006 CarswellOnt 8329 (Ont. Div. Ct.); *Kaur v. Deopaul*, 2006 CarswellOnt 6388, [2006] O.J. No. 4170, 216 O.A.C. 247 at para. 24 (Ont. Div. Ct.).

A party is bound by its pleading. See *Allison v. Street Imports Ltd.* (May 14, 2009), Doc. 03 DV 000953, [2009] O.J. No. 1979 at para. 13 (Ont. Div. Ct.), *Atlas Construction Inc. v. Brownstones Ltd.*, 1996 CarswellOnt 611, [1996] O.J. No. 616, 27 O.R. (3d) 711, 26 C.L.R. (2d) 97 at paras. 82-83 (Ont. Gen. Div.), *Lubrizol Corp. v. Imperial Oil Ltd.*, 1996 CarswellNat 2572, 1996 CarswellNat 651, [1996] F.C.J. No. 454, 112 F.T.R. 264 (note), [1996] 3 F.C. 40, 67 C.P.R. (3d) 1, 197 N.R. 241 at paras. 18-19 (Fed. C.A.).

The court found that the plaintiffs were relying on representations by the appellant's agents.

An overly-technical approach to the rules is not to be taken by the court, as noted in section 23 of the *Courts of Justice Act*, and by rule 2.01 of the *Small Claims Court Rules*. The plaintiffs were awarded $6,750.50 in reimbursement of fees paid.

Jogendra v. Campbell, 2011 ONSC 3324, 2011 CarswellOnt 4955 (Ont. Div. Ct.).

The respondent submitted that the Divisional Court had no jurisdiction to hear this matter. The court agreed.

Ferrier J. dismissed the appeal of Mr. Jogendra from two final decisions of deputy judges of the Small Claims Court. The decisions of Ferrier J. and the appellant's own documents make it clear that Ferrier J. was hearing two appeals, not any motion.

The only available route of appeal from Ferrier J.'s decision was pursuant to section 6(1)(a) of the *Courts of Justice Act*, that is, to the Court of Appeal with leave. Section 21(5) of the *Courts of Justice Act* has no application as Ferrier J. clearly was not hearing a motion. There was no inherent jurisdiction to hear the matter. The matter was dismissed without a determination on the merits.

O'Brien v. Ottawa Hospital, 2011 ONSC 231, 2011 CarswellOnt 88, [2011] O.J. No. 66 (Ont. Div. Ct.).

An appeal from the decision of Tierney J. dated October 2, 2009, dismissing action against the respondents pursuant to r. 20.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, was submitted on the basis that there was no genuine issue for trial. The doctors moved under r. 20.01, and the Hospital moved under that rule and under *Rules of the Small Claims Court*, O. Reg. 258/98, r. 1 and r. 12 and the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 25. The motion judge reached the correct decision on a motion brought pursuant to r. 20.01 of the *Rules of Civil Procedure*.

Kipiniak v. Dubiel, 2011 ONSC 825, 2011 CarswellOnt 766, 274 O.A.C. 249 (Ont. Div. Ct.).

Kipiniak appealed from two orders made by Small Claims Court Judge Thompson, both dated June 15, 2010. In one of the orders Kipiniak was the plaintiff and Ewa Dubiel was the defendant; in the other order (similar in its terms), made in action, Kipiniak was the plaintiff and Kinga Dubiel was the defendant. The Orders dismissed Kipiniak's actions and prohibited him from commencing any further proceedings related to their subject matter in any Small Claims Court in Ontario.

The Orders were made by a judge on her own initiative, in the absence of any motion before the court, without a proper evidentiary foundation, without notice to Kipiniak, and without providing him with any meaningful opportunity to be heard. The Orders were made without jurisdiction and in breach of principles of procedural fairness and natural justice. The Orders were set aside.

Both Orders made reference to a hearing on June 9, 2010. That hearing was a "to be spoken to" attendance, in respect to the action against Kinga Dubiel relating to hydro expenses.

Kipiniak submitted that the Small Claims Court judge erred in law by granting summary judgment and dismissing the two actions in the absence of a motion by the defendants.

Section 31 of the *Courts of Justice Act* provides that an appeal lies to the Divisional Court from a "final order of the Small Claims Court *in an action* for the payment of money in excess of $500, excluding costs." Both of the subject actions were for the payment of money in excess of $20,000.

The June 15, 2010 orders were final orders by which the Small Claims Court judge purported to dismiss the subject actions.

No authority was cited for the proposition that an action can be dismissed at a settlement conference without notice and without an opportunity to be heard. A judge presiding over a settlement conference has no special powers to dispose of actions over the objection of the parties. Jurisdiction to make such an order at a settlement conference is more circumscribed than on a motion.

Kipiniak was wholly successful on appeal. He was self-represented and retired from work and therefore sought only his disbursements. He had documented his out-of-pocket expenses in relation to the appeals at $1,600.63. Costs of $1,600 were awarded.

Tosti v. Society of the Madonna Di Canneto of Windsor Inc., 2011 ONSC 339, 2011 CarswellOnt 454, 275 O.A.C. 108 (Ont. Div. Ct.).

A Small Claims Court judge determined that three plaintiffs had made donations to the defendant society rather than loans that had to be repaid, as alleged by the plaintiffs. The Divisional Court allowed the plaintiffs' appeals, ordering a new trial. The court rejected the plaintiffs' allegation of a reasonable apprehension of bias in that the trial judge, *inter alia*, had failed to control the conduct of counsel for the society and had assisted the society's counsel by doing his own cross-examination of some of the plaintiffs' witnesses. While the trial judge's interventionist approach at times appeared to assist the society, the conduct did not rise to the level required for a finding of bias. The court concluded by commenting on the role of the trial judge in permitting the society's counsel to call an individual who had no independent knowledge of profit boards. The trial judge had an obligation to act as a "gatekeeper" in the interests of ensuring a fair trial by holding a *voir dire* on the evidence that the society was attempting to elicit from this person. As the only reason that he was called was to give an opinion, he had to be qualified as an expert by way of a *voir dire*. If he could not be so qualified, the trial judge should not have allowed him to testify.

It is not the role of an appellate court to retry a case or to substitute its views for those of the trial judge.

See *R. v. Sheppard*, 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, REJB 2002-29516, [2002] S.C.J. No. 30, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 50 C.R. (5th) 68, 633 A.P.R. 50, 210 D.L.R. (4th) 608, 284 N.R. 342, 162 C.C.C. (3d) 298 (S.C.C.), the Supreme Court of Canada held that parties are entitled to be given sufficient reasons for a decision from a trial court so that the decision can be reviewed by an appellate court and the reasons are sufficient to inform the losing party as well as the community of the basis for the decision. One must apply a functional interpretation of the reasons, articulated by the Court of Appeal in both *R. v. Ahmed*, 2002 CarswellOnt 4075, [2002] O.J. No. 4597, 7 C.R. (6th) 308, 166 O.A.C. 254, 170 C.C.C. (3d) 27 (Ont. C.A.) and *R. v. Stewart*, 2003 CarswellOnt 283, [2003] O.J. No. 347 (Ont. C.A.).

Appeals were granted, and a new trial was ordered.

The deputy judge *inter alia* failed to explain how he considered Exhibit 1 to be hearsay and inadmissible, yet he made it an exhibit at the trial.

The deputy judge did not appreciate the evidentiary rule related to spoliation of evidence, or address the issue of the rebuttable presumption.

During the period of adjournment, the Society's counsel obtained an expert report from a handwriting expert. Rule 18.02 in the rules of Small Claims Court provide that such reports are to be served at least *30 days before the trial date* "unless the trial judge orders otherwise." [Emphasis added.].

The deputy judge should have offered an adjournment to the plaintiffs. I find that this is an error of law and requires that the decision of the deputy judge be set aside.

The deputy judge refused to permit the plaintiffs to call a reply witness.

The deputy judge had the obligation to act as "gatekeeper" in the interests of ensuring a fair trial and to hold a *voir dire* on the evidence.

In *R. v. Isiah*, 1999 CarswellOnt 1150, [1999] O.J. No. 1192, *(*sub nom. *R. v. J.I.)* 119 O.A.C. 165 (Ont. C.A.), Justice Rosenberg ordered a new trial on other grounds, however, at para. 27, the court emphasized that the expert evidence should not have been admitted without proper scrutiny at a *voir dire* (David M. Paciocco, "*Context, Culture and the Law of*

Expert Evidence", (2001) 24 *Advocates' Quarterly*, 42 at p. 45). The trial judge remains the gatekeeper, responsible for determining admissibility.

Willmot v. Benton, 2011 ONCA 104, 2011 CarswellOnt 523, 11 C.P.C. (7th) 219 (Ont. C.A.).

A motion was made to quash an appeal. The respondents submitted that the court lacks jurisdiction to entertain the appeal because the order in question was interlocutory in that it did not finally dispose of the issues between the parties. The motion judge made an order that provided that the plaintiff appoint a litigation guardian and then that the plaintiff's litigation guardian appoint counsel to represent her.

The primary aspect of this order did not finally resolve an issue that went to the merit or substance of the litigation that asserts claims.

One specific aspect of the order was the subject of additional submissions. It reads as follows:

> This court further orders that the plaintiff's litigation guardian shall appoint counsel in the action, the application and the small claims action within 30 days of the date of the order failing which the Conservation Authority or any other defendant in the action or respondent to the application may move without further notice pursuant to rule 21.01 of the *Rules of Civil Procedure* to strike out the plaintiff's pleadings and seek dismissal on the ground that the plaintiff's pleadings disclose no reasonable cause of action and are frivolous, vexatious and an abuse of the court's process.

The term did not render the order final. The order was interlocutory. The motion to quash was granted, and the appeal was quashed without prejudice to the respondent's ability to seek leave to appeal to the Divisional Court.

Farrell v. TD Waterhouse Canada Inc., 2011 BCCA 61, 2011 CarswellBC 198, [2011] B.C.J. No. 201 (B.C. C.A.); affirming 2010 BCSC 1930, 2010 CarswellBC 3762, [2010] B.C.J. No. 2770 (B.C. S.C.).

The plaintiff brought an action against the bank in Small Claims Court. The parties reached a settlement which stated the bank would return share certificates and the alleged debt of the plaintiff would be forgiven. The parties disagreed over the form of release. The plaintiff's petition for judicial review was dismissed. The plaintiff appealed. The appeal was dismissed. The trial judge properly concluded that the payment order could be cancelled. There was no merit in the plaintiff's appeal. Any non-compliance with the settlement was on the part of the plaintiff.

McNevan v. Agrico Canada Ltd., 2011 ONSC 2035, 2011 CarswellOnt 2253 (Ont. S.C.J.), Roccamo J.; affirmed 2011 ONCA 720, 2011 CarswellOnt 13239 (Ont. C.A.).

The vendor brought an action in Small Claims Court against the buyer to recover outstanding accounts. The buyer counterclaimed for damages greater than $50,000. The vendor brought a motion for summary judgment. The motion was granted. The vendor relied on an affidavit of its employee. The buyer furnished no evidence to preclude the inference to be drawn from the lab and veterinarian reports.

Issasi v. Rosenzweig, 2011 ONCA 112, 2011 CarswellOnt 637, [2011] O.J. No. 520, 95 R.F.L. (6th) 45, 277 O.A.C. 391 (Ont. C.A. [In Chambers]).

The appellant brought a motion for an order granting leave to extend the time to the day following the determination of the motion so that he could perfect his appeal. Rule 3.02(1) of the Ontario *Rules of Civil Procedure* provides that court might extend the time prescribed by the Rules on such terms as is just. The Court of Appeal stated that "[a]lthough this motion involves a request for leave to extend the time to perfect an appeal, it is useful to consider the factors that apply when determining whether to exercise discretion to extend the time for filing a notice of appeal . . . They are: (1) whether the appellant formed an intention to ap-

peal within the relevant period; (2) the length of the delay and explanation for the delay; (3) any prejudice to the respondent; (4) the merits of the appeal; and (5) whether the justice of the case' requires it.".

Boghossian Legal Profession Corp. v. Permacharts Inc., 2011 ONSC 3783, 2011 CarswellOnt 5833, 282 O.A.C. 330 (Ont. Div. Ct.).

Permacharts Inc. and Carmine Bellow appealed to a Small Claims Court judgment dated October 30, 2009, which awarded the plaintiff $4,355 plus pre-judgment interest and costs.

The appellants sought to introduce fresh evidence on the appeal. The motion was dismissed.

Proposed fresh evidence otherwise must meet the test in *R. v. Palmer* (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1979] S.C.J. No. 126, [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.) at p. 13 [S.C.R.]. the issue on appeal was not what the trial judge should have done or might have done on different evidence. An appeal is limited to the trial record. The standard of review is articulated in *Housen v. Nikolaisen*, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] S.C.J. No. 31, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1 (S.C.C.).

There was no error of law or error in legal principle. There was also no palpable and overriding error in finding of facts or mixed fact and law.

The costs of appeal included the motion to introduce fresh evidence staggering in relation to the amount of money in issue. There were allegations that the plaintiff, a lawyer, obtained the judgment by perjury and fraud. The claim was for costs of almost $20,000 on a partial indemnity basis.

The plaintiff's evidence at the trial was careless and inaccurate.

The plaintiff was entitled to the costs of appeal. The amount of money at issue would probably cap those costs at $4,000 to $5,000. The plaintiff was entitled to more than that because of the allegations of fraud and perjury. The appellants were to pay costs fixed at $10,000 all inclusive.

Mehedi v. Canadian Imperial Bank of Commerce, 2011 ONSC 3635, 2011 CarswellOnt 5986 (Ont. Div. Ct.).

The appellant sued for a return of $2,765 to a G.I.C. A Small Claims Court judge found that the Bank was entitled to the set-off. The appellant exhausted the appeals available to him.

The appellant served a Statement of Defence, largely struck out by the order of Quigley J. What remained was struck out by the decision of Sproat J. who also granted default judgment to the Bank.

The appellant attempted to appeal from the decision of Sproat J. and set aside the default judgment he granted. There was no error in the decision or reasons; the appeal was dismissed.

The Statement of Defence was based on the allegations that were made, or could have been made, in Small Claims Court. It was subject to *res judicata* and cause of action estoppels. Principles provide that issues the court has decided, or which properly could have been raised, cannot be litigated or re-litigated.

Bernard v. New Brunswick, 2006 NBCA 57, 2006 CarswellNB 277, 2006 CarswellNB 278, [2006] N.B.J. No. 216, 299 N.B.R. (2d) 198, 778 A.P.R. 198 (N.B. C.A.).

The appellant, Bernard, appealed the decision of a judge of the Court of Queen's Bench that dismissed his small claims action against the respondent, New Brunswick. Bernard sought to obtain the deductions the Province made to his monthly social assistance payments, represented by the amount of a monthly annuity payment he received as a pension from his for-

mer employer. The decision was appealed and reported at 2004 NBQB 3, 2004 CarswellNB 1, [2004] N.B.J. No. 1, 270 N.B.R. (2d) 83, 48 C.P.C. (5th) 228, 710 A.P.R. 83 (N.B. Q.B.); affirmed 2006 NBCA 57, 2006 CarswellNB 277, 2006 CarswellNB 278, [2006] N.B.J. No. 216, 299 N.B.R. (2d) 198, 778 A.P.R. 198 (N.B. C.A.).

Having failed to establish there was a debt or any damages due to him from the Province under the appeal process referred to above, the Court of Queen's Bench judge decided as follows at para. 22:

> In effect, Mr. Bernard is asking the Small Claims Court to review the Appeals Board's decision but the *Small Claims Act* does not give the Small Claims Court jurisdiction to do that. Its jurisdiction is limited to actions for debt, damages or the recovery of personal property and this claim does not fall into any of those categories.

The Court of Queen's Bench judge was correct in his conclusions and decision to dismiss the small claims action. The appeal was without merit.

Gulati v. Husain, 2011 ONSC 706, 2011 CarswellOnt 407, [2011] O.J. No. 384 (Ont. S.C.J.).

The applicant sought certiorari respecting an order from the learned deputy judge of Small Claims Court: (a) denying an adjournment of the motion to set aside default judgment; (b) staying enforcement of the default judgment; (c) setting aside the default judgment; and (d) costs of $300.

The Order to set aside the default judgment and costs order was set aside. The case was remitted back to a different deputy judge of the Small Claims Court to hear and decide the motion to set aside the default judgment. No costs below for the appearance from the decision reversed, and costs of this application, if not agreed, shall be addressed in writing.

It is inusual to refuse a request to accommodate the counsel's schedule reasonably on a first appearance. And it is not a proper basis to refuse an adjournment that the court believes counsel is unlikely to succeed on the substantive issue. In this case, whatever view the motions judge may have had about the merits of the motion to set aside the default judgment, he had an obligation to accord the respondents a reasonable time to file responding materials and to be heard in argument on the merits.

The deputy judge gave no reason for refusing the adjournment. The refusal to accord the applicant a reasonable opportunity to file materials and make argument required some reasons.

The motion to set aside the default judgment without hearing submissions from either side was a failure to accord procedural fairness to both sides, and cannot stand.

Rudy Hetu Logging Ltd. v. Greyback Logging Ltd., 2012 ABQB 15, 2012 CarswellAlta 29 (Alta. Q.B.).

Rudy Hetu applied for an order directing that an appeal from the decision of Ingram P.C.J. be by way of a trial *de novo*.

Under section 51 of the *Provincial Court Act*, R.S.A. 2000, Ch. P-20, ". . . appeal to be heard as appeal on record unless, on the application of party, Court of Queen's Bench orders appeal to be heard as a trial *de novo* . . .".

Where new evidence is basis for application, the *fresh evidence* rule should at a minimum be considered, following *Gill v. Sandhu*, 1999 ABQB 209, 1999 CarswellAlta 221 (Alta. Q.B. [In Chambers]).

The application for a direction of trial *de novo* was dismissed.

Most of the information the appellant wanted to put forward was available at the time of trial. All of the new information relates to the credibility of Soukup. None of it is on the key point.

In *Janzen v. Alberta (Minister of Infrastructure)*, 2002 ABCA 278, 2002 CarswellAlta 1486, 317 A.R. 228, 284 W.A.C. 228 (Alta. C.A.), the Court of Appeal stated at para. 16 "there should not be a new trial to let the Appellant reshape her case and find different evidence.".

Davison v. Canadian Artists Syndicate Inc., 2011 NSSM 28, 2011 CarswellNS 293, 303 N.S.R. (2d) 63, 957 A.P.R. 63 (N.S. Sm. Cl. Ct.).

An Execution Order named Davison as the judgment debtor. Davison applied for relief from that Execution Order. Davison wanted to pay $100 a month until the debt to the Canadian Artists Syndicate was paid off.

In *Smith's Field Manor Development Ltd. v. Campbell*, 2010 NSSC 63, 2010 CarswellNS 103 (N.S. S.C.) at para. 6, Justice Moir held that Rule 79.22 in the *Civil Procedure Rules* "continues the power to stay execution orders without any substantive change" from the old Rule 53.13 in the *Civil Procedure Rules* (1972). Court does possess the jurisdiction to grant relief from execution orders issued pursuant to judgments rendered in Court.

See, *e.g.*, *Scaraveilli & Associates v. Quinlan*, 2005 NSSM 7, 2005 CarswellNS 616, [2005] N.S.J. No. 575, 241 N.S.R. (2d) 64, 767 A.P.R. 64 (N.S. Sm. Cl. Ct.) and *Wickwire Holm v. Wilkes*, 2005 NSSM 3, 2005 CarswellNS 439, [2005] N.S.J. No. 406, 237 N.S.R. (2d) 197, 754 A.P.R. 197, 28 C.P.C. (6th) 338 (N.S. Sm. Cl. Ct.), both decisions of the Small Claims Court in which the Adjudicators held that the Small Claims Court could direct a judgment debtor (pursuant to an order of the Small Claims Court) to attend a discovery in aid of execution.

It is reasonable to conclude that mechanisms of enforcement can and should be dealt with in the Small Claims Court in respect of Orders of the Small Claims Court (exclusive of *ex facie* contempt issues).

The interest of litigants in the Small Claims Court, many of whom are self-represented (as they are in the case before me), in accessing an informal and inexpensive court process applies not only to the adjudication of issues but also in the enforcement of Small Claims Court Orders that flow from that adjudication process.

There was no reason why the request that the application of the Execution Order be stayed, conditional upon payment of $100 a month, should be granted. The Application was denied.

Graham v. Vandersloot, 2012 ONCA 60, 2012 CarswellOnt 815, 108 O.R. (3d) 641, 6 C.C.L.I. (5th) 171, 346 D.L.R. (4th) 266, 288 O.A.C. 342, [2012] O.J. No. 353 (Ont. C.A.).

The appellant sought to set aside two orders of the Superior Court of Justice: (i) the order dated September 7, 2010, denying the appellant's request for an adjournment of the trial of this action, and (ii) the order dismissing the action.

Adjournment decisions are highly discretionary and appellate courts are rightly reluctant to interfere with them. Laskin J.A. succinctly summarized the operative legal principles in *Khimji v. Dhanani*, 2004 CarswellOnt 525, [2004] O.J. No. 320, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142 (Ont. C.A.). Although he was in dissent, the majority accepted his articulation of the statement of principles. See paras. 14 and 18 in particular. See also *Ariston Realty Corp. v. Elcarim Inc.*, 2007 CarswellOnt 2371 at paras. 33, 36 and 38, [2007] O.J. No. 1497, 51 C.P.C. (6th) 326 (Ont. S.C.J.).

The motion judge gave undue weight to the appellant's lawyer's failure. As Hambley J. noted when granting leave to appeal to the Divisional Court in this matter, "the often applied principle that the sins of the lawyer should not be visited upon the client applies in this case." This principle was enunciated by this Court in *Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd.*, 1985 CarswellOnt 357 at para. 11, [1985] O.J. No. 101, 8 O.A.C. 369, 1 C.P.C. (2d) 24 (Ont. C.A.):

> Undoubtedly counsel is the agent of the client for many purposes . . . but it is a principle of very long standing that the client is not to be placed irrevocably in jeopardy by reason of the

> neglect or inattention of his solicitor, if relief to the client can be given on terms that protect his innocent adversary as to costs thrown away and as to the security of the legal position he has gained. There may be cases where the plaintiff has so changed his position that this is impossible.

It is the overall interests of justice that, at the end of the day, must govern. See *Ariston Realty Corp.*, at para. 38.

The interests of justice favour the appellant's having her day in court to put forward her claim for damages on the merits.

Theofylatos v. Plechac, 2012 ONSC 601, 2012 CarswellOnt 1252 (Ont. Div. Ct.).

The defendant sought to extend the time for appealing an order of a Small Claims Court judge pronounced September 24, 2010.

Under Rule 3.02, the defendant must show:

(i) He had, within the time fixed for an appeal, formed an intention to appeal;

(ii) He had a good explanation for the delay;

(iii) The proposed appeal has merit; and

(iv) There will be no prejudice to the plaintiff if leave is granted.

The appeal was dismissed.

Hodgins v. Grover, 2011 ONCA 72, 2011 CarswellOnt 336, [2011] O.J. No. 310, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, 5 C.P.C. (7th) 33 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.).

A deputy judge of the Small Claims Court granted judgment in favour of the plaintiffs. The deputy judge's order was for a portion of the legal fees that the defendants and other plaintiffs in the lawsuit paid to prosecute an action relating to a condominium complex in which they were all owners. The defendants appealed, challenging unjust enrichment analysis, and the plaintiffs cross-appealed. The appeal was allowed and the cross-appeal was dismissed. The deputy judge overlooked the fact that there was no evidence that the defendants requested that the plaintiffs subsidize their contribution to legal services.

Boghossian Legal Profession Corp. v. Permacharts Inc., 2011 ONSC 3783, 2011 CarswellOnt 5833, 282 O.A.C. 330 (Ont. Div. Ct.).

Practice on appeal. The plaintiff lawyer was awarded a judgment of $4,355 for unpaid account. The defendant appealed. The appeal was dismissed. The defendant failed to demonstrate a palpable and overriding error in the judge's findings of fact. The plaintiff's evidence was hardly challenged on cross-examination. The judge accepted the testimony of the plaintiff and preferred it over that of the defendant. The judge found that the plaintiff's hourly rate was reasonable and accepted the plaintiff's unchallenged evidence on hours spent.

Janicek v. OC Transpo, 2011 ONSC 2601, 2011 CarswellOnt 8110 (Ont. Div. Ct.).

The plaintiff appealed an Order dated June 12, 2009, dismissing without costs an action dated June 28, 2003. The applicable standard of review requires a measure of deference to the court of the first instance, and only permits interference in the event of palpable and overriding errors in a decision rendering it clearly wrong. See *Woodheath Developments Ltd. v. Goldman*, 2003 CarswellOnt 3310, [2003] O.J. No. 3440, 66 O.R. (3d) 731, 38 C.P.C. (5th) 80, 175 O.A.C. 259 (Ont. Div. Ct.); leave to appeal refused 2004 CarswellOnt 1354, [2004] O.J. No. 1021, 44 C.P.C. (5th) 101 (Ont. C.A.); additional reasons at 2004 CarswellOnt 3922, 5 C.P.C. (6th) 36 (Ont. Div. Ct.). The appeal to the Court of Appeal was dismissed, 2004 CarswellOnt 1354, [2004] O.J. No. 1021, 44 C.P.C. (5th) 101 (Ont. C.A.). The limitation period prescribed by section 206 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8

expired by the second anniversary dates of both accidents. The appeal was dismissed with costs against the plaintiff.

Labatt Brewing Co. v. NHL Enterprises Canada L.P., 2011 ONCA 511, 2011 CarswellOnt 6140, 106 O.R. (3d) 677, 86 B.L.R. (4th) 226, 282 O.A.C. 151 (Ont. C.A.).

The application judge's conclusion was not anchored in the pleadings, evidence, positions, or submissions of any of the parties. As NHL and Molson were not given an opportunity to address the ultimate conclusion reached by the application judge, they were denied procedural fairness. See *Rodaro v. Royal Bank*, 2002 CarswellOnt 1047, [2002] O.J. No. 1365, 59 O.R. (3d) 74, 49 R.P.R. (3d) 227, 157 O.A.C. 203, 22 B.L.R. (3d) 274 (Ont. C.A.). Doherty J.A. held that it is both fundamentally unfair and inherently unreliable for a trial judge to make findings against a defendant on the basis of a theory of legal liability not advanced by the claimant.

See also *A-C-H International Inc. v. Royal Bank*, 2005 CarswellOnt 2043, [2005] O.J. No. 2048, 6 B.L.R. (4th) 33, 197 O.A.C. 227, 254 D.L.R. (4th) 327 (Ont. C.A.), Blair J.A.; *Grass (Litigation Guardian of) v. Women's College Hospital*, 2005 CarswellOnt 1401, [2005] O.J. No. 1403, 75 O.R. (3d) 85, 30 C.C.L.T. (3d) 100, 196 O.A.C. 201 (Ont. C.A.); additional reasons at 2005 CarswellOnt 1701, [2005] O.J. No. 1719 (Ont. C.A.); leave to appeal refused 2005 CarswellOnt 5329, 2005 CarswellOnt 5330, [2005] S.C.C.A. No. 310, (sub nom. *Grass v. Women's College Hospital)* 348 N.R. 197 (note), (sub nom. *Grass v. Women's College Hospital)* 215 O.A.C. 393 (note) (S.C.C.), Cronk J.A.; *Garfin v. Mirkopoulos*, 2009 ONCA 421, 2009 CarswellOnt 2818, 71 C.P.C. (6th) 210, 250 O.A.C. 168 (Ont. C.A.), Sharpe J.A.; *Suddaby v. 864226 Ontario Inc.*, 2004 CarswellOnt 2512 at paras. 6-9, [2004] O.J. No. 2536 (Ont. C.A.); and *TSP-Intl Ltd. v. Mills*, 2006 CarswellOnt 4037, [2006] O.J. No. 2702, 81 O.R. (3d) 266, 19 B.L.R. (4th) 21, 212 O.A.C. 66 (Ont. C.A.).

Orders on contempt

A custodial term was imposed recently because of "utter disregard and contempt" for the court's authority. "It is necessary in the circumstances of this case to bring home to the gravity of misconduct." See *Uyj Air Inc. v. Barnes*; *Ogilvy Renault v. Barnes*.

The Ontario Court of Appeal upheld a 14-month sentence against Barry Landen in *Langston v. Landen* for not complying with numerous court orders in an alleged multi-million-dollar estates fraud. The appeal court also concluded in the contempt case of *Chiang (Re)* in 2009 that sentences of eight and 12 months for a couple who breached numerous orders requiring them to disclose assets weren't excessive.

In *Chiang*, one of several cases cited by Roberts, the Court of Appeal described civil contempt as a necessary "coercive" power to try to obtain compliance with court orders.

The Court of Appeal ruled that people serving sentences for contempt aren't eligible for parole and that the release date is within the jurisdiction of the court, not corrections officials.

Gligorevic v. McMaster, 2012 ONCA 115, 2012 CarswellOnt 2155, 109 O.R. (3d) 321, 347 D.L.R. (4th) 17, 254 C.R.R. (2d) 241, 287 O.A.C. 302 (Ont. C.A.).

The appellant, Zeljko Gligorevic, was detained at the CAMH (the Hospital) in Toronto by order of the Ontario Review Board (the ORB).

Gligorevic appealed the Board's decision. He argued that the assistance of counsel at the review hearing was ineffective. The appeal was allowed.

The right to advance an ineffective assistance claim on a criminal appeal is well-established. In *R. v. B. (G.D.)*, 2000 SCC 22, 2000 CarswellAlta 348, 2000 CarswellAlta 349, [2000] S.C.J. No. 22, [2000] 1 S.C.R. 520, 261 A.R. 1, [2000] 8 W.W.R. 193, 81 Alta. L.R. (3d) 1, 143 C.C.C. (3d) 289, 224 W.A.C. 1, 32 C.R. (5th) 207, 184 D.L.R. (4th) 577, 253 N.R. 201 (S.C.C.), the Supreme Court confirmed that the right to effective assistance of counsel ex-

tends to all accused persons. Justice Major, writing for the court, explained at para. 24: "In Canada that right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, section 650(3) of the *Criminal Code of Canada* and sections 7 and 11(d) of the [*Charter*]." See also *R. v. Archer*, 2005 CarswellOnt 4964 at para. 118, [2005] O.J. No. 4348, 34 C.R. (6th) 271, *(*sub nom. *R. v. R.W.A.)* 203 O.A.C. 56, 202 C.C.C. (3d) 60 (Ont. C.A.); *Joanisse*, at pp. 56–58.

Nonetheless, this court has left open the possibility of an ineffective assistance argument as a ground of appeal in a civil case, on an exceptional basis, especially where the interests of vulnerable people are engaged. In *D.W.*, Catzman J.A. of this court stated, at para. 55:

> I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But, also like Grange J.A. [in *Dominion Readers' Service Ltd. v. Brant* (1982), 41 O.R. (2d) 1 (Ont. C.A.)], *I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability*. [Emphasis added.].

At common law, a patient's right of self-determination with respect to medical treatment is recognized and protected, absent emergency circumstances.

When a claim of ineffective assistance is raised, the appellant must demonstrate: (1) where the claim is based on contested facts, the facts that underpin the claim; (2) the incompetence of the assistance provided (the performance component); and (3) that the ineffective assistance caused a miscarriage of justice (the prejudice component): *Archer*, at paras. 119-120. See also *R. v. G. (D.M.)*, 2011 ONCA 343 at para. 100, 2011 CarswellOnt 2825, [2011] O.J. No. 1966, 105 O.R. (3d) 481, 84 C.R. (6th) 420, 281 O.A.C. 85, 275 C.C.C. (3d) 295 (Ont. C.A.); *Joanisse*, at p. 59; *R. v. DiPalma* (2002), 2002 CarswellOnt 6032 at para. 36, [2002] O.J. No. 2684, [2005] 2 C.T.C. 132 (Ont. C.A.).

R. v. Ryan, 2012 NLCA 9, 2012 CarswellNfld 53, 318 Nfld. & P.E.I.R. 15, 281 C.C.C. (3d) 352, 989 A.P.R. 15, 253 C.R.R. (2d) 258, [2012] N.J. No. 55 (N.L. C.A.).

A common theme running through all of the submissions on appeal is that Mr. Ryan, a man with limited formal education and representing himself, was, although he did not fully appreciate it, in the words of his counsel "out of his depth" and could not properly conduct his own defence.

The *Charter*, sections 7 and 11(d), guarantees an accused the right to a fair trial which includes the right to present full answer and defence. It is a fundamental underpinning of our criminal justice system. As stated by Carthy J.A. in *R. v. Clement*, 1995 CarswellOnt 549, 25 O.R. (3d) 230, 42 C.R. (4th) 40, 100 C.C.C. (3d) 103, 83 O.A.C. 226, 31 C.R.R. (2d) 17 (Ont. C.A.) at p. 239 [O.R.]; affirmed 1996 CarswellOnt 2842, 1996 CarswellOnt 2843, EYB 1996-67698, [1996] 2 S.C.R. 289, 28 O.R. (3d) 639, 107 C.C.C. (3d) 52, 198 N.R. 234, 92 O.A.C. 81, 1 C.R. (5th) 393, 41 C.R.R. (2d) 186 (S.C.C.), ". . . a fair trial is at the root of the administration of justice and an unfair trial cannot be condoned, no matter what the other circumstances may be.".

The right to a fair trial does not, of course, mean that the accused is entitled to a perfect trial or even the most advantageous trial from his point of view. See *R. v. Harrer*, 1995 CarswellBC 651, 1995 CarswellBC 1144, EYB 1995-67068, [1995] S.C.J. No. 81, [1995] 3 S.C.R. 562, 42 C.R. (4th) 269, 101 C.C.C. (3d) 193, 128 D.L.R. (4th) 98, 186 N.R. 329, 64 B.C.A.C. 161, 105 W.A.C. 161, 32 C.R.R. (2d) 273 (S.C.C.), McLachlin J.

As a society, we expect to be governed by a system that treats its citizens fairly and does not result in persons being convicted and punished for something they did not do. See *R. v. Bjelland*, 2009 SCC 38, 2009 CarswellAlta 1110, 2009 CarswellAlta 1111, [2009] S.C.J. No. 38, [2009] 2 S.C.R. 651, 460 A.R. 230, 194 C.R.R. (2d) 148, 67 C.R. (6th) 201, 462 W.A.C.

230, 391 N.R. 202, 246 C.C.C. (3d) 129, 10 Alta. L.R. (5th) 1, 309 D.L.R. (4th) 257, [2009] 10 W.W.R. 387 (S.C.C.), Rothstein J.

A guilty plea of an accused will not be accepted and acted upon until, following a screening of the facts by the trial judge, it is concluded by the court that there is a factual basis for conviction. It also underpins the "innocence at stake" exceptions that justify piercing informer (*R. v. Leipert*, 1997 CarswellBC 101, 1997 CarswellBC 102, [1997] S.C.J. No. 14, [1997] 1 S.C.R. 281, 112 C.C.C. (3d) 385, 41 C.R.R. (2d) 266, 85 B.C.A.C. 162, 138 W.A.C. 162, 143 D.L.R. (4th) 38, 207 N.R. 145, 4 C.R. (5th) 259, [1997] 3 W.W.R. 457 (S.C.C.)) and solicitor-client privileges (*R. v. McClure*, 2001 SCC 14, 2001 CarswellOnt 496, 2001 CarswellOnt 497, REJB 2001-22807, [2001] S.C.J. No. 13, [2001] 1 S.C.R. 445, 40 C.R. (5th) 1, 195 D.L.R. (4th) 513, 151 C.C.C. (3d) 321, 142 O.A.C. 201, 80 C.R.R. (2d) 217, 266 N.R. 275 (S.C.C.)) in favour of ensuring full answer and defence: "Our system will not tolerate conviction of the innocent" (per Major J. in *McClure* at para. 40).

Sir James Fitzjames Stephen wrote in his *History of the Criminal Law of England*, Vol. 1 (London, U.K: MacMillan, 1883) p. 442: "when a prisoner is undefended, his position is often pitiable, even if he has a good case.".

The courts have said on more than one occasion that the court cannot "force counsel upon an unwilling accused": *Cunningham v. Lilles*, 2010 SCC 10, 2010 CarswellYukon 21, 2010 CarswellYukon 22, [2010] S.C.J. No. 10, *(*sub nom. *R. v. Cunningham)* [2010] 1 S.C.R. 331, 480 W.A.C. 280, 283 B.C.A.C. 280, *(*sub nom. *R. v. Cunningham)* 317 D.L.R. (4th) 1, *(*sub nom. *R. v. Cunningham)* 254 C.C.C. (3d) 1, 73 C.R. (6th) 1, 399 N.R. 326 (S.C.C.) at para. 9, per Rothstein J.; see also *R. v. Vescio*, 1948 CarswellMan 1, [1949] S.C.R. 139, 6 C.R. 433, 92 C.C.C. 161, [1949] 1 D.L.R. 720 (S.C.C.) at para. 144, per Taschereau J.; and *R. v. Fleming* (1999), 171 Nfld. & P.E.I.R. 183 (Nfld. C.A.) at para. 197, per Marshall J.A. This position is reflective of "respect for individual autonomy within an adversarial system": per Lamer C.J.C. in *R. v. Swain*, 1991 CarswellOnt 1016, 1991 CarswellOnt 93, EYB 1991-67605, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933, 4 O.R. (3d) 383, 63 C.C.C. (3d) 481, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81, 5 C.R. (4th) 253, 83 D.L.R. (4th) 193 (S.C.C.) at p. 972 [S.C.R.].

Canadian criminal law recognizes an accused's right to the effective assistance of counsel, once engaged. It is seen as a principle of fundamental justice under the Chapter: *R. v. B. (G.D.)*, 2000 SCC 22 at para. 24, 2000 CarswellAlta 348, 2000 CarswellAlta 349, [2000] S.C.J. No. 22, [2000] 1 S.C.R. 520, 261 A.R. 1, [2000] 8 W.W.R. 193, 81 Alta. L.R. (3d) 1, 143 C.C.C. (3d) 289, 224 W.A.C. 1, 32 C.R. (5th) 207, 184 D.L.R. (4th) 577, 253 N.R. 201 (S.C.C.). In *G.D.B.*, Major J.

The fundamental duty of a trial judge to see that an accused receives a fair trial means that the judge must take steps to provide assistance to an unrepresented accused to enable his or her defence, or any defence that proceeding may reasonably disclose, is brought to the attention of the jury with full force and effect: *R. v. Darlyn* (1946), 1946 CarswellBC 117, 3 C.R. 13, 88 C.C.C. 269, [1947] 1 W.W.R. 449, 63 B.C.R. 428, [1947] 3 D.L.R. 480 (B.C. C.A.) at para. 7, per O'Halleran J.A.; *R. v. McGibbon*, per Griffiths J.A. at p. 347; *R. v. Tran*, 2001 CarswellOnt 2706, [2001] O.J. No. 3056, 55 O.R. (3d) 161, 156 C.C.C. (3d) 1, 14 M.V.R. (4th) 1, 149 O.A.C. 120, 44 C.R. (5th) 12 (Ont. C.A.) at para. 22, per Borins J.A.; *R. v. Assoun*, 2006 NSCA 47, 2006 CarswellNS 155, [2006] N.S.J. No. 154, 244 N.S.R. (2d) 96, 774 A.P.R. 96, 207 C.C.C. (3d) 372 (N.S. C.A.); leave to appeal refused 2006 CarswellNS 400, 2006 CarswellNS 401, [2006] S.C.C.A. No. 233, [2006] 2 S.C.R. iv (note), 258 N.S.R. (2d) 400 (note), 359 N.R. 392 (note), 824 A.P.R. 400 (note) (S.C.C.) *per curiam* at paras. 259–263.

It cannot be said that a verdict of guilty is one a properly instructed jury, acting judicially, could not reasonably have rendered, within the meaning of such cases as *R. v. Yebes*, 1987

CarswellBC 243, 1987 CarswellBC 705, [1987] S.C.J. No. 51, [1987] 2 S.C.R. 168, [1987] 6 W.W.R. 97, (sub nom. *Yebes v. R.)* 43 D.L.R. (4th) 424, 78 N.R. 351, 17 B.C.L.R. (2d) 1, 36 C.C.C. (3d) 417, 59 C.R. (3d) 108 (S.C.C.) and *R. v. Biniaris* (2000), 2000 SCC 15, 2000 CarswellBC 753, 2000 CarswellBC 754, [1998] S.C.C.A. No. 164, [2000] S.C.J. No. 16, [2000] 1 S.C.R. 381, 134 B.C.A.C. 161, 219 W.A.C. 161, 32 C.R. (5th) 1, 184 D.L.R. (4th) 193, 143 C.C.C. (3d) 1, 252 N.R. 204 (S.C.C.).

I would allow the appeal and order a new trial.

In *Save Guana Cay Reef Association v. Queen, The*, [2009] UKPC 44, the reasonable apprehension of bias which was alleged arose out of the judge being appointed on a temporary basis:

> . . . it is said that he [the trial judge] was an acting judge appointed on a temporary basis (that is on a six-month renewable contract) and that the Government of the Bahamas was at the time in default in failing to review judges' salaries. Miss Jordan added, in reinforcement of those main grounds, that the acting judge has been a senator in the governing party, and that the judicial review proceedings were of particular political sensitivity.

The Privy Council did not see this as raising a reasonable apprehension of bias. It indicated that there is no single test that is decisive.

In *Gedge v. Newfoundland & Labrador (Hearing Aid Practitioner Board)*, 2011 NLCA 50, 2011 CarswellNfld 231, 310 Nfld. & P.E.I.R. 199, 30 Admin. L.R. (5th) 162, 337 D.L.R. (4th) 359, 963 A.P.R. 199 (N.L. C.A.), it was held that "a reasonable apprehension of bias must be raised at the first possible opportunity. The basis for this rule is waiver: a party cannot ask for a remedy from a tribunal and afterwards claim reasonable apprehension of bias." However, the Court of Appeal also pointed out that "the waiver rule can only apply if the person alleging a reasonable apprehension of bias had a prior opportunity to raise the issue. The apprehension must be raised at the first possible opportunity." In *White v. Conception Bay South (Town)*, 2013 NLCA 10, 2013 CarswellNfld 50, 334 Nfld. & P.E.I.R. 325, 1037 A.P.R. 325 (N.L. C.A.), the Court of Appeal noted that "a recusal motion must generally be made before or during the hearing in respect of which the judge is being asked to recuse himself or herself."

Grainger v. Windsor-Essex Children's Aid Society, 2009 CarswellOnt 4000, 96 O.R. (3d) 711 (Ont. S.C.J.).

Judge of Superior Court of Justice erroneously granting leave to appeal order of Small Claims Court judge dismissing defendant's motion for summary judgment. No appeal lying from interlocutory order of Small Claims Court judge. Judge of Divisional Court having authority to quash order erroneously made by judge of Superior Court of Justice.

Motion by defendant for summary judgment dismissing a Small Claims Court action dismissed on grounds that there was a genuine issue for trial. Leave to appeal that decision to the Divisional Court was granted by a judge of the Superior Court of Justice. The appeal should be quashed.

Section 31 of the *Courts of Justice Act* provides for an appeal to this court from a "final order of the Small Claims Court".

The test of whether an order is final or interlocutory is set forth in *Hendrickson v. Kallio*, 1932 CarswellOnt 148, [1932] O.R. 675, [1932] 4 D.L.R. 580, [1932] O.J. No. 380 (Ont. C.A.), the leading case on the issue.

Accordingly, the order of the Deputy Judge was interlocutory, and, as it was made in the Small Claims Court, there is no appeal from such order. As a result, the order made by Gates J. was in error as he had no jurisdiction to grant leave to appeal.

National Service Dog Training Centre Inc. v. Hall, 2013 CarswellOnt 9429, [2013] O.J. No. 3216 (Ont. S.C.J.).

This case involves a dispute over the ownership and possession of a dog currently in the custody of the defendant.

At the opening of trial on April 29, 2013, the plaintiff brought two motions; one requesting an inspection of the dog which would require time and therefore an adjournment of the two-day trial, and the other requesting that the defendant's medical/behavioural evidence about the dog be excluded from trial.

Appeals are made to the Divisional Court and are only available for final orders. There is no appeal of an interim order. See *Cudini v. 1704405 Ontario Inc.*, 2012 ONSC 6645, 2012 CarswellOnt 15146, [2012] O.J. No. 5620 (Ont. Div. Ct.) *Ron Robinson Ltd. v. Canadian Indemnity Co.*, 1984 CarswellOnt 1354, 45 O.R. (2d) 124, 2 O.A.C. 359 (Ont. Div. Ct.); additional reasons 1984 CarswellOnt 1771 (Ont. Div. Ct.), *Gelber v. Allstate Insurance Co. of Canada*, 1983 CarswellOnt 457, 41 O.R. (2d) 318, 35 C.P.C. 324 (Ont. Div. Ct.).

There may be a right to judicial review of an interlocutory order. Such a review is also done by the Divisional Court and not by a deputy judge, and is described in the following excerpt from Ontario Small Claims Court Practice 2013 by Justice Marvin Zuker:

> The plaintiff may take temporary possession of the dog on six separate occasions, one for a veterinary assessment and up to five other six hour assessments during which the dog may be observed by one expert assessor of the plaintiff's choice. None of the assessments shall involve overnight stays. During the inspections, the dog shall remain in the care and control of the plaintiff at all times. The dog will be returned to the defendant at the conclusion of each occasion. All assessments are to be at the plaintiff's expense and completed within the next forty-five days.

2146100 Ontario Ltd. v. 2052750 Ontario Inc., 2013 ONSC 2483, 2013 CarswellOnt 5148, 115 O.R. (3d) 636, 308 O.A.C. 8 (Ont. Div. Ct.).

The presiding Deputy Judge gave judgment in favour of the respondents (defendants) for $21,538.85. The appellant asserts that in the process of doing so, he exceeded the monetary jurisdiction of the court.

The appellant argues that the trial judge's decision effectively adjudicated the appellant's claim at $21,538.85, and adjudicated the respondents' separate claim at $42,633.57, thereby exceeding the monetary jurisdiction of the court.

Subsection 111(3) expressly provides that if the court finds that a larger sum is due from the plaintiff to the defendant, than is found due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance. Courts in Ontario now have the jurisdiction to calculate set offs whether or not the parties assent.

In *Burkhardt*, the plaintiffs sued for $20,000 in damages arising from a fatal car accident involving a pedestrian. The jury assessed damages at $26,000 but found the deceased to have been 50 per cent at fault. In dispute was whether the plaintiffs were limited to 50 per cent of the amount claimed — in other words half of $20,000 — or whether they were entitled to judgment for 50 per cent of $26,000 (the damages assessed by the jury).

Cartwright J. found that the plaintiffs were entitled to half of the damages assessed by the jury.

At the end of the day it is the net judgment that matters. Here, the amount awarded was within the monetary jurisdiction of the Small Claims Court and did not exceed the amount claimed in the Defendants' Claim.

Appeal dismissed.

Stewart v. Toronto Standard Condominium Corp. No. 1591, 2014 ONSC 795, 2014 CarswellOnt 1377 (Ont. Div. Ct.).

Stewart sought a judicial review of the decision of the Deputy Judge who, in dismissing Stewart's claim, ordered him to pay $2000 in costs. The jurisdiction set out in *ThyssenKrupp*

Elevator (Canada) Ltd. v. 1147335 Ontario Inc., 2012 ONSC 4139, 2012 CarswellOnt 9698, 43 Admin. L.R. (5th) 61, 18 C.L.R. (4th) 82, 295 O.A.C. 71, [2012] O.J. No. 3674 (Ont. Div. Ct.) is a "limited and narrow" one that will generally arise only in exceptional circumstances such as bias, breach of principles of natural justice, or an excess of jurisdiction. The conduct of the Deputy Judge did not rise to the level required to find a reasonable apprehension of bias. There was no breach of natural justice or breach of procedural fairness. Evidentiary rulings, right or wrong, do not constitute such a breach. There was no apparent unfairness in not acceding to an adjournment. Rule 19.06, when it refers to "otherwise acting unreasonably", must be interpreted as referring to the conduct of a party within the proceeding. The rule is not intended to give broad and unfettered discretion to make awards of compensation regarding conduct of party unrelated to the matter over which the court has jurisdiction. Consistent with wording of s. 29 of the *Courts of Justice Act*. The Deputy Judge erred in penalizing the applicant in costs for conduct related to his dealings with his condominium corporation and not with respect to how he conducted himself within the proceeding.

Application allowed. Award of costs reduced to $150 under provisions of rule 14.07 (given the unaccepted offer to settle) plus disbursements of $500.

Shuster v. Ontario (Attorney General), 2013 HRTO 1158 (Ont. H.R.T.).

An application was filed under s. 34 of the Human Rights Code alleging discrimination with respect to services because of a disability. The application was dismissed. The applicant was the defendant in actions brought in a Small Claims Court. Judgment was granted to the plaintiffs. The applicant was advised of the cost to obtain transcripts. He refused to pay for them. The order granted that if the Court Reporter consent to request, the applicant could listen to recordings of the transcript. The Reporter advised the applicant that he needed to order the transcripts and that he could listen to the tapes after he had paid for the transcripts. The applicant allegee he has a hearing impediment. He never requested accommodation prior to filing Application. See *Dabic v. Windsor Police Service*, 2010 HRTO 1994, [2010] O.H.R.T.D. No. 1988 (Ont. Human Rights Trib.), paras. 8 and 9.

The application had no reasonable prospect of success. The application was dismissed.

Arnone v. Amelio, 2013 ONSC 6536, 2013 CarswellOnt 17340 (Ont. Div. Ct.).

Appellant ("Amelio") appealed order of Deupty Judge granting judgment favour of plaintiffs for $25,000. Amelio says trial judge became active participant in trial and lost her impartiality. Legal principles for assessing whether intervention of the trial judge gives rise to a claim of bias in *Chippewas of Mnjikaning First Nation v. Ontario*, 2010 ONCA 47, 2010 CarswellOnt 273, *(*sub nom. *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* [2010] 2 C.N.L.R. 18, 265 O.A.C. 247, [2010] O.J. No. 212 (Ont. C.A.); additional reasons 2010 ONCA 408, 2010 CarswellOnt 3730 (Ont. C.A.); leave to appeal refused 2010 CarswellOnt 4919, 2010 CarswellOnt 4920, *(*sub nom. *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* 409 N.R. 396 (note), *(*sub nom. *Chippewas v. Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* 276 O.A.C. 398 (note), [2010] S.C.C.A. No. 91 (S.C.C.), at paras. 230-231. At para. 243 Court of Appeal expressed view that strong presumption exists that trial judges conduct themselves fairly and impartially. Given the absence of examinations-for-discovery prior to a trial in the Small Claims Court, courts have recognized that judicial involvement may be necessary to assist parties. Appeal dismissed.

Hatfield v. Child, 2013 ONSC 7801, 2013 CarswellOnt 17612 (Ont. Div. Ct.).

Appeal by Hatfield from decision of Deputy Judge. Factual findings of a trial Judge should not be overturned on appeal in the absence of palpable and overriding errors. *Housen v. Nikolaisen*, 2002 SCC 33, 2002 CarswellSask 179, 2002 CarswellSask 178, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31

(S.C.C.). Section 27 of the *Courts of Justice Act* permits documentary and oral hearsay evidence in Small Claims Court trials. While Trial Judge made some minor errors of fact, he had sufficient basis to reach the factual conclusions he did. No reversible error of law. Appeal dismissed.

Aljamal v. Bell Canada, 2013 ONSC 5225, 2013 CarswellOnt 12452 (Ont. S.C.J.).

The appellant, Aljamal, issued a claim in the Small Claims Court for $5000 which was subsequently amended to $2500. "For the purposes of clause 31(a) of the Act, the prescribed amount is $2500". In *Action Auto Leasing & Gallery Inc. v. Robillard*, 2011 ONSC 3264, 2011 CarswellOnt 4105, 106 O.R. (3d) 281, 22 C.P.C. (7th) 414, 335 D.L.R. (4th) 439, 278 O.A.C. 293, [2011] O.J. No. 2453 (Ont. Div. Ct.), at para. 36, Heeney J. held that the matter in dispute is the amount claimed in the action. Appeal and cross-appeal dismissed without costs.

Ibrahim v. Kadhim, 2007 CarswellOnt 6 (Ont. S.C.J.); additional reasons 2007 CarswellOnt 5606, 86 O.R. (3d) 728 (Ont. S.C.J.).

Appeal by plaintiffs, defendants by counterclaim from judgment of Deputy Judge. Court satisfied trial judge's conduct during trial was such to deny appellant right to a fair trial and gave rise to a reasonable apprehension of bias. Transcripts show trial judge's involvement in extensive and frequent ways, and the tone of the interventions raised some concerns. Interventions did not result in an unfair trail or create a reasonable apprehension of bias. The nature of Small Claims Court proceedings are of such that, by necessity, trial judges tend to be more interventionist.

See *Garry v. Pohlmann*, 2001 BCSC 1234, 2001 CarswellBC 1893, 12 C.P.C. (5th) 107, [2001] B.C.J. No. 1804 (B.C. S.C.) at page 12 and Farley J. in *Wil v. Burdman*, 1998 CarswellOnt 2541, [1998] O.J. No. 2533 (Ont. Div. Ct.):

> Given the nature of small claims proceedings, appellate courts have recognized that the role of trial judges in small claims court is often, by necessity, more interventionist.

As noted by Farley J. in *Wil v. Burdman*:

> . . ., the task of a small claims judge in, in general, difficult and it is not inappropriate for a trial judge to attempt to focus and assist the parties by indicating an area of concern to the court. An appellate court must therefore look at the impugned interventions of the trial judge in the context of the overall nature of small claims proceedings when determining if the intervention rendered the trial unfair or created a reasonable apprehension of bias. The term "reasonable apprehension of bias" has been authoritatively defined in *R. v. R.D.S.*, [1997] 3. S.C.R. 484 at 530. Cory J. adopted the test proposed by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 as follows:
>
> > The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information . . . [T]he test is "what would an informed person, viewing the matter realistically and practically . . . and having thought the matter through . . . conclude.

Appeal dismissed.

Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital & Health Center, 2013 SCC 30, 2013 CarswellBC 1400, 2013 CarswellBC 1401, *(*sub nom. *Cojocaru v. British Columbia Women's Hospital and Health Centre)* [2013] 2 S.C.R. 357, 51 Admin. L.R. (5th) 1, 44 B.C.L.R. (5th) 1, 1 C.C.L.T. (4th) 1, 357 D.L.R. (4th) 585, [2013] 7 W.W.R. 211, *(*sub nom. *Cojocaru v. British Columbia Women's Hospital and Health Center)* 336 B.C.A.C. 1, 445 N.R. 138, 574 W.A.C. 1, [2013] S.C.J. No. 30 (S.C.C.).

Despite extensive copying of the plaintiff's submissions, the defendants' arguments did not rebut the presumption of judicial integrity and impartiality. The fact that the trial judge rejected some of the plaintiffs' key submissions showed that he considered issues indepen-

dently and impartially. The fact that large portions of reasons were copied from the plaintiffs' submissions did not displace presumption that trial judge engaged with issues and decided them in accordance with law. The judgment should not be set aside on the grounds that the trial judge incorporated large parts of the plaintiffs' submissions in his reasons.

Kay v. Caverson, 2013 ONCA 220, 2013 CarswellOnt 3900, 19 C.L.R. (4th) 213 (Ont. C.A.).

The plaintiff appealed, partly on grounds that the trial judge was biased. The appeal was dismissed.

Transcript references showed nothing more than the trial judge curtailing frequent, and largely inappropriate, interruptions of the plaintiff. There was nothing wrong with the way the trial judge dealt with an improper letter sent by the plaintiff to the trial judge during the course of the trial.

Saint Vincent's Nursing Home v. Fullerton, 2014 NSSC 415, 2014 CarswellNS 857 (N.S. S.C.).

Appeal of Small Claims Court decision. There are no tape recordings as to what happened at the time of the hearing. Neither Respondent attended the hearing date, which was May 8, 2014. The adjudicator dismissed the claim as against both Defendants. The Appellant was not afforded an opportunity to proceed with its case, and have it heard on its merits. The Plaintiff was not granted the right to be heard. An Appeal was granted.

Desjardins v. Van Iersel, 2014 ONSC 6921, 2014 CarswellOnt 16473 (Ont. Div. Ct.).

The trial judge held an action to be statute-barred under the *Limitations Act, 2002*. Concerning the first ground of appeal related to the claim, the Appellant's paralegal failed to commence action on a timely basis, notwithstanding the appellant having provided the pertinent documentation to him at the time of his retainer in February 2012. With regards to the second ground of appeal related to the claim, the Appellant's paralegal failed to present evidence and documentation which he had in his possession. See *Howden Power North America Inc. v. A. Swent & Sons Ltd.*, 2009 CarswellOnt 8115, [2009] O.J. No. 5560 (Ont. S.C.J.) at para. 50; ; additional reasons 2010 ONSC 1807, 2010 CarswellOnt 1766 (Ont. S.C.J.) "the jurisprudence is clear that the subsequent discovery of additional evidence in support of the claim does not postpone the start of a limitation clock to that time." The Appellant was not hindered in presentation of her case by any act or omission of the respondent. Her appeal was dismissed.

Stewart v. Toronto Standard Condominium Corp. No. 1591, 2014 ONSC 795, 2014 CarswellOnt 1377 (Ont. Div. Ct.).

Stewart sought judicial review of the decision of the deputy judge who dismissed Stewart's claim and ordered him to pay $2,000 in costs. The court was satisfied it has jurisdiction for reasons set out in *ThyssenKrupp Elevator (Canada) Ltd. v. 1147335 Ontario Inc.*, 2012 ONSC 4139, 2012 CarswellOnt 9698, 43 Admin. L.R. (5th) 61, 18 C.L.R. (4th) 82, 295 O.A.C. 71, [2012] O.J. No. 3674 (Ont. Div. Ct.).

The conduct of the deputy judge did not rise to the level required to find a reasonable apprehension of bias, namely, whether a reasonably informed bystander could reasonably perceive bias on the part of the deputy judge. There was no basis to conclude any breach of natural justice or breach of procedural fairness. Rule 19.06 must be interpreted as referring to the conduct of a party within the proceeding.

The deputy judge erred in penalizing the applicant in costs for conduct related to his dealings with his condominium corporation and not with respect to how he conducted himself within the proceeding that was before her. An application was allowed, and the award of costs was reduced to $150 under the provisions of rule 14.07 (given the unaccepted offer to settle) plus disbursements of $500.

Mazinani v. Clark, 2014 ONSC 7100, 2014 CarswellOnt 17341, [2014] O.J. No. 5886 (Ont. Div. Ct.).

The Applicant, a lawyer, commenced a collection claim for $3,937.50 in the Small Claims Court against the respondent, her former client, for unpaid invoices. The deputy judge ordered the plaintiff to deliver documents in chronological order. Instead of granting the defendant's motion to strike the claim, the deputy judge exercised his discretion to award costs against the plaintiff. Mazinani sought a judicial review of the cost order. The Applicant sought a judicial review of the interlocutory order of Small Claims Court for $2,000, an amount less than the prescribed threshold for appeals from final orders of the Small Claims Court.

The court will not exercise its judicial review jurisdiction where the judicial review application is, in its essence, an appeal by a different name: See *Millard v. Di Carlo*, 2014 ONSC 1218, 2014 CarswellOnt 2438, [2014] O.J. No. 917 (Ont. Div. Ct.), *Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.) and *Pardar v. McKoy*, 2011 ONSC 2549, 2011 CarswellOnt 3059, [2011] O.J. No. 2092 (Ont. Div. Ct.). The deputy judge possessed the jurisdiction to impose cost sanctions against the plaintiff for such litigation misconduct instead of striking out her claim. The amount of the costs award was reasonable in the circumstances. The application was dismissed.

Tran v. Kerbel, 2014 ONSC 5233, 2014 CarswellOnt 12571, [2014] O.J. No. 4285 (Ont. Div. Ct.).

Appellant Tran issued two claims in the Small Claims Court against the defendant Kerbel, alleging Kerbel was negligent in his representation of her on criminal charges. The deputy judge made an order at a settlement conference consolidating the two actions. Tran brought a motion before another deputy judge seeking to set aside or vary this order. The motion was dismissed. Tran seeks to appeal both orders. She says her ability to sue for an additional $25,000 was taken away.

There are two interlocutory orders of two Small Court Judges that deal with this procedure. The consolidated claim is to proceed and the claim will advance to a trial if it is not settled. If she wanted to sue for more than $25,000, she would have to move her claim to this Court.

The Divisional Court has no jurisdiction to hear an appeal from an interlocutory order of the Small Claims Court (see, for example, *Grainger v. Windsor-Essex Children's Aid Society*, 2009 CarswellOnt 4000, 96 O.R. (3d) 711 (Ont. S.C.J.) at para. 22. The motion was allowed, but the appeal was quashed because the orders are interlocutory orders and there is no right of appeal.

Horstein v. Orbach, 2014 ONSC 3444, 2014 CarswellOnt 7633 (Ont. Div. Ct.); additional reasons 2014 ONSC 4281, 2014 CarswellOnt 9796 (Ont. Div. Ct.).

Motion for an order setting aside the Registrar's Order of January 15, 2014 dismissing the appeal from Small Claims Court action (hereafter Div. Ct. No. 303/13 and *Div. Ct. no. 304/14*, as well as Div. Ct. no. 305/13). The Applicant sought an extension of time to file appeals. See test Rouleau J.A. in *Mignacca v. Merck Frosst Canada Ltd.*, 2009 ONCA 393, 2009 CarswellOnt 2461, 96 O.R. (3d) 164, 249 O.A.C. 19, [2009] O.J. No. 1883 (Ont. C.A. [In Chambers]) at para. 11 as follows:

1. Whether appellant formed intention to appeal within relevant period;
2. The length of delay and explanation for delay;
3. Any prejudice to respondent; and
4. The merits of appeal.

The court also considers whether the justice of the case requires granting of an extension. On the record, there was nothing to indicate that the applicant has an arguable case. The motion to set aside the Registrar's orders dismissing the appeals was dismissed.

Massoudinia v. Volfson, 2013 ONCA 29, 2013 CarswellOnt 256 (Ont. C.A. [In Chambers]).

Motion for leave to appeal and to extend the time within which to appeal. Court will generally consider whether the justice of the case requires it, whether the appellant formed a timely intention to appeal, the length of the delay, and prejudice to the respondent, and the merits of the appeal. See *Kefeli v. Centennial College of Applied Arts & Technology*, 2002 CarswellOnt 2539, 23 C.P.C. (5th) 35, [2002] O.J. No. 3023 (Ont. C.A. [In Chambers]); additional reasons 2002 CarswellOnt 6212, 20 C.P.C. (6th) 25 (Ont. C.A. [In Chambers]). Moving party formed *bona fide* intention to appeal within prescribed appeal period. However, appeal has no merit. Moving party ordered to pay $4,576.49 plus costs by deputy judge.

Divisional Court judge adopted functional approach mandated in *R. v. Sheppard*, 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, REJB 2002-29516, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 162 C.C.C. (3d) 298, 50 C.R. (5th) 68, 210 D.L.R. (4th) 608, 633 A.P.R. 50, 284 N.R. 342, [2002] S.C.J. No. 30 (S.C.C.) in assessing the reasons.

In this case, Divisional Court judge held, in essence, that even if Small Claims court judge's reasons were objectively inadequate, they did not prevent appellate review because the basis of the decision was obvious on the face of the record. Appellate courts recognize that oral reasons ordinarily cannot be as thorough and detailed as written reasons. See Carthy J.A., in *R. v. Richardson*, 1992 CarswellOnt 830, 9 O.R. (3d) 194, 74 C.C.C. (3d) 15, 57 O.A.C. 54, [1992] O.J. No. 1498 (Ont. C.A.) at para. 13, "[i]n moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result."

Where parties already had one appeal, a court deciding whether or not to grant leave should also consider the significance of the legal issues raised to the general administration of justice. See *Canada Mortgage & Housing Corp. v. Iness* (2002), 2002 CarswellOnt 3879, *(*sub nom. *Iness v. Canada Mortgage & Housing Corp.)* 62 O.R. (3d) 255, 220 D.L.R. (4th) 682, *(*sub nom. *Iness v. Canada Mortgage & Housing Corp.)* 166 O.A.C. 38 (Ont. C.A. [In Chambers]).

Haines v. Rochelle, 2014 MBCA 41, 2014 CarswellMan 228 (Man. C.A.).

Rochelle seeks leave to appeal from decision of small claim judge. Appeal from decision of a small claim judge lies under s. 15 of *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M., c. C285 (the Act), only on a question of law, which must be one of importance meriting the attention of the court and having arguable merit. No issues to be considered by Court of Appeal. No novel or new issues of law, nor would maintaining decision amount to an injustice. Application for leave to appeal dismissed.

Sandhu v. British Columbia (Provincial Court Judge), 2013 BCCA 88, 2013 CarswellBC 457, 52 Admin. L.R. (5th) 326, 42 B.C.L.R. (5th) 1, 359 D.L.R. (4th) 329, *(*sub nom. *Sandhu v. McKinnon)* 334 B.C.A.C. 173, *(*sub nom. *Sandhu v. McKinnon)* 572 W.A.C. 173, [2013] B.C.J. No. 327 (B.C. C.A.).

Sandhu hired the claimant in a small claims action to act as an interpreter. The respondent, the judge assigned to preside over the trial, refused to let the appellant act as an interpreter in the trial on basis that she was told the appellant's name was not on a list of interpreters which she incorrectly referred to as a list of court-certified interpreters.

Appellant applied for judicial review of respondent's decision. Chambers judge concluded Sandhu did not have standing to challenge the decision. Decision complied with standard of

review of reasonableness, that the respondent had not fettered her discretion or breached a duty of fairness. There was no reasonable apprehension of bias.

Appellant referred to *R. v. Tran*, 1994 CarswellNS 24, 1994 CarswellNS 435, EYB 1994-67408, [1994] 2 S.C.R. 951, 133 N.S.R. (2d) 81, 92 C.C.C. (3d) 218, 32 C.R. (4th) 34, 117 D.L.R. (4th) 7, 380 A.P.R. 81, 23 C.R.R. (2d) 32, 170 N.R. 81, [1994] S.C.J. No. 16 (S.C.C.), *R. v. Rybak*, 2008 ONCA 354, 2008 CarswellOnt 2512, 90 O.R. (3d) 81, 233 C.C.C. (3d) 58, 171 C.R.R. (2d) 306, 236 O.A.C. 166, [2008] O.J. No. 1715 (Ont. C.A.); leave to appeal refused (2009), 2009 CarswellOnt 161, 2009 CarswellOnt 162, 237 C.C.C. (3d) vi, 180 C.R.R. 376 (note), 394 N.R. 395 (note), 259 O.A.C. 397 (note), [2008] S.C.C.A. No. 311 (S.C.C.), and submitted court supposed to conduct a *voir dire* on issue of competency of an interpreter. Respondent replied she could not rule on somebody's competency as an interpreter in that way and that she would not be conducting a *voir dire*.

Section 5 of the *Small Claims Act*, R.S.B.C. 1996, c. 430, only permits appeals from orders if the order is made after a trial of the action. Numerous decisions where pre-trial decisions made by a Provincial Court judge have been judicially reviewed see *Shaughnessy v. Roth*, 2006 BCCA 547, 2006 CarswellBC 2963, 61 B.C.L.R. (4th) 268, 233 B.C.A.C. 212, 386 W.A.C. 212, [2006] B.C.J. No. 3125 (B.C. C.A.), which involved an order transferring an action from Provincial Court to Supreme Court, and *Hubbard v. Acheson*, 2009 BCCA 251, 2009 CarswellBC 1439, 93 B.C.L.R. (4th) 315, 271 B.C.A.C. 215, 458 W.A.C. 215 (B.C. C.A.), which involved order dismissing application to set aside a default judgment. Nothing expressed in the *Small Claims Act* would give the appellant the right to complain about respondent's decision. Nor is such a right given implicitly. Appeal dismissed.

Kehewin Cree Nation v. Mulvey, 2013 ABCA 294, 2013 CarswellAlta 1568, 556 A.R. 282, 91 Alta. L.R. (5th) 116, 47 C.P.C. (7th) 381, 584 W.A.C. 282 (Alta. C.A.).

Defendant filed appeal in Court of Queen's Bench, but missed statutory deadline for filing transcript. About two months after deadline, a Queen's Bench judge granted an application to extend time to file. The plaintiff appealed to the Court of Appeal. Court of Queen's Bench cannot extend the time.

Statutes bind everyone, unless they are unconstitutional. See *Hansraj v. Ao* (2004), 2004 ABCA 223, 2004 CarswellAlta 849, 354 A.R. 91, 34 Alta. L.R. (4th) 199, [2005] 4 W.W.R. 669, 329 W.A.C. 91, [2004] A.J. No. 734 (Alta. C.A.), *Glover v. Minister of National Revenue*, 1980 CarswellOnt 634, 29 O.R. (2d) 392, 16 C.P.C. 77, [1980] C.T.C. 531, 113 D.L.R. (3d) 161, 18 R.F.L. (2d) 116, 80 D.T.C. 6262, 43 N.R. 273, [1980] O.J. No. 3676 (Ont. C.A.); affirmed (1981), 1981 CarswellOnt 597, 1981 CarswellOnt 618, [1981] 2 S.C.R. 561, [1982] C.T.C. 29, 130 D.L.R. (3d) 383 (note), 25 R.F.L. (2d) 335, 82 D.T.C. 6035, 43 N.R. 271 (S.C.C.). The *Provincial Court Act* binds the Court of Queen's Bench and the Court of Appeal.

A judge has no power to amend or dispense with a statute unless that statute or some other statute expressly gives that power. Therefore, a judge cannot amend a time limit in a statute by shortening it or extending it, unless a statute gives that power. The law does not allow an extension.

Millard v. Di Carlo, 2014 ONSC 1218, 2014 CarswellOnt 2438, [2014] O.J. No. 917 (Ont. Div. Ct.).

Plaintiff brought proceedings in Small Claims Court. Defendants brought motion to dismiss action on basis the claim was statute-barred and Small Claims Court lacked jurisdiction. Deputy judge concluded Small Claims Court had jurisdiction because claims included allegations of theft. Deputy judge left limitations defence to be decided at trial. Defendants applied for judicial review. Application dismissed. Order interlocutory. One aspect of order dealt with jurisdiction but that did not elevate this into matter properly addressed on judicial review. Small Claims Court had jurisdiction to decide whether matter was within its jurisdic-

tion. This was an appeal based on alleged error of law and not a judicial review of alleged lack of jurisdiction.

Novello v. Glick, 2016 ONSC 975, 2016 CarswellOnt 1760, 129 O.R. (3d) 275 (Ont. Div. Ct.).

Appeal from final order of Deputy Judge in his interpretation and application of the limitation period in the *Limitations Act, 2002*. The standard of review on an appeal from the order of a judge is correctness for an error of law, palpable and overriding error for an error of fact, and correctness or palpable and overriding error for a question of missed fact and law, depending on whether there is an extricable legal principle (see *Zeitoun v. Economical Insurance Group*, 2009 ONCA 415, 2009 CarswellOnt 2665, 96 O.R. (3d) 639, 73 C.C.L.I. (4th) 255, 73 C.P.C. (6th) 8, 307 D.L.R. (4th) 218, 257 O.A.C. 29, [2009] O.J. No. 2003 (Ont. C.A.) at para. 1; *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, 2010 CarswellOnt 3521, 102 O.R. (3d) 555, 90 C.P.C. (6th) 101, 319 D.L.R. (4th) 412, 262 O.A.C. 349, [2010] O.J. No. 2225 (Ont. C.A.) at para. 28; ; additional reasons 2010 ONCA 513, 2010 CarswellOnt 5182, 88 C.P.C. (6th) 206 (Ont. C.A.)). The plaintiff has the burden of proving that the cause of action arose within the limitation period (see *Clemens v. Brown*, 1958 CarswellOnt 173, 13 D.L.R. (2d) 488, [1958] O.W.N. 200 (Ont. C.A.) at p. 491 [D.L.R.]; ; affirmed 1960 CarswellOnt 141, [1960] S.C.R. vii, 22 D.L.R. (2d) 545 (S.C.C.); *Soper v. Southcott*, 1998 CarswellOnt 2906, 39 O.R. (3d) 737, 43 C.C.L.T. (2d) 90, 111 O.A.C. 339, [1998] O.J. No. 2799 (Ont. C.A.) at para. 14).

Black v. Owen, 2016 ONSC 40, 2016 CarswellOnt 1688, 65 R.P.R. (5th) 247, 345 O.A.C. 245, [2016] O.J. No. 622 (Ont. Div. Ct.); reversed 2017 ONCA 397, 2017 CarswellOnt 7390, 137 O.R. (3d) 334, 137 O.R. (3d) 352, 413 D.L.R. (4th) 135, 27 E.T.R. (4th) 163, 78 R.P.R. (5th) 173 (Ont. C.A.).

Appeal from decision of Deputy Judge dated December 4, 2012 (the Judgment / Second Decision).

For findings of fact, or mixed fact and law, a trial judge's decision should not to be reversed absent a palpable and overriding error. With respect to a question of law, the standard of review is correctness: see *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.) at para. 36.

Sufficiency of reasons is dependent upon context.

Reasons in the judgment are insufficient when applying the test in *Randall (Litigation Guardian of) v. Lakeridge Health Oshawa*, 2010 ONCA 537, 2010 CarswellOnt 5482, 75 C.C.L.T. (3d) 165, (sub nom. *Randall v. Lakeridge Health Oshawa)* 270 O.A.C. 371, [2010] O.J. No. 3227 (Ont. C.A.) at para. 77, and *R. v. M. (R.E.)*, 2008 SCC 51, 2008 CarswellBC 2037, 2008 CarswellBC 2038, [2008] 3 S.C.R. 3, 83 B.C.L.R. (4th) 44, 235 C.C.C. (3d) 290, 60 C.R. (6th) 1, 297 D.L.R. (4th) 577, [2008] 11 W.W.R. 383, 260 B.C.A.C. 40, 380 N.R. 47, 439 W.A.C. 40, [2008] S.C.J. No. 52 (S.C.C.) at para. 29.

Nagribianko v. Select Wine Merchants Ltd., 2016 ONSC 490, 2016 CarswellOnt 891, 2016 C.L.L.C. 210-030, 344 O.A.C. 273 (Ont. Div. Ct.); affirmed 2017 ONCA 540, 2017 CarswellOnt 9969, 41 C.C.E.L. (4th) 24, 414 D.L.R. (4th) 368, 2017 C.L.L.C. 210-056, [2017] O.J. No. 3410 (Ont. C.A.).

Appeal from judgment of Deputy Judge awarding the plaintiff damages in lieu of 4 months' notice on the termination of his employment.

The standard of review on an appeal is as outlined by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th)

577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.). On pure questions of law, the standard of review is correctness.

The standard of review of findings of fact is palpable and overriding error.

Deputy Judge erred in law.

Tran v. Aviva Canada Inc., 2016 ONSC 549, 2016 CarswellOnt 819 (Ont. Div. Ct.).

Appeal of Small Claims Court decision of Deputy Judge granting judgment in favour of AVIVA Canada Inc. for the sum of $5,567.10 with respect to payment for alleged massage therapy treatments pursuant to a treatment plan for a person injured in a motor vehicle accident.

Aviva claimed the funds because it had paid for massage treatments and then had discovered that Tran was not a licensed massage therapist. There had been no waiver of a treatment plan.

The trial judge assessed the evidence in reaching a conclusion about what had happened. His reasons for his decision are clear. His decision was one that a trial judge could make based on the evidence.

Appeal dismissed.

Pilon v. Smartech Installations, 2016 ONSC 551, 2016 CarswellOnt 817 (Ont. Div. Ct.); additional reasons 2016 ONSC 2048, 2016 CarswellOnt 4375 (Ont. Div. Ct.).

Pilon sued Smartech and Newcap in Small Claims Court. Both defended.

Notice of Appeal sought to have judgment set aside and judgment granted in favour of Smartech or, in the alternative, a new trial.

The trial judge provided no analysis to support the existence of a contract.

The failure to give sufficient reasons to justify and explain the result or to permit meaningful appellant review of the correctness of the decision is in itself grounds for appeal. See *R. v. M. (R.E.)*, 2008 SCC 51, 2008 CarswellBC 2037, 2008 CarswellBC 2038, [2008] 3 S.C.R. 3, 83 B.C.L.R. (4th) 44, 235 C.C.C. (3d) 290, 60 C.R. (6th) 1, 297 D.L.R. (4th) 577, [2008] 11 W.W.R. 383, 260 B.C.A.C. 40, 380 N.R. 47, 439 W.A.C. 40, [2008] S.C.J. No. 52 (S.C.C.).

The issues are legal ones more than factual ones, and not easily dealt with by unrepresented litigants. The court interrupted the hearing to give the parties an opportunity to resolve the dispute in a mutually acceptable way. Unfortunately, they were unable to agree, and the hearing continued.

Mollinga v. T-Zone Health Inc., 2016 ONSC 492, 2016 CarswellOnt 816 (Ont. Div. Ct.).

Appeal by plaintiff of an interlocutory order of Whitaker J. dated February 11, 2015, ordering that the action be consolidated with the respondent's action and that the appellant pay costs of $8,000.

The claims are not identical but substantially similar and deal with the issues between the franchisor and franchisee.

The order to consolidate is appropriate in the circumstances.

> This appeal is dismissed for reasons given orally by Pattillo J. The respondent is entitled to its costs of the leave motion and the appeal, which we fix in the amount of $7,500.00, all inclusive. Were it not for the offers to settle the amount that we would have ordered would have been lower.

Harbinger Network Inc. v. Robert Webster Co., 2016 ONSC 487, 2016 CarswellOnt 893 (Ont. Div. Ct.).

Application for judicial review of the interlocutory order dated June 9, 2015 of Small Claims Court Deputy Judge in which he set aside a default judgment against the respondent on

terms. The basis for this judicial review is an alleged breach of procedural fairness, failure of the Deputy Judge to allow the applicant's counsel to make the oral submissions he wished to make and the alleged failure of the Deputy Judge to deliver adequate reasons for his decision.

The fact that the Deputy Judge may not have seen it as necessary to hear oral submissions on some of the matters in issue does not constitute a breach of procedural fairness that would justify this court's intervention by way of judicial review.

No suggestion that in his oral submissions the applicant's counsel was seeking to introduce any new material.

With respect to the argument about inadequate reasons, in *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, 2011 CarswellNfld 414, 2011 CarswellNfld 415, *(*sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board))* [2011] 3 S.C.R. 708, *(*sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 317 Nfld. & P.E.I.R. 340, 38 Admin. L.R. (5th) 255, 97 C.C.E.L. (3d) 199, 340 D.L.R. (4th) 17, 213 L.A.C. (4th) 95, *(*sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 986 A.P.R. 340, *(*sub nom. *Nfld. and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 2011 C.L.L.C. 220-008, D.T.E. 2012T-7, *(*sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board))* 424 N.R. 220, [2011] S.C.J. No. 62 (S.C.C.) at para. 14, the Supreme Court of Canada made it clear that the inadequacy of reasons does not result in a breach of the duty of procedural fairness. The adequacy of reasons is considered as part of a substantive review of the decision.

There is no right to appeal from an interlocutory order of a Small Claims Court Judge.

Application for judicial review is dismissed.

Prohaska v. Howe, 2016 ONSC 48, 2016 CarswellOnt 13, [2016] O.J. No. 13 (Ont. Div. Ct.).

The appellant appeals Deputy Judge Barycky's decision on the following grounds:

> a) The trial judge erred in law by ruling that expert evidence was inadmissible in Small Claims Court in the absence of prior service of an expert's report.
>
> b) The trial judge exceeded his jurisdiction by adjourning the trial and ordering the plaintiff to obtain and serve an expert report.
>
> c) The trial judge failed to apply s. 27 of the *Courts of Justice Act* when he ruled that the plaintiff's expert evidence was inadmissible.
>
> d) The trial judge's costs award was excessive because he misinterpreted Rule 14.07 of the *Small Claims Court Rules* and violated s. 29 of the *Courts of Justice Act*.

Counsel for the appellant is Mr. J. S. Winny. Mr. Winny is also a Deputy Judge of the Small Claims Court in Kitchener, which is in Central South Region.

Deputy Judges work part-time, and are also practicing lawyers. As a result, there was a general understanding that they could appear on appeals of Small Claims Court matters, as long as they were outside of the region in which they preside.

Giffin Koerth Inc. v. Waye, 2015 ONSC 7298, 2015 CarswellOnt 19617, 343 O.A.C. 255 (Ont. Div. Ct.).

The appeal is brought pursuant to s. 31 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The standard of review is set out in *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R.

1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.) at paras. 6–10 and 36-37. On a pure question of law, the standard of review is correctness.

Hickson v. Thompson, 2015 ONSC 7946, 2015 CarswellOnt 19381 (Ont. Div. Ct.).

Appeal from decision of a Small Claims Court Deputy Judge after trial. See *Maple Ridge Community Management Ltd. v. Peel Condominium Corp. No. 231*, 2015 ONCA 520, 2015 CarswellOnt 10397, 76 C.P.C. (7th) 36, 389 D.L.R. (4th) 711, 336 O.A.C. 391 (Ont. C.A.).

Justice Hourigan, reviewed the standard against which reasons for judgment from the Small Claims Court are to be measured when considered by an appeal court. Reasons must be sufficiently clear to permit judicial review on appeal. They must explain what has been decided and why. However, the appeal court must recognize the informal nature of the Small Claims Court and the volume of cases it handles. This means that context is important to appellate review.

Thompson seeks to tender fresh evidence on this appeal, it is important to set out the basis upon which this may be done. See s. 134(4)(b) of the *Courts of Justice Act*.

The four-part test for admissibility requires the party seeking to tender the fresh evidence to establish that: by due diligence it could not have been admitted at trial, it is relevant to a decisive or potentially decisive issue, it is reasonably capable of belief, and, if believed, it could reasonably, when taken with the rest of the evidence, be expected to have affected the verdict (*Visagie v. TVX Gold Inc.*, 2000 CarswellOnt 1888, 49 O.R. (3d) 198, 6 B.L.R. (3d) 1, 187 D.L.R. (4th) 193, 132 O.A.C. 231, [2000] O.J. No. 1992 (Ont. C.A.)).

Maple Ridge Community Management Ltd. v. Peel Condominium Corp. No. 231, 2015 ONCA 520, 2015 CarswellOnt 10397, 76 C.P.C. (7th) 36, 389 D.L.R. (4th) 711, 336 O.A.C. 391 (Ont. C.A.).

On appeal from order of Justice Edwards of the Divisional Court, reasons reported at 2014 ONSC 3660, 2014 CarswellOnt 8179 (Ont. S.C.J.); [;–additional reasons 2014 ONSC 4524, 2014 CarswellOnt 14800 (Ont. S.C.J.); reversed 2015 ONCA 520, 2015 CarswellOnt 10397, 76 C.P.C. (7th) 36, 389 D.L.R. (4th) 711, 336 O.A.C. 391 (Ont. C.A.)], and cost award reasons reported at 2014 ONSC 4524, 2014 CarswellOnt 14800 (Ont. S.C.J.); [;–reversed 2015 ONCA 520, 2015 CarswellOnt 10397, 76 C.P.C. (7th) 36, 389 D.L.R. (4th) 711, 336 O.A.C. 391 (Ont. C.A.)].

At issue in this appeal is the sufficiency of the reasons for judgment delivered by a Small Claims Court deputy judge after a trial. On appeal to a single judge of the Divisional Court, the appeal court ruled that the trial judge's reasons were insufficient to permit meaningful appellate review and ordered that the case be remitted to the Small Claims Court for a new trial before a different deputy judge.

Appeal allowed.

Massoudinia v. Volfson, 2013 ONCA 29, 2013 CarswellOnt 256 (Ont. C.A. [In Chambers]).

Motion for leave to appeal and to extend the time within which to appeal. Court will consider whether the justice of the case requires it, taking into account whether the appellant formed a timely intention to appeal, the length of the delay, any prejudice to the respondent, and the merits of the appeal: *Kefeli v. Centennial College of Applied Arts & Technology*, 2002 CarswellOnt 2539, 23 C.P.C. (5th) 35, [2002] O.J. No. 3023 (Ont. C.A. [In Chambers]); additional reasons 2002 CarswellOnt 6212, 20 C.P.C. (6th) 25 (Ont. C.A. [In Chambers]). Moving party formed a *bona fide* intention to appeal within the prescribed appeal period. I also accept her explanation for the delay.

However, appeal has no merit.

Biron v. Aviva Insurance Co., 2014 ONCA 558, 2014 CarswellOnt 9843, [2014] O.J. No. 3436 (Ont. C.A.).

The motion judge dismissed the appellant's claim on the grounds that it is an abuse of process, and that it discloses no cause of action. The appeal is from that decision and the motion judge's costs award.

The motion judge found action amounts to an impermissible collateral attack on a decision of the small claims court. She observed that if the appellant had concerns about breaches of the small claims court rules, or the admissibility of documents, then he should have raised those issues in that court.

In litigation, opposing counsel owes no duty of care to the opposing party. This proposition is well known and was expressed by Karakatsanis J., as she then was, in *Admassu v. Pantel*, 2009 CarswellOnt 4047, [2009] O.J. No. 2916 (Ont. S.C.J.) at para. 5.

Leave to appeal costs denied.

Rana v. Unifund Assurance Co., 2014 ONCA 711, 2014 CarswellOnt 14441 (Ont. C.A.); leave to appeal refused 2015 CarswellOnt 3023, 2015 CarswellOnt 3024 (S.C.C.).

The appellant appeals the order requiring her to file a fresh Statement of Claim. The motion judge was correct to require a fresh Statement of Claim in the Superior Court. The appellant's Small Claims Court Claim was improper. The court has jurisdiction over its own process and it was within the discretion of the motion judge to make the order she did.

Leave to appeal costs granted but appeal as to costs dismissed.

Antoniak v. Slater Industries Ltd., 2016 BCSC 179, 2016 CarswellBC 279 (B.C. S.C.).

Appeal from the Provincial Court under the *Small Claims Act*, R.S.B.C. 1996, c. 430, s. 15 (the Act) is the governing section. Section 15 of the Act reads:

> 15. (1) On application, a judge of the Supreme Court may by order shorten or extend the time for doing anything under this Part.
>
> (2) A time limit may be extended even if the application for the extension, or the order granting it, is made after the time limit has expired.

Law concerning applications for extensions of time is set out in *Christ v. William F. Murray Personal Law Corp.*, 2014 BCSC 1262, 2014 CarswellBC 1981 (B.C. S.C.); *Petrick v. Lakeview Credit Union*, 2002 BCSC 672, 2002 CarswellBC 1038, [2002] B.C.J. No. 958 (B.C. S.C.); *Er-Conn Development Inc. v. Shaw Cablesystems Ltd.*, 2005 BCSC 478, 2005 CarswellBC 740, [2005] B.C.J. No. 709 (B.C. S.C.); and *Davies v. Canadian Imperial Bank of Commerce*, 1987 CarswellBC 196, 15 B.C.L.R. (2d) 256, [1987] B.C.J. No. 1479 (B.C. C.A.) identified the following factors that must be examined on an application to extend the time for filing an appeal:

1. Whether a party has a *bona fide* intention to appeal;
2. Whether a party has demonstrated an undue delay in pursuing that intention;
3. Whether the defendant has been unduly prejudiced by the delay;
4. Whether the appeal has merit; and
5. Whether the interests of justice require a time extension.

Salmon v. Daum, 2016 BCSC 119, 2016 CarswellBC 171 (B.C. S.C.).

The jurisdiction to hear an appeal of a small claims judgment is set out in s. 12 of the *Small Claims Act*, R.S.B.C. 1996, c. 430:

> 12. An appeal to the Supreme Court under this Act
>
> (a) may be brought to review the order under appeal on questions of fact and on questions of law, and
>
> (b) must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that court as a new trial.

In *Smithers Parts Ltd. v. Hudson*, 2009 BCSC 1645, 2009 CarswellBC 3226 (B.C. S.C.), Madam Justice MacKenzie, as she then was, discussed the standard of review applicable to decisions made under the *Small Claims Act*:

> [26] The standard of review on pure questions of law is one of correctness, but the standard of review for findings of fact is they cannot be reversed unless the trial judge has made a palpable and overriding error. A palpable error is one that is plainly seen: *Housen v. Nikolaisen*, 2002 SCC 33. An appeal court should only intervene when there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12; *R. v. Clark*, 2005 SCC 2. This court will only intervene in an appeal from Small Claims Court where the trial judge was clearly wrong in his apprehension of the law or the facts: *Priority Buildings Services Ltd. v. Ali*, [1999] B.C.J. No. 2820 at para. 10, and *Stewart v. Strutt*, [1998] B.C.J. No. 636 at para. 10, both being Provincial Court decisions.

(see also *Berg v. Harbour City Diesel & Offroad Ltd.*, 2012 BCSC 710, 2012 CarswellBC 1420, [2012] B.C.J. No. 970 (B.C. S.C.) [*Berg*] at paras. 56–58; *Wong v. Raposo*, 2015 BCSC 173, 2015 CarswellBC 283 (B.C. S.C.) [*Wong*] at paras. 13-14).

The importance of the deference paid to the decision of the trial judge by a reviewing court was explained by Voith J. in *Berg* as follows:

> [57] The reason that such deference is paid to the decision of the trial judge is because the trial judge benefits from hearing the testimony in person, has much greater exposure to the evidence and as a result is more familiar with the case as a whole, and is better able to assess the credibility of witnesses than is a judge sitting on appeal: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.
>
> [58] This standard of review is particularly important as it pertains to the appeal advanced by Mr. Berg. In his various appeal materials and in his supplemental submissions, Mr. Berg has consistently sought to reargue the issues which were before the trial judge. This was not and is not open to him. The onus lies on Mr. Berg to establish either an error of law or that there was no reasonable evidential foundation for the factual findings which the trial judge made.

Hutchison v. Ridyard, 2016 BCSC 1, 2016 CarswellBC 5 (B.C. S.C.); additional reasons 2016 BCSC 268, 2016 CarswellBC 415 (B.C. S.C.).

Standard of review in *Smithers Parts Ltd. v. Hudson*, 2009 BCSC 1645, 2009 CarswellBC 3226 (B.C. S.C.):

> [26] The standard of review on pure questions of law is one of correctness, but the standard of review for findings of fact is they cannot be reversed unless the trial judge has made a palpable and overriding error. A palpable error is one that is plainly seen: *Housen v. Nikolaisen*, 2002 SCC 33. An appeal court should only intervene when there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12; *R. v. Clark*, 2005 SCC 2. This court will only intervene in an appeal from Small Claims Court where the trial judge was clearly wrong in his apprehension of the law or the facts: *Priority Buildings Services Ltd. v. Ali*, [1999] B.C.J. No. 2820 at para. 10, and *Stewart v. Strutt*, [1998] B.C.J. No. 636 at para. 10, both being Provincial Court decisions.
>
> [27] Apart from the ground that the judge based his error on an issue not before the court, I must find palpable and overriding error in order to reverse findings of fact or that the trial judge was clearly wrong in his apprehension of the facts; thus, the rules are the same as in the British Columbia Court of Appeal on a review from a judgment of this court.

IProperty Inc. v. SR Websports Inc., 2015 BCSC 2407, 2015 CarswellBC 3764 (B.C. S.C.).

Appeal from the decision of a judge sitting in the Small Claims Division of the Provincial Court of British Columbia dated June 25, 2015 (Vancouver file no. 14-47305):

> Section 12 of the Act provides that an appeal may be brought to this court "on questions of fact and on questions of law" but "must not be heard as a new trial" unless this court orders the appeal be heard as a new trial.
>
> An appellate court is only permitted to interfere with the findings of fact of the court appealed from where the trial judge has been shown to have committed a palpable and overriding error

> or made findings of fact that are clearly wrong, unreasonable, or unsupported by the evidence. I refer here to the Supreme Court of Canada's decision in *L. (H.) v. Canada (Attorney General)*, 2005 CSC 25, at para. 4.

Khan v. All-Can Express Ltd., 2015 BCCA 234, 2015 CarswellBC 1396, 23 C.C.E.L. (4th) 300, 372 B.C.A.C. 273, 640 W.A.C. 273 (B.C. C.A.).

Application seeking leave to appeal a costs award made following a successful action for wrongful dismissal under the "fast track" procedure. The trial judge, applying Rule 14-1(10) did not award the applicant his costs, apart from taxable disbursements. Held: application dismissed. Given the deferential standard of review on appeal, the proposed appeal is not *prima facie* meritorious. Moreover, the proposed appeal does not raise issues of significance to practice or to the action.

Trial judge made reference to the leading authorities in this court on Rule 14-1(10): *Gehlen v. Rana*, 2011 BCCA 219, 2011 CarswellBC 1058, 18 B.C.L.R. (5th) 340, 304 B.C.A.C. 283, 513 W.A.C. 283 (B.C. C.A.) and *Gradek v. DaimlerChrysler Financial Services Canada Inc./Services Financiers DaimlerChrysler Canada Inc.*, 2011 BCCA 136, 2011 CarswellBC 588, 100 C.P.C. (6th) 12, 307 B.C.A.C. 7, 519 W.A.C. 7 (B.C. C.A.).

Stallan v. Palleson, 2015 BCCA 462, 2015 CarswellBC 3221, 380 B.C.A.C. 6, 655 W.A.C. 6 (B.C. C.A.).

The applicant (respondent) seeks security for costs of the appeal and that the appeal be stayed until security is posted. It argues that the appeal has no merit and its chance of recovery, should costs be won, is low. Held: application denied. The appeal has some merit, the prospects of recovery are not overwhelming, and the appellant will likely have insufficient means to pursue it if costs are ordered.

The respondents, Josephine Palleson and 0979690 B.C. Ltd. seek security for costs of the appeal in the amount of $10,000 and the appeal be stayed until security is posted. A draft bill of costs was not provided by the applicants.

Section 24(1) of the *Court of Appeal Act* provides that a justice may order that an appellant pay or deposit costs in an amount and in a form determined by the justice.

The ultimate question is whether the order would be in the interests of justice (*Lu v. Mao*, 2006 BCCA 560, 2006 CarswellBC 3036, [2006] B.C.J. No. 3168 (B.C. C.A. [In Chambers]) at para. 6). In this regard, Madam Justice Rowles in *Ferguson v. Ferstay*, 2000 BCCA 592, 2000 CarswellBC 2144, 81 B.C.L.R. (3d) 90, 147 B.C.A.C. 61, 241 W.A.C. 61, [2000] B.C.J. No. 2190 (B.C. C.A. [In Chambers]) at para. 7, identified the following as relevant considerations:

(1) appellant's financial means;

(2) the merits of the appeal;

(3) the timeliness of the application; and

(4) whether the costs will be readily recoverable.

The appellant against whom an order is sought bears the onus of showing why security should not be required (*Creative Salmon Co. v. Staniford*, 2007 BCCA 285, 2007 CarswellBC 1062, 242 B.C.A.C. 299, 400 W.A.C. 299 (B.C. C.A. [In Chambers]) at para. 9).

The usual form of security for costs includes "a provision that the appeal is stayed pending the deposit of the security . . ." (*Austin v. Goerz*, 2007 BCCA 151, 2007 CarswellBC 543 (B.C. C.A. [In Chambers])) at para. 6 (Chiasson J.A. in Chambers)). Authority for this order is found in s. 10(2)(b) of the *Court of Appeal Act*, which permits a justice to make any order to prevent prejudice to any person.

Nammo v. Canada, 2015 ABCA 389, 2015 CarswellAlta 2258, 609 A.R. 189, 656 W.A.C. 189, [2015] A.J. No. 1353 (Alta. C.A.); leave to appeal refused 2016 CarswellAlta 875, 2016 CarswellAlta 876 (S.C.C.).

The decision to strike a claim is discretionary and subject to the standard of review of reasonableness, in the absence of error of law: *Bröeker v. Bennett Jones Law Firm*, 2010 ABCA 67, 2010 CarswellAlta 1498, 487 A.R. 111, 29 Alta. L.R. (5th) 167, 495 W.A.C. 111, [2010] A.J. No. 1081 (Alta. C.A.); leave to appeal refused 2010 CarswellAlta 1931, 2010 CarswellAlta 1932, 510 A.R. 399 (note), 410 N.R. 393 (note), 527 W.A.C. 399 (note) (S.C.C.); *Ernst v. EnCana Corp.*, 2014 ABCA 285, 2014 CarswellAlta 1588, 580 A.R. 341, 75 Admin. L.R. (5th) 162, 2 Alta. L.R. (6th) 293, 12 C.C.L.T. (4th) 274, 85 C.E.L.R. (3d) 39, [2014] 11 W.W.R. 496, 319 C.R.R. (2d) 309, 620 W.A.C. 341, [2014] A.J. No. 975 (Alta. C.A.) at para. 11; affirmed *Ernst v. Alberta Energy Regulator*, 2017 CSC 1, 2017 SCC 1, 2017 CarswellAlta 32, 2017 CarswellAlta 33, [2017] 1 S.C.R. 3, 12 Admin. L.R. (6th) 1, 35 C.C.L.T. (4th) 1, 5 C.E.L.R. (4th) 175, 405 D.L.R. (4th) 244, [2017] 2 W.W.R. 211, 374 C.R.R. (2d) 1, [2017] S.C.J. No. 1 (S.C.C.). Whether a pleading discloses a cause of action is a question of law, reviewable on a standard of correctness: *Taft v. Alberta*, 2010 ABCA 366, 2010 CarswellAlta 2370, 510 A.R. 31, 527 W.A.C. 31, [2010] A.J. No. 1394 (Alta. C.A.) at para. 7.

Whether a limitation period has expired is a question requiring the application of findings of fact to a legal standard. Absent an error about the legal standard, the standard of review is reasonableness and this court's intervention is only warranted if a palpable and overriding error is demonstrated: *Ernst v. Alberta* at para. 11; *Tran v. Kerr*, 2014 ABCA 350, 2014 CarswellAlta 1960, 584 A.R. 306, 6 Alta. L.R. (6th) 213, [2015] 1 W.W.R. 70, 623 W.A.C. 306, [2014] A.J. No. 1189 (Alta. C.A.) at para. 12; *Webb v. Birkett*, 2011 ABCA 13, 2011 CarswellAlta 62, 499 A.R. 274, 37 Alta. L.R. (5th) 57, 94 R.F.L. (6th) 265, [2011] 3 W.W.R. 20, 499 N.R. 274, 514 W.A.C. 274 (Alta. C.A.) at para. 23~~,~~; leave to appeal refused 2011 ABCA 170, 2011 CarswellAlta 923, 505 A.R. 311, 522 W.A.C. 311 (Alta. C.A.); *Aram Systems Ltd. v. NovAtel Inc.*, 2007 ABCA 100, 2007 CarswellAlta 358, 404 A.R. 288, 74 Alta. L.R. (4th) 37, 394 W.A.C. 288 (Alta. C.A.) at para. 17.

When an apprehension of bias is alleged, the standard of review is whether a fully informed observer, considering the context of the entire proceedings, would reasonably conclude that the judge was not impartial: *R. v. Switzer*, 2014 ABCA 129, 2014 CarswellAlta 579, 572 A.R. 311, 99 Alta. L.R. (5th) 318, 310 C.C.C. (3d) 301, 609 W.A.C. 311, [2014] A.J. No. 383 (Alta. C.A.) at para. 4.

Saikaley v. Oxford House First Nation Board of Education Inc., 2016 MBCA 3, 2015 CarswellMan 662 (Man. C.A.).

Leave to appeal a small claims decision of a judge of the Court of Queen's Bench. Motion for leave dismissed with reasons.

Appeal to Court of Appeal

15. A party who is aggrieved by the decision of a judge may, with leave of a judge of the Court of Appeal, appeal the decision to the Court of Appeal on a question of law only.

Leave cannot be granted on questions of fact or questions of mixed fact and law. See *Schultz v. Kopp Farms*, 2010 MBCA 30, 2010 CarswellMan 75 (Man. C.A. [In Chambers]):

> Questions of law involve the determination of the correct legal test. Questions of fact are questions of what actually took place between the parties. Questions of mixed fact and law are questions about whether the facts satisfy the legal tests. See *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) at para. 35.

A review of the record shows that all of the findings of the trial judge were open to her on the evidence.

Kowalczyk v. Saskatchewan Government Insurance, 2015 SKCA 47, 2015 CarswellSask 273 (Sask. C.A.).

Kowalczyk asks the court to overturn a Chambers decision which denied her an extension of time for filing an application for leave to appeal.

Section 45 of *The Small Claims Act, 1997* allows an appeal to this Court from the Court of Queen's Bench. It provides that Queen's Bench decisions are ". . . subject to appeal to the Court of Appeal on a question of law, with leave of a judge of that court."

The factors bearing on a decision to grant an extension of time for seeking leave to appeal were summarized in *627360 Saskatchewan Ltd. v. Bellrose*, 2007 SKCA 23, 2007 CarswellSask 113, 293 Sask. R. 164, 397 W.A.C. 164 (Sask. C.A. [In Chambers]):

> The considerations usually taken into account in determining whether to enlarge an appeal period include the following: (a) whether there was a bona fide intention to appeal within the time limit for the appeal; (b) whether an arguable case has been demonstrated; (c) whether the delay is explained, and (d) whether there is prejudice to the respondent. See, for example: *P.G.R. Films Ltd. v. Sooters Studios Ltd. et al.* (1994), 123 Sask. R. 301 (C.A.) at 303. Overall, a judge entertaining such an application should balance all of the relevant factors and considerations with a view to achieving a just result. See: *Royal Bank of Canada v. G.M. Homes Inc. et al.* (1982), 25 Sask. R. 6 (C.A.).

Borowski v. Ukrainetz, 2015 SKCA 44, 2015 CarswellSask 220, *(*sub nom. *Ukrainetz v. Borowski)* 457 Sask. R. 321, *(*sub nom. *Ukrainetz v. Borowski)* 632 W.A.C. 321 (Sask. C.A.).

Appellant "Borowski" seeks leave to appeal an order out of Queen's Bench Chambers dismissing his appeal of a successful small claims action brought against him by the prospective respondent. In addition to obtaining leave, the prospective appellant must demonstrate there is a question of law (s. 45 of *The Small Claims Act, 1997*, S.S. 1997, c. S-50.11).

The Queen's Bench judge found no overriding or palpable error arising from the trial judge's assessment of the evidence. He also found the trial judge's application of the basic principles of law grounded the award of damages made. He allowed the appeal and ordered Borowski to pay costs.

Baradaran v. Nasseri, 2016 ONSC 1568, 2016 CarswellOnt 3447, C. Horkins J. (Ont. Div. Ct.)

The appellant, Baradaran, appeals the final order of the Small Claims Court dated October 8, 2015.

Pursuant to Rule 61.04(1), a party has 30 days to file an appeal of a final Small Claims Court order. The notice of appeal in question was filed well beyond the 30 days after the April 16 Small Claims Court order, which dismissed Baradaran's Small Claims Court action.

His affidavit filed offered minimal evidence.

Deputy Judge McNelly dismissed Mr. Baradaran's motion. It was dismissed based on the evidence that showed that alleged deficiency claims had already been dealt with in the other proceedings. This is an appeal of the October 8, 2015 order. Such an appeal does not reach back and encompass all the 2015 Small Claims Court orders.

Appeal dismissed.

Tran v. Kerbel, 2014 ONSC 5233, 2014 CarswellOnt 12571, [2014] O.J. No. 4285, C. Horkins J. (Ont. Div. Ct.)

The appellant, Tran, issued two claims in the Small Claims Court against the defendant, Kerbel.

In each claim Tran alleges that Kerbel was negligent in his representation of her on criminal charges. On October 11, 2013, a settlement conference was held in the two Small Claims Court claims. Deputy Judge Wheatley issued an order at the settlement conference consoli-

dating the two actions and ordered that they continue as one: "I find that these two actions are one cause of action under one retainer for legal services and to allow the two actions to continue would be splitting the claim under rule 6.02".

A motion to set aside or vary the October 11, 2013 order of Deputy Judge Wheatly was dismissed. Open to Tran to have her claim transferred to the Superior Court of Ontario where she would not be limited to suing for only $25,000 of damages.

The orders of the two Small Claims Court Judges are interlocutory orders that deal with procedure.

An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action for the payment of money in excess of the "prescribed amount", excluding costs, or for the recovery of possession of personal property exceeding the "prescribed amount" in value (see s. 31 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43). In the case of a final order, the appeal is heard by a single Judge of the Divisional Court as provided by (*Courts of Justice Act*, s. 21(2)(b)).

The orders that Ms. Tran seeks to appeal are not final orders, they are interlocutory orders and the Divisional Court has no jurisdiction to hear an appeal from an interlocutory order of the Small Claims Court (see, for example, *Grainger v. Windsor-Essex Children's Aid Society*, 2009 CarswellOnt 4000, 96 O.R. (3d) 711 (Ont. S.C.J.) at para. 22).

Motion allowed, appeal quashed because orders are interlocutory orders and there is no right of appeal.

Edelenbos v. Bandula, 2015 ONSC 354, 2015 CarswellOnt 811, Mulligan J. (Ont. Div. Ct.)

Appeal by Bandula of decision of Deputy Small Claims Court Judge. On the first day of the trial, an issue arose about whether or not benefits under the *Workplace Safety and Insurance Act*[15] should be pursued because both parties were working within the course of their employment when the alleged incident took place.

The *Workplace Safety and Insurance Act* Tribunal conducted a hearing and issued lengthy reasons outlined in *Decision No. 1671/10*. Deputy Small Claims Court judge paid deference to the decision of the Tribunal.

The plaintiff's right of action to sue in Small Claims Court is not taken away.

The standard of review of a judge's decision was canvassed in *Litwinenko v. Beaver Lumber Co.*, 2008 CarswellOnt 3155, 237 O.A.C. 237, [2008] O.J. No. 2133 (Ont. Div. Ct.). The Supreme Court of Canada addressed the issue of sufficiency of reasons in *R. v. Sheppard*, 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, REJB 2002-29516, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 162 C.C.C. (3d) 298, 50 C.R. (5th) 68, 210 D.L.R. (4th) 608, 633 A.P.R. 50, 284 N.R. 342, [2002] S.C.J. No. 30 (S.C.C.).

The learned deputy judge made an error of law in concluding that the defendant was liable for the plaintiff's injuries. Although he reviewed the evidence before him in his decision, he did not come to an independent conclusion about liability, and incorrectly relied upon the Tribunal's qualified finding that defendant was the aggressor, stating, "The Tribunal is to be given due deference in its decision, and I do so completely."

Award of costs set aside.

Prohaska v. Howe, 2016 ONSC 48, 2016 CarswellOnt 13, [2016] O.J. No. 13, LeMay J. (Ont. Div. Ct.)

Appeal of Deputy Judge Barycky on following grounds:

> a) The trial judge erred in law by ruling that expert evidence was inadmissible in Small Claims Court in the absence of prior service of an expert's report.

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[15] S.O. 1997, c.16.

b) The trial judge exceeded his jurisdiction by adjourning the trial and ordering the plaintiff to obtain and serve an expert report.

c) The trial judge failed to apply section 27 of the *Courts of Justice Act* when he ruled that the Plaintiff's expert evidence was inadmissible.

d) The trial judge's costs award was excessive because he misinterpreted Rule 14.07 of the *Small Claims Court Rules* and violated section 29 of the *Court of Justice Act*.

Counsel for the Appellant J.S. Winny. Mr. Winny is also a Deputy Judge of the Small Claims Court in Kitchener, which is in the Central South Region. General understanding that deputy judges could appear on appeals of Small Claims Court matters, as long as there were outside of the region in which they preside.

Analysis starts with Rule 18.02 of the Small Claims Court Rules. Deputy Judges must have the authority to exercise a gatekeeping function to determine whether evidence should be admissible. Expert evidence is opinion evidence. Unless it meets certain requirements for admissibility, expert evidence is *prima facie* inadmissible.

A Small Claims Court Judge does have discretion to consider, and even exclude, expert evidence before the expert testifies. Deputy Judges have discretion to determine how expert evidence will be placed before the Court.

Deputy Judge Barycky acted appropriately when he looked to the *Rules of Civil Procedure* for guidance. Rule 18.02 gives a Deputy Judge the ability to admit documents that do not comply with the requirements.

The application of *S & A Strasser Ltd. v. Richmond Hill (Town)*, 1990 CarswellOnt 435, 1 O.R. (3d) 243, 49 C.P.C. (2d) 234, 45 O.A.C. 394, [1990] O.J. No. 2321 (Ont. C.A.) in the context of the Small Claims Rules appears not to have been considered previously by this Court.

The words of the Small Claims Rules are precisely the same as those of the *Rules of Civil Procedure*. As a result, I am bound by the Court of Appeal's findings in *Strasser*. Therefore, the rule that permits the doubling of costs does not apply when the Plaintiff fails to recover anything.

Cleland Metal Products Ltd. v. Proctor, 2016 ONSC 2277, 2016 CarswellOnt 6006, Justice J.R. Henderson (Ont. Div. Ct.).

The personal defendant (hereinafter called "Proctor") was successful on his appeal to the court from a decision of the Small Claims Court Deputy Judge. Proctor now asks for the costs of the appeal, and further asks for costs orders with respect to other court appearances.

On an appeal to this court on behalf of both defendants, MacPherson J. set aside the judgment from the first Small Claims Court trial, and ordered a new trial. The matter then proceeded to the second Small Claims Court trial in which the Small Claims Court Deputy Judge again granted judgment in favour of the plaintiff against both defendants.

As between Proctor and the plaintiff, the following costs are payable by the plaintiff to Proctor:

Costs of the first Small Claims Court trial	nil
Costs of the first appeal	$ 3,000.00
Costs of the motion to adjourn	$ 500.00
Costs of the second Small Claims Court trial	$ 700.00
Costs of the motion for security for costs	$ 1,500.00
Costs of the second appeal	$ 3,000.00
Total	$ 8,700.00

Maple Ridge Community Management Ltd. v. Peel Condominium Corp. No. 231, 2015 ONCA 520, 2015 CarswellOnt 10397, 76 C.P.C. (7th) 36, 389 D.L.R. (4th) 711, 336 O.A.C. 391 (Ont. C.A.).

At issue is the sufficiency of the reasons for judgment delivered by a Small Claims Court deputy judge after a trial. On appeal to a single judge of the Divisional Court, the appeal court ruled that the trial judge's reasons were insufficient to permit meaningful appellate review and ordered that the case be remitted to the Small Claims Court for a new trial before a different deputy judge.

Appeal allowed.

On appeal to a single judge of the Divisional Court, the court found that the trial judge's reasons were insufficient to allow for meaningful appellate review as required by the test set out in *R. v. M. (R.E.)*, 2008 SCC 51, 2008 CarswellBC 2037, 2008 CarswellBC 2038, [2008] 3 S.C.R. 3, 83 B.C.L.R. (4th) 44, 235 C.C.C. (3d) 290, 60 C.R. (6th) 1, 297 D.L.R. (4th) 577, [2008] 11 W.W.R. 383, 260 B.C.A.C. 40, 380 N.R. 47, 439 W.A.C. 40, [2008] S.C.J. No. 52 (S.C.C.) at para. 17. While *R.E.M.* was a criminal case, these principles apply equally to reasons given in civil cases: *D.M. Drugs Ltd. v. Bywater*, 2013 ONCA 356, 2013 CarswellOnt 7230, 307 O.A.C. 71 (Ont. C.A.) at para. 35~~.~~; additional reasons 2013 ONCA 484, 2013 CarswellOnt 10184 (Ont. C.A.); *C. (R.) v. McDougall*, 2008 SCC 53, 2008 CarswellBC 2041, 2008 CarswellBC 2042, *(*sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41, 83 B.C.L.R. (4th) 1, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, *(*sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, [2008] 11 W.W.R. 414, *(*sub nom. *F.H. v. McDougall)* 260 B.C.A.C. 74, *(*sub nom. *F.H. v. McDougall)* 380 N.R. 82, *(*sub nom. *F.H. v. McDougall)* 439 W.A.C. 74, [2008] A.C.S. No. 54, [2008] S.C.J. No. 54 (S.C.C.) at paras. 97–101.

The Divisional Court was not required to consider the reasons of the trial judge on a reasonableness standard. The leading case on sufficiency of judicial reasons, *R. v. Sheppard*, 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, REJB 2002-29516, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 162 C.C.C. (3d) 298, 50 C.R. (5th) 68, 210 D.L.R. (4th) 608, 633 A.P.R. 50, 284 N.R. 342, [2002] S.C.J. No. 30 (S.C.C.) at paras. 43–47 treats insufficient reasons as an error of law, reviewable on a correctness standard, and makes no mention of a deferential standard of review.

The reason of the trial judge clearly met the standard.

The Supreme Court of Canada has recognized that access to justice is a significant and ongoing challenge to the justice system with the potential to threaten the rule of law. See *Hryniak v. Mauldin*, 2014 CSC 7, 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641, [2014] 1 S.C.R. 87, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, 453 N.R. 51, 314 O.A.C. 1, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7 (S.C.C.).

Reasons for the Small Claims Court must be sufficiently clear to permit judicial review on appeal. They must explain to the litigants what has been decided and why: *Doerr v. Sterling Paralegal*, 2014 ONSC 2335, 2014 CarswellOnt 4782, [2014] O.J. No. 1732 (Ont. Div. Ct.) at paras. 17–19. However, appellate consideration of Small Claims Court reasons must recognize the informal nature of that court, as well as the volume of cases it handles and its statutory mandate to deal with those cases efficiently.

C.M. MacNeill & Associates v. Toulon Development Corp., 2016 NSSC 16, 2016 CarswellNS 31, 62 R.P.R. (5th) 270, [2016] N.S.J. No. 26, Arthur J. LeBlanc (N.S. S.C.).

Mark MacNeill appeals from decision of the Small Claims Court. Appeal dismissed.

Following the filing of the notice of appeal, the adjudicator prepared the required written report pursuant to s. 32(4) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430. The *Small*

Claims Court Act provides an appeal as of right to the Nova Scotia Supreme Court. Section 32(1) of the Act sets out the available grounds of appeal:

> 32. (1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of:
>
> (a) jurisdictional error;
>
> (b) error of law; or
>
> (c) failure to follow the requirements of natural justice,
>
> by filing with the prothonotary of the Supreme Court a notice of appeal.

Section 32(1) confines the availability of an appeal from a decision of the Small Claims Court to three grounds: (a) jurisdictional error; (b) error of law; or (c) failure to follow the requirements of natural justice. The appellants assert the respondent's claim was not within the jurisdiction of the Small Claims Court because it exceeded $25,000. However, a claimant has the option of waiving any portion of their claim in excess of the $25,000 limit to bring their claim within the jurisdiction of the Small Claims Court.

Section 22(8) of the *Small Claims Court Forms and Procedures Regulations*, N.S. Reg. 17/93, as amended, allows for the admission of new material on appeals to the Supreme Court:

> 22. (8) A judge may direct what additional material may be filed and may request a restatement of the case from an adjudicator.

Proposals to introduce new evidence beyond the record of appeal are dealt with under Civil Procedure Rule 7.27. Rule 7.27 provides that an appellant who proposes to introduce new evidence on appeal must, at the time of filing the notice of appeal, file an affidavit describing the proposed evidence, and providing additional evidence in support of its introduction.

The Court must not admit fresh evidence on an appeal of a Small Claims Court decision absent special circumstances.

Rosinski J. considered the meaning of natural justice in *Weller v. Moser*, 2015 NSSC 120, 2015 CarswellNS 294, 358 N.S.R. (2d) 236, 1131 A.P.R. 236, [2015] N.S.J. No. 162 (N.S. S.C.) [*Weller*]:

> 11 In relation to the term "the requirements of natural justice", I note that the *Small Claims Court Act* itself contains some reference in this respect.
>
> 12 Section 2 of the *Small Claims Court Act* sets out the purpose of that legislation in the following words:
>
> > 2. It is the intent and the purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.
>
> Saunders J. (as he then was) in *Brett Motors*, *supra*, explored the meaning of natural justice in the context of Small Claims Court hearings:
>
> > 12 I think it helps to recall that the Small Claims Court's purpose is to provide an informal and inexpensive forum for the resolution of disputes falling within its jurisdiction. It is meant to be accessible to those citizens who need it. To keep costs down there is no transcript of the evidence. Depending on whether the parties are represented by counsel, or other circumstances, an adjudicator may often adopt a more active, inquisitorial role than do judges in other levels of court.

Canadian Bandurist Capella Inc. v. Mishalow, 2016 ONSC 6041, 2016 CarswellOnt 14765, Bloom, J. (Ont. S.C.J.).

Appeals from the judgment of deputy judge. Neither the trial judge's reasons alone nor those reasons supplemented by the record adequately express "what" was decided and "why" it

was decided. Reluctantly, the court must order a new trial. There has been a miscarriage of justice by virtue of the denial to the appellant of appellate review by virtue of the inadequacy of the reasons.

Sennek v. Carleton Condominium Corporation No. 116, 2017 ONCA 154, 2017 CarswellOnt 2279 (Ont. C.A.). G. Pardu J.A.

Sennek moved for an extension of time within which to perfect her appeal. No prejudice to the respondent from the delay. Respondent submits that order from which the moving party wishes to appeal is interlocutory, and court does not have jurisdiction to hear the appeal. The "governing principle" is whether, on the facts, the "justice of the case" requires an extension: see *Rizzi v. Marvos*, 2007 ONCA 350, 2007 CarswellOnt 2841, 85 O.R. (3d) 401, 224 O.A.C. 293, [2007] O.J. No. 1783 (Ont. C.A. [In Chambers]) at para.17.

Section 6(1)(b) of the *Courts of Justice Act* provides that an appeal lies to the Court of Appeal from a final order of a judge of the Superior Court of Justice. The distinction between a final and interlocutory order was expressed in *Hendrickson v. Kallio*, 1932 CarswellOnt 148, [1932] O.R. 675, [1932] 4 D.L.R. 580, [1932] O.J. No. 380 (Ont. C.A.) at p. 678 [O.R.]. The characterization of an order as final or interlocutory is determined by the order's legal nature, rather than the particular circumstances of the plaintiff or defendant affected by the order. See *Laurentian Plaza Corp. v. Martin*, 1992 CarswellOnt 434, 7 O.R. (3d) 111, 6 C.P.C. (3d) 381, 89 D.L.R. (4th) 50, 54 O.A.C. 329, [1992] O.J. No. 230 (Ont. C.A.) at p. 116 [O.R.].

Court has characterized an order requiring plaintiff to appoint a litigation guardian, and requiring the litigation guardian to appoint counsel to represent the plaintiff, as interlocutory: *Willmot v. Benton*, 2011 ONCA 104, 2011 CarswellOnt 523, 11 C.P.C. (7th) 219 (Ont. C.A.). See *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 ONCA 642, 2009 CarswellOnt 5276, 97 O.R. (3d) 161, 97 Admin. L.R. (4th) 159, 80 C.P.C. (6th) 197, 311 D.L.R. (4th) 728, 254 O.A.C. 117, [2009] O.J. No. 3747 (Ont. C.A.) at para. 26.

Order of Roger J. is interlocutory. Appeal from it properly lies to the Divisional Court.

See r. 1.04(1.1) of the *Rules of Civil Procedure*, R.R.O. Reg. 194, as to the principle that "the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding." See also *Abrams v. Abrams*, 2010 ONSC 2703, 2010 CarswellOnt 2915, 102 O.R. (3d) 645, 91 C.P.C. (6th) 337, [2010] O.J. No. 1928 (Ont. S.C.J.) at paras. 66–70; leave to appeal refused 2010 ONSC 4714, 2010 CarswellOnt 6650, 61 E.T.R. (3d) 317, [2010] O.J. No. 4599 (Ont. Div. Ct.).

Caproli v. MacIntosh, 2017 NSSC 48, 2017 CarswellNS 128, Justice Ann E. Smith (N.S. S.C.).

Appeal of decision of Small Claims Court Adjudicator. Appellant sued his lawyer for the return of the retainer. The adjudicator dismissed the claim.

The *Small Claims Court Act*, R.S.N.S. 1989, c. 430, provides an appeal as of right to the Nova Scotia Supreme Court from the decision of a Small Claims Court adjudicator. Section 32(1) of the *Act* sets out the available grounds of appeal.

Caproli filed a Notice of Appeal claiming that the adjudicator committed an error of law "which resulted in unfair court trial concerning the case". Caproli did not articulate to the Court what was "unfair" about the Small Claims Court hearing, apart from the fact that he disagreed with the adjudicator's conclusions. The adjudicator interpreted the evidence before him and reached conclusions based on that evidence. It is not for the Court to interfere with his factual findings.

Traffic Law Advocate (E.E.) Professional Corp. v. Awad, 2017 ONSC 1245, 2017 CarswellOnt 2621, Nordheimer J. (Ont. Div. Ct.)

Defendants appeal from the decision of Deputy Judge, who awarded judgments in favor of the plaintiff/respondent against each of the defendants/appellants, and ordered the appellants to each pay $3,500 to the respondent, including costs assessed at $750 and interest calculated from October 11, 2013. Appeals allowed, actions dismissed.

The appellants signed written retainer agreements. The appellants had a falling out with the respondent in July 2010. They retained counsel and terminated their relationship with the respondent. The respondent commenced actions in the Small Claims Court against the appellants on account of fees.

The appellants entered into their arrangements, in terms of their personal dealings with the respondent, on the clear understanding that they would not have to pay for the respondent's services except as a deduction from any settlement that was reached.

Where one party to an agreement entices the other party to enter into the agreement, based on a specific representation as to the terms of the agreement that is different from what the agreement actually provides, then that party bears the burden of showing that the other party knew and understood the true parameters of the relationship. The respondent, in this case, failed to do so.

Where a lawyer or paralegal makes a representation as to the basis upon which they will be paid for their services, but then purports to change that basis in a written retainer agreement, that agreement may be signed by a client at a time when the client is particularly vulnerable. If lawyers and paralegals want to promote their services, through representations regarding how they will be paid (the expression "we don't get pay unless you get paid" comes to mind), but then seek to alter or qualify the representation through the signing of a written retainer agreement, those lawyers and paralegals will bear the burden of establishing that the alteration in the manner of payment was fully and fairly explained to the client, and the client willingly agreed to it.

In *Skunk v. Ketash*, the Court of Appeal for Ontario found that an order dismissing a summary judgment motion was interlocutory. The general rule is that an order dismissing a motion for summary judgment is an interlocutory, and not a final, order. If the final order does not invoke r. 20.04(4) and reference the legal determination that the party argues is a binding legal determination, the Court of Appeal will usually consider whether the precise scope of the point of law determined by the motion judge is clear and whether it is clear that the motion judge intended that his or her determination be binding on the parties at trial.

Haines v. David, 2017 ONSC 3257, 2017 CarswellOnt 8037 (Ont. Div. Ct.).

Reasons for decision, although brief, were sufficient bearing in mind the efficiency expected of the Small Claims Court. Reasons do not need to be lengthy or include great detail and it has been found that, in particular, Small Claims Court reasons must be viewed in the context of its directive to deal with cases efficiently.

Propane Levac Propane Inc. v. Macaulay, 2011 ONSC 293, 2011 CarswellOnt 108, [2011] O.J. No. 105 (Ont. Div. Ct.).

Appeal from Deputy Judge House awarding costs $1,650 to the Respondent following a trial. The Small Claims Court judge ordered that if the Defendant had not returned the Plaintiff's propane tank within 20 days, then the Defendant was to pay the Plaintiff the sum of $2,000. Trial judge's Reasons addressed what amounted to unreasonable litigation conduct by the Defendant. Failure to accept or to respond to a generous offer, as was the Plaintiff's, is conduct that may be properly considered under the rubric of "unreasonable" behaviour in the proceeding. His award of costs does not prevent a party from proceeding to court to obtain a ruling on a legal matter; rather it encourages litigants to have regard to the applicable law and to the principle of proportionality in their litigation, including at the Small Claims Court level.

Water v. Toronto Police Services Board, 2016 ONSC 7824, 2016 CarswellOnt 19728 (Ont. Div. Ct.).

Reasons from the Small Claims Court must be sufficiently clear to permit judicial review on appeal. The TPS Board's appeal in Small Claims Court File No SC-13-23951 dismissed. The cross-appeal of Moses Water in Small Claims Court File No SC-13-23951 dismissed.

Canadian Bandurist Capella Inc. v. Mishalow, 2016 ONSC 6041, 2016 CarswellOnt 14765 (Ont. S.C.J.).

Having concluded that the reasons of the Small Claims Court were facially incapable of appellate review, the Divisional Court was obliged to consider the record before the trial judge to determine if the reasons were more comprehensible when read in the context of this record. Reasons from the Small Claims Court must be sufficiently clear to permit judicial review on appeal. Given the Small Claims Court context, a new trial was ordered.

Radikov v. Premier Project Consultants, 2017 ONSC 7192, 2017 CarswellOnt 19135 (Ont. Div. Ct.).

An appeal lies to the Divisional Court from a final order of the Small Claims Court. Section 2 of the Small Claims Court Jurisdiction and Appeal Limit, O. Reg. 626/00, provides that the Divisional Court has jurisdiction to hear appeals from final orders of the Small Claims Court in excess of $2,500.

Platinum Stairs Ltd. v. Laranjeira, 2017 ONSC 6107, 2017 CarswellOnt 16032 (Ont. Div. Ct.).

An appeal lies to the Divisional Court from the final order of the Small Claims Court in an action for the payment of money in excess of the "prescribed amount", excluding costs, which at this time is $2,500.

1439957 Ontario Inc. v. Benkoe, 2017 ONSC 4984, 2017 CarswellOnt 13029 (Ont. Div. Ct.).

Judicial review sought from the judgment of Deputy Judge that awarded plaintiff $313.58 on a claim of $1,413.63. No right to appeal from a final order from the Small Claims Court where the payment of sum of money that did not exceed the prescribed amount of $2,500. Application for judicial review is a disguised effort to appeal the decision of the Court.

Goodman v. Florin, 2017 ONSC 4110, 2017 CarswellOnt 10232 (Ont. Div. Ct.).

Divisional Court has jurisdiction to hear application for judicial review from decision from Small Claims Court, whether decision final or interlocutory. While there is no appeal from an interlocutory order of the Smalll Claims Court, judicial review is available, but only with respect to the narrow issue of jurisdiction: *Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.). In the absence of a stay order, a motion to review this decision does not act to stay proceedings in the small claims court.

M. Tucci Construction Ltd. v. Lockwood, 2002 CarswellOnt 365, [2002] O.J. No. 424 (Ont. C.A.).

Same cause of action not determined in earlier proceedings by court of competent jurisdiction. Earlier small claims court action resolved in a settlement; there was no determination by a court and there were no releases. Appeal dismissed with costs.

Sennek v. Carleton Condominium Corporation No. 116, 2017 ONCA 154, 2017 CarswellOnt 2279 (Ont. C.A.).

Motion for an extension of time within which to perfect appeal to court. The "governing principle" is whether, on the facts, the "justice of the case" requires an extension. See *Rizzi v. Marvos*, 2007 ONCA 350, 2007 CarswellOnt 2841, 85 O.R. (3d) 401, 224 O.A.C. 293, [2007] O.J. No. 1783 (Ont. C.A. [In Chambers]) at para. 17. Section 6(1)(b) of the *Courts of Justice Act* provides that an appeal lies to the Court of Appeal from a final order of a judge

of the Superior Court of Justice. The distinction between a final and interlocutory order was expressed in the court's decision in *Hendrickson v. Kallio*, 1932 CarswellOnt 148, [1932] O.R. 675, [1932] 4 D.L.R. 580, [1932] O.J. No. 380 (Ont. C.A.) at p. 678 [O.R.]. The court's assessment of the "justice of the case" for the purpose of granting an extension in these circumstances must take into account the express inclusion in r. 1.04(1.1) of the *Rules of Civil Procedure*, R.R.O. Reg. 194, of the principle that "the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding." See also *Abrams v. Abrams*, 2010 ONSC 2703, 2010 CarswellOnt 2915, 102 O.R. (3d) 645, 91 C.P.C. (6th) 337, [2010] O.J. No. 1928 (Ont. S.C.J.) at paras. 66–70~~.~~; leave to appeal refused 2010 ONSC 4714, 2010 CarswellOnt 6650, 61 E.T.R. (3d) 317, [2010] O.J. No. 4599 (Ont. Div. Ct.). Motion to extend time dismissed, without costs in all the circumstances of this case.

Hunt v. TD Securities Inc., 2003 CarswellOnt 4971, 40 B.L.R. (3d) 156, 43 C.P.C. (5th) 211, [2003] O.J. No. 4868 (Ont. C.A.).

The general principle that applies when an appeal is allowed is that the order for costs at trial is set aside and the costs of the trial and on appeal are awarded to the successful appellant. However, the court has the discretion to depart from this approach in unusual circumstances. See *Kopij v. Metropolitan Toronto (Municipality)*, 1999 CarswellOnt 270, [1999] O.J. No. 239 (Ont. C.A.). Costs are not to be used to shore up a damages award.

Massoudinia v. Volfson, 2013 ONCA 29, 2013 CarswellOnt 256 (Ont. C.A. [In Chambers]).

Motion for leave to appeal and to extend the time within which to appeal. Appellate courts recognize that oral reasons ordinarily cannot be as thorough and detailed as written reasons. As Carthy J.A. said, in *R. v. Richardson*, 1992 CarswellOnt 830, 9 O.R. (3d) 194, 74 C.C.C. (3d) 15, 57 O.A.C. 54, [1992] O.J. No. 1498 (Ont. C.A.) at para. 13, "[i]n moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result." Where the parties have already had one appeal, a court deciding whether or not to grant leave should also consider, the significance of the legal issues raised to the general administration of justice. See *Canada Mortgage & Housing Corp. v. Iness*, 2002 CarswellOnt 3879, *(*sub nom. *Iness v. Canada Mortgage & Housing Corp.)* 62 O.R. (3d) 255, 220 D.L.R. (4th) 682, *(*sub nom. *Iness v. Canada Mortgage & Housing Corp.)* 166 O.A.C. 38 (Ont. C.A. [In Chambers]). While the moving party in this case framed the question in such a manner as to raise an issue of importance to the administration of justice, it is plain from the record that this case has no general significance. Motion dismissed.

Meisels v. Lawyers Professional Indemnity Co., 2015 ONCA 406, 2015 CarswellOnt 8558, 126 O.R. (3d) 448, 28 C.B.R. (6th) 286, 336 O.A.C. 67, [2015] O.J. No. 2960 (Ont. C.A.).

Order dismissing motion to strike and declaring that respondent had status to bring application was final. Respondent lawyer licensed to practice law in Ontario. Respondent undischarged bankrupt. Respondent was being sued for professional negligence in class action in Colorado. Respondent disputed jurisdiction of court to entertain appeal on basis that motion judge's order was interlocutory and leave to appeal to Divisional Court was required. Appeal allowed. Order was final and appeal was properly brought before court. Right to claim indemnity and to enforce claim by bringing action was right of trustee in bankruptcy, and belonged to trustee whether indemnity was payable directly to insured bankrupt or to third party.

Glanworth Developments Inc. v. Toryork Financial Services Ltd., 2018 ONSC 3614, 2018 CarswellOnt 9363 (Ont. Div. Ct.)

Toryork Financial Services Limited successfully sued the applicants in the Small Claims Court for a brokerage fee of 2% for arranging a mortgage in excess of $1 million. Applicants served and filed an appeal from that decision. Appeal was dismissed because the applicants

failed to perfect their appeal within one year after filing notice of appeal. Application dismissed. Applicants failed to explain the reason for the delay. Applicants knew that no transcript would be turned over to them until they paid for it in advance. The applicants also knew that their appeal could not be perfected without the transcript.

Jasmine Princivil v. Mogo Financial Inc., Operating as Mogomoney, 2018 ONSC 3916, 2018 CarswellOnt 10012 (Ont. Div. Ct.). Justice M. O'Bonsawin.

Appeal by Princivil, of the Endorsement of Deputy Judge Leclaire of the Ottawa Small Claims Court. Did Deputy Judge Leclaire err when he issued his Endorsement reinstating the Default Judgement against Ms. Princivil? Standard of review for decisions in the Small Claims Court outlined in *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.) at paras. 8, 10 and 37. Deference owed to the deputy trial judge unless there is a palpable and overriding error. Appeal dismissed.

Joubarne v. Kellam, 2018 ONSC 3997, 2018 CarswellOnt 10456 (Ont. Div. Ct.). Justice R. Ryan Bell.

Joubarne appealled judgment of deputy judge. She sought order extending the time to file her appeal to Divisional Court. Joubarne also sought leave to appeal the costs order made by the deputy judge. This endorsement deals only with the motion to extend time.

Extensions of time for meritless appeals will be denied, even if other factors militate in favour of granting an extension (*1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2015 ONCA 5, 2015 CarswellOnt 3225 (Ont. C.A.) at para. 7). Motion to extend time dismissed.

Azzeh v. Tank Truck Transport Inc., 2018 ONSC 5387, 2018 CarswellOnt 15886 (Ont. Div. Ct.). R. D. Gordon R.S.J.

Tank Truck sought order extending the time to serve and file an appeal of deputy judge to the Divisional Court. The test on motion to extend the time for filing Appeal set out in *Laczko v. Alexander*, 2012 ONCA 803, 2012 CarswellOnt 14480 (Ont. C.A. [In Chambers]); additional reasons 2012 ONCA 872, 2012 CarswellOnt 17256 (Ont. C.A.). Extending the time for appealing the decision of the deputy judge not appropriate. The appeal as presented had little merit and, given the conduct of Tank Truck throughout the proceedings and its continuing default in payment of the costs order of November 30, 2017 it would be unjust to grant the relief. Motion dismissed.

Sabatin v. Ganji, 2018 ONSC 5680, 2018 CarswellOnt 15754 (Ont. Div. Ct.). Perell J.;—; additional reasons 2018 ONSC 6356, 2018 CarswellOnt 17993 (Ont. Div. Ct.)

Plaintiff, Sabatin, appealed Endorsement Order made in the Small Claims Court. There was a judgment debtor examination in the Newmarket Small Claims Court where Ganji resided. Pursuant to rule 20.1O of the *Small Claims Court Rules*, an examination of a judgment debtor shall be held where the judgment debtor resides. Deputy judge's Endorsement Order memorialized a $7,000 settlement of the $25,000 judgment with installment payments. No merit to Sabatin's appeal. Whether to grant or refuse an adjournment of a hearing of an application (or any other hearing) is a matter of judicial discretion (See *Khimji v. Dhanani*, 2004 CarswellOnt 525, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142, [2004] O.J. No. 320 (Ont. C.A.); *Graham v. Vandersloot*, 2012 ONCA 60, 2012 CarswellOnt 815, 108 O.R. (3d) 641, 6 C.C.L.I. (5th) 171, 346 D.L.R. (4th) 266, 288 O.A.C. 342, [2012] O.J. No. 353 (Ont. C.A.)). In *Ariston Realty Corp. v. Elcarim Inc.*, 2007 CarswellOnt 2371, 51 C.P.C. (6th) 326, [2007] O.J. No. 1497 (Ont. S.C.J.), the Court listed some of the factors for a court to consider in deciding to grant or refuse an adjournment. Appeal dismissed.

CLASSIC Pos Inc. v. Hinic, 2018 ONSC 5791, 2018 CarswellOnt 16137 (Ont. Div. Ct.); affirmed *Pos v. Hinic*, 2019 ONSC 3202, 2019 CarswellOnt 8217 (Ont. Div. Ct.). Perell J.

Two actions were tried together. Classic was unsuccessful. Classic appealed. The Registrar dismissed the appeals, because of Classic's failure to deliver proof that it had ordered the trial transcript. However, Justice Myers set aside the Registrar's Orders on terms. Classic applied for to an Order setting aside the registrar's Orders dismissing the appeals. Classic's motions dismissed. Justice Myers exercised his jurisdiction pursuant to Rules 1.04, 1.05, and 37.13 of the *Rules of Civil Procedure*. In prosecuting an appeal under the *Rules of Civil Procedure*, Classic's approach lead to the least expeditious and most expensive determination of the appeal, the exact opposite of what is called for under Rule 1.04.

O'Brien v. Blue Heron, 2018 ONSC 5501, 2018 CarswellOnt 15412 (Ont. Div. Ct.)

Dwoskin D.J. struck parts of the statement of claim and dismissed all but one claim against the respondents. O'Brien appealed that decision. The respondents brought a motion for security for costs. The motion was heard by Smith J. He granted the relief sought, ordering Mr. O'Brien to pay $5,000 as security for costs for the "Blue Heron Respondents" and another $5,000 for the "Sector Respondents". The matter came for a review of that order pursuant to s. 21(5) of the *Courts of Justice Act* and Rule 61.16(6) of the *Rules of Civil Procedure*. A decision regarding security for costs is discretionary in nature and is to be afforded deference See *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 2017 CarswellOnt 16763, 138 O.R. (3d) 1, 75 B.L.R. (5th) 173, 418 D.L.R. (4th) 679 (Ont. C.A.) at para. 20; and *Susin v. Susin*, 2018 ONCA 220, 2018 CarswellOnt 3287 (Ont. C.A.) at para. 10; ; affirmed 2018 ONCA 549, 2018 CarswellOnt 9573 (Ont. C.A.). Section 31(a) of the *Court of Justice Act* does not afford jurisdiction for an appeal when the amount claimed against a defendant does not exceed $2500. S. 31(a) of the *Courts of Justice Act* establishes the appeal is frivolous and vexatious as against those respondents. Smith J. referenced two leading authorities on the legal test. At para. 25 of *Pickard v. London Police Services Board* the Court stated: "To deny meritless claims is not to curtail access to justice, rather to facilitate access to justice by making room for legitimate claims", *Pickard v. London Police Services Board*, 2010 ONCA 643, 2010 CarswellOnt 7357, 268 O.A.C. 153, [2010] O.J. No. 4169 (Ont. C.A. [In Chambers]); and *Lukezic v. Royal Bank*, 2011 ONSC 5263, 2011 CarswellOnt 9257 (Ont. S.C.J.); additional reasons 2012 ONSC 431, 2012 CarswellOnt 1148 (Ont. S.C.J.); reversed 2012 ONCA 350, 2012 CarswellOnt 6464, 350 D.L.R. (4th) 111, [2012] O.J. No. 2344 (Ont. C.A.). Motion dismissed.

Clark v. Pezzente, 2017 ABCA 220, 2017 CarswellAlta 1170 (Alta. C.A.). Madam Justice Veldhuis.

Applicant Clark sought an order restoring his appeal. An order to restore an appeal is discretionary (See *Phillips v. 707739 Alberta Ltd.*, 2001 ABCA 219, 2001 CarswellAlta 1692, 286 A.R. 367, 18 C.P.C. (5th) 299, 253 W.A.C. 367, [2001] A.J. No. 1161 (Alta. C.A. [In Chambers]) at para. 13~~.~~; leave to appeal refused 2002 CarswellAlta 864, 2002 CarswellAlta 865, [2002] 2 S.C.R. v (note), 327 A.R. 331 (note), 296 W.A.C. 331 (note), [2002] S.C.C.A. No. 64 (S.C.C.)). The test is whether it is in the interests of justice to allow the appeal to proceed. Appeal has little, if any, chance of success. Restoring the appeal would prejudice the respondents. Self-represented litigants have a responsibility to "familiarize themselves with the relevant legal practices and procedures pertaining to their case"(Statement of Principles at p. 9). The applicant is sophisticated. Application dismissed.

Bennett v. Fresh Air Inc., 2019 ONSC 3469, 2019 CarswellOnt 10139, Madam Justice H.M. Pierce (Ont. Div. Ct.).

Appellant, Bennett, appeals the Small Claims Court decision of Deputy Judge R. A. Evans dated October 20, 2017. Both parties were self-represented at trial. At the close of the ap-

peal, the respondent's name was amended, *nunc pro tunc*, to "Fresh Air Inc." The appellant submits that:

> 1. The Small Claims Court judge erred in law by ordering specific performance or rescission for which the Small Claims Court has no jurisdiction.
>
> 2. The Deputy Judge erred in law in finding that the respondent had not engaged in unfair business practices pursuant to the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A.
>
> 3. The Deputy Judge erred in finding as a fact that the respondent's obligation to service the appellant's bike was limited to once per year when there was evidence to the contrary.
>
> 4. The Deputy Judge erred in fact and law by failing to award costs in her judgment.

While the Small Claims Court can grant equitable relief within the scope of its statutory authority pursuant to s. 23 of the *Courts of Justice Act*, a Deputy Judge does not have jurisdiction to grant equitable relief outside the scope of s. 23 and, therefore, cannot grant specific performance or rescission, which is what occurred in this case.

The seminal case dealing with the Small Claims Court's jurisdiction to order equitable relief is *Hodgins v. Grover*, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.). The case dealt with a claim for unjust enrichment. At para. 29 of *Grover* Epstein J.A. adopted Heeney J.'s reasoning in *936464 Ontario Ltd. v. Mungo Bear Ltd.*, 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754, [2003] O.J. No. 3795 (Ont. Div. Ct.). Heeney J. concluded that the term "any action" found in s. 23 of the *Courts of Justice Act* was broad enough to encompass both common law and equitable claims. The decision in *Grover* means that, in awarding equitable relief, the Small Claims Court must confine its awards to money judgments or the return of property within its $25,000.00 monetary jurisdiction.

Deputy Judge J.S. Winny also considered the nature of the Small Claims Court's jurisdiction in *Hradecky v. Hydro One Networks Inc.*, 2014 CarswellOnt 3316, [2014] O.J. No. 1249 (Ont. Sm. Cl. Ct.). *Hradecky* concerned a Small Claims Court action where the plaintiff sought a declaratory judgment that his hydro bill was less than the amount claimed by the defendant. Deputy Judge Winny determined that the Small Claims Court had no jurisdiction to issue declaratory relief because it was not relief in the form of money damages. The action was stayed.

Citing *Grover*, Deputy Judge Winny observed that the Small Claims Court does not share the Superior Court of Justice's general and inherent jurisdiction, at para. 13. Unless the relief is expressed as a money judgment within the Small Claims Court's jurisdiction or relates to the return of personal property, a Deputy Judge does not have jurisdiction to order other equitable remedies. Consequently, the trial judge erred in law by granting specific performance or rescission. The judgment for equitable relief is without jurisdiction and is set aside.

The Small Claims Court has no jurisdiction to order specific performance. If specific performance. Section 134(1) of the *Courts of Justice Act* provides that, unless otherwise provided, the court to which an appeal is taken may exercise the following powers on appeal:

> (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
>
> (b) order a new trial;
>
> (c) make any other order or decision that is considered just.

Bondfield Construction Company Limited v. The Globe and Mail Inc., 2019 ONCA 283, 2019 CarswellOnt 5348 (Ont. C.A.)

Costs of appeals. *Presumption that responding party not entitled to costs where motion not dismissed not applicable to* costs on *appeal*.

No reason to depart from presumption under s. 137.1(8) of Act that responding party was not entitled to costs of motion where judge did not dismiss proceeding. Presumption did not apply to costs on appeal. Jurisprudential landscape had shifted significantly between motion and appeal.

Additional reasons in *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166, 2019 CarswellOnt 2912, 144 O.R. (3d) 291, 31 C.P.C. (8th) 419, 431 D.L.R. (4th) 501 (Ont. C.A.); additional reasons 2019 ONCA 283, 2019 CarswellOnt 5348 (Ont. C.A.).

Capital One Bank v. Carroll, 2019 ONSC 6261, 2019 CarswellOnt 17377, 45 C.P.C. (8th) 116 (Ont. Div. Ct.), Kumaranayake J.

Appellant's grounds of appeal are:

> The trial judge erred in law in failing to award postjudgment interest at the contractual rate agreed to between the parties in accordance with the binding decisions . . .

Should the Deputy Judge have provided reasons for why he did not grant postjudgment interest at the requested contractual rate of 19.8% per annum? Should the Deputy Judge have granted postjudgment interest at the requested contractual rate of 19.8% per annum? Answer to both questions is yes. Appeal is granted.

The standard of review for an error of law is correctness. See *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 23, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.) at paras. 8–10.

The Deputy Judge made an error in law by not providing reasons for his decision with respect to postjudgment interest. Without reasons, an effective appellate review is not possible. See *Loans Till Payday v. Brown*, 2010 ONSC 6639, 2010 CarswellOnt 9151 (Ont. Div. Ct.) at para. 18.

As Herman J. stated in *Loans Till Payday v. Brown*, at paras. 16 and 17,

> In considering the adequacy of reasons, the reviewing court must consider the day-to-day realities of the decision-making body. The Small Claims Court is mandated to hear and determine questions of law and fact "in a summary way" (*Courts of Justice Act*, s. 25). The volume of cases it receives makes it the busiest court in Ontario (Coulter A. Osborne, Civil Justice Reform Project, November 2007). A Small Claims Court judge cannot be expected to provide lengthy reasons for his or her decision in every case.
>
> That does not mean, however, that the Small Claims Court judge is relieved of any requirement to provide reasons. As Goudge J. wrote in *Clifford v. Ontario (Attorney General)* (2009), 2009 ONCA 670 (CanLII), 98 O.R. (3d) 210 (Ont. C. A.):
>
> > [R]easons must be sufficient to fulfill the purposes required of them particularly to let the individual whose rights, privileges or interest are affected know why the decision was made and to permit effective judicial review . . . [T]he "path" taken by the tribunal to reach its decision must be clear from the reason read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.

In *Bank of America Canada v. Mutual Trust Co.*, 2002 CSC 43, 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, REJB 2002-30907, [2002] 2 S.C.R. 601, 211 D.L.R.

(4th) 385, 49 R.P.R. (3d) 1, 287 N.R. 171, 159 O.A.C. 1, [2002] S.C.J. No. 44 (S.C.C.) at paras. 49-50, the Supreme Court of Canada states:

> . . . Absent exceptional circumstances, the interest rate which had governed the loan prior to breach would be the appropriate rate to govern the post-breach loan. The application of a lower interest rate would be unjust to the lender.

There was authority that was binding on the Deputy Judge. Deputy Judge erred in law by not awarding postjudgment interest at the contractual interest rate of 19.8%. Postjudgment interest set at 19.8% per annum.

Carola v. Simpson, 2020 ONSC 183, 2020 CarswellOnt 265, Justice S. Gomery (Ont. Div. Ct.).

The Ontario Court of Appeal has emphasized that appellate review of reasons given on Small Claims Court actions "must recognize the informal nature of that court, as well as the volume of cases it handles and its statutory mandate to deal with these cases efficiently". See *Maple Ridge Community Management Ltd. v. Peel Condominium Corp. No. 231*, 2015 ONCA 520, 2015 CarswellOnt 10397, 76 C.P.C. (7th) 36, 389 D.L.R. (4th) 711, 336 O.A.C. 391 (Ont. C.A.) at para. 35.

The Court of Appeal has also recognized that damages for loss of opportunity in solicitor's negligence cases are notoriously difficult to quantify. See *Jarbeau v. McLean*, 2017 ONCA 115, 2017 CarswellOnt 1656, 35 C.C.L.T. (4th) 171, 60 C.L.R. (4th) 177, 410 D.L.R. (4th) 246, 78 R.P.R. (5th) 91, [2017] O.J. No. 717 (Ont. C.A.) at para. 21; ~~,~~additional reasons 2017 ONCA 294, 2017 CarswellOnt 5073, 35 C.C.L.T. (4th) 192 (Ont. C.A.).

An appellate court cannot substitute the trial judge's findings of fact or mixed findings of fact and law with its own unless the trial judge made a palpable and overriding error, or some extricable error in principle "with respect to the characterization of the [legal] standard or its application, in which case the error may amount to an error in law". See *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 23, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.) at para. 37.

Costs awards are highly discretionary and are given significant deference. See *Feinstein v. Freedman*, 2014 ONCA 205, 2014 CarswellOnt 3874, 119 O.R. (3d) 385, 95 E.T.R. (3d) 65, 318 O.A.C. 85 (Ont. C.A.) at para. 52~~,~~; additional reasons 2014 ONCA 446, 2014 CarswellOnt 7456, 97 E.T.R. (3d) 7 (Ont. C.A.). The Deputy Judge concluded that Mr. Simpson behaved unreasonably and that a higher cost award was therefore appropriate. I see no basis to interfere with his exercise of discretion. The appeal is dismissed.

Davidson v. CCC 73, 2019 ONSC 1818, 2019 CarswellOnt 4087, Justice Marc R. Labrosse (Ont. S.C.J.).

The Respondent (Defendant in the Small Claims Court proceedings) brings this motion to dismiss the Appellant's (Plaintiff in the Small Claims Court proceedings) appeal on the basis that the Divisional Court has no jurisdiction to hear the appeal.

The first ground in support of the dismissal is that the order of the Small Claims Court deputy judge under appeal is an interlocutory order and that s. 31 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*") only allows for an appeal of a final order of the Small Claims Court.

The second ground of appeal is that even if the order in question is final, the request for payment of two "amounts for non-compliance" of $500 is less than the prescribed amount of $2,500 required to appeal a final order pursuant to s. 31 of the *CJA*.

Ultimately, the deputy judge followed the decision in *Hradecky v. Hydro One Networks Inc.*, 2014 CarswellOnt 3316, [2014] O.J. No. 1249 (Ont. S.C.J.) and ordered that the action was

temporarily stayed as of October 1, 2018, provided that the Appellant could bring a motion to transfer the proceeding to the Superior Court of Justice. If no such motion was brought before November 15, 2018, the Appellant's claim was to be dismissed for want of jurisdiction.

Section 97 of the *CJA* states that the Small Claims Court is excluded from the power to make binding declarations of right, whether or not any consequential relief is or could be claimed. Pursuant to s. 134(3) of the *CJA*, on a motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

The order of Deputy Judge McNeely was interlocutory and that pursuant to s. 31 of the *CJA*, there is no appeal from such an order. The appeal is therefore quashed as the Divisional Court does not have the jurisdiction to hear an appeal from an interlocutory order of the Small Claims Court.

Gelinas v. Bozzer, 2020 ONSC 359, 2020 CarswellOnt 519, Daley RSJ (Ont. Div. Ct.).

The applicants seek a wide variety of relief against the respondents Bozzer and the "Atty. Gen." including orders pursuant to s. 2(1) of the *Judicial Review Procedure Act R.S.O. 1990, c. J.*1, requiring the Atty. Gen. to review the files managed by the Timmins Small Claims Court to determine whether litigants have received discriminatory, inappropriate or unlawful treatment and further requiring the Atty. Gen. to produce certain records, including emails between court staff and Deputy Judges.

The *Rules of Civil Procedure* in and of themselves do not expressly establish jurisdiction in the court generally or with the Regional Senior Judge to transfer a proceeding from one judicial region to another, on their own motion.

An application for judicial review is not an appeal. See *Zirger v. The Normal Farm Practices and Protection Board*, 2018 ONSC 2236, 2018 CarswellOnt 5357 (Ont. Div. Ct.) at paras. 9–11; *Douglas Aircraft Co. of Canada v. McConnell*, 1979 CarswellOnt 710, 1979 CarswellOnt 710F, [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385, 23 L.A.C. (2d) 143n, 79 C.L.L.C. 14, 221, 29 N.R. 109, [1979] S.C.J. No. 106 (S.C.C.) at 293 [S.C.R.]. The court's inherent jurisdiction to manage and control its own process is properly engaged here.

There is a presumption of judicial impartiality in respect of all matters that come before the court. In *R. v. Montoya*, 2015 ONCA 786, 2015 CarswellOnt 17390, 128 O.R. (3d) 425, [2015] O.J. No. 5988 (Ont. C.A.) the Court of Appeal stated as follows at para. 9:

> We do not accept these submissions. An allegation of reasonable apprehension of bias should not be made lightly. That is because, as McLachlin C.J. said in *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, at para. 22:
>
> > There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.

Further, in *Beard Winter LLP v. Shekhdar*, 2016 ONCA 493, 2016 CarswellOnt 9671, [2016] O.J. No. 3257 (Ont. C.A.); affirmed 2016 ONCA 927, 2016 CarswellOnt 20030 (Ont. C.A.), the appellant moved to have Doherty J.A. recuse himself on the appeal and in denying the recusal motion the court noted at para. 10:

> It is important that justice be administered impartially. A judge must give careful consideration to any claim that he should disqualify himself on account of bias or reasonable apprehension of bias. In my view, a judge is best advised to remove himself if there is any air of reality to a bias claim. That said, judges do the administration of justice a disservice by simply yielding to entirely unreasonable and unsubstantiated recusal demands. Litigants are not entitled to pick their judge. They are not entitled to effectively eliminate judges randomly assigned to their

> case by raising specious partiality claims against those judges. To step aside in the face of a specious bias claim is to give credence to a most objectionable tactic.

The application is ordered to be transferred from the Divisional Court at Brampton in the Central West Region to the Divisional Court at Sudbury in the Northeast Region.

Groia & Company Professional Corporation v. Cardillo, 2019 ONCA 165, 2019 CarswellOnt 3519, 50 C.P.C. (8th) 55, Lauwers J.A. (Ont. C.A.)

Security for costs. S*ecurity for costs appropriate where there was good reason to believe appeal had no merit*

Law firm represented clients in four separate matters, rendering accounts for legal fees and disbursements totaling $221,454. When clients paid only $36,563, law firm brought action to recover outstanding amount. Law firm brought motion pursuant to R. 61.06(1)(a) of Rules of Civil Procedure for order requiring clients to post security for costs.

There was good reason to believe appeal, which really only challenged findings of fact and credibility, without raising any arguable error of law, had no merit. Order requiring clients to post security for costs was justified under R. 61.06(1)(a). Order was also justified under R. 61.06(1)(c) on basis of clients' previous conduct suggesting it would be difficult to collect costs. Clients were ordered to post security for costs in amount of $80,000, $60,000 for judgment under appeal and $20,000 for appeal, failing which appeal would be dismissed.

Joubarne v. Green, 2019 ONSC 2119, 2019 CarswellOnt 5335, Madam Justice J. Parfett (Ont. S.C.J.).

Applicant seeks three orders:

> 1. An order declaring as a nullity the decision of Deputy Judge Stauffer in the motion to strike the defences in two small claims court actions[1];
>
> 2. An order that a motion to strike the defences in the two small claims court actions be heard by this court; and
>
> 3. An order that the two small claims court actions be transferred to this court.

Applicant really seeking is an appeal of the decision of Deputy Judge Stauffer. The Superior Court of Justice has an inherent jurisdiction to transfer a matter from the Small Claims Court to the SCJ. However, this can occur only where "there is a new fact that changes the original basis of the claim." See *Andrews v. Oakdown Holdings Inc.*, 2014 ONSC 5238, 2014 CarswellOnt 12477, 46 C.L.R. (4th) 224 (Ont. S.C.J.) at para. 37;–; additional reasons 2015 ONSC 97, 2015 CarswellOnt 1519, 46 C.L.R. (4th) 239 (Ont. S.C.J.). Onus on the Applicant to show there is such a new fact. The Applicant has not shown there is any new fact that changes the original basis of the claim. Applicant's issue with the Small Claims Court is her concern she cannot receive a fair trial.

Application dismissed.

Kiselman v. Klerer, 2019 ONSC 6668, 2019 CarswellOnt 18949, Mulligan J. (Ont. Div. Ct.)

Kiselman appeals motion decision of Deputy Small Claims Court Judge S. Baker, dated September 5, 2017, who dismissed the plaintiff's claim for want of jurisdiction, as a matter that should have been dealt with by the Landlord and Tenant Board. In coming to his conclusion, the deputy judge provided detailed written reasons, reviewed the case law and noted:

> There is a wealth of authority provided by the defendant to the effect that the Residential Tenancy Board is the forum to go to in a landlord/tenant dispute. They have the expertise and the protocol to deal with these matters.

This issue has been considered in a number of decisions in Ontario. In *Mackie v. Toronto (City)*, 2010 ONSC 3801, 2010 CarswellOnt 4757, [2010] O.J. No. 2852 (Ont. S.C.J.), Perell J. noted at para. 43:

> It is, therefore, my opinion that the Board has exclusive jurisdiction to resolve the Plaintiffs' repair claims . . . From a jurisdictional perspective, it is the substance and not the form of the claim that matters, and the substance of the Plaintiffs' claim is a repair claim between a landlord and tenant that is within the monetary jurisdiction of the Board.

In *Fong v. Lemieux* (May 7, 2016), Doc. 15/15, [2016] O.J. No. 2695 (Ont. S.C.J.), T. Marshall, Deputy J., relied on the decision of Perell J. in *Mackie* and stated at paras. 61-62. In *Efrach v. Cherishome Living*, 2015 ONSC 472, 2015 CarswellOnt 812, [2015] O.J. No. 293 (Ont. Div. Ct.), Horkins J., sitting on appeal, dealt with an order of a deputy Small Claims Court judge dismissing a landlord's claim in Small Claims Court for lack of jurisdiction. Horkins J. reviewed the legislation and Justice Perell's decision in *Mackie*, and summarized the law as follows at paras. 5-6:

> [5] The jurisdiction of the Landlord and Tenant Board is set out in the *Residential Tenancies Act*. The Board has exclusive jurisdiction to determine all Applications under the *Residential Tenancies Act* with respect to all matters in which jurisdiction is conferred on it by the *Residential Tenancies Act*. The Board has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under the *Act*.
>
> [6] Where the Board has jurisdiction, the Small Claims Court has no jurisdiction because the jurisdiction of the Board is exclusive and not concurrent.

Disputes of this sort are the "daily fare" of the Landlord and Tenant Board. The Board is in the best position to determine whether claims for rent arrears and allegations of damage to property against the tenant amount to "undue damage" or simply wear and tear as a result of the normal occupancy of a residential unit. Appeal of the appellant, Kiselman, is dismissed.

Rourke v. Lehrer, 2019 ONSC 5801, 2019 CarswellOnt 16158, Swinton J. (Ont. Div. Ct.)

Motion by Rourke pursuant to s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to set aside a decision of Conway J. dated September 13, 2018. She dismissed his motion to extend the time to bring an appeal of a Small Claims Court order dated June 12, 2015.

The motions judge applied the correct legal principles, as set out in *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 2013 CarswellOnt 2423, 114 O.R. (3d) 636 (Ont. C.A.) at para. 15, in determining whether to extend the time. Rourke was aware of the test, given the endorsement of Gans J. at the time of the first appearance of the motion to extend time on June 11, 2018.

No merit to set aside. No basis for a claim of reasonable apprehension of bias or unfairness in the hearing before Conway J. Motion pursuant to s. 21(5) dismissed.

Teliawala v. Sandhu, 2019 ONSC 2385, 2019 CarswellOnt 5835, Favreau J. (Ont. Div. Ct.)

Sandhu, appeals the order of the Small Claims Court dated May 22, 2018, dismissing her motion to set aside default judgment obtained by the plaintiff against her. Appeal dismissed. The test set out in Rule 11.06 of the Rules of the Small Claims Court for setting aside default judgment requires the Court to be satisfied that:

> (a) the party has a meritorious defence and a reasonable explanation for the default; and
>
> (b) the motion is made as soon as is reasonably possible in all the circumstances.

This test is similar to the common law test for setting aside default judgment, but the courts have recognized that "a meritorious defence" requires the moving party to meet a higher standard than demonstrating an "arguable defence" as required by the common law. See *Coombs v. Curran*, 2010 ONSC 1312, 2010 CarswellOnt 1175, 100 O.R. (3d) 554 (Ont. Div. Ct.) at para. 32; and *Door Doctor Inc. v. Associated Paving and Materials Ltd.* (December 17, 2012), Doc. SC-09-00078879-00, [2012] O.J. No. 6637 (Ont. Sm. Cl. Ct.) at para. 33.

It was open to the Deputy Judge to reject Ms. Sandhu's assertion that she had never been served with the claim. Given his finding that Ms. Sandhu's defence had no merit, in applying the test set out in Rule 11.06 of the Rules of the Small Claims Court, it was not necessary for him to make such a finding.

York Region Standard Condominium Corporation No. 1039 v. Richmond Hill (Town), 2018 ONCA 511, 2018 CarswellOnt 8546, 87 C.L.R. (4th) 228 (Ont. C.A.)

Dismissal for delay. *Error in transcript played significant role in decision to allow appeal*. Typed version of master's handwritten reasons presented to and relied upon by appeal judge contained error. Typed version appeared to have incorrectly transcribed "institutional" as "individual". There was therefore no inconsistency in master's finding. This unfortunate error in transcription played significant role in appeal judge's decision to allow appeal.

York Region Condo Corp. #1039 v. Corp. of Town of Richmond Hill et al, 2017 ONSC 6868, 2017 CarswellOnt 18015, 87 C.L.R. (4th) 218 (Ont. S.C.J.); additional reasons 2018 ONSC 2040, 2018 CarswellOnt 4790 (Ont. S.C.J.); reversed *York Region Standard Condominium Corporation No. 1039 v. Richmond Hill (Town)*, 2018 ONCA 511, 2018 CarswellOnt 8546, 87 C.L.R. (4th) 228 (Ont. C.A.)

Chopak v. Patrick, 2020 ONSC 6873, 2020 CarswellOnt 16478 (Ont. Div. Ct.)

Schabas J., sitting as a single judge of the Divisional Court, allowed an appeal in part from the judgment of the Deputy Judge of the Small Claims Court, reducing the damages awarded to $5,000, with a consequential reduction in the quantum of costs awarded. The plaintiff sought to appeal further but filed her appeal in the Divisional Court, which was the wrong court as the potential further appeal lies to the Court of Appeal with leave of the Court of Appeal: *Courts of Justice Act*, s. 6(1)(a).

1179640 Ontario Limited v. DaSilva, 2020 ONSC 5456, 2020 CarswellOnt 12976, 64 M.V.R. (7th) 219 (Ont. Div. Ct.)

Appeal allowed from Deputy Judge. A palpable and overriding error is where a finding of fact is clearly wrong, unreasonable, or unsupported by the evidence *and* the error affected the result of the motion or trial. This applies whether there is direct proof of the fact in issue or indirect proof of facts from which the fact in issue has been inferred: *L. (H.) v. Canada (Attorney General)*, 2005 CSC 25, 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, EYB 2005-89538, REJB 2005-89538, [2005] 1 S.C.R. 401, 24 Admin. L.R. (4th) 1, 29 C.C.L.T. (3d) 1, 8 C.P.C. (6th) 199, 251 D.L.R. (4th) 604, [2005] 8 W.W.R. 1, 333 N.R. 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] S.C.J. No. 24 (S.C.C.) at paras. 53–56.

Lee v. Chen, 2020 ONSC 5615, 2020 CarswellOnt 13352 (Ont. Div. Ct.)

Lee appealed May 21st, 2018, decision of Deputy Judge of the Small Claims Court rendered after a trial heard over a five-day period in 2016 and 2017. At trial, damages in the amount of $25,000 plus costs and disbursements totalling $13,886.82 were awarded in Ms. Chen's favour. Mr. Lee was found to have breached his fiduciary duty to Ms. Chen and to have misappropriated client trust funds. The counterclaim was determined to be "frivolous and untenable" and was dismissed.

Appeal to court from a final order of the small claims court exceeding $2500 (increased to $3500 effective January 1, 2020) pursuant to s. 31 of the *Courts of Justice Act*, R.S.O.1990, C.43.

Housen v. Nikolaisen set out the applicable standard of review in this appeal. The court is to apply the standard of correctness to questions of law and the standard of palpable and overriding error to questions of fact. To questions of mixed fact and law, the court is to apply the palpable and overriding error standard unless the question involves an extricable question of law, which is to be determined on the correctness standard.

Appeal dismissed.

Rutledge v. Canaan Construction Inc., 2020 ONSC 4246, 2020 CarswellOnt 9578, 65 C.C.E.L. (4th) 178, 2020 C.L.L.C. 210-058 (Ont. S.C.J.).

Deputy Judge granted Judgment in favour of Rutledge, awarding him damages equivalent to 9.5 weeks salary. Appeals involving contractual interpretation encompass issues of mixed fact and law.

Principles of contractual interpretation are applied to the words of the written contract and considered in light of the factual matrix: *Sattva Capital Corp. v. Creston Moly Corp.* Appellant must establish Deputy Judge made a palpable and overriding error before his or her decision may be overturned. Absent such a finding, deference is given to the trier or fact. A palpable and overriding error is where a finding of fact is clearly wrong, unreasonable or unsupported by the evidence *and* the error affected the result of the motion or trial. This applies whether there is direct proof of the fact in issue or indirect proof of facts from which the fact in issue has been inferred.

Appeal dismissed. Failure to give adequate reasons is not a free-standing basis for appeal.

Manos v. Riotrin Properties (Flamborough) Inc., 2020 ONCA 211, 2020 CarswellOnt 3794 (Ont. C.A.); leave to appeal refused *Kim Manos v. Wal-Mart Canada Corp.*, 2020 CarswellOnt 11149, 2020 CarswellOnt 11150 (S.C.C.).

The respondent Manos was accidentally sprayed with a fire extinguisher by an employee of the appellant. The trial judge granted $225,000 in non-pecuniary general damages in addition to pecuniary damages, and damages for subrogated claims for the respondent's insurers. Appellant argues that trial judge provided inadequate reasons because he did not explicitly consider the medical evidence of the appellant's witnesses.

Proper reasons serve to: (i) justify and explain the result; (ii) tell the losing party why he or she lost; (iii) provide for informed consideration of the grounds of appeal; and (iv) satisfy the public that justice has been done. For purposes of appellate intervention, the overarching principle is whether the reasons permit meaningful and effective appellate review.

Appeal allowed and new judgment substituted. Leave to SCC dismissed on August 6, 2020.

Pretto v. Almgren, 2020 ONSC 6966, 2020 CarswellOnt 19119, Mr. Justice W. D. Newton (Ont. Div. Ct.)

Appeal from a judgment of Deputy Judge R.A. Young of the Small Claims Court. At the trial, the Deputy Judge ultimately accepted the evidence of an expert witness.

Strict adherence to the rules regarding the form and content of an expert's report is not required in the Small Claims Court: see *Richard v. 2464597 Ontario Inc.*[16] S. 27 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, states that the Small Claims Court has considerable discretion to admit and act upon any oral or documentary evidence, whether or not it is sworn, affirmed, or admissible in any other court.

Appeal dismissed from award of $10,501.25. Costs awarded to the Respondent in the amount of $5,000.00.

32. (1) Deputy judges — A regional senior judge of the Superior Court of Justice may, with the approval of the Attorney General, appoint a lawyer to act as a deputy judge of the Small Claims Court.

(2) Term of appointment — The appointment of a deputy judge is for a term of three years, subject to subsections (3) and (7).

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[16] 2019 ONSC 2104, 2019 CarswellOnt 4889 (Ont. Div. Ct.) at para. 50

(3) Annual appointment if 65 or older — If the deputy judge is 65 years of age or older and under 75 years of age, the appointment shall be for a term of one year, subject to subsection (8).

(4) Renewal before age 65 — The appointment of a deputy judge who is under 65 years of age may be renewed by a regional senior judge of the Superior Court of Justice for a term of three years, subject to subsection (7).

(5) Annual renewal if 65 or older — The appointment of a deputy judge who is 65 years of age or older and under 75 years of age may be renewed by a regional senior judge of the Superior Court of Justice for a term of one year, subject to subsection (8).

(6) No limit, renewals — Subject to subsections (7) to (9), there is no limit to the number of times the appointment of a deputy judge can be renewed under subsection (4) or (5).

(7) Expiry of term at age 65 — If the deputy judge is 63 years of age or older and under 65 years of age, an appointment under subsection (2) or a renewal under subsection (4) shall provide for a term that expires when he or she reaches 65 years of age.

(8) Expiry of term at age 75 — If the deputy judge is 74 years of age, an appointment under subsection (3) or a renewal under subsection (5) shall provide for a term that expires when he or she reaches 75 years of age.

(9) Age limit — No person shall be appointed as a deputy judge, or have an appointment renewed, once he or she reaches 75 years of age.

(10) Current appointments — For greater certainty, nothing in this section shortens or otherwise affects an appointment or renewed appointment that is in effect immediately before December 15, 2009, but any renewals of the appointment on and after that day are subject to this section.

1994, c. 12, s. 12; 1996, c. 25, s. 9(17); 2009, c. 33, Sched. 2, s. 20(11); 2015, c. 27, Sched. 1, s. 1(4)

Commentary: The Small Claims Court is a branch of the Superior Court of Justice and is generally presided over by deputy judges appointed by the Regional Senior Justices under s. 32. Initial appointments require the approval of the Attorney General of Ontario and are for a three-year term which may be renewed for further three-year terms in the discretion of the Regional Senior Justice. Like other judges, deputy judges are subject to mandatory retirement at age 75.

Most deputy judges sit part-time with an average of two days per month. Most deputy judges also carry on a full-time legal practice. Because of the hybrid nature of their status as both judges and practising lawyers, the standards of conduct for deputy judges are not identical in all respects to those which apply to full-time judges. In April 2016, Chief Justice Smith as president of the Small Claims Court on the recommendation of the Deputy Judges Council, approved a Judicial Reference Guide for deputy judges. It includes principles and commentary on the standards of conduct applicable to deputy judges, affirming the general principle that the *Ethical Principles for Judges* applicable to federally-appointed judges also apply to deputy judges but subject to certain modifications reflecting the fact that deputy judges are not full-time judges and do not have tenure.

Case Law: *Ferster v. Bowerman*, [1986] S.J. No. 195, No. 1390 of 1985 J.C.P.A. (Sask. Q.B.).

Applicant sought judicial review to prohibit Provincial Court from continuing a small claims trial on the basis of apprehension of bias. The judge was "old friend" and "acquaintance" of the plaintiffs. The application was granted.

Therrien c. Québec (Ministre de la justice), REJB 2001-24493, 2001 CarswellQue 1013, 2001 CarswellQue 1014, [2001] S.C.J. No. 36, *(*sub nom. *Therrien, Re)* 155 C.C.C. (3d) 1, 2001 SCC 35, *(*sub nom. *Therrien, Re)* 200 D.L.R. (4th) 1, 43 C.R. (5th) 1, *(*sub nom. *Québec (Ministre de la Justice) v. Therrien)* 270 N.R. 1, 30 Admin. L.R. (3d) 171, *(*sub nom. *Therrien, Re)* 84 C.R.R. (2d) 1, *(*sub nom. *Therrien, Re)* [2001] 2 S.C.R. 3 (S.C.C.); affirming [1998] A.Q. No. 1666, 1998 CarswellQue 393, *(*sub nom. *Québec (Ministre de la justice) c. Thérrien)* [1998] R.J.Q. 1392 (Que. C.A.); affirming 1998 CarswellQue 1066, [1998] A.Q. No. 3105, 21 C.R. (5th) 296, [1998] R.J.Q. 2956 (Que. C.A.); reversing 1998 CarswellQue 3598, *(*sub nom. *Therrien c. Québec (Procureur général))* [1998] Q.J. No. 180 (Que. S.C.). The process of selecting persons qualified for appointment of judges is so closely related to the exercise of the judicial function that they cannot be dissociated. The candidate's failure to reveal that he had been in trouble with the law was relevant to a selection committee charged with assessing a candidate's aptitude and qualification for judicial appointment.

Ontario Deputy Judges Assn. v. Ontario, 2006 CarswellOnt 3137, 80 O.R. (3d) 481, 28 C.P.C. (6th) 1, 268 D.L.R. (4th) 86, *(*sub nom. *Ontario Deputy Judges' Assn. v. Ontario (Attorney General))* 141 C.R.R. (2d) 238, 210 O.A.C. 94, [2006] O.J. No. 2057 (Ont. C.A.).

Deputy judges of the Small Claims Court, although they only preside part-time, fully assume the judicial role when presiding. The constitutional requirement for judicial independence applies to all judges of the Small Claims Court and requires the establishment of an independent body to address their remuneration.

Ontario Deputy Judges Assn. v. Ontario (Attorney General), 2012 ONCA 437, 2012 CarswellOnt 7932, 23 C.P.C. (7th) 1, [2012] O.J. No. 2865 (Ont. C.A.).

The need for the Small Claims Court and its deputy judges to be independent was re-affirmed. The process for initial appointment of deputy judges by the Regional Senior Justices, with the approval of the Attorney General, for a three year term, subject to renewals at the sole discretion of the Regional Senior Justices, does not offend the constitutional requirement for judicial independence.

Rai v. Métivier, 2005 CarswellOnt 3477, 201 O.A.C. 87, 76 O.R. (3d) 641, 258 D.L.R. (4th) 151 (Ont. Div. Ct.), Matlow J. Application for judicial review dismissed. The applicant is a lawyer who served as a Deputy Judge of the Small Claims Court in Ottawa. Respondent is the Senior Regional Judge of the East Region of the Court in Ottawa.

Section 32(2) of the *Courts of Justice Act* ("the Act") confers the authority on a Regional Senior Justice to renew the appointment of a Deputy Judge.

Applicant took issue with the respondent's expressed intention to apply retirement age, 75.

The applicant submits appropriate standard of review is correctness. The respondent and the intervenor submit that it is patent unreasonableness. See *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] S.C.J. No. 46, 1998 CarswellNat 830, 1998 CarswellNat 831, 226 N.R. 201, *(*sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, *(*sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.).

Standard of review is patent unreasonableness.

Decision of the respondent not the requisite standard.

McKenzie v. British Columbia (Minister of Public Safety), 2006 CarswellBC 2262, 2006 BCSC 1372, [2006] 12 W.W.R. 404, 145 C.R.R. (2d) 192, 272 D.L.R. (4th) 455, 52 C.C.E.L. (3d) 191, 61 B.C.L.R. (4th) 57 (B.C. S.C.).

Residential tenancies arbitrators. Appointment fixed, renewable, five-year term. Mid-term termination of appointment without cause unconstitutional. Arbitrator appointed to adjudicate litigious disputes between private parties, independent of government, entitled to security of tenure under unwritten constitutional principle of judicial independence. Termination of petitioner without cause raised spectre of Crown interference in conduct of private litigation, violation of principle of independence.

Saylor v. Madsen Estate, [2007] 1 S.C.R. 838, 279 D.L.R. (4th) 547, 224 O.A.C. 382, 32 E.T.R. (3d) 61, 2007 SCC 18, 2007 CarswellOnt 2755, 2007 CarswellOnt 2754, 42 C.P.C. (6th) 1, [2007] S.C.J. No. 18, 360 N.R. 327 (S.C.C.).

The trial judge failed to consider all evidence. A matter outstanding for nine years and amount in issue was relatively small. In interests of justice appellate court considered evidence and made final determination rather than send matter back for new trial. Where the circumstances warrant, appellate courts have jurisdiction to make a fresh assessment of the evidence on the record: see *Hollis v. Birch* (1995), [1995] S.C.J. No. 104, 26 B.L.R. (2d) 169, 27 C.C.L.T. (2d) 1, 14 B.C.L.R. (3d) 1, [1996] 2 W.W.R. 77, 111 W.A.C. 1, 67 B.C.A.C. 1, 190 N.R. 241, 129 D.L.R. (4th) 609, [1995] 4 S.C.R. 634, EYB 1995-67074, 1995 CarswellBC 1152, 1995 CarswellBC 967 (S.C.C.) and *Prudential Trust Co. v. Forseth* (1959), 21 D.L.R. (2d) 587, 30 W.W.R. 241, [1960] S.C.R. 210, 1959 CarswellSask 50 (S.C.C.).

Brown v. Newton, 2009 NSSC 388, 2009 CarswellNS 721, [2009] N.S.J. No. 621, 285 N.S.R. (2d) 228, 905 A.P.R. 228, 85 C.P.C. (6th) 90 (N.S. S.C.).

At a hearing in Small Claims Court, the plaintiff closed his case after giving his evidence. Counsel for the defendant elected not to call evidence, which surprised the plaintiff, who expected the defendant to testify in his own defence, therefore providing the plaintiff the opportunity to cross examine. Adjudicator dismissed plaintiff's claim without costs. Plaintiff appealed. Appeal allowed. By not exploring further reasons for plaintiff's surprise when he learned that defendant decided not to call evidence and by failing to provide additional information that might have alerted plaintiff to possibility of calling defendant and to cross examine him as part of case-in-chief, plaintiff denied natural justice.

See *R. v. H. (B.C.)*, 1990 CarswellMan 294, 58 C.C.C. (3d) 16 (Man. C.A.), at p. 22, where Justice Twaddle stated:

> The legal system in Canada is mainly adversarial. It works best when each side is represented by a qualified advocate. Inevitably, a litigant in person is at a disadvantage. In strict theory, this should not be so, but it is a fact and there is no use denying it.

As Justice McLachlin (as she then was) said, in *R. v. Harrer*, [1995] S.C.J. No. 81, [1995] 3 S.C.R. 562, 32 C.R.R. (2d) 273, 105 W.A.C. 161, 64 B.C.A.C. 161, 186 N.R. 329, 128 D.L.R. (4th) 98, 101 C.C.C. (3d) 193, 42 C.R. (4th) 269, EYB 1995-67068, 1995 CarswellBC 1144, 1995 CarswellBC 651 (S.C.C.), at para. 45:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view. . . . Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.

See "Statement of Principles on Self-Represented Litigants and Accused Persons" adopted by the Canadian Judicial Council in September 2006. Under the sub-heading, "For the Judiciary," the following four principles are listed:

> 1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.
>
> 2. 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.
>
> 3. Judges should ensure that procedural and evidentiary rules are not used unjustly to hinder the legal interests of self-represented persons.
>
> 4. The judiciary should engage in dialogues with legal professional associations, court administrators, government and legal aid organizations in an effort to design and provide for programs to assist self-represented persons.

Heald v. Campbell, [2008] O.J. No. 251, 2008 ONCA 59, 2008 CarswellOnt 295 (Ont. C.A.).

Would the result have been different if the solicitor had *not* been negligent? See *Folland v. Reardon*, 2005 CarswellOnt 232, [2005] O.J. No. 216, 74 O.R. (3d) 688, 28 C.C.L.T. (3d) 1, 194 O.A.C. 201, 249 D.L.R. (4th) 167 (Ont. C.A.); *Wernikowski v. Kirkland, Murphy & Ain*, 41 C.P.C. (4th) 261, 50 O.R. (3d) 124, 48 C.C.L.T. (2d) 233, 128 O.A.C. 33, 181 D.L.R. (4th) 625, 31 C.R. (5th) 99, 141 C.C.C. (3d) 403, [1999] O.J. No. 4812, 1999 CarswellOnt 4139 (Ont. C.A.); additional reasons at [2000] O.J. No. 469, 2000 CarswellOnt 464, 181 D.L.R. (4th) 625 at 642, 141 C.C.C. (3d) 403 at 420 (Ont. C.A.); leave to appeal refused 264 N.R. 196 (note), 145 O.A.C. 398 (note), [2000] S.C.C.A. No. 98, 2000 CarswellOnt 4191, 2000 CarswellOnt 4190 (S.C.C.). No justification for measuring a barrister's conduct by the more forgiving standard of "egregious error." See Krever J. in *Demarco v. Ungaro*, 27 Chitty's L.J. 23, 95 D.L.R. (3d) 385, 8 C.C.L.T. 207, 21 O.R. (2d) 673, 1979 CarswellOnt 671 (Ont. H.C.). Counsel may be negligent for failing to call a witness whose evidence was necessary to establish the client's case. See, *e.g.*, *Demarco v. Ungaro, Wong v. Thomson, Rogers*, 1992 CarswellOnt 3001, [1992] O.J. No. 1120 (Ont. Gen. Div.); affirmed 1994 CarswellOnt 2925, [1994] O.J. No. 1318 (Ont. C.A.); *Heald v. Campbell*, [2008] O.J. No. 251, 2008 ONCA 59, 2008 CarswellOnt 295 (Ont. C.A.); *Bartolovic v. Bennett*, [1996] O.J. No. 961, 1996 CarswellOnt 1123 (Ont. Gen. Div.); additional reasons at 1996 CarswellOnt 1290 (Ont. Gen. Div.); *Danyliw v. Mark*, 2001 CarswellOnt 2409, [2001] O.J. No. 2783, 55 O.R. (3d) 129, 9 C.P.C. (5th) 163 (Ont. S.C.J.) *Van Duzen v. Lecovin*, 2004 CarswellBC 2462, 2004 BCSC 1333, [2004] B.C.J. No. 2206 (B.C. S.C.).

Wawanesa Mutual Insurance Co. v. Weare, 2009 NSSC 395, 2009 CarswellNS 722, 285 N.S.R. (2d) 162, 87 C.P.C. (6th) 72, 905 A.P.R. 162 (N.S. S.C.).

The appellant alleged it was denied natural justice by the adjudicator of Small Claims Court, who denied request by non-lawyer agent for adjournment to retrieve proof of claim. The appellant also alleged the adjudicator demonstrated bias against agent. Appeal allowed. Matters discussed or comments made in Small Claims Court *not recorded*. There was no transcript of proceeding and therefore what was said could not be reproduced with certainty nor was entire record available to provide context. The adjudicator's decision gave rise to injustice and was error of law resulting in denial of natural justice. In the words of Cromwell J.A.

(as he then was) in the case of *Moore v. Economical Mutual Insurance Co.*, 542 A.P.R. 269, 177 N.S.R. (2d) 269, 1999 CarswellNS 218, [1999] N.S.J. No. 250 (N.S. C.A.):

> *An appellate court should not substitute its judgment for that of the presiding judge but should limit its review to determining whether the judge applied a wrong principle or the decision gave rise to an injustice*. [Emphasis added.].

Beard Winter LLP v. Shekhdar, 255 O.A.C. 245, 2008 CarswellOnt 6433 (Ont. S.C.J.); leave to appeal refused 2009 CarswellOnt 6325 (Ont. Div. Ct.); additional reasons at 2009 CarswellOnt 9148 (Ont. Div. Ct.).

On October 30, 2008, in Shekhdar's absence, Campbell J., dismissed Shekhdar's appeal from an order of Master exercising a case management function. Costs reserved. On April 20, 2009, Campbell J., determined costs issues. The parties could not agree on the order's form. The issue went back to Campbell J. On June 12, 2009, Campbell J., signed a formal order with written reasons. Shekhdar moved for leave to appeal. The Divisional Court, per Aston J., denied leave to appeal. The court rejected Shekhdar's argument that Campbell J., had erred in hearing and determining the matter in that he considered all of the material filed by Shekhdar. Campbell J., had not dismissed the appeal just because Shekhdar failed to make any oral submissions. Shekhdar's non-participation appeared to have been a conscious and strategic choice.

Pavlis v. HSBC Bank Canada (2009), 2009 CarswellBC 2775, 98 B.C.L.R. (4th) 72, [2010] 1 W.W.R. 208, 2009 BCCA 450, 277 B.C.A.C. 105, 469 W.A.C. 105 (B.C. C.A.).

The chambers judge ruled court does not have jurisdiction to order Crown to pay for transcripts on behalf of an appellant, citing *Jong v. Jong*, 2002 CarswellBC 1104, 2002 BCCA 322 (B.C. C.A. [In Chambers]) and *Barbeau-Lafacci v. Holmgren*, 283 W.A.C. 280, 173 B.C.A.C. 280, 2002 CarswellBC 2343, 2002 BCCA 553, [2002] B.C.J. No. 2295 (B.C. C.A. [In Chambers]); additional reasons at 2003 BCCA 549, 2003 CarswellBC 2533 (B.C. C.A. [In Chambers]).

No authority in Canada supporting a general right to access to justice (see *Christie v. British Columbia (Attorney General)*, 155 C.R.R. (2d) 366, [2007] 1 S.C.R. 873, [2007] 8 W.W.R. 64, 280 D.L.R. (4th) 528, 2007 CarswellBC 1118, 2007 CarswellBC 1117, 2007 SCC 21, [2007] S.C.J. No. 21, 2007 G.T.C. 1488 (Eng.), 361 N.R. 322, 66 B.C.L.R. (4th) 1, 2007 G.T.C. 1493 (Fr.), 398 W.A.C. 1, 240 B.C.A.C. 1, 2007 D.T.C. 5229 (Fr.), 2007 D.T.C. 5525 (Eng.) (S.C.C.)) that extends to transcripts. Transcripts free of charge were not a matter of right, not a "benefit" given by law. No stereotypical distinction (see *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203, [1999] 3 C.N.L.R. 19, 239 N.R. 1, 173 D.L.R. (4th) 1, [1999] S.C.J. No. 24, 61 C.R.R. (2d) 189, 1999 CarswellNat 664, 1999 CarswellNat 663, 163 F.T.R. 284 (note) (S.C.C.) at para. 7; reconsideration refused 2000 CarswellNat 2394, 2000 CarswellNat 2393 (S.C.C.)), or attribute stereotypical characteristics to any person or group (see *Eaton v. Brant (County) Board of Education* (1996), [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241, 97 O.A.C. 161, 207 N.R. 171, 142 D.L.R. (4th) 385, 41 C.R.R. (2d) 240, 31 O.R. (3d) 574 (note), 1996 CarswellOnt 5036, 1996 CarswellOnt 5035 (S.C.C.) at paras. 66-7).

There must be state interference having a profound effect on a person's "psychological integrity," see *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, 26 C.R. (5th) 203, [1999] S.C.J. No. 47, 177 D.L.R. (4th) 124, 244 N.R. 276, 1999 CarswellNB 306, 1999 CarswellNB 305, REJB 1999-14250, 7 B.H.R.C. 615, [1999] 3 S.C.R. 46, 552 A.P.R. 25, 216 N.B.R. (2d) 25, 50 R.F.L. (4th) 63, 66 C.R.R. (2d) 267 (S.C.C.), before deprivation may be found.

Where self-represented defendant declared intention to walk out of courtroom at start of trial, judge cautioned her that her absence and non-participation would effectively mean that court would, without challenge, receive plaintiff's evidence, which would be sole evidentiary basis

upon which court would make its decision. Trial judge carried on with uncontested trial and gave judgment in plaintiff's favour. Court of Appeal dismissed defendant's appeal, finding no error in trial judge's decision to proceed with trial after defendant left. See *Berry v. Hall*, 2010 ONCA 546, 2010 CarswellOnt 5800 (Ont. C.A.); affirming 2009 CarswellOnt 9316 (Ont. S.C.J.), *per* Justice Alan C.R. Whitten.

The Ontario Court of Appeal upheld the trial judge's decision to carry on, saying:

> [1] The appellant founds her appeal on the trial judge having proceeded with the trial in her absence, not having inquired into why she acted as she did by leaving the courtroom. In our view, the trial judge was faced with a litigant saying she could not go through a trial, was without resources to retain a lawyer and felt the proceedings were a charade. She had decided therefore to leave. In the circumstances, we can see no error in the trial judge's proceeding with the trial after the appellant left.

No further obligation on trial judge to try to persuade party to remain and to take part in proceedings. Whether there is an obligation on the trial judge to probe into the party's reasons for the walk-out is not clear, although it would not seem wrong to do so.

An order is final, as opposed to interlocutory, if it finally disposes of the substantive issue between the parties. A decision that declines to stay an action, but rather directs that it should proceed to a trial on its merits, is the classic example of an interlocutory order.

VFC Inc. v. MacLean, 2009 NSSC 314, 2009 CarswellNS 570, 283 N.S.R. (2d) 32, 82 C.P.C. (6th) 372, 79 C.P.C. (6th) 105 (N.S. S.C.).

The defendant agreed to pay 130 bi-weekly payments for $24,671.40. The defendant failed to make all payments. VFC Inc. brought action in Small Claims Court. Small Claims Court dismissed claim on basis it did not have jurisdiction as VFC Inc. was not original party to contract as required by section 5(1) of *Small Claims Court Act*. VFC Inc. appealed. Appeal allowed. VFC Inc. was actually party to contract even though it did not sign contract, as it was worded so that the defendant must have known VFC Inc. was providing funds for purchase of car.

Park v. Lee, 98 O.R. (3d) 520, 2009 ONCA 651, 254 O.A.C. 52, 2009 CarswellOnt 5293 (Ont. C.A.).

Park, acting in person at trial, advanced claims in three actions for damages for personal injury. Apart from himself, he had no witnesses and failed to make his medical reports admissible. Defendants had undertaken to call evidence, including the defendant, Belitz. Park refused trial judge's offer to adjourn. Park made opening statement and took the stand. After two hours of Park's evidence in chief, the trial judge on his own motion dismissed all three actions on basis that Park's evidence was incoherent and incapable of proving the case. Two of the actions subsequently settled. Park appealed from dismissal of third. New trial ordered. Park denied fair trial. Inherent jurisdiction to control own process did not extend to dismissing cases without hearing the available evidence and submissions. Trial judge erred by interrupting Park before he had completed his evidence, before he had been given the full opportunity to present his case and before the defendants had honoured their undertaking to call Belitz.

Reid v. R.L. Johnston Masonry Inc., 252 O.A.C. 13, 80 C.L.R. (3d) 164, 2009 CarswellOnt 3428 (Ont. Div. Ct.).

Reid entered into oral contract with R.L. Johnston Masonry Inc. (Johnston) for repair of a water leak. Repairs completed. Reid commenced a small claims action. Action dismissed. The Divisional Court, per Glass J., stated trial judge erred in dismissing several heads of damages peremptorily as being trivial. Heads of damage ought to have been analyzed with a determination of whether they were proven claims.

Cicciarella v. Cicciarella, 252 O.A.C. 156, 72 R.F.L. (6th) 319, [2009] O.J. No. 2906, 2009 CarswellOnt 3972 (Ont. Div. Ct.).

The Divisional Court, referencing the Canadian Judicial Council's advisory "Statement of Principles on Self-represented Litigants and Accused Persons," discussed responsibilities of judges to conduct a fair and impartial proceeding when one party before the court was not self-represented.

Parkway Collision Ltd. v. Ryan, 2009 CarswellOnt 6266, 255 O.A.C. 74 (Ont. Div. Ct.).

Parkway Collision awarded judgment for a towing bill paid on behalf of Ryan and charges for storage of vehicle for $1,298.50. Ryan appealed, arguing trial judge erred in rejecting the evidence of bylaw tow rates in surrounding areas because bylaw not produced. Divisional Court, per Stong J., stated that: "In rejecting oral evidence of By-laws of other municipalities, which By-laws were not in fact presented to the court, the trial judge rejecting collateral and hearsay evidence the acceptance of which would have been simply opinion of a third party and not subject to cross-examination.".

Dew Point Insulation Systems Inc. v. JV Mechanical Ltd., 259 O.A.C. 179, 84 C.P.C. (6th) 297, 2009 CarswellOnt 8064, [2009] O.J. No. 5446, 87 C.L.R. (3d) 138 (Ont. Div. Ct.), at paras. 26–40.

Unrepresented defendants in action under the *Construction Liens Act (Ont.)* failed to comply with a Master's order for production of an affidavit of documents. The Master struck statement of defence. Divisional Court, per Bellamy J., quashed the decision where the Master did not extend procedural fairness to the defendants. Defendants did not appear to appreciate the significance of court procedures. The Master had not informed the defendants of the finality of the motion to strike. She did not provide them with an opportunity to make submissions. No evidence of prejudice to the plaintiff.

Garten v. Kruk, 2009 CarswellOnt 6477, 257 O.A.C. 59 (Ont. Div. Ct.).

Some six months after initial court appearance, without notifying the defendant, plaintiff's counsel had defendant noted in default. Six months later, the plaintiff's lawyer notified the defendant's lawyer of the noting in default. The defendant moved to set aside the noting of default. Master dismissed motion. Divisional Court, *per* Wilson J., allowed appeal. The defendant demonstrated intent to defend. She had immediately obtained counsel. The fact that she appeared before Master and was now before Divisional Court spoke volumes of her desire to defend. Defendant should not be punished for her lawyer's errors. Her lawyer's affidavit clearly stated that his office inadvertently failed to deliver the statement of defence. Master did not accept the lawyer's sworn statement. Master's order reinforced sharp practice.

Gryphon Building Solutions Inc. v. Danforth Estates Management Inc., 253 O.A.C. 10, 2009 CarswellOnt 4741 (Ont. Div. Ct.).

Plaintiffs, Gryphon Building Solutions Inc. and Ontario Roofing, sought costs of appeal of $10,900 and $7,098, respectively, on basis they were successful both on jurisdictional issue and merits. Divisional Court found, on a partial indemnity basis, $4,000, all inclusive, as appropriate quantum of costs in relation to the jurisdictional issue. Jurisdictional issue not complex. Appeal unnecessary (the proper forum to challenge the Master's decision was a motion under r. 54.09). Court ordered the defendant to pay costs of $12,500, all inclusive, to Gryphon, and costs of $1,500, all inclusive, to Ontario Roofing.

McCormick v. Greater Sudbury Police Service, 2010 CarswellOnt 1871, 2010 ONSC 270, 259 O.A.C. 226, 6 Admin. L.R. (5th) 79 (Ont. Div. Ct.).

The hearing officer erred in law in purporting to take judicial notice that combined effects of consumption of alcohol and percocets would negatively impact on an individual's ability to

perceive and recall experienced events. Subject was neither notorious nor within any specialized knowledge of tribunal, and properly the subject of expert evidence.

Sazant v. McKay, 2010 ONSC 4273, 2010 CarswellOnt 5903, 271 O.A.C. 63 (Ont. Div. Ct.).

Party's former lawyer now acting for opposite party. Court of Appeal effectively adopted respondent's submissions that lawyers owe duty of loyalty to former clients who must be able to speak to their lawyers frankly and without fear of exposure of their legal concerns. Clients must be confident that their lawyers will not in future become their adversaries' lawyers in course of same dispute. Lawyer's obligation, whether described as duty of loyalty owed to former client, or as professional obligation to promote public confidence in legal profession and administration of justice dictated that AL could not act on this appeal against his former client.

Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc., 270 O.A.C. 182, [2010] O.J. No. 4996, 2010 ONCA 788, 2010 CarswellOnt 8797, 97 C.P.C. (6th) 16 (Ont. C.A.).

The defendants brought motion for leave to appeal. Motion dismissed. Leave to appeal could be granted on question of law only. Leave to appeal could not be granted on questions of fact or questions of mixed fact and law. At best, issues raised by defendants were questions of mixed fact and law, not of law alone. See *Schultz v. Kopp Farms*, 2010 CarswellMan 75, 2010 MBCA 30 (Man. C.A. [In Chambers]).

Delano v. Craig, 2010 CarswellNS 264, 2010 NSSC 60 (N.S. S.C.).

The plaintiff brought claim in Small Claims Court concerning dispute over lawn mower. The adjudicator gave reasons why he preferred evidence of defendants over that of the plaintiff. The claim was dismissed. Appeal dismissed. The adjudicator's reasons do not have to be exhaustive, but adequate to support findings of fact and demonstrate appreciation and proper application of law based on those facts.

Bulut v. Walker-Fairen, *(*sub nom. *Walker-Fairen v. Bulut)* 259 O.A.C. 15, 2010 ONSC 706, 2010 CarswellOnt 482 (Ont. Div. Ct.).

Trial judge reserved judgment, following seven-week trial. He did not ask for submissions as to costs and none were made. He awarded substantial indemnity costs to plaintiff throughout. Reasons respecting costs set out in the final paragraph of the reasons as follows: "I am not asking for submissions on costs . . . Costs go to the plaintiff payable by all the defendants jointly and severally on a substantial indemnity basis throughout." Divisional Court held that, in the absence of submissions and unsupported by reasons, the trial judge's costs ruling was breach of procedural fairness and natural justice and could not stand. This was an extraordinary costs award, both respecting the scale of costs, the parties liable for the costs and the quantum of costs. Absence of meaningful reasons for award made appellate review impossible.

Link v. Venture Steel Inc., 69 B.L.R. (4th) 161, 79 C.C.E.L. (3d) 201, 259 O.A.C. 199, 2010 ONCA 144, 2010 CarswellOnt 1049, 2010 C.L.L.C. 210-017, [2010] O.J. No. 779 (Ont. C.A.).

The Ontario Court of Appeal stated that "[i]t is well accepted that the parties to an action are entitled to have a resolution of their differences based on the pleadings. Trial judge cannot make a finding of liability and award damages against a defendant on a basis not pleaded in the statement of claim because it deprives the defendant of the opportunity to address that issue." Pleadings included the critical mattes that underlay the plaintiff's claim. The defendant not misled or prejudiced as a result of general pleadings.

Cosentino v. S. Cosentino Leasing Ltd., 96 C.P.C. (6th) 372, 2010 ONSC 2611, 2010 CarswellOnt 2745, 261 O.A.C. 131, [2010] O.J. No. 1838 (Ont. Div. Ct.).

Cosentino, a lawyer, was retained in 1994 by defendant (his uncle's company) with respect to a civil action. Action was settled in 1999, on basis of nominal payment by defendant. Settlement funds paid June 16, 1999. The uncle died on August 17, 1999. Out of respect, Cosentino put file away and did not submit an account for legal services until August 3, 2002. The account was not paid. On July 30, 2008, the plaintiff sued the defendant in Small Claims Court on his account for legal services. Deputy judge found that cause of action arose when work completed and work was completed on June 16, 1999. Accordingly, claim barred under s. 45(1)(g) of the former *Limitations Act*, as the six-year limitation period had expired. Cosentino appealed. Divisional Court dismissed appeal. No palpable and overriding error in conclusion that retainer was at an end when Cosentino paid settlement funds on behalf of company.

R. v. Wang, 95 M.V.R. (5th) 80, 2010 CarswellOnt 3857, 2010 ONCA 435, 78 C.R. (6th) 134, [2010] O.J. No. 2490, 320 D.L.R. (4th) 680, 263 O.A.C. 194, 256 C.C.C. (3d) 225 (Ont. C.A.).

Court of Appeal stated that If unforeseen circumstances arise such that, after delivery of reasons that were meant to be final, a trial judge wishes to correct or supplement the reasons that were already delivered, various options are available. Issuance of an addendum, providing supplementary reasons or, when the original reasons were oral, subsequently issuing a set of amended reasons, written or oral. Candour and transparency are essential. Where changes or additions are made to the reasons, counsel as well as any reviewing court should have a clear record of what occurred and be in a position to opine as to the legal effect, if any, of the changes or additions made by the judge.".

Global Agriculture Trans-Loading Inc. v. (IRS) Industrial Repair Services, 2010 CarswellBC 1470, 2010 BCCA 234, 288 B.C.A.C. 88, 488 W.A.C. 88 (B.C. C.A.).

Appellant defendant in action brought in Small Claims Court. It appealed order on basis plaintiff as named in proceedings not a legal entity. It also sought an order for payment out of court of monies attached post-judgment by garnishing order. Judgment had been obtained in default of appearance at mandated settlement conference but was later set aside.

Respondent a sole proprietorship but when the default judgment obtained, "Ltd." was added to its name in style of cause. That addition did not appear in garnishing order.

Litigants should not be burdened with legal technicality. If there is either a factual or a legal problem with the description of the respondent in the style of cause in that court, that is a matter that should be addressed in that court. The use and withdrawal of the designation "Ltd." does not go to the jurisdiction of the court. Appeal dismissed with costs.

Roskam v. Jacoby-Hawkins, 2010 ONSC 4439, 2010 CarswellOnt 7132 (Ont. S.C.J.).

Judgment delivered by deputy judge on February 12, 2010.

Roskam served a Notice of Appeal of the Small Claims Court Judgment on March 18, 2010, more than 30 days after Judgment released. Jacoby-Hawkins moved to strike out the Notice of Appeal.

Jacoby-Hawkins sought additional relief that Roskam be required to post security for costs of the appeal, that he be declared a vexatious litigant and that Roskam be required to remove all references he has authored about Jacoby-Hawkins and his counsel from the internet.

Section 31 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, provides that an appeal lies to the Divisional Court from a final order of the Small Claims Court in an action for the payment of money in excess of $500.00. Rule 61.04 of the *Rules of Civil Procedure* provides that any such appeal must be commenced within 30 days after the making of the order. The time for appeal usually runs from the date of pronouncement of a judgment: see *Permanent Investment Corp. v. Ops & Graham (Township)*, 1967 CarswellOnt 90, 62 D.L.R. (2d) 258, [1967] 2 O.R. 13 (Ont. C.A.).

Rule 3.02 deals with extensions of time generally. Rule 3.02 provides court with discretion to extend the time in which to file the Notice of Appeal, which was delivered four days late. *Bona fide* intention to pursue appeal. No prejudice to respondent as a result of late service.

Justice requires extension of time to file Notice of Appeal. See *Rizzi v. Mavros*, 2007 ONCA 350, 2007 CarswellOnt 2841, [2007] O.J. No. 1783, 85 O.R. (3d) 401, 224 O.A.C. 293 (Ont. C.A. [In Chambers]). Basis for security grounded in r. 56.01(1)(c) incorporated by reference in r. 61.06(1)(b). Request for security for costs not made out. Rationale underlying s. 140 discussed by Blair J.A. in *Foy v. Foy (No. 2)*, [1979] O.J. No. 4386, 102 D.L.R. (3d) 342, 12 C.P.C. 188, 26 O.R. (2d) 220, 1979 CarswellOnt 458 (Ont. C.A.); leave to appeal refused 102 D.L.R. (3d) 342 (note), [1979] 2 S.C.R. vii, 12 C.P.C. 188n, 26 O.R. (2d) 220n, 31 N.R. 120 (S.C.C.).

The control of vexatious proceedings was necessary to protect integrity of the judicial system. The purpose of section to prevent people from using system for improper purposes, such as harassment or oppression. See *Dale Streiman & Kurz LLP v. De Teresi*, 2007 CarswellOnt 485, [2007] O.J. No. 255, 84 O.R. (3d) 383 (Ont. S.C.J.). Accordingly, a litigant's behaviour both inside and outside of the court is relevant. See *Canada Post Corp. v. Varma*, [2000] F.C.J. No. 851, 2000 CarswellNat 1183, 192 F.T.R. 278 (Fed. T.D.).

Section 140 of the *Courts of Justice Act* gives the court the authority to declare a party a vexatious litigant, thereby restricting his or her access to the courts of Ontario. It is a remedy that should be used very sparingly because the ability to have one's grievances addressed by the courts is fundamental to a free and just society. At the same time, the court must be wary of its processes being used for vexatious purposes.

Given Roskam's behaviour, appropriate case to make an order declaring Roskam to be a vexatious litigant.

Bérubé v. Rational Entertainment Ltd., 2010 ONSC 5545, 2010 CarswellOnt 7623, 324 D.L.R. (4th) 527, 80 B.L.R. (4th) 6, 271 O.A.C. 151 (Ont. Div. Ct.).

On October 16, 2009, Small Claims Court Justice made order dismissing appellant's claim for lack of jurisdiction. On November 17, 2009, appellant served a Notice of Appeal. On December 18, 2009, respondent brought a motion before Power J. sitting as a single judge of the Divisional Court, and requested order that the appeal be quashed pursuant to section 134(3) of the *Courts of Justice Act*. The provisions of sections 31 and 21 of the *Courts of Justice Act* make it clear that Power J. had jurisdiction to hear the respondent's motion on December 18, 2009, sitting as a single judge. Section 134(3) of the *Courts of Justice Act* provides that a court to which an appeal is taken may, in a proper case, quash the appeal when the appeal is manifestly devoid of merit. Rule 61.06 of the *Rules of Civil Procedure* provides for an order for security for costs if it appears that there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal. Rule 56.01(e) contains a similar test. Appeal dismissed.

Cameron v. Nanaimo (Regional District), 2010 CarswellBC 705, 2010 BCCA 73, 317 D.L.R. (4th) 572, 482 W.A.C. 10, 285 B.C.A.C. 10 (B.C. C.A.).

There was sufficient evidence to support the appeal judge's conclusion that respondent's absence from the courtroom was not of her own informed choosing and that trial fairness was negatively affected as a result. The right of a party to a proceeding is to be present and to see and hear the evidence that could affect his or her interests fundamental under the law.

Chippewas of Mnjikaning First Nation v. Ontario, 2010 ONCA 47, 2010 CarswellOnt 273, [2010] O.J. No. 212, *(*sub nom. *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible of Native Affairs))* [2010] 2 C.N.L.R. 18, 265 O.A.C. 247 (Ont. C.A.); additional reasons at 2010 ONCA 408, 2010 CarswellOnt 3730 (Ont. C.A.); leave to appeal re-

fused 2010 CarswellOnt 4919, 2010 CarswellOnt 4920, [2010] S.C.C.A. No. 91, *(*sub nom. *Chippewas v. Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* 276 O.A.C. 398 (note), *(*sub nom. *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible for Native Affairs))* 409 N.R. 396 (note) (S.C.C.).

The trial judge's reasons were careful, thorough, and analytical. Reasons provided ample clarity and transparency to facilitate meaningful appellate review.

Interventions did not create an apprehension of bias. Experienced trial counsel did *not* object that trial judge was too interventionist at trial. The trial judge's interventions during closing arguments did not create an apprehension of bias. See de Grandpré J.'s dissenting opinion in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1976] A.C.S. No. 118, [1976] S.C.J. No. 118, 1976 CarswellNat 434F, 1976 CarswellNat 434, 9 N.R. 115, 68 D.L.R. (3d) 716, [1978] 1 S.C.R. 369 (S.C.C.).

Canadian Imperial Bank of Commerce v. Houlahan, 2011 ONSC 558, 2011 CarswellOnt 291, 73 C.B.R. (5th) 223, 273 O.A.C. 140 (Ont. Div. Ct.).

Appeal from a final order of a Small Claims Court. Leave sought to admit fresh evidence.

"On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness," see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8.

The "traditional test for the admission of fresh evidence on appeal" summarized in *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44 at para. 6.

A "court to which an appeal is taken may order a new trial," see the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(b). A new trial shall not be directed "unless some substantial wrong or miscarriage of justice has occurred," see the *Courts of Justice Act*, s. 134(6). "Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision . . . a new trial may be ordered in respect of only that part . . .," see the *Courts of Justice Act*, s. 134(7). Appeal allowed in part and new trial ordered.

Gulati v. Husain, 2011 CarswellOnt 407, 2011 ONSC 706, [2011] O.J. No. 384 (Ont. S.C.J.).

The applicant sought *certiorari* respecting an order from deputy judge of the Small Claims Court (a) denying an adjournment of the motion to set aside default judgment; (b) staying enforcement of the default judgment; (c) setting aside the default judgment; and (d) costs of $300. Order setting aside default judgment, and costs order set aside.

The court has the discretion to refuse a consent adjournment. But this discretion should be exercised sparingly. It is unusual to refuse a request to accommodate counsel's schedule reasonably on a first appearance.

Deputy judge gave no reason for refusing adjournment. Deputy judge then decided the motion to set aside the default judgment without hearing submissions from either side.

Tosti v. Society of the Madonna Di Canneto of Windsor Inc., 2011 CarswellOnt 454, 2011 ONSC 339, 275 O.A.C. 108 (Ont. Div. Ct.).

Three appeals from judgment of deputy judge after four claims heard together in Windsor Small Claims Court over a five-day period in 2009. Written judgment released December 17, 2009.

In *R. v. Sheppard*, 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, REJB 2002-29516, [2002] S.C.J. No. 30, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 50 C.R. (5th) 68, 633 A.P.R. 50, 210 D.L.R. (4th) 608, 284 N.R. 342, 162 C.C.C. (3d) 298 (S.C.C.), the Supreme Court held that parties are entitled to be given sufficient reasons for a decision from a trial court so that the decision can be reviewed by an appellate court and the reasons are

sufficient to inform the losing party as well as the community of the basis for the decision. At the same time, deficiencies in a trial judge's reasons do not automatically constitute a reversible error. Rather, one must apply a functional interpretation of the reasons. This functional approach articulated by the Court of Appeal in *R. v. Ahmed*, 170 C.C.C. (3d) 27, [2002] O.J. No. 4597, 166 O.A.C. 254, 7 C.R. (6th) 308, 2002 CarswellOnt 4075 (Ont. C.A.) and *R. v. Stewart*, [2003] O.J. No. 347, 2003 CarswellOnt 283 (Ont. C.A.).

Appeals were granted and new trial was ordered.

Significant errors of law and fact identified in the decision and the deputy judge's "they said, they said" simplistic approach to what were complicated factual and legal issues.

While the interventionist approach taken by the deputy judge appeared at times to assist the defendants, for example, when he conducted his own cross-examination of a number of the witnesses for the plaintiffs after he or she had been cross-examined by counsel for the Society and had been re-examined by counsel for the plaintiffs, conduct did not rise to the level required to find bias based on the test for such a finding set out in *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 2002 CarswellOnt 1724, [2002] O.J. No. 2050, 32 C.P.C. (5th) 357, 161 O.A.C. 1 (Ont. Div. Ct.); additional reasons at 2002 CarswellOnt 2939 (Ont. Div. Ct.). Judges must play "gatekeeper" role in relation to the admission of evidence. See David M. Paciocco, "*Context, Culture and the Law of Expert Evidence,"* (2001) 24 Advocates' Quarterly, 42 at p. 45. The trial judge remains the gatekeeper, responsible for determining admissibility.

Elsegood v. Cambridge Spring Service 2001 Ltd., 2011 CarswellOnt 652, 2011 ONSC 534 (Ont. Div. Ct.); affirmed 2011 ONCA 831, 2011 CarswellOnt 14782, 109 O.R. (3d) 143, 99 C.C.E.L. (3d) 327, 346 D.L.R. (4th) 353, 2012 C.L.L.C. 210-008, 287 O.A.C. 32, [2011] O.J. No. 6095 (Ont. C.A.).

An appeal of decision of deputy judge. The argument that respondent's pleadings at trial were not in accord with basis upon which the trial judge found liability. Flaws, or alleged flaws, in pleadings have not been fatal for several decades, especially true in a Small Claims Court setting.

Anand v. Sunfresh Organics, 2011 CarswellOnt 757, 2011 ONSC 776 (Ont. Div. Ct.); additional reasons at 2011 ONSC 1263, 2011 CarswellOnt 1101 (Ont. Div. Ct.).

The appeal by defendant from deputy judge. The appellant argued that trial judge ought to have granted adjournment request and that any prejudice to respondent could be compensated by a cost order. Within Court's jurisdiction to govern its own process and given the facts, trial judge's decision reasonable. The appellant argued the learned judge erred in allowing the plaintiff to reference a document which had not been disclosed to the defendant in accordance with the *Rules of Civil Procedure*. Reference to it not error in judgment or law by trial judge.

The appellant argued the judge allowed as evidence a letter in which an offer of settlement was made and which ought not to have been evidence as it was privileged. This is not a ground for appeal. There was a great deal of other evidence upon which the trial judge could rely to reach his decision. Appeal dismissed.

Ontario Deputy Judges Assn. v. Ontario (Attorney General), 2012 ONCA 437, 2012 CarswellOnt 7932, 23 C.P.C. (7th) 1, [2012] O.J. No. 2865 (Ont. C.A.).

The process for renewing the appointments of Deputy Judges of the Small Claims Court ("Deputy Judges") does not infringe the principles of judicial independence.

Pursuant to s. 32(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "*CJA*"), a Regional Senior Judge of the Superior Court may, with the approval of the Attorney General, appoint a lawyer to act as a Deputy Judge of the Small Claims Court for a period of three years.

Having regard to the nature of the jurisdiction of the Small Claims Court and the presumption that a Regional Senior Judge will act in the best interest of the administration of justice, that a reasonable and well informed observer would conclude that the Deputy Judges and the Ontario Small Claims Court are sufficiently independent so as to satisfy constitutional requirements.

We also endorse the application judge's comment as follows (at para. 62):

> Without doubt, the [Small Claims Court] plays an important and unique role in the justice system. It is absolutely essential that the [Small Claims Court] institutionally and the [Deputy Judges] personally, be regarded as independent.

System for renewal of the appointments of Deputy Judges does not undermine this independence.

Appeal dismissed.

Prohaska v. Howe, 2016 ONSC 48, 2016 CarswellOnt 13, [2016] O.J. No. 13, LeMay J. (Ont. Div. Ct.)

Appeal of Deputy Judge Barycky on following grounds:

> a) The trial judge erred in law by ruling that expert evidence was inadmissible in Small Claims Court in the absence of prior service of an expert's report.
>
> b) The trial judge exceeded his jurisdiction by adjourning the trial and ordering the plaintiff to obtain and serve an expert report.
>
> c) The trial judge failed to apply section 27 of the *Courts of Justice Act* when he ruled that the Plaintiff's expert evidence was inadmissible.
>
> d) The trial judge's costs award was excessive because he misinterpreted Rule 14.07 of the *Small Claims Court Rules* and violated section 29 of the *Court of Justice Act*.

Counsel for the Appellant J.S. Winny. Mr. Winny is also a Deputy Judge of the Small Claims Court in Kitchener, which is in the Central South Region. General understanding that deputy judges could appear on appeals of Small Claims Court matters, as long as there were outside of the region in which they preside.

Analysis starts with Rule 18.02 of the Small Claims Court Rules. Deputy Judges must have the authority to exercise a gatekeeping function to determine whether evidence should be admissible. Expert evidence is opinion evidence. Unless it meets certain requirements for admissibility, expert evidence is *prima facie* inadmissible.

A Small Claims Court Judge does have discretion to consider, and even exclude, expert evidence before the expert testifies. Deputy Judges have discretion to determine how expert evidence will be placed before the Court.

Deputy Judge Barycky acted appropriately when he looked to the *Rules of Civil Procedure* for guidance. Rule 18.02 gives a Deputy Judge the ability to admit documents that do not comply with the requirements.

The application of *S & A Strasser Ltd. v. Richmond Hill (Town)*, 1990 CarswellOnt 435, 1 O.R. (3d) 243, 49 C.P.C. (2d) 234, 45 O.A.C. 394, [1990] O.J. No. 2321 (Ont. C.A.) in the context of the Small Claims Rules appears not to have been considered previously by this Court.

The words of the Small Claims Rules are precisely the same as those of the *Rules of Civil Procedure*. As a result, I am bound by the Court of Appeal's findings in *Strasser*. Therefore, the rule that permits the doubling of costs does not apply when the Plaintiff fails to recover anything.

33. (1) Deputy Judges Council — A council known as the Deputy Judges Council in English and as Conseil des juges suppléants in French is established.

(2) Composition — The Deputy Judges Council is composed of,

(a) the Chief Justice of the Superior Court of Justice, or another judge of the Superior Court of Justice designated by the Chief Justice;

(b) a regional senior judge of the Superior Court of Justice, appointed by the Chief Justice;

(c) a judge of the Superior Court of Justice, appointed by the Chief Justice;

(d) the Small Claims Court Administrative Judge appointed under section 87.2 or a deputy judge, as appointed by the Chief Justice; and

(e) three persons who are neither judges nor lawyers, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation.

(3) Criteria — In the appointment of members under clause (2)(e), the importance of reflecting, in the composition of the Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized.

(4) Chair — The Chief Justice of the Superior Court of Justice, or his or her designate, shall chair the meetings of the Deputy Judges Council.

(5) Same — The chair is entitled to vote, and may cast a second deciding vote if there is a tie.

(6) Functions — The functions of the Deputy Judges Council are,

(a) to review and approve standards of conduct for deputy judges as established by the Chief Justice;

(b) to review and approve a plan for the continuing education of deputy judges as established by the Chief Justice; and

(c) to make recommendations on matters affecting deputy judges.

(7) Duty of Chief Justice — The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French, when they have been approved by the Deputy Judges Council.

1994, c. 12, s. 13; 1996, c. 25, s. 9(14), (17); 2006, c. 21, Sched. A, s. 4; 2017, c. 2, Sched. 2, s. 4

33.1 (1) Complaint — Any person may make a complaint alleging misconduct by a deputy judge, by writing to the judge of the Superior Court of Justice designated by the regional senior judge in the region where the deputy judge sits.

Commentary: New s. 33 establishes the Deputy Judges Council and its composition. The Council deals with the education of Small Claims Court deputy judges and makes recommendations on any other matters affecting them. Section 33.1 establishes a new procedure for complaints of alleged misconduct by deputy judges.

(2) Dismissal — The judge shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it falls outside the jurisdiction of the regional senior judge, is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given.

(3) Notice of dismissal — The judge shall notify the regional senior judge, the complainant and the deputy judge in writing of a dismissal under subsection (2), giving brief reasons for it.

(4) Committee — If the complaint is not dismissed, the judge shall refer it to a committee consisting of three persons chosen by the regional senior judge.

(5) Same — The three persons shall be a judge of the Superior Court of Justice, a deputy judge and a person who is neither a judge nor a lawyer, all of whom reside or work in the region where the deputy judge who is the subject of the complaint sits.

(6) Investigation — The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and deputy judge shall be given an opportunity to make representations to the committee, in writing or, at the committee's option, orally.

(7) Recommendation — The committee shall make a report to the regional senior judge, recommending a disposition in accordance with subsections (8), (9) and (10).

(8) Disposition — The regional senior judge may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the deputy judge's conduct presents grounds for imposing a sanction, may,

(a) warn the deputy judge;

(b) reprimand the deputy judge;

(c) order the deputy judge to apologize to the complainant or to any other person;

(d) order that the deputy judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a deputy judge;

(e) suspend the deputy judge for a period of up to 30 days;

(f) inform the deputy judge that his or her appointment will not be renewed under subsection 32(2);

(g) direct that no judicial duties or only specified judicial duties be assigned to the deputy judge; or

(h) remove the deputy judge from office.

(9) Same — The regional senior judge may adopt any combination of the dispositions set out in clauses (8)(a) to (g).

(10) Disability — If the regional senior judge finds that the deputy judge is unable, because of a disability, to perform the essential duties of the office, but would be able to perform them if his or her needs were accommodated, the regional senior judge shall order that the deputy judge's needs be accommodated to the extent necessary to enable him or her to perform those duties.

(11) Application of subs. (10) — Subsection (10) applies if,

(a) the effect of the disability on the deputy judge's performance of the essential duties of the office was a factor in the complaint; and

(b) the regional senior judge dismisses the complaint or makes a disposition under clauses (8)(a), (b), (c), (d), (e) or (g).

(12) Undue hardship — Subsection (10) does not apply if the regional senior judge is satisfied that making an order would impose undue hardship on the person responsible for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(13) Opportunity to participate — The regional senior judge shall not make an order under subsection (10) against a person without ensuring that the person has had an opportunity to participate and make submissions.

(14) Crown bound — An order made under subsection (10) binds the Crown.

(15) Compensation — The regional senior judge shall consider whether the deputy judge should be compensated for all or part of his or her costs for legal services incurred in connection with all the steps taken under this section in relation to the complaint.

(16) Recommendation — If the regional senior judge is of the opinion that the deputy judge should be compensated, he or she shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation.

(17) Same — If the complaint is dismissed with a finding that it is unfounded, the regional senior judge shall recommend to the Attorney General that the deputy judge be compensated for his or her costs for legal services and shall indicate the amount of compensation.

(17.1) Exception — If the regional senior judge makes a disposition under clause (8) (h) in relation to a complaint made on or after the day section 1 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (15) does not apply and compensation shall not be recommended under subsection (16).

(18) Maximum — The amount of compensation recommended under subsection (16) or (17) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar legal services.

(19) Payment — The Attorney General shall pay compensation to the judge in accordance with the recommendation.

(20) Non-application of *SPPA* — The *Statutory Powers Procedure Act* does not apply to a judge, regional senior judge or member of a committee acting under this section.

(21) Personal liability — No action or other proceeding for damages shall be instituted against a judge, regional senior judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person, or for any neglect or default in the exercise or performance in good faith of such power or duty.

1994, c. 12, s. 13; 1996, c. 25, s. 9(17); 2017, c. 2, Sched. 2, s. 5; 2020, c. 11, Sched. 5, s. 1

Ontario Court of Justice

34. Ontario Court of Justice — The Ontario Court (Provincial Division) is continued as a court of record under the name Ontario Court of Justice in English and Cour de justice de l'Ontario in French.

1996, c. 25, s. 9(5)

35. Composition of Ontario Court of Justice — The Ontario Court of Justice shall consist of,

(a) the Chief Justice of the Ontario Court of Justice appointed under subsection 42(3), who shall be president of the Ontario Court of Justice;

(a.1) the Associate Chief Justice and the Associate Chief Justice — Co-ordinator of Justices of the Peace of the Ontario Court of Justice appointed under subsections 42(4) and (5);

(b) a regional senior judge of the Ontario Court of Justice appointed under subsection 42(6) for each region;

(b.1) the Senior Advisory Family Judge of the Ontario Court of Justice appointed under subsection 42(6.2);

(c) such provincial judges as are appointed under subsection 42(1); and

(d) such provincial judges as were assigned to the Provincial Court (Criminal Division) or the Provincial Court (Family Division) on the 31st day of December, 1989.

1994, c. 12, s. 14; 1996, c. 25, s. 9(18), (20); 2015, c. 27, Sched. 1, s. 1(5)

36. Chief Justice, Associate Chief Justice and regional senior judges of Ontario Court of Justice — (1) Powers and duties of Chief Justice — The Chief Justice of the Ontario Court of Justice shall direct and supervise the sittings of the Ontario Court of Justice and the assignment of its judicial duties.

(2) Regional senior judges — A regional senior judge of the Ontario Court of Justice shall, subject to the authority of the Chief Justice of the Ontario Court of Justice, exercise the powers and perform the duties of the Chief Justice of the Ontario Court of Justice in his or her region.

(3) Delegation — A regional senior judge of the Ontario Court of Justice may delegate to a judge of the Ontario Court of Justice in his or her region the authority to exercise specified functions.

(4) Absence of Chief Justice — If the Chief Justice of the Ontario Court of Justice is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by an associate chief justice of the Ontario Court of Justice designated by the Chief Justice of the Ontario Court of Justice.

(5) Senior Advisory Family Judge — The Senior Advisory Family Judge of the Ontario Court of Justice shall,

(a) advise the Chief Justice of the Ontario Court of Justice with regard to,

(i) the education of judges with respect to family law matters, and

(ii) practices, procedures and programs relating to family law matters;

(b) preside over the Ontario Court of Justice Advisory Committee on Family Law;

(c) attend such meetings as the Chief Justice directs; and

(d) perform other duties respecting family law matters assigned to the Senior Advisory Family Judge by the Chief Justice.

(6) Absence of regional senior judge or Senior Advisory Family Judge — The powers and duties of a regional senior judge of the Ontario Court of Justice or of the Senior Advisory Family Judge when he or she is absent from Ontario or is for any reason unable to act shall be exercised and performed by a judge of the Ontario Court of Justice designated by the Chief Justice of the Ontario Court of Justice.

(7) Meetings — The Chief Justice of the Ontario Court of Justice may hold meetings with the associate chief justices, the regional senior judges of the Ontario Court of Justice and the Senior Advisory Family Judge in order to consider any matters concerning sittings of the Ontario Court of Justice and the assignment of its judicial duties.

1994, c. 12, s. 15; 1996, c. 25, s. 9(16), (18), (20); 2015, c. 27, Sched. 1, s. 1(6)

37. (1) Judges assigned to regions — The Chief Justice of the Ontario Court of Justice shall assign every provincial judge to a region and may re-assign a judge from one region to another.

(2) Idem — Subsection (1) does not prevent the temporary assignment of a provincial judge to a location anywhere in Ontario.

1996, c. 25, s. 9(18), (20)

38. Jurisdiction of Ontario Court of Justice — (1) Criminal matters — A provincial judge has the power and authority of two or more justices of the peace when sitting in the Ontario Court of Justice and shall exercise the powers and perform the duties that any Act of the Parliament of Canada confers on a provincial court judge when sitting in the Ontario Court of Justice.

(2) Provincial offences and family matters — The Ontario Court of Justice shall perform any function assigned to it by or under the *Provincial Offences Act*, the *Family Law Act*, the *Children's Law Reform Act*, the *Child, Youth and Family Services Act, 2017* or any other Act.

(3) Youth court and youth justice court — The Ontario Court of Justice is a youth court for the purposes of the *Young Offenders Act* (Canada) and a youth justice court for the purposes of the *Youth Criminal Justice Act* (Canada).

1996, c. 25, s. 9(18); 2006, c. 19, Sched. D, s. 5(1); 2017, c. 14, Sched. 4, s. 10(3)

39. (1) Judge to preside — A proceeding in the Ontario Court of Justice shall be heard and determined by one judge of the Ontario Court of Justice.

(2) Justice of the peace may preside — A justice of the peace may preside over the Ontario Court of Justice in a proceeding under the *Provincial Offences Act*.

1996, c. 25, s. 9(18)

40. (1) Appeals — If no provision is made concerning an appeal from an order of the Ontario Court of Justice, an appeal lies to the Superior Court of Justice.

(2) Exception — Subsection (1) does not apply to a proceeding under the *Criminal Code* (Canada) or the *Provincial Offences Act*.

1996, c. 25, s. 9(17), (18)

41. Penalty for disturbance outside courtroom — Any person who knowingly disturbs or interferes with a proceeding in the Ontario Court of Justice without reasonable justification while outside the courtroom is guilty of an offence and on conviction is liable to a fine of not more than $1,000 or to imprisonment for a term of not more than thirty days, or to both.

1996, c. 25, s. 9(18)

Provincial Judges

42. (1) Appointment of provincial judges — The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such provincial judges as are considered necessary.

(2) Qualification — No person shall be appointed as a provincial judge unless he or she,

(a) has been a member of the bar of one of the provinces or territories of Canada for at least 10 years; or

(b) has, for an aggregate of at least 10 years,

(i) been a member of a bar mentioned in clause (a), and

(ii) after becoming a member of such a bar, exercised powers and performed duties of a judicial nature on a full-time basis in respect to a position held under a law of Canada or of one of its provinces or territories.

(3) Chief Justice — The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint a provincial judge as Chief Justice of the Ontario Court of Justice.

(4) Associate chief justices — The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint two provincial judges as associate chief justices of the Ontario Court of Justice.

(5) Same — One of the associate chief justices shall be appointed to the office of Associate Chief Justice — Co-ordinator of Justices of the Peace, which is created for the purposes of the *Justices of the Peace Act*.

(6) Regional senior judges — The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint a provincial judge to be the regional senior judge of the Ontario Court of Justice for each region.

(6.1) Same — Before making a recommendation referred to in subsection (4) or (6), the Attorney General shall consult with the Chief Justice of the Ontario Court of Justice.

(6.2) Senior Advisory Family Judge — The Chief Justice of the Ontario Court of Justice may appoint a provincial judge to be the Senior Advisory Family Judge of the Ontario Court of Justice.

(7) Terms of office — The associate chief justices each hold office for six years, and regional senior judges each hold office for three years.

(7.1) Same — The Chief Justice holds office for eight years from the time of his or her appointment. If a successor has not yet been appointed on the day the term expires, the Chief Justice continues in office until a successor is appointed, but shall not hold office for more than nine years in any event.

(7.2) Same — The Senior Advisory Family Judge holds office for three years.

(8) Reappointment — The Chief Justice and associate chief justices shall not be reappointed.

(9) Same — A regional senior judge may be reappointed once, for a further three years, on the Chief Justice's recommendation; if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the regional senior judge.

(9.1) Same — The Senior Advisory Family Judge may be reappointed once, for a term of three years.

(9.2) Transitional salary — Until and subject to the determination of his or her salary by the Provincial Judges Remuneration Commission, the Senior Advisory Family

Judge is entitled to receive as an annual salary the annual salary of a regional senior judge appointed on or after November 12, 2013.

(10) Status at end of term — A Chief Justice, associate chief justice, Senior Advisory Family Judge or regional senior judge whose term expires continues to be a provincial judge.

(11) Information to be maintained in confidence — Any records or other information collected, prepared, maintained or used by the Attorney General in relation to the appointment or consideration of an individual as a provincial judge, including any such records or other information provided to the Attorney General by the Judicial Appointments Advisory Committee, shall be maintained in confidence and shall not be disclosed except as authorized by the Attorney General.

(12) Prevails over *FIPPA* — Subsection (11) prevails over the *Freedom of Information and Protection of Privacy Act*.

1994, c. 12, s. 16; 1996, c. 25, ss. 1, 9(18), (20); 2006, c. 21, Sched. A, s. 5; 2015, c. 27, Sched. 1, s. 1(7); 2016, c. 5, Sched. 7, s. 1; 2021, c. 4, Sched. 3, s. 3

43. (1) Judicial Appointments Advisory Committee — The committee known as the Judicial Appointments Advisory Committee in English and Comité consultatif sur les nominations à la magistrature in French is continued.

(2) Composition — The Committee is composed of,

(a) two provincial judges, appointed by the Chief Justice of the Ontario Court of Justice;

(b) three lawyers appointed by the Attorney General, one appointed from a list of three names submitted by the Law Society of Ontario, one appointed from a list of three names submitted by the Ontario Bar Association and one appointed from a list of three names submitted by the Federation of Ontario Law Associations;

(c) seven persons who are neither judges nor lawyers, appointed by the Attorney General; and

(d) a member of the Judicial Council, appointed by it.

(3) Criteria — In the appointment of members under clauses (2)(b) and (c), the importance of reflecting, in the composition of the Committee as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized.

(4) Term of office — The members hold office for three-year terms and may be reappointed.

(5) Chair — The Attorney General shall designate one of the members to chair the Committee for a term of up to three years.

(6) Term of office — The same person may serve as chair for two or more terms.

(7) Meetings — The Committee may hold its meetings and conduct interviews in person or through electronic means, including telephone conferencing and video conferencing.

(8) Annual report — The Committee shall prepare an annual report, provide it to the Attorney General and make it available to the public.

(9) Same — The annual report must include,

(a) statistics about the sex, gender, gender identity, sexual orientation, race, ethnicity, cultural identity, disability status and ability to speak French of candidates who volunteer that information, including whether the candidates identify as Indigenous or as a member of a Francophone community, at each stage of the process, as specified by the Attorney General; and

(b) such other content as the Attorney General may require.

(10) Tabling of annual report — The Attorney General shall table the Committee's annual report in the Assembly.

(11) Personal liability — No action or other proceeding for damages shall be instituted against any member or former member of the Committee for any act done in good faith in the execution or intended execution of any power or duty that he or she has or had as a member of the Committee, or for any neglect or default in the exercise or performance in good faith of such power or duty.

(12) Crown liability — Subsection (11) does not, by reason of subsection 8(3) of the *Crown Liability and Proceedings Act, 2019*, relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (11) to which it would otherwise be subject.

(13) Transition — Despite subsection (2), the appointment of every person who was a member of the Judicial Appointments Advisory Committee on the day before the day section 4 of Schedule 3 to the *Accelerating Access to Justice Act, 2021* came into force is continued.

(14) [Repealed 2021, c. 4, Sched. 3, s. 4.]

(14.1) [Repealed 2021, c. 4, Sched. 3, s. 4.]

(15) [Repealed 2021, c. 4, Sched. 3, s. 4.]

1994, c. 12, s. 16; 1996, c. 25, s. 9(18), (20); 2017, c. 2, Sched. 2, s. 6; 2017, c. 34, Sched. 46, s. 10; 2018, c. 8, Sched. 15, s. 8(2); 2021, c. 4, Sched. 3, s. 4

43.1 Judicial Appointments Advisory Committee — (1) Functions — The functions of the Judicial Appointments Advisory Committee are to,

(a) recommend candidates to the Attorney General for the appointment of provincial judges; and

(b) provide advice to the Attorney General respecting the process for appointing provincial judges in accordance with this Act.

(2) Manner of operating — The Committee shall perform its functions in the following manner:

1. When a judicial vacancy occurs and the Attorney General asks the Committee to make a recommendation, it shall, subject to paragraph 2, advertise the vacancy and solicit applications.

2. If the Committee provided a recommendation for a judicial vacancy for the same court location that matches the requirements of the current judicial vacancy within 12 months before the day the Attorney General asked for a recommendation for the current judicial vacancy, it shall not advertise the current judicial vacancy and shall, subject to subsection (9), instead provide to the Attorney Gen-

eral a ranked list of at least six candidates whom it recommends, with brief supporting reasons, consisting of,

i. all of the candidates for the previous judicial vacancy who were recommended by the Committee for that vacancy, who confirm their interest in being considered for the current judicial vacancy and who continue to meet the Committee's criteria for recommendation, and

ii. if subparagraph i results in a list of fewer than six candidates, enough additional candidates to prepare a list of at least six candidates from among the candidates for the previous judicial vacancy who were not recommended for that vacancy but who meet the Committee's criteria for recommendation and who confirm their interest in being considered for the current judicial vacancy.

3. If the Committee advertises a judicial vacancy, it shall review and evaluate all applications received in response to the advertisement.

4. It may interview any of the candidates in conducting its review and evaluation.

5. It shall conduct the advertising, review and evaluation process in accordance with the criteria it establishes, which must, at minimum, provide for an assessment that,

i. assesses the candidates' professional excellence, community awareness and personal characteristics, and

ii. recognizes the desirability of reflecting the diversity of Ontario society in judicial appointments.

6. It shall make the criteria it established under paragraph 5 available to the public.

7. Subject to subsection (9), for every judicial vacancy advertised by the Committee, it shall provide the Attorney General a ranked list of at least six candidates whom it recommends, with brief supporting reasons.

(3) Qualifications — The Committee shall not consider an application by a candidate,

(a) who does not meet the qualifications set out in subsection 42(2); or

(b) who is or was a member of the Committee within the previous three years.

(4) Information to be provided to Attorney General on request — The Committee shall provide the Attorney General with any information about the application, review and evaluation process that the Attorney General requests, other than,

(a) the names or identifying information of candidates who were not recommended for a judicial vacancy;

(b) the names or identifying information of candidates who are being assessed for a judicial vacancy that has been advertised but for which the Committee has not yet made a recommendation; and

(c) information collected or prepared by the Committee through a discreet inquiry.

(5) Same — The Committee shall provide any information requested by the Attorney General under subsection (4) within 30 days of the request unless otherwise directed by the Attorney General.

(6) Meaning of discreet inquiry — For the purposes of clause (4)(c), a discreet inquiry is a confidential inquiry conducted by the Committee into the views or opinions of individuals with knowledge of a candidate's suitability for appointment.

(7) Recommendation of criteria — The Attorney General may recommend criteria to be included in the criteria the Committee establishes under paragraph 5 of subsection (2), and the Committee shall consider whether to include those criteria in the criteria it has established.

(8) Rejection of ranked list — The Attorney General may reject a ranked list of recommended candidates provided under paragraph 2 or 7 of subsection (2), or under this subsection, and require the Committee to produce a new ranked list of at least six candidates whom the Committee recommends from among the remaining candidates for the judicial vacancy, with brief supporting reasons.

(9) Insufficient recommendable candidates — If there are not enough candidates for the Committee to recommend at least six candidates who meet the Committee's criteria for recommendation in a ranked list described in paragraph 2 or 7 of subsection (2) or in subsection (8), the Committee shall,

(a) if there is at least one candidate who meets the criteria for recommendation,

(i) include in the ranked list as many candidates as possible who meet the Committee's criteria for recommendation, and

(ii) provide the Attorney General with an explanation as to why six candidates have not been recommended; or

(b) if no candidates meet the criteria for recommendation, begin a new process to advertise the judicial vacancy and solicit applications in accordance with paragraphs 3 to 7 of subsection (2).

(10) Recommendation by Attorney General — The Attorney General shall only recommend a candidate who is in a ranked list provided under paragraph 2 or 7 of subsection (2) or under subsection (8) to the Lieutenant Governor in Council for appointment to fill a judicial vacancy.

(11) Transition — Despite this section, subsections 43(8) to (12) of this Act, as they read immediately before the day section 4 of Schedule 3 to the *Accelerating Access to Justice Act, 2021* came into force, continue to apply to any judicial vacancy that was advertised by the Committee before that day.

2021, c. 4, Sched. 3, s. 4

44. (1) Full and part-time service — A provincial judge may, at his or her option and with the Chief Justice's consent, change from full-time to part-time service or the reverse, or increase or decrease the amount of part-time service.

(2) Part-time judges — The Chief Justice, with the Attorney General's consent, may designate a former provincial judge who has retired from office to serve as a provincial judge on a part-time basis, not to exceed 50 per cent of full-time service in a calendar year.

(3) Same — A person designated under subsection (2) is a provincial judge and a member of the Ontario Court of Justice.

(4) Same — A judge who is serving on a part-time basis under subsection (1) or (2) shall not engage in any other remunerative occupation.

1994, c. 12, s. 16; 1996, c. 25, s. 9(18), (20)

45. (1) Application for order that needs be accommodated — A provincial judge who believes that he or she is unable, because of a disability, to perform the essential duties of the office unless his or her needs are accommodated may apply to the Judicial Council for an order under subsection (2).

(2) Duty of Judicial Council — If the Judicial Council finds that the judge is unable, because of a disability, to perform the essential duties of the office unless his or her needs are accommodated, it shall order that the judge's needs be accommodated to the extent necessary to enable him or her to perform those duties.

(3) Undue hardship — Subsection (2) does not apply if the Judicial Council is satisfied that making an order would impose undue hardship on the person responsible for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(4) Guidelines and rules of procedure — In dealing with applications under this section, the Judicial Council shall follow its guidelines and rules of procedure established under subsection 51.1(1).

(5) Opportunity to participate — The Judicial Council shall not make an order under subsection (2) against a person without ensuring that the person has had an opportunity to participate and make submissions.

(6) Crown bound — The order binds the Crown.

1994, c. 12, s. 16

46. (1) Outside activities — A provincial judge may act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator only if expressly authorized by an Act of the Parliament of Canada or the Legislature or appointed or authorized by the Governor in Council or Lieutenant Governor in Council.

(2) Same — A judge who, before January 1, 1985, had the consent of the Attorney General to act as an arbitrator or conciliator may continue to do so.

(3) Remuneration — A judge acting under subsection (1) shall not receive remuneration but shall be reimbursed for reasonable travelling and other expenses incurred while so acting.

1994, c. 12, s. 16

47. (1) Retirement — Every provincial judge shall retire upon attaining the age of sixty-five years.

(2) Same — Despite subsection (1), a judge appointed as a full-time magistrate, judge of a juvenile and family court or master before December 2, 1968 shall retire upon attaining the age of seventy years.

(3) Continuation of judges in office — A judge who has attained retirement age may, subject to the annual approval of the Chief Justice of the Ontario Court of Justice, continue in office as a full-time or part-time judge until he or she attains the age of seventy-five years.

(4) Same, regional senior judges — A regional senior judge of the Ontario Court of Justice who is in office at the time of attaining retirement age may, subject to the annual approval of the Chief Justice, continue in that office until his or her term

(including any renewal under subsection 42(9)) expires, or until he or she attains the age of seventy-five years, whichever comes first.

(5) Same, Chief Justice and associate chief justice — A Chief Justice or associate chief justice of the Ontario Court of Justice who is in office at the time of attaining retirement age may, subject to the annual approval of the Judicial Council, continue in that office until his or her term expires, or until he or she attains the age of seventy-five years, whichever comes first.

(6) Same — If the Judicial Council does not approve a Chief Justice's or associate chief justice's continuation in that office under subsection (5), his or her continuation in the office of provincial judge is subject to the approval of the Judicial Council and not as set out in subsection (3).

(7) Criteria — Decisions under subsections (3), (4), (5) and (6) shall be made in accordance with criteria developed by the Chief Justice and approved by the Judicial Council.

(8) Appointment after reaching 65 years — This section applies, with necessary modifications, to a person appointed as a provincial judge, or as a Chief Justice, associate chief justice or regional senior judge, after reaching 65 years of age.

1994, c. 12, s. 16; 1996, c. 25, s. 9(18), (20); 2017, c. 2, Sched. 2, s. 7; 2017, c. 20, Sched. 2, s. 3

48. Resignation and election — (1) Resignation — A provincial judge may at any time resign from his or her office by delivering a signed letter of resignation to the Chief Justice of the Ontario Court of Justice or, in the case of the Chief Justice, to the Attorney General.

(2) Election — A Chief Justice, an associate chief justice or a regional senior judge may, before the expiry of his or her term of office under section 42, elect to hold the office of a provincial judge only, by delivering a signed letter to that effect to the Attorney General in the case of a Chief Justice, or to the Chief Justice of the Ontario Court of Justice in any other case.

(3) [Repealed 2016, c. 5, Sched. 7, s. 2.]

(4) Effective date — A resignation or election under this section takes effect on the day the letter is delivered to the Chief Justice or the Attorney General, as the case may be or, if the letter specifies a later day, on that day.

(5) Repeal — [Subsection (3) was repealed and replaced by the current subsection (3) on September 1, 1995.]

1994, c. 12, s. 16; 1996, c. 25, s. 9(20); 2016, c. 5, Sched. 7, s. 2; 2017, c. 2, Sched. 2, s. 8

Ontario Judicial Council

49. (1) Judicial Council — The Ontario Judicial Council is continued under the name Ontario Judicial Council in English and Conseil de la magistrature de l'Ontario in French.

(2) Composition — The Judicial Council is composed of,

(a) the Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice;

(b) the Chief Justice of the Ontario Court of Justice, or another judge of that court designated by the Chief Justice, and the Associate Chief Justice of the Ontario Court of Justice;

(c) a regional senior judge of the Ontario Court of Justice, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation;

(d) two judges of the Ontario Court of Justice, appointed by the Chief Justice;

(e) the Treasurer of the Law Society of Ontario, or another bencher of the Law Society who is a lawyer, designated by the Treasurer;

(f) a lawyer who is not a bencher of the Law Society of Ontario, appointed by the Law Society;

(g) four persons who are neither judges nor lawyers, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation.

(3) Temporary members — The Chief Justice of the Ontario Court of Justice may appoint a judge of that court to be a temporary member of the Judicial Council in the place of another provincial judge, for the purposes of dealing with a complaint, if the requirements of subsections (13), (15), (17), (19) and (20) cannot otherwise be met.

(4) Criteria — In the appointment of members under clauses (2)(d), (f) and (g), the importance of reflecting, in the composition of the Judicial Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized.

(5) Term of office — The regional senior judge who is appointed under clause (2)(c) remains a member of the Judicial Council until he or she ceases to hold office as a regional senior judge.

(6) Same — The members who are appointed under clauses (2)(d), (f) and (g) hold office for four-year terms and shall not be reappointed.

(7) [Repealed 2017, c. 2, Sched. 2, s. 9(1).]

(8) Chair — The Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice, shall chair the meetings and hearings of the Judicial Council that deal with complaints against particular judges and its meetings held for the purposes of section 45 and subsection 47(5).

(9) Same — The Chief Justice of the Ontario Court of Justice, or another judge of that court designated by the Chief Justice, shall chair all other meetings and hearings of the Judicial Council.

(10) Same — The chair is entitled to vote, and may cast a second deciding vote if there is a tie.

(11) Open and closed hearings and meetings — The Judicial Council's hearings and meetings under sections 51.6 and 51.7 shall be open to the public, unless subsection 51.6(7) applies; its other hearings and meetings may be conducted in private, unless this Act provides otherwise.

(12) Vacancies — Where a vacancy occurs among the members appointed under clause (2)(d), (f) or (g), a new member similarly qualified may be appointed for the remainder of the term.

(13) Quorum — The following quorum rules apply, subject to subsections (15) and (17):

1. Eight members, including the chair, consistute a quorum.

2. At least half the members present must be judges and at least four must be persons who are not judges.

(14) Review panels — The Judicial Council may establish a panel for the purpose of dealing with a complaint under subsection 51.4(17) or (18) or subsection 51.5(8) or (10) and considering the question of compensation under section 51.7, and the panel has all the powers of the Judicial Council for that purpose.

(15) Same — The following rules apply to a panel established under subsection (14):

1. The panel shall consist of two provincial judges other than the Chief Justice, a lawyer and a person who is neither a judge nor a lawyer.

2. One of the judges, as designated by the Judicial Council, shall chair the panel.

3. Four members constitute a quorum.

(16) Hearing panels — The Judicial Council may establish a panel for the purpose of holding a hearing under section 51.6 and considering the question of compensation under section 51.7, and the panel has all the powers of the Judicial Council for that purpose.

(17) Same — The following rules apply to a panel established under subsection (16):

1. Half the members of the panel, including the chair, must be judges, and half must be persons who are not judges.

2. At least one member must be a person who is neither a judge nor a lawyer.

3. The Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice, shall chair the panel.

4. Subject to paragraphs 1, 2 and 3, the Judicial Council may determine the size and composition of the panel.

5. All the members of the panel constitute a quorum.

(18) Chair — The chair of a panel established under subsection (14) or (16) is entitled to vote, and may cast a second deciding vote if there is a tie.

(19) Participation in stages of process — The members of the subcommittee that investigated a complaint shall not,

(a) deal with the complaint under subsection 51.4(17) or (18) or subsection 51.5(8) or (10); or

(b) participate in a hearing of the complaint under section 51.6.

(20) Same — The members of the Judicial Council who dealt with a complaint under subsection 51.4(17) or (18) or subsection 51.5(8) or (10) shall not participate in a hearing of the complaint under section 51.6.

(21) Expert assistance — The Judicial Council may engage persons, including counsel, to assist it.

(22) Support services — The Judicial Council shall provide support services, including initial orientation and continuing education, to enable its members to participate effectively, devoting particular attention to the needs of the members who are

neither judges nor lawyers and administering a part of its budget for support services separately for that purpose.

(23) Same — The Judicial Council shall administer a part of its budget for support services separately for the purpose of accommodating the needs of any members who have disabilities.

(24) Confidential records — The Judicial Council or a subcommittee may order that any information or documents relating to a mediation or a Council meeting or hearing that was not held in public are confidential and shall not be disclosed or made public.

(25) Same — Subsection (24) applies whether the information or documents are in the possession of the Judicial Council, the Attorney General or any other person.

(26) Exceptions — Subsection (24) does not apply to information and documents,

(a) that this Act requires the Judicial Council to disclose; or

(b) that have not been treated as confidential and were not prepared exclusively for the purposes of the mediation or Council meeting or hearing.

(27) Personal liability — No action or other proceeding for damages shall be instituted against the Judicial Council, any of its members or employees or any person acting under its authority for any act done in good faith in the execution or intended execution of any power or duty of the Council or person, or for any neglect or default in the exercise or performance in good faith of such power or duty.

(28) Remuneration — The members who are appointed under clause (2)(g) are entitled to receive the daily remuneration that is fixed by the Lieutenant Governor in Council.

1994, c. 12, s. 16; 1996, c. 25, s. 9(15), (18), (20); 2017, c. 2, Sched. 2, s. 9; 2018, c. 8, Sched. 15, s. 8(1), item 1

Case Law: *Kipiniak v. Ontario Judicial Council*, 2012 ONSC 5866, 2012 CarswellOnt 14214, 298 O.A.C. 389, [2012] O.J. No. 5299 (Ont. Div. Ct.).

Application for judicial review of decision of the Ontario Judicial Council (OJC). Court has no authority to order an inquiry into the OJC's conduct or to substitute opinion for that of the OJC. Jurisdiction flows from the *Judicial Review Procedure Act*. Application for judicial review dismissed. Costs to Kipiniak in any event in the amount of $382 representing the filing fee of $181 for the judicial review application and fee of $201 for perfecting application.

50. Complaint against Chief Justice, Associate Chief Justice or regional senior judge of the Ontario Court of Justice — (1) Complaint against Chief Justice — If the Chief Justice of the Ontario Court of Justice is the subject of a complaint,

(a) the Chief Justice of Ontario shall appoint another judge of the Ontario Court of Justice to be a member of the Judicial Council instead of the Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of;

(b) the Associate Chief Justice of the Ontario Court of Justice shall chair meetings and hearings of the Council instead of the Chief Justice of the Ontario Court of Justice, and make appointments under subsection 49(3) instead of the Chief Justice, until the complaint is finally disposed of; and

(c) any reference of the complaint that would otherwise be made to the Chief Justice of the Ontario court of Justice under clause 51.4(13)(b) and 51.4(18)(c), subclause 51.5(8)(b)(ii) or clause 51.5(10)(b) shall be made to the Chief Justice of the Superior Court of Justice instead of to the Chief Justice of the Ontario Court of Justice.

(2) Suspension of Chief Justice — If the Chief Justice of the Ontario Court of Justice is suspended under subsection 51.4(12),

(a) complaints that would otherwise be referred to the Chief Justice of the Ontario Court of Justice under clauses 51.4(13)(b) and 51.4(18)(c), subclause 51.5(8)(b)(ii) and 51.5(10)(b) shall be referred to the Associate Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of; and

(b) annual approvals that would otherwise be granted or refused by the Chief Justice of the Ontario Court of Justice shall be granted or refused by the Associate Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of.

(3) Complaint against Associate Chief Justice or regional senior judge — If the Associate Chief Justice of the Ontario Court of Justice or the regional senior judge appointed under clause 49(2)(c) is the subject of a complaint, the Chief Justice of the Ontario Court of Justice shall appoint another judge of the Ontario Court of Justice to be a member of the Judicial Council instead of the Associate Chief Justice or regional senior judge, as the case may be, until the complaint is finally disposed of.

1994, c. 12, s. 16; 1996, c. 25, s. 9(6)

51. Other duties of Judicial Council — (1) Provision of information to public — The Judicial Council shall provide, in courthouses and elsewhere, information about itself and about the justice system, including information about how members of the public may obtain assistance in making complaints.

(2) Same — In providing information, the Judicial Council shall emphasize the elimination of cultural and linguistic barriers and the accommodation of the needs of persons with disabilities.

(3) Assistance to public — Where necessary, the Judicial Council shall arrange for the provision of assistance to members of the public in the preparation of documents for making complaints.

(4) Telephone access — The Judicial Council shall provide province-wide free telephone access, including telephone access for the deaf, to information about itself and its role in the justice system.

(5) Persons with disabilities — To enable persons with disabilities to participate effectively in the complaints process, the Judicial Council shall ensure that their needs are accommodated, at the Council's expense, unless it would impose undue hardship on the Council to do so, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(6) Annual report — After the end of each year, the Judicial Council shall make an annual report to the Attorney General on its affairs, in English and French, including, with respect to all complaints received or dealt with during the year, a summary of the complaint, the findings and a statement of the disposition, but the report shall not include information that might identify the judge or the complainant.

(7) Same, publication — The Judicial Council shall, no earlier than 15 but no later than 30 days after making the report, publish it in English and French on its website.

1994, c. 12, s. 16; 2019, c. 7, Sched. 15, s. 1

51.1 (1) Rules — The Judicial Council shall establish and make public rules governing its own procedures, including the following:

1. **Guidelines and rules of procedure for the purpose of section 45.**
2. **Guidelines and rules of procedure for the purpose of subsection 51.4(21).**
3. **Guidelines and rules of procedure for the purpose of subsection 51.4(22).**
4. **If applicable, criteria for the purpose of subsection 51.5(2).**
5. **If applicable, guidelines and rules of procedure for the purpose of subsection 51.5(13).**
6. **Rules of procedure for the purpose of subsection 51.6(3).**
7. **Criteria for the purpose of subsection 51.6(7).**
8. **Criteria for the purpose of subsection 51.6(8).**
9. **Criteria for the purpose of subsection 51.6(10).**

(2) *Legislation Act, 2006*, Part III — Part III (Regulations) of the *Legislation Act, 2006* does not apply to rules, guidelines or criteria established by the Judicial Council.

(3) Sections 28, 29 and 33 of *SPPA* — Sections 28, 29 and 33 of the *Statutory Powers Procedure Act* do not apply to the Judicial Council.

1994, c. 12, s. 16; 2006, c. 21, Sched. F, s. 136(1), Table 1

51.2 (1) Use of official languages of courts — The information provided under subsections 51(1), (3) and (4) and the matters made public under subsection 51.1(1) shall be made available in English and French.

(2) Same — Complaints against provincial judges may be made in English or French.

(3) Same — A hearing under section 51.6 shall be conducted in English, but a complainant or witness who speaks French or a judge who is the subject of a complaint and who speaks French is entitled, on request,

(a) to be given, before the hearing, French translations of documents that are written in English and are to be considered at the hearing;

(b) to be provided with the assistance of an interpreter at the hearing; and

(c) to be provided with simultaneous interpretation into French of the English portions of the hearing.

(4) Same — Subsection (3) also applies to mediations conducted under section 51.5 and to the Judicial Council's consideration of the question of compensation under section 51.7, if subsection 51.7(2) applies.

(5) Bilingual hearing or mediation — The Judicial Council may direct that a hearing or mediation to which subsection (3) applies be conducted bilingually, if the Council is of the opinion that it can be properly conducted in that manner.

(6) Part of hearing or mediation — A directive under subsection (5) may apply to a part of the hearing or mediation, and in that case subsections (7) and (8) apply with necessary modifications.

(7) Same — In a bilingual hearing or mediation,

(a) oral evidence and submissions may be given or made in English or French, and shall be recorded in the language in which they are given or made;

(b) documents may be filed in either language;

(c) in the case of a mediation, discussions may take place in either language;

(d) the reasons for a decision or the mediator's report, as the case may be, may be written in either language.

(8) Same — In a bilingual hearing or mediation, if the complainant or the judge who is the subject of the complaint does not speak both languages, he or she is entitled, on request, to have simultaneous interpretation of any evidence, submissions or discussions spoken in the other language and translation of any document filed or reasons or report written in the other language.

1994, c. 12, s. 16

51.3 (1) Complaint re provincial judge — Any person may make a complaint to the Judicial Council alleging misconduct by a provincial judge.

(2) Same — If an allegation of misconduct against a provincial judge is made to a member of the Judicial Council, it shall be treated as a complaint made to the Judicial Council.

(3) Same — If an allegation of misconduct against a provincial judge is made to any other judge or to the Attorney General, the other judge, or the Attorney General, asthe case may be, shall provide the person making the allegation with information about the Judicial Council's role in the justice system and about how a complaint may be made, and shall refer the person to the Judicial Council.

(4) Carriage of matter — Once a complaint has been made to the Judicial Council, the Council has carriage of the matter.

(5) Information re complaint — At any person's request, the Judicial Council may confirm or deny that a particular complaint has been made to it.

1994, c. 12, s. 16

51.4 Role of subcommittee — (1) Review — A complaint received by the Judicial Council shall be reviewed by a subcommittee of the Council consisting of a provincial judge other than the Chief Justice and a person who is neither a judge nor a lawyer.

(2) Rotation of members — The eligible members of the Judicial Council shall all serve on the subcommittee on a rotating basis.

(3) Dismissal — The subcommittee shall dismiss the complaint without further investigation if, in the subcommittee's opinion, it falls outside the Judicial Council's jurisdiction or is frivolous or an abuse of process.

(4) Investigation — If the complaint is not dismissed under subsection (3), the subcommittee shall conduct such investigation as it considers appropriate.

(5) Expert assistance — The subcommittee may engage persons, including counsel, to assist it in its investigation.

(6) Investigation private — The investigation shall be conducted in private.

(7) Non-application of *SPPA* — The *Statutory Powers Procedure Act* does not apply to the subcommittee's activities.

(8) Interim recommendations — The subcommittee may recommend to a regional senior judge the suspension, with pay, of the judge who is the subject of the complaint, or the judge's reassignment to a different location, until the complaint is finally disposed of.

(9) Same — The recommendation shall be made to the regional senior judge appointed for the region to which the judge is assigned, unless that regional senior judge is a member of the Judicial Council, in which case the recommendation shall be made to another regional senior judge.

(10) Power of regional senior judge — The regional senior judge may suspend or reassign the judge as the subcommittee recommends.

(11) Discretion — The regional senior judge's discretion to accept or reject the subcommittee's recommendation is not subject to the direction and supervision of the Chief Justice.

(12) Exception: complaints against certain judges — If the complaint is against the Chief Justice of the Ontario Court of Justice, an associate chief justice of the Ontario Court of Justice or the regional senior judge who is a member of the Judicial Council, any recommendation under subsection (8) in connection with the complaint shall be made to the Chief Justice of the Superior Court of Justice, who may suspend or reassign the judge as the subcommittee recommends.

(13) Subcommittee's decision — When its investigation is complete, the subcommittee shall,

(a) dismiss the complaint;

(b) refer the complaint to the Chief Justice;

(c) refer the complaint to a mediator in accordance with section 51.5; or

(d) refer the complaint to the Judicial Council, with or without recommending that it hold a hearing under section 51.6.

(14) Same — The subcommittee may dismiss the complaint or refer it to the Chief Justice or to a mediator only if both members agree; otherwise, the complaint shall be referred to the Judicial Council.

(15) Conditions, reference to Chief Justice — The subcommittee may, if the judge who is the subject of the complaint agrees, impose conditions on a decision to refer the complaint to the Chief Justice.

(16) Report — The subcommittee shall report to the Judicial Council, without identifying the complainant or the judge who is the subject of the complaint, its disposition of any complaint that is dismissed or referred to the Chief Justice or to a mediator.

(17) Power of Judicial Council — The Judicial Council shall consider the report, in private, and may approve the subcommittee's disposition or may require the subcommittee to refer the complaint to the Council.

(18) Same — The Judicial Council shall consider, in private, every complaint referred to it by the subcommittee, and may,

(a) hold a hearing under section 51.6;

(b) dismiss the complaint;

(c) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in subsection (15); or

(d) refer the complaint to a mediator in accordance with section 51.5.

(19) Non-application of *SPPA* — The *Statutory Powers Procedure Act* does not apply to the Judicial Council's activities under subsections (17) and (18).

(20) Notice to judge and complainant — After making its decision under subsection (17) or (18), the Judicial Council shall communicate it to the judge and the complainant, giving brief reasons in the case of a dismissal.

(21) Guidelines and rules of procedure — In conducting investigations, in making recommendations under subsection (8) and in making decisions under subsections (13) and (15), the subcommittee shall follow the Judicial Council's guidelines and rules of procedure established under subsection 51.1(1).

(22) Same — In considering reports and complaints and making decisions under subsections (17) and (18), the Judicial Council shall follow its guidelines and rules of procedure established under subsection 51.1(1).

1994, c. 12, s. 16; 1996, c. 25, s. 9(7), (20)

51.5 (1) Mediation — The Judicial Council may establish a mediation process for complainants and for judges who are the subject of complaints.

(2) Criteria — If the Judicial Council establishes a mediation process, it must also establish criteria to exclude from the process complaints that are inappropriate for mediation.

(3) Same — Without limiting the generality of subsection (2), the criteria must ensure that complaints are excluded from the mediation process in the following circumstances:

1. There is a significant power imbalance between the complainant and the judge, or there is such a significant disparity between the complainant's and the judge's accounts of the event with which the complaint is concerned that mediation would be unworkable.

2. The complaint involves an allegation of sexual misconduct or an allegation of discrimination or harassment because of a prohibited ground of discrimination or harassment referred to in any provision of the *Human Rights Code*.

3. The public interest requires a hearing of the complaint.

(4) Legal advice — A complaint may be referred to a mediator only if the complainant and the judge consent to the referral, are able to obtain independent legal advice and have had an opportunity to do so.

(5) Trained mediator — The mediator shall be a person who has been trained in mediation and who is not a judge, and if the mediation is conducted by two or more persons acting together, at least one of them must meet those requirements.

(6) Impartiality — The mediator shall be impartial.

(7) Exclusion — No member of the subcommittee that investigated the complaint and no member of the Judicial Council who dealt with the complaint under subsection 51.4(17) or (18) shall participate in the mediation.

(8) Review by Council — The mediator shall report the results of the mediation, without identifying the complainant or the judge who is the subject of the complaint, to the Judicial Council, which shall review the report, in private, and may,

(a) approve the disposition of the complaint; or

(b) if the mediation does not result in a disposition or if the Council is of the opinion that the disposition is not in the public interest,

(i) dismiss the complaint,

(ii) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in subsection 51.4(15), or

(iii) hold a hearing under section 51.6.

(9) Report — If the Judicial Council approves the disposition of the complaint, it may make the results of the mediation public, providing a summary of the complaint but not identifying the complainant or the judge.

(10) Referral to Council — At any time during or after the mediation, the complainant or the judge may refer the complaint to the Judicial Council, which shall consider the matter, in private, and may,

(a) dismiss the complaint;

(b) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in subsection 51.4(15); or

(c) hold a hearing under section 51.6.

(11) Non-application of *SPPA* — The *Statutory Powers Procedure Act* does not apply to the Judicial Council's activities under subsections (8) and (10).

(12) Notice to judge and complainant — After making its decision under subsection (8) or (10), the Judicial Council shall communicate it to the judge and the complainant, giving brief reasons in the case of a dismissal.

(13) Guidelines and rules of procedure — In reviewing reports, considering matters and making decisions under subsections (8) and (10), the Judicial Council shall follow its guidelines and rules of procedure established under subsection 51.1(1).

1994, c. 12, s. 16; 1996, c. 25, s. 9(20)

51.6 (1) Adjudication by Council — When the Judicial Council decides to hold a hearing, it shall do so in accordance with this section.

(2) Application of *SPPA* — The *Statutory Powers Procedure Act*, except section 4 and subsection 9(1), applies to the hearing.

(3) Rules of procedure — The Judicial Council's rules of procedure established under subsection 51.1(1) apply to the hearing.

(4) Communication re subject-matter of hearing — The members of the Judicial Council participating in the hearing shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person, unless all the parties and the persons representing the parties under the authority of the *Law Society Act* receive notice and have an opportunity to participate.

(5) Exception — Subsection (4) does not preclude the Judicial Council from engaging counsel to assist it in accordance with subsection 49(21), and in that case the nature of

the advice given by counsel shall be communicated to the parties so that they may make submissions as to the law.

(6) Parties — The Judicial Council shall determine who are the parties to the hearing.

(7) Exception, closed hearing — In exceptional circumstances, if the Judicial Council determines, in accordance with the criteria established under subsection 51.1(1), that the desirability of holding open hearings is outweighed by the desirability of maintaining confidentiality, it may hold all or part of the hearing in private.

(8) Disclosure in exceptional circumstances — If the hearing was held in private, the Judicial Council shall, unless it determines in accordance with the criteria established under subsection 51.1(1) that there are exceptional circumstances, order that the judge's name not be disclosed or made public.

(9) Orders prohibiting publication — If the complaint involves allegations of sexual misconduct or sexual harassment, the Judicial Council shall, at the request of a complainant or of another witness who testifies to having been the victim of similar conduct by the judge, prohibit the publication of information that might identify the complainant or witness, as the case may be.

(10) Publication ban — In exceptional circumstances and in accordance with the criteria established under subsection 51.1(1), the Judicial Council may make an order prohibiting, pending the disposition of a complaint, the publication of information that might identify the judge who is the subject of the complaint.

(11) Dispositions — After completing the hearing, the Judicial Council may dismiss the complaint, with or without a finding that is unfounded or, if it finds that there has been misconduct by the judge, may,

(a) warn the judge;

(b) reprimand the judge;

(c) order the judge to apologize to the complainant or to any other person;

(d) order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;

(e) suspend the judge with pay, for any period;

(f) suspend the judge without pay, but with benefits, for a period up to thirty days; or

(g) recommend to the Attorney General that the judge be removed from office in accordance with section 51.8.

(12) Same — The Judicial Council may adopt any combination of the dispositions set out in clauses (11)(a) to (f).

(13) Disability — If the Judicial Council finds that the judge is unable, because of a disability, to perform the essential duties of the office, but would be able to perform them if his or her needs were accommodated, the Council shall order that the judge's needs be accommodated to the extent necessary to enable him or her to perform those duties.

(14) Application of subs. (13) — Subsection (13) applies if,

(a) the effect of the disability on the judge's performance of the essential duties of the office was a factor in the complaint; and

(b) the Judicial Council dismisses the complaint or makes a disposition under clauses (11)(a) to (f).

(15) Undue hardship — Subsection (13) does not apply if the Judicial Council is satisfied that making an order would impose undue hardship on the person responsible for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(16) Opportunity to participate — The Judicial Council shall not make an order under subsection (13) against a person without ensuring that the person has had an opportunity to participate and make submissions.

(17) Crown bound — An order made under subsection (13) binds the Crown.

(18) Report to Attorney General — The Judicial Council may make a report to the Attorney General about the complaint, investigation, hearing and disposition, subject to any order made under subsection 49(24), and the Attorney General may make the report public if of the opinion that this would be in the public interest.

(19) Non-identification of persons — The following persons shall not be identified in the report:

1. A complainant or witness at whose request an order was made under subsection (9).

2. The judge, if the hearing was conducted in private, unless the Judicial Council orders that the judge's name be disclosed.

(20) Continuing publication ban — If an order was made under subsection (10) and the Judicial Council dismisses the complaint with a finding that it was unfounded, the judge shall not be identified in the report without his or her consent and the Council shall order that information that relates to the complaint and might identify the judge shall never be made public without his or her consent.

1994, c. 12, s. 16; 2006, c. 21, Sched. C, s. 105(3)

51.7 (1) Compensation — When the Judicial Council has dealt with a complaint against a provincial judge, it shall consider whether the judge should be compensated for his or her costs for legal services incurred in connection with all the steps taken under sections 51.4, 51.5 and 51.6 and this section in relation to the complaint.

(2) Consideration of question combined with hearing — If the Judicial Council holds a hearing into the complaint, its consideration of the question of compensation shall be combined with the hearing.

(3) Public or private consideration of question — The Judicial Council's consideration of the question of compensation shall take place in public if there was a public hearing into the complaint, and otherwise shall take place in private.

(4) Recommendation — If the Judicial Council is of the opinion that the judge should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation.

(5) Same — If the complaint is dismissed after a hearing, the Judicial Council shall recommend to the Attorney General that the judge be compensated for his or her costs for legal services and shall indicate the amount.

(5.1) Exception — If the Judicial Council makes a recommendation under clause 51.6(11)(g) in relation to a complaint made on or after the day section 2 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsections (1) to (3) do not apply and compensation shall not be recommended under subsection (4).

(6) Disclosure of name — The Judicial Council's recommendation to the Attorney General shall name the judge, but the Attorney General shall not disclose the name unless there was a public hearing into the complaint or the Council has otherwise made the judge's name public.

(7) Amount of compensation — The amount of compensation recommended under subsection (4) or (5) may relate to all or part of the judge's costs for legal services, and shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services.

(8) Payment — The Attorney General shall pay compensation to the judge in accordance with the recommendation.

1994, c. 12, s. 16; 2020, c. 11, Sched. 5, s. 2

51.8 (1) Removal for cause — A provincial judge may be removed from office only if,

(a) a complaint about the judge has been made to the Judicial Council; and

(b) the Judicial Council, after a hearing under section 51.6, recommends to the Attorney General that the judge be removed on the ground that he or she has become incapacitated or disabled from the due execution of his or her office by reason of,

(i) inability, because of a disability, to perform the essential duties of his or her office (if an order to accommodate the judge's needs would not remedy the inability or could not be made because it would impose undue hardship on the person responsible for meeting those needs, or was made but did not remedy the inability),

(ii) conduct that is incompatible with the due execution of his or her office, or

(iii) failure to perform the duties of his or her office.

(2) Tabling of recommendation — The Attorney General shall table the recommendation in the Assembly if it is in session or, if not, within fifteen days after the commencement of the next session.

(3) Order for removal — An order removing a provincial judge from office under this section may be made by the Lieutenant Governor on the address of the Assembly.

(4) Application — This section applies to provincial judges who have not yet attained retirement age and to provincial judges whose continuation in office after attaining retirement age has been approved under subsection 47(3), (4) or (5).

(5) [Repealed 2017, c. 2, Sched. 2, s. 10.]

1994, c. 12, s. 16; 2017, c. 2, Sched. 2, s. 10

51.9 (1) Standards of conduct — The Chief Justice of the Ontario Court of Justice may establish standards of conduct for provincial judges, including a plan for bringing the standards into effect, and may implement the standards and plan when they have been reviewed and approved by the Judicial Council.

(2) Duty of Chief Justice — The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French, when they have been approved by the Judicial Council.

(3) Goals — The following are among the goals that the Chief Justice may seek to achieve by implementing standards of conduct for judges:

1. Recognizing the independence of the judiciary.

2. Maintaining the high quality of the justice system and ensuring the efficient administration of justice.

3. Enhancing equality and a sense of inclusiveness in the justice system.

4. Ensuring that judges' conduct is consistent with the respect accorded to them.

5. Emphasizing the need to ensure the professional and personal development of judges and the growth of their social awareness through continuing education.

1994, c. 12, s. 16; 1996, c. 25, s. 9(18), (20); 2006, c. 21, Sched. A, s. 6

51.10 (1) Continuing education — The Chief Justice of the Ontario Court of Justice shall establish a plan for the continuing education of provincial judges, and shall implement the plan when it has been reviewed and approved by the Judicial Council.

(2) Duty of Chief Justice — The Chief Justice shall ensure that the plan for continuing education is made available to the public, in English and French, when it has been approved by the Judicial Council.

(3) Goals — Continuing education of judges has the following goals:

1. Maintaining and developing professional competence.

2. Maintaining and developing social awareness.

3. Encouraging personal growth.

1994, c. 12, s. 16; 1996, c. 25, s. 9(18), (20)

51.11 (1) Performance evaluation — The Chief Justice of the Ontario Court of Justice may establish a program of performance evaluation for provincial judges, and may implement the program when it has been reviewed and approved by the Judicial Council.

(2) Duty of Chief Justice — The Chief Justice shall make the existence of the program of performance evaluation public when it has been approved by the Judicial Council.

(3) Goals — The following are among the goals that the Chief Justice may seek to achieve by establishing a program of performance evaluation for judges:

1. Enhancing the performance of individual judges and of judges in general.

2. Identifying continuing education needs.

3. Assisting in the assignment of judges.

4. Identifying potential for professional development.

(4) Scope of evaluation — In a judge's performance evaluation, a decision made in a particular case shall not be considered.

(5) Confidentiality — A judge's performance evaluation is confidential and shall be disclosed only to the judge, his or her regional senior judge, and the person or persons conducting the evaluation.

(6) Inadmissibility, exception — A judge's performance evaluation shall not be admitted in evidence before the Judicial Council or any court or other tribunal unless the judge consents.

(7) Application of subss. (5), (6) — Subsections (5) and (6) apply to everything contained in a judge's performance evaluation and to all information collected in connection with the evaluation.

1994, c. 12, s. 16; 1996, c. 25, s. 9(18), (20)

51.12 Consultation — In establishing standards of conduct under section 51.9, a plan for continuing education under section 51.10 and a program of performance evaluation under section 51.11, the Chief Justice of the Ontario Court of Justice shall consult with judges of that court and with such other persons as he or she considers appropriate.

1994, c. 12, s. 16; 1996, c. 25, s. 9(15), (18), (20)

Provincial Judges' Remuneration

51.13 Remuneration and framework agreement — (1) Provincial Judges Remuneration Commission — The committee known as the Provincial Judges Remuneration Commission in English and as Commission de rémunération des juges provinciaux in French is continued.

(2) Composition and functions — The composition and functions of the Commission are set out in Appendix A of the framework agreement set out in the Schedule to this Act.

(3) Framework agreement — The framework agreement forms part of this Act.

(4) Same — The reference in paragraph 11 of the framework agreement to public servants as defined in the *Public Service Act* is deemed to be a reference to public servants employed under Part III of the *Public Service of Ontario Act, 2006*.

1994, c. 12, s. 16; 2006, c. 35, Sched. C, s. 20(1)

Miscellaneous

52. Meetings of judges — (1) Superior Court of Justice — The judges of the Superior Court of Justice shall meet at least once in each year, on a day fixed by the Chief Justice of the Superior Court of Justice, in order to consider this Act, the rules of court and the administration of justice generally.

(2) Family Court — The judges of the Family Court shall meet at least once in each year, on a day fixed by the Chief Justice of the Superior Court of Justice, in order to consider this Act, the rules of court and the administration of justice generally.

(2.1) [Repealed 2009, c. 33, Sched. 2, s. 20(12).]

(2.2) Regional senior judges, Superior Court of Justice — The regional senior judges of the Superior Court of Justice and the Senior Judge of the Family Court shall meet at least once in each year with the Chief Justice and the Associate Chief Justice of the Superior Court of Justice, on a day fixed by the Chief Justice, in order to consider this Act, the rules of court and the administration of justice generally.

(3) [Repealed 2009, c. 33, Sched. 2, s. 20(13).

(4) Regional meeting of judges — The judges of the Court of Ontario in each region shall meet at least once in each year in order to consider this Act, the rules of court and the administration of justice in the region generally, on a day fixed jointly by the regional senior judge of the Superior Court of Justice and the regional senior judge of the Ontario Court of Justice.

(5) [Repealed 2009, c. 33, Sched. 2, s. 20(14).]

1994, c. 12, s. 17; 1996, c. 25, s. 9(8), (14), (15), (17), (18), (20); 1998, c. 20, Sched. A, s. 22(9), (10); 2006, c. 21, Sched. A, s. 7; 2009, c. 33, Sched. 2, s. 20(12)–(14)

53. (1) Regulations — The Lieutenant Governor in Council may make regulations,

(a) fixing the number of judges of the Superior Court of Justice for the purpose of clause 12(1)(e);

(a.1) fixing the number of judges of the Superior Court of Justice who are members of the Family Court appointed under clause 21.2(1)(e);

(a.2) fixing the remuneration of provincial judges;

(a.3) providing for the benefits to which provincial judges are entitled, including benefits respecting,

(i) leave of absence and vacations,

(ii) sick leave credits and payments in respect of those credits, and

(iii) pension benefits for provincial judges and their surviving spouses and children.

(a.4) providing for the matters referred to in clauses (a.2) and (a.3) with respect to the Small Claims Court Administrative Judge appointed under section 87.2;

(b) fixing the remuneration of case management masters and providing for the benefits to which they are entitled;

Proposed Amendment — 53(1)(b)

(b) fixing the remuneration of associate judges and providing for the benefits to which they are entitled;

2021, c. 4, Sched. 3, s. 5 [Not in force at date of publication.]

(b.1) fixing the remuneration of deputy judges of the Small Claims Court;

(c) prescribing a period of time for the purposes of subsection 86.1(2);

(d) prescribing family law proceedings for the purposes of the Schedule to section 21.8;

(e) prescribing the maximum amount of a claim in the Small Claims Court for the purposes of subsection 23(1);

(f) prescribing the maximum amount of a claim over which a deputy judge may preside for the purposes of subsection 24(3);

(g) prescribing the minimum amount of a claim that may be appealed to the Divisional Court for the purposes of section 31;

(h) [Repealed 1994, c. 12, s. 18(4).]

(i) prescribing for each region the minimum number of judges of the Superior Court of Justice and of the Ontario Court of Justice who are to be assigned to that region;

(j) prescribing for each region the minimum number of judges of the Superior Court of Justice who are members of the Family Court and to be assigned to that region.

(2) Idem — A reduction in the number of judges of the Superior Court of Justice under clause (1)(a) does not affect appointments existing at the time of the reduction.

(3) Idem — If there is a conflict between a regulation made under clause (1)(a.2), (a.3) or (a.4) and the Framework Agreement set out in the Schedule, the Framework Agreement prevails.

(4) Application of regulations — A regulation made under subsection (1) may be general or particular in its application.

(5) Definition — In clause (1)(a.3),

"same-sex partner" [Repealed 2005, c. 5, s. 17(3).]

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage.

1994, c. 12, s. 18; 1996, c. 25, ss. 1(8), 9(17), (18); 1998, c. 20, s. 2, Sched. A, ss. 11, 22(11); 1999, c. 6, s. 18(2), (3); 2002, c. 18, Sched. A, s. 4(1); 2005, c. 5, s. 17(2)–(4); 2006, c. 21, Sched. A, s. 8; 2009, c. 33, Sched. 2, s. 20(15); 2015, c. 27, Sched. 1, s. 1(8); 2017, c. 2, Sched. 2, s. 11

PART III — (SS. 54–64)

[Heading repealed 1994, c. 12, s. 19]

54. [Repealed 1994, c. 12, s. 19.]

55. [Repealed 1994, c. 12, s. 19.]

56. [Repealed 1994, c. 12, s. 19.]

57. [Repealed 1994, c. 12, s. 19.]

58. [Repealed 1994, c. 12, s. 19.]

59. [Repealed 1994, c. 12, s. 19.]

60. [Repealed 1994, c. 12, s. 19.]

61. [Repealed 1994, c. 12, s. 19.]

62. [Repealed 1994, c. 12, s. 19.]

63. [Repealed 1994, c. 12, s. 19.]

64. [Repealed 1994, c. 12, s. 19.]

PART IV — RULES OF COURT (SS. 65–70.1)

65. (1) Civil Rules Committee — The committee known as the Civil Rules Committee is continued under the name Civil Rules Committee in English and Comité des règles en matière civile in French.

(2) Composition — The Civil Rules Committee shall be composed of,

(a) the Chief Justice and Associate Chief Justice of Ontario;

(a.1) the Chief Justice and associate chief justice of the Superior Court of Justice;

(a.2) the Chief Justice of the Ontario Court of Justice, or another judge of that court designated by the Chief Justice;

(b) two judges of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;

(c) eight judges of the Superior Court of Justice, who shall be appointed by the Chief Justice of the Superior Court of Justice;

(d) the Small Claims Court Administrative Judge appointed under section 87.2;

(e) the Attorney General or a person designated by the Attorney General;

(f) one law officer of the Crown, who shall be appointed by the Attorney General;

(g) two persons employed in the administration of the courts, who shall be appointed by the Attorney General;

(h) four lawyers, who shall be appointed by the Law Society of Ontario;

(i) one lawyer, who shall be appointed by the Chief Justice of Ontario;

(j) four lawyers, who shall be appointed by the Chief Justice of the Superior Court of Justice.

(3) Idem — The Chief Justice of Ontario shall preside over the Civil Rules Committee but, if the Chief Justice of Ontario is absent or so requests, another member designated by the Chief Justice of Ontario shall preside.

(4) Tenure of office — Each of the members of the Civil Rules Committee appointed under clauses (2)(b), (c), (f), (g), (h), (i) and (j) shall hold office for a period of three years and is eligible for reappointment.

(5) Vacancies — Where a vacancy occurs among the members appointed under clause (2)(b), (c), (f), (g), (h), (i) or (j), a new member similarly qualified may be appointed for the remainder of the unexpired term.

(6) Quorum — One-third of the members of the Civil Rules Committee constitutes a quorum.

1994, c. 12, s. 20; 1996, c. 25, s. 9(14), (17), (18), (20); 1998, c. 20, Sched. A, s. 12; 2006, c. 21, Sched. A, s. 9; 2017, c. 2, Sched. 2, s. 12; 2018, c. 8, Sched. 15, s. 8(1), item 2

66. (1) Civil rules — Subject to the approval of the Attorney General, the Civil Rules Committee may make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, except for proceedings in relation to which the Family Rules Committee may make rules under section 68.

(2) Idem — The Civil Rules Committee may make rules under subsection (1), even though they alter or conform to the substantive law, in relation to,

(a) conduct of proceedings in the courts;

(b) joinder of claims and parties, settlement of claims by or against persons under disability, whether or not a proceeding has been commenced in respect of the claim, the binding effect of orders and representation of parties;

(c) commencement of proceedings, representation of parties and service of process in or outside Ontario;

(d) disposition of proceedings without a hearing and its effect and authorizing the Court of Appeal to determine in the first instance a special case arising in a proceeding commenced in the Superior Court of Justice;

(e) pleadings;

(f) discovery and other forms of disclosure before hearing, including their scope and the admissibility and use of that discovery and disclosure in a proceeding;

(g) examination of witnesses in or out of court;

(h) jurisdiction of case management masters, including the conferral on case management masters of any jurisdiction of the Superior Court of Justice, including jurisdiction under an Act, but not including the trial of actions or jurisdiction conferred by an Act on a judge;

Proposed Amendment — 66(2)(h)

(h) jurisdiction of associate judges, including the conferral on associate judges of any jurisdiction of the Superior Court of Justice, including jurisdiction under an Act, but not including the trial of actions or jurisdiction conferred by an Act on a judge;

2021, c. 4, Sched. 3, s. 6 [Not in force at date of publication.]

(i) jurisdiction and duties of officers;

(j) motions and applications, including the hearing of motions and applications in the absence of the public and prohibiting a party from making motions without leave;

(k) preservation of rights of parties pending the outcome of litigation, including sale, recovery of possession or preservation of property;

(l) interpleader;

(m) preparation for trial and offers to settle and their legal consequences;

(n) the mode and conduct of trials;

(o) the appointment by the court of independent experts, their remuneration and the admissibility and use of their reports;

(p) the discount rate to be used in determining the amount of an award in respect of future pecuniary damages;

(q) references of proceedings or issues in a proceeding and the powers of a person conducting a reference;

(r) costs of proceedings, including security for costs and, in the case of a person representing a party or other person, the representative's liability for, or disentitlement to, costs;

(s) enforcement of orders and process or obligations under the rules;

(t) the time for and procedure on appeals and stays pending appeal;

(u) payment into and out of court;

(v) the method of calculating the amount to be included in an award of damages to offset any liability for income tax on income from investment of the award;

(w) the prejudgment interest rate with respect to the rate of interest on damages for non-pecuniary loss;

(w.1) the issuance, service, filing and storage of documents by electronic means, including methods of completing and signing documents for those purposes.

(x) any matter that is referred to in an Act as provided for by rules of court.

(3) Same — Nothing in subsection (1) or (2) authorizes the making of rules that conflict with an Act, but rules may be made under subsection (1) supplementing the provisions of an Act in respect of practice and procedure.

(4) Same — Rules made under subsection (1) in relation to the matters described in clauses (2)(p), (v) and (w) shall be reviewed at least once in every four-year period.

(5) Application — A rule made under this section may be general or particular in its application.

1994, c. 12, s. 21; 1996, c. 25, ss. 1(9), 9(17); 1998, c. 18, Sched. B, s. 5(1); 2006, c. 21, Sched. A, s. 10, Sched. C, s. 105(4); 2020, c. 11, Sched. 5, s. 3

67. (1) Family Rules Committee — The committee known as the Family Rules Committee is continued under the name Family Rules Committee in English and Comité des règles en matière de droit de la famille in French.

(2) Composition — The Family Rules Committee is composed of,

(a) the Chief Justice and Associate Chief Justice of Ontario;

(b) the Chief Justice and Associate Chief Justice of the Superior Court of Justice;

(c) the Senior Judge of the Family Court;

(d) the Chief Justice of the Ontario Court of Justice or, an associate chief justice designated by the Chief Justice;

(e) one judge of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;

(f) four judges of the Superior Court of Justice appointed by the Chief Justice of the Superior Court of Justice appointed by the Chief Justice of the Superior Court of Justice, at least two of whom shall be judges of the Family Court referred to in clause 21.2(1)(d) or (e);

(g) the Senior Advisory Family Judge of the Ontario Court of Justice, and two other judges of the Ontario Court of Justice who shall be appointed by the Chief Justice of the Ontario Court of Justice;

(h) the Attorney General or a person designated by the Attorney General;

(i) one law officer of the Crown, who shall be appointed by the Attorney General;

(j) two persons employed in the administration of the courts, who shall be appointed by the Attorney General;

(k) four lawyers, who shall be appointed by the Law Society of Ontario;

(l) four lawyers, who shall be appointed by the Chief Justice of the Superior Court of Justice; and

(m) two lawyers, who shall be appointed by the Chief Justice of the Ontario Court of Justice.

(3) Who shall preside — The Chief Justice of Ontario shall preside over the Family Rules Committee but, if the Chief Justice of Ontario is absent or so requests, another member designated by the Chief Justice shall preside.

(4) Tenure of office — Each of the members of the Family Rules Committee appointed under clauses (2)(e), (f), (g), (i), (j), (k), (l) and (m) shall hold office for a period of three years and is eligible for reappointment.

(5) Vacancies — Where a vacancy occurs among the members appointed under clause (2)(e), (f), (g), (i), (j), (k), (l) or (m), a new member similarly qualified may be appointed for the remainder of the unexpired term.

(6) Quorum — One-third of the members of the Family Rules Committee constitutes a quorum.

1994, c. 12, s. 22; 1996, c. 25, ss. 1(10), (11), 9(17), (18); 1998, c. 20, Sched. A, ss. 13(2), 22(12); 2006, c. 21, Sched. A, s. 11; 2015, c. 27, Sched. 1, s. 1(9); 2018, c. 8, Sched. 15, s. 8(3)

68. (1) Family rules — Subject to the approval of the Attorney General, the Family Rules Committee may make rules for the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in relation to the practice and procedure of those courts in the proceedings referred to in the Schedule to section 21.8.

(2) Same — Subsections 66(2), (3) and (5) apply with necessary modifications to the Family Rules Committee making rules under subsection (1).

(3) [Repealed 2006, c. 21, Sched. A, s. 12.]

(4) [Repealed 2006, c. 19, Sched. D, s. 5(2).]

(5) [Repealed 2009, c. 11, s. 20.]

1996, c. 25, s. 9(17), (18); 1998, c. 20, Sched. A, s. 22(13); 2006, c. 19, Sched. D, s. 5(2); 2006, c. 21, Sched. A, s. 12; 2009, c. 11, s. 20

69. (1) Criminal Rules Committee — The committee known as the Criminal Rules Committee is continued under the name Criminal Rules Committee in English and Comité des règles en matière criminelle in French.

(2) Idem — The Criminal Rules Committee shall be composed of,

(a) the Chief Justice and Associate Chief Justice of Ontario, the Chief Justice and Associate Chief Justice of the Superior Court of Justice and the Chief Justice and associate chief justices of the Ontario Court of Justice;

(b) one judge of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;

(c) three judges of the Superior Court of Justice, who shall be appointed by the Chief Justice of the Superior Court of Justice;

(d) four judges of the Ontario Court of Justice, who shall be appointed by the Chief Justice of the Ontario Court of Justice;

(e) [Repealed 1994, c. 12, s. 23(2).]

(f) the Attorney General or a person designated by the Attorney General;

(g) one law officer of the Crown, who shall be appointed by the Attorney General;

(h) four Crown attorneys, deputy Crown attorneys or assistant Crown attorneys, who shall be appointed by the Attorney General;

(i) two persons employed in court administration, who shall be appointed by the Attorney General;

(j) two lawyers, who shall be appointed by the Law Society of Ontario;

(k) one lawyer, who shall be appointed by the Chief Justice of Ontario;

(l) one lawyer, who shall be appointed by the Chief Justice of the Superior Court of Justice; and

(m) two lawyers, who shall be appointed by the Chief Justice of the Ontario Court of Justice.

(3) Idem — The Chief Justice of Ontario shall preside over the Criminal Rules Committee but, if the Chief Justice of Ontario is absent or so requests, another member designated by the Chief Justice of Ontario shall preside.

(4) Tenure of office — Each of the members of the Criminal Rules Committee appointed under clauses (2)(b), (c), (d), (e), (g), (h), (i), (j), (k), (l) and (m) shall hold office for a period of three years and is eligible for reappointment.

(5) Vacancies — Where a vacancy occurs among the members appointed under clause (2)(b), (c), (d), (e), (g), (h), (i), (j), (k), (l) or (m), a new member similarly qualified may be appointed for the remainder of the unexpired term.

(6) Quorum — One-third of the members of the Criminal Rules Committee constitutes a quorum.

1994, c. 12, s. 23; 1996, c. 25, s. 9(14), (17), (18), (20); 2018, c. 8, Sched. 15, s. 8(1), item 3

Criminal and provincial offences rules

70. (1) Criminal rules — At the request of the Court of Appeal, the Superior Court of Justice or the Ontario Court of Justice, the Criminal Rules Committee may prepare rules for the purposes of section 482 of the *Criminal Code* (Canada) for consideration by the relevant court.

(2) [Repealed 2017, c. 2, Sched. 2, s. 13.]

(3) [Repealed 2017, c. 2, Sched. 2, s. 13.]

1994, c. 12, s. 24; 1996, c. 25, s. 9(17), (18); 1998, c. 4, s. 2; 2006, c. 21, Sched. A, s. 13; 2017, c. 2, Sched. 2, s. 13

70.1 (1) Provincial offences rules — Subject to subsection (2), the Attorney General may make rules in relation to the practice and procedure of the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in proceedings under the *Provincial Offences Act*, including rules,

(a) regulating any matters relating to the practice and procedure of proceedings under the *Provincial Offences Act*;

(b) prescribing forms;

(c) regulating the duties of the employees of the courts;

(d) regulating the duties of municipal employees and other persons who act under the authority of agreements made under Part X of the *Provincial Offences Act*;

(e) prescribing and regulating the procedures under any Act that confers jurisdiction under the *Provincial Offences Act* on the Ontario Court of Justice or a judge or justice of the peace sitting in it;

(f) prescribing any matter relating to proceedings under the *Provincial Offences Act* that is referred to in an Act as provided for by the rules of court.

(2) Prior approval of courts — Before a rule may be made under subsection (1), the Attorney General shall obtain the approval of one or more of the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice, as the Attorney General considers appropriate given the proceedings to which the rule would apply.

(3) Recommendations, proposals by courts — The Attorney General shall consider any recommendations or proposals given to him or her by the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice or the Chief Justice of the Ontario Court of Justice respecting rules that may be made under subsection (1).

2017, c. 2, Sched. 2, s. 14

PART V — ADMINISTRATION OF THE COURTS (SS. 71–79.3)

[Heading amended 2006, c. 21, Sched. A, s. 14.]

71. Goals — The administration of the courts shall be carried on so as to,

(a) maintain the independence of the judiciary as a separate branch of government;

(b) recognize the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice;

(c) encourage public access to the courts and public confidence in the administration of justice;

(d) further the provision of high-quality services to the public; and

(e) promote the efficient use of public resources.

2006, c. 21, Sched. A, s. 14

Commentary: This provision expresses the Attorney General's responsibility for the administration of the courts. It represents a specific aspect of the Attorney General's responsibilities under s. 5(c) of the *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17.

72. Role of Attorney General — The Attorney General shall superintend all matters connected with the administration of the courts, other than the following:

1. Matters that are assigned by law to the judiciary, including authority to direct and supervise the sittings and the assignment of the judicial duties of the court.

2. Matters related to the education, conduct and discipline of judges and justices of the peace, which are governed by other provisions of this Act, the *Justices of the Peace Act* and Acts of the Parliament of Canada.

3. Matters assigned to the judiciary by a memorandum of understanding under section 77.

1994, c. 12, s. 25; 1996, c. 25, s. 9(17), (18), (20); 1998, c. 20, Sched. A, s. 22(14); 2006, c. 21, Sched. A, s. 14

73. Court officers and staff — (1) Appointment — Registrars, sheriffs, court clerks, assessment officers and any other administrative officers and employees that are considered necessary for the administration of the courts in Ontario may be appointed under Part III of the *Public Service of Ontario Act, 2006*.

(2) Assignment of powers, duties — The Deputy Attorney General or a person designated by the Deputy Attorney General may, in writing, assign to any person or class of persons a power or duty given to a registrar, sheriff, court clerk, bailiff, assessment officer, Small Claims Court referee or official examiner under an Act, regulation or rule of court, subject to any conditions or restrictions set out in the assignment.

Commentary: This section is amended to include Small Claims Court referee (after assessment officer). The powers and duties given to a Small Claims Court referee under an Act, regulation, or rule of court can now be assigned to courts administration staff under this section.

Court staff generally derive their authority from an assignment of powers and duties [under s. 73(2) of the *Courts of Justice Act*]. Where required, staff are assigned the appropriate delegation of authority within their local office jurisdiction(s) or within alternative jurisdictions or regions, in accordance with s. 73(2), of the *Courts of Justice Act* [formerly s. 77(2)].

Fees for civil, small claims and family court cases, appeals, and for enforcement of a court or tribunal order are prescribed by regulation under the *Administration of Justice Act*.

(2.1) Same — For greater certainty, a power or duty may be assigned to a person or class of persons under subsection (2) regardless of whether or not the person or persons are appointed under Part III of the *Public Service of Ontario Act, 2006*.

(3) Same — Subsection (2) applies in respect of an Act, regulation or rule of court made under the authority of the Legislature or of the Parliament of Canada.

(4) [Repealed 2006, c. 21, Sched. A, s. 14.]

1994, c. 12, s. 26; 1996, c. 25, s. 9(18); 1998, c. 20, Sched. A, s. 22(15); 2006, c. 21, Sched. A, s. 14; 2006, c. 35, Sched. C, s. 20(2); 2017, c. 2, Sched. 2, s. 15

74. Destruction of documents — Documents and other materials that are no longer required in a court office shall be disposed of in accordance with the directions of the Deputy Attorney General, subject to the approval of,

(a) in the Court of Appeal, the Chief Justice of Ontario;

(b) in the Superior Court of Justice, the Chief Justice of the Superior Court of Justice;

(c) in the Ontario Court of Justice, the Chief Justice of the Ontario Court of Justice.

1994, c. 12, s. 27; 2006, c. 21, Sched. A, s. 14

75. (1) Powers of chief or regional senior judge — The powers and duties of a judge who has authority to direct and supervise the sittings and the assignment of the judicial duties of his or her court include the following:

1. Determining the sittings of the court.

2. Assigning judges to the sittings.

3. Assigning cases and other judicial duties to individual judges.

4. Determining the sitting schedules and places of sittings for individual judges.

5. Determining the total annual, monthly and weekly workload of individual judges.

6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.

(2) Powers re case management masters — Subsection (1) applies, with necessary modifications, in respect of directing and supervising the sittings and assigning the judicial duties of case management masters.

Proposed Amendment — 75(2)

(2) Powers re associate judges — Subsection (1) applies, with necessary modifications, in respect of directing and supervising the sittings and assigning the judicial duties of associate judges.

2021, c. 4, Sched. 3, s. 7 [Not in force at date of publication.]

(3) [Repealed 2006, c. 21, Sched. A, s. 14.]

(4) [Repealed 2006, c. 21, Sched. A, s. 14.]

1994, c. 12, s. 28; 1996, c. 25, ss. 1(12), 9(17), (18); 1998, c. 20, Sched. A, s. 22(16); 2006, c. 21, Sched. A, s. 14; 2020, c. 11, Sched. 5, s. 4

76. (1) Direction of court staff — In matters that are assigned by law to the judiciary, registrars, court clerks, court reporters, interpreters and other court staff shall act at the direction of the chief justice of the court.

(2) Same — Court personnel referred to in subsection (1) who are assigned to and present in a courtroom shall act at the direction of the presiding judge, justice of the peace or case management master while the court is in session.

Proposed Amendment — 76(2)

(2) Same — Court personnel referred to in subsection (1) who are assigned to and present in a courtroom shall act at the direction of the presiding judge, justice of the peace or associate judge while the court is in session.

2021, c. 4, Sched. 3, s. 8 [Not in force at date of publication.]

1996, c. 25, ss. 1(13), 9(20); 2006, c. 21, Sched. A, s. 14; 2009, c. 33, Sched. 2, s. 20(16); 2020, c. 11, Sched. 5, s. 5

Commentary: The provision requires court staff assigned to and present in the courtroom to act at the direction of the presiding judge or master while the court is in session.

77. Memoranda of understanding between Attorney General and Chief Justices — (1) Court of Appeal — The Attorney General and the Chief Justice of Ontario may enter into a memorandum of understanding governing any matter relating to the administration of the Court of Appeal.

(2) Superior Court of Justice — The Attorney General and the Chief Justice of the Superior Court of Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court.

(3) Ontario Court of Justice — The Attorney General and the Chief Justice of the Ontario Court of Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court.

(4) Scope — A memorandum of understanding under this section may deal with the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice, but shall not deal with any matter assigned by law to the judiciary.

(5) Publication — The Attorney General shall ensure that each memorandum of understanding entered into under this section is made available to the public, in English and French.

1994, c. 12, s. 29; 2006, c. 21, Sched. A, s. 14; 2006, c. 35, Sched. C, s. 20(4)

78. (1) Ontario Courts Advisory Council — The council known as the Ontario Courts Advisory Council is continued under the name Ontario Courts Advisory Council in English and Conseil consultatif des tribunaux de l'Ontario in French.

(2) Same — The Ontario Courts Advisory Council is composed of,

(a) the Chief Justice of Ontario, who shall preside, and the Associate Chief Justice of Ontario;

(b) the Chief Justice and the Associate Chief Justice of the Superior Court of Justice and the Senior Judge of the Family Court;

(c) the Chief Justice and the associate chief justices of the Ontario Court of Justice; and

(d) the regional senior judges of the Superior Court of Justice and of the Ontario Court of Justice.

(3) Mandate — The Ontario Courts Advisory Council shall meet to consider any matter relating to the administration of the courts that is referred to it by the Attorney General or that it considers appropriate on its own initiative, and shall make recommendations on the matter to the Attorney General and to its members.

1996, c. 25, ss. 1(14), 9(9); 2006, c. 21, Sched. A, s. 14

79. (1) Ontario Courts Management Advisory Committee — The committee known as the Ontario Courts Management Advisory Committee is continued under the name Ontario Courts Management Advisory Committee in English and Comité consultatif de gestion des tribunaux de l'Ontario in French.

(2) Same — The Ontario Courts Management Advisory Committee is composed of,

(a) the Chief Justice and Associate Chief Justice of Ontario, the Chief Justice and Associate Chief Justice of the Superior Court of Justice, the Senior Judge of the Family Court and the Chief Justice and associate chief justices of the Ontario Court of Justice;

(b) the Attorney General, the Deputy Attorney General, the Assistant Deputy Attorney General responsible for courts administration, the Assistant Deputy Attorney General responsible for criminal law and two other public servants chosen by the Attorney General;

(c) three lawyers appointed by the Law Society of Ontario and three lawyers appointed by the Federation of Ontario Law Associations; and

(d) not more than six other persons, appointed by the Attorney General with the concurrence of the judges mentioned in clause (a) and the lawyers appointed under clause (c).

(3) Who presides — The following persons shall preside over meetings of the Committee, by rotation at intervals fixed by the Committee:

1. A judge mentioned in clause (2)(a), selected by the judges mentioned in that clause.

2. The Attorney General, or a person mentioned in clause (2)(b) and designated by the Attorney General.

3. A lawyer appointed under clause (2)(c), selected by the lawyers appointed under that clause.

4. A person appointed under clause (2)(d), selected by the persons appointed under that clause.

(4) Function of Committee — The function of the Committee is to consider and recommend to the relevant bodies or authorities policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest.

1996, c. 25, s. 9(14), (17), (18), (20); 1998, c. 20, Sched. A, s. 18; 2006, c. 21, Sched. A, s. 14; 2018, c. 8, Sched. 15, s. 8(4)

79.1 (1) Regions — For administrative purposes related to the administration of justice in the province, Ontario is divided into the regions prescribed under subsection (2).

(2) Regulations — The Lieutenant Governor in Council may make regulations prescribing regions for the purposes of this Act.

2006, c. 21, Sched. A, s. 14

79.2 (1) Regional Courts Management Advisory Committee — The committee in each region known as the Regional Courts Management Advisory Committee is continued under the name Regional Courts Management Advisory Committee in English and Comité consultatif régional de gestion des tribunaux in French, and is composed of,

(a) the regional senior judge of the Superior Court of Justice, the regional senior judge of the Ontario Court of Justice and, in a region where the Family Court has jurisdiction, a judge chosen by the Chief Justice of the Superior Court of Justice;

(b) the regional director of courts administration for the Ministry of the Attorney General and the regional director of Crown attorneys;

(c) two lawyers appointed jointly by the presidents of the county and district law associations in the region; and

(d) not more than two other persons, appointed by the Attorney General with the concurrence of the judges mentioned in clause (a) and the lawyers appointed under clause (c).

(2) Who presides — The following persons shall preside over meetings of the Committee, by rotation at intervals fixed by the Committee:

1. A judge mentioned in clause (1)(a), selected by the judges mentioned in that clause.

2. An official mentioned in clause (1)(b), selected by the officials mentioned in that clause.

3. A lawyer appointed under clause (1)(c), selected by the lawyers appointed under that clause.

4. A person appointed under clause (1)(d), selected by the persons appointed under that clause.

(3) Function of Committee — The function of the Committee is to consider and recommend to the relevant bodies or authorities policies and procedures for the region to promote the better administration of justice and the effective use of human and other resources in the public interest.

(4) Frequency of meetings — The Committee shall meet at least once each year.
2006, c. 21, Sched. A, s. 14

79.3 (1) Annual report on administration of courts — Within six months after the end of every fiscal year, the Attorney General shall cause a report to be prepared on the administration of the courts during that fiscal year, in consultation with the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice.

(2) Same — The annual report shall provide information about progress in meeting the goals set out in section 71 and shall be made available to the public in English and French.

(3) Inclusion in Ministry's annual report — The Attorney General may cause all or part of the annual report on the administration of the courts to be incorporated into the corresponding annual report referred to in the *Ministry of the Attorney General Act*.
2006, c. 21, Sched. A, s. 14

PART VI — JUDGES AND OFFICERS (SS. 80–94)

80. Oath of office — Every judge or officer of a court in Ontario, including a deputy judge of the Small Claims Court, shall, before entering on the duties of office, take and sign the following oath or affirmation in either the English or French language:

I solemnly swear (affirm) that I will faithfully, impartially and to the best of my skill and knowledge execute the duties of .....

So help me God. (*Omit this line in an affirmation*)

1994, c. 12, s. 30

81. Persona designata abolished — Where an adjudicative function is given by an Act to a judge or officer of a court in Ontario, the jurisdiction shall be deemed to be given to the court.

82. Liability of judges and other officers — The following persons have the same immunity from liability as judges of the Superior Court of Justice:

1. Judges of all courts in Ontario, including judges in the Small Claims Court and deputy judges of that court.

2. Masters.

3. Case management masters.

Proposed Amendment — 82, para. 3

3. Associate judges.
2021, c. 4, Sched. 3, s. 9 [Not in force at date of publication.]

1994, c. 12, s. 32; 1996, c. 25, ss. 1(15), 9(17)

Commentary: Every judge of a court in Ontario has absolute immunity from civil liability for any acts related to or in connection with his or her judicial capacity. Judicial immunity is an essential component of judicial independence permitting judges to act impartially, without fear of personal liability, and independently. The law in this area is well established and numerous courts have struck out actions on motions on the basis of judicial immunity. See *Tsai v. Klug* (2005), [2005] O.J. No. 2277, 2005 CarswellOnt 2359 at paras. 4-9, 15 and 17-18 (Ont. S.C.J.); additional reasons at (2005), [2005] O.J. No. 2889, 2005 CarswellOnt

2914 (Ont. S.C.J.); affirmed (2006), [2006] O.J. No. 665, 2006 CarswellOnt 1020, 207 O.A.C. 225 at para. 2 (Ont. C.A.); leave to appeal denied (2006), [2006] S.C.C.A. No. 169, 2006 CarswellOnt 5001, 2006 CarswellOnt 5002, 225 O.A.C. 399 (note), 358 N.R. 391 (note) (S.C.C.); *Kopyto v. Ontario Court of Justice (Provincial Division)* (February 28, 1995), Doc. T 2861/1994, [1995] O.J. No. 601 at paras. 32-46 (Ont. Gen. Div.); *Rivard c. Morier*, 1985 CarswellQue 92, [1985] S.C.J. No. 81, 1985 CarswellQue 115, 64 N.R. 46, 17 Admin. L.R. 230, [1985] 2 S.C.R. 716, 23 D.L.R. (4th) 1 at paras. 67-81 and 85-113 (S.C.C.); *K. (L.M.) v. Ontario (Ministry of Community & Social Services)* (1996), 1996 CarswellOnt 1297, [1996] O.J. No. 812 at para. 21 (Ont. Gen. Div.); *Baryluk v. Campbell*, 2008 CarswellOnt 6355, 61 C.C.L.T. (3d) 292, [2008] O.J. No. 4279 (Ont. S.C.J.); additional reasons at 2009 CarswellOnt 3900, 66 C.C.L.T. (3d) 160 (Ont. S.C.J.) at paras. 19–32; *Dyce v. Ontario* (2007), [2007] O.J. No. 2142, 2007 CarswellOnt 3437 at para. 23 (Ont. S.C.J.).

The principle of judicial immunity was reviewed by Karakatsanis J. in *Tsai*, *supra*, affirmed on appeal, with leave to appeal to the Supreme Court of Canada denied (at paras. 4–7):

> **Judicial Immunity**
>
> The Plaintiff takes the position that any protection or immunity to judges in the exercise of their judicial functions cannot encompass an illegal act. By definition, the plaintiff argues, an illegal act would clearly be beyond the scope of their judicial capacity.
>
> Section 82 of the *Courts of Justice Act* states that a Deputy Small Claims Court Judge has the same immunity as a Judge of the Superior Court. Similar provisions have been found to provide absolute civil immunity for commissioners of inquiries and justices of the peace in the execution of their judicial function.
>
> In *Morier and Boiley v. Rivard*, [1985] 2 S.C.R. 716 (S.C.C.) at pp. 737 ff, the Supreme Court of Canada considered whether judicial immunity extended to acts that may be without or in excess of jurisdiction. The Supreme Court of Canada held that the civil immunity of Superior Court Judges in Ontario and Quebec was absolute. *While the immunity does not extend to purely personal acts, judges are however immune for any acts done in the course of or in connection with their legal duties, even if the acts are malicious or mal fides*. The Court cites with approval a number of old English cases. At page 737:
>
> In *Fray v. Blackburn* (1863), 3 B. & S. 576, it states at p. 578: It is a principle of our law that no action will lie against a Judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly . . . The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the Judges and prevent their being harassed by vexatious actions. [Emphasis added.]

In *Tsai*, *supra*, the court dismissed the claim on the basis of judicial immunity in respect of conduct claimed to be unlawful and not part of the defendants' judicial duties. That alleged conduct was as follows: (at paras. 2 and 17-18):

> The pleadings against Deputy Judge Libman allege that he turned a blind eye to Mr. Tsai's representation, he collaborated with Mr. Klug to fraudulently set aside the plaintiff's default judgment in violation of the rules; that he was in breach of trust by not sending his decision to Mr. Tsai; that he dealt with the motion without a transcript; and that he was the leader of an organized team in Toronto Small Claims Court to collaborate with Mr. Klug to rig and manipulate the justice system to create social injustice. The pleadings allege fraud misrepresentation, breach of trust and malice against Deputy Judge Winer for hearing and dismissing a non-existent claim and phantom defence in breach of trust. They allege that he allowed Ms. Tsai to move to re-instate the claim thereby imposing on the plaintiff to pursue the claim so that Mr. Klug would reap the costs; that he illegally acquired documents during the hearing from Mr. Klug; and that he forged reasons for judgment as the non-certified transcript, without indicating Mr. Tsai's appearance; and that he was a member of Deputy Judge Libman's team to rig and manipulate the justice system.

The court in *Kopyto*, *supra*, similarly dismissed the claim on the basis of judicial immunity in similar circumstances to the present action. In that action, Mr. Kopyto alleged that the

judge wrongly denied his right to act for his client, falsely advised his client that he could not act, and implied that he was incompetent. Mr. Kopyto claimed that such conduct was malicious and for the purpose of causing him financial harm and that he suffered financial harm because he could not act for the client. Mr. Kopyto claimed in injurious falsehood and breaches of ss. 11 and 24 of the *Charter of Rights and Freedoms*. In dismissing the action the court stated as follows (at paras. 36–40):

> *It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, even if it be alleged to have been done maliciously or corruptly...*
>
> Immunity from suit is not for the sake of the judges but for the sake of the public who must be assured that justice is being administered with freedom of thought and independence of judgment.
>
> *Even though a Judge of a superior court goes outside her jurisdiction, the judge is not liable as long as acting judicially.* [Emphasis added.]
>
> [*Kopyto v. Ontario Court of Justice (Provincial Division)*, O.J. No. 601 at paras. 36-40 (Ont S.C.J.).]

In *Morier*, the Supreme Court of Canada applied judicial immunity to immunize the defendants from liability in respect of the following wide range of allegations (at para. 6):

> 4. As will be explained below, defendants acted without jurisdiction and/or exceeded the jurisdiction they claimed to have, in particular in that:
>
> 4.1 they contravened the Act and the *audi alteram partem* rule of natural justice;
>
> 4.2 defendants failed to comply with s. 34.3 of the *Police Act* where plaintiff is concerned;
>
> 4.3 defendants acted in a discriminatory manner toward plaintiff;
>
> 4.4 defendants contravened the provisions of the Charter of Human Rights and Freedoms;
>
> 4.5 defendant Gilbert Morier could not sign the report relating to plaintiff and Terreau & Racine Ltée, since he did not hear the evidence;
>
> 4.6 the quorum of two in the matter of Terreau & Racine Ltée, as required by the Act, was not observed by defendant Gilbert Morier;
>
> 4.7 defendants knowingly committed a fraud on the law;
>
> [*Morier v. Rivard*, [1985] S.C.J. 81 (S.C.C.) at para. 6.]

The Supreme Court of Canada dismissed the claim, finding (at para. 110):

> It is possible that they exceeded their jurisdiction by doing or failing to do the acts mentioned in the statement of claim. It is possible that they contravened the rules of natural justice, that they did not inform respondent of the facts alleged against him or that they did not give him an opportunity to be heard. It is possible that they contravened the *Charter of Human Rights and Freedoms* ... in my opinion these are not allegations which may be used as the basis for an action in damages.
>
> [*Morier v. Rivard*, [1985] S.C.J. 81 (S.C.C.) at para. 110.]

In *Hamalengwa*, judicial immunity was even applied to the writing of a letter to the Law Society of Upper Canada. Furthermore, in *Pispidikis*, the court found that the judge was judicially immune in respect of his extra-jurisdictional sentence of one year of imprisonment for a charge that had a maximum six-month sentence. See *Hamalengwa v. Duncan* (2005), 2005 CarswellOnt 8201, [2005] O.J. No. 851 at para. 28 (Ont. S.C.J.); affirmed (2005), 2005 CarswellOnt 4451, [2005] O.J. No. 3993, 202 O.A.C. 233, 135 C.R.R. (2d) 251 at paras. 10-11 (Ont. C.A.); leave to appeal denied (2006), [2005] S.C.C.A. No. 508, 2006 CarswellOnt 928, 2006 CarswellOnt 929, 221 O.A.C. 399 (note), 352 N.R. 196 (note) (S.C.C.); *Pispidikis v. Ontario (Justice of the Peace)* (2002), 2002 CarswellOnt 4508, [2002] O.J. No. 5081, (sub nom. *Pispidikis v. Scroggie)* 62 O.R. (3d) 596 (Ont. S.C.J.); additiona1 reasons at (2003), 2003 CarswellOnt 1357 at paras. 37-39 (Ont. S.C.J.); affirmed (2003), [2003] O.J. No. 4830,

2003 CarswellOnt 4957, *(*sub nom. *Pispidikis v. Scroggie)* 68 O.R. (3d) 665, *(*sub nom. *Pispidikis v. Scroggie)* 180 O.A.C. 45 (Ont. C.A.).

Case Law: *Tripp v. Robertson*, [2019] O.J. No. 932 (Sm. Cl. Ct.)

During family law proceedings the plaintiff became offended at certain actions taken by his opponent's lawyers and he sued the two lawyers in Small Claims Court, in four separate actions. The defence filed a letter asking that the claims be dismissed under rule 12.02(3) on the basis that the actions appeared on their face to be inflammatory, a waste of time, a nuisance or an abuse of the court's process. During the period for written submissions to be filed under rule 12.02(4), a deputy judge adjourned four settlement conferences in the four actions for two weeks, in chambers and without a hearing. The plaintiff then commenced four actions in Small Claims Court against the deputy judge based on her adjournment orders. On motion under rule 12.02(1), the four actions against the deputy judge were dismissed as disclosing no reasonable cause of action and based on the judicial immunity in s. 82.

Mayer v. Zuker (2009), 2009 CarswellOnt 1781, 249 O.A.C. 1 (Ont. Div. Ct.).

The respondent was a judge who had presided over the appellant's family law action. The appellants alleged the negative decision of respondent judge was motivated by malice. The appellant then appealed the decision of the respondent judge and obtained a transcript of the proceedings which had been edited by the respondent, thereby delaying the appeal. The allegations that the respondent has fabricated evidence and obstructed justice did not give rise to a civil cause of action even if true. As there was no allegation in the appellants' pleading concerning the conduct of the respondent that did not fall within the ambit of activities either directly related or ancillary to judicial functions, the respondent was absolutely insulated from civil action by the principle of judicial immunity.

Bérubé v. Ontario Court of Justice, 2010 ONSC 1677, 2010 CarswellOnt 1930, [2010] O.J. No. 1271 (Ont. S.C.J.).

Motion by defendants, Mr. Justice R. Lajoie and her Majesty the Queen in right of Ontario to set aside a noting in default, and dismiss the action pursuant to r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Citing *Hunt v. T & N plc*, 1990 CarswellBC 216, 1990 CarswellBC 759, EYB 1990-67014, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93, [1990] 2 S.C.R. 959, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, 4 C.C.L.T. (2d) 1 (S.C.C.), counsel for the moving parties set out the legal principles applicable on a r. 21 motion to dismiss an action as follows:

> a) The allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven;
>
> b) The moving party, in order to succeed, must show that it is plain, obvious and beyond doubt that the Plaintiff could not succeed;
>
> c) A claim will not be dismissed simply because it is novel; and
>
> d) The Statement of Claim must be read generously with allowance for inadequacies due to drafting deficiencies.

Defendants argued that justices judicially immune from civil liability for any acts related to or ancillary to their judicial capacity.

Section 82 of the *Courts of Justice Act* states that a Deputy Small Claims Court Judge has the same immunity as a Judge of the Superior Court. Similar provisions have been found to provide absolute civil immunity for commissioners of inquiries and justices of the peace in the execution of their judicial function.

See *Rivard c. Morier*, 23 D.L.R. (4th) 1, [1985] 2 S.C.R. 716, 1985 CarswellQue 115, [1985] S.C.J. No. 81, 1985 CarswellQue 92, 17 Admin. L.R. 230, 64 N.R. 46 (S.C.C.) where the Supreme Court of Canada considered whether judicial immunity extended to acts that may be without or in excess of jurisdiction. It held that the civil immunity of Superior Court judges in Ontario and Quebec absolute. While the immunity does not extend to purely personal acts, judges are, however, immune for any acts done in the course of or in connection with their legal duties, even if the acts are malicious or *mal fides*.

The judges in the Province of Ontario are not agents and servants of the Crown. The Attorney General of Ontario cannot tell a judge how to decide his case. His or her role is to protect challenges on the constitutionality and legality of provincial laws. Le Dain J. in *R. v. Valente (No. 2)* (1985), 1985 CarswellOnt 948, 19 C.R.R. 354, 23 C.C.C. (3d) 193, 14 O.A.C. 79, 64 N.R. 1, 37 M.V.R. 9, [1985] 2 S.C.R. 673, 49 C.R. (3d) 97, 24 D.L.R. (4th) 161, [1985] S.C.J. No. 77, 1985 CarswellOnt 129, [1986] D.L.Q. 85, 52 O.R. (2d) 779 (S.C.C.) at 708 [S.C.R.] states:

> The third essential condition of judicial independence for purposes of s. 11(d) [*Charter of Rights and Freedoms*] is, in my opinion, the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. . . .

There is ample authority for an award of full indemnity costs where unsubstantiated allegations of dishonesty, illegality, and conspiracy are advanced without merit. Allegations made or conduct by a party that are "reprehensible, scandalous, or outrageous" fall within the ambit of an award of full indemnity costs, see *Schreiber v. Mulroney*, 2007 CarswellOnt 5267, [2007] O.J. No. 3191 (Ont. S.C.J.); leave to appeal refused 2007 CarswellOnt 7184 (Ont. Div. Ct.); *Penney v. Penney*, 2006 CarswellOnt 7605, [2006] O.J. No. 4802 (Ont. S.C.J.); *Donmor Industries Ltd. v. Kremlin Canada Inc.*, 1992 CarswellOnt 1728, 6 O.R. (3d) 506, [1992] O.J. No. 4055 (Ont. Gen. Div.); and *Apotex Inc. v. Egis Pharmaceuticals*, 37 C.P.R. (3d) 335, 4 O.R. (3d) 321, 1991 CarswellOnt 3149, [1991] O.J. No. 1232 (Ont. S.C.J.).

Collins v. R. (2010), 2010 ONSC 6542, 2010 CarswellOnt 9265, 223 C.R.R. (2d) 370, [2011] 3 C.T.C. 211, [2010] O.J. No. 5210 (Ont. S.C.J.); affirmed 2011 ONCA 461, 2011 CarswellOnt 4984 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 251, 2012 CarswellOnt 252, *(*sub nom. *Collins v. Canada)* 432 N.R. 390 (note), *(*sub nom. *Collins v. Canada)* 294 O.A.C. 396 (note) (S.C.C.).

Defendant, Justice Elizabeth Heneghan, moved to have claim struck insofar as it asserts a claim against her.

For the purpose of motion under r. 21.01(1)(b) of the *Rules of Civil Procedure* facts pleaded must be accepted and are capable of being proven.

The law respecting judicial immunity was reviewed by Karakatsanis J. in *Tsai v. Klug*, 2005 CarswellOnt 2359, [2005] O.J. No. 2277, [2005] O.T.C. 480 (Ont. S.C.J.); additional reasons at [2005] O.J. No. 2889, 2005 CarswellOnt 2914 (Ont. S.C.J.); leave to appeal refused 2006 CarswellOnt 1020, [2006] O.J. No. 665, 207 O.A.C. 225 (Ont. C.A.); leave to appeal refused 2006 CarswellOnt 5001, 2006 CarswellOnt 5002, [2006] S.C.C.A. No. 169, 225 O.A.C. 399 (note), 358 N.R. 391 (note) (S.C.C.). The plaintiffs alleged that two Deputy Small Claims Court judges acted fraudulently, unlawfully and unconstitutionally. Karakatsanis J. struck the claim, and dismissed the action.

The Court of Appeal in *Tsai* expressed agreement with the reasons of Karakatsanis J.

See *Baryluk v. Campbell*, 2008 CarswellOnt 6355, [2008] O.J. No. 4279, 61 C.C.L.T. (3d) 292 (Ont. S.C.J.); additional reasons at 2009 CarswellOnt 3900, [2009] O.J. No. 2772, 66 C.C.L.T. (3d) 160 (Ont. S.C.J.), Hackland J., referring to *Tsai*, stated:

> [31] Like Karakatsanis J., I specifically reject the argument that a pleading of bad faith or deliberate excess of jurisdiction can defeat the principle of judicial immunity. If it were otherwise, mere allegations in pleadings could place judges in the position of having to defend the

> manner in which they have discharged their judicial duties in subsequent legal proceedings commenced by disaffected litigants. To place judges in this position would be seriously to undermine the principle of judicial independence.

See also *Taylor v. Canada (Attorney General)*, 2000 CarswellNat 3253, 253 N.R. 252, 184 D.L.R. (4th) 706, [2000] F.C.J. No. 268, 2000 CarswellNat 354, 37 C.H.R.R. D/368, 44 C.P.C. (4th) 1, [2000] 3 F.C. 298, 21 Admin. L.R. (3d) 27 (Fed. C.A.); leave to appeal refused 263 N.R. 399 (note), [2000] S.C.C.A. No. 213, 2000 CarswellNat 2567, 2000 CarswellNat 2566 (S.C.C.) the Federal Court of Appeal concluded, contrary to the Ontario authorities cited, that there is an exception to judicial immunity in the event that a judge knowingly acts beyond jurisdiction. The claim against Heneghan J. discloses no reasonable cause of action.

The plaintiff to file a fresh as amended Statement of Claim.

Kipiniak v. Superior Court of Justice Small Claims Court, 2011 HRTO 793 (Ont. Human Rights Trib.).

An Application was submitted under section 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19 ("Code"), as amended. The applicant alleged that the respondent discriminated against him with respect to services because of a disability. First, he said, a deputy judge did not permit him to make an audio recording of a Small Claims Court hearing using his own personal recorder. Second, he alleges that during a mediation at the Small Claims Court, the mediator did not permit him to make an audio recording. According to the applicant, because of a disability he is unable to take notes and he requires the recording as an accommodation.

The Tribunal issued a Notice of Intent to Dismiss, seeking submissions from the applicant on whether the Application falls outside its jurisdiction as a result of the doctrine of judicial immunity. See *Cartier v. Nairn*, 2009 HRTO 2208, 2009 CarswellOnt 9111, 8 Admin. L.R. (5th) 150 (Ont. Human Rights Trib.) and *Hazel v. Ainsworth Engineered Corp.*, 2009 HRTO 2180, 2009 CarswellOnt 9730 (Ont. Human Rights Trib.).

The applicant argued the Application was filed against the court and not an individual judge.

It is plain and obvious that the actions fell within the concept of judicial immunity and are therefore outside the Tribunal's jurisdiction (power) to decide.

The principle of judicial immunity has been applied to protect judicial actors from human rights complaints. See *Taylor v. Canada (Attorney General)*, 2000 CarswellNat 354, 2000 CarswellNat 3253, [2000] F.C.J. No. 268, [2000] 3 F.C. 298, 21 Admin. L.R. (3d) 27, 44 C.P.C. (4th) 1, 37 C.H.R.R. D/368, 184 D.L.R. (4th) 706, 253 N.R. 252 (Fed. C.A.); leave to appeal refused 2000 CarswellNat 2566, 2000 CarswellNat 2567, [2000] S.C.C.A. No. 213, 263 N.R. 399 (note) (S.C.C.).

In *Gonzalez v. British Columbia (Ministry of Attorney General)*, 2009 BCSC 639, 2009 CarswellBC 1274, 67 C.H.R.R. D/268, 95 B.C.L.R. (4th) 185, 97 Admin. L.R. (4th) 195, [2009] 11 W.W.R. 132 (B.C. S.C.), the Supreme Court of B.C. upheld a decision of the British Columbia Human Rights Tribunal in which it found that it lacked jurisdiction to deal with part of a complaint alleging discrimination by a provincial court judge on the basis of disability in respect of employment and services.

As Lord Bridge of Harwich said in *McC v. Mullan* (1984), [1984] 3 All E.R. 908, [1985] A.C. 528 (U.K. H.L.) at p. 916 [All E.R.]

> The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.

Judicial independence, protected in the Constitution, includes the ability of the judge to make determinations about *how* a case is conducted. See *R. v. Beauregard*, 1986 CarswellNat 1004, 1986 CarswellNat 737, EYB 1986-67283, [1986] S.C.J. No. 50, *(*sub nom. *Beauregard v. Canada)* [1986] 2 S.C.R. 56, 70 N.R. 1, 30 D.L.R. (4th) 481, 26 C.R.R. 59 (S.C.C.) at para. 21. The Superior Court, like the judge, benefits from this protection and this portion of the Application was dismissed.

At this stage it is not plain and obvious that the actions of the mediator, which may not be protected by the principles of judicial independence, are subject to immunity. Accordingly, the Application will be delivered to the respondent, which need only respond to the portions of it that relate to mediation.

Mennes v. Burgess, 2011 ONSC 3711, 2011 CarswellOnt 9691 (Ont. S.C.J.); additional reasons at 2011 ONSC 5515, 2011 CarswellOnt 10570 (Ont. S.C.J.).

An Application was brought by Mennes pursuant to Rule 14.05(3)(g) of the *Rules of Civil Procedure*, R.R.O. 194. The Application was for interpretation of section 24(2)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which concerns the appointment of small claims and deputy judges.

The applicant was entitled to have a matter heard in any court, including Small Claims Court, by an impartial and unbiased member of the judiciary. See *R. v. Curragh Inc.*, 1997 CarswellNS 88, 1997 CarswellNS 89, [1997] S.C.J. No. 33, [1997] 1 S.C.R. 537, 159 N.S.R. (2d) 1, 113 C.C.C. (3d) 481, 144 D.L.R. (4th) 614, 468 A.P.R. 1, 5 C.R. (5th) 291, 209 N.R. 252 (S.C.C.), "when a court of appeal determines that the trial judge was biased or demonstrated a reasonable apprehension of bias, that finding retroactively renders all the decisions and orders made during the trial void and without effect.".

Issues of recusal for bias have often been dealt with in the context of an appeal; see *Curragh*, *supra*, *Roskam v. Rogers Cable*, 2008 CarswellOnt 2958, [2008] O.J. No. 2049, *(*sub nom. *Roskam v. Rogers Cable (A Business))* 173 C.R.R. (2d) 157 (Ont. Div. Ct.) and *Rando Drugs Ltd. v. Scott*, 2007 ONCA 553, 2007 CarswellOnt 4888, [2007] O.J. No. 2999, 86 O.R. (3d) 641, *(*sub nom. *Rando Drugs Ltd. c. Scott)* 86 O.R. (3d) 653, 42 C.P.C. (6th) 23, 284 D.L.R. (4th) 756, 229 O.A.C. 1 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 353, 2008 CarswellOnt 354, 384 N.R. 398 (note), 249 O.A.C. 399 (note) (S.C.C.).

This was, in reality, an appeal from the deputy judge.

The proper forum for dealing with a complaint about a decision of a justice is the process of appeal; see *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, 2002 CarswellNB 46, 2002 CarswellNB 47, REJB 2002-27816, [2002] S.C.J. No. 9, [2002] 1 S.C.R. 249, *(*sub nom. *Conseil de la magistrature (N.-B.) v. Moreau-Bérubé)* 245 N.B.R. (2d) 201, *(*sub nom. *Conseil de la magistrature (N.-B.) v. Moreau-Bérubé)* 636 A.P.R. 201, 36 Admin. L.R. (3d) 1, *(*sub nom. *Nouveau-Brunswick (Conseil de la magistrature) v. Moreau-Bérubé)* 281 N.R. 201, *(*sub nom. *Moreau-Bérubé v. New Brunswick (Judicial Council))* 209 D.L.R. (4th) 1 (S.C.C.). It is not through litigation brought against a justice personally and such an action will be dismissed: see *Mayer v. Zuker*, 2009 CarswellOnt 1781, [2009] O.J. No. 1354, 249 O.A.C. 1 (Ont. Div. Ct.), *Dyce v. Ontario*, [2007] O.J. No. 2142, 2007 CarswellOnt 3437 (Ont. S.C.J.) and *Tsai v. Klug*, 2005 CarswellOnt 2359, [2005] O.J. No. 2277, [2005] O.T.C. 480 (Ont. S.C.J.); additional reasons at [2005] O.J. No. 2889, 2005 CarswellOnt 2914 (Ont. S.C.J.); leave to appeal refused 2006 CarswellOnt 1020, [2006] O.J. No. 665, 207 O.A.C. 225 (Ont. C.A.); leave to appeal refused 2006 CarswellOnt 5001, 2006 CarswellOnt 5002, [2006] S.C.C.A. No. 169, 225 O.A.C. 399 (note), 358 N.R. 391 (note) (S.C.C.)). This matter was a civil matter for a declaration concerning a judicial officer carrying out his duties as a deputy judge of the Small Claims Court. There was a personal claim against the judge being pursued in this matter which created liability, if only to appear and defend his actions. This

application offended the principles of judicial immunity as codified for the respondent in section 82 of the *Courts of Justice Act*. The Application was dismissed.

Tao v. Small Claims Court of Toronto, 2013 HRTO 25 (Ont. Human Rights Trib.).

The applicant states that an unnamed judge of the Small Claims Court of Toronto rendered an unfair decision in a matter before the Small Claims Court. The tribunal has stated that it has no jurisdiction to hear applications against courts and tribunals based on the execution of adjudicative duties or decision making because of the doctrine of judicial or adjudicative immunity. The tribunal directed the applicant to provide written submissions regarding jurisdiction issue by December 19, 2012. The applicant filed very limited submissions on December 10, 2012 opposing dismissal. In *Cartier v. Nairn*, 2009 HRTO 2208 (Ont. Human Rights Trib.), the Tribunal described the doctrine of judicial immunity. The principle of judicial immunity has been applied to protect judicial actors from human rights complaints. See *Taylor v. Canada (Attorney General)*, 2000 CarswellNat 354, 2000 CarswellNat 3253, [2000] 3 F.C. 298, 21 Admin. L.R. (3d) 27, 44 C.P.C. (4th) 1, 184 D.L.R. (4th) 706, 37 C.H.R.R. D/368, 253 N.R. 252, [2000] F.C.J. No. 268 (Fed. C.A.); leave to appeal refused 2000 CarswellNat 2566, 2000 CarswellNat 2567, 263 N.R. 399 (note), [2000] S.C.C.A. No. 213 (S.C.C.). See also *Gonzalez v. British Columbia (Ministry of Attorney General)*, 2009 BCSC 639, 2009 CarswellBC 1274, 97 Admin. L.R. (4th) 195, 95 B.C.L.R. (4th) 185, [2009] 11 W.W.R. 132, 67 C.H.R.R. D/268 (B.C. S.C.).

Application dismissed.

83. [Repealed 1996, c. 25, s. 1(16).]

84. (1) Extra-judicial services — A judge of the Court of Appeal or the Superior Court of Justice may act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator or on a commission of inquiry under an Act of the Legislature or under an agreement made under any such Act.

(2) Remuneration — A judge acting under subsection (1) shall not receive any remuneration but shall be reimbursed for reasonable travelling and other expenses incurred while so acting.

1996, c. 25, ss. 1(17), 9(17)

85. Judges' gowns — The Lieutenant Governor in Council may make regulations respecting the form of the gown to be worn in court by all judges appointed after the 1st day of September, 1990.

86. (1) How certain judges to be addressed — Every judge of the Court of Ontario may be addressed as "Your Honour" or as "(*Mr. or Madam*) Justice (*naming the judge*)" in English or as "Votre Honneur" ou "(M. ou Mme) le/la Juge (*nom de juge*)" in French.

(2) Idem — A judge appointed to the High Court of Justice before the 1st day of September, 1990 may elect to be addressed according to the practice in existence before that day.

(3) [Repealed 1996, c. 25, s. 9(11).]

Proposed Amendment — 86(3)

(3) Associate judge — Every associate judge of the Court of Ontario may be addressed as "Your Honour" or "Associate Justice (naming the associate judge)" in En-

glish or as "Votre Honneur" or "(M. ou M^me^) le/la Juge associé(e) (nom du juge associé)" in French.

2021, c. 4, Sched. 3, s. 10 [Not in force at date of publication.]

(4) [Repealed 1998, c. 20, Sched. A, s. 19(2).]

1994, c. 12, s. 33; 1996, c. 25, s. 9(10), (11); 1998, c. 20, Sched. A, s. 19

86.1 Case management masters — (1) Appointment — The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such case management masters as are considered necessary.

Proposed Amendment — 86.1(1)

(1) Appointment — The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such associate judges as are considered necessary.

2021, c. 4, Sched. 3, s. 11(1) [Not in force at date of publication.]

(2) Qualification — No person shall be appointed as a case management master unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least the period of time prescribed in the regulations or, for an aggregate of at least that period, has been a member of such a bar or served as a judge anywhere in Canada after being a member of such a bar.

Proposed Amendment — 86.1(2)

(2) Qualification — No person shall be appointed as an associate judge unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least the period of time prescribed in the regulations or, for an aggregate of at least that period, has been a member of such a bar or served as a judge anywhere in Canada after being a member of such a bar.

2021, c. 4, Sched. 3, s. 11(2) [Not in force at date of publication.]

(3) Term of office — A case management master holds office for seven years.

Proposed Amendment — 86.1(3)

(3) Retirement — Every case management master shall retire when he or she reaches the age of 65.

2020, c. 11, Sched. 5, s. 6(1) [Not in force at date of publication.]

Proposed Amendment — 86.1(3)

(3) Retirement — Every associate judge shall retire when he or she reaches the age of 65.

2020, c. 11, Sched. 5, s. 6(1) [Not in force at date of publication. Amended 2021, c. 4, Sched. 3, s. 11(3). Not in force at date of publication.]

(4) Reappointment — Subject to subsections (5) and (5.1), a case management master shall be reappointed for an additional seven-year term at the expiry of his or her intial seven-year term and each subsequent seven-year term.

Proposed Amendment — 86.1(4)

(4) Transition, previous appointments — The appointment of a case management master who had not reached the age of 65 before the day subsection 6(1) of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* came into force and whose appoint-

ment was in effect immediately before that day is deemed to specify a term of office that expires when the case management master reaches the age of 65.

2020, c. 11, Sched. 5, s. 6(1) [Not in force at date of publication.]

Proposed Amendment — 86.1(4)

(4) Transition, previous appointments — The appointment of an associate judge who had not reached the age of 65 before the day subsection 6(1) of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* came into force and whose appointment was in effect immediately before that day is deemed to specify a term of office that expires when the associate judge reaches the age of 65.

2020, c. 11, Sched. 5, s. 6(1) [Not in force at date of publication. Amended 2021, c. 4, Sched. 3, s. 11(4). Not in force at date of publication.]

(5) Expiry of term at age of 65 — If the case management master is 58 years of age or older, the reappointment under subsection (4) shall provide for a term that expires when he or she reaches the age of 65.

Proposed Repeal — 86.1(5)

(5) [Repealed 2020, c. 11, Sched. 5, s. 6(1). Not in force at date of publication.]

(5.1) Resignation or removal from office — Subsection (4) does not apply if,

(a) the case management master has resigned under section 48; or

(b) the Chief Justice has decided to remove the case management master from office under clause 86.2(8)(g) and,

(i) the time for an appeal from the decision has expired without an appeal being filed, or

(ii) any appeal has been finally disposed of and the Chief Justice's decision has been confirmed.

Proposed Repeal — 86.1(5.1)

(5.1) [Repealed 2020, c. 11, Sched. 5, s. 6(1). Not in force at date of publication.]

(5.2) Annual reappointments — A case management master who has reached the age of 65 may be reappointed by the Lieutenant Governor in Council, on the recommendation of the Chief Justice, for a one-year term, subject to subsection (5.3); if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the case management master.

Proposed Amendment — 86.1(5.2)

(5.2) Annual reappointments — Despite subsections (3) and (4) a case management master who has reached the age of 65 may be reappointed by the Lieutenant Governor in Council, on the recommendation of the Chief Justice, for a one-year term, subject to subsection (5.3); if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the case management master.

2020, c. 11, Sched. 5, s. 6(2) [Not in force at date of publication.]

Proposed Amendment — 86.1(5.2)

(5.2) Annual reappointments — An associate judge who has reached the age of 65 may be reappointed by the Lieutenant Governor in Council, on the recommendation of

the Chief Justice, for a one-year term, subject to subsection (5.3); if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the associate judge.
2021, c. 4, Sched. 3, s. 11(5) [Not in force at date of publication.]

(5.3) Expiry of term at age of 75 — If the case management master is 74 years of age or older, the reappointment under subsection (5.2) shall provide for a term that expires when he or she reaches the age of 75.

Proposed Amendment — 86.1(5.3)

(5.3) Expiry of term at age of 75 — If the associate judge is 74 years of age or older, the reappointment under subsection (5.2) shall provide for a term that expires when he or she reaches the age of 75.
2021, c. 4, Sched. 3, s. 11(6) [Not in force at date of publication.]

(5.4) No limit — Subject to subsections (5) and (5.3), there is no limit to the number of times a case management master can be reappointed under subsection (4) and subsection (5.2).

Proposed Amendment — 86.1(5.4)

(5.4) No limit — Subject to subsection (5.3), there is no limit to the number of times a case management master can be reappointed unde subsection (5.2).
2020, c. 11, Sched. 5, s. 6(3) [Not in force at date of publication.]

Proposed Amendment — 86.1(5.4)

(5.4) No limit — Subject to subsection (5.3), there is no limit to the number of times an associate judge can be reappointed unde subsection (5.2).
2020, c. 11, Sched. 5, s. 6(3) [Not in force at date of publication. Amended 2021, c. 4, Sched. 3, s. 11(7). Not in force at date of publication.]

(6) Jurisdiction — A case management master has the jurisdiction conferred by the rules of court.

Proposed Amendment — 86.1(6)

(6) Jurisdiction — An associate judge has the jurisdiction conferred by the rules of court.
2021, c. 4, Sched. 3, s. 11(8) [Not in force at date of publication.]

(7) Application of ss. 46 to 48 — Sections 46 to 48 apply to case management masters, with necessary modifications, in the same manner as to provincial judges, with the following exceptions:

Proposed Amendment — 86.1(7) opening words

(7) Application of ss. 46 to 48 — Sections 46 to 48 apply to associate judges, with necessary modifications, in the same manner as to provincial judges, with the following exceptions:
2021, c. 4, Sched. 3, s. 11(9) [Not in force at date of publication.]

1. Section 46 does not apply in circumstances in which the rules of court require participation in alternative dispute resolution.

2. Subsection 47(3) does not apply.

3. Letters of resignation under section 48 shall be delivered to the Attorney General instead of to the Chief Justice of the Ontario Court of Justice.

(8) [Repealed 2017, c. 2, Sched. 2, s. 16.]

(9) Standards of conduct — The Chief Justice may establish standards of conduct for case management masters.

Proposed Amendment — 86.1(9)

(9) Standards of conduct — The Chief Justice may establish standards of conduct for associate judges.

2021, c. 4, Sched. 3, s. 11(10) [Not in force at date of publication.]

(10) Duty of Chief Justice — The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French.

1996, c. 25, ss. 1(18), 9(14); 2002, c. 18, Sched. A, s. 4(2); 2006, c. 21, Sched. A, s. 15; 2015, c. 27, Sched. 1, s. 1(12); 2017, c. 2, Sched. 2, s. 16; 2020, c. 11, Sched. 5, s. 6(4)

86.2 (1) Complaint re case management master — Any person may make a complaint alleging misconduct by a case management master, by writing to the Chief Justice of the Superior Court of Justice.

Proposed Amendment — 86.2(1)

(1) Complaint re case management master — Any person may make a complaint alleging misconduct by an associate judge, by writing to the Chief Justice of the Superior Court of Justice.

2021, c. 4, Sched. 3, s. 12(1) [Not in force at date of publication.]

(2) Dismissal — The Chief Justice shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given.

(3) Notice of dismissal — The Chief Justice shall notify the complainant and the case management master in writing of a dismissal under subsection (2), giving brief reasons for it.

Proposed Amendment — 86.2(3)

(3) Notice of dismissal — The Chief Justice shall notify the complainant and the associate judge in writing of a dismissal under subsection (2), giving brief reasons for it.

2021, c. 4, Sched. 3, s. 12(2) [Not in force at date of publication.]

(4) Committee — If the complaint is not dismissed, the Chief Justice shall refer it to a committee consisting of three persons chosen by him or her.

(5) Same — The three persons shall be a judge of the Superior Court of Justice, a case management master and a person who is neither a judge nor a lawyer.

Proposed Amendment — 86.2(5)

(5) Same — The three persons shall be a judge of the Superior Court of Justice, an associate judge and a person who is neither a judge nor a lawyer.

2021, c. 4, Sched. 3, s. 12(3) [Not in force at date of publication.]

(6) Investigation — The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and the case management master shall be given an opportunity to make representations to the committee, in writing or, at the committee's option, orally.

Proposed Amendment — 86.2(6)

(6) Investigation — The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and the associate judge shall be given an opportunity to make representations to the committee, in writing or, at the committee's option, orally.

2021, c. 4, Sched. 3, s. 12(4) [Not in force at date of publication.]

(7) Recommendation — The committee shall make a report to the Chief Justice, recommending a disposition in accordance with subsections (8), (9) and (10).

(8) Disposition — The Chief Justice may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the case management master's conduct presents grounds for imposing a sanction, may,

Proposed Amendment — 86.2(8) opening words

(8) Disposition — The Chief Justice may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the associate judge's conduct presents grounds for imposing a sanction, may,

2021, c. 4, Sched. 3, s. 12(5) [Not in force at date of publication.]

(a) warn the case management master;

Proposed Amendment — 86.2(8)(a)

(a) warn the associate judge;

2021, c. 4, Sched. 3, s. 12(6) [Not in force at date of publication.]

(b) reprimand the case management master;

Proposed Amendment — 86.2(8)(b)

(b) reprimand the associate judge;

2021, c. 4, Sched. 3, s. 12(6) [Not in force at date of publication.]

(c) order the case management master to apologize to the complainant or to any other person;

Proposed Amendment — 86.2(8)(c)

(c) order the associate judge to apologize to the complainant or to any other person;

2021, c. 4, Sched. 3, s. 12(6) [Not in force at date of publication.]

(d) order that the case management master take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a case management master;

Proposed Amendment — 86.2(8)(d)

(d) order that the associate judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as an associate judge;

2021, c. 4, Sched. 3, s. 12(7) [Not in force at date of publication.]

(e) suspend the case management master for a period of up to 30 days;

Proposed Amendment — 86.2(8)(e)

(e) suspend the associate judge for a period of up to 30 days;

2021, c. 4, Sched. 3, s. 12(8) [Not in force at date of publication.]

(f) direct that no judicial duties or only specified judicial duties be assigned to the case management master; or

Proposed Amendment — 86.2(8)(f)

(f) direct that no judicial duties or only specified judicial duties be assigned to the associate judge; or

2021, c. 4, Sched. 3, s. 12(8) [Not in force at date of publication.]

(g) remove the case management master from office.

Proposed Amendment — 86.2(8)(g)

(g) remove the associate judge from office.

2021, c. 4, Sched. 3, s. 12(8) [Not in force at date of publication.]

(9) Same — The Chief Justice may adopt any combination of the dispositions set out in clauses (8)(a) to (f).

(9.1) Appeal — The Chief Justice's decision may be appealed to the Court of Appeal,

(a) by the case management master, as of right; or

Proposed Amendment — 86.2(9.1)(a)

(a) by the associate judge, as of right; or

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(b) by the complainant, with leave of the Court of Appeal.

(9.2) Parties — The case management master and the complainant are parties to any appeal and the Attorney General is the respondent.

Proposed Amendment — 86.2(9.2)

(9.2) Parties — The associate judge and the complainant are parties to any appeal and the Attorney General is the respondent.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(9.3) Power of Court of Appeal — The Court of Appeal may substitute its opinion for that of the Chief Justice on all questions of fact and law.

(9.4) Time for appeal — The notice of appeal or motion for leave to appeal shall be filed within 30 days after the date of the Chief Justice's decision.

(9.5) Stay — On the filing of a notice of appeal, the imposition of any sanction is stayed until the final disposition of the appeal.

(10) Compensation — The Chief Justice shall consider whether the case management master should be compensated for all or part of his or her costs for legal services incurred in connection with the steps taken under this section in relation to the complaint.

Proposed Amendment — 86.2(10)

(10) Compensation — The Chief Justice shall consider whether the associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the steps taken under this section in relation to the complaint.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(11) Recommendation — If the Chief Justice is of the opinion that the case management master should be compensated, he or she shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation.

Proposed Amendment — 86.2(11)

(11) Recommendation — If the Chief Justice is of the opinion that the associate judge should be compensated, he or she shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(12) Same — If the complaint is dismissed with a finding that it is unfounded, the Chief Justice shall recommend to the Attorney General that the case management master be compensated for his or her costs for legal services and shall indicate the amount of compensation.

Proposed Amendment — 86.2(12)

(12) Same — If the complaint is dismissed with a finding that it is unfounded, the Chief Justice shall recommend to the Attorney General that the associate judge be compensated for his or her costs for legal services and shall indicate the amount of compensation.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(12.0.1) Exception — If the Chief Justice makes a disposition under clause (8)(g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (10) does not apply and compensation shall not be recommended under subsection (11).

(12.1) Compensation — When there is an appeal or motion for leave to appeal under subsection (9.1), the Court of Appeal shall consider whether the case management master should be compensated for all or part of his or her costs for legal services incurred in connection with the appeal or motion.

Proposed Amendment — 86.2(12.1)

(12.1) Compensation — When there is an appeal or motion for leave to appeal under subsection (9.1), the Court of Appeal shall consider whether the associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the appeal or motion.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(12.2) Recommendation — If the Court of Appeal is of the opinion that the case management master should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation.

Proposed Amendment — 86.2(12.2)

(12.2) Recommendation — If the Court of Appeal is of the opinion that the associate judge should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(12.3) Same — If a complainant's motion for leave to appeal is dismissed, the Court of Appeal shall recommend to the Attorney General that the case management master be compensated for his or her costs for legal services and shall indicate the amount of compensation.

Proposed Amendment — 86.2(12.3)

(12.3) Same — If a complainant's motion for leave to appeal is dismissed, the Court of Appeal shall recommend to the Attorney General that the associate judge be compensated for his or her costs for legal services and shall indicate the amount of compensation.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(12.4) Removal from office upheld — If the Court of Appeal upholds a disposition of the Chief Justice made under clause (8)(g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (12.1) does not apply and compensation shall not be recommended under subsection (12.2).

(12.5) Removal from office not upheld — If the Court of Appeal does not uphold a disposition of the Chief Justice made under clause (8)(g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, the Court shall, under subsection (12.1), also consider whether the case management master should be compensated for all or part of his or her costs for legal services incurred in connection with the steps taken under this section in relation to the complaint.

Proposed Amendment — 86.2(12.5)

(12.5) Removal from office not upheld — If the Court of Appeal does not uphold a disposition of the Chief Justice made under clause (8)(g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, the Court shall, under subsection (12.1), also consider whether the associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the steps taken under this section in relation to the complaint.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(13) Maximum — The amount of compensation recommended under subsection (11), (12), (12.2) or (12.3) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar legal services.

(14) Payment — The Attorney General shall pay compensation to the case management master in accordance with the recommendation.

Proposed Amendment — 86.2(14)

(14) Payment — The Attorney General shall pay compensation to the associate judge in accordance with the recommendation.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(15) Confidential records — The committee may order that any information or documents relating to a complaint that was not dealt with in a manner that was open to the public are confidential and shall not be disclosed or made public.

(16) Same — Subsection (15) applies whether the information or documents are in the possession of the committee, the Chief Justice, the Attorney General or any other person.

(17) Limitation — Subsection (15) applies only to information and documents that have been treated as confidential or were prepared exclusively for the committee, or for submission to the committee, in relation to its investigation.

(18) Non-application of *SPPA* — The *Statutory Powers Procedure Act* does not apply to a judge, case management master or member of a committee acting under this section.

Proposed Amendment — 86.2(18)

(18) Non-application of *SPPA* — The *Statutory Powers Procedure Act* does not apply to a judge, associate judge or member of a committee acting under this section.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

(19) Personal liability — No action or other proceeding for damages shall be instituted against a judge, case management master or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person, or for any neglect or default in the exercise or performance in good faith of such power or duty.

Proposed Amendment — 86.2(19)

(19) Personal liability — No action or other proceeding for damages shall be instituted against a judge, associate judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person, or for any neglect or default in the exercise or performance in good faith of such power or duty.

2021, c. 4, Sched. 3, s. 12(9) [Not in force at date of publication.]

1996, c. 25, ss. 1(18), 9(14), (17); 2002, c. 18, Sched. A, s. 4(3)–(5); 2017, c. 2, Sched. 2, s. 17; 2020, c. 11, Sched. 5, s. 7

87. [Repealed 2020, c. 11, Sched. 5, s. 8.]

Commentary: no new masters were appointed after September 1, 1990, and starting with the appointment of Case Management Master Polika in 1997, the new office of case management master under s. 86.1 has replaced the office of master under s. 87. Following the retirement of Master Sandler in 2015, there are no remaining masters appointed prior to September 1, 1990.

87.1 (1) Small Claims Court judges — This section applies to provincial judges who were assigned to the Provincial Court (Civil Division) immediately before September 1, 1990.

(2) Full and part-time service — The power of the Chief Justice of the Ontario Court of Justice referred to in subsections 44(1) and (2) shall be exercised by the Chief Justice of the Superior Court of Justice with respect to provincial judges to whom this section applies.

(3) Continuation in office — The right of a provincial judge to whom this section applies to continue in office under subsection 47(3) is subject to the approval of the Chief Justice of the Superior Court of Justice, who shall make the decision according to criteria developed by himself or herself and approved by the Judicial Council.

(4) Complaints — When the Judicial Council deals with a complaint against a provincial judge to whom this section applies, the following special provisions apply:

1. One of the members of the Judicial Council who is a provincial judge shall be replaced by a provincial judge who was assigned to the Provincial Court (Civil Division) immediately before September 1, 1990. The Chief Justice of the Ontario Court of Justice shall determine which judge is to be replaced and the Chief Justice of the Superior Court of Justice shall designate the judge who is to replace that judge.

2. Complaints shall be referred to the Chief Justice of the Superior Court of Justice rather than to the Chief Justice of the Ontario Court of Justice.

3. Subcommittee recommendations with respect to interim suspension shall be made to the appropriate regional senior judge of the Superior Court of Justice, to whom subsections 51.4(10) and (11) apply with necessary modifications.

(5) Application of ss. 51.9, 51.10, 51.11 — Section 51.9, which deals with standards of conduct for provincial judges, section 51.10, which deals with their continuing education, and section 51.11, which deals with evaluation of their performance, apply to provincial judges to whom this section applies only if the Chief Justice of the Superior Court of Justice consents.

1994, c. 12, s. 35; 1996, c. 25, s. 9(14), (17), (18), (20)

87.2 (1) Small Claims Court Administrative Judge — The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint a person who meets the qualifications set out in subsection 42(2) as Small Claims Court Administrative Judge.

Commentary: following the reorganization of the Ontario court system effective September 1, 1990, Small Claims Court continued to be presided over by full-time judges who were formerly judges of the Provincial Court (Civil Division). Following the retirement of Justice Godfrey in 2019, there are no remaining judges of the Small Claims Court who were formerly judges of the Provincial Court (Civil Division). In 2017, a single full-time judicial office was created for the Small Claims Court, and designated as Small Claims Court Administrative Judge, under s. 87.2.

(2) Prior consultation — Before making a recommendation under subsection (1), the Attorney General shall consult with the Chief Justice of the Superior Court of Justice.

(3) Term — The appointment of a person as Small Claims Court Administrative Judge is for a term of five years, subject to subsection (5).

(4) Reappointment — The Lieutenant Governor in Council shall reappoint a person as Small Claims Court Administrative Judge for one further term of five years, subject

to subsection (5), if the Chief Justice of the Superior Court of Justice recommends the reappointment.

(5) On reaching 65 — The completion of any portion of a term during which a person serving as Small Claims Court Administrative Judge is over 64 years of age and under 75 years of age is subject to the annual approval of the Chief Justice of the Superior Court of Justice.

(6) On reaching 75 — If a person reaches 75 years of age while serving as Small Claims Court Administrative Judge, his or her term is deemed to expire on that day.

(7) Compensation — The salary, pension benefits, other benefits and allowances of the Small Claims Court Administrative Judge are subject to the recommendations of the Provincial Judges Remuneration Commission and, for the purpose, the Small Claims Court Administrative Judge is deemed to be a provincial judge under the framework agreement set out in the Schedule to this Act.

(8) Same — Until and subject to the first recommendations of the Provincial Judges Remuneration Commission respecting the Small Claims Court Administrative Judge, he or she is entitled to receive the same salary, pension benefits, other benefits and allowances a provincial judge receives under the framework agreement.

(9) Application of ss. 44 to 46 — Subsections 44(1) and (4), and sections 45 and 46, apply with necessary modifications to the Small Claims Court Administrative Judge as if he or she were a provincial judge, subject to the following:

> **1. For the purposes of subsection 44(1), the consent of the Chief Justice of the Superior Court of Justice is required.**
>
> **2. For the purposes of an application under section 45, one of the members of the Judicial Council who is a provincial judge shall be replaced by a judge of the Superior Court of Justice. The Chief Justice of the Ontario Court of Justice shall determine which judge is to be replaced and the Chief Justice of the Superior Court of Justice shall designate the judge who is to replace that judge.**

(10) Resignation — The Small Claims Court Administrative Judge may at any time resign from his or her office by delivering a signed letter of resignation to the Attorney General.

(11) [Repealed 2017, c. 20, Sched. 2, s. 4.]

(12) [Repealed 2017, c. 20, Sched. 2, s. 4.]

(13) Standards, education, evaluation — Subject to the consent of the Chief Justice of the Superior Court of Justice, sections 51.9, 51.10 and 51.11 apply with necessary modifications to the Small Claims Court Administrative Judge.

2017, c. 2, Sched. 2, s. 18; 2017, c. 20, Sched. 2, s. 4

87.3 (1) Complaint — Any person may make a complaint alleging misconduct by the Small Claims Court Administrative Judge to the Chief Justice of the Superior Court of Justice.

(2) Dismissal — The Chief Justice shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given.

(3) Notice of dismissal — The Chief Justice shall notify the Small Claims Court Administrative Judge and the complainant in writing of a dismissal under subsection (2), giving brief reasons for it.

(4) Committee — If the complaint is not dismissed, the Chief Justice shall refer it to a committee consisting of three persons determined in accordance with subsection (5).

(5) Same — The three persons shall be chosen by the Chief Justice, and shall be a judge of the Superior Court of Justice, a deputy judge and a person who is neither a judge nor a lawyer.

(6) Investigation — The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and the Small Claims Court Administrative Judge shall be given an opportunity to make representations to the committee, in writing or, at the committee's option, orally.

(7) Recommendation — The committee shall make a report to the Chief Justice, recommending a disposition in accordance with subsection (8).

(8) Disposition — The Chief Justice may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the Small Claims Court Administrative Judge's conduct presents grounds for imposing a sanction, may,

(a) warn the Small Claims Court Administrative Judge;

(b) reprimand the Small Claims Court Administrative Judge;

(c) order the Small Claims Court Administrative Judge to apologize to the complainant or to any other person;

(d) order that the Small Claims Court Administrative Judge take specified measures, such as receiving education or treatment;

(e) suspend the Small Claims Court Administrative Judge for a period of up to 30 days;

(f) direct that no judicial duties or only specified judicial duties be assigned to the Small Claims Court Administrative Judge;

(g) recommend to the Attorney General that the Small Claims Court Administrative Judge be removed from office; or

(h) adopt any combination of the dispositions set out in clauses (a) to (g).

(9) Cause for removal — A recommendation for removal may only be made on the basis of a ground listed in clause 51.8(1)(b), and any such recommendation shall specify the ground on which it is made.

(10) Recommendation for removal — In making a recommendation for removal to the Attorney General, the Chief Justice shall include with the recommendation,

(a) a copy of the committee's report; and

(b) if the recommendation of the Chief Justice does not accord with the report, reasons for his or her recommendation.

(11) Non-identification — If the complaint involves an allegation of sexual misconduct or sexual harassment, an alleged victim of the misconduct or harassment shall not, on that person's request, be identified in the report provided to the Attorney General under clause (10)(a) or in any reasons provided under clause (10)(b).

(12) Report, reasons may be made public — The Attorney General may make the report and any reasons public if he or she is of the opinion that it is in the public interest.

(13) Tabling — If the Chief Justice makes a recommendation for removal under clause (8)(g), the Attorney General shall table the recommendation, including the ground on which the recommendation is made, in the Assembly.

(14) Order for removal — The Lieutenant Governor may, on the basis of a recommendation for removal, order the removal of the Small Claims Court Administrative Judge from office on the address of the Assembly.

(15) Compensation — Subsections 86.2(10), (11), (12), (12.0.1), (13) and (14) apply with necessary modifications with respect to the compensation of costs incurred by the Small Claims Court Administrative Judge for legal services in relation to a complaint.

(16) Delegation — The Chief Justice may delegate his or her powers, duties and functions under this section to the Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice, or the Senior Judge of the Family Court.

(17) Same — The Chief Justice may delegate his or her powers, duties and functions under subsections (2), (3) and (4) to a judge of the Superior Court of Justice, but a judge who acts under any of those subsections in relation to a complaint may not be chosen under subsection (5) to be part of a committee to investigate the complaint.

(18) Non-application of SPPA — The *Statutory Powers Procedure Act* does not apply to a judge or member of a committee acting under this section.

(19) Personal liability — No action or other proceeding for damages shall be instituted against a judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person under this section, or for any neglect or default in the exercise or performance in good faith of such power or duty.

2017, c. 20, Sched. 2, s. 5; 2020, c. 11, Sched. 5, s. 9

88. (1) Regulations — The Lieutenant Governor in Council may make regulations,

(a) prescribing the officer or employee to whom money paid into the Superior Court of Justice shall be paid and providing for the vesting of that money and any securities in which that money is invested in that officer or employee;

(b) governing the management and investment of money paid into a court;

(c) providing for the payment of interest on money paid into a court and fixing the rate of interest so paid;

(d) prescribing the officer or employee in whose name mortgages and other securities taken under an order of the Superior Court of Justice and instruments taken as security in respect of a proceeding in the Superior Court of Justice shall be taken;

(e) respecting the deposit of the mortgages, securities and instruments and the duty or obligation, if any, in respect of them of the officer or employee in whose name they are taken.

(2) Regulations under *Public Guardian and Trustee Act* — With respect to all functions performed by the Public Guardian and Trustee in his or her capacity as Accountant of the Superior Court of Justice, the *Public Guardian and Trustee Act* and

the regulations made under that Act prevail over subsection (1) and the regulations made under it.

1996, c. 25, s. 9(12), (17); 1997, c. 23, s. 5; 2000, c. 26, Sched. A, s. 5

89. (1) Children's Lawyer — The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint a Children's Lawyer for Ontario.

(2) Qualification — No person shall be appointed as Children's Lawyer unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least ten years or, for an aggregate of at least ten years, has been a member of such a bar or served as a judge anywhere in Canada after being a member of such a bar.

(3) Duties — Where required to do so by an Act or the rules of court, the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding.

(3.1) Same — At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding.

(4) Costs — The same costs as are payable to litigation guardians are payable to the Children's Lawyer and costs recovered by the Children's Lawyer shall be paid into the Consolidated Revenue Fund.

(5) Security for costs — The Children's Lawyer shall not be required to give security for costs in any proceeding.

(6) Mortgages held by Accountant — Where a person for whom the Children's Lawyer has acted is interested in a mortgage held by the Accountant of the Superior Court of Justice, the Children's Lawyer shall take reasonable care to ensure that,

(a) money payable on the mortgage is promptly paid;

(b) the mortgaged property is kept properly insured; and

(c) taxes on the mortgaged property are promptly paid.

(7) Payment into court — Money received by the Children's Lawyer on behalf of a person for whom he or she acts shall, unless the court orders otherwise, be paid into court to the credit of the person entitled.

(8) Assessment of costs — Where the amount payable into court under subsection (7) is to be ascertained by the deduction of unassessed costs from a fund, the Children's Lawyer may require the costs to be assessed forthwith.

(9) Audit — The Auditor General shall examine and report on the accounts and financial transactions of the Children's Lawyer.

1994, c. 12, s. 37; 1994, c. 27, s. 43; 1996, c. 25, s. 9(13); 1999, c. 12, Sched. B, s. 4(1); 2004, c. 17, s. 32, Table

90. (1) Assessment officers — The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint assessment officers.

(2) [Repealed 2020, c. 11, Sched. 5, s. 10.]

(3) Jurisdiction — Every assessment officer has jurisdiction to assess costs in a proceeding in any court.

(4) Appeal from assessment of costs before tribunal — Where costs of a proceeding before a tribunal other than a court are to be assessed by an assessment officer,

(a) the rules of court governing the procedure on an assessment of costs apply with necessary modifications; and

(b) an appeal lies to the Superior Court of Justice from a certificate of assessment of the costs if an objection was served in respect of the issue appealed in accordance with the rules of court.

1996, c. 25, s. 9(17); 2020, c. 11, Sched. 5, s. 10

91. Officers of court — Every official examiner and deputy official examiner is an officer of every court in Ontario.

92. Administration of oaths — Every officer of a court has, for the purposes of any matter before him or her, power to administer oaths and affirmations and to examine parties and witnesses.

93. Money held by officer of court — Money or property vested in or held by an officer of a court shall be deemed to be vested in the officer in trust for Her Majesty, subject to being disposed of in accordance with any Act, rule of court or order.

94. (1) Disposition of court fees — All fees payable to a salaried officer of a court in respect of a proceeding in the court shall be paid into the Consolidated Revenue Fund.

(2) Exception — Subsection (1) does not apply to fees payable to court reporters under the *Administration of Justice Act*.

PART VII — COURT PROCEEDINGS (SS. 95–148)

95. Application of Part — (1) Civil proceedings — This Part applies to civil proceedings in courts of Ontario.

(2) Criminal proceedings — Sections 109 (constitutional questions) and 123 (giving decisions), section 125 and subsection 126(5) (language of proceedings) and sections 132 (judge sitting on appeal), 136 (prohibition against photography at court hearing) and 146 (where procedures not provided) also apply to proceedings under the *Criminal Code* (Canada), except in so far as they are inconsistent with that Act.

Proposed Amendment — 95(2)

(2) Criminal proceedings — Sections 109 (constitutional questions) and 123 (giving decisions), section 125 and paragraph 2 of subsection 126(1) (documents that may be written in French) and sections 132 (judge sitting on appeal), 136 (prohibition against photography at court hearing) and 146 (where procedures not provided) also apply to proceedings under the *Criminal Code* (Canada), except in so far as they are inconsistent with that Act.

2021, c. 4, Sched. 3, s. 13 [Not in force at date of publication.]

(3) Provincial offences proceedings — Sections 109 (constitutional questions), 125, 126 (language of proceedings), 132 (judge sitting on appeal), 136 (prohibition

against photography at court hearings), 144 (arrest and committal warrants enforceable by police) and 146 (where procedures not provided) also apply to proceedings under the *Provincial Offences Act* and, for the purpose, a reference in one of those sections to a judge includes a justice of the peace presiding in the Ontario Court of Justice.

1996, c. 25, s. 9(18)

Common Law And Equity

96. (1) Rules of law and equity — Courts shall administer concurrently all rules of equity and the common law.

(2) Rules of equity to prevail — Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

(3) Jurisdiction for equitable relief — Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

1994, c. 12, s. 38; 1996, c. 25, s. 9(17)

Commentary: The Court of Appeal for Ontario provided a detailed review of the jurisdiction of the Small Claims Court over rules and relief originating in equity, in *Hodgins v. Grover*, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.); leave to appeal refused (2012), 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.). There the court held that the Small Claims Court does have jurisdiction to apply equitable rules and grant equitable relief provided that the relief claimed is otherwise within the jurisdiction of that court. The question is not whether a rule or remedy raised by a party originated in equity rather than at common law. The question is whether the relief sought falls within the court's jurisdiction: *i.e.*, a monetary claim not exceeding the maximum $25,000 limit, or a claim for recovery of possession of personal property where the value of the property does not exceed that same limit. The court's jurisdiction over a claim for damages for restitution or unjust enrichment was upheld.

Case Law: *Bemjapipatkul v. Rungruangwong* (January 13, 2014), Doc. SC-12-16636-0000, [2014] O.J. No. 119 (Ont. Sm. Cl. Ct.).

The Small Claims Court has no jurisdiction to order an accounting of income and profits of a corporation.

Brander v. Backstage Bar & Grill Inc. (January 28, 2014), Doc. 12-21, 12-22, 12-22 D1, [2014] O.J. No. 370 (Ont. S.C.J.).

The Small Claims Court has no jurisdiction over claims by unsecured creditors or minority shareholders of a corporation for an oppression remedy.

Moore v. Cdn. Newspapers Co. Ltd. (1989), 69 O.R. (2d) 262, 37 C.P.C. (2d) 189, 60 D.L.R. (4th) 113, 34 O.A.C. 328 (Ont. Div. Ct.).

The order to publish an apology and retraction was an equitable remedy because it refused the performance of a specified act. The provincial court has no jurisdiction to grant equitable relief. Query present wording of subsection deleting specific exclusion of the Small Claims Court.

McKay v. Toronto (City) (1991), 2 W.D.C.P. (2d) 422 (Ont. Sm. Cl. Ct.).

The plaintiff sought either to close a strip of land known as "The Belt Line" or to have constructed solid fences or buildings. The Small Claims Court had no jurisdiction to grant declaratory relief.

Ford Motor Co. of Canada Ltd. and Facchinato, Re (1978), 18 O.R. (2d) 581 (Ont. Div. Ct.).

A Small Claims Court cannot hear an action arising out of the interpretation, application, administration or alleged violation of a collective agreement.

Domtar Commercial Roofing & Insulation v. Exeter Roofing & Sheet Metal Co. Ltd. (1993), 13 C.L.R. (2d) 63, 109 D.L.R. (4th) 443 (Ont. Gen. Div.).

A declaratory claim dealing with trust funds, here pursuant to the *Construction Lien Act*, R.S.O. 1990, c. C.30 would ordinarily be decided by federally appointed Judges who are members of the General Division. The three Small Claims Court actions were therefore stayed pursuant to section 107 of the *Courts of Justice Act* since a similar one had already been commenced in the General Division.

McLean v. Compon Agro Inc. (1993), 90 Man. R. (2d) 59 (Man. Q.B.).

The Small Claims Court in Manitoba, "the Small Claims Act", R.S.M. 1987, c. C285 does not have jurisdiction to grant declaratory relief under s. 232 or 234 of the *Corporations Act*, R.S.M. 1987, c. C 225.

American Home Assurance Co. v. Brett Pontiac Buick GMC. Ltd. (1991), 105 N.S.R. (2d) 425, 284 A.P.R. 425.

Action not transferred from superior court to the Small Claims Court since action included claim for declaratory and injunctive relief.

Vinet v. Campbellton (Ville) (January 16, 1991), Doc. 176/90/CA (N.B. C.A.).

The Small Claims Court was not competent to deal with a request for a mandatory injunction.

Manitoba Public Insurance Corp. v. Sundstrom, [1998] I.L.R. I-3529, 16 C.P.C. (4th) 353, 125 Man. R. (2d) 268, 2 C.C.L.I. (3d) 167 (Man. Q.B.).

Stay of proceedings granted. A claim for declaratory relief was outside the jurisdiction of Small Claims Court. The respondent's (Jain's) claim was premature because the regulations required the appraisal process to determine the quantum of loss.

Prtenjaca v. Fox (2001), 2001 CarswellOnt 1729, 9 C.L.R. (3d) 141 (Ont. Sm. Cl. Ct.).

Although Ontario Small Claims Court did not have jurisdiction to grant equitable "relief" pursuant to s. 96 of Ontario Courts of *Justice Act*, R.S.O. 1990, c. C.43, it had jurisdiction to administer "rules of equity," and could therefore consider claim of unjust enrichment and order monetary compensation.

Szeib v. Team Truck Centres-Freightliner (2001), 2001 CarswellOnt 2026 (Ont. Sm. Cl. Ct.).

Plaintiff claimed he gave defendant deposit pursuant to conditional sale contract. Plaintiff cancelled order before delivery. Defendant's motion for order that Small Claims Court without jurisdiction because claim equitable relief dismissed. Section 96(3) of *Courts of Justice Act*, R.S.O. 1990, c. C.43 did not prevail over s. 23(1)(b).

MacIntyre v. Ontario (Ministry of Community & Social Services) (2003), 68 O.R. (3d) 236, 2003 CarswellOnt 3847, 47 C.B.R. (4th) 52 (Ont. S.C.J.); affirmed (2004), 2004 CarswellOnt 956 (Ont. C.A.). Ministry of Community and Social Services defrauded of funds paid for social assistance. Ministry granted restitution order. Ministry obtained writ of seizure and sale. Ministry entitled to set-off of its claim against funds being paid by Motor Vehicle Accident Claim Fund, *Financial Administration Act*, R.S.O. 1990, c. F.12.

936464 Ontario Ltd. v. Mungo Bear Ltd., [2003] O.J. No. 3795, 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754 (Ont. Div. Ct.).

Deputy Judge not lacking jurisdiction to award damages based on *quantum meruit*, common law rather than equitable remedy. Small Claims Court specifically empowered to grant equitable relief in forms of orders for payment of money and orders for recovery of possession of personal property. See *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 23(1), 96(1), (3).

Courts authorized under s. 96(1) to concurrently administer all rules of equity and the common law. Small Claims Court not empowered to grant any forms of equitable relief, such as injunctions, declarations and specific performance (unless, perhaps, the performance involves nothing beyond the payment of money or the delivery of possession of personal property, within the applicable limits).

Mullin v. R - M & E Pharmacy, 2005 CarswellOnt 203, 74 O.R. (3d) 378 (Ont. S.C.J.).

Garnishment is an equitable remedy. Court has jurisdiction to declare moneys payable on account of personal injury damages for pain and suffering to be exempt from garnishment. Law of Ontario that damages awarded for pain and suffering exempt from a bankrupt's trustee. See *Holley v. Gifford Smith Ltd.*, 1986 CarswellOnt 178, [1986] O.J. No. 165, 14 O.A.C. 65, *(*sub nom. *Holley, Re)* 54 O.R. (2d) 225, *(*sub nom. *Holley, Re)* 26 D.L.R. (4th) 230, *(*sub nom. *Holley, Re)* 59 C.B.R. (N.S.) 17, 12 C.C.E.L. 161 (Ont. C.A.). Plaintiff in personal injury claim cannot assign his cause of action. If all proceeds were to be scooped up by creditors, plaintiffs would not pursue legitimate claims.

Grillo v. D'Angela (2009), [2009] O.J. No. 7, 2009 CarswellOnt 11, 306 D.L.R. (4th) 370 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 455.

Plaintiff — a principal of a law firm — commenced an action for a mandatory order requiring the Defendants — former associates of Plaintiff's law firm, to return 250 clients' files taken by the Defendants without Plaintiff's knowledge and permission when leaving his law firm.

The test for interlocutory injunctive relief is set out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311:

(a) is there a serious question to be tried?;

(b) will the moving party suffer irreparable harm if the injunction is not granted?; and

(c) where does the balance of convenience lie?

Plaintiff must establish a strong *prima facie* case: there must be a "higher degree of assurance" in the case of interlocutory mandatory orders and the case must be "unusually sharp and clear": See *Ticketnet Corporation v. Air Canada* (1987), 21 C.P.C. (2d) 38 (Ont. H.C.J.).

Hodgins v. Grover, 2011 ONCA 72, 2011 CarswellOnt 336, [2011] O.J. No. 310, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, 5 C.P.C. (7th) 33 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.).

Section 23 of the *Courts of Justice Act (Ont.)* sets out the jurisdiction of the Small Claims Court, while section 96 deals with the equitable jurisdiction of all courts. The Court of Appeal held that section 23 was a wide grant of jurisdiction. The wording "any action" was sufficiently broad enough to include the jurisdiction to grant equitable remedies. Sections 23, 96(1) and 96(3) are to be read as a "coherent package." Section 23 was broad enough to allow the Small Claims Court to deal with claims in common law and equity. Under section 96(1), the courts, including the Small Claims Court, is authorized to concurrently administer all rules of equity and the common law.

This court has been operating on the basis that it has jurisdiction to consider claims for equitable relief and, in appropriate cases, to grant it.

See *Szeib v. Team Truck Centres — Freightliner*, [2001] O.T.C. 439, [2001] O.J. No. 2208, 2001 CarswellOnt 2026 (Ont. Sm. Cl. Ct.), Searle Deputy J., specifically considered the jurisdictional issue and held that the Small Claims Court has jurisdiction to grant relief from forfeiture, a form of equitable relief. See *Rizzo & Rizzo Shoes Ltd., Re*, 1998 CarswellOnt 1 at para. 21, 1998 CarswellOnt 2, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.). Analysis must focus on the words of the relevant statutory provisions, read in their entire context and interpreted harmoniously with the scheme and the object of the Act and with the legislature's intention.

Kourtessis v. Minister of National Revenue, 1993 CarswellBC 1259, 1993 CarswellBC 1213, EYB 1993-67101, [1993] 2 S.C.R. 53, 78 B.C.L.R. (2d) 257, 81 C.C.C. (3d) 286, 20 C.R. (4th) 104, [1993] 1 C.T.C. 301, 102 D.L.R. (4th) 456, [1993] 4 W.W.R. 225, 27 B.C.A.C. 81, 14 C.R.R. (2d) 193, 93 D.T.C. 5137, 153 N.R. 1, 45 W.A.C. 81, [1993] S.C.J. No. 45 (S.C.C.).

Court pled provincial legislation which conferred admiralty jurisdiction on a small claims court; Court relied on a number of authorities which upheld provincial jurisdiction in [. . .] The superior court, and would therefore have jurisdiction to entertain an action for a declaration seeking this kind of relief but subject to the same discretion to refuse to exercise it.

Hodgins v. Grover, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.); leave to appeal refused (2012), 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.).

The Small Claims Court has jurisdiction to grant equitable relief when an order involves the return of personal property or monetary payment within the limits of the Small Claims Court. The court is a statutory court that derives its jurisdiction solely through the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Section 23 is of primary relevance in this appeal, while s. 96 is also informative to the analysis. The court having jurisdiction to grant equitable relief is the decision of the Divisional Court in *936464 Ontario Ltd. v. Mungo Bear Ltd.*, 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754, [2003] O.J. No. 3795 (Ont. Div. Ct.), in which a remedy based on quantum merit was in issue. Heeney J., at paras. 12–15, concluded that notwithstanding that quantum merit is part of the restitutionary group of remedies, its origins can be found in the common law and therefore the court does not need equitable jurisdiction to award it. Heeney J. noted [at para. 9] that while s. 96(3) specifically excludes the Small Claims Court from the list of courts able to grant equitable relief, it does so with the proviso found in the words "unless otherwise provided".

In *Moore v. Canadian Newspapers Co.*, 1989 CarswellOnt 423, 69 O.R. (2d) 262, 37 C.P.C. (2d) 189, 60 D.L.R. (4th) 113, 34 O.A.C. 328 (Ont. Div. Ct.), Rosenberg J. analyzed the jurisdiction of the Small Claims Court to award equitable relief and determined that there was none. However, this case was decided before the legislative changes in 1989 and 1994 (discussed below). Also, the remedy at issue in Moore was injunctive relief, not a monetary payment.

Matteau v. Johnson, 2012 ONSC 1179, 2012 CarswellOnt 2216, [2012] O.J. No. 763, Wilcox J. (Ont. Div. Ct.).

The Respondent appealed from order of Deputy Judge.

The claim was for payment of moneys allegedly owed by the Appellant to the Respondent under an oral agreement between them, together with some living expense debts. The Appellant's defence was based solely on procedural grounds.

In *Hodgins v. Grover*, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.); leave to appeal refused (2012), 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.), a decision of the Court of Appeal for Ontario dated January 27, 2011, Epstein J.A., writing for the court, after a lengthy analysis concluded that the Small Claims Court does have jurisdiction to award legal or equitable relief where the relief requested is a monetary payment under the limit of $25,000 or the return of personal property valued within that limit. The claim discloses a common law cause of action. The claim could be characterized as one based in contract for the repayment of moneys lent. The Respondent appears to have waived the excess in order to bring the claim within the monetary jurisdiction of the Small Claims Court. The appeal is dismissed.

Evergreen Solutions CA Inc. v. Depositario, 2015 ONSC 6664, 2015 CarswellOnt 20350, M.A. Sanderson J. (Ont. Div. Ct.)

The defendant/appellant, (Depositario), appeals from judgment of Deputy Judge in the Small Claims Court dated January 24, 2014, with reasons reported at *Evergreen Solutions CA Inc. v. Depositario*, 2014 CarswellOnt 10368, [2014] O.J. No. 3557 (Ont. S.C.J.). Prattas D.J. granted motion of plaintiff/respondent, (Evergreen), and issued a Small Claims Court Judgment in the amount of $5,757.75 to enforce an arbitration award in the same amount.

Deputy Judge Prattas held Small Claims Court has jurisdiction to enforce award by granting judgment under *Arbitration Act* s. 6 and, additionally or in alternative, as a statutory court pursuant to *Courts of Justice Act* ("*CJA*") s. 23.

Section 23 of the *Courts of Justice Act* sets out the jurisdiction of the Small Claims Court and Section 22 provides that it is a branch of the Superior Court of Justice.

The mandate of the Small Claims Court is set out in the *Courts of Justice Act* s. 25 and Rule 1.03. Prattas D.J. interpreted the ambit of jurisdiction under *Courts of Justice Act* s. 23, at para. 26, relying on *Hodgins v. Grover*, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.) at para. 21; leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.), and *936464 Ontario Ltd. v. Mungo Bear Ltd.*, 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754, [2003] O.J. No. 3795 (Ont. Div. Ct.) at para. 26.

The Deputy Small Claims Court judge did not err in holding that he had jurisdiction to enforce an arbitration award here. In *Hodgins v. Grover*, Epstain J.A. considered whether the Small Claims Court had jurisdiction to grant equitable relief.

The legislative history of the relevant provisions of the *Court of Justice Act*, particularly ss. 96(3) and 96(1), is available as a tool for determining the intention of the legislature: *Rizzo (Re)*, at para. 31.

Hodgins v. Grover, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.), has been followed in several cases including: *Matteau v. Johnson*, 2012 ONSC 1179, 2012 Cars-

wellOnt 2216, [2012] O.J. No. 763 (Ont. S.C.J.), *Cedar Sands Roadway Assn. v. Broadfoot* (June 24, 2015), Doc. 15-0015, [2015] O.J. No. 3302 (Ont. S.C.J. — Sm. Cl. Ct.), *Safety First Consulting Professional Corp. v. Scipione* (June 16, 2015), Doc. 14-18605, [2015] O.J. No. 3168 (Ont. S.C.J. — Sm. Cl. Ct.). In *Anton, Campion, MacDonald & Phillips v. Rowat*, 1996 CarswellYukon 84, [1996] Y.J. No. 130 (Y.T. Terr. Ct.), the parties submitted to arbitration and asked the arbitrator, on consent, to submit the award to the SCC upon conclusion of the arbitration. The court agreed to file the award as a Small Claims Court judgment, at para. 5.

Appeal dismissed.

936464 Ontario Ltd. v. Mungo Bear Ltd., 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754, [2003] O.J. No. 3795 (Ont. Div. Ct.) [equitable relief — jurisdiction].

This appeal raises a fundamental question as to the jurisdiction of the Small Claims Court. Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided. Deputy Judge not lacking jurisdiction to award damages based on *quantum meruit*. *Quantum meruit* constituting common law rather than equitable remedy — Even if *quantum meruit* is equitable remedy, Small Claims Court is specifically empowered to grant equitable relief in forms of orders for payment of money and orders for recovery of possession of personal property: *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 23(1), 96(1), (3).

Hodgins v. Grover, 2011 ONCA 72, 2011 CarswellOnt 336, *(*sub nom. *Grover v. Hodgins)* 103 O.R. (3d) 721, 5 C.P.C. (7th) 33, *(*sub nom. *Grover v. Hodgins)* 330 D.L.R. (4th) 712, *(*sub nom. *Grover v. Hodgins)* 275 O.A.C. 96, [2011] O.J. No. 310 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 825, 2012 CarswellOnt 826, 432 N.R. 392 (note), *(*sub nom. *Grover v. Hodgins)* 295 O.A.C. 398 (note), [2011] S.C.C.A. No. 142 (S.C.C.): Small claims court — Small Claims Court having jurisdiction to grant equitable relief when order involves return of personal property or monetary payment within limits of Small Claims Court.

97. Declaratory orders — The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right whether or not any consequential relief is or could be claimed.

1994, c. 12, s. 39; 1996, c. 25, s. 9(17)

Commentary: The Small Claims Court has no jurisdiction to grant declaratory relief: *Giannaris v. Toronto (City)*, 2012 ONSC 5183, 2012 CarswellOnt 11747, [2012] O.J. No. 4460 (Ont. Div. Ct.); *Hradecky v. Hydro One Networks Inc.*, 2014 CarswellOnt 3316, [2014] O.J. No. 1249 (Ont. Sm. Cl. Ct.).

Case Law: *Kelman v. Stibor* (1998), 55 C.R.R. (2d) 165 (Ont. Prov. Div.).

Only superior court can make in rem declaratory judgment, binding on other courts. Declaration of constitutional validity made by Provincial Division was *in personam* judgment, applicable to this particular case only.

Green v. Canada (Attorney General), 2011 ONSC 4778, 2011 CarswellOnt 8299, 91 C.C.P.B. 126 (Ont. S.C.J.), Kane J.; additional reasons at 2011 ONSC 5750, 2011 CarswellOnt 10573, 93 C.C.P.B. 149 (Ont. S.C.J.).

The plaintiff commenced action by a Statement of Claim under the simplified procedure provided in Rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The relief sought was limited to declaratory relief.

The defendants sought an order:

(a) Striking out the Statement of Claim.

Section 97 of the *Courts of Justice Act* states:

> The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make *binding declarations of right whether or not* any *consequential relief* is or could be *claimed*. [Emphasis added.]

The phrase "cause of action" is not a defined term under the *Rules of Civil Procedure* or the *Courts of Justice Act*.

It is unreasonable to interpret a "cause of action" under Rule 21.01(1)(b) as excluding an action which seeks a declaration only. To do so interprets a rule of procedure as defeating a right granted to parties under section 97 of the *Courts of Justice Act*. The phrase "cause of action," as it appears in Rule 21.01(1)(b), must include an action which claims nothing more than a declaration.

The test to be applied on a motion under Rule 21, assuming the allegations pleaded can be proved, is to ask "is it plain, obvious, and beyond doubt that the plaintiff could not succeed?" See *L. (A.) v. Ontario (Minister of Community & Social Services)*, 2006 CarswellOnt 7393 at para. 17, [2006] O.J. No. 4673, 83 O.R. (3d) 512, 274 D.L.R. (4th) 431, 35 R.F.L. (6th) 56, 218 O.A.C. 150, 36 C.P.C. (6th) 265, 45 C.C.L.T. (3d) 207 (Ont. C.A.); leave to appeal refused 2007 CarswellOnt 3059, 2007 CarswellOnt 3060, [2007] S.C.C.A. No. 36, 372 N.R. 390 (note), 239 O.A.C. 198 (note) (S.C.C.)).

Failure to obtain the declaration sought is not certain, and the granting of a declaration, being a discretionary matter, cannot be pronounced upon without first hearing evidence and conducting a trial. (See *Horton Bay Holdings Ltd. v. Wilks*, 1991 CarswellBC 584, [1991] B.C.J. No. 3481, 3 C.P.C. (3d) 112, 8 B.C.A.C. 68, 17 W.A.C. 68 (B.C. C.A.)).

See *Solosky v. R.* (1970), 1979 CarswellNat 4, 1979 CarswellNat 630, [1979] S.C.J. No. 130, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495 (S.C.C.), setting out the principles which guide the court in exercising its jurisdiction to grant declarations as including the following:

> (a) The question must be real and not theoretical.
>
> (b) There must be good reason for the court to exercise its discretion to resolve a point in issue by declaration.

As to whether the issue raised in the pleading is hypothetical or abstract, the Supreme Court in *Borowski v. Canada (Attorney General)*, 1989 CarswellSask 241, 1989 CarswellSask 465, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342, [1989] 3 W.W.R. 97, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232 (S.C.C.) at para. 15 in dealing with the doctrine of mootness states that:

> 15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question.

An Order was made striking out the Statement of Claim, subject to the plaintiff's right for 60 days, to amend such pleading so as to place before the court all constituent elements in action for negligent misrepresentation. Alternatively, if the action was struck because the Statement of Claim was not amended, that would be without prejudice to the right of the plaintiff to bring a properly constituted action on this or similar grounds in the future.

Green v. Canada (Attorney General), 2011 ONSC 4778, 2011 CarswellOnt 8299, 91 C.C.P.B. 126 at para. 17 (Ont. S.C.J.), Kane J.; additional reasons at 2011 ONSC 5750, 2011 CarswellOnt 10573, 93 C.C.P.B. 149 (Ont. S.C.J.).

It is not reasonable to interpret a "cause of action" under Rule 21.01(1)(b) [of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194] as excluding an action which seeks a declaration only. To do so interprets a rule of procedure as defeating a right granted to parties under section 97 of the *Courts of Justice Act* [R.S.O. 1990, c. C.43].

98. Relief against penalties — A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

99. Damages in substitution for injunction or specific performance — A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.

Commentary: the Small Claims Court has no jurisdiction to grant an injunction or order specific performance.

100. Vesting orders — A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Commentary: the Small Claims Court has no jurisdiction to make a vesting order.

Interlocutory Orders

101. (1) Injunctions and receivers — In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) Terms — An order under subsection (1) may include such terms as are considered just.

1994, c. 12, s. 40; 1996, c. 25, s. 9(17)

Commentary: the Small Claims Court has no jurisdiction to grant an interlocutory injunction or mandatory order or to appoint a receiver or receiver and manager. Section 101(1) defines the power to make such orders as being within the power of a judge of the Superior Court of Justice. Note that s. 23(1)(b) does given the Small Claims Court a limited related jurisdiction to order the recovery of possession of personal property where the value of the property does not exceed the court's monetary jurisdiction.

102. Injunction in labour dispute — (1) Definition — In this section,

"labour dispute" means a dispute or difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(2) Notice — Subject to subsection (8), no injunction to restrain a person from an act in connection with a labour dispute shall be granted without notice.

(3) Steps before injunction proceeding — In a motion or proceeding for an injunction to restrain a person from an act in connection with a labour dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful.

(4) Evidence — Subject to subsection (8), affidavit evidence in support of a motion for an injunction to restrain a person from an act in connection with a labour dispute

shall be confined to statements of facts within the knowledge of the deponent, but any party may by notice to the party filing such affidavit, and payment of the proper attendance money, require the attendance of the deponent to be cross-examined at the hearing.

(5) Interim injunction — An interim injunction to restrain a person from an act in connection with a labour dispute may be granted for a period of not longer than four days.

(6) Notice — Subject to subsection (8), at least two days notice of a motion for an interim injunction to restrain a person from any act in connection with a labour dispute shall be given to the responding party and to any other person affected thereby but not named in the notice of motion.

(7) Idem — Notice required by subsection (6) to persons other than the responding party may be given,

(a) where such persons are members of a labour organization, by personal service on an officer or agent of the labour organization; and

(b) where such persons are not members of a labour organization, by posting the notice in a conspicuous place at the location of the activity sought to be restrained where it can be read by any persons affected,

and service and posting under this subsection shall be deemed to be sufficient notice to all such persons.

(8) Interim injunction without notice — Where notice as required by subsection (6) is not given, the court may grant an interim injunction where,

(a) the case is otherwise a proper one for the granting of an interim injunction;

(b) notice as required by subsection (6) could not be given because the delay necessary to do so would result in irreparable damage or injury, a breach of the peace or an interruption in an essential public service;

(c) reasonable notification, by telephone or otherwise, has been given to the persons to be affected or, where any of such persons are members of a labour organization, to an officer of that labour organization or to the person authorized under section 94 of the *Labour Relations Act, 1995* to accept service of process under that Act on behalf of that labour organization or trade union, or where it is shown that such notice could not have been given; and

(d) proof of all material facts for the purpose of clauses (a), (b) and (c) is established by oral evidence.

(9) Misrepresentation as contempt of court — The misrepresentation of any fact or the withholding of any qualifying relevant matter, directly or indirectly, in a proceeding for an injunction under this section, constitutes a contempt of court.

Commentary: the Small Claims Court has no jurisdiction to grant a labour injunction, which is a species of the equitable jurisdiction under s. 101 which lies with the Superior Court of Justice and not the Small Claims Court.

(10) Appeal — An appeal from an order under this section lies to the Court of Appeal without leave.

2017, c. 2, Sched. 2, s. 19

103. (1) Certificate of pending litigation — The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person

who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).

(2) Registration — Where a certificate of pending litigation is issued under subsection (1) it may be registered whether the land is registered under the *Land Titles Act* or the *Registry Act*.

(3) Exception — Subsections (1) and (2) do not apply to a proceeding for foreclosure or sale on a registered mortgage or to enforce a lien under the *Construction Act*.

(4) Liability where no reasonable claim — A party who registers a certificate under subsection (2) without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration.

(5) Recovery of damages — The liability for damages under subsection (4) and the amount thereof may be determined in the proceeding in respect of which the certificate was registered or in a separate proceeding.

(6) Order discharging certificate — The court may make an order discharging a certificate,

(a) where the party at whose instance it was issued,

(i) claims a sum of money in place of or as an alternative to the interest in the land claimed,

(ii) does not have a reasonable claim to the interest in the land claimed, or

(iii) does not prosecute the proceeding with reasonable diligence;

(b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or

(c) on any other ground that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

(7) Effect — Where a certificate is discharged, any person may deal with the land as fully as if the certificate had not been registered.

2017, c. 24, s. 75

Commentary: the Small Claims Court has no jurisdiction to issue a certificate of pending litigation, which is a form of protection for parties claiming an interest in real property. The Small Claims Court has no jurisdiction to grant remedies reflecting a successful claim to an interest in real property, such as a declaration of ownership or a declaration of a trust interest. Therefore there is no need for certificates of pending litigation in Small Claims Court proceedings, and the *Small Claims Court Rules* make no provision for the registration or discharge of such certificates.

104. (1) Interim order for recovery of personal property — In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

(2) Damages — A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

Commentary: There are conflicting authorities from the Small Claims Court on whether that court has jurisdiction to make an order for interim recovery of personal property: see *Ever Fresh Direct Foods Inc. v. Schindler* (August 11, 2011), Doc. 315/11, [2011] O.J. No. 3634 (Ont. Sm. Cl. Ct.), where the applicable rules and authorities are reviewed. In any event, as was pointed out in *Gunn v. Gunn*, 2013 CarswellOnt 235, [2013] O.J. No. 30 (Ont. Sm. Cl. Ct.), even if such a jurisdiction existed, the moving party would bear the onus to prove among other things that there are substantial grounds for the claim to possession.

To date there appears to be no appellate resolution of this issue. The section does not expressly state that it does or does not apply to actions in Small Claims Court. Arguably the reference in s. 104(2) to motions for interim recovery or to set aside orders for interim recovery and potential liability for loss resulting therefrom, without reference to the limited monetary jurisdiction of the Small Claims Court, indicates that the section does not apply in that court. The *Small Claims Court Rules* make no provision for such motions.

It could be argued that the Small Claims Court's jurisdiction over claims for recovery of possession of personal property covers the matter, displacing s. 104. Such claims may in appropriate cases be determined on a final basis under rule 12.02 of the *Small Claims Court Rules*. The creation of an interim motion remedy would be a matter for the Civil Rules Committee.

On the other hand it could be argued that s. 104 does apply in Small Claims Court and the omission from the *Small Claims Court Rules* of any equivalent to Rule 44 of the *Rules of Civil Procedure* (interim recovery of personal property) triggers the option to apply Rule 44 "by analogy". See *Riddell v. Apple Canada Inc.*, 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.); leave to appeal refused *Matthew Riddell v. Apple Canada Inc.*, 2018 CarswellOnt 9253, 2018 CarswellOnt 9254, [2017] S.C.C.A. No. 470 (S.C.C.), where the distinction between a legislative gap and a deliberate omission is reviewed in the context of whether motions under Rule 32 of the *Rules of Civil Procedure* (inspection of real or personal property) could be entertained in Small Claims Court.

105. Physical or mental examination — (1) Definition — In this section,

"health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction.

(2) Order — Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

(3) Idem — Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

(4) Further examinations — The court may, on motion, order further physical or mental examinations.

(5) Examiner may ask questions — Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence.

1998, c. 18, Sched. G, s. 48

Commentary: section 105 deals with what are generally referred to as "defence medical examinations". It does not expressly state that this procedure is or is not available in Small Claims Court proceedings. It has been held that defence medicals are not available in Small Claims Court: *Kotsos v. Wang* (April 26, 2017), Davis D.J., [2017] O.J. No. 2072 (Ont. Sm. Cl. Ct.) at para. 37. The point has yet to be determined at the appellate level.

It is well-established that defence medical examinations are a form of discovery and a part of the discovery process: *Bellamy v. Johnson*, 1992 CarswellOnt 1712, 8 O.R. (3d) 591, 90 D.L.R. (4th) 564, 55 O.A.C. 62, [1992] O.J. No. 864 (Ont. C.A.) at para. 16. Only very limited forms of discovery are available in Small Claims Court and those relate solely to discovery of documents: see *Riddell v. Apple Canada Inc.*, 2016 ONSC 6014, 2016 CarswellOnt 14847, [2016] O.J. No. 4934 (Ont. Div. Ct.) at para. 11; ; affirmed 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.); leave to appeal refused *Matthew Riddell v. Apple Canada Inc.*, 2018 CarswellOnt 9253, 2018 CarswellOnt 9254, [2017] S.C.C.A. No. 470 (S.C.C.). See also *Elguindy v. St. Joseph's Health Care London*, 2016 ONSC 2847, 2016 CarswellOnt 8374, [2016] O.J. No. 2742 (Ont. Div. Ct.).

Defence medical examinations are a relatively intrusive form of discovery extending above and beyond documentary issues, and compel the subject to attend an examination by a medical practitioner not of his or her choosing and to answer that practitioner's questions. Such mandatory orders fall beyond the Small Claims Court's traditional jurisdiction and the *Small Claims Court Rules* contain no equivalent to Rule 33 of the *Rules of Civil Procedure*.

It appears therefore that s. 105 does not apply to Small Claims Court proceedings, but the point has yet to be addressed at the appellate level.

106. Stay of proceedings — A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Case Law: *Galtaco Redlaw Castings Corp. v. Brunswick Industrial Supply Co.* (1989), 69 O.R. (2d) 478 (Ont. H.C.).

The proper test to be applied when determining whether to stay an action between competing jurisdictions is:

> 1. the party seeking a stay must satisfy the court that there is another forum to whose jurisdiction it is amenable in which justice can be done between the parties at substantially less inconvenience or expense; and
>
> 2. if that is established, the responding party must then establish that the stay will deprive it of a legitimate personal or juridical advantage.

As part of the first step described above, the applicant for a stay must satisfy the court that the foreign jurisdiction is the convenient forum. Convenient forum means that the applicant must establish that the foreign jurisdiction is the most appropriate natural forum to try the action in the sense that the foreign jurisdiction has the most real and substantial connection with a lawsuit.

The action in Ohio was only for the price of goods sold. The Ontario action was more comprehensive. There may be a serious question as to the proper law contract. The defendant failed to demonstrate that justice could be done in Ohio at substantially less inconvenience or expense. The plaintiffs have satisfied whatever onus rests on them.

Kelman v. MacInnis (1993), 4 W.D.C.P. (2d) 136 (Ont. Gen. Div.).

A stay of a Small Claims Court action was granted for one year pending resolution of a similar action in the Ontario Court (General Division) involving the same defendants. A

request for an order striking the claim was dismissed. The court did *not* determine the issue of the equitable jurisdiction of a Small Claims Court Judge.

Simpkin v. Holoday (1997), 14 C.P.C. (4th) 351 (Ont. Gen. Div.).

Motion to stay civil action set for trial in face of criminal charges against defendant dismissed. Defendant failed to demonstrate extraordinary or exceptional circumstances which was test. Stay would greatly prejudice plaintiffs who commenced action three years before and who were not complainants in criminal proceedings.

Stoney Band v. Stoney Band Council (1996), *(*sub nom. *Powderface v. Baptist)* 118 F.T.R. 118 (Fed. T.D.).

Two actions against Crown alleged breach of fiduciary duty. Crown moved to strike out or stay second action on ground that there were duplicate proceedings. Where pleadings were not identical, there were insufficient grounds to strike. However, second action stayed where there were serious issues to be tried, and Crown could suffer irreparable harm if contradictory judgments made. Balance of convenience weighed in favour of Crown.

1085178 Ontario Ltd. v. Henderson (December 3, 1997), Doc. 97-CV-1704, 100, 208/96 (Ont. Gen. Div.).

Second action, commenced dealing with many of same occurrences as first, stayed until first action was completed, pursuant to Rule 21.01(3) of *Rules of Civil Procedure*, R.R.O. 194, and s. 106 of *Courts of Justice Act*, R.S.O. 1990, c. C.43. Continuance of second action would be abuse of court process and stay would not cause any injustice to plaintiffs in second action.

Piper v. Scott Properties Ltd. (May 5, 1997), Doc. Saskatoon Q.B. 2291/96 (Sask. Q.B.).

Appellant's appeal to Queen's Bench was to protect his interests respecting his counterclaim which was in excess of jurisdiction of Small Claims Court. Appellant should have applied for stay of small claims matter pending resolution by Queen's Bench. Instead he forced small claims judge to determine issues relevant to counterclaim without benefit of hearing counterclaim. As trial judge did not commit error, appeal dismissed.

Catic-Pacus Investment Corp. v. Noble China Inc. (November 20, 1998), Doc. 98-CL-2991 (Ont. Gen. Div. [Commercial List]).

Motion by Noble China to stay application pursuant to Rules 21.01(3) and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This application and application bearing Court File No. B105/97 was between the same parties. Court adopted approach by Morin J. in *Sportmart Inc. v. Toronto Hospital Foundation* (1995), 62 C.P.R. (3d) 129 (Ont. Gen. Div.). Fairest to stay application, without prejudice to amending the first application to enlarge the relief sought.

Dominion of Canada General Insurance Co. v. Lee (1998), 8 C.C.L.I. (3d) 152 (Ont. Gen. Div.).

A motion by defendant for order staying this action pending disposition of an application for arbitration. See the *Courts of Justice Act*, R.S.O. 1990 c. C.43, sections 106 and 138. Arbitration is not a proceeding in the court. Arbitration under the *Insurance Act* is an elective process. This action (98-CV-5676) stayed until final determination of application for arbitration.

Hudson's Bay Co. c. Sklar (20 juillet 2000), no C.A. Montréal 500-09-009804-006 (Que. C.A.).

In order to justify stay of civil proceedings, the applicant was required to show that without a stay, the right to a full and fair defence was compromised. No such grounds were established. No basis for leave to appeal made out.

Dimitrov v. Summit Square Strata Corp., 2005 CarswellBC 2490, 2005 BCSC 1469 (B.C. S.C.).

Applicant Dimitrov seeks declaration she is an indigent person, and an order she not be required to pay court fees in respect of appeal from order in small claims court.

She further seeks order pursuant to s. 8(6) of the *Small Claims Act* which would exempt her from requirements to deposit $200 security for costs, and the amount of the judgment ($725), when she files her notice of appeal.

She is unemployed, current net monthly income is $1,060.92, source of her income is social assistance, child support and government child tax benefits. The child tax benefits have been cancelled. She owns strata property jointly with her husband which she values at approximately $43,000, but mortgage balance is more than $34,000. Her household goods have an approximate value of $5,000. She is a person possessed of some means, but such scanty means that she is needy and poor. She is an indigent person. (See *Munro v. Stewart*, 1988 CarswellBC 353, 31 B.C.L.R. (2d) 164 (B.C. S.C.).).

Leading case of *Hunt v. T & N plc*, 1990 CarswellBC 759, 1990 CarswellBC 216, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.). The test is: Assuming the facts asserted in the notice of appeal are true, is it plain and obvious that the appeal is certain to fail?

Appellant should be required to show there is at least a reasonable possibility that the appeal will succeed. Words "reasonable prospect of success" also convey appropriate test.

Amount required to be deposited by Ms. Dimitroy when filing her notice of appeal, reduced from $925 to $200.

Bryant v. City Dairy Co. (1921), 50 O.L.R. 40, 37 C.C.C. 405, 64 D.L.R. 283 (Ont. C.A.). Where civil action brought in a Division Court within the jurisdiction of court, Judge has full authority to order a stay of proceedings based on the same transaction, and such judicial discretion may not be interfered with by way of prohibition.

Clarke v. Our Neighbourhood Living Society, 2004 CarswellNS 669, 258 N.S.R. (2d) 1, 824 A.P.R. 1, 48 C.P.C. (6th) 56, 2004 NSSM 32 (N.S. Sm. Cl. Ct.).

Plaintiff commenced an action in both small claims court and Supreme Court against same defendants and some issues were same. Defendant brought counterclaim in small claims court. Court ruled that counterclaim in small claims court action should be served. Defendant's counterclaim dealt with separate matter and it could be severed from plaintiff's claim. Defendant was not prejudiced since it could raise matters in its counterclaim by amending its pleadings in Supreme Court action to make these claims.

107. (1) Consolidation of proceedings in different courts — Where two or more proceedings are pending in two or more different courts, and the proceedings,

(a) have a question of law or fact in common;

(b) claim relief arising out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason ought to be the subject of an order under this section,

an order may, on motion, be made,

(d) transferring any of the proceedings to another court and requiring the proceedings to be consolidated, or to be heard at the same time, or one immediately after the other; or

(e) requiring any of the proceedings to be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them.

Case Law: *Autometric Autobody Inc. v. High Performance Coatings Inc.*, 2014 ONSC 6073, 2014 CarswellOnt 14460, 328 O.A.C. 197, [2014] O.J. No. 4868 (Ont. Div. Ct.).

Two weeks before the scheduled trial of the plaintiff's claim and defendant's claim in Small Claims Court, the defendant issued a fresh claim in the Superior Court of Justice claiming more than $25,000 based on the same subject-matter as the defendant's claim in Small Claims Court, and successfully moved in the Superior Court of Justice to transfer the Small Claims Court action to that court. On appeal, that order was set aside. The Divisional Court held that the motions judge erred in law by failing to consider whether the existing action could properly and justly be determined in Small Claims Court. Since the action was a proper one for Small Claims Court, it should not have been transferred.

Morle v. Janisse, 2014 ONSC 5949, 2014 CarswellOnt 15044, [2014] O.J. No. 5112 (Ont. S.C.J.)

A motion to require a Small Claims Court action to continue as a counterclaim to the defendant's related action in the Superior Court of Justice was dismissed. Section 107 requires the consent of the plaintiff in the Small Claims Court action, which was not given. There is no general rule that a Small Claims Court action is trumped by a later action in the Superior Court of Justice. The moving party failed to persuade the court that the motion was not simply strategic.

Beacon Hall Golf Club v. Rogers, 2014 ONSC 318, 119 O.R. (3d) 72, [2014] O.J. No. 880 (Ont. S.C.J.).

The plaintiff had sued in Small Claims Court claiming damages of $25,000. The defendant counterclaimed for damages of $35,000 and brought a motion to a judge of the Superior Court of Justice to transfer both claims to that court. Plaintiff opposed the motion. The court transferred both claims to the Superior Court of Justice, citing its inherent jurisdiction to control its process, although cautioning that a defence strategy to force a Small Claims Court matter into the Superior Court of Justice by way of a counterclaim should not be condoned.

Wu v. Ng, 2014 ONSC 7126, 2014 CarswellOnt 17292, 6 E.T.R. (4th) 104 (Ont. S.C.J.); additional reasons 2015 ONSC 320, 2015 CarswellOnt 351, 6 E.T.R. (4th) 117 (Ont. S.C.J.).

Defendant Mei-Tim brought a summary judgment motion dismissing all claims against her.

Plaintiffs bring cross-motion in part transferring Toronto Small Claims Court Action to the Superior Court and consolidating it with this action.

Summary judgment motion dismissed. See s. 107 (1) of the *Courts of Justice Act*. No merit to argument that Ontario Court does not have jurisdiction *simpliciter*. See *e.g.*, *Khan Resources Inc. v. W M Mining Co., LLC*, 2006 CarswellOnt 1309, 79 O.R. (3d) 411, 208 O.A.C. 204, [2006] O.J. No. 845 (Ont. C.A.)

There are genuine issues for trial about when the breaches of the alleged agreements were discovered.

Shouldice v. Stewart (November 20, 1996), Doc. 96-CU-98520CM (Ont. Gen. Div.).

Cause of action in second action was debt for $135,500, representing three advances. First action was against S. personally and second one was against corporation. Relief claimed did not arise out of same transaction. There was no application of "any other reason" provision in r. 6.01 of *Rules of Civil Procedure* (Ont.). Motion for consolidation denied.

Foote v. Mutual of Omaha Insurance Co. (1997), 157 Nfld. & P.E.I.R. 252, 486 A.P.R. 252 (Nfld. T.D.).

Order granted for trial together, not for consolidation of two actions. Actions had little in common except they had roots in same insurance policy. Insurer raised real and substantial defences to claim which militated against consolidation.

Rosenthal v. Burchell (March 9, 1999), Doc. Vancouver 97034165 (B.C. Prov. Ct.).

Application by Rosenthal to have his action transferred from the Small Claims Court to the Supreme Court. Application allowed. Rosenthal proved that the monetary outcome of the claim might exceed $10,000. Although Rosenthal's award might have been reduced by a finding of contributory negligence, this was not a sufficiently compelling argument in this inquiry.

Roberts v. S-G. Transport Ltd. (1998), 160 Nfld. & P.E.I.R. 128, 494 A.P.R. 128, 26 C.P.C. (4th) 339, 1998 CarswellPEI 49 (P.E.I. T.D. [In Chambers]).

Two plaintiffs filed a total of 25 claims against the defendant in Small Claims Court on the same day. The defendant successfully applied to have noting in default in all claims set aside and moved for a consolidation of claims. The consolidation required matters to be moved from Small Claims to General Division and the defendant was given an opportunity to file defences. The plaintiffs' filing fees for 25 notices were ordered refunded less the filing fee in General Division.

Ram Western Express Ltd. v. Baskin, 2004 CarswellOnt 3363 (Ont. S.C.J.).

Motion by Ram for order for directions as to how three actions should proceed.

Third action commenced in the Brampton Small Claims Court for liquidated damages. That claim similar to another claim. Rule 6.01 of the *Rules of Civil Procedure* and Section 107(1) of the *Courts of Justice Act* relevant to the relief being sought. Prerequisite conditions set out in Rule 6.01 and Section 107(1) not met. No common questions of law or fact. See *Rae-Dawn Construction Ltd. v. Edmonton (City)*, 1992 CarswellAlta 333, 3 C.L.R. (2d) 190, 10 C.P.C. (3d) 356, *(*sub nom. *Ellis-Don Management Services v. Rae-Dawn Construction Ltd.)* 131 A.R. 190, *(*sub nom. *Ellis-Don Management Services v. Rae-Dawn Construction Ltd.)* 25 W.A.C. 190 (Alta C.A.).

Under section 107(2) of the *CJA* a proceeding in Small Claims Court shall not be transferred under clause (1)(d) to the Superior Court of Justice without consent of plaintiff in proceeding in the Small Claims Court. Banting did consent on behalf of 1124396. *Vigna v. Toronto Stock Exchange*, 1998 CarswellOnt 4560, [1998] O.J. No. 4924, 115 O.A.C. 393, 28 C.P.C. (4th) 318 (Ont. Div. Ct.) distinguished. Motion dismissed.

1029822 Ontario Inc. v. Smith, 2005 CarswellOnt 906 (Ont. C.A.).

Appeal from Justice Power's dismissal of Superior Court action. Dismissal determined that action abuse of process because it raised the same *lis* that had already been determined in earlier Small Claims Court action.

In Small Claims Court action, appellant swore that issues in the two separate actions "dealt with the exact same issues." In the Superior Court action, the appellant swore that his earlier statement was in error and that the two actions raised different legal issues.

Actions not identical.

Superior Court action should *not* have been dismissed. Appeal allowed. Dismissal of Superior Court action set aside.

Domjan Investments Inc. v. D.J. Wagner Investments Inc., 2005 CarswellOnt 7750, 79 O.R. (3d) 150 (Ont. S.C.J.).

Partnership action and action for payment of personal loan ordered consolidated. Actions having question of fact or law in common. Relief claimed in both actions arising out of same transaction or occurrence.

Clarke v. Our Neighbourhood Living Society, 2004 CarswellNS 669, 258 N.S.R. (2d) 1, 824 A.P.R. 1, 48 C.P.C. (6th) 56, 2004 NSSM 32 (N.S. Sm. Cl. Ct.).

Plaintiff commenced actions in both Small Claims Court and Supreme Court against same defendants and some of issues were same. Society brought counterclaim in Small Claims Court relating to monies allegedly owing by plaintiff to society in respect of clients who were under written contract for plaintiff's services at different location. Court ruled that counterclaim in Small Claims Court action should be severed. Defendant's counterclaim dealt with separate matter which was written contract for plaintiff's services at O home and it could be severed from plaintiff's claim. Society not prejudiced since it could raise matters in its counterclaim by amending its pleadings in Supreme Court action to make these claims.

Haines, Miller & Associates Inc. v. Foss, 1996 CarswellNS 301, 153 N.S.R. (2d) 53, 450 A.P.R. 53, 3 C.P.C. (4th) 349 (N.S. S.C. [In Chambers]) and *R. Llewellyn Building Supplies Ltd. v. Nevitt*, 1987 CarswellNS 319, [1987] N.S.J. No. 262, 80 N.S.R. (2d) 415, 200 A.P.R. 415 (N.S. Co. Ct.) provided authority for the Small Claims Court severing the counterclaim or set off from the main claim.

Gulamani v. Chandra, 2008 CarswellBC 271, 80 B.C.L.R. (4th) 382, 2008 BCSC 179 (B.C. S.C.).

Application brought by the defendants to have two actions commenced by the plaintiff tried together. The applicants, as defendants in the first action, submitted that it was in the interests of justice that the proceedings be heard together given identical allegations of injuries, losses, and damages. The court found that it was too early in the evolution of the second action to meaningfully assess common issues and the risk of inconsistent findings. Further delay was highly prejudicial to the plaintiff. Application dismissed.

Wood v. Farr Ford Ltd. (2008), 2008 CarswellOnt 6116, 67 C.P.C. (6th) 23 (Ont. S.C.J.).

Motion brought by the plaintiff to have his action and the action against him brought by the defendants to be consolidated into once action. Defendants were represented by different counsels in the actions and opposed consolidation due to possible loss of its counsel of choice in its action against plaintiff. Motion allowed. There was no reason that defendants would not be able to continue to have their present counsel represent them with their counsel of choice serving as co-counsel. Consolidation would provide great time and costs savings.

Cunning v. Whitehorse (City), 2009 CarswellYukon 90, 2009 YKSC 48, 74 C.P.C. (6th) 141 (Y.T. S.C.).

Plaintiff and other homeowners brought action in Supreme Court. Plaintiff brought concurrent action in Small Claims Court, making same allegations. Action stayed in Small Claims Court until plaintiff discontinued action in Supreme Court. Trial judge came to correct conclusion that Small Claims Court had jurisdiction to hear dispute. Since plaintiff only sought damages, it did not matter that litigation peripherally involved land. Litigation would likely involve some analysis of easement agreement but only in context of what city should have done as prudent municipality.

Farlow v. Hospital for Sick Children, 2009 CarswellOnt 7124, [2009] O.J. No. 4847, 100 O.R. (3d) 213, 83 C.P.C. (6th) 290 (Ont. S.C.J.).

The plaintiffs brought a medical malpractice action in Small Claims Court against hospital and doctors for the death of their infant daughter. The defendants brought the motion to transfer action to Superior Court and exempt it from simplified procedure, and plaintiffs sought order immunizing them from costs in Superior Court. Motion granted. The action was exempted from simplified procedure. Costs immunity not granted. The claim raised complex issues requiring evidence from number of experts. Given reasons for transferring, particularly the need for discovery and expert witnesses, it was preferable to exempt case from simplified procedure.

A judge of a superior court has the inherent power to transfer a matter from the Small Claims Court to the Superior Court in appropriate circumstances (*Vigna v. Toronto Stock Exchange*, 28 C.P.C. (4th) 318, [1998] O.J. No. 4924, 115 O.A.C. 393, 1998 CarswellOnt 4560 (Ont. Div. Ct.) at para. 7). It is, however, a discretion that should be rarely exercised (*Crane Canada Co. v. Montis Sorgic Associates Inc.*, 2006 CarswellOnt 3051, [2006] O.J. No. 1999 (Ont. C.A.)).

Given the reasons for transferring this case to the Superior Court, that is, the complexity and seriousness of the allegations, the need for discovery and the number of potential expert witnesses, it is preferable to exempt the case from simplified procedure.

Court's Jurisdiction to Grant Costs Immunity

The courts' broad discretion to order costs has long been recognized (*British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003), 21 B.C.L.R. (4th) 209, 309 W.A.C. 161, 189 B.C.A.C. 161, [2004] 1 C.N.L.R. 7, 233 D.L.R. (4th) 577, 2003 CarswellBC 3041, 2003 CarswellBC 3040, 2003 SCC 71, [2003] 3 S.C.R. 371, 313 N.R. 84, [2004] 2 W.W.R. 252, 114 C.R.R. (2d) 108, [2003] S.C.J. No. 76, 43 C.P.C. (5th) 1 (S.C.C.)). In Ontario, this discretion is recognized in section 131(1) of the *Courts of Justice Act* and r. 57.01 of the *Rules of Civil Procedure*.

There have been several exceptions to the general rule that costs follow the cause and that costs can only be determined at the conclusion of the proceeding. A losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs. In exceptional cases, the successful party may have to pay the costs of the losing party (*B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1995), [1994] S.C.J. No. 24, EYB 1995-67419, 1995 CarswellOnt 515, 1995 CarswellOnt 105, 78 O.A.C. 1, 176 N.R. 161, 26 C.R.R. (2d) 202, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1, 21 O.R. (3d) 479 (note), 9 R.F.L. (4th) 157 (S.C.C.)). Interim or advance costs may be awarded prior to the conclusion of the proceeding. Access to justice may be a factor to be taken into consideration.

A costs immunity order raises the risk that the party that has been immunized from a costs order may fail to be accountable for the time and money expended on the case. However, this risk could be addressed by requiring that the litigant relinquish some control over the litigation process. The action should be transferred. Given the nature of the case, it should be exempted from the simplified procedure.

Craig-Smith v. John Doe, [2009] I.L.R. I-4889, 2009 CarswellOnt 5827 (Ont. S.C.J.), Hourigan J.

The plaintiff brought motion for order that actions be consolidated or tried together. Motion granted. Actions had overlapping facts, evidence and legal issues and were sufficiently similar. This was not one of the clearest of cases where actions should be separated. The defendant did not establish any prejudice if motion granted.

Atkins v. Joyce, 2010 BCPC 147, 2010 CarswellBC 1867 (B.C. Prov. Ct.).

Two applications heard:

> 1) Application by claimant, Atkins, for an order consolidating action with actions no. 0509789 and 0509790 to the Supreme Court. If consolidation not granted, the claimant sought order for Action No. 0509789 to be transferred to Supreme Court.
>
> 2) Application by defendants, Joyce and Ishida, for order to enforce settlement agreement reached at pre-trial conference and stay of proceedings.

Was there a concluded settlement to enforce? See *Gerald Walsh Recruitment Services Inc. v. Fraser*, 2002 NSSC 105, 2002 CarswellNS 179, [2002] N.S.J. No. 204 (N.S. S.C.).

See *Radhakrishnan v. University of Calgary Faculty Assn.* (2002), 2002 ABCA 182, 2002 CarswellAlta 943, [2002] A.J. No. 961, 312 A.R. 143, [2003] 1 W.W.R. 244, 5 Alta. L.R. (4th) 1, 215 D.L.R. (4th) 624, 45 Admin. L.R. (3d) 77, 281 W.A.C. 143 (Alta. C.A.)

> 43 Each party to a settlement makes concessions and assumes some risk, in favour of bringing the dispute to an end. Interests of finality prevail, unless there are contractual problems such as fraud, misrepresentation, duress, undue influence, unconscionability, or mutual or unilateral mistake.
>
> 45 The public interest in finality is noticed in *Christiansen v. Bachul* (2001), 284 A.R. 196: "There is a well-established policy in favour of finality of litigation. To accede to this application would undermine that policy." The principle of finality was emphasized where it precluded interference with settlement of even an infant's claim made on incomplete and erroneous fact assumptions: see *Tsaoussis v. Baetz*, 1998 CanLII 5454 (ON C.A.).
>
> 49 Whether or not that is correct, the strong policy of the law is to let parties negotiate their own settlements: *Amoco Can. Petro. Co. v. Propak Systems*, 2001 ABCA 110 (CanLII), 2001 ABCA 110. Absent material inducement by misrepresentation, fraud, duress or undue influence, the courts steadfastly refuse to look at the adequacy of consideration.
>
> Based on sections 2(1) and (2) of the *Small Claims Act* and *Rules* as well as following policy in favour of finality of litigation, application to consolidate three files to the Supreme Court denied as well as the application to transfer Action No. 0509789 to the Supreme Court made by the claimant.

Da Costa v. TD Home and Auto Insurance Co., 2014 ONSC 6066, 2014 CarswellOnt 14432, 41 C.C.L.I. (5th) 149 (Ont. S.C.J.). Douglas J.

Consolidation would result in delay where plaintiff in serious financial need. Factors in favour of consolidation order and militating against order considered. Not appropriate for court to exercise its discretion and order consolidation. First action was scheduled for trial the following month and consolidation would result in delay in circumstances where plaintiff was in serious financial need and should be permitted to pursue relief.

J.P. Towing v. Intact, 2019 ONSC 1495, 2019 CarswellOnt 7232, L. A. Pattillo J. (Ont. S.C.J.)

There are two motions before the court. Intact moves for summary judgment dismissing the Action in its entirety on the ground that it raises no cause of action against it. J.P. Towing brought a cross-motion for various declarations and an order consolidating various actions.

J.P. Towing's claim for a declaration that the daily storage rate for the vehicles as determined by Deputy Judge Ashby of the Toronto Small Claims Court ("TSCC") is *res judicata* is a valid claim. Granting J.P. Towing summary judgment declaring that Intact is bound by the decision in *Sherwood* is the most expeditious and least expensive way of achieving a just result. J.P. Towing's motion seeks an Order consolidating the Repair and Storage Lien Applications and actions set out in the schedule attached to the Notice of Motion.

The relief sought by J.P. Towing essentially mirrors the relief sought by it in the Statement of Claim in the Action. Court not prepared to grant consolidation.

(2) Transfer from Small Claims Court — A proceeding in the Small Claims Court shall not be transferred under clause (1)(d) to the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court.

Case Law: *CAD-FM Micro Systems v. Coldmatic Refrigeration of Canada Ltd.* (1994), 71 O.A.C. 348 (Ont. Gen. Div.).

Defendant brought motion transferring trial to the General Division since counterclaim exceeded monetary jurisdiction of the court. Any action is limited in the Small Claims Court to its monetary jurisdiction. The action cannot be transferred to the General Division. The

plaintiff by counterclaim could commence a separate action in the General Division and apply s. 107 of the *Courts of Justice Act*.

MacMaster v. Insurance Corp. of British Columbia (1994), 24 C.P.C. (3d) 288 (B.C. C.A.).

The appellant sought a transfer of action from the Small Claims Court to the Supreme Court. The plaintiff brought an action on the last day of the limitation period and later discovered that the damages exceeded the limit of the Small Claims Court. There was no statutory authority to transfer the case. Appeal from 35 A.C.W.S. (3d) 194 was dismissed.

Rathjen v. Clippingdale (January 29, 1997), Doc. Nelson 5548 (B.C. S.C. [In Chambers]).

Plaintiff initiated several actions in Small Claims Court before commencing action in Supreme Court. Small Claims judge stayed actions pending trial in Supreme Court. Defendant sought to set aside stay. Court held that Small Claims judge had no jurisdiction to adjourn actions *sine die*. Actions could proceed.

Vigna v. Toronto Stock Exchange, 1998 CarswellOnt 4560, [1998] O.J. No. 4924, 115 O.A.C. 393, 28 C.P.C. (4th) 318 (Ont. Div. Ct.).

Motions judge declined to transfer matter, absent Vigna's consent to the transfer. The Toronto Stock Exchange appealed. Divisional Court allowed the appeal. The procedures of the Small Claims Court inadequate to deal with the complex nature of issues. Additional parties would have to participate, *viva voce* and documentary evidence would be required and expert opinion would be necessary. Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that, as far as possible, a multiplicity of legal proceedings shall be avoided. Section 107(1)(d) is applicable here. Judge had the necessary jurisdiction inherent to his powers as a Superior Court judge to control the process of the courts. Rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, appropriate here, does not contain any provision for the transfer of a case from Small Claims Court.

Hayes v. Maritime Life Assurance Co. (2000), 45 C.P.C. (4th) 333, 225 N.B.R. (2d) 133, 578 A.P.R. 133, 2000 CarswellNB 163 (N.B. Q.B.).

The plaintiff brought an action in Small Claims Court for a maximum $6,000. The insurance company applied to transfer the matter to the Court of Queen's Bench. The application was granted. The transfer was due to the complexity and the possibility of multiplicity of actions. The potential for payment under the policy continued until the plaintiff reached age 65. The potential existed for a $6,000 action in Small Claims Court every time the amount should have been paid and was not. No provision existed in small claims actions for discovery procedures or medical examination of the plaintiff prior to trial.

Cunningham v. Millard, 2005 CarswellBC 1890, 2005 BCPC 343 (B.C. Prov. Ct.), Judge D.E. Moss. Ruling on a Transfer Application to Supreme Court involving Provincial Court Small Claims.

Position that Provincial Court's $10,000 monetary limit insufficient to satisfy their claim, even with the court's enhanced jurisdiction to $25,000 as of September 1, 2005, monetary award they seek will exceed.

Appropriate to transfer case to Supreme Court of British Columbia for all purposes. Should the plaintiff's claim prove to be successful but have a value of under $25,000, claimant ought to be visited with costs as it was clearly open to proceed within the Provincial Court.

Griffioen v. Liao, 2003 CarswellOnt 5290, 68 O.R. (3d) 535 (Ont. S.C.J.).

Former "rule of thumb" that defamation actions should not be tried with other actions no longer applying. Two defamation actions and counterclaim arising out of dispute between two doctors over ten-month period. Consolidation of actions appropriate. See Rule 1.04(1) of the *Rules of Civil Procedure*. Consolidating claims and counterclaim more likely to promote pre-trial settlement and resolution.

Layland v. Roberts & Associates (2007), 2007 CarswellOnt 4847 (Ont. S.C.J.).

Motion pursuant to s. 107 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for order to have action commenced in Small Claims Court in Richmond Hill transferred and continued as an action before Superior Court in Toronto.

Layland further sought order allowing her to amend statement of claim pursuant to Rule 26 of the *Rules of Civil Procedure*. She sought under Rule 76 to proceed under the court's simplified Procedure.

Respondents brought cross-motion under Rule 21.01(3)(d) for order dismissing claim as frivolous and vexatious or abuse of process.

Layland cited case authorities to support position to amend pleadings. See *Denton v. Jones (No. 2)*, 1976 CarswellOnt 363, 14 O.R. (2d) 382, 73 D.L.R. (3d) 636, 3 C.P.C. 137 (Ont. H.C.) and *Atlantic Steel Industries Inc. v. CIGNA Insurance Co. of Canada*, [1997] O.J. No. 1278, 1997 CarswellOnt 913, 33 O.R. (3d) 12, (sub nom. *Atlantic Steel Industries Inc. v. Cigna Insurance Co. of Canada)* 31 O.T.C. 184 (Ont. Gen. Div.).

See also *Mrzlecki v. Kusztos*, 1987 CarswellOnt 850, [1987] O.J. No. 325, 59 O.R. (2d) 301 (Ont. H.C.) and *Williams (Litigation Guardian of) v. Barnett*, 2000 CarswellOnt 3681, [2000] O.J. No. 3815, 11 C.P.C. (5th) 224 (Ont. S.C.J.) as to new evidence to support increase in claim for damages.

Request for order to transfer Small Claims action to the Superior Court premature. No new evidence, medical or otherwise, that warranted a claim for higher damages. Court ordered Layland's motion under s. 107 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 dismissed. Motion under Rule 26 dismissed, cross-motion dismissed.

Shaughnessy v. Roth, 2006 CarswellBC 2963, 61 B.C.L.R. (4th) 268, 2006 BCCA 547, 386 W.A.C. 212, 233 B.C.A.C. 212 (B.C. C.A.).

Claimant filed claim with Small Claims Court for damages against defendant, who filed counterclaim. Defendant also commenced action in Supreme Court. Defendant successfully applied for transfer of claim and counterclaim to Supreme Court. Provincial Court judge stated that two hearings in two different courts could result in conflicting judicial findings, and there was potential for damages that would exceed jurisdiction of court. Claimant's application for judicial review was granted in part. Provincial Court directed to determine whether claim had monetary outcome that might exceed $25,000, and if so, whether claimant chose to abandon amount over $25,000. Defendant appealed. Appeal dismissed. For purposes of r. 71, court must consider monetary values of claim and counterclaim separately.

Country Cottage Living Inc. v. Heath (2008), 2008 CarswellOnt 2766, 72 C.L.R. (3d) 301 (Ont. S.C.J.).

Trial judge consolidated Small Claims Action with the Construction Lien Action. The counsel for the defendant submits that s. 107(2) of the *Courts of Justice Act* is inconsistent with the general consolidation power provided for in s. 59(2) of the *Construction Lien Act*. Argument rejected by the court. The wording of s. 107(2) of the *Courts of Justice Act* is clear and unambiguous and the consolidation power under s. 59(2) of the *CLA* is limited to lien actions and does not apply to "regular" actions.

Farlow v. Hospital for Sick Children, 2009 CarswellOnt 7124, 83 C.P.C. (6th) 290, [2009] O.J. No. 4847, 100 O.R. (3d) 213 (Ont. S.C.J.).

Plaintiffs brought a complex medical malpractice case to Small Claims Court. Defendants moved successfully for order transferring action to Superior Court *and* exempting it from simplified procedure. Plaintiffs' request for immunity from costs dismissed. Court having discretion to grant such order in exceptional circumstances. Plaintiffs failed to establish they would be denied access to justice. Plaintiffs not immunized from costs. Facts were complex and expert evidence was required.

Lau v. Rai, 2009 CarswellBC 1390, 2009 BCSC 696, [2009] B.C.J. No. 1037, 72 C.P.C. (6th) 112 (B.C. S.C.); additional reasons to 2007 CarswellBC 2888, 2007 BCSC 1746 (B.C. S.C.); affirmed 2010 BCCA 26, 2010 CarswellBC 99, 2 B.C.L.R. (5th) 119, [2010] 5 W.W.R. 18 (B.C. C.A.), R.E. Powers J.; additional reasons 2010 BCCA 194, 2010 CarswellBC 944, 282 B.C.A.C. 110, 476 W.A.C. 110 (B.C. C.A.).

The plaintiff brought action in Small Claims Court. Plaintiff successfully applied to have proceedings transferred to Supreme Court. Defendants contended that any costs allowed to plaintiff should be limited by r. 57(10) of *Rules of Court*, 1990. Rule states that the plaintiff recovering sum within jurisdiction of Provincial Court under *Small Claims Act* is not entitled to costs, other than disbursements, unless court finds there was sufficient reason to bring action in Supreme Court, and so orders. The plaintiff had sufficient reason for brings proceedings to Supreme Court when it was initially transferred from Provincial Court.

376101 Alberta Ltd. v. Westvillage Condominiums Ltd., 2009 ABPC 329, 2009 CarswellAlta 2231, 483 A.R. 304 (Alta. Prov. Ct.).

The plaintiff brought action in Provincial Court against the developers of a condominium. Application dismissed. Superior Court had jurisdiction over alternative claim for relief under *Business Corporations Act*. Fact there were 45 other actions against defendants for damages totalling $750,000 was not ground for transferring this action. Claim did not bring title to land into question.

Gradek v. DaimlerChrysler Financial Services Canada Inc./Services Financiers DaimlerChrysler Canada Inc., 2010 CarswellBC 665, 2010 BCSC 356, 95 C.P.C. (6th) 375 (B.C. S.C. [In Chambers]); affirmed 2011 BCCA 136, 2011 CarswellBC 588, 100 C.P.C. (6th) 12, *(*sub nom. *Gradek v. DaimlerChrysler Financial Services Canada Inc.)* 307 B.C.A.C. 7, *(*sub nom. *Gradek v. DaimlerChrysler Financial Services Canada Inc.)* 519 W.A.C. 7 (B.C. C.A.); additional reasons to 2009 BCSC 1572, 2009 CarswellBC 3297, [2009] B.C.J. No. 2432 (B.C. S.C.).

The defendant argued the plaintiff should receive costs only if action was in accordance with r. 57(10) of *Rules of Court*, 1990, which states that the plaintiff who recovers sum in jurisdiction of Provincial Court under *Small Claims Act* is not entitled to costs unless the court finds there was sufficient reasons for bringing action in Supreme Court. The plaintiff was from Poland and spoke little English. The plaintiff would have had extraordinary difficulty presenting case on his own. The defendant submitted that in Provincial Court it would have been represented by the adjuster, but Court held that the plaintiff still would have been outmatched.

1000728 Ontario Ltd. v. Kakish, 2010 ONSC 538, 2010 CarswellOnt 599, 88 C.P.C. (6th) 108 (Ont. S.C.J.).

The consignee brought motion to transfer action from Small Claims Court to Superior Court of Justice. Motion granted. Case complex and expert evidence required to assess interrelationship of invoices, purchase orders, bills of lading and other documents as well as their legal relationship. Small Claims Court lacked procedure for exchange of expert reports prior to trial. Full discovery was required.

Cases may be moved from the Small Claims Court on a motion and with the order of a Superior Court judge. See *Alexandrov v. Csanyi*, 247 O.A.C. 228, 2009 CarswellOnt 1325 (Ont. Div. Ct.); *Csanyi v. Alexandrov*, 2009 CarswellOnt 5446 (Ont. S.C.J.), and *Haines, Miller & Associates Inc. v. Foss*, 1996 CarswellNS 301, 3 C.P.C. (4th) 349, 450 A.P.R. 53, 153 N.S.R. (2d) 53 (N.S. S.C. [In Chambers]); additional reasons at 1996 CarswellNS 304, 466 A.P.R. 389, 158 N.S.R. (2d) 389 (N.S. S.C. [In Chambers]).

In *Alexandrov*, the court stated that the jurisprudence on transfer is that a plaintiff may be forced, in very exceptional cases, into the Superior Court against the actual wishes of the

plaintiff. In *Farlow v. Hospital for Sick Children*, 2009 CarswellOnt 7124, 83 C.P.C. (6th) 290, [2009] O.J. No. 4847, 100 O.R. (3d) 213 (Ont. S.C.J.), Court held that on a motion to transfer an action from Small Claims Court to the Superior Court of Justice, there must be a balancing of the various factors enumerated in that decision.

The Small Claims Court does *not* have procedural framework similar to rr. 53.03 and 76.10(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for the timely exchange of expert reports in advance of the trial. In *Crane Canada Co. v. Montis Sorgic Associates Inc.*, 2005 CarswellOnt 9989, [2005] O.J. No. 6247 (Ont. S.C.J.); affirmed 2006 CarswellOnt 3051, [2006] O.J. No. 1999 (Ont. C.A.), the court found that expert evidence would be central to the determination of the claims and that such evidence would likely be complex, and decided accordingly that claims would be more appropriately dealt with in the Superior Court.

Capano v. Rahm, 2010 CarswellOnt 4760, 2010 ONSC 3241, [2010] O.J. No. 2866 (Ont. S.C.J.); additional reasons at 2010 ONSC 4131, 2010 CarswellOnt 6013 (Ont. S.C.J.); leave to appeal refused 2010 CarswellOnt 7425 (Ont. Div. Ct.).

The motion was brought pursuant to the rr. 1.04(1), (1.1) and 48.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and sections 23(2) and 110 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 by the plaintiffs, for order moving matter *to* the Small Claims Court, in light of the increase in the Small Claims Court's monetary jurisdiction to $25,000 from $10,000 as of January 1, 2010.

Section 23(2) of the *Courts of Justice Act* makes it clear that an action in the Superior Court of Justice may be transferred to the Small Claims Court before the trial commences only on the consent of *all* parties. The defendant refused to consent.

Court may draw on its inherent powers over its own process to transfer an action from one judicial forum to another: see *Vigna v. Toronto Stock Exchange* (1998), 28 C.P.C. (4th) 318, [1998] O.J. No. 4924, 115 O.A.C. 393, 1998 CarswellOnt 4560 (Ont. Div. Ct.) at para. 7. However, particular facts of this case do not warrant its exercise.

Master has jurisdiction to decide whether to move an action in the Superior Court to the Small Claims Court. Section 107(4) of the *Courts of Justice Act* states that where there are two or more proceedings pending in two or more different courts, a request to transfer must be made to a judge of the Superior Court. In other words, judges of the Superior Court have the exclusive jurisdiction to hear motions for consolidation, hearing together, or hearing one after the other of *existing* proceedings. By implication, requests for transfer *simpliciter* can be dealt with by either a judge or a master.

On February 22, 2010, pretrial adjourned to a date after August 1, 2010. Plaintiffs had benefit of mediation, two motions and the assessment of Master Haberman. Pretrial to proceed without need for expert evidence. It was too late to transfer case to another court. Motion dismissed.

Sioux Lookout (Municipality) v. Goodfellow, 2010 ONSC 1812, 2010 CarswellOnt 2349 (Ont. S.C.J.); additional reasons at 2010 ONSC 2875, 2010 CarswellOnt 4195, [2010] O.J. No. 2564 (Ont. S.C.J.).

The municipality of Sioux Lookout was the plaintiff in this action in the Superior Court. Goodfellow was the sole defendant; Goodfellow was the plaintiff in 10 actions in the Small Claims Court at Dryden.

A motion was made to strike Goodfellow's defence and counterclaim, in a Superior Court action, with leave to file a fresh claim and counterclaim to include claims made by Goodfellow as the plaintiff in the 10 Small Claims Court actions, and to stay or dismiss the Small Claims Court actions. In the alternative, the municipality sought to have the 10 Small Claims Court actions consolidated with the Superior Court of Justice action.

All 10 Small Claims Court actions should be transferred to the Superior Court of Justice.

See *Vigna v. Toronto Stock Exchange*, 1998 CarswellOnt 4560, [1998] O.J. No. 4924, 115 O.A.C. 393, 28 C.P.C. (4th) 318 (Ont. Div. Ct.). It is part of the jurisdiction of the Superior Court to transfer a matter from the Small Claims Court to the Superior Court in appropriate circumstances, without the consent of the plaintiff in the Small Claims Court proceedings.

It was inappropriate for Goodfellow to split what was, in essence, one cause of action into separate causes of action so that they could proceed in the Small Claims Court. See Rule 6.02 of the *Small Claims Court Rules*.

Goodfellow agreed to transfer the two Small Claims Court actions relating to the costs of his claim to the Superior Court of Justice, leaving the remaining eight Small Claims Court actions, totalling $21,418.44, within recently increased monetary jurisdiction of the Small Claims Court of $25,000. All ten Small Claims Court actions were essentially one cause of action.

The transfer of the actions was consistent with the policy objective of the *Rules of Civil Procedure* as set out in rule 1.04(1):

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Rule 6.03(1) of the *Small Claims Court Rules* is to similar effect:

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the *Courts of Justice Act*.

Once a Small Claims Court action is transferred to the Superior Court, the question becomes whether the court should order consolidation, or whether it should order the hearing of the proceedings together or one after the other.

Particulars for pleading are only to be ordered when they are not within the knowledge of the party demanding them and they are necessary to enable the other party to plead. The onus to satisfy the court that these two criteria have been met rests on the party requesting the particulars. See *Obonsawin v. Canada*, 2001 CarswellOnt 306, [2001] O.J. No. 369, [2001] 2 C.T.C. 96, [2001] G.S.T.C. 26 (Ont. S.C.J.) *per* Epstein J. (as she was then) and *Cutajar v. Frasca*, 2009 CarswellOnt 7476, [2009] O.J. No. 5126 (Ont. Master), *per* Master Muir.

Vista Sudbury Hotel Inc. v. Double T Earth Moving Ltd., 2011 ONSC 3454, 2011 CarswellOnt 4890 (Ont. S.C.J.).

"Double T" brought an action against Vista in the Small Claims Court for payment of unpaid invoices. Vista filed a defence to that action.

Vista subsequently brought an action in the Superior Court of Justice against Double T for a breach of contact. Vista brought a motion for an order traversing Sudbury Small Claims Court file to the Ontario Superior Court of Justice.

The actions in the Small Claims Court and the Superior Court of Justice involved the same parties and arose out of the same set of facts. Common questions of law and fact were discussed.

The motion was governed by section 107 of the *Courts of Justice Act*.

Three issues arose: (1) Whether the plaintiff was requesting an order under section 107(1)(d); (2) If so, whether there was jurisdiction in the court to make the requested order; and (3) If so, whether that order ought to be granted in the circumstances of the case.

Section 107(3) of the *Courts of Justice Act* provides that a proceeding in a Small Claims Court shall not be required under subclause (1)(e)(ii) to be asserted by way of counterclaim in a proceeding in the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court.

Section 107(2) provides that a proceeding in the Small Claims Court *shall not* be transferred under clause (1)(d) to the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court. Double T, the plaintiff, had *not* consented.

Vista relied on the case of *Vigna v. Toronto Stock Exchange*, 1998 CarswellOnt 4560, [1998] O.J. No. 4924, 115 O.A.C. 393, 28 C.P.C. (4th) 318 (Ont. Div. Ct.), where the Divisional Court held that it is open to a judge of the Superior Court to transfer a matter from the Small Claims Court to the General Division in appropriate circumstances without the consent of the plaintiff in the Small Claims proceeding. The case was distinguishable because the Divisional Court specifically found that the relief claimed it did not fall under section 107(1)(d) and the consent of the plaintiff was not required.

Section 107 clearly contemplates coincident actions in the Small Claims Court and the Superior Court of Justice that may involve common parties, common issues of fact, and common issues of law.

Where the effect of the requested order is to force the plaintiff in the Small Claims Court action to adjudicate his or her claims in the Superior Court in concert with another Superior Court action, or as a counterclaim in a Superior Court action, the consent of the plaintiff is a precondition to transfer.

The motion was dismissed.

Resort Country Realty Inc. v. Tanglewood (Sierra Homes) Inc., 2013 ONSC 1120, 2013 CarswellOnt 1770 (Ont. S.C.J.); additional reasons 2013 ONSC 1650, 2013 CarswellOnt 3372 (Ont. S.C.J.).

The Respondent moves for leave to appeal the order of McCarthy J. dated October 3, 2012 which granted the Plaintiff's motion to consolidate and transfer Small Claims Court actions to the Superior Court of Justice and which dismissed the Defendant's motion to strike the claims for abuse of process.

It is conceded that but for the issues arising from the earlier proceeding in the Superior Court of Justice the consolidation and transfer of the several Small Claims Court actions to this court would be proper.

In the present case there wereco-existing claims in three courts. The consent dismissal was silent as to these other cases. The correspondence referred to discontinuance, then dismissal, of the case in the Superior Court of Justice and the consent and resulting order referred to it by number. No one, not either lawyer, chose to be specific about the co-existing cases.

There is no prejudice that cannot be remedied by applying the same principles to bring the counterclaim back before the court or by costs for the steps generated by the plaintiff blundering into the Small Claims Court.

Motion dismissed.

Singh v. McHatten, 2012 BCCA 286, 2012 CarswellBC 1878, 33 B.C.L.R. (5th) 251, [2012] 10 W.W.R. 280, 323 B.C.A.C. 314, 550 W.A.C. 314 (B.C. C.A.).

The respondent brought two separate actions for claims arising from a single motor vehicle accident; the first was in the Small Claims Court and the second in Supreme Court.

The appellants in the Supreme Court action pleaded *res judicata* and moved to dismiss the action. On 11 August 2011, a summary trial judge dismissed the application: 2011 BCSC 1093, 2011 CarswellBC 2098 (B.C. S.C.); reversed 2012 BCCA 286, 2012 CarswellBC 1878, 33 B.C.L.R. (5th) 251, [2012] 10 W.W.R. 280, 323 B.C.A.C. 314, 550 W.A.C. 314 (B.C. C.A.). The appellants appeal from that decision.

The appellants say the judge erred in confusing the respondent's motivation for bringing the first proceeding with the cause of action supporting it and in failing to identify any valid special circumstance justifying the refusal to give effect to cause of action estoppel.

Innes v. Bui, is not similar to the case at bar. The Small Claims action in this case is not framed in terms of contract or breach of statutory duty against ICBC but in negligence against alleged tortfeasors.

Appeal allowed, action dismissed.

Vista Sudbury Hotel Inc. v. Double T Earth Moving Ltd., 2011 ONSC 3454, 2011 CarswellOnt 4890, R. D. Gordon J. (Ont. S.C.J.).

The actions in the Small Claims Court and the Superior Court of Justice involve the same parties and arise out of the same set of facts. The two actions will involve common questions of law and fact.

Vista's motion was governed by provisions of section 107 of the *Courts of Justice Act*.

Three issues arise from this section: (1) Whether the plaintiff is requesting an order under section 107(1)(d); (2) If so, whether there is jurisdiction in the court to make the requested order; and (3) If so, whether that order ought to be granted in the circumstances of this case.

Section 107 clearly contemplates coincident actions in the Small Claims Court and the Superior Court of Justice that may involve common parties, common issues of fact, and common issues of law. Where the effect of the requested order is to force the plaintiff in the Small Claims Court action to adjudicate his or her claim in the Superior Court in concert with another Superior Court action, or as a counterclaim in a Superior Court action, the consent of the plaintiff is a precondition to transfer. Absent Double T's consent in this instance, the court was unable to make the requested order. Should court be mistaken, however, this is not the type of rare case referred to by the court in *Vigna v. Toronto Stock Exchange* that would warrant a transfer to the Superior Court.

Vista's motion is dismissed.

Sioux Lookout (Municipality) v. Goodfellow, 2010 ONSC 1812, 2010 CarswellOnt 2349, Mr. Justice D.C. Shaw (Ont. S.C.J.); additional reasons 2010 ONSC 2875, 2010 CarswellOnt 4195, [2010] O.J. No. 2564 (Ont. S.C.J.).

Goodfellow is the plaintiff in 10 actions in the Small Claims Court at Dryden. The Municipality is the sole defendant in 9 of the 10 actions. The Municipality, Stan Nissley, and Perron Contracting 917260 Ont. Inc. are the defendants in one of the 10 actions. All 10 Small Claims Court actions should be transferred to the Superior Court of Justice.

Based on *Vigna v. Toronto Stock Exchange*, 1998 CarswellOnt 4560, 28 C.P.C. (4th) 318, 115 O.A.C. 393, [1998] O.J. No. 4924 (Ont. Div. Ct.), it is within the jurisdiction of the Superior Court of Justice to transfer a matter from the Small Claims Court to the Superior Court of Justice in appropriate circumstances, without the consent of the plaintiff in the Small Claims Court proceeding.

It was inappropriate for Goodfellow to split one cause of action into separate causes of action so that they could proceed in the Small Claims Court. Rule 6.02 of the *Small Claims Court Rules* prohibits a cause of action from being divided into two or more actions for the purpose of bringing it within the court's jurisdiction. All 10 Small Claims Court actions are essentially one cause of action.

Transfer of actions consistent with the policy objective of the *Rules of Civil Procedure* as set out in rule 1.04(1):

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Rule 6.03(1) of the *Small Claims Court Rules* is to similar effect:

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the *Courts of Justice Act*.

1000728 Ontario Ltd. v. Kakish, 2010 ONSC 538, 2010 CarswellOnt 599, 88 C.P.C. (6th) 108 (Ont. S.C.J.).

Motion by defendant, ("Access"), for an order transferring Small Claims Court Claim (the "Action") to the Superior Court of Justice. Baron pleads it is entitled to recover from Access unpaid invoices by reason of Access being a consignee of goods under a bill of lading for purposes of the *Mercantile Law Amendment Act*, R.S.O. 1990, c. M.10.

Cases may be moved from the Small Claims Court on a motion and with the order of a Superior Court judge. (See: *Alexandrov v. Csanyi*, 2009 CarswellOnt 1325, 247 O.A.C. 228 (Ont. Div. Ct.); *Csanyi v. Alexandrov*, 2009 CarswellOnt 5446 (Ont. S.C.J.); *Haines, Miller & Associates Inc. v. Foss*, 1996 CarswellNS 301, 153 N.S.R. (2d) 53, 3 C.P.C. (4th) 349, 450 A.P.R. 53 (N.S. S.C. [In Chambers]); additional reasons 1996 CarswellNS 304, 158 N.S.R. (2d) 389, 466 A.P.R. 389 (N.S. S.C. [In Chambers]).

In *Farlow v. Hospital for Sick Children*, 2009 CarswellOnt 7124, 100 O.R. (3d) 213, 83 C.P.C. (6th) 290, [2009] O.J. No. 4847 (Ont. S.C.J.) at para. 18, Court held that on a motion to transfer an action from Small Claims Court to the Superior Court of Justice, there must be a balancing of the various factors enumerated in that decision.

Expert evidence will be necessary for determination of issues are to be tried. Expert evidence can be given in the Small Claims Court. However, it is not contested that the Small Claims Court does not have procedural framework similar to Rules 53.03 and 76.10(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for the timely exchange of expert reports in advance of the trial.

See *Crane Canada Co. v. Montis Sorgic Associates Inc.*, 2005 CarswellOnt 9989, [2005] O.J. No. 6247 (Ont. S.C.J.); affirmed 2006 CarswellOnt 3051, [2006] O.J. No. 1999 (Ont. C.A.). The Small Claims Court is not in a position to provide consecutive trial dates, which is a standard procedure in the Superior Court of Justice. Motion granted.

Autometric Autobody Inc. v. High Performance Coatings Inc., 2014 ONSC 6073, 2014 CarswellOnt 14460, 328 O.A.C. 197, [2014] O.J. No. 4868 (Ont. Div. Ct.).

Motion argued before Snowie J. of the Superior Court who ordered both the SCC Claim and Counterclaim to be transferred to the Superior Court and be tried together with the SCJ Action.

In *Vigna v. Toronto Stock Exchange*, the court recognized that a judge of the Superior Court of Justice had the inherent jurisdiction to transfer a Small Claims Court action to the Superior Court without the consent of the plaintiff, but only in the "rare" case. The motions judge failed to inquire whether the issues raised in the SCC Claim and Counterclaim were capable of being justly and fairly resolved by procedures available in the Small Claims Court. The SCC Claim and SCC Counterclaim shall continue in the Small Claims Court. Allowing the appeal would result in concurrent proceedings in the Small Claims Court and the Superior Court of Justice. However, as Gordon J. observed in *Vista Sudbury Hotel Inc. c. Double T Earth Moving Ltd.*, such a result is contemplated by c. 107 of the *CJA*.

M. Tucci Construction Ltd. v. Lockwood, 2002 CarswellOnt 365, [2002] O.J. No. 424 (Ont. C.A.).

Cause of action estoppel did not apply because same cause of action not determined in earlier proceedings by court of competent jurisdiction. The earlier Small Claims Court action resolved in a settlement. No determination by a court and there were no releases. It may well be that these were separate causes of action. Respondent was not required to assert his complaint with a counterclaim, since counterclaim would have exceeded the monetary jurisdiction of the Small Claims Court. It could only be moved to Superior Court with appellant's consent. Appeal dismissed with costs.

Beacon Hall Golf Club v. Rogers, 2014 ONSC 318, 119 O.R. (3d) 72, [2014] O.J. No. 880 (Ont. S.C.J.).

Golf club suing Defendant in Small Claims Court for balance owing for membership dues and other items. Defendant counterclaiming for $35,000 (representing value of his equity membership that Plaintiff had allegedly confiscated) and alleging Plaintiff had breached its fiduciary duty to him. Defendant moving to transfer matter to Superior Court under Rule 76 of simplified procedure. Motion granted. Both parties will have the advantage in Superior Court of expanded discovery, consideration of equitable claims, and use of experts. Transfer also avoiding multiplicity of proceedings.

Majeau v. Condominium Corporation No. 0024327, 2019 ABQB 603, 2019 CarswellAlta 1621, Justice S.D. Hillier (Alta. Q.B.)

Appeal from decision of the Provincial Court which ordered that the Plaintiffs' action against the named Defendants be transferred to the Court of Queen's Bench Judicial Centre of Fort McMurray. The Appellants assert that the Judge erred in concluding that Provincial Court lacked jurisdiction to hear and determine the action of the Plaintiffs. In brief oral reasons, the Judge stated that she considered herself bound by the decision of Smart MC in *Condominium Corp. No 042 5636 v. Chevillard*, 2012 ABQB 131, 2012 CarswellAlta 352 (Alta. Q.B.), as regards a limited remedial jurisdiction under the *Condominium Property Act*, RSA 2000, c. C-22 (the *CPA*).

Appellants argue that s 9.6(1)(a)(i)(B) of the *Provincial Court Act*, RSA 2000, c P-31, confers jurisdiction to hear and adjudicate on any claim or counterclaim:

> B. for damages, including damages for breach of contract, if the amount claimed or counterclaimed, as the case may be, exclusive of interest payable under an Act or by agreement on the amount claimed, does not exceed the amount prescribed by the regulations.

Claim was reduced to the regulatory maximum of $50,000 as required.

The Provincial Court is not a court of inherent jurisdiction and derives authority from the *Provincial Court Act: 527375 Alberta Ltd. v. EPCOR Energy Services (Alberta) Inc.*, 2003 ABQB 997, 2003 CarswellAlta 1740, 349 A.R. 247, 26 Alta. L.R. (4th) 306, 41 C.P.C. (5th) 298, [2004] 10 W.W.R. 725, [2003] A.J. No. 1510 (Alta. Q.B.) at para. 20. The jurisdiction of the Court is clearly set out in ss 9.2 and 9.6. The remedy for lawsuits which fall outside the Provincial Court's jurisdiction is set out in s 56(1): "If at any time a claim, counterclaim or defence involves a matter that is beyond the jurisdiction of the Court, the Court may order that the matter be transferred to the Court of Queen's Bench."

The Provincial Court judge properly exercised discretion to transfer this matter to Queen's Bench. Under the *CPA* as presently worded, a claim for damages based on breach of statutory obligations under the *CPA*, whether deliberate or arising from negligence, cannot be adjudicated in the Provincial Court. Appeal dismissed.

Velocity Standardbreds v. Tackoor, 2019 ONSC 1995, 2019 CarswellOnt 4925, Justice M. L. Lack (Ont. S.C.J.)

Motion for an order dismissing this action under the provisions of rule 21.01(1)(a) and rule 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, as barred by the application of the principles of *res judicata*, collateral attack and/or abuse of process.

The defendants, Tackoor and Tackoor Racing's position is that the three constituent elements of *res judicata* arise on the plaintiff Velocity's claim in the present action. The position of Velocity is that its claim is not barred by the principle of *res judicata*. Its claim is for an amount outside the jurisdiction of the Small Claims Court. To advance that claim in the context of the Small Claims Court proceeding, Velocity would have had to commence a separate action in Superior Court and then sought to consolidate the two actions under s. 107

of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. That section provides in clause 107(1)(d) that a proceeding in Small Claims Court shall not be transferred to Superior Court without the consent of the plaintiff in the Small Claims Court proceeding.

S. 107 of the *Courts of Justice Act* has the effect of barring the application of *res judicata* to Velocity's action in the present circumstances.

The parties to the present action are not the same parties who were involved in the Small Claims Court action. The issues were also different. The Small Claims Court judgment does not bar this action in the Ontario Superior Court by operation of the principle of *res judicata*.

Velocity's claims are not inconsistent with and do not bring into question the default judgment obtained by Tackoor in the Small Claims Court for payment of invoices. In pith and substance, Velocity's claims in the Superior Court relate to negligence. The claim is not a collateral attack on the Small Claims Court judgment, which was simply for a liquidated amount, as claimed. The defendants' motion is dismissed.

Ontario Federation of Osteopathic v. Industrial Alliance Ins., 2020 ONSC 5776, 2020 CarswellOnt 16990, G. Dow, J. (Ont. S.C.J.)

Defendant seeks to transfer Small Claims Court action to the Superior Court of Justice. Alternatively, portions of the relief sought are beyond the jurisdiction of the Small Claims Court.

The legal test to be applied sets out five factors:

(i) the complexity of the issues;

(ii) the importance of export evidence to determine the issues;

(iii) the need for discovery;

(iv) whether the case involves issues of general importance; and

(v) the desire for a just and fair determination.[17]

Trial will take more than one day. Small Claims Court does not provide continuous trial dates.[18] Justice Herman in *Farlow v. Hospital for Sick Children states* "Small Claims Court is hospitable to litigants who are not represented by counsel. Its procedures are straightforward".[19] That is not the situation here.

Action should proceed in the Superior Court of Justice.

(3) Idem — A proceeding in the Small Claims Court shall not be required under subclause (1)(e)(ii) to be asserted by way of counterclaim in a proceeding in the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court.

Case Law: *Miller v. Walters*, 2008 CarswellBC 2190, 2008 BCPC 292 (B.C. Prov. Ct.).

Claimants brought application for order transferring claim to Supreme Court. Application dismissed. Claimants did not show, on balance of probabilities, prima facie case that monetary outcome of claim would exceed $25,000. Claimants offered no evidence supporting their assertion.

Csanyi v. Alexandrov (2009), [2009] O.J. No. 3829, 2009 CarswellOnt 5446 (Ont. S.C.J.).

Circumstances necessary to enable court to exercise its discretion to transfer Small Claims action to Superior Court not present. Issues in Small Claims action not complex. Simple

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[17] See *Farlow v. Hospital for Sick Children*, 2009 CarswellOnt 7124, 100 O.R. (3d) 213, 83 C.P.C. (6th) 290, [2009] O.J. No. 4847 (Ont. S.C.J.) at para. 20.

[18] ~~*Ibid*~~, *supra at para. 42.*

[19] *Supra at para. 48.*

claim within monetary jurisdiction of the Small Claims Court could be easily resolved within Small Claims Court procedure. Allowing the Small Claims action to proceed would not cause any injustice to any of the parties in either the Small Claims action or the Superior Court action.

Farlow v. Hospital for Sick Children (2009), 2009 CarswellOnt 7124, [2009] O.J. No. 4847 (Ont. S.C.J.).

Defendants sought order transferring small claims action by plaintiffs to the Superior Court and for exemption from simplified procedure. The court allowed motion because nature and complexity of issues warranted transfer to Superior Court and exemption from simplified procedure to facilitate discovery of several experts.

However, circumstances did not warrant exceptional remedy of order granting plaintiffs immunity from a future award of costs. Insufficient evidence of plaintiffs' finances to determine whether denial of access to justice would occur if case transferred. No costs immunity or interim costs were awarded. Impact of such an order on the defendants, as private litigants and a public sector institution, uncertain. Public interest did not support award for costs immunity, as claim in its current form sought a monetary remedy.

Rabbit Hill Recreations Inc. v. Stelter, 2009 ABQB 329, 2009 CarswellAlta 795, 82 R.P.R. (4th) 238, 9 Alta. L.R. (5th) 106 (Alta. Q.B.).

Statements of claim in two actions virtually identical. Also, third party notices in each action were extremely similar. Parties also similar. Accordingly, actions could be consolidated and it was further ordered that trials be heard together by same judge and all evidence admissible in one action to be admissible in other.

(4) Motions — The motion shall be made to a judge of the Superior Court of Justice.

(5) Directions — An order under subsection (1) may impose such terms and give such directions as are considered just, including dispensing with service of a notice of readiness or listing for trial and abridging the time for placing an action on the trial list.

(6) Transfer — A proceeding that is transferred to another court under clause (1)(d) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court.

(7) Discretion at hearing — Where an order has been made that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise.

1996, c. 25, s. 9(17)

Procedural Matters

108. (1) Jury trials — In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.

(2) Trials without jury — The issues of fact and the assessment of damages in an action shall be tried without a jury in the following circumstances:

1. The action involves a claim for any of the following kinds of relief:

i. Injunction or mandatory order.

ii. Partition or sale of real property.

iii. Relief in proceedings referred to in the Schedule to section 21.8.

iv. Dissolution of a partnership or taking of partnership or other accounts.

v. Foreclosure or redemption of a mortgage.

vi. Sale and distribution of the proceeds of property subject to any lien or charge.

vii. Execution of a trust.

viii. Rectification, setting aside or cancellation of a deed or other written instrument.

ix. Specific performance of a contract.

x. Declaratory relief.

xi. Other equitable relief.

xii. Relief against a municipality.

2. The action is proceeding under Rule 76 of the *Rules of Civil Procedure*.

Commentary: Section 108(2) has been amended so that a jury is only prohibited in respect of the claim of one of the enumerated kinds of relief (*e.g.*, equitable relief). A jury may therefore still determine the issues of fact with respect to other claims in an action.

(2.1) Same — Paragraph 2 of subsection (2) does not apply to an action in respect of which a jury notice has been delivered in accordance with the *Rules of Civil Procedure* before January 1, 2020.

(3) Idem — On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury.

(4) Composition of jury — Where a proceeding is tried with a jury, the jury shall be composed of six persons selected in accordance with the *Juries Act*.

(5) Verdicts or questions — Where a proceeding is tried with a jury,

(a) the judge may require the jury to give a general verdict or to answer specific questions, subject to section 15 of the *Libel and Slander Act*; and

(b) judgment may be entered in accordance with the verdict or the answers to the questions.

(6) Idem — It is sufficient if five of the jurors agree on the verdict or the answer to a question, and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer.

(7) Discharge of juror at trial — The judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause.

(8) Continuation with five jurors — Where a juror dies or is discharged, the judge may direct that the trial proceed with five jurors, in which case the verdict or answers to questions must be unanimous.

(9) Specifying negligent acts — Where a proceeding to which subsection 193(1) of the *Highway Traffic Act* applies is tried with a jury, the judge may direct the jury to specify negligent acts or omissions that caused the damages or injuries in respect of which the proceeding is brought.

(10) Malicious prosecution — In an action for malicious prosecution, the trier of fact shall determine whether or not there was reasonable and probable cause for instituting the prosecution.

1996, c. 25, s. 9(17); 2006, c. 21, Sched. A, s. 16; 2019, c. 7, Sched. 15, s. 2

109. (1) Notice of constitutional question — Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

(2) Failure to give notice — If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

(2.1) Form of notice — The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

(2.2) Time of notice — The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise.

(3) Notice of appeal — Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

(4) Right of Attorneys General to be heard — Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

(5) Right of Attorneys General to appeal — Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

(6) Boards and tribunals — This section applies to proceedings before boards and tribunals as well as to court proceedings.

1994, c. 12, s. 42

Case Law: *Paluska v. Cava*, 2002 CarswellOnt 1457, 59 O.R. (3d) 469, 18 C.P.C. (5th) 290, 212 D.L.R. (4th) 226, 94 C.R.R. (2d) 169, 158 O.A.C. 319, [2002] O.J. No. 1767 (Ont. C.A.).

The requirement for notice of a constitutional question is mandatory. Where notice was not provided, the resulting decision by a motions judge was invalid and not merely voidable.

110. (1) Proceeding in wrong forum — Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court, judge or officer.

(2) Continuation of proceeding — A proceeding that is transferred to another court under subsection (1) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court.

Commentary: This provision permits a proceeding, or a step in a proceeding, brought or taken before the wrong court, judge or officer, to be transferred or adjourned to the proper court, judge or officer. Without this provision, a person who mistakenly chooses the wrong forum may find that he has missed a time period and is too late to start again.

Case Law: *Armstrong Manufacturing Co. v. Keyser* (1987), 9 W.D.C.P. 193 (Ont. Prov. Ct.).

The court has jurisdiction to transfer both a claim and/or a counterclaim to the Supreme Court of Ontario. In this case,the counterclaim of $250,000 and pleadings relating thereto were inappropriate for transfer. The counterclaim was therefore dismissed as being in excess of the monetary jurisdiction of the court.

Graves v. Avis Rent A Car System Inc. (1993), 21 C.P.C. (3d) 391 (Ont. Gen. Div.).

This Court has inherent jurisdiction to govern its own process. Pursuant to section 23(2) of the *Courts of Justice Act* the defendants refused to consent to transfer the action to the Small Claims Court. Rule 1.04 to be applied, case transferee. Jury Notice of no effect. Section 110(1) also not available because the proceeding was not commenced in the wrong court.

Castle v. Toronto Harbour Commissioners, 1987 CarswellOnt 464, 20 C.P.C. (2d) 266 (Ont. Prov. Ct.).

There was no jurisdiction in court to hear the plaintiff's claim since the matter related to the admiralty jurisdiction. The action was transferred to the Supreme Court of Ontario.

Mrzlecki v. Kusztos, 1987 CarswellOnt 850, [1987] O.J. No. 325, 59 O.R. (2d) 301 (Ont. H.C.).

A judge of the Supreme Court has an inherent jurisdiction associated with a power of certiorari to move matters from a lower court into a superior court of jurisdiction.

Tawfik v. Baker (1992), 10 C.P.C. (3d) 239 (Ont. Gen. Div.).

The fact that a personal injury action was brought in the Small Claims Court for an amount exceeding the monetary jurisdiction limit of the court did not render the Small Claims Court the "wrong court" within the meaning of s. 110. However, there was authority to transfer the action to the General Division.

Sahota v. Beauchamp (1994), 5 W.D.C.P. (2d) 168, [1994] O.J. No. 466, 1994 CarswellOnt 4413 (Ont. Gen. Div.).

Section 110 of the *Courts of Justice Act* cannot be invoked for the purpose of transferring actions to the General Division. The number of defendants does not increase the number of causes of action having regard to Rule 6.02.

Buchanan v. Singh (1994), 51 A.C.W.S. (3d) 633 (B.C. S.C.).

An application to transfer a matter to Small Claims Court was dismissed. The defendant relied on the plaintiff having the matter set down so that jury notice could be filed. The plaintiff was refused order transferring the action to Small Claims Court. Although the plaintiff was prepared to reduce the monetary claim to Small Claims limit, the defendant should not be deprived of an opportunity for jury trial. The defendant was awarded costs in any event.

Grisé v. Sebestyen (1994), 26 C.P.C. (3d) 339 (B.C. Master); reversed (1994), 30 C.P.C. (3d) 51 (B.C. S.C.).

In an action for damages, the plaintiff determined that the damages were in the jurisdiction of the Small Claims Court and sought a transfer from the Supreme Court. As the defendant had not delivered trial and jury notices when the application to re-elect was brought, it could not be said that the action was set for jury trial before the motion was brought. Appeal from 48 A.C.W.S. (3d) 554.

In an action for damages, the plaintiff determined that the most likely award of damages was within the Small Claims Court jurisdiction and sought to transfer from the Supreme Court. After the defendant was advised of the plaintiff's request for consent to transfer, the defendant served jury notice prior to the motion for transfer. Held, on appeal, unless granted by statute, the Judge did not have unfettered discretion to override the party's election for trial by jury. As the defendant had actual notice of the plaintiff's concession that claim fell within the monetary jurisdiction of the Small Claims Court and that the plaintiff had bona fide intention tore-elect jurisdiction, as the defendant had not delivered notice of trial and jury when the plaintiff's application to re-elect was brought. It could not be said that the action was set for jury trial before the motion was brought. The case was transferred to the Small Claims Court. The appeal was allowed.

Juker v. Keith (1994), 29 C.P.C. (3d) 253, 99 B.C.L.R. (2d) 262 (B.C. S.C.).

The plaintiff had been injured in a motor vehicle accident. Counsel for the defendant informed the plaintiff's counsel that he intended to set the matter down for jury trial. The plaintiff's counsel had determined by this time that damages would be in $10,000 range and before the defendant had confirmed any trial dates, the plaintiff brought his application for transfer to the Small Claims Court. The defendant objected to this transfer. Held, the balance of convenience was overwhelmingly in favour of the plaintiff's application. It is not reasonable to compel 8 citizens to put their lives on hold for couple of days to accommodate the defendant's insurers' policy. Application to transfer action to the Small Claims Court was allowed.

Long v. Insurance Corp. of British Columbia (1994), 45 A.C.W.S. (3d) 865 (B.C. S.C.).

An application to transfer action for damages from the Supreme Court to the Small Claims Court was allowed. Quantum was agreed to be set at the Small Claims Court level. No real costs had been incurred by the defence. The plaintiff's costs were limited to disbursements for commencement of proceedings and service.

Long v. Jackson, 1994 CarswellBC 110, [1994] B.C.J. No. 258, 88 B.C.L.R. (2d) 46, 24 C.P.C. (3d) 323, [1994] B.C.W.L.D. 573, 45 A.C.W.S. (3d) 864 (B.C. Master).

An application to transfer action for damages from the Supreme Court to the Small Claims Court was allowed. Liability was not in issue and quantum was now agreed to be at the Small Claims Court level. A simple accident did not justify a five-day judge and jury trial. Costs incurred prior to transfer would be paid at the Supreme Court tariff.

Long v. Jackson, 1994 CarswellBC 137, 89 B.C.L.R. (2d) 106, 24 C.P.C. (3d) 331, [1994] B.C.W.L.D. 934 (B.C. S.C.).

A transfer of action from the Supreme Court to the Small Claims Court would deprive the defendant, who had elected trial by jury, of right to a jury trial. S. 13.1 of *Supreme Court Act*, R.S.B.C. 1979, does not apply to jury trials. Appeal of decision at 45 A.C.W.S. (3d) 864 was allowed.

Pachini v. Pietramala, 1995 CarswellBC 294, 7 B.C.L.R. (3d) 266, 38 C.P.C. (3d) 122, 54 A.C.W.S. (3d) 19 (B.C. S.C.).

Plaintiff entitled to costs at Supreme Court level even though recovery at Small Claims Court level. Onus on plaintiff satisfied that it was reasonable and that there was sufficient cause to continue in Supreme Court after discoveries.

McGinty v. Toronto Transit Commission (1996), 7 W.D.C.P. (2d) 101 (Ont. Div. Ct.).

Pre-trial judge, on his own motion, decided to transfer action from the General Division to the Small Claims Court. If it were clear that the plaintiff's claim was for $6,000 or less, then under s. 23(2) of the *Courts of Justice Act* with consent of all parties, the action could have been transferred to the Small Claims Court. If it were also clear that the plaintiff's claim was for $6,000 or less, even without a motion made by a party the pre-trial judge could exercise

his inherent jurisdiction and, without necessary recourse to either s. 23(2) or s. 110(1), could have made an order transferring the action to the Small Claims Court. See *Shoppers Trust Co. v. Mann Taxi Management Ltd.* (1993), 16 O.R. (3d) 192 (Gen. Div.), just as an action brought in the Small Claims Court could be transferred to the General Division where the value of the claim exceeds that of the Small Claims Court. See *Tawfik v. Baker* (1992), 10 O.R. (3d) 569 (Gen. Div.). Jurisprudence governing pre-trials followed in *Essa (Township) v. Guergis* (1993), 15 O.R. (3d) 573 (Div. Ct.).

Leblanc v. Parry (1998), 3 C.C.L.I. (3d) 45 (Ont. Gen. Div.).

The plaintiff sustained injuries when her vehicle was struck by the dislodged wheel of the defendant's vehicle. She originally commenced an action in Small Claims Court. At the pre-trial, the plaintiff was unrepresented, and the defendant was represented by a student-at-law. The defendant's representative told her that her claim should be filed with her insurer and based upon this and other statements made to her by the defendant's representative, the plaintiff agreed to sign a dismissal of the Small Claims Court proceeding. Approximately 10 months later, the plaintiff commenced an action in General Division based on the same facts. The court held that a judgment by consent is the same as a judgment after the trial of an action. In this case, however, the court found that the plaintff's consent was not informed consent because it was based on advice given by the opposing party, advice upon which the consent to dismissal was obtained and executed. There was no abuse of process.

Siebert v. Tse (September 3, 1998), Doc. Toronto CP-05375/97, CP-05376/97 (Ont. Sm. Cl. Ct.).

At the pre-trial of these matters, the Deputy Judge ordered that any party "may move the court as to the matter of jurisdiction within 15 days". The Plaintiff has brought a motion to determine whether these two claims can proceed as separate causes of action or whether they should be consolidated into one action for $6,000. It is not within the authority of this court to consolidate the two actions for the sum of $12,000 and then traverse to the General Division: Sections 107 and 110, *Courts of Justice Act*, R.S.O. 1990, c. C.43; *Tawfik v. Baker* (1992), 10 O.R. (3d) 569 (Ont. Gen. Div.).

Fantasy Construction Ltd. v. Condominium Plan No. 9121612, 1998 CarswellAlta 1007, 26 C.P.C. (4th) 311, *(*sub nom. *Owners-Condominium Plan No. 9121612 v. Fantasy Construction Ltd.)* 235 A.R. 147 (Alta. Q.B.).

A construction company sued in Provincial Court in the sum of $5,665 for damages. The construction company applied to have action transferred to the Court of Queen's Bench. The provincial judge granted an adjournment on the condition that the company pays $5,665 into court within 15 days. The *Provincial Court Act* (Alberta.), s. 70, did not disclose a statutory authority for the judge to impose such a condition as that appealed from. The effect of the order was to take away the individual's right to defend the action unless the individual could pay into court the amount for which the individual was being sued.

Pappin v. Continental Insurance Co., 1999 CarswellBC 2996 (B.C. Master).

The defendant moved to have a matter transferred to Small Claims Court. There was no evidence that the plaintiff would succeed on a claim exceeding the sum of $10,000. There were no other compelling reasons to keep the matter in the Supreme Court. Motion allowed.

Livingston v. Ould, 1976 CarswellOnt 321, 2 C.P.C. 41 (Ont. H.C.).

Issues of general importance seriously raising novel and complicated questions of law. Small claims courts are Courts of equity and good conscience. They are too pressed by their case loads and too informal in nature to deal with such matters. When plaintiffs are not without financial means, such a case may be transferred to the Supreme Court pursuant to the wide discretion conferred under s. 62 of the Act, without any special order as to costs. This was an action for $25 damages based upon a contested claim for a declaration.

Davis v. Ojibway Windsor Realty Co. (1923), 24 O.W.N. 242 (Ont. H.C.).

Where plaintiff's cause of action was within Division Court jurisdiction, but the defence involved matters beyond the competence of the Division Court, but defendant made no application for a transfer of the action under s. 71, prohibition could not be granted.

McGregor v. Union Life Insurance Co., 1906 CarswellOnt 170, 7 O.W.R. 423 (Ont. H.C.).

Where a plaintiff's cause of action is within the competence of a Division Court, a defendant who applies for an order of removal to the High Court should establish good, substantial reason for involving plaintiff in a much more expensive, complicated, and lengthened controversy in another court. He has to make out that case "ought" to be tried there, and "more fit" to be tried there than in an inferior court.

Qualico Developments Ltd. v. Doherty, 1985 CarswellAlta 256, 41 Alta. L.R. (2d) 380, 23 D.L.R. (4th) 605, 67 A.R. 334 (Alta. Q.B.).

Provincial Court Judge transferring matter in its entirety to Court of Queen's Bench. Plaintiff appealing. Appeal dismissed. Transfer to Court of Queen's Bench appropriate since claim and counterclaim containing similar facts and issues.

Ottawa-Carleton Regional Transit Commission v. Banister, 1973 CarswellOnt 407, [1973] 2 O.R. 152 (Ont. H.C.).

Where action commenced in Small Claims Court and counterclaim by defendant exceeds monetary jurisdiction of that Court, defendant may be granted order transferring whole matter to the County Court. The combined effect of ss. 1(1)(a), 54(a), 61(1) and 190(1) of the Act and R. 117 is that the word "action" in ss. 1(1)(a) and 61(1) includes the word, "counterclaim." No reason why s. 61(1) should be available only to a plaintiff.

Markwart v. Blaine Lake No. 434 (Rural Municipality), 2005 CarswellSask 548, 2005 SKQB 356 (Sask. Q.B. [In Chambers]).

Trial judge declined to hear case because he concluded that claim was in substance a judicial review application and not a damage claim. Application dismissed. Section 11 of the Act provided that a small claims matter commenced in Provincial Court may be transferred to the Court of Queen's Bench if the Provincial Court Judge made a transfer order with the consent of the parties or if the Provincial Court Judge made a transfer order because he or she concluded that the matter was one to which the Act did not apply. Once a s. 11 transfer order had been made action deemed to have been commenced in the Court of Queen's Bench. The Provincial Court file should not have been sent to Court of Queen's Bench without a s. 11 transfer order of a Provincial Court Judge.

Leus v. Laidman, 2008 CarswellBC 2931, 2008 BCSC 1819, 65 C.P.C. (6th) 327 (B.C. S.C.).

Plaintiff commenced action for injuries sustained in motor vehicle accident. Defendants made formal offer to settle under now repealed R. 37 of Rules of Court, 1990, for $16,000 plus costs, which was rejected. Plaintiff awarded $12,748.48 at trial. No costs awarded. Plaintiff had sufficient reason to bring action in Supreme Court rather than pursuant to Small Claims rules, so R. 57(10) irrelevant. Depriving plaintiff of costs sufficient to meet objectives of Rule. Size of award, fact that it was less than $4,000 lower than offer, and impact of costs decision on what plaintiff will actually receive, were particularly considered.

Alexandrov v. Csanyi (2009), [2009] O.J. No. 1030, 2009 CarswellOnt 1325, 247 O.A.C. 228 (Ont. Div. Ct.).

The plaintiff commenced a small claims action for unpaid wages. The defendants brought their own claim for $10,000, alleging $1 million in damages were caused by the plaintiff's negligence. The defendants unsuccessfully moved for consolidation and to transfer both claims into the Superior Court. The court found that the fact that the defendants commenced

an action alleging damages of $1 million did not make the Small Claims Court the "wrong court" as contemplated in is. 110 of the *Courts of Justice Act*, R.S.O. 1990, c. C 43. There was no basis to transfer plaintiff's claim from the Small Claims to the Superior Courts court. Plaintiff had right to choose his forum. Nothing complex about the case.

Cunning v. Whitehorse (City), 2009 CarswellYukon 90, 2009 YKSC 48, 74 C.P.C. (6th) 141 (Y.T. S.C.).

Plaintiff and other homeowners brought action in Supreme Court against city. Plaintiff brought concurrent action in Small Claims Court. City brought motion to dismiss claim for lack of jurisdiction. Plaintiff abandoned all claims other than monetary damages. Action stayed in small Claims Court until plaintiff discontinued action in Supreme Court. Trial judge came to correct conclusion that Small Claims Court had jurisdiction to hear dispute. In s. 2(2)(a) of *Small Claims Court Act*, phrase "recovery of land" limited and coloured more general limitation on jurisdiction excluding cases involving "interest in land." Litigation would likely involve some analysis of easement agreement but only in context of what city should have done as prudent municipality.

Howard v. Madill, 2009 CarswellBC 3265, 2009 BCPC 355 (B.C. Prov. Ct.).

Matter involved three separate court files.

Nothing which prevents parties from litigating some issues in the Supreme Court and litigating other issues in Small Claims Court, assuming that the subjects of the litigation fall within the jurisdiction of the respective courts. Dismissal of a Claim prior to trial is a remedy which must be exercised cautiously. See *Cecil v. Holt Renfrew & Co.*, 2001 BCPC 54, 2001 CarswellBC 583, [2001] B.C.J. No. 789 at para. 7 (B.C. Prov. Ct.).

Abuse of process has been defined by *Toronto (City) v. C.U.P.E. Local 79*, 31 C.C.E.L. (3d) 216, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 2003 C.L.L.C. 220-071, REJB 2003-49439, 311 N.R. 201, 2003 CarswellOnt 4329, 2003 CarswellOnt 4328, 2003 SCC 63, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 232 D.L.R. (4th) 385, [2003] S.C.J. No. 64 (S.C.C.), at para. 35, as proceedings which are unfair to the point that they are contrary to interests of justice. See also *Shaughnessy v. Roth*, [2006] B.C.J. No. 3125, 2006 CarswellBC 2963, 61 B.C.L.R. (4th) 268, 2006 BCCA 547, 386 W.A.C. 212, 233 B.C.A.C. 212 (B.C. C.A.).

K.N. Umlah Insurance Agency Ltd. v. Christie, 2009 CarswellNS 286, 278 N.S.R. (2d) 285, 886 A.P.R. 285, 2009 NSSM 15 (N.S. Sm. Cl. Ct.).

The case started in the Supreme Court of Nova Scotia and was transferred to the Small Claims Court. Successful party claimed costs incurred in the Supreme Court prior to the transfer to the Small Claims Court. Section 15(1) of *Small Claims Court Forms and Procedures Regulations* specifies cost award that may be made by adjudicator to successful party. The word "costs" in s. 15(1)(e) was found to mean only the costs incurred in the Supreme Court prior to transfer in nature of disbursements and did not include the costs of retaining a lawyer.

Lau v. Rai, 2009 CarswellBC 1390, 72 C.P.C. (6th) 112, 2009 BCSC 696, [2009] B.C.J. No. 1037 (B.C. S.C.); additional reasons to 2007 CarswellBC 2888, 2007 BCSC 1746 (B.C. S.C.); affirmed 2010 CarswellBC 99, 2010 BCCA 26, 2 B.C.L.R. (5th) 119, [2010] 5 W.W.R. 18 (B.C. C.A.); additional reasons 2010 BCCA 194, 2010 CarswellBC 944, 282 B.C.A.C. 110, 476 W.A.C. 110 (B.C. C.A.).

Plaintiff's claim totalled $8,071.30. Plaintiff successfully applied to have proceedings transferred to Supreme Court. At trial, plaintiff was awarded damages of $9,243.12, including $7,243.12. Defendant contended any costs allowed to plaintiff should be limited, that plaintiff who recovers sum within jurisdiction of Provincial Court under *Small Claims Act* is not entitled to costs, other than disbursements, unless court finds there was sufficient reason to

bring action in Supreme Court. Plaintiff entitled to costs throughout. Court of Appeal had concluded that only time to consider whether plaintiff had sufficient reason to bring proceeding in Supreme Court was time of initiation of action. Plaintiff had sufficient reason for bringing proceedings to Supreme Court when it was initially transferred from Provincial Court.

Ostovic v. Foggin, 2009 BCSC 58, 2009 CarswellBC 114 (B.C. S.C.).

Parties acknowledged matter fell within jurisdiction of Small Claims Court. Position of defendant justified plaintiff pursuing case in Supreme Court where pre-trial discovery available. Had plaintiff taken action in Provincial Court, he would not have been able to recover costs of counsel that he would have required to face institutional defendant. Plaintiff entitled to costs under circumstances.

Williams v. Kameka (2009), 2009 NSCA 107, 2009 CarswellNS 553, 77 C.P.C. (6th) 218, 282 N.S.R. (2d) 376, 85 M.V.R. (5th) 157, 895 A.P.R. 376 (N.S. C.A.).

Williams sued Kameka in Small Claims Court and obtained a judgment against Kameka for $6,257.68. Williams sued Kameka in the Nova Scotia Supreme Court. Defendants sought dismissal of the claim on the basis of *res judicata*. Application was dismissed. Defendants appealed.

See *Cox v. Robert Simpson Co.* (1973), 1973 CarswellOnt 888, 40 D.L.R. (3d) 213, 1 O.R. (2d) 333 (Ont. C.A.), where plaintiff advanced claim for cost of repairs to his vehicle under the *Division Courts Act* (subsequently renamed the *Small Claims Court Act*). The defendant paid the monies claimed into court and the plaintiff accepted the payment. He then sued in County Court alleging personal injuries, seeking special and general damages. His claim was dismissed due to his earlier claim. Arnup J.A., for the court, concluded that the plaintiff's cause of action could not be split. He wrote:

> "The factual situation" which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action.

If not a court of competent jurisdiction, the doctrine of *res judicata* would have no application whatsoever. Remedy respondent sought in Supreme Court action in fact available in Small Claims Court. See further *Comeau v. Breau* (1994), [1994] N.B.J. No. 74, 1994 CarswellNB 256, 372 A.P.R. 329, 145 N.B.R. (2d) 329 (N.B. C.A.) and *Ontario v. National Hard Chrome Plating Co.* (1996), [1996] O.J. No. 93, 1996 CarswellOnt 119 (Ont. Gen. Div.).

Chambers judge erred in law. Williams had one cause of action against Kameka. Having obtained judgment in the Small Claims Court, cause of action merged into that judgment. Appeal allowed with costs.

Cunning v. Whitehorse (City), 2008 YKSM 3, 2008 CarswellYukon 84 (Y.T. Sm. Cl. Ct.).

Some 74 current owners of properties in question commenced an action in the Supreme Court of Yukon. Cunning, one of the 74 plaintiffs in the Supreme Court action, sued the City in the Small Claims Court. Allegations of fact, and relief claimed, were identical to those contained in the Supreme Court action, except that the damage claim in the small Claims Court action was limited to $25,000.

The City of Whitehorse moved to have the Supreme Court either dismiss or stay Cunning's Small Claims Court action on two grounds. City said the award of a declaration or an injunction was beyond the jurisdiction of the Small Claims Court. The City argued that the plaintiff must elect to proceed in one court or the other.

The Small Claims Court is a statutory court and, in consequence, has only the powers expressly given to it by statute, subject to the implied power to control its own process.

The court has no power to grant equitable relief. Decisions from other courts supported the City's contention that the court cannot grant injunctive or declaratory relief. (See, for *e.g.*, *Icecorp International Cargo Express Corp. v. Nicolaus*, 2007 BCCA 97, 2007 CarswellBC 444, 236 B.C.A.C. 294, 390 W.A.C. 294, 38 C.P.C. (6th) 26 (B.C. C.A.), *Hellman v. Crane Canada Co.*, 2007 BCPC 133, 2007 CarswellBC 1067 (B.C. Prov. Ct.).).

The plaintiff abandoned her claim for a declaration and an injunction, but insisted the claim for damages could proceed despite the existence of the action in the Supreme Court.

The plaintiff refused to elect. Counsel for the plaintiff stated that if he pursued the Small Claims action, and obtained a judgment in Cunning's favour, he might then continue the Supreme Court action in an attempt to obtain the declaration and/or injunction.

The plaintiff could not divide her claim in that way.

Even where no *forum conveniens* issue arises, and two courts have clear concurrent jurisdiction over a matter, law is clear that you cannot maintain concurrent suits in both courts where the parties, the object, and the cause are the same in both cases. See *Dominion Ready Mix Inc. c. Rocois Construction Inc.*, 1990 CarswellQue 105, 1990 CarswellQue 105F, *(*sub nom. *Rocois Construction Inc. v. Québec Ready Mix Inc.)* [1990] 2 S.C.R. 440, 112 N.R. 241, 31 Q.A.C. 241 (S.C.C.); *ABN Amro Bank Canada v. Wackett*, 1997 CarswellNS 370, *(*sub nom. *ABN AMRO Bank Canada v. Collins Barrow)* 161 N.S.R. (2d) 48, 477 A.P.R. 48 (N.S. C.A.).

Cunning was required to elect which court she would proceed in, and that her action in the Small Claims Court ought to be stayed unless and until her action in the Supreme Court was discontinued.

The British Columbia Court of Appeal in *Shaughnessy v. Roth*, 2006 BCCA 547, 2006 CarswellBC 2963, [2006] B.C.J. No. 3125, 61 B.C.L.R. (4th) 268, 386 W.A.C. 212, 233 B.C.A.C. 212 (B.C. C.A.) held that subsection 92 provides the only statutory basis for transferring a claim to the Supreme Court had acted without jurisdiction in transferring a claim on the basis that there were concurrent, related proceedings in the Supreme Court.

Provided that a claimant is prepared to abandon any claim in excess of the Small Claims Court's jurisdiction, their choice to proceed in that court should be respected.

Cunning's claim in the Small Claims court stayed until such time as she provided proof of the discontinuance of her Supreme Court action relating to the same matter. Should she elect to discontinue the Supreme Court action, the Small Claims Court action may proceed. If the plaintiff so elects, the decision of this court will finally determine the dispute between the parties. The plaintiff will not retain the right to sue for additional relief in the Supreme Court.

Rowley v. Royal Bank of Canada, 2013 NSCA 27, 2013 CarswellNS 165 (N.S. C.A.).

The Bank agreed, at the Defendants' request, to move part of its action from the Supreme Court to the Small Claims Court. It discontinued its action against Rowley in the Supreme Court. At the hearing before the Smalls Claims Court, the Defendants claimed that the court had no jurisdiction to decide the matter because it was ongoing in the Supreme Court. The Bank applied in the Supreme Court to re-add Rowley to the Supreme Court action so that the trial in the Supreme Court could proceed. The Bank's application was granted. The Defendants' Appeal was dismissed. Judge's order was interlocutory discretionary one. On an appeal of such an order, the court will not interfere unless wrong principles of law were applied or manifest injustice has resulted: *Doncaster v. Field*, 2013 NSCA 17, 326 N.S.R. (2d) 381, 1033 A.P.R. 381, [2013] N.S.J. No. 64 (N.S. C.A.) at para. 10.

Recent decisions suggest that a proposal to transfer a proceeding brought in the wrong court may now be scrutinized more closely than may have been the case previously. For example, in *The Bank of Nova Scotia v. Compas Inc.*, 2018 ONSC 6522, 2018 CarswellOnt 18111, 24

C.P.C. (8th) 317 (Ont. Div. Ct.), the appellant's process servers accidentally filed the notice of appeal in Divisional Court instead of the Court of Appeal. Court staff accepted the notice of appeal and appellant's counsel then perfected the appeal in the wrong court before he noticed the error and brought a motion to transfer the appeal to the Court of Appeal. The motion was dismissed however, after the motions judge held that the appeal raised questions of fact or mixed fact and law and there was no prospect for the appellant to establish any palpable and overriding error on the part of the trial judge. The motions judge applied *Dunnington v. 656956 Ontario Ltd.*, 1991 CarswellOnt 464, 9 O.R. (3d) 124, 6 C.P.C. (3d) 298, 89 D.L.R. (4th) 607, 54 O.A.C. 345 (Ont. Div. Ct.), holding that in exercising its discretion to transfer an appeal, the court may consider the merits of the appeal in addition to any prejudice to the respondent and whether the motion was brought promptly.

In *Mattina v. Mattina*, 2018 ONSC 1569, 2018 CarswellOnt 3444, 11 R.F.L. (8th) 69 (Ont. Div. Ct.), a motions judge had previously held that the appeal was properly brought in the Divisional Court and that order was not appealed. However when the appeal came on for hearing before a panel of the court, the panel disagreed and transferred the appeal to the Court of Appeal for Ontario. It held that jurisdiction could not be conferred by the consent of the parties or by the previous order.

It may be possible to transfer an action from Small Claims Court to the Superior Court of Justice where the plaintiff has a basis to amend its claim to claim damages beyond the jurisdiction of the Small Claims Court. In *Peel Condo. Corp. No. 346 v. Florentine Financial Corp.*, [2018] O.J. No. 2586 (S.C.J.), the plaintiff's motion to amend its claim to increase the damages claim and transfer the action to the Superior Court of Justice was granted.

2503257 Ontario Ltd. v. 2505304 Ontario Inc. (Good Guys Gas Bar), 2020 ONCA 149, 2019 CarswellOnt 22213, Justice Ivan S. Bloom (Ont. C.A.)

Appeal from January 23, 2019 order granting vacant possession must be made to the Divisional Court. Appeal transferred to the Divisional Court pursuant to s. 110 (1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Appeals are statutory. As such, it is always good practice to clearly identify the appellate court in which the matter can be adjudicated. Interestingly, even where an appellate court has jurisdiction to adjudicate *some* aspects of a matter, it may be that such jurisdiction does not extend to all aspects. Although the Court of Appeal had previously refused a stay of the Order under appeal in this case, the Court determined that this was "ancillary to the order granting vacant possession". (See para. 3).

The mechanism to affect the transfer is s. 110(1) of the *Courts of Justice Act*, which provides:

> 110. Proceeding in wrong forum — (1) Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court, judge or officer.

This involves the Court's discretion. There may be circumstances in which a Court is not prepared to make the Order. S. 110(2) provides that, once the proceeding is transferred, it continues "as if it had been commenced in that court".

Kreppner v. HMQ, 2020 ONSC 70, 2020 CarswellOnt 21, 52 C.C.P.B. (2nd) 261, Cavanagh J. (Ont. S.C.J.)

Motions for an order transferring the Small Claims Court actions to the Superior Court of Justice and to have them consolidated or heard one after another or as the trial judge directs. The plaintiffs were self-represented on the motions.

The costs claimed are based on the number of hours expended by each plaintiff at a substantial indemnity hourly rate of $97.50 or such other rate as may be appropriate. Each plaintiff

also seeks reimbursement of disbursements. The first question is whether the plaintiffs are entitled to an award of costs for time expended on the motions.

In *Fong v. Chan*, 1999 CarswellOnt 3955, 46 O.R. (3d) 330, 181 D.L.R. (4th) 614, 128 O.A.C. 2, [1999] O.J. No. 4600 (Ont. C.A.), the Court of Appeal held that self-represented litigants are not entitled to costs calculated on the same basis as those of a litigant who retained counsel. The Court of Appeal held at para. 26 that costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation, and that as a result, they incurred an opportunity cost by forgoing remunerative activity.

The *Fong* decision was cited by the Divisional Court in *Mustang Investigations Inc. v. Ironside*, 2010 ONSC 3444, 2010 CarswellOnt 5398, 103 O.R. (3d) 633, 98 C.P.C. (6th) 105, 321 D.L.R. (4th) 357, 267 O.A.C. 302, [2010] O.J. No. 3184 (Ont. Div. Ct.) in which Jennings J., writing for the Court, held at para. 27 that a self-represented litigant who seeks costs must demonstrate that, "as a result of the lawyer-like work put on the file, remunerative activity was forgone". Jennings J. held that without such proof, no costs are available.

The *Fong* decision was cited by the Court of Appeal for Ontario in *Benarroch v. Fred Tayar & Associates P.C.*, 2019 ONCA 228, 2019 CarswellOnt 4101, 30 C.P.C. (8th) 221, 433 D.L.R. (4th) 112 (Ont. C.A.) at para. 33 on how the principles in *Fong* are to be applied:

> In summary, as explained in *Fong*, a trial or application judge retains the discretion to award or not to award costs. Where the judge determines that an award is warranted and, based on the record, the judge is satisfied that lost opportunity costs have been suffered because the self-represented party has foregone remunerative activity, the judge is either to assess and fix "moderate" or "reasonable" costs, or to provide clear guidelines to an assessment officer as to the manner in which costs are to be assessed.

Based on the principles in *Fong* and *Benarroch*, the self-represented plaintiffs are not entitled to an award of costs for time spent responding to these motions.

Bernard v. Fuhgeh, 2020 ONCA 529, 2020 CarswellOnt 11927 (Ont. C.A.).

Fuhgeh filed a Notice of Motion for Leave to Appeal that should have been filed in the Divisional Court. He sought an order pursuant to s. 110 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, transferring the Court of Appeal file to that court.

Fuhgeh's motion dismissed.

Motion for leave to appeal the December 9, 2019 order frivolous because Fuhgeh acknowledged endorsement merged with order of July 2, 2019. A merged order cannot be the subject of a separate appeal; and the materials filed by Fuhgeh bear "the hallmarks of vexatious proceedings" identified in *Scaduto v. Law Society of Upper Canada*.[20]

Section 110(1) of the *Courts of Justice Act* provides: "Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court, judge or officer."

Citing *Dunnington v. 656956 Ontario Ltd.*, 1991 CarswellOnt 464, 9 O.R. (3d) 124, 6 C.P.C. (3d) 298, 89 D.L.R. (4th) 607, 54 O.A.C. 345 (Ont. Div. Ct.), Paciocco J.A. noted he is authorized to transfer the leave to appeal application file to the Divisional Court, but "[w]hether I do so is a matter of discretion". In exercising judicial discretion to authorize the transfer, the following factors may be considered:

- "The merits of the proposed appeal or application;

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[20] 2015 ONCA 733, 2015 CarswellOnt 16545, 81 C.P.C. (7th) 258, 343 O.A.C. 87, [2015] O.J. No. 5692 (Ont. C.A.); leave to appeal refused 2016 CarswellOnt 21905, 2016 CarswellOnt 21906, [2015] S.C.C.A. No. 488 (S.C.C.)

- Whether the respondent will suffer undue prejudice as a result of further delay while the appeal or application is waiting to be heard; and
- Whether the appellant moved expeditiously after becoming aware that jurisdiction was in dispute."[21]

111. (1) Set off — In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

(2) Idem — Mutual debts may be set off against each other, even if they are of a different nature.

Commentary: This provision was derived from former s. 135(1) of the *Judicature Act*, R.S.O. 1980, c. 223, which did not contain a reference to setting off debts owed in a personal capacity against debts owed in another capacity. This has now been corrected.

(3) Judgment for defendant — Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance.

Case Law: *2146100 Ontario Ltd. v. 2052750 Ontario Inc.*, 2013 ONSC 2483, 2013 CarswellOnt 5148, 115 O.R. (3d) 636, 308 O.A.C. 8 (Ont. Div. Ct.).

The presiding Deputy Judge gave judgment in favour of the respondents (defendants) for $21,538.85. The appellant asserts that in the process of doing so, he exceeded the monetary jurisdiction of the court.

The appellant argues that the trial judge's decision effectively adjudicated the appellant's claim at $21,538.85, and adjudicated the respondents' separate claim at $42,633.57, thereby exceeding the monetary jurisdiction of the court.

Subsection 111(3) expressly provides that if the court finds that a larger sum is due from the plaintiff to the defendant, than is found due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance. Courts in Ontario now have the jurisdiction to calculate set offs whether or not the parties assent.

In *Burkhardt*, the plaintiffs sued for $20,000 in damages arising from a fatal car accident involving a pedestrian. The jury assessed damages at $26,000 but found the deceased to have been 50 per cent at fault. In dispute was whether the plaintiffs were limited to 50 per cent of the amount claimed — in other words half of $20,000 — or whether they were entitled to judgment for 50 per cent of $26,000 (the damages assessed by the jury).

Cartwright J. found that the plaintiffs were entitled to half of the damages assessed by the jury.

At the end of the day it is the net judgment that matters. Here, the amount awarded was within the monetary jurisdiction of the Small Claims Court and did not exceed the amount claimed in the Defendants' Claim.

Appeal dismissed.

112. (1) Investigation and report of Children's Lawyer — In a proceeding under the *Divorce Act* (Canada) or the *Children's Law Reform Act* in which a question concerning decision-making responsibility, parenting time or contact with respect to a child is before the court, the Children's Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning

[21] ~~*Ibid.*~~ *at para. 15.*

decision-making responsibility, parenting time or contact with respect to the child and the child's support and education.

(2) Idem — The Children's Lawyer may act under subsection (1) on his or her own initiative, at the request of a court or at the request of any person.

(3) Report as evidence — An affidavit of the person making the investigation, verifying the report as to facts that are within the person's knowledge and setting out the source of the person's information and belief as to other facts, with the report attached as an exhibit thereto, shall be served on the parties and filed and on being filed shall form part of the evidence at the hearing of the proceeding.

(4) Attendance on report — Where a party to the proceeding disputes the facts set out in the report, the Children's Lawyer shall if directed by the court, and may when not so directed, attend the hearing on behalf of the child and cause the person who made the investigation to attend as a witness.

Proposed Amendment — 112

112. Report of Children's Lawyer — (1) Investigation — In a proceeding under the *Divorce Act* (Canada) or the *Children's Law Reform Act* in which a question concerning decision-making responsibility, parenting time or contact with respect to a child is before the court, the Children's Lawyer may,

(a) cause an investigation to be made on all matters concerning decision-making responsibility, parenting time or contact with respect to the child;

(b) cause an investigation to be made on matters specified by the court related to decision-making responsibility, parenting time or contact with respect to the child; or

(c) meet with the child to determine the child's views and preferences with respect to matters that may include decision-making responsibility, parenting time or contact.

(2) Report — The Children's Lawyer may report and make recommendations to the court on the results of an investigation or meeting conducted under subsection (1).

(3) Authority to act — The Children's Lawyer may act under subsection (1) or (2) on his or her own initiative, at the request of a court or at the request of any person.

(4) Affidavit — The person who prepares a report under subsection (2) shall execute an affidavit verifying the facts in the report that are within the person's knowledge and setting out the source of the person's information and belief respecting facts that are not within their knowledge.

(5) Service — The person who prepares a report under subsection (2) shall serve the affidavit, along with a copy of the report attached as an exhibit, on the parties and file the affidavit and report with the court.

(6) Evidence — The filed affidavit and report shall form part of the evidence at the hearing of the proceeding.

(7) Attendance on report — Where a party to the proceeding disputes the facts set out in the report, the Children's Lawyer shall if directed by the court, and may when not so directed, attend the hearing on behalf of the child and cause the person who conducted the investigation or meeting under subsection (1) to attend as a witness.

2021, c. 4, Sched. 3, s. 14 [Not in force at date of publication.]

1994, c. 27, s. 43(2); 2020, c. 25, Sched. 1, s. 27(2)

113. Agreement preventing third party claim or crossclaim — Rules of court permitting a defendant to make a third party claim or crossclaim apply despite any agreement that provides that no action may be brought until after judgment against the defendant.

114. Agreement as to place of hearing — Where a party moves to change the place of hearing in a proceeding, an agreement as to the place of hearing is not binding, but may be taken into account.

115. Security — Where a person is required to give security in respect of a proceeding in a court, a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance is sufficient, unless the court orders otherwise.

1997, c. 19, s. 32

Commentary: Section 115 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 permits guarantee companies (to which the *Guarantee Companies Security Act*, R.S.O. 1990, c. G.11 applies), to give security by bond, policy, or guarantee contract in court proceedings. Previously, such companies were listed in a regulation made under the *Guarantee Companies Security Act*. Regulation 541, R.R.O. 1990 has been revoked and the list of approved companies is not maintained by Order-in-Council. Some of the proceedings to which security by bond may apply are: an interim order for recovery of personal property under the *Rules of Civil Procedure*; matters under the *Construction Lien Act* and the *Repair and Storage Liens Act*; and estates matters.

The corporations currently approved as guarantee companies were approved by Order-in-Council 1266/94 made on May 11, 1994.

The list of corporations was amended by Order-in-Council No. 2569/94 which was approved and ordered on October 7, 1994.

The depositing of security with a court pursuant to s. 24 of the *Repair and Storage Liens Act* is another procedure which is new to the Small Claims Courts. The deposits can only be in the form of an Irrevocable Letter of Credit (Form 10) or a Financial Guarantee Bond (Form 11) and these forms are issued directly to the applicant by the financial institution involved for filing with the court. These documents are retained by the court and if the respondent accepts the monies offered in settlement under s. 24 the documents are returned to the applicant for cancellation by him. If, or course, the respondent does not accept the monies offered in settlement the court will retain the documents pending receipt of a court order setting out their disposition.

116. (1) Periodic payment and review of damages — In a proceeding where damages are claimed for personal injuries or under Part V of the *Family Law Act* for loss resulting from the injury to or death of a person, the court,

(a) if all affected parties consent, may order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just; and

(b) if the plaintiff requests that an amount be included in the award to offset any liability for income tax on income from the investment of the award, shall order the defendant to pay all or part of the award periodically on such terms as the court considers just.

(2) No order — An order under clause (1)(b) shall not be made if the parties otherwise consent or if the court is of the opinion that the order would not be in the best interest of the plaintiff, having regard to all the circumstances of the case.

(3) Best interests — In considering the best interests of the plaintiff, the court shall take into account,

(a) whether the defendant has sufficient means to fund an adequate scheme of periodic payments;

(b) whether the plaintiff has a plan or a method of payment that is better able to meet the interests of the plaintiff than periodic payments by the defendant; and

(c) whether a scheme of periodic payments is practicable having regard to all the circumstances of the case.

(4) Future review — In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

(5) Amount to offset liability for income tax — If the court does not make an order for periodic payment under subsection (1), it shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award.

1996, c. 25, s. 1(20)

116.1 (1) Periodic payment, medical malpractice actions — Despite section 116, in a medical malpractice action where the court determines that the award for the future care costs of the plaintiff exceeds the prescribed amount, the court shall, on a motion by the plaintiff or a defendant that is liable to pay the plaintiff's future care costs, order that the damages for the future care costs of the plaintiff be satisfied by way of periodic payments.

(2) The order — If the court makes an order under subsection (1), the court shall determine the amount and frequency of the periodic payments without regard to inflation and shall order the defendant to provide security for those payments in the form of an annuity contract that satisfies the criteria set out in subsection (3).

(3) Form of security — The annuity contract shall satisfy the following criteria:

1. The annuity contract must be issued by a life insurer.

2. The annuity must be designed to generate payments in respect of which the beneficiary is not required to pay income taxes.

3. The annuity must include protection from inflation to a degree reasonably available in the market for such annuities.

(4) Directions from the court — If the parties are unable to agree on the terms of the annuity, either party may seek directions from the court about the terms.

(5) Filing and approval of plan — Unless the court orders otherwise, a proposed plan to provide security required by an order under subsection (2) shall be filed with the court within 30 days of the judgment or within another period that the court may specify, and the court may approve the proposed plan, with or without modifications.

(6) Effect of providing security — If security is provided in accordance with a plan approved by the court, the defendant by whom or on whose behalf the security is provided is discharged from all liability to the plaintiff in respect of damages that are

to be paid by periodic payments, but the owner of the security remains liable for the periodic payments until they are paid.

(7) Effect of not providing security — If a proposed plan is not filed in accordance with subsection (5) or is not approved by the court, the court shall, at the request of any party to the proceeding, vacate the portions of the judgment in which periodic payments are awarded and substitute a lump sum award.

(8) Application for lump sum — The court may order that the future care costs be paid in whole or in part by way of a lump sum payment to the extent that the plaintiff satisfies the court that a periodic payment award is unjust, having regard to the capacity of the periodic payment award to meet the needs for which the damages award for future care costs is intended to provide compensation.

(9) Amount to offset liability for income tax — If the court does not make an order for periodic payments under subsection (1) or makes an order for a lump sum payment under subsection (7) or (8), the court shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award except to the extent that the evidence shows that the plaintiff will not derive taxable income from investing the award.

(10) Periodic payments exempt from garnishment, etc. — Periodic payments of damages for future care costs are exempt from seizure or garnishment to the same extent that wages are exempt under section 7 of the *Wages Act*, unless the seizure or garnishment is made by a provider of care to the plaintiff and the seizure or garnishment is to pay for the costs of products, services or accommodations or any one of them with respect to the plaintiff.

(11) Future review — In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

(12) Regulations — The Lieutenant Governor in Council may make regulations prescribing or calculating the amount of future care costs for the purpose of subsection (1).

(13) Definitions — In this section,

"future care costs" means the cost of medical care or treatment, rehabilitation services or other care, treatment, services, products or accommodations that is incurred at a time after judgment;

"medical malpractice action" means an action for personal injuries alleged to have arisen from negligence or malpractice in respect of professional services requested of, or rendered by, a health professional who is a member of a health profession as defined in the *Regulated Health Professions Act, 1991* or an employee of the health professional or for which a hospital as defined in the *Public Hospitals Act* is held liable;

"prescribed amount" means $250,000 or such greater amount as may be prescribed by regulation, calculated as a present value at the time of judgment in accordance with the *Rules of Civil Procedure*.

(14) Transition — This section applies to all proceedings in which a final judgment at trial or final settlement has not been made on the day the *Access to Justice Act, 2006* receives Royal Assent.

2006, c. 21, Sched. A, s. 17

117. Assessment of damages — Where damages are to be assessed in respect of,

(a) a continuing cause of action;

(b) repeated breaches of a recurring obligation; or

(c) intermittent breaches of a continuing obligation,

the damages, including damages for breaches occurring after the commencement of the proceeding, shall be assessed down to the time of the assessment.

118. Guidance and submissions — In an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages.

119. Power of court on appeal — On an appeal from an award for damages for personal injury, the court may, if it considers it just, substitute its own assessment of the damages.

120. (1) Advance payments — If a defendant makes a payment to a plaintiff who is or alleges to be entitled to recover from the defendant, the payment constitutes, to the extent of the payment, a release by the plaintiff or the plaintiff's personal representative of any claim that the plaintiff or the plaintiff's personal representative or any person claiming through or under the plaintiff or by virtue of Part V of the *Family Law Act* may have against the defendant.

(2) Idem — Nothing in this section precludes the defendant making the payment from demanding, as a condition precedent to such payment, a release from the plaintiff or the plaintiff's personal representative or any other person to the extent of such payment.

(3) Payment to be taken into account — The court shall adjudicate upon the matter first without reference to the payment but, in giving judgment, the payment shall be taken into account and the plaintiff shall only be entitled to judgment for the net amount, if any.

(4) Disclosure — The fact of any payment shall not be disclosed to the judge or jury until after judgment but shall be disclosed before formal entry thereof.

121. (1) Foreign money obligations — Subject to subsections (3) and (4), where a person obtains an order to enforce an obligation in a foreign currency, the order shall require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a bank in Ontario listed in Schedule I to the *Bank Act* (Canada) at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the creditor.

(2) Multiple payments — Where more than one payment is made under an order referred to in subsection (1), the rate of conversion shall be the rate determined as provided in subsection (1) for each payment.

(3) Discretion of court — Subject to subsection (4), where, in a proceeding to enforce an obligation in a foreign currency, the court is satisfied that conversion of the amount of the obligation to Canadian currency as provided in subsection (1) would be inequitable to any party, the order may require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at

a bank in Ontario on such other day as the court considers equitable in the circumstances.

(4) Other obligations that include conversion — Where an obligation enforceable in Ontario provides for a manner of conversion to Canadian currency of an amount in a foreign currency, the court shall give effect to the manner of conversion in the obligation.

(5) Enforcement by seizure or garnishment — Where a writ of seizure and sale or notice of garnishment is issued under an order to enforce an obligation in a foreign currency, the day the sheriff, bailiff or clerk of the court receives money under the writ or notice shall be deemed, for the purposes of this section and any obligation referred to in subsection (4), to be the day payment is received by the creditor.

122. (1) Actions for accounting — Where an action for an accounting could have been brought against a person, the action may be brought against the person's personal representative.

(2) Idem — An action for an accounting may be brought by a joint tenant or tenant in common, or his or her personal representative, against a co-tenant for receiving more than the co-tenant's just share.

123. Judge's retirement, etc., inability or failure to give decision — (1) Definitions — In this section,

"chief judge" means a person having authority to assign duties to the judge;

"judge" [Repealed 2015, c. 27, Sched. 1, s. 1(13).]

(1.1) Application — This section also applies, with necessary modifications, in respect of deputy judges and case management masters.

Proposed Amendment — 123(1.1)

(1.1) Application — This section also applies, with necessary modifications, in respect of deputy judges and associate judges.

2021, c. 4, Sched. 3, s. 15 [Not in force at date of publication.]

(2) Decision after retirement, etc. — A judge may, within ninety days of,

(a) reaching retirement age;

(b) resigning; or

(c) being appointed to another court,

give a decision or participate in the giving of a decision in any matter previously tried or heard before the judge.

(3) Inability to give decision; panel of judges — Where a judge has commenced a hearing together with other judges and,

(a) dies before the decision is given;

(b) is for any reason unable to participate in the giving of the decision; or

(c) does not participate in the giving of the decision under subsection (2),

the remaining judges may complete the hearing and give the decision of the court but, if the remaining judges are equally divided, a party may make a motion to the chief judge for an order that the matter be reheard.

(4) Inability to give decision; sitting alone — Where a judge has commenced hearing a matter sitting alone and,

(a) dies without giving a decision;

(b) is for any reason unable to make a decision; or

(c) does not give a decision under subsection (2),

a party may make a motion to the chief judge for an order that the matter be reheard.

(5) Failure to give decision — Where a judge has heard a matter and fails to give a decision,

(a) in the case of a judgment, within six months; or

(b) in any other case, within three months,

the chief judge may extend the time in which the decision may be given and, if necessary, relieve the judge of his or her other duties until the decision is given.

(6) Continued failure — Where time has been extended under subsection (5) but the judge fails to give the decision within that time, unless the chief judge grants a further extension,

(a) the chief judge shall report the failure and the surrounding circumstances to the appropriate judicial council; and

(b) a party may make a motion to the chief judge for an order that the matter be reheard.

(7) Rehearing — Where an order is made under subsection (3), (4) or (6) for the rehearing of a matter, the chief judge may,

(a) dispose of the costs of the original hearing or refer the question of those costs to the judge or judges presiding at the rehearing;

(b) direct that the rehearing be conducted on the transcript of evidence taken at the original hearing, subject to the discretion of the court at the rehearing to recall a witness or require further evidence; and

(c) give such other directions as are considered just.

1996, c. 25, s. 1(21); 2015, c. 27, Sched. 1, s. 1(13), (14); 2020, c. 11, Sched. 5, s. 11

124. [Repealed 2009, c. 33, Sched. 2, s. 20(17).]

Language

125. (1) Official languages of the courts — The official languages of the courts of Ontario are English and French.

(2) Proceedings in English unless otherwise provided — Except as otherwise provided with respect to the use of the French language,

(a) hearings in courts shall be conducted in the English language and evidence adduced in a language other than English shall be interpreted into the English language; and

(b) documents filed in courts shall be in the English language or shall be accompanied by a translation of the document into the English language certified by affidavit of the translator.

Commentary: English and French are the official languages of the courts in Ontario. You have the right to a bilingual court proceeding for all criminal and non-jury civil cases held in the Ontario Court of Justice, the Superior Court of Justice and the Court of Appeal for Ontario. The right to a bilingual proceeding extends to all other hearings associated with the proceeding, such as procedural motions, pre-trial hearings, and hearings to assess costs. You may address the court directly in French. Witnesses testify in the language in which they feel most comfortable and the court provides interpreters as needed.

You may exercise your right to a bilingual proceeding by:

- Filing or issuing your first document in French
- Filing a requisition form requesting a bilingual proceeding
- Filing a written statement with the court requesting a bilingual proceeding
- Making an oral statement to the court during an appearance in the proceeding that expresses the desire that the proceeding be conducted as a bilingual proceeding

French Language Rights

The test as to whether someone is francophone is whether or not they are able to instruct counsel and follow the proceedings in the chosen language irrespective of cultural identity or personal language preferences of the Accused. See sections 125 and 126 of the *Ontario Court of Justice Act (CJA)*. See *R. v. Beaulac* (1999), 1999 CarswellBC 1025, 1999 CarswellBC 1026, [1999] 1 S.C.R. 768 (S.C.C.).

What is the difference between French language rights and the right of the interpreter?

The right of the interpreter is protected by section 14 of the Charter, which states that a party or witness in any proceeding, who does not understand or speak the language in which the proceedings are conducted, or who is deaf, has the right to the assistance of an interpreter. Anyone who is a party or a witness to a proceeding has this right, and it is predicated on whether or not they understand or speak the language in which the proceedings are conducted. The right to a hearing in the official language of the Defendant's choice only applies when the language is English or French, and it requires more that providing him or her with an interpreter. It means that the hearing itself must be in the official language of his or her choosing. He or she must be offered and make an informed and conscious choice. His or her lawyer must provide all legal services in the official language that the Defendant has chosen. The right to a hearing in the official language of a Defendant's choice is predicated on whether or not a Defendant has a sufficient connection with that language, and whether or not he or she can instruct counsel in that language.

Legal Resources Available to French-speaking Residents of Ontario

The Law Society of Upper Canada

The Law Society of Upper Canada operates a bilingual referral service that can provide the names of French-speaking lawyers in your area. For further information, contact:

Law Society Referral Service (LSRS)

Crisis line: 416-947-5255 / 1-855-947-5255

TTY: 416-644-4886

Website: <http://www.lawsocietyreferralservice.ca>

For more information, visit: <http://www.lsrs.info>

Email: lsrs@lsuc.on.ca

Legal Aid

Legal Aid is available to people who cannot afford the services of a lawyer. If you qualify for legal aid, you will be given a legal aid lawyer certificate. This certificate is a guarantee of payment from Legal Aid Ontario to the private lawyer of your choice, subject to the rates and limitations set out in the legal aid tariff. For further information, contact:

Legal Aid Ontario

Toll free: 1-800-668-8258

Website: <http://www.legalaid.on.ca>

Email: info@lao.on.ca

Case Law: *Mutual Tech Canada Inc. v. Law* (2000), 189 D.L.R. (4th) 325, 76 C.R.R. (2d) 64, 2 C.P.C. (5th) 143, 2000 CarswellOnt 2088 (Ont. S.C.J.).

Motion for interpreter granted. Attempt by counsel to restate answers compromised opposite counsel's right to cross-examine. Witness was unable to understand English language; interpreter ordered.

Wittenberg v. Fred Geisweiller/Locomotive Investments Inc. (1999), 44 O.R. (3d) 626, *(*sub nom. *Wittenberg v. Geisweiller)* 123 O.A.C. 139, 41 C.P.C. (4th) 358, 1999 CarswellOnt 1888 (Ont. S.C.J.).

Presiding judge erred in not offering the defendant bilingual proceeding. The denial of right to bilingual proceeding under s. 126 of *Courts of Justice Act* constituted a substantial wrong.

Chiasson c. Chiasson (1999), 222 N.B.R. (2d) 233, 570 A.P.R. 233, 44 C.P.C. (4th) 276, 1999 CarswellNB 599, 1999 CarswellNB 600 (N.B. C.A.).

The defendant appealed a small claims judgment on the ground of being denied the right to testify in English. The appeal was allowed and a new trial was ordered. The defendant was francophone but informed the court that he intended to testify in English. The defendant had the fundamental right to testify in either official language. The trial judge erred in commenting on the defendant's choice of language.

Upper Canada District School Board v. Conseil de District des Écoles Publiques de Langue Française No. 59 (2002), 2002 CarswellOnt 1161, [2002] O.J. No. 1525 (Ont. S.C.J.); additional reasons at (2002), 2002 CarswellOnt 1470 (Ont. S.C.J.).

Defendant exercised right to plead in French under section 126(1) of *Courts of Justice Act* (Ontario). Costs awarded against defendant should not include costs of translation for Anglophone counsel for plaintiff. Award would improperly penalize defendant for exercising its right.

Kilrich Industries Ltd. v. Halotier, 2007 CarswellYukon 50, 2007 CarswellYukon 51, 406 W.A.C. 159, 246 B.C.A.C. 159, 161 C.R.R. (2d) 331, 2007 YKCA 12 (Y.T. C.A.).

A French-speaking defendant appealed an order allowing the plaintiff's action in debt after a summary trial on the ground that the defendant did not have a fair opportunity to present his defence because the Rules of Court were not available to him in French. Appeal allowed, decision set aside and matter remitted to trial court to have a new trial. The defendant was denied a fundamental right accorded him by the *Languages Act*. The failure to print and publish the Rules of Court in French seriously impaired the defendant's ability to engage in the court's processes.

Kilrich Industries Ltd. v. Halotier, 2008 CarswellYukon 16, 261 B.C.A.C. 301, 440 W.A.C. 301, 2008 YKCA 4, 56 C.P.C. (6th) 214 (Y.T. C.A.).

This case involves assessment of costs to be paid by an intervenor, Minister of Justice in this case, in appeal concerning scope of French language rights in Yukon courts. Yukon Court of

Appeal held that because of systemic failure caused unnecessary expenses to parties, the Minister of Justice should pay special costs of both parties for trial and appeal.

Ndem v. Patel, 2008 CarswellOnt 1271, 2008 CarswellOnt 1272, 2008 ONCA 148, *(*sub nom. *Belende v. Patel)* 290 D.L.R. (4th) 490, *(*sub nom. *Belende v. Patel)* 89 O.R. (3d) 494, *(*sub nom. *Belende c. Patel)* 89 O.R. (3d) 502 (Ont. C.A.).

Plaintiff did not attend motion for dismissal of his claim on grounds that bilingual judge was not provided for him pursuant to s. 126 of *Courts of Justice Act*. His counsel brought unsuccessful motion for adjournment. The motion judge held that in his opinion the plaintiff was attempting to manipulate the bilingual obligation of provincial laws to his own purpose in order to delay the proceedings and granted summary judgment against the Plaintiff. Plaintiff appealed. Appeal allowed.

The motion judge's failure to adjourn the proceeding and refer the matter to a bilingual judge violated the plaintiff's rights under s. 126 of the Act. Language rights under s. 126 of the Act are quasi-constitutional in nature, and violation of those rights constitutes material prejudice to the linguistic minority.

Toronto Dominion Bank c. Ndem, 2008 CarswellOnt 1065, 2008 ONCA 146 (Ont. C.A.); leave to appeal refused (2008), [2008] S.C.C.A. No. 125, 2008 CarswellOnt 3797, 2008 CarswellOnt 3798, *(*sub nom. *Toronto-Dominion Bank v. Ndem)* 387 N.R. 400 (note) (S.C.C.).

The defendant appealed judgment at trial on basis that trial judge had not been bilingual. At hearing, lawyer appeared and indicated that she represented a third party on appeal. Defendant objected to lawyers presence on basis that her client was not part of appeal. Appeal allowed. Defendant has right to trial before bilingual judge. Lawyer client had no interest in appeal as his own application to extend time limits had been dismissed.

Bajikijaie v. Mbuyi (2009), 2009 CarswellOnt 3318, 2009 CarswellOnt 3319, 252 O.A.C. 304 (Ont. Div. Ct.).

Appeal by plaintiff from costs order. Plaintiff commenced action by filing a statement of claim in French. The case management Master was not bilingual and ordered the action to be discontinued on consent and fixed costs in favour of the defendants. Pursuant to s. 3(1) of Regulation for Bilingual Proceedings, the plaintiff deemed to have exercised his right to have all proceedings presided over by a bilingual judge or officer. The deeming provisions that required all future hearings in the proceeding to be presided over by a bilingual person had been breached.

Sandhu v. British Columbia (Provincial Court Judge), 2012 BCSC 1064, 2012 CarswellBC 2278, 44 Admin. L.R. (5th) 92, [2012] B.C.J. No. 1502 (B.C. S.C.); affirmed 2013 BCCA 88, 2013 CarswellBC 457, 52 Admin. L.R. (5th) 326, 42 B.C.L.R. (5th) 1, 359 D.L.R. (4th) 329, *(*sub nom. *Sandhu v. McKinnon)* 334 B.C.A.C. 173, *(*sub nom. *Sandhu v. McKinnon)* 572 W.A.C. 173, [2013] B.C.J. No. 327 (B.C. C.A.).

Sandhu applies under the provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (JRPA) seeking judicial review of the May 16, 2011, decision of Provincial Court Judge Jane McKinnon. Sandhu challenges McKinnon P.C.J.'s decision that he could not act as an interpreter to a party in a small claims action.

The role of counsel for a tribunal whose decision is impugned is thoroughly canvassed in the jurisprudence. In *Legal Services Society (British Columbia) v. Brahan*, 1983 CarswellBC 175, 46 B.C.L.R. 32, 5 C.C.C. (3d) 404, 148 D.L.R. (3d) 692 (B.C. S.C.), the court expressed the view that it was not appropriate for counsel on behalf of a Provincial Court Judge to appear on judicial review and make submissions in favour of upholding an order by the judge: at 38.

The applicable standard of review is reasonableness. As noted in *Farrell v. TD Waterhouse Canada Inc.*, 2010 BCSC 1930, 2010 CarswellBC 3762, [2010] B.C.J. No. 2770 (B.C. S.C.); affirmed 2011 BCCA 61, 2011 CarswellBC 198, [2011] B.C.J. No. 201 (B.C. C.A.), the appropriate standard of review to be applied to an interlocutory decision of the Small Claims Court is reasonableness: at paras. 22 to 25.

Mr. Nahal required an interpreter from the list maintained by the registry falls within a range of possible, acceptable outcomes which are defensible in respect of the facts. It is also a reasonable decision in law.

There is nothing in the *Small Claims Act* or *Small Claims Rules* which requires a Provincial Court Judge to certify interpreters. McKinnon P.C.J. was required to decide the case before her. She was not required to consider Mr. Sandhu's application to act as an interpreter. Nonetheless, she adopted a reasonable basis upon which to exercise discretion.

Mr. Sandhu did not have a right to be heard or owed a duty of fairness. Neither he, nor Mr. Hara on his behalf, was entitled to make submissions or present evidence. The transcript demonstrates that McKinnon P.C.J. attempted to explain to Mr. Nahal her practice of requiring that interpreters be on the list of court-certified interpreters. She allowed Mr. Sandhu an opportunity to investigate why he was not on the list and whether that was an error.

The petition is dismissed.

Solarcan Portes et fenêtres Corp. c. Bruce, 2012 QCCQ 2254 (Que. Sm. Cl. Ct.).

Under our Constitution, the official languages of Canada (English and French) can be used in the courts of law of Québec. The parties and witnesses may address the court in the official language of their choosing. In Montreal, Justices sitting in the Small Claims Court Division are versed in the two official languages.

The Ministère de la Justice has issued Directive A-6 dealing with interpretation services and payment of costs relating thereto.

Section B of Directive A-6 entitled "*In Civil Matters*" stipulates:

> B) — In Civil Matters
>
> i) Court of Québec, Civil Division and Superior Court.
>
> A party must request interpretation services on his own and will assume the related costs, where he or the witness he has assigned does not understand the language used at the hearing.
>
> ii) Court of Québec, Civil Division, Small Claims Division.
>
> Where a judge does not understand the language used by one of the parties or one of the witnesses, interpretation services are provided at the hearing on his request, then the costs are at the expense of the *Ministère de la Justice*. Otherwise, a party makes his own request for interpretation services and assumes the related costs.
>
> [Emphasis added].
>
> [An excerpt of the Directive is attached to the present judgment to form part hereof as if recited at length herein].

Based on the foregoing, while the court is sympathetic to Mrs. Bruce's request, it cannot accede to her request, under the present circumstances. If Mrs. Bruce feels that the services of an interpreter are nevertheless warranted, she will have to make the arrangements herself and assume all costs related thereto.

For those reasons, the court dismisses the motion to appoint a French/English interpreter.

Wittenberg v. Fred Geisweiller / Locomotive Investments Inc., 1999 CarswellOnt 1888, 44 O.R. (3d) 626, 41 C.P.C. (4th) 358, (sub nom. *Wittenberg v. Geisweiller)* 123 O.A.C. 139 (Ont. S.C.J.).

The trial judge rejected the defendant's request that the Small Claims Court case be heard in French on the grounds that the judge not bilingual. The defendant's right to a bilingual pro-

ceeding is conferred by s. 126(1) of the *Courts of Justice Act* and is a substantive right which cannot be overridden by the direction in s. 25 to Small Claims Court judges to keep procedures simple and costs low. The denial of the defendant's right to a bilingual proceeding constituted a substantial wrong. An appeal was allowed; a new trial was ordered. The defendant did not waive his right to a bilingual proceeding under s. 126. The waiver of such a right must be clear and informed. A reading of the transcript does not satisfy it was clear or informed.

Sera v. Amboise, 2013 ONSC 7067, 2013 CarswellOnt 15619, 40 R.F.L. (7th) 425 (Ont. S.C.J.); leave to appeal refused 2014 ONSC 2981, 2014 CarswellOnt 6162 (Ont. S.C.J.); additional reasons 2014 ONSC 4268, 2014 CarswellOnt 9674 (Ont. S.C.J.).

Respondent mother brought motion to adjourn trial. She requested that the trial be heard as a bilingual matter. She sought to set aside all previous interim orders on grounds that her right to a bilingual hearing had been breached.

The father opposed the filing of documents in French. He argued that section 126(2) parts 6 and 7 of the *Courts of Justice Act* specify that documents may only be filed in French (except with the consent of the parties) in designated Schedule 2 areas. Newmarket is not a designated Schedule 2 area.

The court declined to adjourn the trial of this matter. The father does not consent to documents being filed in French as he does not speak French nor does his lawyer. That rule pertains to the Superior Court of Justice, and any so called exception in section 126(4) of the *Courts of Justice Act* does not apply as it would otherwise completely contradict the intention of section 126(2) and (6) of the *Courts of Justice Act*. While Newmarket is not a designated schedule 2 area, it does not mean that section 126(4) of the *Courts of Justice Act* can be ignored. The mother has the right to file future documents in French. Upon the request of the father, documents may be translated into English.

Sera v. Amboise, 2013 ONSC 7067, 2013 CarswellOnt 15619, 40 R.F.L. (7th) 425 (Ont. S.C.J.) C.A). Gilmore J.;–; leave to appeal refused 2014 ONSC 2981, 2014 CarswellOnt 6162 (Ont. S.C.J.); additional reasons 2014 ONSC 4268, 2014 CarswellOnt 9674 (Ont. S.C.J.).

Mother aware of process to request bilingual hearing and did not pursue matter. Under ss. 125 and 126 of *Courts of Justice Act* (Ont.), party can request bilingual proceeding.

Pleadings and documents could be in French as of right in specified areas and with consent. However, in the Family Court of the Superior Court, originating process could be written in French and documents could be filed in French. Mother could file future documents in French. However, that did not mean that previous orders should be set aside.

Mazraani c. Industrielle Alliance, Assurance et services financiers inc., 2018 CSC 50, 2018 SCC 50, 2018 CarswellNat 6701, 2018 CarswellNat 6702, [2018] 3 S.C.R. 261, 50 C.C.E.L. (4th) 177, [2019] 2 C.T.C. 75, 427 D.L.R. (4th) 6, *(*sub nom. *Mazraani v. Industrielle Alliance)* 2018 D.T.C. 5126, *(*sub nom. *Mazraani v. Industrial Alliance)* 2018 D.T.C. 5127 (note), [2018] S.C.J. No. 50 (S.C.C.)

Language of your choice. In *Mazraani c. Industrielle Alliance, Assurance et services financiers inc.*, the Supreme Court of Canada affirmed that there is a duty on judges of the Tax Court of Canada to ensure that the language rights of participants in the court process are protected.

Several of Industrial's witnesses as well as Industrial's counsel asked to speak in French. Ho*wev*er, Mr. Mazraani spoke English and did not understand French. The court, in a unanimous judgement, upheld the FCA's decision ordering a new trial. In its reasoning, the court noted that "language rights are substantive rights, not procedural rights" and these rights must be "interpreted purposively, in a manner consistent with the preservation and develop-

ment of official language communities in Canada." It also noted that the constitutional protection of language rights set out in section 133 of the *Constitution Act, 1867* and section 19 of the C*anadian Charter of Rights and Freedoms,* apply to proceedings before the TCC. There are also quasi-constitutional rights set out in the *Official Languages Act*.

Regarding remedy, the court stated that any remedy must achieve the objective of the right, which is "full and equal participation of linguistic minorities in the country's institutions." The court also noted that "because language rights are not procedural rights, the fact that a violation has had no impact on the fairness of the hearing is in principle not relevant to the remedy."

126. (1) Bilingual proceedings — A party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding.

(2) Idem — The following rules apply to a proceeding that is conducted as a bilingual proceeding:

1. The hearings that the party specifies shall be presided over by a judge or officer who speaks English and French.

2. If a hearing that the party has specified is held before a judge and jury in an area named in Schedule 1, the jury shall consist of persons who speak English and French.

3. If a hearing that the party has specified is held without a jury, or with a jury in an area named in Schedule 1, evidence given and submissions made in English or French shall be received, recorded and transcribed in the language in which they are given.

4. Any other part of the hearing may be conducted in French if, in the opinion of the presiding judge or officer, it can be so conducted.

5. Oral evidence given in English or French at an examination out of court shall be received, recorded and transcribed in the language in which it is given.

6. In an area named in Schedule 2, a party may file pleadings and other documents written in French.

7. Elsewhere in Ontario, a party may file pleadings and other documents written in French if the other parties consent.

8. The reasons for a decision may be written in English or French.

9. On the request of a party or counsel who speaks English or French but not both, the court shall provide interpretation of anything given orally in the other language at hearings referred to in paragraphs 2 and 3 and at examinations out of court, and translation of reasons for a decision written in the other language.

(2.1) Prosecutions — When a prosecution under the *Provincial Offences Act* by the Crown in right of Ontario is being conducted as a bilingual proceeding, the prosecutor assigned to the case must be a person who speaks English and French.

(3) Appeals — When an appeal is taken in a proceeding that is being conducted as a bilingual proceeding, a party who speaks French has the right to require that the appeal be heard by a judge or judges who speak English and French; in that case subsection (2) applies to the appeal, with necessary modifications.

(4) Documents — A document filed by a party before a hearing in a proceeding in the Family Court of the Superior Court of Justice, the Ontario Court of Justice or the Small Claims Court may be written in French.

Commentary: A document filed by a party before a hearing in a proceeding in the Ontario Court of Justice or the Small Claims Court may be written in French.

Case Law: *Case Law*: *Ndem v. Patel*, 2008 ONCA 148, 2008 CarswellOnt 1271, 2008 CarswellOnt 1272, *(*sub nom. *Belende v. Patel)* 89 O.R. (3d) 494, *(*sub nom. *Belende c. Patel)* 89 O.R. (3d) 502, *(*sub nom. *Belende v. Patel)* 290 D.L.R. (4th) 490 (Ont. C.A.).

The right to bilingual proceeding under section 126 of *Courts of Justice Act* is *not* qualified by judicial discretion. The court is able to control process and prevent abuse without violating litigant's statutory right to bilingual proceeding.

Before hearing, appellant notified bilingual judge would not be available. Appellant's request for adjournment denied and motion judge, who was not bilingual, dismissal action. Appeal allowed. Right to a bilingual hearing a particular kind of right. Violation of the right, which was quasi-constitutional in nature, constituted material prejudice to the linguistic minority. Order was set aside and matter referred back to the court below.

See also *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, 62 C.R.R. (2d) 133, 173 D.L.R. (4th) 193, 134 C.C.C. (3d) 481, 198 W.A.C. 227, 121 B.C.A.C. 227, 238 N.R. 131, 1999 CarswellBC 1026, 1999 CarswellBC 1025 (S.C.C.), at para. 41:

> Language rights have a totally distinct origin and role [when compared with the right to a fair trial]. They are meant to protect official language minorities in this country and to insure the equality of status of French and English.

In *Greenspoon v. Belende*, [2004] O.J. No. 3269, 2004 CarswellOnt 3247, 2004 CarswellOnt 3241, 189 O.A.C. 140 (Ont. C.A.); leave to appeal refused 2004 CarswellOnt 5203, 2004 CarswellOnt 5202, 338 N.R. 195 (note) (S.C.C.) at para. 15, court stated:

> Where, as in this case, the appellant has met the procedural requirements to trigger a right to a bilingual hearing, this right is more than purely procedural, it is substantive and the appropriate remedy is to set aside the order.

Sera v. Amboise, 2013 ONSC 7067, 2013 CarswellOnt 15619, 40 R.F.L. (7th) 425 (Ont. S.C.J.); leave to appeal refused 2014 ONSC 2981, 2014 CarswellOnt 6162 (Ont. S.C.J.); additional reasons 2014 ONSC 4268, 2014 CarswellOnt 9674 (Ont. S.C.J.).

In the Ontario Court of Justice, Small Claims Court, or the Family Court of the Superior Court of Justice, an originating process and documents may be written in French.

(5) Process — A process issued in or giving rise to a criminal proceeding or a proceeding in the Family Court of the Superior Court of Justice or the Ontario Court of Justice may be written in French.

(6) Translation — On a party's request, the court shall provide translation into English or French of a document or process referred to in subsection (4) or (5) that is written in the other language.

(7) Interpretation — At a hearing to which paragraph 3 of subsection (2) does not apply, if a party acting in person makes submissions in French or a witness gives oral evidence in French, the court shall provide interpretation of the submissions or evidence into English.

(8) Parties who are not natural persons — A corporation, partnership or sole proprietorship may exercise the rights conferred by this section in the same way as a natural person, unless the court orders otherwise.

(9) Regulations — The Lieutenant Governor in Council may make regulations,

(a) prescribing procedures for the purpose of this section;

(b) adding areas to Schedule 1 or 2.

Proposed Amendment — 126

126. Use of French — (1) Documents that may be written in French — The following documents may be written in French:

1. Pleadings or other documents filed by a party.

2. A process issued in or giving rise to the proceeding.

(2) Translation of documents — On a party's request, the court shall provide a translation into English or French of a document described in paragraph 1 or 2 of subsection (1) that is written in the other language.

(3) Interpretation — If a party acting in person makes submissions in French or a witness gives oral evidence in French, the court shall provide interpretation of the submissions or evidence into English. This subsection does not apply to a hearing in a bilingual proceeding to which paragraph 3 of subsection (4) applies.

(4) Bilingual proceedings — A party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding, and the following rules apply if the party does so:

1. The hearings that the party specifies shall be presided over by a judge or officer who speaks English and French.

2. If a hearing that the party has specified is held before a judge and jury in an area described in subsection (5), the jury shall consist of persons who speak English and French.

3. If a hearing that the party has specified is held without a jury, or with a jury in an area described in subsection (5), evidence given and submissions made in English or French shall be received, recorded and transcribed in the language in which they are given.

4. Any other part of the hearing may be conducted in French if, in the opinion of the presiding judge or officer, it can be so conducted.

5. Oral evidence given in English or French at an examination out of court shall be received, recorded and transcribed in the language in which it is given.

6. On the request of a party, if the party or their counsel speaks English or French but not both, the court shall provide interpretation of anything given orally in the other language at hearings referred to in paragraph 3 and at examinations out of court.

7. The reasons for a decision may be written in English or French, but the court shall provide a translation into the other language on the request of a party.

(5) Bilingual juries — The areas referred to in paragraphs 2 and 3 of subsection (4) are the following:

1. Counties:

i. Essex.

ii. Middlesex.

iii. Prescott and Russell.

iv. Renfrew.

v. Simcoe.

vi. Stormont, Dundas and Glengarry.

2. Territorial districts:

i. Algoma.

ii. Cochrane.

iii. Kenora.

iv. Nipissing.

v. Sudbury.

vi. Thunder Bay.

vii. Timiskaming.

3. The area of the County of Welland as it existed on December 31, 1969.

4. The Municipality of Chatham Kent.

5. The City of Hamilton.

6. The City of Ottawa.

7. The Regional Municipality of Peel.

8. The City of Greater Sudbury.

9. The City of Toronto.

10. Such other areas as are prescribed.

(6) Prosecutions — If a prosecution under the *Provincial Offences Act* is to be conducted as a bilingual proceeding by a prosecutor referred to in paragraph 1 or 2 of the definition of "prosecutor" in subsection 1(1) of that Act or an agent acting on behalf of that pe rson, the prosecutor assigned to the case must speak English and French.

(7) Appeals — When an appeal is taken in a proceeding that is being conducted as a bilingual proceeding, a party who speaks French has the right to require that the appeal be heard by a judge or judges who speak English and French; in that case subsection (4) applies to the appeal, with necessary modifications.

(8) Parties who are not natural persons — A corporation, partnership or sole proprietorship may exercise the rights conferred by this section in the same way as a natural person, unless the court orders otherwise.

(9) Regulations — The Lieutenant Governor in Council may make regulations,

(a) prescribing procedures for the purpose of this section;

(b) prescribing areas for the purpose of paragraph 10 of subsection (5).

(10) Transition — This section, as it read immediately before section 17 of Schedule 3 to the *Accelerating Access to Justice Act, 2021* came into force, continues to apply to proceedings commenced before the day that section came into force.

2021, c. 4, Sched. 3, s. 16 [Not in force at date of publication.]

Schedule 1 — Bilingual Juries

Paragraphs 2 and 3 of subsection 126(2)

The following counties:

Essex

Middlesex

Prescott and Russell

Renfrew
Simcoe
Stormont, Dundas and Glengarry

The following territorial districts:

Algoma
Cochrane
Kenora
Nipissing
Sudbury
Thunder Bay
Timiskaming

The area of the County of Welland as it existed on December 31, 1969.

The Municipality of Chatham Kent.

The City of Hamilton.

The City of Ottawa.

The Regional Municipality of Peel.

The City of Greater Sudbury.

The City of Toronto.

O. Reg. 922/93, s. 1 [Amended O. Reg. 441/97, s. 1.]; 1994, c. 12, s. 43(3); 1997, c. 26, Sched.; 2002, c. 17, Sched. F, s. 1

Schedule 2 — Bilingual Documents

Paragraph 6 of subsection 126(2)

The following counties:

Essex
Middlesex
Prescott and Russell
Renfrew
Simcoe
Stormont, Dundas and Glengarry

The following territorial districts:

Algoma
Cochrane
Kenora
Nipissing
Sudbury
Thunder Bay
Timiskaming

The area of the County of Welland as it existed on December 31, 1969.

The Municipality of Chatham Kent.

The City of Hamilton.

The City of Ottawa.

The Regional Municipality of Peel.

The City of Greater Sudbury.

The City of Toronto.

O. Reg. 922/93, s. 2 [Amended O. Reg. 441/97, s. 2.]; 1994, c. 12, s. 43(3); 1997, c. 26, Sched.; 2002, c. 17, Sched. F, s. 1
1994, c. 12, s. 43; 1996, c. 25, s. 9(17), (18)

Commentary: Additional areas where a party may file pleadings and other documents in French were added by O. Reg. 922/93 which came into force on December 17, 1993. This amendment is to include those changes in the *Courts of Justice Act*.

The following French language court proceedings apply to all courts:

A party who speaks the French language has the right to:

(a) file documents in French;

(b) a pre-trial hearing before a bilingual referee;

(c) a trial before a bilingual judge;

(d) subsequent examinations before a bilingual judge.

This can also include a corporation, partnership or sole proprietorship unless the court orders otherwise.

Requests for such services can be made in many ways:

1. By filing a claim or defence in French. (This automatically means that a request has been made);

2. By making an oral statement to the court during an appearance in the proceeding;

3. By filing a written statement with the clerk where the proceeding was commenced;

4. By filing a requisition on Form 1.

The request should be made before the notice of trial is sent. A request can be made subsequently with the leave of the court.

If a party who speaks the French language as not requested a trial before a bilingual court, no interpreter is provided. Where parties do not speak the French language and therefore are not entitled to a bilingual trial, but such parties wish to call a witness or witnesses who wish to testify in French, the court will provide an interpreter. Parties should advise the court of this requirement in writing at least 10 days before the hearing.

NOTE: The following is available for use in the courts:

Form 1 — Requisition — Bilingual Proceeding

Courts of Justice Act, 1984

Claim Number:.....

PLAINTIFF:.....

DEFENDANT:.....

COURT:..... Small Claims Court

.....(name of party), a party who speaks the French language, requires that (check (1) or (2) below):

.....(1) The hearing be conducted before a judge/referee who speaks both the English and French languages.

.....(2) The hearing of the appeal be conducted before a judge (or judges) who speaks both the English and French languages.

Date: .....

Name, address and telephone number or solicitor filing requisition:

.....

.....

.....

Ontario Regulation 806/84, Form 1

The following Small Claims Courts (County/District in brackets) are required to provide services in French when requested:

ALEXANDRIA (Stormont, Dundas & Glengarry)
AMHERSTBURG (Essex)
BELLEVILLE (Hastings)
BLIND RIVER (Algoma)
BRAMPTON (Peel)
BURLINGTON (Halton)
CAMBRIDGE (Waterloo)
CHAPLEAU (Sudbury)
CHATHAM (Kent)
COCHRANE (Cochrane)
CORNWALL (Stormont, Dundas & Glengarry)
ELLIOT LAKE (Algoma)
ENGLEHART (Timiskaming)
ESPANOLA (Sudbury)
ETOBICOKE (Metro Toronto)
HAILEYBURY (Timiskaming)
HAMILTON (Hamilton-Wentworth)
HAWKESBURY (Prescott & Russell)
IROQUOIS (Stormont, Dundas & Glengarry)
IROQUOIS FALLS (Cochrane)
KAPUSKASING (Cochrane)
KILLALOE STATION (Renfrew)
KINGSTON (Frontenac)
KINGSVILLE (Essex)
KIRKLAND LAKE (Timiskaming)
KITCHENER (Waterloo)
LONDON (Middlesex)
MIDLAND (Simcoe)
MILTON (Halton)
NEWMARKET (York Region)
NIAGARA FALLS (Niagara South)
NORTH BAY (Nipissing)
NORTH YORK (Metro Toronto)
OAKVILLE (Halton)
OSHAWA (Durham)
OTTAWA (Ottawa-Carleton)
PEMBROKE (Renfrew)
RENFREW (Renfrew)
RECLINED (Prescott & Russell)
ST. CATHARINES (Niagara North)
SARNIA (Lambton)
SAULT STE. MARIE (Algoma)
SCARBOROUGH (Metro Toronto)
STURGEON FALLS (Nipissing)
SUDBURY (Sudbury)
THESSALON (Algoma)
TIMMINS (Cochrane)

TORONTO (Metro Toronto)
WAWA (Algoma)
WELLAND (Niagara South)
WHITBY (Durham)
WINCHESTER (Stormont, Dundas & Glengarry)
WINDSOR (Essex)

Interest and Costs

127. Prejudgment and postjudgment interest rates — (1) Definitions — In this section and in sections 128 and 129,

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to the banks listed in Schedule I to the *Bank Act (Canada)*;

"date of the order" means the date the order is made, even if the order is not entered or enforceable on that date, or that the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed;

"postjudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent;

"prejudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point;

"quarter" means the three-month period ending with the 31st day of March, 30th day of June, 30th day of September or 31st day of December.

(2) Calculation and publication of interest rates — After the first day of the last month of each quarter, a person designated by the Deputy Attorney General shall forthwith,

(a) determine the prejudgment and postjudgment interest rate for the next quarter; and

(b) publish in the prescribed manner a table showing the rate determined under clause (a) for the next quarter and the rates determined under clause (a) or under a predecessor of that clause for all the previous quarters during the preceding 10 years.

Commentary: NOTE: It appears that causes of action arising on or before October 23, 1989 are governed by the former s. 137(1)(d). As a result of the amendment (s. 127(1) "prejudgment interest rate"), the prejudgment and postjudgment interests are now to be calculated differently.

Pre- and Post-Interest Calculations

If judgment is awarded in court and the judge sets an interest rate for pre-, that rate applies to pre-, not postjudgment interest.

If the judge awards pre-interest and states from what date the interest is to be awarded from but does not set an interest rate, the rate is determined by the month the claim was originally filed.

If the judge awards pre-interest but does not indicate a date, then the number of days are to be determined from the date of the claim or if stated in the claim from the date stated.

If judgment is by default and there is a date stated in the claim as to when the monies were owing the number of days is calculated from this date at the rate of the month when the claim was filed.

If judgment is by default and there is an interest rate mentioned with supporting documentation, both pre- and post- are calculated at this amount from the date when the monies were owing, or if not stated, from the date of the claim.

If judgment is by default and the claim mentions no date from when the monies were owing or an interest rate then the days are calculated from the date the claim is filed and the rate the month when the claim was filed.

Post-interest is calculated at the rate of month the judgment was awarded by default, or at the interest rate the judge has awarded, or at the rate of the month the judgment was awarded by the judge.

Formula to calculate prejudgment interest:

Principal Judgment Amount

× prejudgment interest rate %

× number of days from date the claim arose (or the claim was issued) to date of judgment

divided by 365 days

Formula to calculate postjudgment interest:

× postjudgment interest rate %

× number of days from date of judgment to date of enforcement process (or payment received)

divided by 365 days

Note: Calculation of interest is always on the amount owing from time to time as payments are received. This is true for both prejudgment and postjudgment interest.

Courts of Justice Act

Postjudgment and Prejudgment Interest Rates

Please note that effective October 1, 2007, postjudgment and prejudgment interest rates are published on the Ministry's website pursuant to O. Reg. 339/07.

1. Postjudgment interest rates (and prejudgment interest rates for causes of action arising on or before October 23, 1989) are as follows:

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
1985	12%	13%	11%	11%
1986	11%	13%	10%	10%
1987	10%	9%	10%	11%
1988	10%	10%	11%	12%
1989	13%	13%	14%	14%
1990	14%	15%	15%	14%
1991	14%	11%	11%	10%
1992	9%	9%	8%	7%
1993	10%	8%	7%	6%
1994	6%	6%	8%	7%

1995	8%	10%	9%	8%
1996	8%	7%	6%	6%
1997	5%	5%	5%	5%
1998	5%	6%	6%	7%
1999	7%	7%	6%	6%
2000	6%	7%	7%	7%
2001	7%	7%	6%	6%
2002	4%	4%	4%	4%
2003	4%	4%	5%	5%
2004	4%	4%	4%	4%
2005	4%	4%	4%	4%
2006	5%	5%	6%	6%
2007	6%	6%	6%	6%
2008	6%	6%	5%	5%
2009	4%	3%	2%	2%
2010	2%	2%	2%	2%
2011	3.0%	3.0%	3.0%	3.0%
2012	3.0%	3.0%	3.0%	3.0%
2013	3.0%	3.0%	3.0%	3.0%
2014	3.0%	3.0%	3.0%	3.0%
2015	3.0%	2.0%	2.0%	2.0%
2016	2.0%	2.0%	2.0%	2.0%
2017	2.0%	2.0%	2.0%	2.0%
2018	3.0%	3.0%	3.0%	3.0%
2019	3.0%	3.0%	3.0%	3.0%
2020	3.0%	3.0%	2.0%	

Notes:

This table shows the postjudgment interest rates for orders made in the quarters indicated. This table also shows the prejudgment interest rates for actions commenced in the quarters indicated in respect of causes of action arising on or before October 23, 1989.

For proceedings commenced before January 1, 1985, the postjudgment interest rate is the prime bank rate, which is published in the Bank of Canada Review. The rate can be found from either the back copies of the Bank of Canada Review or by calling the Bank of Canada.

2. Prejudgment interest rates for causes of action arising after October 23, 1989 are as follows:

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
1989				12.4%
1990	12.5%	13.5%	13.9%	12.9%
1991	12.3%	10.0%	9.1%	8.8%
1992	7.7%	7.5%	6.3%	5.1%
1993	8.3%	6.1%	5.1%	5.0%
1994	4.3%	4.1%	6.6%	5.6%
1995	6.0%	8.0%	7.6%	6.6%

1996	6.1%	5.6%	5.0%	4.3%
1997	3.3%	3.3%	3.3%	3.5%
1998	4.0%	5.0%	5.0%	6.0%
1999	5.3%	5.3%	4.8%	4.8%
2000	5.0%	5.3%	6.0%	6.0%
2001	6.0%	5.8%	4.8%	4.3%
2002	2.5%	2.3%	2.5%	3.0%
2003	3.0%	3.0%	3.5%	3.3%
2004	3.0%	2.8%	2.3%	2.3%
2005	2.8%	2.8%	2.8%	2.8%
2006	3.3%	3.8%	4.5%	4.5%
2007	4.5%	4.5%	4.5%	4.8%
2008	4.8%	4.3%	3.3%	3.3%
2009	2.5%	1.3%	0.5%	0.5%
2010	0.5%	0.5%	0.5%	1.0%
2011	1.3%	1.3%	1.3%	1.3%
2012	1.3%	1.3%	1.3%	1.3%
2013	1.3%	1.3%	1.3%	1.3%
2014	1.3%	1.3%	1.3%	1.3%
2015	1.3%	1.0%	1.0%	1.0%
2016	0.8%	0.8%	0.8%	0.8%
2017	0.8%	0.8%	0.8%	1.0%
2018	1.3%	1.5%	1.5%	1.8%
2019	2.0%	2.0%	2.0%	3.0%
2020	3.0%	3.0%	2.0%	

Notes:

This table shows the prejudgment interest rates for actions commenced in the quarters indicated in respect of causes of action arising after October 23, 1989.

(3) Regulations — The Attorney General may, by regulation, prescribe the manner in which the table described in clause (2)(b) is to be published.

2006, c. 21, Sched. A, s. 18

128. (1) Prejudgment interest — A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

(2) Exception for non-pecuniary loss on personal injury — Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court under clause 66(2)(w).

Commentary: The amendment deletes the discount rate determined by the rules of court as the rate of interest on damages for non-pecuniary loss in a personal injury action and substitutes the prejudgment interest rate [see section 21(2) amendment to clause 66(2)(w)].

(3) Special damages — If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

(4) Exclusion — Interest shall not be awarded under subsection (1),

(a) on exemplary or punitive damages;

(b) on interest accruing under this section;

(c) on an award of costs in the proceeding;

(d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(e) with respect to the amount of any advance payment that has been made towards settlement of the claim, for the period after the advance payment has been made;

(f) where the order is made on consent, except by consent of the debtor; or

(g) where interest is payable by a right other than under this section.

1994, c. 12, s. 44

Commentary: The *Courts of Justice Act* (the "Act") (Section 128) provides for an order of prejudgment interest.

Prejudgment interest rate is defined in the *Courts of Justice Act* (s. 127(1)). These rates posted quarterly in the Ontario Gazette.

It is the responsibility of the claimant to seek prejudgment interest in the claim and insert the full amount of interest on the requisition and default judgment filed (principal judgment amount × prejudgment interest rate % × number of days from the date the claim arose (or the claim was issued) to date of judgment / 365 days).

In general, the Act states that a person is entitled to claim prejudgment interest calculated from the date the action arose to the date the order for payment of money was made. The order is to reflect the prejudgment interest rate.

However, the Act states that prejudgment interest will not be awarded on the following [s. 128(3), *CJA*]:

Interest accruing under this section:

- An award of costs in the proceeding;
- For any advance payment that has already been made, from the date the payment was made;
- Where the order is made on consent, except by consent of the debtor; and/or
- Where interest is payable by a right (*e.g.*, contractual right) other than under Section 128, *Courts of Justice Act*.

What happens if the date the cause of action arose is not set out in the claim and the claimant does not specify in the claim a date from which interest is to commence, yet prejudgment interest is claimed? In that case, interest would be calculated from the date that the claim was filed, issued and at the rate applicable at that time.

How are claimants to determine the date of judgment for the purpose of calculating prejudgment interest when the default judgment is mailed in? Claimants electing to submit notices of default judgment by mail must accept and calculate prejudgment interest by using the date of mailing as the date of judgment.

Recovery Of Legal Fees

Where a solicitor has commenced an action to recover unpaid legal fees, the right to prejudgment interest is governed by s. 33 of the *Solicitors Act*, R.S.O. 1990, c. S.15. Pursuant to subsection 33(4) of the Act, there is no entitlement to prejudgment interest if the rate of interest is not shown on the account delivered to the defendant(s).

In the case of postjudgment interest, a solicitor who has obtained a judgment for unpaid legal fees is entitled to postjudgment interest pursuant to subsection 129(1) of the *Courts of Justice Act* even if there is no mention of it in the account delivered to the defendant(s).

The precise rate of interest must be stated on the account delivered to the defendant. A copy of the account as delivered showing the actual rate of interest must be filed with the court before judgment is entered.

The applicable rate of interest shall be the rate shown on the account as long as it does not exceed the rate permitted by the *Courts of Justice Act*. Where the account contains a rate which is higher than that permitted under the *Courts of Justice Act*, it is the statutory rate which applies. The statutory rate is the rate in effect on the date that the account was delivered to the defendant by the solicitor. Interest runs from one month after the account is delivered to the date of judgment.

If no precise interest rate is stated on the account as delivered, the plaintiff is not entitled to any prejudgment interest. It is not sufficient to state "interest in accordance with Section 33 of the Solicitors Act."

Postjudgment interest is applicable to all judgments even where no rate has been stated or where the original account contains no reference to postjudgment interest. The interest rate is the statutory rate in effect on the date that judgment was entered. If the parties have agreed to a contractual rate, the contractual rate will apply.

Section 25 — Prejudgment Interest and Postjudgment Interest.

Case Law: *Danforth Roofing Supply Ltd. v. Smith* (1987), 9 W.D.C.P. 62 (Ont. Prov. Ct.).

Merely putting an interest amount on an invoice does not create a right pursuant to s. 138 of the *Courts of Justice Act*, 1984. The plaintiff would have received interest at a compound interest rate.

Alderson v. Callaghan (March 2, 1995), Doc. 300257/87 (Ont. Gen. Div.).

Plaintiff's claim for no-fault benefits in November, 1985 did not constitute "notice" of a claim for prejudgment interest as required by s. 138 of *Courts of Justice Act* [now s. 128(1)]. Now allowed from when cause of action arose.

Dell Holdings Ltd. v. Toronto Area Transit Operating Authority (2000), 193 D.L.R. (4th) 762, 71 L.C.R. 161, 2000 CarswellOnt 3957 (Ont. S.C.J.).

Endorsement — The party who was successful before the Supreme Court of Canada on expropriation matter sought payment of interest on costs award. At the time of the hearing no interest was payable on costs award, but the law changed. Applicability of current state of law should be raised in the court that made the costs award and not before the Superior Court of Justice.

Plester v. Wawanesa Mutual Insurance Co., 2006 CarswellOnt 5536, 215 O.A.C. 187, 41 C.C.L.I. (4th) 15, 275 D.L.R. (4th) 552 (Ont. C.A.).

After release of appellate decision, counsel for plaintiffs brought application for prejudgment interest on award of aggravated damages. Insurer argued plaintiffs had not requested prejudgment interest earlier, nor raised the issue by way of cross-appeal. Application for prejudgment interest dismissed. Finality to litigation was one of the hallmarks of a just result.

Capital One Bank v. Matovska (2007), 2007 CarswellOnt 5661, 230 O.A.C. 1 (Ont. Div. Ct.); additional reasons at (2007), [2007] O.J. No. 3368, 2007 CarswellOnt 5605 (Ont. Div. Ct.).

Bank obtained default judgment against three credit card customers for the balance debt. Trial judge refused to award bank prejudgment or postjudgment interest at rate stipulated in credit card agreements or pre-proceeding collection expenses paid to legal counsel. The bank appealed. Appeal allowed.

Bank entitled to prejudgment and postjudgment interest at the rate stipulated in the credit card agreement. It was also entitled to the pre-proceeding collection expenses, as they constituted a claim for a liquidated demand for money.

Pre-proceeding collection expenses claimed in the credit card agreement claim for a liquidated demand for money, within the meaning of the Small Claims Court Rules 11.10(1) and 11.02(1). See *Holden Day Wilson v. Ashton* (1993), 14 O.R. (3d) 306, 104 D.L.R. (4th) 266, 64 O.A.C. 4 (Div. Ct.). See also *Cantalia Sod Co. v. Patrick Harrison & Co.*, 1967 CarswellOnt 176, [1968] 1 O.R. 169 (Ont. H.C.).

The *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, sets out the rules respecting an award of prejudgment interest (s. 128) and postjudgment interest (s. 129), subject to the overriding discretion of the court.

In *Bank of America Canada v. Mutual Trust Co.*, [2002] S.C.J. No. 44, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, REJB 2002-30907, 287 N.R. 171, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 159 O.A.C. 1, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), the Supreme Court of Canada interpreted the above sections of the *Courts of Justice Act*.

MacLeod v. Marshall, 2019 ONCA 842, 2019 CarswellOnt 17375, 148 O.R. (3d) 727, 100 C.C.L.I. (5th) 183, 440 D.L.R. (4th) 310, Thorburn J.A. (Ont. C.A.); additional reasons 2019 ONCA 955, 2019 CarswellOnt 21284, 100 C.C.L.I. (5th) 199 (Ont. C.A.); leave to appeal refused *Basilian Fathers of Toronto v. Roderick MacLeod*, 2020 CarswellOnt 6047, 2020 CarswellOnt 6048 (S.C.C.)

In 2015 the *Ontario Insurance Act*, R.S.O. 1990 c.C.18 was amended to provide that Rule 53.10 of the *Rules of Civil Procedure*, R.R.O. 1990, which calls for pre-judgment interest at 5%, no longer applies to cases involving car accidents.

In *MacLeod v. Marshall*, the Court recognized that a trial judge has the discretion to allow interest at a lower rate having regard to changes in market rates, under s. 130 of the Act. *MacLeod* involved a claim for damages for sexual abuse. The trial judge failed to consider the jurisdiction to reduce the rate of interest, despite the submissions of counsel for the defence.

The Court of Appeal concluded that the trial judge should have taken into account the declining rates of interest and allowed the appeal on the rate of interest, to adjust it to 1.3% on general and aggravated damages, reflecting the economic reality that rates have declined significantly over time.

Rubner v. Waddington McLean & Co. Limited, 2020 ONSC 692, 2020 CarswellOnt 1138, F.L. Myers J. (Ont. Div. Ct.)

Pre-judgement interest. *Courts of Justice Act*, RSO 1990, c C.43; 128(1) — 130 — 130(1) — 130(2) — 134(1) — 134(6)

The trial judge made no mention of prejudgment interest although Mr. Rubner sought it in both his claim and in his closing written submissions. In *Somers v. Fournier*, 2002 CarswellOnt 2119, 60 O.R. (3d) 225, 12 C.C.L.T. (3d) 68, 22 C.P.C. (5th) 264, 214 D.L.R. (4th) 611, 27 M.V.R. (4th) 165, 162 O.A.C. 1, [2002] O.J. No. 2543 (Ont. C.A.); additional reasons 2002 CarswellOnt 2600, 162 O.A.C. 1 at 17 (Ont. C.A.), the Court of Appeal set out the basic principles applicable to prejudgment interest. At para. 23 of the decision, the Court explained:

> Modern theories of pre-judgment interest relate it to compensatory, rather than punitive, goals. Awards of pre-judgment interest are designed to recognize the impact of inflation and to provide relief to a successful litigant against the declining value of money between the date of entitlement to damages and the time when damages are awarded. (See M.A. Waldron, *The Law of Interest in Canada* (Scarborough: Carswell, 1992) at p. 127.) In *Pagliarella v. DiBiase Brothers Inc.* (1989), 1989 CanLII 4092 (ON CA); 68 O.R. (2d) 597, 58 D.L.R. (4th) 691

(C.A.), leave to appeal to S.C.C. refused S.C.C. File No. 21500, S.C.C. Bulletin 1989, p. 2316, Finlayson J.A. commented (at p. 607 O.R.):

> It must be remembered that interest is merely the value of money and when we are speaking of prejudgment interest we are talking about compensation [page235] for the victim with respect to the delay necessitated by the time interval from the date on which the right to a money award arises and the date on which it is awarded. It is, in the words of Chouinard J. in *Travelers Ins. Co. of Canada v. Corriveau*, 1982 CanLII 222 (SCC); [1982] 2 S.C.R. 866 at p. 875, *(*sub nom. *La Compagnie d'Assurance Travelers du Canada v. Corriveau)* [1983] I.L.R. [para.] 1–1601 (S.C.C.), merely "damages due to delay".

Section 128 provides for prejudgment interested to commence running when the cause of action accrued. Mr. Rubner's cause of action for misrepresentation was complete upon the purchase of the statue in 2006. In *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156, 2012 CarswellOnt 2578, 347 D.L.R. (4th) 657, 290 O.A.C. 42, [2012] O.J. No. 1099 (Ont. C.A.), the Court of Appeal explained:

> As I will explain, for the purpose of negligent misrepresentation claims, damage is the condition of being worse off than if the defendant had not made the misrepresentation. In cases where a plaintiff is induced to enter into a transaction in reliance on a misrepresentation and fails to get what he was entitled to (the context relevant to the City's case), the plaintiff suffers damage sufficient to complete the cause of action when he enters into the transaction, not when the loss is monetized into a specific amount.

Although the limitation period did not commence until Mr. Rubner learned that he had been misled in 2018, his loss occurred when he received a worthless fake statue in 2006 and was deprived of his funds. Accordingly, under s. 128, Mr. Rubner is entitled to prejudgment interest as compensation for the lost use of his money from the time the cause arose in 2006 until the date of the judgment below. The failure to award interest was either an oversight or a reversible error. S. 134(1)(a) and (6) of the *Courts of Justice Act* authorizes the Court to make the decision that the trial judge ought to have made.

Mr. Rubner is not entitled to compensation for time spent as a client. He is entitled to compensation for time that would otherwise have been spent by a lawyer. Using a rate of $100 per hour, costs to Mr. Rubner for his time at $2,500 (See: *McMurter v. McMurter*, 2017 ONSC 725, 2017 CarswellOnt 1045 (Ont. S.C.J.), and the cases cited in that case at para. 20).

MDS Inc. v. Factory Mutual Insurance Company, 2020 ONSC 1924, 2020 CarswellOnt 4943, 5 B.L.R. (6th) 1, 4 C.C.L.I. (6th) 161, [2020] I.L.R. I-6243 (Ont. S.C.J.); additional reasons 2020 ONSC 4464, 2020 CarswellOnt 10845, 4 C.C.L.I. (6th) 319 (Ont. S.C.J.)

The Ontario Superior Court considered when it is appropriate to depart from the standard approach in favour of an interest award based on the actual interest rates paid by the plaintiff and calculated on a compound basis aimed at more fairly compensating the plaintiff for its actual loss.

The Court awarded MDS a PJI payment equal to its actual cost of its borrowing calculated on a compound basis. In doing so, the Court relied on its statutory discretion under the CJA to vary the standard PJI rate where it considers it "just to do so".

129. (1) Postjudgment interest — Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order.

(2) Interest on periodic payments — Where an order provides for periodic payments, each payment in default shall bear interest only from the date of default.

(3) Interest on orders originating outside Ontario — Where an order is based on an order given outside Ontario or an order of a court outside Ontario is filed with a court in Ontario for the purpose of enforcement, money owing under the order bears interest at the rate, if any, applicable to the order given outside Ontario by the law of the place where it was given.

(4) Costs assessed without order — Where costs are assessed without an order, the costs bear interest at the postjudgment interest rate in the same manner as if an order were made for the payment of costs on the date the person to whom the costs are payable became entitled to the costs.

(5) Other provision for interest — Interest shall not be awarded under this section where interest is payable by a right other than under this section.

Commentary

Post-judgment Interest

Section 129 of the *Courts of Justice Act* provides that money owing under an order, including any cost award, bears interest at the post-judgment interest rate calculated from the date of the order.

Unlike prejudgment interest, a creditor does not have to claim post-judgment interest to be entitled to it. Moneys owing under an order, including costs, bear post-judgment interest according to the CJA from the date of the order, or, if there is no order, from the date the person to whom costs are payable became entitled to them.

The post-judgment interest rate is defined within section 127(1) of the *Courts of Justice Act*.

Interest will not be awarded in accordance with section 127(1) of the *Courts of Justice Act* where there is a right to receive post-judgment interest at a different rate. For example, a contract or lease might specify a different post-judgment interest rate that the parties agreed to.

Unless otherwise directed by the court in its judgment, post-judgment interest is to be calculated from the date of the order. This applies where the court makes an order or judgment, but releases reasons on a later date. However, if the judgment is reserved, the interest is calculated from the date the judgment is released.

"Date of the order" means the date the order is made even if the order is not issued or enforceable on the date [s. 127(1), CJA].

Post-judgment interest is calculated on the total amount of the order including prejudgment interest and costs. Post-judgment interest is payable on prejudgment interest included in the judgment because the prejudgment interest is "money owing under an order."

130. (1) Discretion of court — The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,

(a) disallow interest under either section;

(b) allow interest at a rate higher or lower than that provided in either section;

(c) allow interest for a period other than that provided in either section.

Case Law: *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 2011 CarswellOnt 5034, 106 O.R. (3d) 427, 87 B.L.R. (4th) 1, 86 C.C.L.T. (3d) 179, 334 D.L.R. (4th) 714, 278 O.A.C. 363, [2011] O.J. No. 2786 (Ont. C.A.); additional reasons 2011 ONCA 581, 2011 CarswellOnt 9210, 86 C.C.L.T. (3d) 206 (Ont. C.A.).

The prejudgment interest rate prescribed under s. 128 for the quarter when the claim was issued is the applicable rate unless the court finds special circumstances to justify departing from it. Here the trial judge erred by applying a rate based on the average interest rate for the year in which the cause of action arose, rather than applying the statutory rate for the quarter in which the claim was commenced.

Niagara Air Bus Inc. v. Camerman (1991), 3 O.R. (3d) 108 (Ont. C.A.).

An action was brought on a number of promissory notes maturing in 1986 and 1987, in which the stated rate of interest was 2 per cent per month. Upon maturity, principal and interest merged to become a simple debt due at that date. Interest was payable therefore within the exercise of discretion under s. 140 [now s. 130], in this case an annual effective rate of interest of 24 per cent was allowed and not restricted to interest at 5 per cent pursuant to s. 4 of the federal *Interest Act*.

Murano v. Bank of Montreal (1998), [1998] O.J. No. 2897, 1998 CarswellOnt 2841, 111 O.A.C. 242, 163 D.L.R. (4th) 21, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.).

An unsuccessful litigant asserted on appeal that the trial judge erred in awarding prejudgment interest at the average rate of 7 per cent per annum rather than 10 per cent. The Ontario Court of Appeal stated that the components of a prejudgment interest award were, to some extent, a matter of discretion. The court referred to the requirement for courts to take changes in interest rates into account pursuant to s. 130(2)(a) of the Act.

Bank of America Canada v. Mutual Trust Co. (2000), 30 R.P.R. (3d) 167, 184 D.L.R. (4th) 1, 130 O.A.C. 149, 2000 CarswellOnt 654 (Ont. C.A.); leave to appeal allowed (2000), 261 N.R. 398 (note), 2000 CarswellOnt 3824, 2000 CarswellOnt 3825 (S.C.C.).

The trial judge erred in law in finding that he had jurisdiction under s. 130 of the *Courts of Justice Act* to award compound interest. Section 130 cannot be read to empower the court to override clear legislative insert found in ss. 128 and 129 that both prejudgment and postjudgment interest is awarded on simple, not compounded, basis.

Allen v. McLean, Budden Ltd. (2000), 128 O.A.C. 138, 2000 CarswellOnt 118 (Ont. C.A.).

Postjudgment interest payable according to rate prescribed by s. 127(1) of the *Courts of Justice Act*. Date of judgment effectively determined as date of court's reasons.

Mullins v. Levy, 2006 CarswellBC 2869, 38 C.P.C. (6th) 82, 2006 BCSC 1723, 276 D.L.R. (4th) 251 (B.C. S.C.).

Plaintiff awarded general damages for assault and wrongful detention. General damages non-pecuniary damages arising from personal injury. Plaintiff entitled to interest on general damages awarded for non-pecuniary damages arising from personal injury.

Prince Albert Co-operative Assn. Ltd. v. Rybka, 2006 CarswellSask 793, 2006 SKCA 136, 24 B.L.R. (4th) 256, [2007] 4 W.W.R. 23, 382 W.A.C. 92, 289 Sask. R. 92 (Sask. C.A.).

Creditor brought application for summary judgment allowing action in debt, including interest of 24 per cent per annum. Application granted in part. Creditor ordered to account to debtor for principal owed together with interest rate of 5 per cent. Trial judge found creditor had made unilateral changes to frequency of interest calculation and rate of interest charged. Appeal allowed. Debtor was entitled to principal owed with interest thereon at rate of 24 per cent per annum. Trial judge made error of fact in finding that interest provisions of invoices supplanted interest terms of credit agreement.

Capital One Bank v. Matovska, [2007] O.J. No. 3368, 2007 CarswellOnt 5605 (Ont. Div. Ct.).

In each case, the plaintiff sought recovery of a debt pursuant to a written credit card agreement for outstanding principal, interest and pre-proceeding collection expenses. Although

the defendants each failed to deliver defences and were noted in default, the Small Claims Court clerk did not sign default judgment on requisition and matter went to trial on an uncontested basis. The trial judge declined to award any amount for interest as stipulated in the credit card agreement nor for any pre-proceeding collection expenses of the plaintiff pursuant to terms of the credit card agreement.

Appeals based on alleged error by the trial judges in failing to find that pre-proceeding collection expenses claimed by the plaintiff were a liquidated demand for money and in failing to make an award for pre- and postjudgment interest at a rate stipulated in the credit card agreement.

Pre-proceeding collection expenses claimed in the credit card agreement are a claim for liquidated demand for money, within the meaning of the *Small Claims Court Rules* 11.10(1) and 11.02(1). See *Holden Day Wilson v. Ashton* (1993), 14 O.R. (3d) 306, 104 D.L.R. (4th) 266, 64 O.A.C. 4 (Div. Ct.). See also *Cantalia Sod Co. v. Patrick Harrison & Co.*, 1967 CarswellOnt 176, [1968] 1 O.R. 169 (Ont. H.C.).

The claim for pre-proceeding collection expenses charged by the plaintiff's counsel pursuant to a retainer agreement providing for a fixed percentage of the outstanding indebtedness is a "liquidated demand for money" and by necessary implication enforceable as a liquidated demand for money by the plaintiff against the defendants.

The *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, sets out the rules respecting an award of prejudgment interest (s. 128) and postjudgment interest (s. 129), subject to the overriding discretion of the court to, among other things, disallow interest under either s. 128 or 129 or to allow interest at a rate higher or lower than that provided in either of those sections: see s. 130(1)(a) and (b). In *Bank of America Canada v. Mutual Trust Co.*, [2002] S.C.J. No. 44, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, REJB 2002-30907, 287 N.R. 171, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 159 O.A.C. 1, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), the Supreme Court of Canada interpreted the above sections of the *Courts of Justice Act*. Unless the terms respecting interest rates in the credit card agreement are vague or unclear or unless the interest rate derived from the written agreement infringes a statutory provision such as the *Interest Act*, effect should be given to the contractual rate for the determination of both pre- and postjudgment interest.

Brown v. Newton, 293 N.S.R. (2d) 27, 928 A.P.R. 27, 2010 CarswellNS 256, 2010 NSSM 33 (N.S. Sm. Cl. Ct.).

The defendant is a lawyer; the claimant his client. The claimant sought pre-judgment interest from November 2, 2004. At issue was trial judge's reduction in the period through which pre-judgment interest would be paid from approximately six years to four years. It took the claimant some 3-1/2 years to commence claim against the defendant. Pre-judgment interest awarded from November 2, 2004, through to and including November 2, 2007.

(2) Idem — For the purpose of subsection (1), the court shall take into account,

(a) changes in market interest rates;

(b) the circumstances of the case;

(c) the fact that an advance payment was made;

(d) the circumstances of medical disclosure by the plaintiff;

(e) the amount claimed and the amount recovered in the proceeding;

(f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and

(g) any other relevant consideration.

131. (1) Costs — Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Commentary: section 131(1) identifies the overarching costs jurisdiction of the Superior Court of Justice in civil proceedings. The specific application of that jurisdiction requires consideration of a considerable body of common law along with the specific procedural rules applicable in that court including rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In the Superior Court of Justice, costs are generally awarded on a partial indemnity scale, and in exceptional cases may be awarded on a substantial indemnity or full indemnity scale as those terms are defined under the *Rules of Civil Procedure*.

For Small Claims Court proceedings, s. 131(1) is generally immaterial because that court has its own specific cost rules under section 29 of the *Courts of Justice Act* and under the *Small Claims Court Rules*, O.Reg. 258/98. The concepts of partial or substantial indemnity scale costs generally have no place in Small Claims Court proceedings — except in unusual instances where the court makes a penalty costs award under s. 29 and/or rule 19.06. Even in those instances, those measures of costs may be referenced merely as an aid to the determination of what costs order is appropriate given the smaller stakes and particular circumstances of a Small Claims Court proceeding.

Despite s. 29 and the costs provisions of the *Small Claims Court Rules*, s. 131(1) does have some general relevance for Small Claims Court proceedings.

First, s. 131(1) refers to "the costs of and incidental to a proceeding". That imports the traditional common law definition of costs as indemnity, to one extent or another for the legal fees and disbursements incurred by a party in the course of the proceeding. Costs are by their nature compensatory and no costs order, even on a full indemnity scale, can exceed the party's actual fees and disbursements.

Second, the reference to "a proceeding or a step in a proceeding" imports the jurisdictional divide between the costs discretion of a motions judge or settlement conference judge, and the discretion of a trial judge. A motions judge has discretion over costs of the motion and a settlement conference judge has discretion over costs of the settlement conference. However the trial judge does not have jurisdiction to award costs of those prior steps — unless those steps resulted in an order reserving the costs of those steps to the trial judge. See *Islam v. Rahman*, 2007 ONCA 622, 2007 CarswellOnt 5718, 41 R.F.L. (6th) 10, 228 O.A.C. 371, [2007] O.J. No. 3416 (Ont. C.A.) at para. 2. In Small Claims Court, the costs which may be awarded at trial are addressed by Rule 19 of the *Small Claims Court Rules*, which makes no reference to costs of any prior motion or the settlement conference.

(2) Crown costs — In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

1994, c. 12, s. 45

Appeals

132. Judge not to hear appeal from own decision — A judge shall not sit as a member of a court hearing an appeal from his or her own decision.

133. Leave to appeal required — No appeal lies without leave of the court to which the appeal is to be taken,

(a) from an order made with the consent of the parties; or

(b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs.

134. (1) Powers on appeal — Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just.

(2) Interim orders — On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal.

(3) Power to quash — On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

(4) Determination of fact — Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

(5) Scope of decisions — The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal.

(6) New trial — A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

(7) Idem — Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties.

1999, c. 12, Sched. B, s. 4(3)

Case Law: *Aim Business Furnishings & Filing Systems Inc. v. Alterior-Designs*, 2013 ONSC 377, 2013 CarswellOnt 428 (Ont. S.C.J.).

The standard of review of an appellate court with respect to alleged errors in consideration of the evidence by the trial judge requires the appellant to show that a palpable and overriding error was committed: *Housen v. Nikolaisen*, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.). Absent such an error, the evaluation of the evidence and findings made by a trial judge are to be given considerable deference by a reviewing court.

As there were no errors made by the trial judge, the appeal is dismissed with costs to the respondent.

Wiles Welding Ltd. v. Solutions Smith Engineering Inc., 2012 NSSC 255, 2012 CarswellNS 511, 318 N.S.R. (2d) 396, 1005 A.P.R. 396, [2012] N.S.J. No. 379 (N.S. S.C.).

Appeal by Wile's Welding Limited from an order made by an adjudicator of the Small Claims Court on September 28, 2011.

The appellant submits that in allowing Mr. Crane to testify, the adjudicator relied on Mr. Crane's evidence which reduced the actual impact of Mr. Doucette's statement.

The standard of review, where a ground of appeal raises an error of law, is correctness. The second ground of appeal, which is failure to follow requirements of natural justice, does not engage the standard of review analysis in the traditional sense (*Sackville Trenching Ltd. v. Nova Scotia (Occupational Health & Safety Appeal Panel*, 2012 NSCA 39, 2012 CarswellNS 252, (sub nom. *Sackville Trenching Ltd. v. Healthy & Safety)* 315 N.S.R. (2d) 308, 998 A.P.R. 308 (N.S. C.A.)). The burden for the court is to determine if the process was fair to the claimant.

Did the adjudicator fail to follow the requirements of natural justice? Was the process fair to the claimant?

While the failure to follow the requirements of natural justice does not engage a standard of review analysis, the court is tasked with determining if the process was fair to the respective parties. The requirements of natural justice are complicated by the fact that the appellant was self-represented.

In *Earthcraft Landscape Ltd. v. Clayton*, 2002 NSSC 259, 2002 CarswellNS 497, 210 N.S.R. (2d) 101, 659 A.P.R. 101, [2002] N.S.J. No. 516 (N.S. S.C.), Justice LeBlanc allowed an appeal from the Small Claims Court on the grounds that the adjudicator had failed to follow the requirements of natural justice.

Appeal allowed and remitted back to the Small Claims Court for a new trial before a different adjudicator.

Doyle v. Topshee Housing Co-operative Ltd., 2012 NSSC 371, 2012 CarswellNS 773, [2012] N.S.J. No. 570 (N.S. S.C.).

The court asked to consider issue whether Appellant should be entitled to admit fresh evidence on the hearing of a Small Claims Court appeal.

The *Small Claims Court Act* and regulations do not contemplate an appeal by way of trial de novo. Appeals are to be based on the record. See *Killam Properties Inc. v. Patriquin*, 2011 NSSC 338, 2011 CarswellNS 647, 307 N.S.R. (2d) 170, 975 A.P.R. 170, [2011] N.S.J. No. 502 (N.S. S.C.) at para. 8 by Justice MacDougall.

Tests for the introduction of new evidence was stated in the Supreme Court in *R. v. Nielsen*, 1988 CarswellMan 112, 1988 CarswellMan 257, EYB 1988-67144, (sub nom. *R. v. Stolar)* [1988] 1 S.C.R. 480, (sub nom. *R. v. Stolar)* 40 C.C.C. (3d) 1, (sub nom. *R. v. Stolar)* 62 C.R. (3d) 313, [1988] 3 W.W.R. 193, 52 Man. R. (2d) 46, (sub nom. *R. v. Stolar)* 82 N.R. 280, [1988] S.C.J. No. 20 (S.C.C.).

Litigants in the Small Claims Court are not required to provide the court with applicable legislation although it is helpful. The Adjudicator in this case was required to take judicial notice of applicable legislation.

To require litigants in Small Claims Court to produce copies of legislation would be an error at law and that appears to be what occurred during the Small Claims Court proceedings. In addition, if the bylaws were not before the Small Claims Court one must ask how the Adjudicator could determine the issue of whether the bylaws were complied with?

Respondent to decide if it will continue in asserting its resistance to the appeal and that issue will be decided on the final hearing of this appeal.

Young v. Refinements-Renovations and Construction Developments Inc., 2013 NSSC 52, 2013 CarswellNS 96 (N.S. S.C.).

The *Small Claims Court Forms and Procedure Regulations* provide that an appeal is commenced not only by filing the notice of appeal before a deadline, but also by serving a copy of the notice on the respondent before the deadline.

Did the approach adopted by the adjudicator exceed the monetary limit for Small Claims Court?

There was a *bona fide* intention to appeal and there is a reasonable excuse for the delay, but the notice of appeal does not present grounds of sufficient merit because it is clear that Adjudicator Parker had to do as he did: subtract the assessed amount of the lower claim over which he had jurisdiction from the assessed amount of the higher claim over which he had separate jurisdiction.

Motion dismissed.

Leighton v. Stewiacke Home Hardware Building Center, 2012 NSSC 184, 2012 CarswellNS 300, 316 N.S.R. (2d) 315, 28 C.P.C. (7th) 285 (N.S. S.C.).

Leighton requested that the Small Claims adjudicator reconsider the hearing outcome, by application made pursuant to s. 23 of the *Small Claims Court Act* RSNS 1989 c. 430 as amended.

The appropriate standards of review canvassed by Justice Saunders in *Mor-Town Developments Ltd. v. MacDonald*, 2012 NSCA 35, 2012 CarswellNS 225, 316 N.S.R. (2d) 183, 19 C.P.C. (7th) 227, 349 D.L.R. (4th) 161 (N.S. C.A.) at paras. 19 and 51.

Although "within Canada, defendants are presumed to know the law of the jurisdiction seized with any action against them" [*per* Major J. for the Majority at para. 68 *Beals v. Saldanha*, 2003 SCC 72, 2003 CarswellOnt 5101, 2003 CarswellOnt 5102, REJB 2003-51513, [2003] 3 S.C.R. 416, 70 O.R. (3d) 94 (note), 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1, 234 D.L.R. (4th) 1, 113 C.R.R. (2d) 189, 314 N.R. 209, 182 O.A.C. 201, [2003] S.C.J. No. 77 (S.C.C.)], here the applicable sections of the *Small Claims Court Act* and its Regulations are patently so poorly drafted that they are rendered unintelligible to the average person; those for whom the Act is intended to create a simple and understandable procedure to make or contest "small claims".

New hearing of the claim take place before a different adjudicator and Defendant to file a Defence by 30 days from the release of these written reasons.

Massoudinia v. Volfson, 2013 ONCA 29, 2013 CarswellOnt 256 (Ont. C.A. [In Chambers]).

Motion for leave to appeal and to extend the time within which to appeal.

Appeal has no merit. The moving party now seeks leave to appeal to this court on a question that is not a question of fact alone. The Divisional Court judge adopted the functional approach mandated by the Supreme Court of Canada in *R. v. Sheppard*, 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, REJB 2002-29516, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 162 C.C.C. (3d) 298, 50 C.R. (5th) 68, 210 D.L.R. (4th) 608, 633 A.P.R. 50, 284 N.R. 342, [2002] S.C.J. No. 30 (S.C.C.), in assessing the reasons.

As Binnie J. held in *Sheppard*, at para. 53, inadequate reasons do not alone give "a free-standing right of appeal" or "entitlement to appellate intervention".

Appellate courts recognize that oral reasons ordinarily cannot be as thorough and detailed as written reasons. As Carthy J.A. said, in *R. v. Richardson*, 1992 CarswellOnt 830, 9 O.R. (3d) 194, 74 C.C.C. (3d) 15, 57 O.A.C. 54, [1992] O.J. No. 1498 (Ont. C.A.) at para. 13, "[i]n moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result."

Where the parties have already had one appeal, a court deciding whether or not to grant leave should also consider the significance of the legal issues raised to the general administration of justice. See *Canada Mortgage & Housing Corp. v. Iness*, 2002 CarswellOnt 3879,

*(*sub nom. *Iness v. Canada Mortgage & Housing Corp.)* 62 O.R. (3d) 255, 220 D.L.R. (4th) 682, *(*sub nom. *Iness v. Canada Mortgage & Housing Corp.)* 166 O.A.C. 38 (Ont. C.A. [In Chambers]). While the moving party in this case framed the question in such a manner as to raise an issue of importance to the administration of justice, it is plain from the record that this case has no general significance.

Motion dismissed.

Canadian Imperial Bank of Commerce v. Houlahan, 2011 ONSC 558, 2011 CarswellOnt 291, 73 C.B.R. (5th) 223, 273 O.A.C. 140 (Ont. Div. Ct.).

An action was made in Small Claims Court against the appellant ("Houlahan"), for unpaid student loans. Houlahan did not testify or call witnesses. The argument presented on his behalf at trial related only to the statute-barred defence. Documents filed at trial did not mention the *Canada Student Loans Act*. A "court to which an appeal is taken may order a new trial": see the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(b). A new trial shall not be directed "unless some substantial wrong or miscarriage of justice has occurred": see the *Courts of Justice Act*, s. 134(6).

"Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision . . . a new trial may be ordered in respect of only that part . . .": see the *Courts of Justice Act*, s. 134(7).

An appeal was allowed in part, and a new trial was ordered.

Public Access

135. (1) Public hearings — Subject to subsection (2) and rules of court, all court hearings shall be open to the public.

(2) Exception — The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

(3) Disclosure of information — Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information.

Case Law: *Jane Doe v. D'Amelio*, 2009 CarswellOnt 5842, 98 O.R. (3d) 387, 83 C.P.C. (6th) 67 (Ont. S.C.J.).

The plaintiff brought a motion for various relief, including an order permitting her to commence action against defendants by way of pseudonym. Motion dismissed. Rule 14.06 of *Rules of Civil Procedure* did not provide automatic exclusion for civil cases involving allegations of sexual assault. The onus was on the person seeking exemption from that rule to provide compelling evidence on which the court could exercise its discretion to grant relief sought, and it must be something more than plaintiff's own assessment of her own vulnerability. The Supreme Court has confirmed that openness of the courts is a fundamental aspect of Canadian democracy. See *MacIntyre v. Nova Scotia (Attorney General)*, 1982 CarswellNS 110, 65 C.C.C. (2d) 129, 132 D.L.R. (3d) 385, 96 A.P.R. 609, 26 C.R. (3d) 193, 1982 CarswellNS 21, 40 N.R. 181, 49 N.S.R. (2d) 609, [1982] 1 S.C.R. 175 (S.C.C.); *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, 1994 CarswellOnt 112, 25 C.R.R. (2d) 1, 76 O.A.C. 81, 94 C.C.C. (3d) 289, 175 N.R. 1, 120 D.L.R. (4th) 12, [1994] 3 S.C.R. 835, 20 O.R. (3d) 816 (note), 34 C.R. (4th) 269, EYB 1994-67668, 1994 SCC 102, 1994 CarswellOnt 1168 (S.C.C.); *Sierra Club of Canada v. Canada (Minister of Finance)*, REJB 2002-30902, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 93 C.R.R. (2d) 219, 2002 CarswellNat 823, 2002 CarswellNat 822, 2002 SCC 41, 40 Admin. L.R. (3d) 1, 20 C.P.C.

(5th) 1, 223 F.T.R. 137 (note), 211 D.L.R. (4th) 193, 44 C.E.L.R. (N.S.) 161, 18 C.P.R. (4th) 1, 287 N.R. 203 (S.C.C.); and *Toronto Star Newspapers Ltd. v. Ontario*, 132 C.R.R. (2d) 178, 200 O.A.C. 348, 335 N.R. 201, [2005] S.C.J. No. 41, 76 O.R. (3d) 320 (note), 2005 CarswellOnt 2614, 2005 CarswellOnt 2613, 2005 SCC 41, [2005] 2 S.C.R. 188, EYB 2005-92055, 197 C.C.C. (3d) 1, 29 C.R. (6th) 251, 253 D.L.R. (4th) 577 (S.C.C.).

Palkowski v. Ivancic, 2009 ONCA 705, 2009 CarswellOnt 5950, 100 O.R. (3d) 89, 76 C.P.C. (6th) 204, 312 D.L.R. (4th) 329, 258 O.A.C. 55, 84 R.P.R. (4th) 226 (Ont. C.A.).

The defendant brought motion to determine whether, or to what extent, amended statement of claim complied with motion judge's order. Counsel asked to join motion judge in anteroom adjacent to courtroom. Motion judge advised counsel that she had prepared endorsements which included copy of proposed amended statement of claim with extensive revisions. The plaintiffs appealed motion decision. Appeal allowed on other grounds. Nothing in record contrary to section 135(1) of *Courts of Justice Act*, which provides that, subject to subsection 2 and rules of court, all court hearings shall be open to public. No one requested that plaintiffs personally be permitted to attend on motion judge with their counsel. Where counsel in the court below is of the view that the judge is exhibiting bias, they have the obligation to raise it with that judge below at the time. The words "open to the public" should be given the ordinary grammatical sense that best accords with the statutory purpose of section 135. The phrase "Open to the public" when interpreted to foster its enormously important purposes must be taken to mean a forum where the public understands it is free to enter without specifically requesting admission.

136. (1) Prohibition against photography, etc., at court hearing — Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing; or

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2)(b).

(2) Exceptions — Nothing in subsection (1),

(a) prohibits a person from unobtrusively making handwritten notes or sketches at a court hearing; or

(b) prohibits a lawyer, a party acting in person or a journalist from unobtrusively making an audio recording at a court hearing, in the manner that has been approved by the judge, for the sole purpose of supplementing or replacing handwritten notes.

(3) Exceptions — Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the court hearing;

(b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves.

(4) Offence — Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than six months, or to both.

1996, c. 25, s. 1(22)

Commentary

Public Access

In general, most court documents are publicly accessible, unless a stature provision, common law rule or court order restricts access.

The Court Services Division of the Ministry of the Attorney General is responsible for the care and maintenance of court files and documents, with the exception of court files and documents in the Provincial Offences courts, which are administrated by municipal partners under a transfer agreement.

No cameras (including cell phone cameras) or video recording devices may be used in the courtroom without the approval of the presiding judicial official (s. 136 of the *Courts of Justice Act*). Photographing of any person in attendance at the courthouse is also prohibited.

Section 137 of the *Courts of Justice Act* (*CJA*) provides for public access to civil court documents.

Statutory provisions restrict public access to certain civil documents. For example, documents filed in the Small Claim Court in relation to the *Parental Responsibility Act* that include evidence obtained under the *Young Offenders Act* (*YOA*) or *Youth Criminal Justice Act* (*YCOA*) must be treated like *Young Offenders Act* or *Youth Criminal Justice Act* documents and are not publicly accessible.

In general, when the court imposes a publication ban, the public can still access the court file and documents.

A sealing order typically provides the date the file was sealed and the name of the judicial official who sealed the documents, but it does not disclose information about the content of the sealed documents.

Enforcement documents filed with the court fall under section 137 of the *Courts of Justice Act* (*JCA*) and are therefore publicly accessible, upon payment of the prescribed fee, and provided that non-statutory provision, common law or court order restricts access.

Examples include:

- writs;
- orders;
- schemes of distribution;
- notices of garnishment; and
- any other documents provided to the enforcement office on a form prescribed by the rules of court.

If an exhibit is attached to an affidavit and filed with the court, it is a document filed in a proceeding and is publicly accessible under the section 137 of the *Courts of Justice Act* (*JCA*) unless a statutory provision, common law or court order restricts access.

If an exhibit is referred to in an affidavit as being produced and shown to the deponent, the party does not attach the exhibit to the affidavit. Instead, the party leaves the exhibit with the registrar/clerk for the court's use. In this case, the exhibit is not "filed" with the courts and is not accessible under s. 137 of the *Courts of Justice Act*.

If the exhibit was entered into evidence in the course of a trial (i.e. marked, numbered and entered on a list by the registrar/clerk), the exhibit is not "filed" in the proceeding and is therefore not covered by the s. 137. These exhibits are within the control of the court and are not publicly accessible, except by court order.

Since exhibit books are documents filed with the court within the meaning of s. 137 of the *Courts of Justice Act*, copies of exhibits contained in an exhibit book and filed with the Court of Appeal are publicly accessible, unless a statutory provision, common law or court order restricts access.

137. (1) Documents public — On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

(2) Sealing documents — A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

(3) Court lists public — On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

(4) Copies — On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

Case Law: *H. (M.E.) v. Williams*, 2012 ONCA 35, 2012 CarswellOnt 1100, 108 O.R. (3d) 321, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37, 287 O.A.C. 133, [2012] O.J. No. 525 (Ont. C.A.)

Court files are public. For a non-publication or sealing order to be justified, the party requesting such an order must provide evidence that such a remedy is necessary based on a serious risk to a public interest, and that the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public in the open courts principle.

Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)

[Heading added 2015, c. 23, s. 3.]

137.1 Dismissal of proceeding that limits debate — (1) Purposes — The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

(2) Definition, "expression" — In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

(3) Order to dismiss — On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

(4) No dismissal — A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

(5) No further steps in proceeding — Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

(6) No amendment to pleadings — Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding.

(7) Costs on dismissal — If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

(8) Costs if motion to dismiss denied — If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

(9) Damages — If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

2015, c. 23, s. 3

Commentary: Section 137.1 of the *Courts of Justice Act* was enacted in 2015 to deter "Strategic Litigation Against Public Participation" also known as SLAPP suits. This refers to the phenomenon of strategic lawsuits designed to discourage or punish statements made by defendants which plaintiffs would prefer not be made. Typically such lawsuits are framed in defamation. Often the plaintiffs are financially powerful and wish to silence the defendants and others who might wish to make statements on the matter in question. Often the actual damages are modest and the essential purpose of the suit is strategic rather than compensatory. Section 137.1 creates a screening mechanism to weed out SLAPP suits at an early

stage, by means of an "anti-SLAPP" motion. The provisions create special costs rules, and a special right of appeal to the Court of Appeal for Ontario — regardless of the motion result.

The right of appeal from an anti-SLAPP motion to the Court of Appeal for Ontario under s. 6(1)(d) is defined as being from "an order made under s. 137.1." This reverses the usual distinction between final orders which may be appealed as of right, and interlocutory orders which cannot be appealed as of right. In the normal course an order made by a judge of the Superior Court of Justice which dismisses a motion seeking dismissal of a proceeding would be appealable to the Divisional Court only by leave, because it is interlocutory. The new appeal right under s. 6(1)(d) permits appeal regardless of the outcome of the motion, and bypasses the Divisional Court's normal role as the appellate court for interlocutory orders of the Superior Court of Justice.

Nothing in s. 6(1)(d) or ss. 137.1 through 137.5 refer specifically to the Small Claims Court or to the deputy judges of that court. This left uncertainty as to whether anti-SLAPP motions could be brought in Small Claims Court. If they could be brought in Small Claims Court, the various legislative references to procedural matters which do not apply in Small Claims Court such as cross-examination on affidavits and motion costs on a full indemnity basis, would seem anomalous. It would seem particularly strange to have the anti-SLAPP ruling appealable as of right from the Small Claims Court directly to the Court of Appeal for Ontario, and even if the motion was dismissed.

On July 12, 2019, the Court of Appeal for Ontario held that **deputy judges have no jurisdiction to hear anti-SLAPP motions under s. 137.1**: *Bruyea v. Canada (Veteran Affairs)*, 2019 ONCA 599, 2019 CarswellOnt 11601, 147 O.R. (3d) 84, 439 D.L.R. (4th) 193 (C.A.); [2019] O.J. No. 3847 (C.A.). Nordheimer J.A. held that properly interpreted, the jurisdiction of a "judge" under s. 137.1 did not extend to deputy judges. The court set aside the deputy judge's order dismissing the action, without prejudice to any fresh motion that might be brought before a judge.

It appears that this decision deals only with the narrow question whether deputy judges can hear anti-SLAPP motions. The broader question of whether the Small Claims Court can hear anti-SLAPP motions does not appear to have been decided — perhaps as a consequence of the fact that the court rejected the position taken jointly by both parties and the Attorney General of Ontario.

Thus it could be argued that the Small Claims Court has jurisdiction to hear anti-SLAPP motions, but only if the motion is heard by a judge who is not a deputy judge. "Judge" would then have to mean either a judge of the Superior Court of Justice sitting as a Small Claims Court under s. 24(1), or a provincial judge under s. 24(2)(b) (except that there are none since the retirement of Justice Godfrey in 2019), or the Small Claims Court Administrative Judge appointed under s. 87.2. In practice, however, there is no procedure to require a Small Claims Court motion to be heard by a judge of the Superior Court of Justice, nor to have all anti-SLAPP motions in Ontario heard by the

Small Claims Court Administrative Judge. And it remains that the wording of the anti-SLAPP legislation does not fit the Small Claims Court context in a number of material respects.

It appears therefore that anti-SLAPP motions are unavailable in Small Claims Court regardless of what judicial officer might in theory preside over such a motion. If so this avoids the risk that a comparatively expensive preliminary screening motion, which may be appealed as of right to the Court of Appeal for Ontario, could impose more cost and delay on the parties and the administration of justice than would be involved in simply holding a trial in the normal course.

In *Nanda v. McEwan*, 2020 ONCA 431, 2020 CarswellOnt 9040, 450 D.L.R. (4th) 145 (Ont. C.A.); additional reasons 2020 ONCA 535, 2020 CarswellOnt 12066 (Ont. C.A.), the court

cited its earlier decision in *Bruyea v. O'Regan* as holding that anti-SLAPP motions had to be heard by the Superior Court of Justice judges.

The leading cases on the proper analysis for an anti-SLAPP motion are *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 2018 CarswellOnt 14179, 142 O.R. (3d) 161, 46 Admin. L.R. (6th) 70, 50 C.C.L.T. (4th) 173, 23 C.P.C. (8th) 312, 426 D.L.R. (4th) 233, 79 M.P.L.R. (5th) 179 (Ont. C.A.); additional reasons 2018 ONCA 853, 2018 CarswellOnt 17537, 50 C.C.L.T. (4th) 211, 23 C.P.C. (8th) 350, 80 M.P.L.R. (5th) 181 (Ont. C.A.); affirmed 2020 CSC 22, 2020 SCC 22, 2020 CarswellOnt 12650, 2020 CarswellOnt 12651, 72 Admin. L.R. (6th) 1, 68 C.C.L.T. (4th) 1, 55 C.P.C. (8th) 1, 449 D.L.R. (4th) 1, 6 M.P.L.R. (6th) 1, [2020] S.C.J. No. 22 (S.C.C.), and *Platnick v. Bent*, 2018 ONCA 687, 2018 CarswellOnt 14124, 82 C.C.L.I. (5th) 191, 23 C.P.C. (8th) 275, 426 D.L.R. (4th) 60, 417 C.R.R. (2d) 350, 419 C.R.R. (2d) 61 (Ont. C.A.); additional reasons 2018 ONCA 851, 2018 CarswellOnt 17533, 83 C.C.L.I. (5th) 308, 23 C.P.C. (8th) 309 (Ont. C.A.); affirmed *Bent v. Platnick*, 2020 CSC 23, 2020 SCC 23, 2020 CarswellOnt 12648, 2020 CarswellOnt 12649, 5 C.C.L.I. (6th) 1, 55 C.P.C. (8th) 217, 449 D.L.R. (4th) 45 (S.C.C.). The initial onus is on the defendant under s. 137.1(3) to establish that the proceeding arises from an expression relating to a matter of public interest. Then the onus shifts to the plaintiff to establish the criteria under s. 137.1(4)(a) (the merits hurdle) and 137.1(4)(b) (the public interest hurdle).

Dealing with the requirement for the plaintiff to show reasonable grounds to believe that the defendant has no valid defence to the proceeding, *Pointes Protection* clarifies that the anti-SLAPP motion is not a Rule 20 summary judgment motion or a mini-trial. Rather it is an early assessment to determine whether a reasonable trier of fact could conclude that the defendant has no valid defence. It is up to the defendant to raise one or more defences in the motion material. If the motions judge concludes that a reasonable trier of fact could conclude that a given defence was established or not established, then the plaintiff has met the necessary onus under s. 137.1(4)(a)(ii) to survive the anti-SLAPP motion.

Dealing with the "public interest hurdle" under s. 137.1(4)(b), *Pointes Protection* states that the plaintiff will generally need to provide evidence of tangible and significant damages caused by the expression. If the motions judge concludes that any harm is minimal, or that the action bears hallmarks of a SLAPP lawsuit, the public interest hurdle is unlikely to be met. In some cases the test under s. 137.1(4)(b) will be more straightforward that under s. 137.1(4)(a).

Additional Court of Appeal for Ontario decisions on s. 137.1 are as follows:

Armstrong v. Corus Entertainment Inc., 2018 ONCA 689, 2018 CarswellOnt 14125, 143 O.R. (3d) 54, 23 C.P.C. (8th) 381, 427 D.L.R. (4th) 236 (Ont. C.A.); additional reasons 2018 ONCA 852, 2018 CarswellOnt 17535, 23 C.P.C. (8th) 402 (Ont. C.A.)

Able Translations Ltd. v. Express International Translations Inc., 2018 ONCA 690, 2018 CarswellOnt 14126, 23 C.P.C. (8th) 404, 428 D.L.R. (4th) 568 (Ont. C.A.); additional reasons 2018 ONCA 854, 2018 CarswellOnt 17534, 23 C.P.C. (8th) 417 (Ont. C.A.)

Platnick v. Bent, 2018 ONCA 687, 2018 CarswellOnt 14124, 82 C.C.L.I. (5th) 191, 23 C.P.C. (8th) 275, 426 D.L.R. (4th) 60, 417 C.R.R. (2d) 350, 419 C.R.R. (2d) 61 (Ont. C.A.); ~~affirmed 2020 CSC 22, 2020 SCC 22, 2020 CarswellOnt 12650, 2020 CarswellOnt 12651, 72 Admin. L.R. (6th) 1, 68 C.C.L.T. (4th) 1, 55 C.P.C. (8th) 1, 449 D.L.R. (4th) 1, 6 M.P.L.R. (6th) 1, [2020] S.C.J. No. 22 (S.C.C.)~~

Veneruzzo v. Storey, 2018 ONCA 688, 2018 CarswellOnt 14127, 23 C.P.C. (8th) 352 (Ont. C.A.)

Fortress Real Developments Inc. v. Rabidoux, 2018 ONCA 686, 2018 CarswellOnt 14128, 23 C.P.C. (8th) 363, 426 D.L.R. (4th) 1 (Ont. C.A.)

United Soils Management Ltd. v. Mohammed, 2019 ONCA 128, 2019 CarswellOnt 2370, 53 C.C.L.T. (4th) 1, 23 C.E.L.R. (4th) 11, 44 C.P.C. (8th) 1 (Ont. C.A.); leave to appeal refused *United Soils Management Ltd. v. Katie Mohammed*, 2019 CarswellOnt 16393, 2019 CarswellOnt 16394 (S.C.C.); leave to appeal refused *United Soils Management Ltd. v. Kayt Barclay*, 2019 CarswellOnt 16395, 2019 CarswellOnt 16396 (S.C.C.)

New Dermamed Inc. v. Sulaiman, 2019 ONCA 141, 2019 CarswellOnt 2538, 144 O.R. (3d) 721, 51 C.P.C. (8th) 300 (Ont. C.A.)

Lascaris v. B'nai Brith Canada, 2019 ONCA 163, 2019 CarswellOnt 2913, 144 O.R. (3d) 211, 45 C.P.C. (8th) 319, 431 D.L.R. (4th) 486 (Ont. C.A.); leave to appeal denied [2019] S.C.C.A. No. 147

Bondfield Construction Company Limited v. The Globe and Mail Inc., 2019 ONCA 166, 2019 CarswellOnt 2912, 144 O.R. (3d) 291, 31 C.P.C. (8th) 419, 431 D.L.R. (4th) 501 (Ont. C.A.); additional reasons 2019 ONCA 283, 2019 CarswellOnt 5348 (Ont. C.A.)

Levant v. Day, 2019 ONCA 244, 2019 CarswellOnt 4638, 145 O.R. (3d) 442, 46 C.P.C. (8th) 12 (Ont. C.A.); leave to appeal refused *Robert P.J. Day v. Ezra Levant*, 2019 CarswellOnt 17884, 2019 CarswellOnt 17885, [2019] S.C.C.A. No. 194 (S.C.C.)

Montour v. Beacon Publishing Inc., 2019 ONCA 246, 2019 CarswellOnt 4655 (Ont. C.A.); leave to appeal refused *Beacon Publishing Inc. o/a FrontLine Safety & Security, et al. v. Jerry Bradwick Montour, et al.*, 2019 CarswellOnt 16389, 2019 CarswellOnt 16390, [2019] S.C.C.A. No. 154 (S.C.C.)

These decisions provide further clarification of the nature of the harm that a plaintiff must establish to survive the anti-SLAPP motion under the public interest hurdle in s. 137.1(4)(b).

London District Catholic School Board v. Michail, 2020 ONSC 7331, 2020 CarswellOnt 17428 (Ont. S.C.J.)

In *London District Catholic School Board v. Michail*, the Ontario Superior Court of Justice considered a motion pursuant to s. 137.1 of the *Courts of Justice Act* (commonly referred to as the "anti-SLAAP provisions") within the context of an Application for a declaration of a vexatious litigant pursuant to s. 140 of the *Courts of Justice Act*. The matter was heard via Zoom.

This decision found that:

- Legal proceedings constitute a form of "expression" as defined in s. 137.1(2) of the *Courts of Justice Act*;
- The Court will not deem vexatious litigation as a protected form of expression; and
- Proceedings brought under s. 140 of the *Courts of Justice Act* are not caught by s. 137.1(3) of the *Courts of Justice Act*, as the relief sought pursuant to s. 140 is procedural in nature, and is not capable of "gagging" or suppressing protected expression.

See also *1704604 Ontario Ltd. v. Pointes Protection Association*,[22] which interpreted the test under s. 137.1.[23]

Justice Mitchell noted that Michail's proceedings demonstrated a pattern of litigation, as she had appealed every decision in which she had been unsuccessful, including a reconsideration of a decision to the Supreme Court of Canada.

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[22] 2020 CSC 22, 2020 SCC 22, 2020 CarswellOnt 12650, 2020 CarswellOnt 12651, 72 Admin. L.R. (6th) 1, 68 C.C.L.T. (4th) 1, 55 C.P.C. (8th) 1, 449 D.L.R. (4th) 1, 6 M.P.L.R. (6th) 1, [2020] S.C.J. No. 22 (S.C.C.).

[23] ~~*Ibid.*~~ *at para. 21.*

Justice Mitchell dismissed Michail's motion, making it unnecessary to proceed further with the analysis provided under s. 137.1(4). However, Justice Mitchell left the success of LDCSB's application for another day. Where the relief sought in a proceeding is procedural in nature, such mattersare not suitable for motions pursuant to section 137.1 of the *Courts of Justice Act*.

137.2 Procedural matters — (1) Commencement — A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced.

(2) Motion to be heard within 60 days — A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court.

(3) Hearing date to be obtained in advance — The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served.

(4) Limit on cross-examinations — Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants.

(5) Same, extension of time — A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice.

2015, c. 23, s. 3

137.3 Appeal to be heard as soon as practicable — An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal.

2015, c. 23, s. 3

137.4 (1) Stay of related tribunal proceeding — If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal.

(2) Notice — The tribunal shall give to each party to a tribunal proceeding stayed under subsection (1),

(a) notice of the stay; and

(b) a copy of the notice of motion that was filed with the tribunal.

(3) Duration — A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4).

(4) Stay may be lifted — A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

(a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or

(b) the proceeding that is the subject of the motion under section 137.1 and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay.

(5) Same — A motion under subsection (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under section 137.1 is under appeal, a judge of the Court of Appeal.

(6) Statutory Powers Procedure Act — This section applies despite anything to the contrary in the *Statutory Powers Procedure Act*.

2015, c. 23, s. 3

137.5 Application — Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading.

2015, c. 23, s. 3

Miscellaneous

138. Multiplicity of proceedings — As far as possible, multiplicity of legal proceedings shall be avoided.

139. (1) Joint liability not affected by judgment or release — Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding.

(2) Two proceedings in respect of same damage — Where a person who has suffered damage brings two or more proceedings in respect of the damage, the person is not entitled to costs in any of the proceedings, except the first proceeding in which judgment is obtained, unless the court is of the opinion that there were reasonable grounds for bringing more than one proceeding.

140. (1) Vexatious proceedings — Where a judge of the Superior Court of Justice is satisfied, on application, that a person has persistently and without reasonable grounds,

(a) instituted vexatious proceedings in any court; or

(b) conducted a proceeding in any court in a vexatious manner,

the judge may order that,

(c) no further proceeding be instituted by the person in any court; or

(d) a proceeding previously instituted by the person in any court not be continued,

except by leave of a judge of the Superior Court of Justice.

Commentary: Section 140(1) of the *Courts of Justice Act* provides that an application may be made to a judge of the Superior Court of Justice for an order against a vexatious litigant who has persistently, and without reasonable grounds, brought vexatious proceedings in any court, or conducted a proceeding in a vexatious manner. This application process is referred to as a vexatious proceeding.

When the court is satisfied that there are grounds on which an order may be made against the vexatious litigant, the judge may:

- Order that the person not institute any further proceeding in any court;

OR

- Order that a proceeding instituted by the person not continue,

without leave of a judge of the Superior Court of Justice.

The particulars of vexatious proceedings orders vary. Prior to refusing any process from a person listed on the Index of Vexatious Proceedings Orders, the Small Claims Court must refer to the relevant vexatious proceedings order itself to confirm the exact direction given in a vexatious proceedings order.

Jurisprudence establishes that Canadian courts of superior jurisdiction maintain a general inherent jurisdiction, which includes the discretion to control their own process.

In the words of English procedural law authority I.H. Jacob, "the juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective measure." [I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 27-28.]

Vexatious litigant provisions have their roots in England, which enacted its first vexatious litigants statute in 1896. See *Vexatious Actions Act*, 1896 (U.K.) 59 & 60 Vict., c. 51. This statute was primarily meant to protect public bodies or officers from vexatious litigation: see Simon Smith, "Vexatious Litigants and Their Judicial Control — The Victorian Experience" (1989) 15 *Monash U.L. Rev.* 48 at 57. The 1925 English statute, 1925 (15 & 16 *Geo.* 5), c. 49, s. 51, provided the model for an equivalent 1930 Ontario statute, referring to a person who "has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings . . ."

Vexatious proceedings legislation does not take away an individual's right to redress. Rather it provides that if an order is made against that individual under the legislation, he/she cannot seek redress until he/she has satisfied the proper authority that the proposed legal proceedings are not an abuse of process of the court and there is *prima facie* ground for them. See *Foy v. Foy (No. 2)*, 1979 CarswellOnt 458, [1979] O.J. No. 4386, 26 O.R. (2d) 220, 12 C.P.C. 188, 102 D.L.R. (3d) 342 (Ont. C.A.) at 225 (O.R.).

As is clearly stated in s. 140(1), a vexatious litigant application must be made to a judge of the Superior Court of Justice. The Small Claims Court has no jurisdiction to make a vexatious litigant declaration under s. 140: *Ferguson v. Plate*, [2018] O.J. No. 3754 (Ont. S.C.J.).

The Small Claims Court does possess a narrower jurisdiction to deal with vexatious litigants in the context of specific claims or specific motions, under rule 12.02 of the *Small Claims Court Rules*. Where an action or a motion appears on its face to be "inflammatory, a waste of time, a nuisance or an abuse of the court's process", the court may on its own initiative make an order staying or dismissing the action or motion. Unless the court orders otherwise, such an order shall be after giving the opportunity for written submissions from the parties as provided in rule 12.02(4).

If the Small Claims Court determines that a person who is already subject to an existing vexatious litigant declaration under s. 140(1), has instituted or continued an action without first obtaining leave of the Superior Court of Justice, the Small Claims Court shall make an order staying or dismissing the action. Such an order may be made without notice: see rule 12.03 of the *Small Claims Court Rules*.

Case Law: *Godding v. Berg's Cartage & Storage Ltd.*, [1995] B.C.W.L.D. 2662 (B.C. S.C.).

Order precluding petitioner from bringing further actions against respondents was made. Special costs were awarded to respondents on ground that petitioner circumvented spirit of order by reconstituting small claims action under different guise and causing respondents

under stress. Inflammatory statements made against respondents and their lawyer was reprehensible conduct deserving of award of special costs.

Canada Post Corp. v. Varma (February 19, 1998), Doc. 98-CV-141125 (Ont. Gen. Div.).

Respondent had commenced 16 actions of which 12 were dismissed. Actions found to comprise harassment and oppression of other parties, repeating of previous actions. Respondent had persistently, and without reasonable grounds, instituted vexatious proceedings. Costs orders against respondent remained unpaid. Order under s. 140(1) of *Courts of Justice Act*, R.S.O. 1990, c. C.43 made prohibiting further proceedings without leave.

Warren v. Pollitt (March 11, 1999), Doc. 98-FA-7046 (Ont. Gen. Div.).

Request by applicant for Order prohibiting respondent from instituting any further proceedings. Several cases deal with vexatious proceedings. *Foy v. Foy (No. 2)*, 1979 CarswellOnt 458, [1979] O.J. No. 4386, 26 O.R. (2d) 220, 12 C.P.C. 188, 102 D.L.R. (3d) 342 (Ont. C.A.); *Kitchener-Waterloo Record Ltd. v. Weber* (1986), 53 O.R. (2d) 687 (Ont. H.C.); and *Law Society of Upper Canada v. Zikov* (1984), 47 C.P.C. 42 (Ont. H.C.), were reviewed by Henry J. in *Lang Michener Lash Johnston v. Fabian*, 1987 CarswellOnt 378, [1987] O.J. No. 355, 16 C.P.C. (2d) 93, 59 O.R. (2d) 353, 37 D.L.R. (4th) 685 (Ont. H.C.). Respondent has failed to pay costs of prior unsuccessful proceedings and the Respondent's conduct as a litigant fell within the principles enunciated in case law. For these reasons application granted.

Law Society of Upper Canada v. Chavali (1998), 21 C.P.C. (4th) 20 (Ont. Gen. Div.); affirmed (December 21, 1998), Doc. CA C29428 (Ont. C.A.).

Respondents had commenced 19 actions since 1989. Order under s. 140 of *Courts of Justice Act*, R.S.O. 1990, c. C.43, prohibiting further proceedings without leave justified.

1066087 Ontario Inc. v. Church of the First Born Apostolic Inc. (2002), 23 C.P.C. (5th) 297, 2002 CarswellOnt 2648 (Ont. Master).

Defendants brought motion pursuant to Rule 56.01(e) of RCP for order for security for costs on basis action frivolous and vexatious. Motion granted. Conjunctive test under Rule 56.01(e) required both good reason to believe that action is frivolous and vexatious and that plaintiff has insufficient assets to pay costs. While defendants established that plaintiff had insufficient assets, they failed to establish that action was frivolous and vexatious. Given defendants' solicitors' respective experience, fact that solicitors charging reduced rate based on church's charitable status represented partial indemnity scale, complete indemnity not appropriate. Security for costs was awarded to defendants in amount of $65,000.

Ebrahim v. Ebrahim, 2003 CarswellBC 363, [2003] B.C.J. No. 338, 2003 BCCA 94 (B.C. C.A.).

Husband commenced action for malicious prosecution against wife arising out of fact that he was found in contempt of court in family law proceedings. Contempt order set aside on grounds of lack of notice. Wife's application to strike out claim allowed on grounds action was vexatious. No error in striking out claim. Appeal from 2002 CarswellBC 694, [2002] B.C.J. No. 638, 2002 BCSC 466 (B.C. S.C.) dismissed.

Sinclair v. Elwood & Pensa (2001), 2001 CarswellOnt 4886 (Ont. S.C.J.).

Claim was attempt to re-litigate issued raised in earlier actions. Claim dismissed as frivolous and vexatious. No further proceeding to be instituted by plaintiff in any court and any proceeding previously instituted by him in any court not to continue.

R. v. Wu, 2003 SCC 73, 2003 CarswellOnt 5099, 2003 CarswellOnt 5100, [2003] S.C.J. No. 78, [2003] 3 S.C.R. 530, 180 C.C.C. (3d) 97, 16 C.R. (6th) 289, 234 D.L.R. (4th) 87, 182 O.A.C. 6, 313 N.R. 201 (S.C.C.).

Genuine inability to pay a fine is not a proper basis for imprisonment. A conditional sentence is a form of imprisonment. Unless, in the terms of s. 734.7(1), the Crown can establish that such a defaulter has "without reasonable excuse, refused to pay", a warrant of committal should not be issued.

McTeague v. Kalevar, 2005 CarswellOnt 337 (Ont. S.C.J.).

Kalevar has sued for damages in at least 13 proceedings involving nine parties. Nine of these proceedings have been dismissed. Order under s. 140 to go.

Dempsey v. Peart, 2004 CarswellBC 1611, 2004 BCCA 395 (B.C. C.A.).

Dempsey brought appeal from orders dismissing three actions, Supreme Court of British Columbia barring him, pursuant to s. 18 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443, from bringing any further action or application without leave of the court against any of the defendants, *inter alia*. Appeal dismissed.

Griffiths v. Hughes, 2006 CarswellOnt 3369 (Ont. S.C.J.).

Motion by the defendant. Griffiths requested an adjournment. Court denied the adjournment. Action dismissed as an abuse of process. Hughes seeks an order under s. 140 of the *Courts of Justice Act*. Griffiths has instituted vexatious proceedings. Griffiths shall not commence any further proceeding against Peter Norman Hughes in any court governed by the *Courts of Justice Act* without first obtaining leave from a judge of the Superior Court of Justice.

Kalevar v. McTeague (September 16, 2005) (Ont. C.A.).

Kalevar appealled order declaring him a vexatious litigant. Kalevar under impression that before he can be declared a vexatious litigant first necessary for the multiple other proceedings he has instituted to be concluded. That is wrong. Appeals without merit, and dismissed. Order of Ferrier J. confirmed.

Barrie (City) v. Predie, 2006 CarswellOnt 2309 (Ont. S.C.J.).

Respondent had history of litigating matters and seeking adjournments and failed to pay costs on many other cases. Respondent had commenced vexatious proceedings and was barred from bringing any further proceedings or appeals.

Kalaba v. Bylykbashi, [2006] O.J. No. 545, 2006 CarswellOnt 749, *(*sub nom. *Kallaba v. Bylykbashi)* 265 D.L.R. (4th) 320, 23 R.F.L. (6th) 235, 207 O.A.C. 60 (Ont. C.A.).

Vexatious litigant order is a final order for the purpose of s. 6(1) of the *CJA* because it constituted a final determination of right to engage in further litigation. Accordingly, right to appeal from that order. While the order's wording appeared to limit statutory right of appeal, no order under s. 140(1) of the *CJA* could operate that broadly. Motion judge's order should be read down so as not to apply to an appeal from this order.

Dale Streiman & Kurz LLP v. De Teresi (2007), [2007] O.J. No. 255, 2007 CarswellOnt 485, 84 O.R. (3d) 383 (Ont. S.C.J.).

The applicant lawyer sued by the respondent paralegal. Applicant brought application to have respondent declared a vexatious litigant. Application granted. See s. 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*").

The term "vexatious proceedings" was defined by Chief Justice Howland in *Foy v. Foy*, in the context of the *Vexatious Proceedings Act*, R.S.O. 1970, c. 481, the predecessor to *CJA* s. 140, as follows:

> The word 'vexatious' has not been clearly defined. Under the Act the legal proceedings must be vexatious and must also have been instituted without reasonable ground. In many of the reported decisions the legal proceedings have been held to be vexatious because they were instituted without any reasonable ground. As a result the proceedings were found to constitute an abuse of the process of the Court. An example of such proceedings is the bringing of one or

> more actions to determine an issue which has already been determined by a Court of competent jurisdiction.

Foy v. Foy (No. 2), 1979 CarswellOnt 458, [1979] O.J. No. 4386, 26 O.R. (2d) 220, 12 C.P.C. 188, 102 D.L.R. (3d) 342 (Ont. C.A.), at p. 226 (O.R.) as cited by Sedgwick J. in *National Bank of Canada v. Filzmaier*, 2000 CarswellOnt 474, [2000] O.J. No. 567, [2000] O.T.C. 19 (Ont. S.C.J.). See also *Lang Michener Lash Johnston v. Fabian*, 1987 CarswellOnt 378, [1987] O.J. No. 355, 16 C.P.C. (2d) 93, 59 O.R. (2d) 353, 37 D.L.R. (4th) 685 (Ont. H.C.), at pp. 358-59 (O.R.).

R. v. Deutsch (2007), 2007 CarswellOnt 7400, [2007] O.J. No. 4411 (Ont. S.C.J.).

The judge convicted Mr. Deutsch of one count of perjury. The count related to a civil case, *Fleet Rent-A-Car Ltd. v. Vadim Bidnyk*, heard by Justice Thomson of the same court.

Ducharme J. stated:

> Having considered Mr. Deutsch's criminal record, I can do no better here than adopt Justice Moldaver's description of Mr. Deutsch in *R. v. Deutsch*, 2005 CarswellOnt 7455, [2005] O.J. No. 5542, 205 O.A.C. 272, 204 C.C.C. (3d) 361 (Ont. C.A.) at 379 in dismissing his appeal from the fraud conviction.
>
> The appellant is a life-long fraud artist. He is incorrigible and he is a menace to society. In his case, I see virtually no hope of reformation.
>
> . . . . .
>
> The fact that Mr. Deutsch has been declared a vexatious litigant does not make any of these principles less applicable to the determination of the appropriate sentence in this case.

Appropriate sentence 14 months.

British Columbia (Attorney General) v. Lindsay, 2007 CarswellBC 600, [2007] B.C.J. No. 565, 393 W.A.C. 254, 238 B.C.A.C. 254, 2007 BCCA 165 (B.C. C.A.); leave to appeal refused (2007), 2007 CarswellBC 2730, 2007 CarswellBC 2731, 381 N.R. 400 (note), 445 W.A.C. 320 (note), 264 B.C.A.C. 320 (note) (S.C.C.).

Appellant challenged order declaring Appellant a vexatious litigant and ordering that he "must not, without leave of the court, institute or commence legal proceedings in any British Columbia court, nor file applications in any existing legal proceedings in any British Columbia court without leave of the court . . .".

Leave required for instituting proceedings in either the Provincial or Supreme Court, and the Court of Appeal added itself to the list that Appellant obtain leave of a justice before commencing a proceeding in the Court of Appeal, as "Mr. Lindsay's litigation conduct before this Court has been as fruitless and vexatious as it has been in the Provincial and Supreme Courts.".

Bono General Construction Ltd. v. Susin, 2006 CarswellOnt 4476 (Ont. C.A.).

Respondents' application for order under s. 140 of *Courts of Justice Act* granted. Applicant barred from commencing or continuing proceedings against respondents without leave. Appeal dismissed. Respondents did not lack status to bring application on basis that they were undischarged bankrupts. Relief sought by respondents did not deal with property but was personal in nature.

Henson v. Berkowits, 2005 CarswellMan 144, 2005 MBQB 32, 193 Man. R. (2d) 170 (Man. Q.B.); affirmed 2006 CarswellMan 301, 2006 MBCA 102, 208 Man. R. (2d) 42, 383 W.A.C. 42 (Man. C.A.).

Plaintiff brought separate actions against individual defendants in Small Claims Court. Defendants brought application for order to prohibit plaintiff from instituting proceedings without leave of court. Application granted. Present actions were brought with view to harass

individual defendants and to oppress board. Order made pursuant to s. 73 of *Court of Queen's Bench Act*.

Nelson v. Canada (Customs & Revenue Agency), 2006 CarswellBC 2444, 2006 BCCA 442 (B.C. C.A.).

Plaintiff declared vexatious litigant under provincial *Supreme Court Act* in 1981. At that time, chief justice made order prohibiting plaintiff from bringing any court proceeding without leave. Paragraph of order forbidding plaintiff from filing any application for leave to commence proceedings until plaintiff paid costs award set aside. Paragraph imposed condition that might undermine plaintiff's access to courts should he have reasonably founded or arguable case unrelated to frivolous and vexatious claims disclosed on four applications he already brought before provincial Supreme Court.

Sauvé v. Merovitz, [2006] O.J. No. 4266, 2006 CarswellOnt 6601 (Ont. S.C.J.); additional reasons at 2006 CarswellOnt 8132 (Ont. S.C.J.).

Application under s. 140 of *Courts of Justice Act* seeking order that no further proceedings be instituted or continued by man except by leave of judge of Superior Court of Justice. Application granted.

Vrooman v. Taylor (2007), 2007 CarswellOnt 495 (Ont. S.C.J.).

Frivolous or vexatious pleadings. Because of conduct of plaintiff, action should be struck on grounds that it is frivolous and vexatious.

O'Neill v. Deacons, [2007] A.J. No. 1397, 2007 CarswellAlta 1695, 83 Alta. L.R. (4th) 152, 49 C.P.C. (6th) 130, 441 A.R. 60, 2007 ABQB 754 (Alta. Q.B.).

Defendants brought an application to bar plaintiff from instituting or continuing any proceedings without leave of court on the grounds that plaintiff had mislead or attempted to mislead court on several occasions. Application allowed.

Plaintiff was found to be a vexatious litigant since persistently abused processes of courts for improper purposes. Plaintiff's failure to pay costs of numerous failed applications, her persistence in bringing such applications, and her attempts to mislead court were incidences of conduct of a vexatious litigant.

Benson v. Manitoba (Workers' Compensation Board), [2008] M.J. No. 88, 2008 CarswellMan 120, 2008 MBCA 32, [2008] 5 W.W.R. 420, 53 C.P.C. (6th) 269, 228 Man. R. (2d) 46, 427 W.A.C. 46 (Man. C.A.).

Appellant challenged dismissal of application for judicial review of Workers Compensation Board's denial of benefits for alleged injuries arising from anxiety attack. Motions judge found the injury was not a result of an accident causing a disability within the meaning of the *Workers Compensation Act* and therefore did not give rise to a claim against the Board. Appeal dismissed. Benson did not demonstrate that motions judge made any error in principle or any palpable and overriding error.

Intervener employer brought motion for order declaring employee to be vexatious litigant and be prevented from instituting further proceedings without leave. Motion granted. Employer as added party can request vexatious litigant declaration and order prohibiting further proceedings.

McIntyre v. Connolly (2008), 2008 CarswellOnt 1604, [2008] O.J. No. 1097 (Ont. S.C.J.).

Defendants brought motions to dismiss or strike out plaintiff's claim, and to have plaintiff declared vexatious litigant. Motions granted. Plaintiff vexatious litigant. Plaintiff's action brought in circumstances where same issues had already been determined by Superior Court, Small Claims Court and labour arbitrator.

Roskam v. Jacoby-Hawkins, 2010 ONSC 4439, 2010 CarswellOnt 7132 (Ont. S.C.J.).

Judgment delivered by deputy judge on February 12, 2010.

Roskam served a Notice of Appeal of the Small Claims Court Judgment on March 18, 2010, more than 30 days after Judgment released. Jacoby-Hawkins moved to strike out the Notice of Appeal.

Jacoby-Hawkins sought additional relief that Roskam be required to post security for costs of the appeal, that he be declared a vexatious litigant and that Roskam be required to remove all references he has authored about Jacoby-Hawkins and his counsel from the internet.

Section 31 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, provides that an appeal lies to the Divisional Court from a final order of the Small Claims Court in an action for the payment of money in excess of $500.00. Rule 61.04 of the *Rules of Civil Procedure* provides that any such appeal must be commenced within 30 days after the making of the order. The time for appeal usually runs from the date of pronouncement of a judgment: see *Permanent Investment Corp. v. Ops & Graham (Township)*, 1967 CarswellOnt 90, 62 D.L.R. (2d) 258, [1967] 2 O.R. 13 (Ont. C.A.).

Rule 3.02 deals with extensions of time generally. Rule 3.02 provides court with discretion to extend the time in which to file the Notice of Appeal, which was delivered four days late. *Bona fide* intention to pursue appeal. No prejudice to respondent as a result of late service.

Justice requires extension of time to file Notice of Appeal. See *Rizzi v. Mavros*, 2007 ONCA 350, 2007 CarswellOnt 2841, [2007] O.J. No. 1783, 85 O.R. (3d) 401, 224 O.A.C. 293 (Ont. C.A. [In Chambers]). Basis for security grounded in r. 56.01(1)(c) incorporated by reference in r. 61.06(1)(b). Request for security for costs not made out. Rationale underlying s. 140 discussed by Blair J.A. in *Foy v. Foy (No. 2)*, [1979] O.J. No. 4386, 102 D.L.R. (3d) 342, 12 C.P.C. 188, 26 O.R. (2d) 220, 1979 CarswellOnt 458 (Ont. C.A.); leave to appeal refused 102 D.L.R. (3d) 342 (note), [1979] 2 S.C.R. vii, 12 C.P.C. 188n, 26 O.R. (2d) 220n, 31 N.R. 120 (S.C.C.).

The control of vexatious proceedings was necessary to protect integrity of the judicial system. The purpose of section to prevent people from using system for improper purposes, such as harassment or oppression. See *Dale Streiman & Kurz LLP v. De Teresi*, 2007 CarswellOnt 485, [2007] O.J. No. 255, 84 O.R. (3d) 383 (Ont. S.C.J.). Accordingly, a litigant's behaviour both inside and outside of the court is relevant. See *Canada Post Corp. v. Varma*, [2000] F.C.J. No. 851, 2000 CarswellNat 1183, 192 F.T.R. 278 (Fed. T.D.).

Section 140 of the *Courts of Justice Act* gives the court the authority to declare a party a vexatious litigant, thereby restricting his or her access to the courts of Ontario. It is a remedy that should be used very sparingly because the ability to have one's grievances addressed by the courts is fundamental to a free and just society. At the same time, the court must be wary of its processes being used for vexatious purposes.

Given Roskam's behaviour, appropriate case to make an order declaring Roskam to be a vexatious litigant.

Petrykowski v. 553562 Ontario Ltd., 2011 ONSC 6711, 2011 CarswellOnt 12895 (Ont. S.C.J.).

This motion is the latest in a long line of procedural missteps by Petrykowski. Petrykowski filed a claim in the Small Claims Court. He revived the claim against him in the Superior Court.

The justice of the case considered the governing principle in determining whether to grant leave to extend the time for an appeal (Laskin J.A. in *Bratti v. Wabco Standard Trane Inc.*, 1994 CarswellOnt 267, [1994] O.J. No. 855, 25 C.B.R. (3d) 1 (Ont. C.A.)).

In circumstances where the court finds that an appeal is without merit, the court should not be required to assist in bringing it forward. In such cases, the justice of the case should compel a court to bring closure to the proceeding instead (*Petrykowski v. 553562 Ontario Ltd.*, 2011 ONSC 1101, 2011 CarswellOnt 1014, [2011] O.J. No. 734 (Ont. Div. Ct.)). Pe-

trykowski's overly-litigious conduct was well documented. The motion to extend the time to appeal was dismissed.

Houweling Nurseries Ltd. v. Houweling, 2010 BCCA 315, 2010 CarswellBC 1511, 321 D.L.R. (4th) 317, 289 B.C.A.C. 121, 489 W.A.C. 121 (B.C. C.A.).

Vexatious litigant orders were made against the appellant. The Orders were to be used sparingly and only in the clearest of cases. This is one of those cases. The appellant precluded from filing any further documents in the Court of Appeal in connection with the subject matter of litigation. The court has an inherent jurisdiction to control its own process from being abused. This was clearly a case where the court should act on its own motion.

Dyce v. Lyons-Batstone, 2012 ONSC 490, 2012 CarswellOnt 568 (Ont. S.C.J.); affirmed 2012 ONCA 553, 2012 CarswellOnt 10390 (Ont. C.A.); affirmed 2012 ONCA 626, 2012 CarswellOnt 17231 (Ont. C.A.).

Since 2007, there has been a plethora of litigation between Wayne Dyce and Megan Hubbard.

Allegations in statement of claim were very similar in nature to the allegations Wayne Dyce made in the actions before Cunningham A.C.J.S.C.J. and therefore should be struck.

Pleading shows complete absence of material facts. It is frivolous and vexatious and should be struck as being scandalous: see *Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574, [2003] O.J. No. 5331 (Ont. S.C.J.).

Accordingly, pursuant to rules 21.01(1)(b), 21.01(3)(d) and 25.11 of the *Rules of Civil Procedure*, the claim was struck and the action dismissed.

This would be a case in which security for costs would be appropriate, pursuant to rule 56.01(1)(c) and (e), of the *Rules of Civil Procedure*.

The court was unable to grant such an order at this time since the defendants had not filed a statement of defence.

Section 140 of the *Courts of Justice Act* provided the jurisdiction to a judge of the superior court to deem a person to be a vexatious litigant.

In *Roskam v. Jacoby-Hawkins*, 2010 ONSC 4439, 2010 CarswellOnt 7132 (Ont. S.C.J.), Boswell J. set out the rationale of section 140.

See also Henry J., in *Lang Michener Lash Johnston v. Fabian*, 1987 CarswellOnt 378, [1987] O.J. No. 355, 59 O.R. (2d) 353, 16 C.P.C. (2d) 93, 37 D.L.R. (4th) 685 at para. 19 (Ont. H.C.). The behaviour of a litigant was also considered in the decision of Dawson J. in *Canada Post Corp. v. Varma*, 2000 CarswellNat 1183, [2000] F.C.J. No. 851, 192 F.T.R. 278 at para. 23 (Fed. T.D.).

The Court of Appeal for Ontario has made it clear that orders requiring a litigant to seek leave prior to continuing with "any such proceeding previously instituted . . . in any court" include appeals to their court. Only the order declaring the litigant to be vexatious is appealable as of right pursuant to section 6(1)(b) of the *Courts of Justice Act*: see *Kallaba v. Bylykbashi*. Furthermore, this order can include the staying of actions until outstanding costs orders are paid: see *Landmark Vehicle Leasing Corp. v. Marino*, 2011 ONSC 1671, 2011 CarswellOnt 1771 (Ont. S.C.J.); additional reasons at 2011 ONSC 8028, 2011 CarswellOnt 5858 (Ont. S.C.J.).

V.I. Fabrikant v. Eisenberg, 2011 QCCA 1560, 2011 CarswellQue 9346, EYB 2011-195209 (Que. C.A.); leave to appeal refused 2012 CarswellQue 501, 2012 CarswellQue 502, 432 N.R. 396 (note) (S.C.C.).

Fabrikant, the applicant, has been serving a life sentence since 1992. He was declared a vexatious litigant. On April 3, 2011, he initially sought authorization to institute an action in damages against the respondents (the "doctors"), via an application dated April 3, 2011. The

Application for authorization to institute an action was brought under Rule 84 and following of the *Rules of Practice* of the Superior Court of Québec, since the Applicant can no longer institute any proceedings before the Courts of Québec without prior authorization. The Application for leave to appeal to the Supreme Court of Canada was dismissed with costs.

Szpakowsky v. Kramar, 2012 ONCA 77, 2012 CarswellOnt 1320, 19 C.P.C. (7th) 274, [2012] O.J. No. 446 (Ont. C.A.); additional reasons at 2012 ONCA 136, 2012 CarswellOnt 2087 (Ont. C.A.).

This case contains security for costs, as the case may be a waste of time or nuisance. The Court does not need to be satisfied that a case is without merit and frivolous, vexatious, or otherwise an abuse of the court's process. The court needs only to have "good reason to believe" that a case has those characteristics. The appellant's history of re-litigating this case brought it within those characteristics. For this and other grounds, the appeal court ordered the appellant to pay $15,000 into the court as security for the costs of appeal.

With respect to the second arm of the test in clause 61.06(1)(a) of *Rules of Civil Procedure*, the appellant conceded that she was impecunious. Impecunious litigants are not entitled to litigate with impunity, causing their opponents to run up significant costs and without having to face normal consequences of costs if they (impecunious litigants) were unsuccessful. The Court was unwilling to make an order for security for costs of more than $43,000 and instead settled upon a sum of $15,000 as security for costs. The appeal has been stayed pending the appellant's compliance with this order.

Liu v. Tangirala, 2010 ABCA 383, 2010 CarswellAlta 2441, 493 A.R. 378, 502 W.A.C. 378, 2 C.P.C. (7th) 426 (Alta. C.A.); leave to appeal refused 2011 CarswellAlta 1123, 2011 CarswellAlta 1124, 522 A.R. 408 (note), 426 N.R. 389 (note), 544 W.A.C. 408 (note) (S.C.C.).

The plaintiff brought an action against the defendant. The plaintiff had brought at least 24 applications, and commenced or sought leave to commence at least seven appeals. The decision to declare the plaintiff a vexatious litigant was a discretionary decision. From the plaintiff's conduct and statements, there was a real risk that he would continue to commence actions.

Hudgins v. Hudgins, 2012 ONSC 2133, 2012 CarswellOnt 4130 (Ont. S.C.J.).

The Respondent, Hudgins brings a motion for an order declaring that the Applicant is a vexatious litigant and from further instituting or continuing any proceedings instituted in any court in Ontario, except with leave of the Regional Senior Judge of the Superior Court of Justice or his/her designate pursuant to s. 140(1)(a) to (d) and s. 140(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the *Family Law Rules*, 2(2), 2(3), and 14(21) O.Reg. 114/99, as amended. See *Lang Michener Lash Johnston v. Fabian*, 1987 CarswellOnt 378, 59 O.R. (2d) 353, 16 C.P.C. (2d) 93, 37 D.L.R. (4th) 685, [1987] O.J. No. 355 (Ont. H.C.) at para. 19, where Justice Henry considered a number of judicial decisions and summarized the principles relating to vexatious proceedings.

The court has a broad jurisdiction under s. 140 of the *Courts of Justice Act*. The Court of Appeal has stated that orders requiring a litigant to seek leave to continue with proceedings or to institute new proceedings in any court includes appeals to their court. Only the order declaring the litigant to be vexatious is appealable as of right pursuant to s. 6(1)(b) of the *Courts of Justice Act*. (*Kalaba v. Bylykbashi*, 2006 CarswellOnt 749, *(*sub nom. *Kallaba v. Bylykbashi)* 265 D.L.R. (4th) 320, 23 R.F.L. (6th) 235, 207 O.A.C. 60, [2006] O.J. No. 545 (Ont. C.A.); leave to appeal refused 2006 CarswellOnt 5138, 2006 CarswellOnt 5139, [2006] 2 S.C.R. ix (note), 358 N.R. 394 (note), 227 O.A.C. 394 (note), [2006] S.C.C.A. No. 144 (S.C.C.). Order of vexatious litigant can include the staying of actions, whether by way of further motion, appeals or other steps, until outstanding cost orders are paid. (*Landmark*

Vehicle Leasing Corp. v. Marino, 2011 ONSC 1671, 2011 CarswellOnt 1771 (Ont. S.C.J.) at para. 47; ; additional reasons 2011 ONSC 8028, 2011 CarswellOnt 5858 (Ont. S.C.J.)).

Appropriate to make an order declaring Hudgins a vexatious litigant and to impose terms on him.

Ontario v. Jogendra, 2012 ONSC 3303, 2012 CarswellOnt 7960, [2012] O.J. No. 2899 (Ont. S.C.J.); affirmed 2012 ONCA 834, 2012 CarswellOnt 15025, [2012] O.J. No. 5605 (Ont. C.A.); leave to appeal refused 2013 CarswellOnt 4862, 2013 CarswellOnt 4863, 455 N.R. 397 (note), 320 O.A.C. 399 (note) (S.C.C.).

Regis Jogendra is a former Justice of the Peace who has instituted a myriad of civil, administrative, regulatory and private criminal proceedings against the Crown and its employees, judicial officials and other adjudicators, and many of the lawyers who represent them.

The Applicant seeks orders declaring Mr. Jogendra a vexatious litigant, and prohibiting him from instituting or continuing any civil or private criminal proceedings without obtaining leave of a judge of this court.

Court may consider all of the proceedings in which he has been a party and may also consider his conduct as a litigant within those proceedings: *Dale Streiman & Kurz LLP v. De Teresi*, 2007 CarswellOnt 485, 84 O.R. (3d) 383, [2007] O.J. No. 255 (Ont. S.C.J.).

Order Jogendra obtain leave of a judge of the Superior Court of Justice prior to instituting or continuing any civil proceedings in any court, and that any such application for leave made pursuant to section 140(3) of the *Courts of Justice Act* shall be made on at least ten days written notice to the Attorney General of Ontario.

Bank of Montreal v. Cudini, 2013 ONSC 482, 2013 CarswellOnt 525 (Ont. S.C.J.).

Application under s. 140 of the *Courts of Justice Act*, to declare respondent vexatious litigant. Application granted. Applicant relies on *Lang Michener Lash Johnston v. Fabian*, 1987 CarswellOnt 378, 59 O.R. (2d) 353, 16 C.P.C. (2d) 93, 37 D.L.R. (4th) 685, [1987] O.J. No. 355 (Ont. H.C.); *Law Society of Upper Canada v. Chavali*, 1998 CarswellOnt 1581, 21 C.P.C. (4th) 20, [1998] O.J. No. 5890 (Ont. Gen. Div.); affirmed 1998 CarswellOnt 4982, 31 C.P.C. (4th) 221, [1998] O.J. No. 5344 (Ont. C.A.); *Ontario v. Coote*, 2011 ONSC 858, 2011 CarswellOnt 989, [2011] O.J. No. 697 (Ont. S.C.J.); affirmed 2011 ONCA 562, 2011 CarswellOnt 8624 (Ont. C.A.); and *Hainsworth v. Canada (Attorney General)*, 2011 ONSC 2642, 2011 CarswellOnt 3844, [2011] O.J. No. 2408 (Ont. S.C.J.). Conduct of Cudini vexatious within s. 140 of the Act. Order similar to van Rensburg J. in *Coote*. Order will include a form of "screening" that will require an *ex parte* written application before a judge before a responding party is required to respond to a motion for leave.

See also Norheimer J. in *Chavali v. Law Society of Upper Canada*, 2006 CarswellOnt 3122, [2006] O.J. No. 2036 (Ont. S.C.J.) at paras. 20–22.

Baradaran v. Tarion Warranty Corp., 2014 ONCA 597, 2014 CarswellOnt 11145, 32 C.L.R. (4th) 167, 375 D.L.R. (4th) 710, 324 O.A.C. 219 (Ont. C.A.).

Appeal from the orders of McEwen J. Second order, declaring appellant to be a vexatious litigant and prohibiting him from continuing or commencing any action without leave against Master and Nasseri and prohibiting the appellant without leave from any further action against Tarion and its representatives with respect to certain matters only, resulted from application by Master and Nasseri under s. 140 of the *Courts Justice Act*, R.S.O. 1990, c. C.43.

Application judge considered appellant's history of commencing claims against a variety of persons (48 Small Claims Court actions in Toronto since 2003 and 11 actions in the Superior Court since 2007), his obstreperous conduct while appearing before tribunals, the fact that he wrongly held himself out as a licensed paralegal, and his pattern of expanding his grievances to include lawyers who acted against him and judges who had presided over the proceedings.

Conduct does not justify the vexatious litigant order in the terms made by the application judge. Appellant's pattern of litigation against others not sufficient reason to uphold vexatious litigant order in this case. Vexatious litigant order set aside.

Chutskoff Estate v. Bonora, 2014 ABCA 444, 2014 CarswellAlta 2380, 588 A.R. 303, 26 Alta. L.R. (6th) 255, 626 W.A.C. 303 (Alta. C.A.).

Applicant declared vexatious litigant by Court of Queen's Bench. Vexatious litigants required to obtain permission to launch any appeal. Applications for permission to appeal out of time. No basis for permitting appeal of vexatious litigant order. Applicant unable to accept the finality of court decisions. He asserts that courts have a duty to "accommodate" his mental disability. While the courts always attempt to accommodate persons with special needs, obligation to accommodate does not extend as far as enabling persons to abuse the court system, use up valuable court resources, and waste the time and money of other litigants. Applicant has obligation to control himself. Applications for permission to appeal dismissed.

Poplawski v. McGill University, 2014 QCCA 1695, 2014 CarswellQue 9426, EYB 2014-242219 (C.A. Que.).

Motion for leave to appeal from judgment by Superior Court. Motion dismissed. Petitioner not declared vexatious or quarrelsome litigant in the Quebec Court of Appeal. The Quebec Court, Small Claims Division, had jurisdiction over petitioner's claim (article 953 C.C.P: a claim which did not exceed $7,000). Motion for judicial review will only be granted if decision unreasonable. No appeal lies from judgment rendered by Small Claims Division of the Quebec Court (article 984 *C.C.P.*) and no judicial review may be sought except where there is want or excess of jurisdiction.

Court will tolerate neither abusive language in correspondence addressed to its members or to any of its jurists or other employees (*Mazhero v. CBC/Radio-Canada*, 2014 QCCA 107, 2014 CarswellQue 280 (C.A. Que.); leave to appeal refused 2014 CarswellQue 7524, 2014 CarswellQue 7525 (S.C.C.); *R. v. Wozny*, 2005 QCCA 360, 2005 CarswellQue 1036, EYB 2005-88928, [2005] Q.J. No. 3614 (C.A. Que.)) nor inappropriate, arrogant or abusive behaviour on its premises. Motion for leave to appeal dismissed with costs.

Dutton Brock LLP v. Balanyk, 2014 ONCA 122, 2014 CarswellOnt 1699 (Ont. C.A.); leave to appeal refused 2014 CarswellOnt 13159, 2014 CarswellOnt 13160 (S.C.C.).

Summary judgment dismissing actions granted. Applicant then filed series of motions and appeals in relation to those actions. Respondent law firm filing application seeking to have applicant declared vexatious litigant and seeking order requiring her to obtain leave of the court before commencing or continuing any action in any court in Ontario. Application to declare Applicant vexatious litigant was granted. C.A. Motion to file fresh evidence and appeal was dismissed. Motion for extension of time to serve and file respondent's response was dismissed.

Wilson v. Canada Revenue Agency, 2013 ONCA 31, 2013 CarswellOnt 370 (Ont. C.A.).

Wilson launched action against Revenue Canada (now Canada Revenue Agency) in 1999 to recover income tax refunds. Action dismissed in 2003, as were all subsequent appeals. Wilson commenced second action in the Federal Court that was dismissed, as was his appeal. He subsequently brought action in the Tax Court but action and appeal dismissed. Wilson then commenced an action in the Superior Court concerning the same issues. Applicant's statement of claim struck. Applicant declared vexatious litigant. C.A.: Applicant's appeal dismissed. "The motion for an extension to serve and file that application for leave to appeal . . . is dismissed with costs. In any event, had such motion been granted, the application for leave to appeal would have been dismissed with costs."

Reyes v. Esbin, 2017 ONSC 601, 2017 CarswellOnt 918, M.D. Faieta J (Ont. S.C.J.).

Motion for summary judgment brought by the defendants had been granted.

At common law, a court has no authority to declare that a person is a vexatious litigant and thus barred from bringing or continuing any proceedings in any court without leave: see *Kalaba v. Bylykbashi*, 2006 CarswellOnt 749, (sub nom. *Kallaba v. Bylykbashi)* 265 D.L.R. (4th) 320, 23 R.F.L. (6th) 235, 207 O.A.C. 60, [2006] O.J. No. 545 (Ont. C.A.) at para. 116; leave to appeal refused 2006 CarswellOnt 5138, 2006 CarswellOnt 5139, [2006] 2 S.C.R. ix (note), 358 N.R. 394 (note), 227 O.A.C. 394 (note), [2006] S.C.C.A. No. 144 (S.C.C.). Section 140 of the *Courts of Justice Act* provides a "mechanism to prevent a litigant from instigating or conducting litigation for an improper purpose".

The nature and purpose of section 140 of the Act was explained by Blair J. in *Foy v. Foy*, 1979 CarswellOnt 458, 26 O.R. (2d) 220, 12 C.P.C. 188, 102 D.L.R. (3d) 342, [1979] O.J. No. 4386 (Ont. C.A.) at paras. 66 and 67; leave to appeal refused [1979] 2 S.C.R. vii, 26 O.R. (2d) 220n, 12 C.P.C. 188n, 102 D.L.R. (3d) 342 (note), 31 N.R. 120 (S.C.C.).

The Act provides only two remedies once a person is found to be a vexatious litigant. A judge may order that no further proceeding be instituted by the person in any court and may order that a proceeding previously instituted by the person in any court not be continued, except by leave of a judge of the Superior Court of Justice.

Caliciuri v. Matthias, 2017 ONSC 748, 2017 CarswellOnt 1362, Ellies J. (Ont. S.C.J.)

Caliciuri and Matthias lived together in a common-law relationship. After they separated, Caliciuri commenced three claims against Matthias in the Small Claims Court. None of those claims proceeded beyond a settlement conference. Caliciuri later commenced an action against Matthias in the Superior Court, within which this motion is brought.

Matthias sought order staying or dismissing the SCJ action on the basis that it is frivolous, vexatious and/or an abuse of process. Motion dismissed.

The only SCC claim that is relevant was never decided on its merits. For that reason, the doctrine of *res judicata* does not apply. Because Caliciuri let the SCC claim lapse based on Matthias' position that the SCC had no jurisdiction, the SCJ claim does not constitute an abuse of process. The SCJ action must proceed to trial.

Should the SCJ claim be dismissed under Rules 2.1 and/or 21.01 (3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on the basis that it is frivolous, vexatious or otherwise an abuse of this court's process? SCJ action is not frivolous, vexatious or an abuse of process.

The doctrine of *res judicata* is part of the general law of estoppel. It has two distinct forms: issue estoppel and cause of action estoppel: see Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed, (Markham: LexisNexis Canada Inc., 2015), at p. 1.

Can an administrative dismissal of an action trigger the application of the doctrine of *res judicata*? See *Duca Financial Services Credit Union Ltd. v. Smith*, 2016 ONSC 4497, 2016 CarswellOnt 13042 (Ont. S.C.J.). SCJ action not estopped by virtue of the doctrine of *res judicata*, nor an abuse of this court's process.

Rule 20.04(1) permits a court to grant summary judgment where the court is satisfied that there is no genuine issue requiring a trial. In *Hryniak v. Mauldin*, 2014 CSC 7, 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641, [2014] 1 S.C.R. 87, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, 453 N.R. 51, 314 O.A.C. 1, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7 (S.C.C.), the Supreme Court held that a court must grant summary judgment where the judge is able to reach fair and just determination upon the merits of the motion.

There is clearly a genuine issue in this case.

Vermette v. Nassr, 2016 ONCA 658, 2016 CarswellOnt 13771 (Ont. C.A.); leave to appeal refused *Nassr v. Vermette*, 2017 CarswellOnt 1612, 2017 CarswellOnt 1613 (S.C.C.).

After numerous proceedings Nassr declared to be a vexatious litigant pursuant to s. 140 of the *Courts of Justice Act*: *Vermette v. Nassr*, 2015 ONSC 2450. Vermette moved to C.A. for an order quashing Mr. Nassr's appeal, which was granted. The court did not accept Nassr's argument that under R. 2.03 of the *Rules of Civil Procedure* the court should dispense with compliance with the requirements he obtain leave. The application for leave to appeal to the SCC was dismissed with costs.

O'Brien v. Blue Heron Co-Operative Homes Inc. et al., 2017 ONSC 7168, 2017 CarswellOnt 19650 (Ont. Div. Ct.); affirmed *O'Brien v. Blue Heron*, 2018 ONSC 5501, 2018 CarswellOnt 15412 (Ont. Div. Ct.).

The Small Claims Court cannot grant the declaratory relief requested by O'Brien. Motion seeking order appellant, ("O'Brien") provide security for costs for his appeal of a Small Claims Court Decision dismissing most of his claims. The requirements to obtain an order for security for costs are set out in rule 61.06(1) of the *Rules of Civil Practice*. The overreaching principle governing the exercise of discretion is the "justness of the order sought". Test to be applied to determine if an appeal was frivolous and vexatious is whether there was "good reason to believe" that the appeal was frivolous and vexatious and the appellant lacked sufficient assets to pay appeal costs. See *Lukezic v. Royal Bank*, 2011 ONSC 5263, 2011 CarswellOnt 9257 (Ont. S.C.J.); additional reasons 2012 ONSC 431, 2012 CarswellOnt 1148 (Ont. S.C.J.); reversed in part 2012 ONCA 350, 2012 CarswellOnt 6464, 350 D.L.R. (4th) 111, [2012] O.J. No. 2344 (Ont. C.A.), where the Court accepted non-exhaustive list of factors to consider when determining whether a proceeding is vexatious. Appellant's actions motivated by anger and revenge. Appellant is acting in a vexatious manner. In *York University v. Markicevic*, 2017 ONCA 651, 2017 CarswellOnt 12236 (Ont. C.A.) at para. 21 the Court of Appeal held that when determining whether it would be just to order security for costs the court must balance the rights of access to justice against the moving party's right to protection from defending uncontentious claims. Order appellant post security for costs of $5000 for the appeal involving the Blue Heron Respondents and $5000 for the appeal of the decision as it relates to the Sector Respondents within 60 days failing which his appeal will be dismissed.

Carleton Condominium Corporation 116 v. Sennek, 2018 ONCA 118, 2018 CarswellOnt 1698 (Ont. C.A.).

Sennek raised more than 20 grounds for appeal from judgment declaring her to be a vexatious litigant. No basis to interfere with application judge's finding that characteristics of a vexatious litigant as listed in *Lang Michener Lash Johnston v. Fabian*, 1987 CarswellOnt 378, 59 O.R. (2d) 353, 16 C.P.C. (2d) 93, 37 D.L.R. (4th) 685, [1987] O.J. No. 355 (Ont. H.C.), have been made out. No basis for concluding application judge was biased. See *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 CSC 25, 2015 SCC 25, 2015 CarswellYukon 37, 2015 CarswellYukon 38, [2015] 2 S.C.R. 282, 84 Admin. L.R. (5th) 185, 75 B.C.L.R. (5th) 1, 383 D.L.R. (4th) 579, [2015] 11 W.W.R. 217, *(*sub nom. *Commission scolaire francophone du Yukon No. 23 v. Yukon (Procureure générale))* 370 B.C.A.C. 1, 336 C.R.R. (2d) 137, *(*sub nom. *Commission scolaire francophone du Yukon No. 23 v. Yukon (Procureure générale))* 471 N.R. 206, *(*sub nom. *Commission scolaire francophone du Yukon No. 23 v. Yukon (Procureure générale))* 635 W.A.C. 1, [2015] S.C.J. No. 25 (S.C.C.) at paras. 20-21.

Lin v. Toronto Police Services Board, 2016 ONSC 6736, 2016 CarswellOnt 16642 (Ont. Div. Ct.).

Lin commenced an action in the Ontario Superior Court against the named defendants. Defendants requested dismissal of action as frivolous and vexatious pursuant to Rule 2.1.01 of

the Ontario *Rules of Civil Procedure*. Superior Court stayed action, directing Registrar to give notice to Applicant that court considering order dismissing action as frivolous, vexatious and abuse of process. Action dismissed. The application for leave to appeal to the SCC dismissed on May 17, 2018.

Moffet v. Taylor Automall, 2019 ONSC 5832, 2019 CarswellOnt 17358, Graeme Mew J. (Ont. S.C.J.)

Motion brought by defendant seeking orders, *inter alia*, (a) dismissing the action pursuant to Rule 21.01(3)(d) of the *Rules of Civil Procedure*; and (b) declaring the plaintiff a vexatious litigant pursuant to section 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C43 (as amended).

Rule 21.01(3)(d) permits a defendant to move before a judge to have an action stayed or dismissed on the ground that the action is frivolous or vexatious or otherwise and abuse of the court's process.

The claim does not articulate a clear or legitimate cause of action and, is replete with the type of grandiose claims that characterise many vexatious actions. That would be sufficient to warrant dismissal of the claim pursuant to Rule 2.1.01. See *Van Sluytman v. Muskoka (District Municipality)*, 2018 ONCA 32, 2018 CarswellOnt 301, 26 C.P.C. (8th) 130 (Ont. C.A.) at para. 5; leave to appeal refused *Van Sluytman v. Canada*, 2018 CarswellOnt 18335, 2018 CarswellOnt 18336 (S.C.C.).

The relief requested under section 140 of the *Courts of Justice Act* must be sought in a separate application and cannot be obtained by way of a motion in an action. See *Lukezic v. Royal Bank*, 2012 ONCA 350, 2012 CarswellOnt 6464, 350 D.L.R. (4th) 111, [2012] O.J. No. 2344 (Ont. C.A.).

Mohammed v. Carquest Auto Parts, 2019 ONSC 569, 2019 CarswellOnt 969 (Ont. Div. Ct.). D.L. Corbett J.

Mohammed was declared a vexatious litigant pursuant to s. 140 of the *Courts of Justice Act* by order of Loukidelis J. on October 16, 2007. Mohammed required to obtain relief under s. of the *Courts of Justice Act* in order to commence or pursue court proceedings, or to be relieved from the vexatious litigant order made against him. Paragraph 140(4)(e) of the Courts of Justice Act provides that no appeal lies from a refusal to grant relief to an applicant on an application pursuant to s. 140(3). There is no right of appeal from the order of Gunsolus J. Appeal quashed. As was done in *Peoples Trust Company v. Atas (See Peoples Trust Company v. Atas*, 2018 ONSC 58, 2018 CarswellOnt 2893 (Ont. S.C.J.) at paras. 322–325~~.~~; additional reasons 2018 ONSC 1281, 2018 CarswellOnt 2839 (Ont. S.C.J.); additional reasons *Caplan v. Atas*, 2018 ONSC 6134, 2018 CarswellOnt 17154 (Ont. S.C.J.); affirmed 2019 ONCA 359, 2019 CarswellOnt 6854 (Ont. C.A.); leave to appeal refused 2020 CarswellOnt 5671, 2020 CarswellOnt 5672 (S.C.C.); *Peoples Trust Company v. Atas*, 2018 ONSC 5631, 2018 CarswellOnt 16106 (Ont. S.C.J.) at paras. 41–50). Mohammed ordered not to apply for or to accept a fee waiver in any proceeding or in any step in a proceeding in the Ontario Superior Court of Justice, including the Small Claims Court, without first obtaining a judge's order.

IntelliView Technologies Inc. v. Badawy, 2019 ABCA 66, 2019 CarswellAlta 286, 85 Alta. L.R. (6th) 217 (Alta. C.A.). Madam Justice Barbara Lea Veldhuis.

Applicant, Badawy, sought permission to appeal a chambers decision declaring him to be a vexatious litigant: *IntelliView Technologies Inc v. Badawy*, 2018 ABQB 961, 2018 CarswellAlta 3167, [2018] A.J. No. 1553 (Alta. Q.B.). Respondent successfully applied for an order imposing court access restrictions on Badawy, which require him to obtain legal representation and seek leave of the court before initiating or continuing legal proceedings. Order imposing court access restrictions on Badawy was not punitive in nature, buy was intended to

prevent future abuse of the court process. The administration of justice requires such an order in the circumstances. Badawy was still entitled to access the courts. He must simply do so with legal assistance and permission of the court. Application for permission to appeal dismissed.

Jonsson v. Lymer, 2020 ABCA 167, 2020 CarswellAlta 843, 7 Alta. L.R. (7th) 146, 448 D.L.R. (4th) 275 (Alta. C.A.).

Appeal by the defendant from vexatious litigant order made against him. The appellant, an undischarged bankrupt and self-represented litigant, was pursued by investors trying to trace their lost funds given to the appellant in an investment scheme.

Appeal allowed. Even if the vexatious litigant order was appropriate, the conditions imposed were unreasonable. The sanction must be set aside because of the failure to give the appellant a fair hearing as the case management judge concluded that an oral hearing was not needed to resolve the credibility issue, because he was not going to believe the appellant anyway.

(2) [Repealed 1998, c. 18, Sched. B, s. 5(2).]

(3) Application for leave to proceed — Where a person against whom an order under subsection (1) has been made seeks leave to institute or continue a proceeding, the person shall do so by way of an application in the Superior Court of Justice.

(4) Leave to proceed — Where an application for leave is made under subsection (3),

(a) leave shall be granted only if the court is satisfied that the proceeding sought to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding;

(b) the person making the application for leave may seek the recission of the order made under subsection (1) but may not seek any other relief on the application;

(c) the court may rescind the order made under subsection (1);

(d) the Attorney General is entitled to be heard on the application; and

(e) no appeal lies from a refusal to grant relief to the applicant.

(5) Abuse of process — Nothing in this section limits the authority of a court to stay or dismiss a proceeding as an abuse of process or on any other ground.

1996, c. 25, s. 9(17); 1998, c. 18, Sched. B, s. 5(2)

Case Law: *Holland v. British Columbia (Attorney General)*, 2020 BCCA 304, 2020 CarswellBC 2728, 394 C.C.C. (3d) 552 (B.C. C.A.)

A vexatious litigant order made by a civil court did not require a party to seek leave to issue a certiorari application in relation to a criminal case

Hoban v. Draymon (December 9, 1996) (B.C. S.C. [In Chambers]).

Plaintiff had been placed on probation for violation of court order. Plaintiff had ulterior desire to use court to espouse his scheme involving company and was using litigation for collateral and improper purposes. Claims were struck out as abuse of process. As plaintiff had habitually, persistently instituted vexatious proceedings, he was declared vexatious litigant.

Mayes v. Beland (November 17, 1997) (Sask. Prov. Ct.).

Employer laid criminal charges for theft by former bookkeeper. Charges were dismissed. President of employer not party to criminal matter, and different standard of proof applied. Action by employer did not constitute abuse of process and should not be struck.

Minott v. Danbury Sales Inc. (January 21, 1998), Doc. 98-CV-139018 (Ont. Gen. Div.).

Plaintiff commenced action relating to purchase of goods at auction conducted by one of defendants. Defendants sought to dismiss proceeding on basis that it was virtually identical to earlier claim which had been dismissed. Parties in two actions were same but for addition of two plaintiffs and five defendants. Issues, claims and relief sought were identical. Court dismissed action as abuse of process of court.

Varma v. Rozenberg (October 21, 1998), Doc. CA C27230, C28110, C28550, C28548, C28549, C28201, C28202 (Ont. C.A.); leave to appeal refused (1999), 246 N.R. 396 (note), 127 O.A.C. 398 (note) (S.C.C.).

The case involved an appeal of seven orders striking out the appellant's statements of claim in seven actions as disclosing no reasonable cause of action. The appellant sought to appeal from the order, which declared the appellant to be a vexatious litigant, pursuant to s. 140 of *Courts of Justice Act*, R.S.O. 1990, c. C.43. The appeals were stayed pending leave being obtained to continue them, or until such time as a s. 140 order was set aside, reversed, rescinded, or stayed under s. 7(5) of Act.

Toronto Hospital v. Nourhaghighi (2000), [1999] S.C.C.A. No. 382, 254 N.R. 398 (note), 134 O.A.C. 398 (note), 2000 CarswellOnt 915, 2000 CarswellOnt 916 (S.C.C.).

The applicant brought several actions raising condominium law issues and made allegations of police torture, etc. The applicant was found to be a vexatious litigant.

Kalevar v. McTeague, 2005 CarswellOnt 1958 (Ont. S.C.J.), DiTomaso J. Applicant (Kalevar) brought application for leave to continue Small Claims Court actions. Actions previously joined for trial together in Whitby Small Claims Court.

Issue whether Kalevar should be granted leave to continue the three Small Claims Court actions pursuant to s. 140(3) of the *Courts of Justice Act*.

Section 140 of the *Courts of Justice Act* deals with the subject of vexatious proceedings:

> (3) Application for leave to proceed — Where a person against whom an order subsection (1) has been made seeks leave to institute or continue a proceeding, the person shall do so by way of an application in the Superior Court of Justice.

Leave sought very same leave to continue sought by his counsel and denied by Justice Ferrier.

For issue *estoppel* see, *Danyluk v. Ainsworth Technologies Inc.*, REJB 2001-25003, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, [2001] S.C.J. No. 46, 2001 SCC 44, 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 7 C.P.C. (5th) 199, 272 N.R. 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 34 Admin. L.R. (3d) 163, [2001] 2 S.C.R. 460 (S.C.C.). Issue *estoppel* has been successfully invoked by the respondents. See also *R. v. Scott*, EYB 1990-67596, 1990 CarswellOnt 65, 1990 CarswellOnt 1012, [1990] S.C.J. No. 132, 116 N.R. 361, 1 C.R.R. (2d) 82, 43 O.A.C. 277, 2 C.R. (4th) 153, 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979 (S.C.C.), p. 1007 re abuse of process.

Multiplicity of proceedings indicative of vexatiousness. Application dismissed with costs.

Jensen v. Jackman, 496 W.A.C. 225, 293 B.C.A.C. 225, 2010 CarswellBC 9, 2010 BCCA 6 (B.C. C.A. [In Chambers]).

The applicant was required by prior court order to get leave to commence any legal proceeding as she had history of starting vexatious proceedings. Application dismissed. The applicant could not show her appeal was not without merit or that her proposed claim against defendants was reasonably founded or arguable.

Ontario v. Coote, 2011 ONSC 858, 2011 CarswellOnt 989, [2011] O.J. No. 697 (Ont. S.C.J.); affirmed 2011 ONCA 562, 2011 CarswellOnt 8624 (Ont. C.A.).

Vexatious proceedings and abuse of process.

141. (1) Civil orders directed to sheriffs — Unless the Act provides otherwise, orders of a court arising out of a civil proceeding and enforceable in Ontario shall be directed to a sheriff for enforcement.

(2) Police to assist sheriff — A sheriff who believes that the execution of an order may give rise to a breach of the peace may require a police officer to accompany the sheriff and assist in the execution of the order.

Commentary: Amendments to the *Courts of Justice Act* and the *Police Service Act* in 1984 and 1989 repealed the *Sheriffs Act* and converted sheriffs to civil servant status.

The amendments clarified that:

- Sheriffs have responsibility for enforcing civil court orders.
- Police, not Sheriffs, are responsible for carrying out any orders that require the apprehension of individuals, or the taking of persons into custody.
- Sheriffs may call on the police for assistance in enforcing civil orders if they anticipate a breach of the peace.
- Sheriffs continue to have a variety of responsibilities under the *Juries Act*, even though the majority of the requirements under that Act are now administered by the Provincial Jury Centre.

Orders arising out of a civil court proceeding and enforceable in Ontario are required to be directed to a Sheriff for re-enforcement [s. 141(1), *Courts of Justice Act*].

A power or a duty given to a Sheriff under an Act, regulation or Rule may only be exercised or performed by a person or a class of persons to whom the power or duty has been assigned by the Deputy Attorney General or his/her designate (e.g. the ADAG, Court Services Division or Director of Court Operations) [s. 73(2), *Courts of Justice Act*].

Sheriffs, now referred to as enforcement officers, are public servants appointed under the *Public Service of Ontario Act, 2006*.

142. Protection for acting under court order — A person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario.

143. Enforcement — (1) Bonds and recognizances — A bond or recognizance arising out of a civil proceeding may be enforced in the same manner as an order for the payment of money by leave of a judge on motion by the Attorney General or any other person entitled to enforcement.

(2) Fines for contempt — A fine for contempt of court may be enforced by the Attorney General in the same manner as an order for the payment of money or in any other manner permitted by law.

(3) Sheriff — The sheriff to whom a writ obtained under subsection (1) or (2) is directed shall proceed immediately to carry out the writ without a direction to enforce.

143.1 [Repealed 1999, c. 12, Sched. B, s. 4(4).]

144. Orders enforceable by police — Warrants of committal, warrants for arrest and any other orders requiring persons to be apprehended or taken into custody shall be directed to police officers for enforcement.

Commentary: Warrants of committal may be issued by the Small Claims Court where a finding of contempt is made under *Courts of Justice Act* s. 30, for contempt of court.

Warrants for arrest may be issued by the Small Claims Court where a material witness fails to attend or remain in attendance at trial in accordance with a summons to witness, under rule 18.03(6) of the *Small Claims Court Rules*, or may be issued by a judge of the Superior Court of Justice where a party fails to attend a contempt hearing.

Both types of warrant are directed to police officers for enforcement.

145. Consul as official representative — Where a person who is ordinarily resident in a foreign country is entitled to money or property that is in the hands of a court or an executor or administrator, and if the foreign country has a consul in Canada who is authorized to act as the person's official representative, the money or property may be paid or delivered to the consul.

146. Where procedures not provided — Jurisdiction conferred on a court, a judge or a justice of the peace shall, in the absence of express provision for procedures for its exercise in any Act, regulation or rule, be exercised in any manner consistent with the due administration of justice.

147. (1) Seal of court — The courts shall have such seals as are approved by the Attorney General.

(2) Idem — Every document issued out of a court in a civil proceeding shall bear the seal of the court.

148. Jurisdiction of Federal Court — The Federal Court of Canada has jurisdiction,

(a) in controversies between Canada and Ontario;

(b) in controversies between Ontario and any other province in which an enactment similar to this section is in force,

in accordance with section 19 of the *Federal Court Act* (Canada).

PART VII.1 — ENFORCEMENT OF CERTAIN TRADE AGREEMENTS (SS. 148.1–148.3)

[Heading added 2017, c. 20, Sched. 2, s. 6.]

148.1 Application — This Part applies to the following agreements:

1. The Agreement on Internal Trade, signed in 1994 by the governments of Canada, the provinces of Canada, the Northwest Territories and the Yukon Territory, as amended from time to time.

2. The Canadian Free Trade Agreement, signed in 2017 by the governments of Canada and the provinces and territories of Canada, as amended from time to time.

3. Other prescribed domestic trade agreements that the Government of Ontario has entered into with the government of another province or territory of Canada, the Government of Canada or any combination of those governments.

2017, c. 20, Sched. 2, s. 6

148.2 (1) Enforcement of order to pay tariff costs — An order against a person to pay tariff costs to a party to an agreement listed in section 148.1 may, for the purpose of its enforcement only, be made an order of the Superior Court of Justice if the order is against,

(a) a person who initiated the complaint; or

(b) a person who was added to the complaint as a co-party with a person who initiated the complaint.

(2) Procedure — To enforce an order described in subsection (1), a party in whose favour the order is made shall file a certified copy of the order with the Superior Court of Justice.

(3) Effect — From the date of filing, the order has the same effect as an order of the Superior Court of Justice for the purpose of enforcement to the extent that it is authorized by the applicable agreement.

(4) Date of order — For the purposes of section 129, the date on which the order is filed with the Superior Court of Justice shall be deemed to be the date of the order.

2017, c. 20, Sched. 2, s. 6

148.3 Regulations — The Lieutenant Governor in Council may make regulations prescribing agreements as domestic trade agreements for the purposes of this Part.

2017, c. 20, Sched. 2, s. 6

PART VIII — MISCELLANEOUS (SS. 149–151.1)

149. (1) Family law mediation and information services — In this section,

"agreement" includes a contract or other instrument;

"service provider" means a person or entity that has entered into an agreement with the Crown in right of Ontario under subsection (2).

(2) Agreements with service providers — The Attorney General may, on behalf of the Crown in right of Ontario, enter into agreements with one or more persons or entities for the provision of mediation and information services in relation to family law matters, as specified in the agreements.

(3) Fees — Fees for the provision of the mediation services may be collected by or on behalf of a service provider to the extent permitted and in accordance with the agreement entered into by the service provider under subsection (2).

(4) Same — Fees collected by or on behalf of a service provider in accordance with subsection (3) are not public money within the meaning of the *Financial Administration Act*, but the fees must be used by the service provider only for or in relation to the provision of the mediation and information services, as specified in the agreement, or for any other purpose specified in the agreement.

(5) Same, publication — The Ministry of the Attorney General shall publish the fees payable under subsection (3) on a Government of Ontario website.

2018, c. 17, Sched. 10, s. 1

150. Renewal of writs of execution issued before January 1, 1985 — A writ of execution that was issued before the 1st day of January, 1985 may be renewed

in the same manner and with the same effect as a writ of execution issued on or after that day.

151. (1) References to counties for judicial purposes — A reference in this Act or any other Act, rule or regulation to a county or district for judicial purposes is deemed to be a reference to the corresponding area that, for municipal or territorial purposes, comprises the county, district, union of counties or regional, district or metropolitan municipality.

(2) Separated municipalities — For the purpose of subsection (1), every city, town and other municipality is united to and forms part of the county in which it is situate.

(3) Exceptions — Subsection (1) is subject to the following:

1. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Haldimand-Norfolk, deemed to be a reference to the following areas:

i. All the area of the County of Haldimand as it existed on the 31st day of March, 1974.

ii. All the area of the County of Norfolk as it existed on the 31st day of March, 1974.

2. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Niagara, deemed to be a reference to the following areas:

i. All the area of the County of Lincoln as it existed on the 31st day of December, 1969.

ii. All the area of the County of Welland as it existed on the 31st day of December, 1969.

3. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Sudbury and the Territorial District of Sudbury, deemed to be a reference to all the area in The Regional Municipality of Sudbury and in the Territorial District of Sudbury.

4. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of an area described below, deemed to be a reference to all the area in the areas described below:

i. All the area in the County of Victoria.

ii. All the area in the County of Haliburton.

iii. All the area in any part of the townships of Sherborne, McClintock, Livingstone, Lawrence and Nightingale located in Algonquin Park, so long as the part remains part of Algonquin Park.

151.1 Meaning unchanged — Despite the repeal of the *Municipal Act*, for the purposes of this Act and any provision of another Act or regulation that relates to the operation of the courts or the administration of justice, the terms "county", "district", "union of counties", "regional municipality" and "district municipality" have the same meaning as they did on December 31, 2002, unless the context otherwise requires.

2002, c. 17, Sched. F

SCHEDULE [1]

The number in square brackets has been editorially added by Carswell.

Appendix A to Framework Agreement

BETWEEN:

Her Majesty the Queen in right of the Province of Ontario represented by the Chair of Management Board

("the Minister")

and

the Judges of the Ontario Court (Provincial Division) and the former Provincial Court (Civil Division) represented by the respective Presidents of The Ontario Judges Association, The Ontario Family Law Judges Association, and the Ontario Provincial Court (Civil Division) Judges' Association

("the Judges")

These are the terms to which the Minister and the Judges agree:

Definitions

1. In this agreement,

"Commission" means the Provincial Judges' Remuneration Commission;

"Crown" means Her Majesty the Queen in right of the Province of Ontario;

"judges' associations" means the associations representing the Judges of the Ontario Court (Provincial Division) and the former Provincial Court (Civil Division);

"parties" means the Crown and the judges' associations.

Introduction

2. The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges, including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decisions made by the Commission shall contribute to securing and maintaining the independence of the Provincial Judges. Further, the agreement is intended to promote co-operation between the executive branch of the government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice.

3. It is the intention of the parties that the binding process created by this document will take effect with respect to the 1995 Provincial Judges Remuneration Commission, and thereafter.

4. The Minister or the Judges may designate one or more persons to act on their behalf under this agreement.

Commission And Appointments

5. The parties agree that the Provincial Judges Remuneration Commission is continued.

6. The parties agree that the Commission shall consist of the following three members:

1. **One appointed jointly by the associations representing provincial judges.**
2. **One appointed by the Lieutenant Governor in Council.**
3. **One, who shall head the Commission, appointed jointly by the parties referred to in paragraphs 1 and 2.**

7. The parties agree that the members of the Commission shall serve for a term of three years beginning on the first day of July in the year their inquiry under paragraph 13 is to be conducted.

8. The parties agree that the term of office of the persons who are members of the Commission on May 1, 1991 shall expire on June 30, 1995.

9. The parties agree that the members of the Commission may be reappointed when their term of office expires.

10. The parties agree that if a vacancy occurs on the Commission, a replacement may be appointed for the unexpired part of the term.

11. The parties agree that judges and public servants, as defined in the *Public Service Act*, shall not be members of the Commission.

12. The parties agree that the members of the Commission shall be paid the remuneration fixed by the Management Board of Cabinet and, subject to Management Board's approval, the reasonable expenses actually incurred in carrying out their duties.

Scope

13. The parties agree that in 1995, and in every third year after 1995, the Commission shall conduct an inquiry respecting:

(a) the appropriate base level of salaries,

(b) the appropriate design and level of pension benefits, and

(c) the appropriate level of and kind of benefits and allowances of provincial judges.

14. The parties agree that in addition to the inquiry referred to in paragraph 13, the Commission may, in its discretion, conduct any further inquiries into any matter relating to salary levels, allowances and benefits of provincial judges that are mutually agreed by the judges and the Government of Ontario.

15. The parties agree that the Commission whose term begins July 1, 1995 and all subsequent Commissions shall begin their inquiry under paragraph 13 immediately after their term begins and shall, on or before the thirty-first day of December in the year the inquiry began, present recommendations and a report to the Chair of the Management Board of Cabinet.

16. The parties agree that the Commission shall make an annual report of its activities to the Chair of Management Board and the Chair shall table the report in the Legislature.

Powers And Procedures

17. The parties agree that the Commission may retain support services and professional services, including the services of counsel, as it considers necessary, subject to the approval of the Management Board.

18. The parties agree that the representatives of the Judges and the Lieutenant Governor in Council may confer prior to, during or following the conduct of an inquiry and may file such agreements with the Commission as they may be advised.

19. The parties agree that the Commission may participate in joint working committees with the judges and the government on specific items related to the inquiry of the Commission mentioned in paragraphs 13 and 14.

20. The parties agree that in conducting its inquiries, the Commission shall consider written and oral submissions made by provincial judges' associations and by the Government of Ontario.

21. The parties agree that the following rules govern the presentation to the Commission of submissions by provincial judges' associations and by the Government of Ontario, and their consideration by the Commission:

1. Each judges' association is entitled to receive advance disclosure of written submissions by the Government of Ontario and is entitled to make a written submission in reply.

2. The Government of Ontario is likewise entitled to receive advance disclosure of written submissions by provincial judges' associations and is entitled to make a written submission in reply.

3. When a representative of the Government of Ontario or of a judges' association makes an oral submission, the Commission may exclude from the hearing all persons except representatives of the Government of Ontario and of the judges' associations.

4. The representatives of the Government of Ontario and of the judges' associations are entitled to reply to each other's oral submissions.

5. If people have been excluded from the hearing under paragraph 3, the submissions of the Government of Ontario and of the judges' associations shall not be made public except to the extent that they are mentioned in the Commission's report.

22. The parties agree that the Commission may hold hearings, and may consider written and oral submissions from other interested persons and groups.

23. The parties agree that the Government of Ontario and the provincial judges' associations are entitled to be present when other persons make oral submissions to the Commission and are entitled to receive copies of other persons' written submissions.

24. Despite the repeal of the *Public Inquiries Act*, in connection with, and for the purposes of, any inquiry, the Commission or any member thereof has the powers of a commission under that Act.

2009, c. 33, Sched. 6, s. 50

Criteria

25. The parties agree that the Commission in making its recommendation on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:

(a) the laws of Ontario,

(b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial economy,

(c) the growth or decline in real per capital income,

(d) the parameters set by any joint working committees established by the parties,

(e) that the Government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence,

(f) any other factor which it considers relevant to the matters in issue.

Report

26. The parties agree that they may jointly submit a letter to the Commission requesting that it attempt, in the course of its deliberations under paragraph 13, to produce a unanimous report, but in the event that the Commission cannot deliver a majority report, the Report of the Chair shall be the Report of the Commission for the purpose of paragraphs 13 and 14.

Binding And Implementation

27. The recommendations of the Commission under paragraph 13, except those related to pensions, shall come into effect on the first day of April in the year following the year the Commission began its inquiry, except in the case of salary recommendations which shall come into effect on the first of April in the year in which the Commission began its inquiry and shall have the same force and effect as if enacted by the Legislature and are in substitution for the provisions of any schedule made pursuant to this Agreement and shall be implemented by the Lieutenant Governor in Council by order-in-council within sixty days of the delivery of the Commission's report pursuant to paragraph 15.

28. The parties agree that the Commission may, within thirty days, upon application by the Crown or the judges' associations made within ten days after the delivery of its recommendations and report pursuant to paragraph 15, subject to affording the Crown and the judges' associations the opportunity to make representations thereupon to the Commission, amend, alter or vary its recommendations and report where it is shown to the satisfaction of the Commission that it has failed to deal with any matter properly arising from the inquiry under paragraph 13 or that an error relating to a matter properly under paragraph 13 is apparent on the report, and such decision is final and binding on the Crown and the judges' associations, except those related to pensions.

29. Where a difference arises between the Crown and the judges' associations relating to the implementation of recommendations properly within the scope of issues set out in paragraph 13, except those related to pensions, the difference shall be referred to the Commission and, subject to affording the Crown and the judges' associations the opportunity to make representation thereupon to the Commission, its decision is final and binding on the Crown and the judges' associations.

30. The parties agree that the recommendations with respect to pensions, or any reconsideration under paragraph 28 of a matter relating to pensions, shall be presented to the Management Board of Cabinet for consideration.

31. The parties agree the recommendations and report of the Commission following a discretionary inquiry pursuant to paragraph 14 shall be presented to the Chair of Management Board of Cabinet.

32. The parties agree that the recommendations of the Commission in consequence of an inquiry pursuant to paragraph 14 shall be given every consideration by Management Board of Cabinet, but shall not have the same force and effect as recommendations referred to in paragraph 13.

33. The parties agree that if the Management Board of Cabinet endorses recommendations referenced in paragraph 30 or 31, or some variation of those recommendations, the Chair of Management Board shall make every effort to implement them at the earliest possible date, following subsequent approval from Cabinet.

Disputes

34. The parties agree that if disputes arise as to whether a recommendation is properly the subject of an inquiry referenced in paragraph 13, or whether the recommendation falls within the parameters of paragraph 27 or 30, or with respect to the process, either party may require the Commission to consider the matter further.

35. The parties agree that requests by either party, made under paragraph 34, shall be presented to the Commission for consideration within one month of the presentation of the report to the Chair of Management Board.

36. The parties agree that the Commission, upon receiving notice from either party as set out in paragraph 34, shall present to the Chair of Management Board a decision with respect to the said matter, within one month of receiving such notice.

37. The parties may, during the course of the Commission's inquiry set out in paragraph 34, present either written or oral positions to the Commission for consideration on the said matter, which shall be disclosed to either party.

38. The parties agree that the decision of the Commission, as set out in paragraph 36, shall be given every consideration and very great weight by the Management Board of Cabinet.

39. Neither party can utilize the dispute clauses to limit, or to narrow, the scope of the Commission's review as set out under paragraph 13, or the binding effect of recommendations within its scope as set out under paragraphs 27 and 28.

40. The parties agree that in the event that an item(s) is referred to the Commission under paragraph 34, the Minister will proceed to implement the other recommendations of the Commission as set out in paragraphs 27, 28 and 33, except where the matter in dispute under paragraph 34 directly impacts the remaining items.

Review

41. The parties agree that either party may, at any time, request the other party to meet and discuss improvements to the process.

42. The parties agree that any amendments agreed to by the parties in paragraph 41 shall have the same force and effect as if enacted by the Legislature and are in substitution for the provisions of this Act or any schedule made pursuant to this Act.

Communication

43. The parties agree that all provincial judges should be made aware of any changes to their compensation package as a result of recommendations of the Commission.

44. The parties agree that all provincial judges should receive updated copies of legislation, regulations or schedules as necessary, related to compensation changes.

Salaries And Indexing

45. The parties agree that effective on the first day of April in every year after 1995, the annual salaries for full-time provincial judges shall be adjusted as follows:

> **1. Determine the Industrial Aggregate for the twelve-month period that most recently precedes the first day of April of the year for which the salaries are to be calculated.**
>
> **2. Determine the Industrial Aggregate for the twelve-month period immediately preceding the period referred to in paragraph 1.**
>
> **3. Calculate the percentage that the Industrial Aggregate under paragraph 1 is of the Industrial Aggregate under paragraph 2.**
>
> **4. If the percentage calculated under paragraph 3 exceeds 100 per cent, the salaries are to be calculated by multiplying the appropriate salaries for the year preceding the year for which the salaries are to be calculated by the lesser of that percentage and 107 per cent.**
>
> **5. If the percentage calculated under paragraph 3 does not exceed 100 per cent, the salaries shall remain unchanged.**

46. In paragraph 45, "Industrial Aggregate" for a twelve-month period is the average for the twelve-month period of the weekly wages and salaries of the Industrial Aggregate in Canada as published by Statistics Canada under the authority of the *Statistics Act* (Canada).

47. The salaries, allowances and benefits of provincial judges shall be paid out of the Consolidated Revenue Fund.

Additional Provisions

48. This agreement shall be binding upon and enure to the benefit of the parties hereto and their respective successors and assigns.

Appendix B of Framework Agreement

Judicial Salaries

Date	Formula
April 1, 1991	**$124,250**
April 1, 1992	**0%**
April 1, 1993	**AIW (Note: See paragraph 46 of Appendix "A")**
April 1, 1994	**AIW (Note: See paragraph 46 of Appendix "A")**

Notes:

1994, c. 12, s. 48; CTS 25 JL 17 - 1

CHAPTER 4 — RULES OF THE SMALL CLAIMS COURT

Summary Table of Contents

ONT. REG. 258/98 — RULES OF THE SMALL CLAIMS COURT

made under the *Courts of Justice Act*

O. Reg. 258/98, as am. O. Reg. 295/99; 461/01 [ss. 1(2), 4(2), 7(4), 8(2), (4), 9(2), 10(3), 12(2), (4), 13(5), 14(3), 17(2), 19(3), 20(3), 22(2), 23(2) revoked O. Reg. 330/02, ss. 1(2), 3(2), 4(2), 5(2), (4), 6(2), 7(2), 8(2), (4), 9(2), 10(2), 11(2), 12(2), 13(3), 14(3), 15(2), respectively.]; 330/02, ss. 1(1), 2, 3(1), 4(1), (3), 5(1), (3), 6(1), 7(1), 8(1), (3), 9(1), 10(1), 11(1), 12(1), 13(1), (2), 14(1), (2), 15(1); 440/03; 78/06; 574/07; 56/08; 393/09, ss. 1–13, 14(1)–(3), (4) (Fr.), (5) (Fr.), (6), 15 (Fr.), 16–25; 505/09; 440/10; 56/12; 400/12; 230/13; 44/14 [s. 15 repealed O. Reg. 144/14, s. 2.]; 144/14, s. 1; 171/14; 194/15, ss. 1 (Fr.), 2 (Fr.), 3, 4; 38/16; 488/16; 202/17; 345/19; CTR 12 FE 20 - 1; 108/21; 249/21.

Commentary: The procedural rules of the Small Claims Court are known as the *Small Claims Court Rules*. Subject to the provisions of the *Courts of Justice Act* applicable to the Small Claims Court, the *Small Claims Court Rules* establish the basic framework for practice and procedure in that court.

The most basic elements of Small Claims Court practice are pleadings, settlement conference and trial.

Pleadings consist of Plaintiff's Claims (see Rule 7), Defences see Rule 9) and Defendant's Claims (see Rule 10). Service of court documents including pleadings is addressed by Rule 8 and venue or in other words the appropriate court office where a claim must be commenced, is addressed by Rule 6.

Undefended claims may be the subject of default proceedings which are addressed by Rule 11. Stagnant claims may be dismissed for delay by the clerk, pursuant to Rule 11.1.

Settlement conferences are mandatory in defended cases and are addressed by Rule 13. Matters which are not settled may then be set down for trial by any party.

Trials are scheduled pursuant to Rule 16. Trial procedure is addressed by Rule 17 and evidence at trial is addressed by Rule 18. Costs are addressed by Rule 19.

Enforcement of orders, where required, may be accomplished through a series of methods set out in Rule 20.

Court documents in the Small Claims Court are as set out in the Forms.

Rule 1 — General

[Heading amended O. Reg. 78/06, s. 1.]

1.01 Citation — These rules may be cited as the Small Claims Court Rules.

1.02 (1) Definitions — In these rules,

"court" means the Small Claims Court;

"disability", where used in respect of a person or party, means that the person or party is,

(a) a minor,

(b) mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person or party has a guardian or not, or

(c) an absentee within the meaning of the *Absentees Act*;

"document" includes data and information in electronic form;

"electronic" includes created, recorded, transmitted or stored in digital form in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, and "electronically" has a corresponding meaning;

"holiday" means,

(a) any Saturday or Sunday,

(b) New Year's Day,

(b.1) Family Day,

(c) Good Friday,

(d) Easter Monday,

(e) Victoria Day,

(f) Canada Day,

(g) Civic Holiday,

(h) Labour Day,

(i) Thanksgiving Day,

(j) Remembrance Day,

(k) Christmas Day,

(l) Boxing Day, and

(m) any special holiday proclaimed by the Governor General or the Lieutenant Governor,

and if New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday, and if Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays, and if Christmas Day falls on a Friday, the following Monday is a holiday;

"information technology" [Repealed O. Reg. 78/06, s. 2(1).]

"order" includes a judgment;

"paralegal" means a person licensed under the *Law Society Act* to provide legal services in Ontario;

"proof of service" means, with respect to a document, proof of service of the document in accordance with rule 8.06;

"representative" means the lawyer, paralegal or other person representing a person in a proceeding under these rules;

"self-represented", when used in reference to a person, means that the person is not represented by a representative;

"territorial division" means,

(a) a county, a district or a regional municipality, and

(b) each of the following, as they existed on December 31, 2002:

(i) The combined area of County of Brant and City of Brantford.

(ii) Municipality of Chatham-Kent.

(iii) Haldimand County.

(iv) City of Hamilton.

(v) City of Kawartha Lakes.

(vi) Norfolk County.

(vii) City of Ottawa.

(viii) County of Prince Edward.

(ix) City of Toronto.

(2) [Repealed O. Reg. 78/06, s. 2(3).]

O. Reg. 461/01, s. 1 [s. 1(2) revoked O. Reg. 330/02, s. 1(2).]; 330/02, s. 1(1); 440/03, s. 5, item 1; 78/06, s. 2; 574/07, s. 1; 393/09, s. 1; 230/13, s. 1; 44/14, s. 1

1.03 (1) General Principle — These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the *Courts of Justice Act*.

Commentary: Rule 1.03(1) codifies the general rule of legislative interpretation favouring a purposive liberal construction aimed at securing the just, most expeditious and least expensive determination of civil proceedings on their merits. It also refers back to the general mandate of the Small Claims Court under *Courts of Justice Act*, s. 25, which is to hear and determine in a summary way all questions of law and fact and to make "such order as is considered just and agreeable to good conscience."

However, the court's mandate to make "such order as appears just and agreeable to good conscience" does not permit the court to fail to apply substantive law: *Sereda v. Consolidated Fire & Casualty Insurance Co.*, 1934 CarswellOnt 37, [1934] O.R. 502, [1934] 3 D.L.R. 504, [1934] O.W.N. 394 (Ont. C.A.); *Travel Machine Ltd. v. Madore*, 1983 CarswellOnt 901, 143 D.L.R. (3d) 94 (Ont. H.C.).

Despite the summary process of the Small Claims Court, the rules of natural justice apply in that court: *Nicolazzo v. Princess Cruises*, 2009 CarswellOnt 3185, *(*sub nom. *Princess Cruises v. Nicolazzo)* 97 O.R. (3d) 630, 250 O.A.C. 4 (Ont. Div. Ct.). Where a trial judge attempts to move a trial along in a manner which denies a party a proper hearing, amounts to undue intervention or creates a reasonable apprehension of bias, a new trial will be ordered: *Grande National Leasing Inc. v. Vaccarello*, 2015 ONSC 5463, 2015 CarswellOnt 14082, 339 O.A.C. 177, [2015] O.J. No. 4804 (Ont. Div. Ct.); *Chanachowicz v. Winona Wood Ltd.*, [2016] O.J. No. 37 (Div. Ct.).

Given the high incidence of self-represented parties, the rules of pleading should not be applied rigidly and the Small Claims Court may decide unpleaded issues where doing so will not cause real unfairness: *936464 Ontario Ltd. v. Mungo Bear Ltd.*, 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754, [2003] O.J. No. 3795 (Ont. Div. Ct.); *Brighton Heating & Air Conditioning Ltd. v. Savoia*, 2006 CarswellOnt 340, 79 O.R. (3d) 386, 49 C.L.R. (3d) 235, 207 O.A.C. 1, [2006] O.J. No. 250 (Ont. Div. Ct.); *Gardiner v. Mulder*, 2007 CarswellOnt 1411, 221 O.A.C. 200 (Ont. Div. Ct.); additional reasons 2007 CarswellOnt 2829, 224 O.A.C. 156 (Ont. Div. Ct.); *Popular Shoe Store Ltd. v. Simoni*, 1998 Car-

swellNfld 48, 163 Nfld. & P.E.I.R. 100, 24 C.P.C. (4th) 10, 503 A.P.R. 100, [1998] N.J. No. 57 (Nfld. C.A.).

(2) Matters Not Covered in Rules — If these rules do not cover a matter adequately, the court may give directions and make any order that is just, and the practice shall be decided by analogy to these rules, by reference to the *Courts of Justice Act* and the Act governing the action and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure*.

O. Reg. 78/06, s. 3

Commentary: Rule 1.03(2) is often referred to as the analogy rule. It provides a certain amount of flexibility by permitting the practice in Small Claims Court to be decided by reference to the *Courts of Justice Act* and the *Rules of Civil Procedure*. The rule does not make the *Rules of Civil Procedure* applicable in Small Claims Court however, and it should be noted that rule 1.02 of the *Rules of Civil Procedure* specifically provides that those rules don't apply in Small Claims Court, which has its own *Small Claims Court Rules*. Reasoning by analogy under rule 1.03(2) is only available if the *Small Claims Court Rules* fail to cover a matter adequately.

In *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.); additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.), the court rejected the proposition that motions for summary judgment under Rule 20 of the *Rules of Civil Procedure* could be brought in Small Claims Court. Some prior cases had applied the analogy rule to support the opposite conclusion. Implicitly overruling those cases, the Court of Appeal held that motions for judgment under rule 12.02 of the *Small Claims Court Rules* were the applicable procedure. In other words, Small Claims Court procedure is determined by the *Small Claims Court Rules*.

The decision in *Van de Vrande v. Butkowksy*, *supra*, is consistent with prior decisions of the Court of Appeal for Ontario holding that a similar analogy rule in the *Rules of Civil Procedure* cannot justify the creation of procedures that are different from those enacted by the Civil Rules Committee: *Toronto Dominion Bank v. Szilagyi Farms Ltd.*, 1988 CarswellOnt 429, 65 O.R. (2d) 433, 28 C.P.C. (2d) 231, 29 O.A.C. 357, [1988] O.J. No. 1223 (Ont. C.A. [In Chambers]); *Andreacchi v. Perruccio*, 1971 CarswellOnt 687, [1972] 1 O.R. 508 (Ont. C.A.).

For some years it appeared that the weight of first-instance authorities was unreceptive to attempts to import procedures taken from the *Rules of Civil Procedure* into the Small Claims Court: *Fountain v. Ford*, 2009 CarswellOnt 705, [2009] O.J. No. 562 (Ont. Sm. Cl. Ct.); *Caprio v. Caprio*, 2009 CarswellOnt 8270, 97 O.R. (3d) 312 (Ont. Sm. Cl. Ct.); *Lemont v. State Farm Mutual Automobile Insurance Co.*, 2011 CarswellOnt 15743, 9 C.C.L.I. (5th) 318, [2011] O.J. No. 4601 (Ont. Sm. Cl. Ct.); *Crocker v. Ventawood Management Inc.* (September 26, 2013), Doc. SC-11-00007447-0000, [2013] O.J. No. 4588 (Ont. Sm. Cl. Ct.); *Garg v. Raywal Limited Partnership*, 2014 CarswellOnt 10789, [2014] O.J. No. 3686 (Ont. Sm. Cl. Ct.) But this was not the unanimous view among deputy judges and occasionally, despite *Van de Vrande*, *supra*, discovery processes from the *Rules of Civil Procedure* were applied in Small Claims Court based on the "by analogy" or "gap" reasoning that was rejected in that case: the foremost example is *National Service Dog Training Centre Inc. v. Hall*, 2013 CarswellOnt 9429, [2013] O.J. No. 3216 (Ont. Sm. Cl. Ct.).

In 2016, the Divisional Court released two decisions dealing with this general issue. Both were decisions by panels of the court dealing with applications for judicial review of interlocutory orders of deputy judges.

In *Elguindy v. St. Joseph's Health Care London*, 2016 ONSC 2847, 2016 CarswellOnt 8374, [2016] O.J. No. 2742 (Ont. Div. Ct.), the court held that the Small Claims Court had no

jurisdiction to make orders for production of documents by non-parties under Rule 30.10 of the *Rules of Civil Procedure*.

In *Riddell v. Apple Canada Inc.*, 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.); affirming 2016 ONSC 6014, 2016 CarswellOnt 14847, [2016] O.J. No. 4934 (Ont. Div. Ct.); leave to appeal refused 2018 CarswellOnt 9253, 2018 CarswellOnt 9254 (S.C.C.), it was held that rule 17.03 of the *Small Claims Court Rules* failed to deal adequately with the question of pre-trial inspection of property such that by analogy to rule 32 of the *Rules of Civil Procedure*, the Small Claims Court has jurisdiction to entertain rule 32 motions for pre-trial inspection of property in exceptional cases where such production is essential to a proper determination of the issues at trial.

With respect to the availability of discovery in the Small Claims Court, the Divisional Court in *Riddell v. Apple Canada Inc.*, *supra*, confirmed that there are no oral examinations for discovery in Small Claims Court and the right to document discovery is "very limited". The extent of document discovery is limited to three procedures: (i) the requirement to attach copies of documents relied on for a claim or defence to the pleading; (ii) the requirement to serve copies of documents to be relied on at trial prior to the settlement conference; and (iii) the requirement to serve copies of documents before trial where they are to be tendered through rule 18.02. See paragraphs 9–11 of *Riddell* (Div. Ct.).

Case Law: *Caprio v. Caprio*, 2009 CarswellOnt 8270, 97 O.R. (3d) 312 (Ont. Sm. Cl. Ct.).

There is a difference between not covering a matter adequately and a procedure not being provided for at all. If Rule 20 summary judgment motions could be made available in Small Claims Court "by analogy", other procedures from the *Rules of Civil Procedure* such as cross-examinations on affidavits, affidavits of documents and examinations for discovery could equally be made applicable in Small Claims Court. The analogy rule cannot be applied in such a broad manner.

Fountain v. Ford, 2009 CarswellOnt 705, [2009] O.J. No. 562 (Ont. Sm. Cl. Ct.).

The analogy rule cannot be employed to introduce into Small Claims Court practice procedures which are entirely alien to the summary procedures of that court.

Lemont v. State Farm Mutual Automobile Insurance Co., 2011 CarswellOnt 15743, 9 C.C.L.I. (5th) 318, [2011] O.J. No. 4601 (Ont. Sm. Cl. Ct.).

The analogy rule can only be applied where the *Small Claims Court Rules* fail to cover a matter adequately. Since it appears plain that discovery has been deliberately omitted from the summary procedures of the Small Claims Court, the court did not have jurisdiction to make a non-party production order "by analogy" to rule 30.10 of the *Rules of Civil Procedure*, which rules expressly state that they do not apply in Small Claims Court.

Schaefer v. Wagner, [2016] O.J. No. 6526 (Ont. Sm. Cl. Ct.).

The court dismissed a motion for pre-trial inspection of real property by a proposed expert witness, holding that the evidence did not establish the necessary for such an order. *Riddell v. Apple Canada Inc.*, 2016 ONSC 6014, 2016 CarswellOnt 14847, [2016] O.J. No. 4934 (Ont. Div. Ct.); affirmed 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.); leave to appeal refused *Matthew Riddell v. Apple Canada Inc.*, 2018 CarswellOnt 9253, 2018 CarswellOnt 9254 (S.C.C.), applied.

1.04 Orders on Terms — When making an order under these rules, the court may impose such terms and give such directions as are just.

Commentary: The court has a general discretion to impose terms and conditions when making an order. Common terms may include provision for payment of costs, and scheduling matters such as a deadline for service of court documents.

The court must have jurisdiction to impose the terms or conditions in question. For example, where a motion to set aside a default judgment was adjourned on terms that the defendant was required to submit to cross-examination on an affidavit, it was held that since there was no cross-examination on affidavits in Small Claims Court, the deputy judge had no jurisdiction to impose such a term: *Mayo v. Veenstra*, 2003 CarswellOnt 9, 63 O.R. (3d) 194, [2003] O.J. No. 37 (Ont. S.C.J.). See also *First Baptist Church — Teddy Bear Daycare v. Brown*, [2016] O.J. No. 4986 (Ont. Sm. Cl. Ct.).

Where the court makes an order dismissing a motion, that order can be made subject to terms and conditions: *Bradbury v. Traise*, 1986 CarswellOnt 442, 12 C.P.C. (2d) 261, [1986] O.J. No. 2625 (Ont. Dist. Ct.).

An order for the payment of money may be made subject to an instalment order under *Courts of Justice Act* s. 28.

Terms and conditions imposed as part of an interlocutory order such as an order granting leave to amend a pleading, generally should not restrict the parties' rights at trial. In *Foster v. Citadel General Assurance Co.*, 1997 CarswellOnt 4309, 36 O.R. (3d) 750, 20 C.P.C. (4th) 300 (Ont. Gen. Div.); leave to appeal denied (January 15, 1998), [1998] O.J. No. 563, Boland J. (Ont. Gen. Div.), it was held that a master exceeded his jurisdiction by imposing as a condition of granting leave to amend a statement of claim, that the plaintiff could not bring a motion to strike the jury notice.

Case Law: *Platinum Stairs Ltd. v. Laranjeira*, 2017 ONSC 6107, 2017 CarswellOnt 16032 (Ont. Div. Ct.).

Pursuant to Rule 61.3(7) of the *Rules of Civil Procedure*, if costs are appealed as part of the appeal of a final order, the request for leave to appeal shall be included in the Notice of Appeal or in a Supplementary Notice of Appeal as part of the relief sought. The discretion to award costs should only be interfered with if the judge considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion. See *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CarswellNat 264, 1995 CarswellNat 700, 85 F.T.R. 79 (note), [1995] 1 S.C.R. 3, 26 Admin. L.R. (2d) 1, 122 D.L.R. (4th) 129, *(*sub nom. *Matsqui Indian Band v. Canadian Pacific Ltd.)* [1995] 2 C.N.L.R. 92, 177 N.R. 325, [1995] S.C.J. No. 1 (S.C.C.) at p. 32 [S.C.R.]. The rules of the Small Claims Court do not have an equivalent rule to Rule 57.03(2). Rule 1.03(1)/(2) of the Small Claims Court Rules provides that "if these rules do not cover a matter adequately, the court may give directions and make any order that is just, and the practice shall be decided by analogy to these rules, by reference to the *CJA* and the Act governing the action and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure*." Also of some relevance is Rule 2.01 of the Small Claims Court Rules which provides that a failure to comply with the Rules is an irregularity not a nullity and the court may grant all necessary amendments or other relief on such terms as are just "to secure the just determination of the real matters in dispute." In *Melloul-Blamey Construction Ltd. v. Schleiss Development Co.*, 2003 CarswellOnt 4413, 1 C.P.C. (6th) 352 (Ont. Div. Ct.) at para. 12, the failure to invite submissions raises a concern of procedural fairness and indicates an improper exercise of discretion requiring appellate intervention. Deputy Judge with respect to costs of the motion, it is granted. The Deputy Judge's decision on costs in breach of Rule 15.07 of the Small Claims Court Rules that costs of a motion exclusive of disbursements shall not exceed $100 unless the court orders otherwise "because there are special circumstances". Matter remitted back to the Small Claims Court so that the appellant's claim and the respondents' claim can be heard on the merits by a different Deputy Judge.

Montgomery Fleet Services Inc. v. Corlies, 2016 ONSC 1223, 2016 CarswellOnt 2634, 346 O.A.C. 51 (Ont. Div. Ct.).

Appeal by defendant from judgment of Deputy Judge of Small Claims Court in Belleville. Rule 1.03(2) of the Small Claims Court contemplates that where required, the court may be guided by the *Rules of Civil Procedure*. "Error in principle is a familiar basis for reviewing the exercise of judicial discretion. Appeal by defendant from the Judgment for an Order setting aside the Judgment and directing a new trial. Defendant did not disclose any documents or reports prior to trial. Disclosure obligations are addressed by Rule 13.03(2) of the Rules of the Small Claims Court. As admitted, defendant failed to meet that obligation. Attempting to cross-examine on undisclosed documents is not only unfair to the witness, but is equivalent to trial by ambush. It should not be judicially condoned. See *Iannarella v. Corbett*, 2015 ONCA 110, 2015 CarswellOnt 2150, 124 O.R. (3d) 523, 45 C.C.L.I. (5th) 171, 65 C.P.C. (7th) 139, 75 M.V.R. (6th) 185, 331 O.A.C. 21, [2015] O.J. No. 726 (Ont. C.A.) at para. 33~~.~~; additional reasons 2015 ONCA 238, 2015 CarswellOnt 4876, 71 C.P.C. (7th) 267 (Ont. C.A.). Rule 1.03(2) of the Small Claims Court contemplates that where required, the court may be guided by the *Rules of Civil Procedure*. A trial, no matter the level of court, is by definition an adversarial process. The effect of the denial to grant the defendant the requested adjournment and the ruling that prevented the defendant from cross-examining the plaintiff on undisclosed documents curtailed the defendant's ability to make full answer and defence to the claim the plaintiff advanced against him. That said, the defendant was clearly offside on his disclosure obligations and to a lesser degree, on his failure to subpoena his proposed witness. Natural justice dictates that a party to an action should have the opportunity within the rules of engagement to fully advance his or her case. That did not unfold in this trial, based on the defendant's failure to address obligations expected of him. In the face of the defendant's expressed request for an adjournment, based on his failure to subpoena his proposed witness and on his implied request under Rule 53.08 of the *Rules of Civil Procedure*, based on his failure to disclose documents, the court had an obligation to put to the defendant the option of an adjournment on terms. The failure to have done so is an error in principle. Appeal allowed. Trial judgment set aside, and new trial directed. The costs of the first trial are reserved to the Deputy Judge hearing the second trial.

Khan v. Krylov & Company LLP, 2017 ONCA 625, 2017 CarswellOnt 16235, 138 O.R. (3d) 581, 12 C.P.C. (8th) 74, [2017] O.J. No. 4073 (Ont. C.A.).

The motion judge dismissed the appellant's action under rule 2.1.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as being frivolous, vexatious or otherwise an abuse of the process of the court. rule 2.1 is new and evolving. It was largely summarized in *Scaduto v. Law Society of Upper Canada*, 2015 ONCA 733, 2015 CarswellOnt 16545, 81 C.P.C. (7th) 258, 343 O.A.C. 87, [2015] O.J. No. 5692 (Ont. C.A.); leave to appeal refused 2016 CarswellOnt 21905, 2016 CarswellOnt 21906, [2015] S.C.C.A. No. 488 (S.C.C.) at paras. 7–9. Rule 2.1 is not meant to be an easily accessible alternative to a pleadings motion, a motion for summary judgment, or a trial. Appeal allowed, and the order of the motion judge is set aside including the cost award.

1.05 Standards for Documents — A document in a proceeding shall be printed, typed, written or reproduced legibly.

O. Reg. 78/06, s. 4; 108/21, s. 1

1.05.1 (1) Electronic Filing, Issuance of Documents — If these rules permit or require a document to be filed electronically, the software authorized by the Ministry of the Attorney General for the purpose shall be used for the filing.

(2) Any document to be issued under these rules may be issued electronically,

(a) by the clerk dating, signing and sealing with an electronic version of the seal of the court a copy of the document in electronic format; or

(b) by use of the software authorized by the Ministry of the Attorney General for the purpose.

(3) A document issued in accordance with subrule (2) is deemed to have been issued by the Small Claims Court.

(4) Requirement for Signature — If a document is filed or issued electronically using the authorized software, a requirement in these rules that the document contain a person's signature is satisfied if the authorized software indicates on the document that the document has been electronically filed or issued, as the case may be.

(5) Date of Filing, Issuance — The date on which a document that is filed or issued electronically is considered to have been filed or issued, as the case may be, is the date indicated for the document,

(a) by the authorized software, if the document was filed or issued using that software; or

(b) by the clerk, if the document was issued by the clerk.

(6) Filing, Issuance Outside of Business Hours — A document that is filed or issued electronically outside of regular business hours is deemed to have been filed or issued, as the case may be, on the next day that is not a holiday.

(7) Requirement to Keep Original — A person who electronically files an affidavit or other signed or certified document in accordance with these rules shall,

(a) keep the original document until the third anniversary of the electronic filing, until the clerk requests that the original document be filed or until these rules require that the original document be filed, whichever is earliest; and

(b) file the original document on the clerk's request.

(8) [Repealed O. Reg. 108/21, s. 2(4).]

(9) Inconsistencies — In the event of an inconsistency between a document filed electronically by a person using the authorized software and information provided by the person using the authorized software other than the electronically filed document,

(a) the electronically filed document prevails; and

(b) the clerk may request written clarification from the person respecting the inconsistency.

O. Reg. 44/14, s. 2; 38/16, s. 1; 108/21, s. 2

Commentary: following the suspension of normal court operations due to COVID-19 starting March 16, 2020, the use of electronic issuance and filing of court documents in Small Claims Court has been significantly expanded and now applies to most documents. The specific processes including the document naming convention are outlined in section 11 of the Consolidated Notice to the Profession and Public Regarding the Small Claims Court. Subject to any subsequent amendments — which should be searched on the official website of the Superior Court of Justice (www.ontariocourts.ca) — that section as it read effective March 1 2021 provides as follows:

11. — Filing

11.1 — Plaintiff's claims

Most plaintiff's claims can be filed online through the Small Claims Court E-Filing Service portal. You can learn more about the portal at: www.ontario.ca/page/file-small-claims-online/. Please note that, as of March 1, 2021, this portal is **ONLY** available for plaintiffs to file a plaintiff's claim or an amended plaintiff's claim where the claim has not already been served

on the defendant(s). Because updates to this portal are in progress, no other documents can be filed or issued through this portal until further notice.

The document naming convention protocol in section 11.4 (Naming Documents) does **not** apply to documents filed through this portal. Instead, the following requirements apply:

- File names may only contain letters and numbers. A file name and its extension (e.g. ".pdf" or ".jpg") combined must be 30 characters or less.
- The document name must indicate the following information:
  - Document type (e.g. "plaintiff's claim" or "PC");
  - Name of the party submitting the document, and
  - Date on which the document was created or signed, in the format DDMMMYYYY (e.g. 13MAR2021).

Below are sample document names:

- PC Loblaws 13MAR2021.pdf
- SchedA Loblaws 13MAR2021.jpg

11.2 — Other documents

The Ministry of the Attorney General advises that most other Small Claims Court documents can be filed through the Small Claims Court Submissions Online portal. You can learn more about the portal at: www.ontario.ca/page/file-small-claims-online. You cannot submit a plaintiff's claim through this portal unless you have, or wish to apply for, a fee waiver certificate. Please see the portal for a list of documents that can be filed there.

Documents must be named in accordance with section 11.4 (Naming Documents) below, and must be in searchable PDF format. The portal will only accept documents smaller than 10 MB.

Note: You cannot submit documents using Small Claims Court Submissions Online:

- for a court date that is five business days away or fewer (for example, if your court date is on Tuesday, February 9, you cannot submit documents online after Monday, February 1); or
- if you are legally required to submit documents by a deadline that is five business days away or fewer.

If your court date or submission deadline is five days or fewer away, the Small Claims Court will accept the documents by e-mail at the specific e-mail addresses indicated on the Email Accounts for Small Claims Court Locations page. See sections 11.3, 11.4 and 11.5 (Email Filing Format, Naming Documents and Communicating with Court Staff by Email) below for more information on email filing requirements.

Where representatives and parties deliver materials by email, subject to direction from the Court, they undertake to file the same materials in paper format, and pay the requisite filing fee, at the court when regular court operations resume.

Where a document may not be accepted online or by email, parties are encouraged to file by mail. In-person attendance at a courthouse is strongly discouraged unless it is absolutely necessary.

11.3 — Email Filing Format

Emailed filings must be submitted in searchable PDF format, ensuring each document is a separate attachment.

To file by email a prescribed form (available at www.ontariocourtforms.on.ca) that must be signed, you may do either of the following:

- Apply an electronic signature to a .DOC version of the form, convert the form to PDF then submit the PDF file; or
- Print the form, sign it manually, scan it then submit it as a PDF.

Any photographs must be submitted in PDF format.

The request forms provided in this notice should be submitted in .DOC or .DOCX format. Each email sent to the court, including attachments, must not exceed 35 MB.

Unless a matter is proceeding *ex parte* (i.e. without notice to responding parties), filed materials must indicate when and how service on responding parties was made (i.e. affidavit of service).

11.4 — Naming Documents

NOTE: This section does **not** apply to plaintiff's claims or amended plaintiff's claims that are filed through the Small Claims Court E-Filing Service Portal. Please see section 11.1 for information on naming those documents.

When documents are submitted to the Small Claims Court in electronic format, the document name must indicate the following information:

- Document type;
- Type of party or person submitting the document (e.g. plaintiff, defendant, moving party, litigation guardian);
- Name of the party submitting the document (including initials if the name is not unique to the case); and
- Date on which the document was created or signed, in the format DD-MMM-YYYY (e.g. 12-JAN-2021).

Below are sample document names:

Notice of Motion — Moving Party — Loblaws Inc. — 13-MAR-2021

Settlement Conference Request Form — Plaintiff — A. Wong — 21-NOV-2021

Consent to Act as Litigation Guardian — Litigation Guardian — C. Herman — 12-JAN-2021

Affidavit — Responding Party — XYZ Ltd. — 5-MAY-2021

Document names shall not include firm-specific naming conventions, abbreviations, or file numbers.

11.5 — Communicating with Court Staff by Email

The below direction should be followed when communicating by email with court staff:

I. To ensure the email is received and processed by the appropriate court office, **the subject line** should include the following information:

- LEVEL OF COURT (SCC)
- TYPE OF MATTER (Small Claims Court)
- FILE NUMBER (indicate NEW if no court file number exists)
- TYPE OF DOCUMENT (e.g., Defence, Notice of Discontinued Claim, etc.)

II. The body of the email should include the following information if applicable:

- court file number (if it is an existing file)
- short title of proceeding
- list of documents attached (note: **attachments cannot exceed 35 MB**)
- type of request (filing or hearing request)
- name, role (i.e. lawyer/representative, party, etc.,) and contact information (i.e. email address) of all parties.

11.6 — Filing Fees

Parties and representatives filing documents using the Small Claims Court E-Filing Service or the Small Claims Court Submissions Online portals can pay the applicable filing fees through those portals.

Where parties and representatives deliver materials by email, they undertake to file the same materials in paper format, and pay the requisite filing fee, at the court counter when regular court operations resume.

1.05.2 (1) Electronic Court Documents, Communications, Signatures — Any document that the court or clerk may or must send, give or otherwise provide to a person under these rules may be sent to the person in electronic format by email to,

(a) the email address most recently indicated for the person in the applicable court file, if any; or

(b) in the case of a lawyer or paralegal whose email address is not indicated in the court file, the email address for the lawyer or paralegal as published on the Law Society of Ontario's website.

(2) Any communication that the court or clerk may or must send to a person in connection with a proceeding under these rules may be sent to the person in electronic format by email to,

(a) the email address most recently indicated for the person in the applicable court file, if any; or

(b) in the case of a lawyer or paralegal whose email address is not indicated in the court file, the email address for the lawyer or paralegal as published on the Law Society of Ontario's website.

(3) Subrules (1) and (2) apply despite anything to the contrary in these rules.

(4) Electronic Signatures — A document that may or must be signed by the court or a judge, clerk or person presiding at a proceeding or a step in a proceeding under these rules may be signed with an electronic signature.

(5) In subrule (4),

"electronic signature" means electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document.

O. Reg. 108/21, s. 3

Commentary: effective March 1, 2021, documents which must be given to the parties by the clerk will generally be delivered by email, or by regular mail.

1.05.3 (1) Small Claims Court E-Filing Service Portal — In this rule,

"Small Claims Court E-Filing Service Portal" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the Internet under the name "Small Claims Court E-Filing Service Portal" in English and "Portail du Service de dépôt électronique de la Cour des petites créances" in French.

(2) Limitation — This rule applies to permit the electronic filing or issuance of a document through the Small Claims Court E-Filing Service Portal only if the person filing the document or requesting its issuance agrees to the Portal's terms of use and submits through the Portal an email address at which the person agrees to accept documents from the court electronically.

(3) Electronic Filing of Plaintiff's Claim — A plaintiff's claim (Form 7A) may be filed electronically through the Small Claims Court E-Filing Service Portal if,

(a) any interest payable in relation to the claim is no greater than 35 per cent per year; and

(b) the defendant is not a person under disability.

(4) Electronic Filing of Other Documents — Subject to subrule (5), the following documents in a proceeding may be filed electronically through the Small Claims Court E-Filing Service Portal:

1. An amended plaintiff's claim (Form 7A), if the claim being amended has not yet been served.

2. An affidavit of service (Form 8A).

3. A request to clerk (Form 9B) to note in default or for an assessment hearing.

4. An affidavit for jurisdiction (Form 11A).

5. A default judgment (Form 11B).

6. A notice of discontinued claim (Form 11.3A).

7. A notice of motion and supporting affidavit (Form 15A) requesting a motion in writing for an assessment of damages.

(5) Application — Subrule (4) does not apply unless,

(a) the plaintiff's claim in the proceeding was issued electronically through the Small Claims Court E-Filing Service Portal; and

(b) no other document in the proceeding has been filed by a method other than through the Small Claims Court E-Filing Service Portal.

(6) Electronic Issuance — The following documents may be issued electronically through the Small Claims Court E-Filing Service Portal:

1. A plaintiff's claim (Form 7A).

2. A default judgment (Form 11B).

O. Reg. 249/21, s. 1

1.05.4 (1) Small Claims Court Submissions Online Portal — In this rule,

"Small Claims Court Submissions Online Portal" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the Internet under the name "Small Claims Court Submissions Online Portal" in English and "Portail de soumission en ligne pour la Cour des petites créances" in French.

(2) Limitation — This rule applies to permit the electronic filing or issuance of a document through the Small Claims Court Submissions Online Portal only if the person requesting the filing or issuance agrees to the Portal's terms of use and submits through the Portal an email address at which the person agrees to accept documents from the court electronically.

(3) Documents That May be Filed — Subject to subrules (4) and (5), any document that may or must be filed under these rules may be filed electronically by submitting the document through the Small Claims Court Submissions Online Portal, if the Small Claims Court Submissions Online Portal provides for the electronic filing of the document.

(4) Exceptions — Subrule (3) does not apply with respect to,

(a) a plaintiff's claim (Form 7A), unless the prescribed filing fee is not required to be paid; or

(b) a document filed for the purposes of rule 20.07 (writ of seizure and sale of land).

(5) Clerk's Acceptance Required — A document submitted for filing through the Small Claims Court Submissions Online Portal is filed only if it is accepted by the clerk.

(6) Confirmation of Filing — If the clerk accepts the document for filing, the clerk shall send confirmation of the filing by email.

(7) Filing Date — A document filed in accordance with subrule (5) is, despite subrules 1.05.1(5) and (6), considered to have been filed on the day indicated in the clerk's confirmation.

(8) Documents That May be Issued — Subject to subrules (9) and (10), any document that may or must be issued under these rules may be issued electronically by submitting the document through the Small Claims Court Submissions Online Portal, if the Small Claims Court Submissions Online Portal provides for the electronic issuance of the document.

(9) Exceptions — Subrule (8) does not apply with respect to,

(a) a plaintiff's claim (Form 7A), unless the prescribed issuance fee is not required to be paid; or

(b) a document issued for the purposes of rule 20.07 (writ of seizure and sale of land).

(10) Clerk's Acceptance Required — A document submitted for issuance through the Small Claims Court Submissions Online Portal will be issued only if it is accepted by the clerk.

(11) Confirmation of Issuance — If the clerk accepts the document for issuance, the clerk shall issue the document and send confirmation of the issuance by email, together with the issued document.

(12) Issuance Date — A document issued by the clerk under subrule (11) is, despite subrules 1.05.1(5) and (6), considered to have been issued on the day indicated in the clerk's confirmation.

(13) If Clarification Needed — The clerk may request from a person written clarification with respect to a document that is submitted for filing or issuance, and the person shall provide the clarification in the manner specified by the clerk.

(14) No Filing or Issuance Without Acceptance — For greater certainty, a document that is not accepted by the clerk for filing or issuance is not considered to have been filed or issued, as the case may be.

O. Reg. 249/21, s. 1

1.06 (1) Forms — The forms prescribed by these rules shall be used where applicable and with such variations as the circumstances require.

(2) Table of Forms — In these rules, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of these rules and is available on the Internet through *www.ontariocourtforms.on.ca*.

(3) Additional Parties — If a form does not have sufficient space to list all of the parties to the action on the first page, the remaining parties shall be listed in Form 1A, which shall be appended to the form immediately following the first page.

(4) Additional Debtors — If any of the following forms do not have sufficient space to list all of the debtors in respect of which the form applies, the remaining debtors shall be listed in Form 1A.1, which shall be appended to the form:

1. Certificate of judgment (Form 20A).

2. Writ of seizure and sale of personal property (Form 20C).

3. Writ of seizure and sale of land (Form 20D).

4. Direction to enforce writ of seizure and sale of personal property (Form 20O).

(5) Affidavit — If these rules permit or require the use of an affidavit, Form 15B may be used for the purpose unless another form is specified.

Commentary: The Forms are prescribed by regulation and may be found on the CD-Rom accompanying this work, and on www.ontariocourtforms.on.ca. The Forms are numbered to correspond with the Rules which mandate them.

(6) [Repealed O. Reg. 78/06, s. 4.]

(7) [Repealed O. Reg. 78/06, s. 4.]

(8) [Repealed O. Reg. 78/06, s. 4.]

(9) [Repealed O. Reg. 78/06, s. 4.]

(10) [Repealed O. Reg. 78/06, s. 4.]

(11) [Repealed O. Reg. 78/06, s. 4.]

(12) [Repealed O. Reg. 78/06, s. 4.]

(13) [Repealed O. Reg. 78/06, s. 4.]

(14) [Repealed O. Reg. 78/06, s. 4.]

(15) [Repealed O. Reg. 78/06, s. 4.]

(16) [Repealed O. Reg. 78/06, s. 4.]

(17) [Revoked O. Reg. 440/03, s. 1.]

(18) [Revoked O. Reg. 440/03, s. 1.]

(19) [Revoked O. Reg. 440/03, s. 1.]

O. Reg. 461/01, s. 2; 330/02, s. 2; 440/03, s. 1; 78/06, s. 4; 393/09, s. 2

1.07 (1) Telephone and Video Conferences — Where Available — If facilities for a telephone or video conference are available at the court, all or part of any of the following may be heard or conducted by telephone or video conference as permitted by subrules (2) and (3):

1. A settlement conference.

2. A motion.

(1.1) If facilities for a video conference are available at the court, all or part of an examination of a debtor or other person under rule 20.10 may be conducted by video conference as permitted by subrules (2) and (3).

(2) Request to be Made — A settlement conference or motion may be heard or conducted by telephone or video conference or all or part of an examination under rule

20.10 may be conducted by video conference if a party files a request for the conference (Form 1B), indicating the reasons for the request, and the court grants the request.

(3) Balance of Convenience — In deciding whether to direct a telephone or video conference, the judge shall consider,

(a) the balance of convenience between the party that wants the telephone or video conference and any party that opposes it; and

(b) any other relevant matter.

(4) Arrangements for Conference — If an order directing a telephone or video conference is made, the court shall make the necessary arrangements for the conference and notify the parties of them.

(5) Setting Aside or Varying Order — A judge presiding at a proceeding or step in a proceeding may set aside or vary an order directing a telephone or video conference.

O. Reg. 78/06, s. 4; 393/09, s. 3

Commentary: During the suspension of normal court operations due to COVID-19 the court's limited operations have been set by practice direction which has been amended from time to time. Settlement conferences are being heard remotely by videoconference or teleconference, and not in person. Starting in late February 2021, trials which had started but required continuation dates as of March 16, 2020, were to continue by videoconference to be arranged by the clerk. The practice direction has changed over time and tends to be amended monthly on average so the current status of operations should be checked by consulting the official website of the Superior Court of Justice (www.ontariocourts.ca). As of June 2021 the two relevant practice directions are entitled Consolidated Notice to the Profession and Public Regarding the Small Claims Court (as amended June 4, 2021), and Continued suspension of Small Claims Court operations due to COVID-19 (as amended May 31, 2021).

Videoconference hearings during the COVID-19 suspension of operations have been held using the Zoom application.

Note that the *Rules of Civil Procedure* were amended effective January 1, 2021, to require routine consideration of remote hearings in place of in-person hearings, effectively encouraging remote hearings wherever feasible: see rule 1.08 as amended by O.Reg. 689/20. Similar amendments have not been made for the *Small Claims Court Rules*.

1.08 Representation — For greater certainty, nothing in these rules permits or authorizes the court to permit a person to act as a representative if that person is not authorized to do so under the *Law Society Act*.

O. Reg. 230/13, s. 2

Commentary: This rule is intended to prevent or discourage the appearance of representatives in Small Claims Court who are neither licensees of the Law Society nor exempted persons under By-Law 4. For further reference, see the commentary under *Courts of Justice Act* s. 26.

1.09 Ceasing to be a Representative — On ceasing to represent a person in a proceeding, a representative shall notify the court in writing of,

(a) the person's last known address and, if different, the address where a document addressed to the person is most likely to come to the person's attention; and

(b) the person's telephone number and email address, if any.

O. Reg. 108/21, s. 4

Rule 2 — Non-Compliance With The Rules

2.01 Effect of Non-Compliance — A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute.

Commentary: This rule is designed to limit the consequences of failures to comply with the rules, by providing that such failure does not render the proceeding, step, document or order a nullity and by providing that the court has a discretion to remedy failures to comply with the rules. Typically this rule applies to remedy purely "technical" procedural issues having no real effect on the substance of the dispute.

For example if a Plaintiff's Claim fails to contain some of the information required by rule 7.01(2), rule 2.01 would apply to prevent a finding that the Plaintiff's Claim is a nullity. Instead, if that omission were objected to, the court could direct the insertion of the missing information by way of an amendment of the pleading. If rule 2.01 were not available and the claim were to be deemed a nullity, it would be as if the claim had never existed, leaving the plaintiff to start a fresh proceeding and to face the increased cost of doing so along with the prospect of a potential limitation problem.

2.02 Court May Dispense With Compliance — If necessary in the interest of justice, the court may dispense with compliance with any rule at any time.

Rule 3 — Time

3.01 Computation — If these rules or an order of the court prescribe a period of time for the taking of a step in a proceeding, the time shall be counted by excluding the first day and including the last day of the period; if the last day of the period of time falls on a holiday, the period ends on the next day that is not a holiday.

Commentary: Days are counted as including holidays unless the last day of a period falls on a weekend or other court holiday in which case the last day is deemed to be the next court day. For example, the minimum time to serve a motion is seven days, so if service of the motion is effective on a Wednesday, the first day of the seven-day period is Thursday and the seventh day is the following Wednesday. But if service is effective on a Friday, the first day of the period is pushed to Monday because of the weekend, and the seventh day is the next Monday for a net period of nine days.

The calculation under rule 3.01 of the *Small Claims Court Rules* contrasts with the computation of time under subrule 3.01(1)(b) of the *Rules of Civil Procedure*, which provides that for periods of time seven days and less, holidays are not counted. In Small Claims Court, holidays are counted (but provided that if the last day falls on a holiday the count jumps to the next day that is not a holiday).

Note that a period of time runs from when service is effective. Therefore, if service is effected by a method which delays deemed receipt of the document, the first day of the period would be delayed accordingly. For example, service by mail under subrule 8.07(2) is deemed to be effective on the fifth day following the date of mailing. Therefore, if a motion is served by mail sent on a Wednesday, proper minimum notice of the motion is five days for effective service by mail plus seven days for minimum notice of the motion: service is deemed effective on the Monday after mailing, and the seven days runs to the next Monday for a total period of twelve days inclusive of the time for service by mail.

Holidays are defined in subrule 1.02(1) and include both weekends and those other holidays listed in that subrule.

Depending on the method of service used, the time of day when the document is sent may affect the computation of time. For example, service by email on a Friday after 4 p.m. is, by virtue of subrule 8.08(4)(b), deemed to have been received on the next day, which due to the weekend would be Monday unless that particular Monday happens to be a holiday in which case the count is pushed to the Tuesday (unless the Monday was Christmas Day and Tuesday was Boxing Day, which are both holidays in which case the count is pushed to the Wednesday).

Here is a chart of the deemed effectiveness for various methods of service recognized under the *Small Claims Court Rules*:

Effective Dates for Various Methods of Service

Method of Service	Rule	When Deemed Effective
Personal service	8.02	Same day
Regular mail	8.07(2)	Five days
Registered mail (document other than plaintiff's claim or defendant's claim)	8.07(2)	Five days
Courier (document other than plaintiff's claim or defendant's claim)	8.07.1(2)	Five days after courier verifies delivery
Email (before 4 p.m.)	8.08(4)(a)	Same day
Email (4 p.m. or later)	8.08(4)(b)	Next day
Acceptance by lawyer or paralegal	8.03(5)	Date of acceptance endorsed by lawyer or paralegal
Mail or courier to corporation and directors — rule 8.03(3)	8.03(4)	Five days after mailing or five days after courier verifies delivery
Service on adult member of same household and second copy by mail or courier — rule 8.03(2)	8.03(4)	Five days after mailing or five days after courier verifies delivery
Service of plaintiff's claim or defendant's claim by registered mail or courier — rule 8.03(7)	8.03(8)	Date of signature verifying receipt

3.02 (1) Powers of Court — The court may lengthen or shorten any time prescribed by these rules or an order, on such terms as are just.

(2) Consent — A time prescribed by these rules for serving or filing a document may be lengthened or shortened by filing the consent of the parties.

O. Reg. 461/01, s. 3

Commentary: The court has a general discretion to extend or abridge any time prescribed under the *Small Claims Court Rules* or under an order of the court. Common examples of orders extending time include order extending the time for service of a Plaintiff's Claim under rule 8.01(2), extending the time for delivery of a Defence under rule 9.01 or for issuance of a Defendant's Claim under rule 10.01(2), and extending the time for automatic dismissal under rule 11.1.01(1).

Time under the rules for serving or filing a document may also be extended or abridged, without an order, by filing the consent of the parties (Form 13B). Where the court is asked for an extension of time under the rules, the usual focus of the inquiry is whether the proposed extension will advance the just resolution of the dispute, without prejudice or unfairness to the parties: *Chiarelli v. Wiens*, 2000 CarswellOnt 280, 46 O.R. (3d) 780, 43 C.P.C. (4th) 19, *(*sub nom. *Chiarelli v. Weins)* 129 O.A.C. 129, [2000] O.J. No. 296 (Ont. C.A.).

Note however that the jurisdiction of the court to extend procedural timelines under the *Small Claims Court Rules*, does not permit the court to extend timelines provided by statute, such as limitation periods: see *Murphy v. Welsh*, 1993 CarswellOnt 987, 1993 CarswellOnt 428, EYB 1993-67515, [1993] 2 S.C.R. 1069, 14 O.R. (3d) 799, 14 O.R. (3d) 799 (note), 18 C.C.L.T. (2d) 101, 18 C.P.C. (3d) 137, 106 D.L.R. (4th) 404, 47 M.V.R. (2d) 1, 156 N.R. 263, 65 O.A.C. 103, [1993] S.C.J. No. 83 (S.C.C.); additional reasons 1993 CarswellOnt 4476, 1993 CarswellOnt 4477, *(*sub nom. *Stoddard c. Watson)* 157 N.R. 372, *(*sub nom. *Stoddard c. Watson)* 66 O.A.C. 240 (S.C.C.); *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 2008 CarswellOnt 3495, 90 O.R. (3d) 401, 56 C.P.C. (6th) 14, 294 D.L.R. (4th) 141, 241 O.A.C. 29, [2008] O.J. No. 2339 (Ont. C.A.). A statutory limitation period can only be extended if the statute provides for the extension.

Rule 4 — Parties Under Disability

4.01 (1) Plaintiff's Litigation Guardian — An action by a person under disability shall be commenced or continued by a litigation guardian, subject to subrule (2).

(2) Exception — A minor may sue for any sum not exceeding $500 as if he or she were of full age.

(3) Consent — A plaintiff's litigation guardian shall, at the time of filing a claim or as soon as possible afterwards, file with the clerk a consent (Form 4A) in which the litigation guardian,

(a) states the nature of the disability;

(b) in the case of a minor, states the minor's birth date;

(c) sets out his or her relationship, if any, to the person under disability;

(d) states that he or she has no interest in the proceeding contrary to that of the person under disability;

(e) acknowledges that he or she is aware of his or her liability to pay personally any costs awarded against him or her or against the person under disability; and

(f) states whether he or she is represented by a representative and, if so, gives that person's name and confirms that the person has written authority to act in the proceeding.

O. Reg. 230/13, s. 3

Commentary: Rule 4 creates certain protections and procedures for parties under "disability" — which is a defined term under rule 1.02(1). The definition includes three classes of people: (i) minors, (ii) those incapable of managing property or incapable of personal care within the meaning of ss. 6 and 45, respectively, of the *Substitute Decisions Act, 1992*, and (iii) absentees within the meaning of the *Absentees Act*.

The exception under rule 4.01(2) is that minors "may sue for any sum not exceeding $500 as if he or she were of full age." For such claims, minor plaintiffs are not subject to the provisions of rule 4.

For all other plaintiffs under disability, a litigation guardian is required and must file a consent to act as litigation guardian (Form 4A) at the time of issuance of the claim or as soon as

possible afterwards. The litigation guardian must be an adult with no interest in the proceeding contrary to that of the person under disability, and must accept personal liability for any costs awarded against the person under disability, subject to the choices of litigation guardian under rule 4.03(2). The litigation guardian then acts as the decision-maker for the person under disability for purposes of the litigation and decides on settlement positions and other matters, based on the interests of the person under disability. If the litigation guardian is represented by a lawyer or paralegal, the litigation guardian is the client.

If a defendant is a person under disability, service of the Plaintiff's Claim must be effected under the specific service rule for absentees, minors or mentally incapable persons, as the case may be: see rules 8.02(h), (i) and (j), respectively.

A defendant under disability must be represented by a litigation guardian, who must file with the Defence a Consent to Act as Litigation Guardian (Form 4A). If a defendant does not have a litigation guardian and it appears to the court that the defendant is a person under disability, the court may appoint a litigation guardian, after notice of the proposed appointment is given to the proposed litigation guardian: rule 4.02(3).

The court may at any time remove or replace a litigation guardian: rule 4.05. Typically, that may occur when a conflict of interest is found or arises as between the litigation guardian and the interests of the person under disability.

If a defendant is a person under disability and the action has not been defended by a litigation guardian, the court may set aside the noting in default, default judgment and enforcement steps if any, under rule 4.06: *Co-operators General Ins. Co. v. Jones*, [2018] O.J. No. 545 (Ont. Sm. Cl. Ct).

No settlement of a claim by or against a person under disability is binding on the person without the approval of the court: rule 4.07. A motion must be brought seeking judicial approval of such a settlement. While the Small Claims Court Rules give no specific indication of the material required on such a motion, the usual practice is to file the material referenced in rule 7.08(4) of the *Rules of Civil Procedure*, namely an affidavit of the litigation guardian, an affidavit of the representative of the litigation guardian, the consent of the person under disability where that person is a minor over the age of 16, and a copy of the settlement terms or minutes of settlement.

On a motion for approval of a settlement, the court's focus is on the best interests of the party under disability: *Poulin v. Nadon*, 1950 CarswellOnt 150, [1950] O.R. 219, [1950] 2 D.L.R. 303, [1950] O.W.N. 163 (Ont. C.A.); *Wu Estate v. Zurich Insurance Co.*, 2006 CarswellOnt 2971, 37 C.C.L.I. (4th) 222, 27 C.P.C. (6th) 207, 268 D.L.R. (4th) 670, 23 E.T.R. (3d) 205, [2006] I.L.R. l-4504, 211 O.A.C. 133, [2006] O.J. No. 1939 (Ont. C.A.); leave to appeal refused 2006 CarswellOnt 7712, 2006 CarswellOnt 7713, [2006] 2 S.C.R. xiii (note), 362 N.R. 399 (note), 228 O.A.C. 398 (note), [2006] S.C.C.A. No. 289 (S.C.C.). Generally, the evidence should include the representative's affidavit evidence providing a review of the issues in the case including some analysis of the risks of success or failure from the perspective of the party under disability. This should demonstrate that the proposed settlement is objectively reasonable and consistent with the best interests of the party under disability. For an excellent review of the particular details which the court may look for on such motions, in the context of actions in the Superior Court of Justice, see the decision of Justice Glithero in *Umbach v. Wilmot (Township)*, [2014] O.J. No. 2298 (Ont. S.C.J.). Materials for such a motion in the Small Claims Court may be shorter than in that court, but should touch on the issues in sufficient detail to satisfy the motions judge that the proposed settlement is in the best interests of the person under disability.

Case Law: *Azzeh (Litigation guardian of) v. Legendre*, 2017 ONCA 385, 2017 CarswellOnt 7165, 135 O.R. (3d) 721, 65 M.P.L.R. (5th) 181 (Ont. C.A.); leave to appeal refused

Julia A. Gagnon, et al. v. City of Greater Sudbury, et al., 2018 CarswellOnt 2058, 2018 CarswellOnt 2059 (S.C.C.).

The Ontario Court of Appeal canvassed the law relating to limitation and notice periods in the context of claims initiated by minor plaintiffs. Where the person with a claim is a minor, the two-year limitation period under the *Limitations Act, 2002*, begins to run when the minor is "represented by a litigation guardian in relation to the claim". However, with respect to the city's notice period argument, the majority held that the ten-day notice period under the *Municipal Act, 2001*, began to run in June 2014 when Ms. Neville commenced the claim on her son's behalf.

Willmot v. Benton, 2011 ONCA 104, 2011 CarswellOnt 523, 11 C.P.C. (7th) 219 (Ont. C.A.).

The primary aspect of the order requiring the plaintiff to appoint a litigation guardian and counsel is procedural in nature and does not finally resolve an issue that goes to the merit or substance of this litigation that asserts claims for damages primarily based on misrepresentation and harassment. The order is interlocutory. Motion to quash granted, appeal is quashed without prejudice to the respondent's ability to seek leave to appeal to the Divisional Court.

Mayer v. Rubin, 2018 ONSC 5273, 2018 CarswellOnt 15062, 41 E.T.R. (4th) 313, F.L. Myers J. (Ont. S.C.J.); additional reasons 2018 ONSC 5605, 2018 CarswellOnt 15663, 41 E.T.R. (4th) 323 (Ont. S.C.J.)

Mental incompetents. *Client had no status to bring motion to remove litigation guardian or vary appointment order.*

Applicant was granted right to appoint estate trustee during litigation. Mother's incapacity was confirmed during assessment and litigation guardian was appointed. Litigation guardian requested case conference to address his status in relation to upcoming motions. This was endorsement made in case conference. Litigation guardian remained under terms of appointment. If mother wished to bring motion to remove litigation guardian, she could not do so on *ex parte* basis, as capacity issues required transparency.

4.02 (1) Defendant's Litigation Guardian — An action against a person under disability shall be defended by a litigation guardian.

(2) A defendant's litigation guardian shall file with the defence a consent (Form 4A) in which the litigation guardian,

(a) states the nature of the disability;

(b) in the case of a minor, states the minor's birth date;

(c) sets out his or her relationship, if any, to the person under disability;

(d) states that he or she has no interest in the proceeding contrary to that of the person under disability; and

(e) states whether he or she is represented by a representative and, if so, gives that person's name and confirms that the person has written authority to act in the proceeding.

(3) If it appears to the court that a defendant is a person under disability and the defendant does not have a litigation guardian the court may, after notice to the proposed litigation guardian, appoint as litigation guardian for the defendant any person who has no interest in the action contrary to that of the defendant.

O. Reg. 78/06, s. 5; 230/13, s. 4

Commentary: NOTE: A claim against a person under disability shall be defended by a litigation guardian (formerly guardian ad litem).

The defendant in the claim should be described as follows:

A.B. — A person under disability.

A copy of the claim should be served:

(a) On a minor, by leaving a copy of claim with the minor and where the minor resides with a parent or other person having the care or lawful custody of the minor, by leaving another copy of the document with the parent or other person.

(b) On all other persons under disability, as set out in subrules 8.03(h) and 8.03(j).

The plaintiff should also serve the parent or any other person having the care or lawful custody of the person under disability if the party is a minor. The demand may be served with the claim or at a later date. It is the responsibility of the plaintiff to serve the demand if it is served other than with the claim. If the demand is not served with the claim, service may be made by mail.

A person may act as litigation guardian by filing a consent with the defence.

Where the defendant fails to have a litigation guardian appointed, the plaintiff should proceed by notice of motion to have the Official Guardian or Public Trustee appointed. The Official Guardian or Public Trustee should be served with a copy of the notice of motion as well as the person under disability.

RULE 4: PARTIES UNDER DISABILITY

DEMAND

ONTARIO COURT (SUPERIOR COURT OF JUSTICE)

_____SMALL CLAIMS COURT

BETWEEN:

BUD BLACK

and Plaintiff

BILL BROWN, a party under disability

Defendant

DEMAND

TAKE NOTICE that as Arthur Black, the above-named defendant, is a party under disability (a minor under the age of eighteen years or as the case may be) he/she must defend this action by litigation guardian appointed for such purpose.

AND TAKE FURTHER NOTICE that unless within twenty (20) days from the receipt hereof action is taken to have the defendant's father, mother or other suitable adult appointed as litigation guardian for the defendant an application will be made without further notification to you to have the Childrens' Lawyer (or Public Guardian and Trustee as the case may be) appointed litigation guardian for the purpose of this action.

DATED at this day of , A.D.20__.

(name)

(address)

(plaintiff/solicitor/agent)

TO:
The above-named defendant
Bill Brown
Toronto, Ontario

AND TO:
Mr. Brown, Senior

(Father of Bill Brown)
Toronto, Ontario

4.03 (1) Who May Be Litigation Guardian — Any person who is not under disability may be a plaintiff's or defendant's litigation guardian, subject to subrule (2).

(2) If the plaintiff or defendant,

(a) is a minor, in a proceeding to which subrule 4.01(2) does not apply,

(i) the parent or person with lawful custody or another suitable person shall be the litigation guardian, or

(ii) if no such person is available and able to act, the Children's Lawyer shall be the litigation guardian;

(b) is mentally incapable and has a guardian with authority to act as litigation guardian in the proceeding, the guardian shall be the litigation guardian;

(c) is mentally incapable and does not have a guardian with authority to act as litigation guardian in the proceeding, but has an attorney under a power of attorney with that authority, the attorney shall be the litigation guardian;

(d) is mentally incapable and has neither a guardian with authority to act as litigation guardian in the proceeding nor an attorney under a power of attorney with that power,

(i) a suitable person who has no interest contrary to that of the incapable person may be the litigation guardian, or

(ii) if no such person is available and able to act, the Public Guardian and Trustee shall be the litigation guardian;

(e) is an absentee,

(i) the committee of his or her estate appointed under the *Absentees Act* shall be the litigation guardian,

(ii) if there is no such committee, a suitable person who has no interest contrary to that of the absentee may be the litigation guardian, or

(iii) if no such person is available and able to act, the Public Guardian and Trustee shall be the litigation guardian;

(f) is a person in respect of whom an order was made under subsection 72(1) or (2) of the *Mental Health Act* as it read before April 3, 1995, the Public Guardian and Trustee shall be the litigation guardian.

4.04 (1) Duties of Litigation Guardian — A litigation guardian shall diligently attend to the interests of the person under disability and take all steps reasonably necessary for the protection of those interests, including the commencement and conduct of a defendant's claim.

(2) Public Guardian and Trustee, Children's Lawyer — The Public Guardian and Trustee or the Children's Lawyer may act as litigation guardian without filing the consent required by subrule 4.01(3) or 4.02(2).

4.05 Power of Court — The court may remove or replace a litigation guardian at any time.

Commentary: Motions to remove or replace a litigation guardian are uncommon in practice but may occur where a litigation guardian is in a conflict of interest or is not acting in the best interests of the person under disability.

4.06 Setting Aside Judgment, etc. — If an action has been brought against a person under disability and the action has not been defended by a litigation guardian, the court may set aside the noting of default or any judgment against the person under disability on such terms as are just, and may set aside any step that has been taken to enforce the judgment.

4.07 Settlement Requires Court's Approval — No settlement of a claim made by or against a person under disability is binding on the person without the approval of the court.

Commentary: No settlement of a claim by or against a person under disability is binding without judicial approval. Such approval is obtained on motion, and is generally brought in writing and on consent of the parties. In cases where settlement has been reached prior to commencement of a proceeding, the practice is to commence a claim only to bring a motion for judicial approval of the settlement.

The material required for judicial approval is generally the same as required under rule 7.08(4) of the *Rules of Civil Procedure* and consists of:

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the lawyer or paralegal acting for the litigation guardian setting out the lawyer or paralegal's position in respect of the proposed settlement;

(c) where the person under disability is a minor over the age of sixteen, the minor's consent to the settlement; and

(d) a copy of the proposed terms of settlement.

Generally, the most important of these materials is the affidavit of lawyer or paralegal. That affidavit should outline the basis assessment of the case, generally dealing separately with liability and damages in as much detail as the circumstances require to give the reviewing judge a good overview of the case to determine whether the proposed settlement is fair and reasonable and in the best interests of the party under disability. Key documentary evidence can be exhibited to the affidavit as needed.

For example, in a negligence case the affidavit should generally provide some detail on liability to explain why the lawyer or paralegal assesses the chance of obtaining judgment at trial as very strong, unlikely, speculative or as the case may be, and should also explain the assessment of countervailing factors such as contributory negligence.

In a personal injury case, it will often be appropriate to attach one or more medical reports or records to the affidavit to set out the basic nature of the injuries to explain the lawyer or paralegal's assessment of the damages outlook. Providing an opinion in the form of a range of reasonably possible damages assessment is an acceptable and common approach.

The material also needs to deal with costs recovery if any as a term of settlement, and the extent to which any part of settlement funds is proposed to be allocated to legal fees and disbursements and paid out to the lawyer or paralegal, as the case may be. The basis of charges agreed with the litigation guardian also needs to be set out.

Case Law: *Woolner v. D'Abreau* (2009), 2009 CarswellOnt 664, 70 C.P.C. (6th) 290, 50 E.T.R. (3d) 59, [2009] O.J. No. 1746 (Ont. S.C.J.), Brown J.; reversed (2009), 2009 CarswellOnt 6479, 53 E.T.R. (3d) 18 (Ont. Div. Ct.).

This case involves consideration of jurisdiction of court to direct independent representation of a person whose capacity was in issue. The *parens patriae* jurisdiction of the court well-established, based on court's power to protect the vulnerable. Section 3(1) of the *Substitute Decisions Act*, 1992 authorizes the court to direct the Public Guardian and Trustee to arrange for independent representation of a person whose capacity is in issue in a proceeding. While not applicable to a Rule 57.07 hearing, that section provides an appropriate analogy upon which this court can draw in deciding to direct the appointment of independent counsel, through the Public Guardian and Trustee.

4.08 (1) Money to be Paid into Court — Any money payable to a person under disability under an order or a settlement shall be paid into court, unless the court orders otherwise, and shall afterwards be paid out or otherwise disposed of as ordered by the court.

(2) If money is payable to a person under disability under an order or settlement, the court may order that the money shall be paid directly to the person, and payment made under the order discharges the obligation to the extent of the amount paid.

(3) Supporting Affidavit — A motion for an order under this rule shall be supported by an affidavit in Form 4B rather than an affidavit in Form 15A.

(4) Costs — In making an order under this rule, the court may order that costs payable to the moving party be paid out of the money in court directly to the moving party's representative.

O. Reg. 400/12, s. 1; 230/13, s. 5

Commentary: Forms associated with Rule 4 are drafted in the simplest way possible. Form 4A is used for a litigation guardian for a plaintiff and Form 4B is used for a litigation guardian for a defendant.

A person under disability may sue for any amount not exceeding $500 as if he were of full age. For any other claim, the action shall be commenced by a litigation guardian (formerly next friend). Rule 4 provides that a person under a disability shall commence the action or continue the action with a litigation guardian. The exception to this rule is an action to proceed without a litigation guardian if the sum sought does not exceed $500. This monetary sum is the same as the provision as to appeals. There can be no appeal from a decision of the Small Claims Court if the amount claimed does *not* exceed $2,500, exclusive of costs. This does not preclude applying for a new trial if warranted.

Rule 4.01(3) indicates in clear language the steps that need to be taken in connection with the Form 4A.

The same principle applies to Form 4B and the defendant's litigation guardian with the exception that the defendant's litigation guardian is not required to acknowledge liability for costs. If it is found that a defendant does not have a litigation guardian, Rule 4.02(3) gives the court the power to appoint a person to be a litigation guardian. The duties as set forth are the same as those found in the *Rules of Civil Procedure*, Rule 7.05(2).

The litigation guardian shall file with the court a "consent" at the time the claim is filed or as soon thereafter as possible. Where the Children's Lawyer or Public Trustee acts as litigation guardian, a consent is not required.

If the litigation guardian has incurred out of pocket expenses on behalf of the person under disability, and wishes to recover same, the style of cause should be set out naming the person

under disability by his or her litigation guardian and the said litigation guardian personally. The rule further provides for the Children's Lawyer or the Public Trustee to act in the capacity of a litigation guardian without the consent as contemplated by Rules 4.01(2) or 4.02(2).

The court on motion or otherwise may at any time remove or replace a litigation guardian.

Monies payable to a person under disability pursuant to an order or settlement shall be paid into court unless otherwise ordered by a judge. The monies will be distributed in accordance with the judge's order. Where monies are paid into court and no order for disposition has been given, the matter may be listed for hearing before a judge. The monies will not be paid out without a judges' order.

Rules 4.04 and 4.05 give the court power to remove or change a litigation guardian who may no longer be required or to give relief where the action has not been properly defended due to the absence of a litigation guardian.

No settlement of a claim made by a person under disability is binding on the person without the approval of the court.

A claim against a person under disability shall be defended by a litigation guardian (formerly guardian *ad litem*). A copy of the claim should be served on both the person under disability and the parent or person having care or custody of the person under disability. The plaintiff should also serve the person under disability and the parent or person having care or custody of the person under disability with a demand. The demand may be served with the claim or at a later date. A person may act as litigation guardian by filing a consent with the defence.

Where the defendant fails to have a litigation guardian appointed, the plaintiff should file a notice of motion to have the Children's Lawyer or Public Trustee appointed and the Children's Lawyer or Public Trustee should be served with a copy of the notice of motion.

If monies are paid into court by someone under disability, same will not be released to the plaintiff without a judge's order. Also, of course, no settlement of a claim against a person under disability is binding without the approval of the court.

As previously stated, the approval of a settlement of any claim involving a person under disability must be made by the court itself. Rule 4.08 provides for both payment into and payment out of court. This rule allows the clerk to act pursuant to a court order. The rule provides for an order for direct payment to a person under a disability. If the payment is made pursuant to an order given in that regard, then there is no further liability on the person who has paid the amount provided for in the order.

Rule 5 — Partnerships And Sole Proprietorships

5.01 Partnerships — A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership.

Commentary: Plaintiffs who sue a business which is either a partnership or a sole proprietorship should consider rule 5 and make an informed decision on how to name the defendant or defendants in the Plaintiff's Claim. That decision may have a fundamental effect on the enforcement and enforceability of an eventual judgment.

A partnership may be sued by naming all or some of the partners as separate individual defendants (using Form 1A — Additional Parties, as needed). Or the partnership may be sued by naming the firm name of the partnership as a single defendant under rule 5.01. If that option is selected, the plaintiff should serve the Plaintiff's Claim together with a Notice to Alleged Partner (Form 5A) on each of the individual partners. Rule 5.03(2) then operates to deem each person served with that notice to have been a partner at the material time, unless the person defends the proceeding separately, denying that fact. The plaintiff who obtains judgment should request the court to include in the judgment, under rule 5.05(2), a direction that the judgment may be enforced against any person deemed to have been partner, or who admitted to being a partner or who was adjudged to have been a partner at the relevant time.

Note that while plaintiffs may choose to sue either the partnership using its business name, or all or some of the individual partners, it is improper to do both: *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.*, 1998 CarswellOnt 4423, 41 O.R. (3d) 577, 43 B.L.R. (2d) 136, 167 D.L.R. (4th) 272, 21 R.P.R. (3d) 187, 114 O.A.C. 201, 70 O.T.C. 80, [1998] O.J. No. 4733 (Ont. C.A.). That choice also affects the requirements for service: a partnership may be served under rule 8.02(k), but individual partners if sued separately must be served as individuals: *All Canadian Mechanical & Electrical Inc. v. Henderson*, 2011 CarswellOnt 15950, [2011] O.J. No. 1456 (Ont. Sm. Cl. Ct.).

Sole proprietorships are dealt with similarly. Plaintiffs may choose to sue the individual or the business name. In practice it is generally preferable to sue the individual and include the business name as the "also known as" name on the first page of the Plaintiff's Claim. Service is addressed by rule 8.02(l).

Case Law: *Suzanne Street Properties Ltd. v. Manhold Development Corp.* (1998), *(*sub nom. *Street (Suzanne) Properties Ltd. v. Manhold Development Corp.)* 106 O.A.C. 311, 37 O.R. (3d) 797 (Ont. C.A.).

Plaintiff, general partner of limited partnership, found to have capacity to sue defendant. Defendant argued only limited partnership had capacity to sue. Evidence showed general partner was owner of property in question as well as contracting party to all relevant agreements in issue.

Kucor Construction & Developments & Associates v. Canada Life Assurance Co., 1998 CarswellOnt 4423, 41 O.R. (3d) 577, 43 B.L.R. (2d) 136, 167 D.L.R. (4th) 272, 21 R.P.R. (3d) 187, 114 O.A.C. 201, [1998] O.J. No. 4733 (Ont. C.A.).

The procedural option to sue using the partnership's name addresses the problems where there are a large number of partners. The alternative is to sue some or all of the individual partners. However it is improper to sue both the partnership and the individual partners.

Downtown Eatery (1993) Ltd. v. Ontario (2002), 2002 CarswellOnt 246, 2002 CarswellOnt 247, [2001] S.C.C.A. No. 397, 289 N.R. 195 (note), 163 O.A.C. 397 (note) (S.C.C.).

Plaintiff suing corporation that issued salary cheques for wrongful dismissal. Considering, but deciding not to sue principals. Not considering suing related corporations on basis of

common employer doctrine. Estopped from suing principals. Not estopped from suing related corporations.

Domjan Investments Inc. v. D.J. Wagner Investments Inc., 2005 CarswellOnt 7750, 79 O.R. (3d) 150 (Ont. S.C.J.).

Partnership action and action for payment of personal loan ordered consolidated. Actions having question of fact or law in common. Relief claimed in both actions arising out of same transaction or occurrence.

Coulombe v. Sabatier, 2006 CarswellAlta 1108, 66 Alta. L.R. (4th) 17, 2006 ABQB 618, 24 B.L.R. (4th) 1 (Alta. Q.B.).

Even though participants at liberty to conduct independent business affairs either separately or jointly for unrelated purposes, the output of the use of the shared land and assets, together with the shared work connected with it, was understood to be partnership property. They created a sort of partnership of a flexible form.

Parties understood they were entering into something in the nature of a partnership with mutual rights and obligations in furtherance of a common business for a shared ability to profit by the business.

Point on the Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd., 2007 CarswellAlta 809, 2007 ABCA 204, 78 Alta. L.R. (4th) 16, [2007] 11 W.W.R. 46, 410 W.A.C. 191, 417 A.R. 191, 45 C.P.C. (6th) 5 (Alta. C.A.).

Appeal by plaintiff from finding that it was in contempt of court and dismissed. Evidence demonstrated that plaintiff failed to comply with court orders requiring information to be provided by certain dates and that it failed to demonstrate any reasonable excuse for its non-compliance. Failure to act was intentional and not accidental and contempt must was proved beyond reasonable doubt. Sanctions not overly severe or disproportionate to the harm caused.

Cross-appeal brought by defendant from decision that partners and former partners of plaintiff were entitled to file their own statements of defence was also dismissed. The court found that *Partnership Act* did not take away entitlement of partners and former partners to defend themselves separate and apart from whatever the managing partner might have done.

All Canadian Mechanical & Electrical Inc. v. Henderson, 2011 CarswellOnt 15950, [2011] O.J. No. 1456 (Ont. Sm. Cl. Ct.).

Instead of following the procedure set out in rule 5.01, the plaintiff named two partners as a single defendant carrying on business as the partnership name, then served only one of the two partners and sought to enforce the resulting default judgment against the other partner who had not been served. The court found the default judgment to have been irregularly-obtained and it was set aside.

5.02 If a proceeding is commenced against a partnership using the firm name, the partnership's defence shall be delivered in the firm name and no person who admits being a partner at any material time may defend the proceeding separately, except with leave of the court.

5.03 (1) Notice to Alleged Partner — In a proceeding against a partnership using the firm name, a plaintiff who seeks an order that would be enforceable personally against a person as a partner may serve the person with the claim, together with a notice to alleged partner (Form 5A).

(2) A person served as provided in subrule (1) is deemed to have been a partner at the material time, unless the person defends the proceeding separately denying having been a partner at the material time.

Commentary: Where, after an order has been made against a partnership using the firm name, the creditor claims to be entitled to enforce it against any person who has not been served with a notice as provided in Rule 5.03, the party must make a motion to the court for leave to do so. This also applies where a judgment has been obtained against a sole proprietorship in the business name.

Where a claim is commenced against a partnership using the firm name there is only one defendant. However, if the plaintiff wishes notices (Form 5A) served on alleged partners the plaintiff is required to file sufficient additional copies of the claim with the court. Two copies for each alleged partner if they are to be served at their residences or, one additional copy if they are to be served at the business address.

Where a claim has been issued against a partnership using the firm name and service is to be made on more than one person (*i.e.*, alleged partners), the clerk is only entitled to charge the appropriate filing fee for a claim against one defendant.

Where a notice to alleged partner has been served by the plaintiff, the person served then has 20 days (25 days if service was made on an adult member of the same household where the person to be served resides, 40 days from the date the claim was mailed where service was made under subrule 8.03(7)) to enter a defence denying that he or she was a partner at the material time. The plaintiff should file an affidavit of service with the court. Where a partnership has been sued in the firm name and has been noted in default, default judgment should not be signed until all persons who have been served with a notice under Rule 5.03 have had an opportunity to file a defence.

Where a person has been served with a notice to alleged partner under Rule 5.03 and fails to defend the proceeding separately, denying that he or she was a partner at the material time, the clerk should when signing default judgment include in the order that it is enforceable against that alleged partner. If this is not done at the time of signing judgment, a party wishing to enforce the order against any person who was served with a notice as provided under Rule 5.03 must apply to a judge by way of a notice of motion for leave to do so.

The same rules (5.01 to 5.05) apply, with necessary modifications, to a sole proprietorship sued in the business name.

5.04 (1) Disclosure of Partners — If a proceeding is commenced by or against a partnership using the firm name, any other party may serve a notice requiring the partnership to disclose immediately in writing the names and addresses of all partners constituting the partnership at a time specified in the notice; if a partner's present address is unknown, the partnership shall disclose the last known address.

(1.1) [Repealed O. Reg. 78/06, s. 6.]

(1.1.1) [Repealed O. Reg. 78/06, s. 6.]

(2) If a partnership fails to comply with a notice under subrule (1), its claim may be dismissed or the proceeding stayed or its defence may be struck out.

O. Reg. 461/01, s. 4 [s. 4(2) revoked O. Reg. 330/02, s. 3(2).]; 330/02, s. 3(1); 440/03, s. 5, item 2; 78/06, s. 6

5.05 (1) Enforcement of Order — An order against a partnership using the firm name may be enforced against the partnership's property.

Commentary: Where, after an order has been made against a partnership using the firm name, a creditor claims to be entitled to enforce it against any person who has not been served with a notice as provided in Rule 5.03, the party must bring a motion to the court for leave to do so. This also applies where a judgment has been obtained against a sole proprietorship in the business name.

Where a claim is commenced against a partnership using the firm name there is only one defendant. If the plaintiff wishes notices (Form 5A) served on alleged partners, the plaintiff is required to file sufficient additional copies of the claim with the court. Two copies for each alleged partner if they are to be served at their residences or, one additional copy if they are to be served at the business address.

Rule 5.03(1) allows a plaintiff to serve an alleged partner with a copy of the claim, together with a notice to the alleged partner.

(2) An order against a partnership using the firm name may also be enforced, if the order or a subsequent order so provides, against any person who was served as provided in rule 5.03 and who,

(a) under that rule, is deemed to have been a partner at the material time;

(b) has admitted being a partner at that time; or

(c) has been adjudged to have been a partner at that time.

(3) Against Person not Served as Alleged Partner — If, after an order has been made against a partnership using the firm name, the party obtaining it claims to be entitled to enforce it against any person alleged to be a partner other than a person who was served as provided in rule 5.03, the party may make a motion for leave to do so; the judge may grant leave if the person's liability as a partner is not disputed or, if disputed, after the liability has been determined in such manner as the judge directs.

O. Reg. 78/06, s. 7

Commentary: The change to subrule (3) clarifies the right of a creditor who wishes to enforce an order against individual partners or a proprietor although the claim was issued against only the firm. Where a person has been served with a notice to an alleged partner along with the statement of claim and fails to file a defence denying that he or she was a partner or proprietor at the material time specified in the notice, the order may be enforced against both the individual and the firm. A judge's order is not required to permit enforcement against the individual. If no notice was served with the claim, the order is only enforceable against the firm. However, the creditor can proceed by way of a notice of motion to seek an order against the individual partner or proprietor.

5.06 (1) Sole Proprietorships — If a person carries on business in a business name other than his or her own name, a proceeding may be commenced by or against the person using the business name.

(2) Rules 5.01 to 5.05 apply, with necessary modifications, to a proceeding by or against a sole proprietor using a business name, as though the sole proprietor were a partner and the business name were the firm name of a partnership.

Commentary: Sole proprietorships are dealt with in a similar fashion as partnerships, pursuant to Rule 5.06. This rule allows a person who carries on business in a name other than his or her own name to commence proceedings in the business name. Rule 5.06(2) provides that the preceding Rules 5.01 to 5.05 inclusive apply with the necessary modifications to sole proprietorship situations.

Case Law: *Elliott v. Ritins International Inc.*, 2008 CarswellOnt 1960, [2008] O.J. No. 1326 (Ont. Div. Ct.).

Ritins should not have been held personally liable because he ceased to be a party to the action when his companies replaced him as parties to the action. Joint and several liability should not have been imposed on the two companies, as one ceased to exist when the other commenced operations. Judge erred in law in imposing liability on Andrejs Ritins personally in his Addendum to Judgment.

Rule 6 — Forum And Jurisdiction

6.01 Place of Commencement and Trial — (1) An action shall be commenced,

(a) in the territorial division,

(i) in which the cause of action arose, or

(ii) in which the defendant or, if there are several defendants, in which any one of them resides or carries on business; or

(b) at the court's place of sitting that is nearest to the place where the defendant or, if there are several defendants, where any one of them resides or carries on business.

(2) An action shall be tried in the place where it is commenced, but if the court is satisfied that the balance of convenience substantially favours holding the trial at another place than those described in subrule (1), the court may order that the action be tried at that other place.

(3) If, when an action is called for trial or settlement conference, the judge finds that the place where the action was commenced is not the proper place of trial, the court may order that the action be tried in any other place where it could have been commenced under this rule.

O. Reg. 78/06, s. 8(1)

Commentary: In Small Claims Court, the proceedings must generally be commenced at the court office in the county where the defendant resides or carries on business. If there are several defendants, the claim may be commenced where any one of the defendants resides or carries on business. The policy choice of the Civil Rules Committee for the venue rule in Small Claims Court sacrifices convenience to plaintiffs in favour of convenience to defendants: *Chaly v. Preferred Roadside Towing* (2018), 2018 ONSC 5935, 2018 CarswellOnt 16677 (Ont. Div. Ct.).

The alternative option is to commence the action where the cause of action arose. For example, in a negligence case arising from an accident, the cause of action generally arises where the accident occurred. Note that for simple debt claims the cause of action is breach of contract arising from the failure to pay. The place where the contract was formed is not the place where the cause of action arose because it is the breach not the formation of the contract which is the cause of action. Simple debt claims must be commenced where the defendant or one of several defendants resides or carries on business: *Cash 4 You Corp. v. Power*, 2014 CarswellOnt 5814, [2014] O.J. No. 2131 (Ont. Sm. Cl. Ct.); *Action Auto Leasing & Gallery Inc. v. Braun*, 2009 CarswellOnt 8666, [2009] O.J. No. 1003 (Ont. Sm. Cl. Ct.).

A change of venue may be ordered under rule 6.01(2) so that the trial will take place at a court location other than where the claim was issued. However the test for a change of venue is the "substantial convenience" test, which in general is difficult to meet. It essentially calls for a review of the witnesses who will likely be required to attend at trial, including both party and non-party witnesses, and the convenience or travel costs involved in those various

witnesses travelling from their respective places of residence to the current versus the proposed place for trial. Note that the convenience of the parties' representatives is not relevant, although the cost to the parties of paying for their representatives' travel to court is relevant: *Continental Breweries Inc. v. 707517 Ontario Ltd.*, 1990 CarswellOnt 422, 46 C.P.C. (2d) 151, [1990] O.J. No. 2985 (Ont. Gen. Div.). Only where the balance of convenience "substantially favours" a change of venue for trial will such a change be ordered under rule 6.01(2).

The onus is on the moving party to demonstrate that the balance of convenience "substantially favours" the proposed change of venue: *Pizza Pizza Ltd. v. Boyack*, 1995 CarswellOnt 359, 38 C.P.C. (3d) 306, [1995] O.J. No. 1448 (Ont. Gen. Div.); *Enterprise Excellence Corp. v. Royal Bank*, 2000 CarswellOnt 585, 19 C.P.C. (5th) 393, [2000] O.J. No. 665 (Ont. S.C.J.).

Care should be taken when considering change of venue caselaw decided by the Superior Court of Justice after rule 13.1 of the *Rules of Civil Procedure*, which came into force in 2004. That rule replaced the former "substantial balance of convenience" test with a new test that is materially different from the wording of rule 6.01(2) of the *Small Claims Court Rules*.

A change of venue may also be ordered in situations where the plaintiff's choice of venue to start the case is found to be improper, under rule 6.01(3). Under that rule the question is not the relative convenience of the place of trial but where the action ought to have been commenced under rule 6.01(1): *2055525 Ontario Ltd. v. Thirty Three Rosedale Holdings Inc.*, 2013 CarswellOnt 15959, [2013] O.J. No. 5350 (Ont. Sm. Cl. Ct.).

Where the court is concerned whether a claim was brought in the correct venue and the court raises that issue on its own initiative and without advance notice to the parties, the rules of natural justice apply and could in some cases warrant a adjournment for the parties to consider the issue and prepare submissions. In *620369 Ontario Inc. v. Borroto* (2020), 2020 ONSC 7204, 2020 CarswellOnt 17381, [2020] O.J. No. 5128 (Ont. Div. Ct.), a motions judge hearing a motion for default judgment raised the question of venue and made an order dismissing one action and provisionally staying two others. On appeal it was held that proper notice and opportunity to make submissions had not been given to the plaintiff and the order was set aside.

Jurisdiction Simpliciter and Forum Non Conveniens

Both of these doctrines address whether Ontario courts will exercise jurisdiction over a case. Rule 6 deals with where in Ontario a case proceeds and assumes the Ontario courts have jurisdiction. Rule 6 does not deal with jurisdiction *simpliciter* or *forum non conveniens*. However both of those issues can arise in Small Claims Court proceedings.

Jurisdiction *simpliciter* deals with whether the Ontario courts have jurisdiction over a case. This issue can arise where some or all of the events occurred outside Ontario or some or all of the parties are outside Ontario, whether in another province or another country. The leading case is *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, *(*sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572, *(*sub nom. *Charron Estate v. Village Resorts Ltd.)* 114 O.R. (3d) 79 (note), 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 343 D.L.R. (4th) 577, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, [2012] A.C.S. No. 17, [2012] S.C.J. No. 17 (S.C.C.), which confirms and elaborates upon the "real and substantial connection" test for jurisdiction *simpliciter*. For tort claims, to establish a real and substantial connection between the subject matter of the case and Ontario, the party arguing in favour of jurisdiction must establish one or more of the following presumptive connecting factors:

(a) The defendant is domiciled or resident in Ontario;

(b) The defendant carries on business in Ontario;

(c) The tort was committed in Ontario; and

(d) A contract connected with the dispute was made in Ontario.

Those presumptive connecting factors are not exhaustive and may be developed by the courts in future and with a particular view to the particular cause of action where it is other than tort. The presence or absence of the plaintiff in Ontario is not in itself a sufficient connecting factor.

The presumptive factors are rebuttable and the party challenging the jurisdiction of Ontario courts bears the onus to rebut the applicable presumptions. This may be done by establishing facts which tend to undermine or downplay the significance of the connections in the specific case.

If the Ontario court finds that it lacks jurisdiction *simpliciter* over the dispute, it must dismiss or stay the action, subject to possible application of the doctrine of forum of necessity.

If the court finds that it has jurisdiction, the defendant may object that the Ontario court should nevertheless exercise its discretion to decline jurisdiction on the basis of *forum non conveniens* — in other words, that the courts of another province or country also have jurisdiction and are the more appropriate forum for the dispute. Under *forum non conveniens*, the defendant bears the onus to establish that another province or country has an appropriate connection to the case under the conflict rules, and why that other proposed forum should be preferred and considered more appropriate to Ontario.

In *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 CSC 30, 2016 SCC 30, 2016 CarswellOnt 10977, 2016 CarswellOnt 10978, [2016] 1 S.C.R. 851, 143 O.R. (3d) 79 (note), 53 B.L.R. (5th) 173, 86 C.P.C. (7th) 223, 400 D.L.R. (4th) 1, *(*sub nom. *Trillium Motor World Ltd. v. General Motors of Canada Ltd.)* 485 N.R. 1, *(*sub nom. *Trillium Motor World Ltd. v. General Motors of Canada Ltd.)* 349 O.A.C. 1, [2016] S.C.J. No. 30 (S.C.C.), a third party claim was made by the Ontario defendant against a series of Quebec law firms, who challenged the jurisdiction of the Ontario court. The court held that the Ontario court had a real and substantial connection based on the existence of contract made in Ontario that were connected to the tort alleged in the plaintiff's claim. Judicial economy favoured Ontario as a convenient forum for the third party claim.

The rise of the internet and electronic commerce poses new challenges in determining whether a commercial entity carries on business in Ontario for purposes of jurisdiction *simpliciter* and *forum non conveniens*. The recent decision in *Douez v. Facebook, Inc.*, 2017 CSC 33, 2017 SCC 33, 2017 CarswellBC 1663, 2017 CarswellBC 1664, [2017] 1 S.C.R. 751, 97 B.C.L.R. (5th) 1, 71 B.L.R. (5th) 1, 1 C.P.C. (8th) 213, 3 C.P.C. (8th) 1, 411 D.L.R. (4th) 434, [2017] 7 W.W.R. 637 (S.C.C.), deals with forum selection clauses in the context of internet business. The plaintiff was a resident of British Columbia and a member of the Facebook network operated by the California defendant. Facebook's contract terms included a forum selection clause requiring disputes to be addressed in California courts. The plaintiff alleged a breach of privacy under a B.C. statute. The Supreme Court of Canada determined that policy favoured not enforcing the otherwise valid forum selection clause and allowing the litigation to proceed in British Columbia.

The next major decision from the Supreme Court of Canada on conflict of laws is expected to be its decision in the internet defamation case of *Goldhar v. Haaretz.com*, 2016 ONCA 515, 2016 CarswellOnt 10242, 132 O.R. (3d) 331, 401 D.L.R. (4th) 634, 349 O.A.C. 132 (Ont. C.A.); additional reasons 2016 ONCA 668, 2016 CarswellOnt 14115 (Ont. C.A.); reversed *Haaretz.com v. Goldhar*, 2018 CSC 28, 2018 SCC 28, 2018 CarswellOnt 8883, 2018 CarswellOnt 8884, [2018] 2 S.C.R. 3, 153 O.R. (3d) 64 (note), 46 C.C.L.T. (4th) 177, 18 C.P.C. (8th) 1, 423 D.L.R. (4th) 419, [2018] S.C.J. No. 28 (S.C.C.) (appeal heard and decision reserved on November 29, 2017). The plaintiff who lived in Toronto and spent part of each year in Israel, sued an Israeli newspaper and reporter for defamation arising from an

internet publication of comments about his management of an Israeli soccer team. Some Canadian viewers had read the internet publication. The defendants objected that the Ontario court lacked jurisdiction *simpliciter* or alternatively that Israel was a more convenient forum. A motions judge dismissed that motion and an appeal was dismissed by the Court of Appeal for Ontario, but with a strong dissent by Pepall J.A. on the issue of *forum non conveniens*. In its decision released on June 6, 2018, by a majority decision the Supreme Court of Canada allowed the appeal and stayed the Ontario action, holding that although the Ontario court had jurisdiction *simpliciter*, Israel was the more convenient forum: *Haaretz.com v. Goldhar*, 2018 CSC 28, 2018 SCC 28, 2018 CarswellOnt 8883, 2018 CarswellOnt 8884, [2018] 2 S.C.R. 3, 153 O.R. (3d) 64 (note), 46 C.C.L.T. (4th) 177, 18 C.P.C. (8th) 1, 423 D.L.R. (4th) 419, [2018] S.C.J. No. 28 (S.C.C.).

Haaretz.com v. Goldhar, 2018 CSC 28, 2018 SCC 28, 2018 CarswellOnt 8883, 2018 CarswellOnt 8884, [2018] 2 S.C.R. 3, 153 O.R. (3d) 64 (note), 46 C.C.L.T. (4th) 177, 18 C.P.C. (8th) 1, 423 D.L.R. (4th) 419, [2018] S.C.J. No. 28 (S.C.C.).

Israel is a clearly more appropriate forum for this claim to be heard, and the action in Ontario stayed.

Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP, 2020 ONSC 934, 2020 CarswellOnt 1712, 149 O.R. (3d) 466, Perell J. (Ont. S.C.J.); additional reasons 2020 ONSC 3839, 2020 CarswellOnt 8584 (Ont. S.C.J.)

Lui and Kan An Development bring a motion to have the action against them stayed or dismissed on the grounds that the court does not have jurisdiction *simpliciter* or alternatively on the grounds that Ontario is forum *non conveniens*. Court dismissed the action as against Lui and Ka An Development.

Under rule 17.02, as of right, a plaintiff may serve a foreign party with originating process outside of Ontario for certain types of cases, which are listed in the rule. An originating process served outside Ontario without leave shall disclose the facts and specifically refer to the provision of rule 17.02 relied on in support of such service. Lui has not been served, but cannot be served pursuant to rule 17.02 (p) because he does not reside in Ontario and he does not carry on business in Ontario. Lui cannot be served without leave.

Ka An Developments also cannot be served pursuant to rule 17.02 (p) because it does not reside in Ontario and it does not carry on business in Ontario. Thus, the purported service on Ka An Developments without leave was not in accordance with the *Rules of Civil Procedure*. Under rule 17.05(3), an originating process or other document to be served outside Ontario in a contracting state under the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, signed at The Hague on November 15, 1965 (Can TS 1989 No 2 [entered into force February 10, 1969, accession by Canada September 26, 1988]), shall be served:

> (a) through the central authority in the contracting state, or
>
> (b) in a manner that is permitted by the Convention and that would be permitted by these rules if the document were being served in Ontario.

Service should have been made in accordance with rule 17.05(3) and it was not.

In *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, *(*sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572, *(*sub nom. *Charron Estate v. Village Resorts Ltd.)* 114 O.R. (3d) 79 (note), 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 343 D.L.R. (4th) 577, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, [2012] A.C.S. No. 17, [2012] S.C.J. No. 17 (S.C.C.), to achieve order and fairness, which is a major goal of private international law, the Supreme Court of Canada developed a system of presumptive connecting factors to determine whether there was a real and substantial connection.

In *Chevron Corp. v. Yaiguaje*, 2015 CSC 42, 2015 SCC 42, 2015 CarswellOnt 13353, 2015 CarswellOnt 13354, [2015] 3 S.C.R. 69, 136 O.R. (3d) 384 (note), 38 B.L.R. (5th) 171, 22 C.C.L.T. (4th) 1, 73 C.P.C. (7th) 1, 388 D.L.R. (4th) 253, *(*sub nom. *Yaiguaje v. Chevron Corp.)* 474 N.R. 1, *(*sub nom. *Yaiguaje v. Chevron Corp.)* 335 O.A.C. 201 (S.C.C.) at para. 85, Justice Gascon stated:

> 85. Whether a corporation is "carrying on business" in the province is a question of fact . . . [T]he court must inquire into whether the company has "some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time" . . . These factors are and always have been compelling indicia of corporate presence . . . [T]he common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor: LeBel J. accepted this in *Van Breda* when he held that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there" . . .

If a domestic Canadian court has jurisdiction *simpliciter*, the action against the foreign defendant may proceed, but subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. The objectives in determining the appropriate forum are to ensure fairness to the parties and to provide an efficient process for resolving their dispute. See *Bouzari v. Bahremani*, 2015 ONCA 275, 2015 CarswellOnt 5486, 126 O.R. (3d) 223, 385 D.L.R. (4th) 332, 331 O.A.C. 344 (Ont. C.A.) at para. 47.

The proper forum for the litigation between the competing Chinese corporations about the consequences of an alleged simultaneous retainer with Faskins Consulting is Hong Kong or Beijing, China. Ontario is *forum non conveniens*.

Vahle v. Global Work & Travel Co. Inc., 2020 ONCA 224, 2020 CarswellOnt 3746 (Ont. C.A.).

Two sisters from Ontario went to Thailand to teach English. The teaching program was organized by the defendant. While riding a motor scooter, the sisters were struck by a car. One sister died and the other sustained serious injuries. A lawsuit was commenced in Ontario.

The defendant argued that the Ontario court lacked jurisdiction and that Ontario was not the convenient forum.

The presumptive connecting factors were outlined by the Supreme Court of Canada in *Van Breda v. Village Resorts Ltd.*:[24]

- The defendant is domiciled or resident in the province.
- The defendant carries on business in the province.
- The tort was committed in the province.
- A contract connected with the dispute was made in the province.

Justice Schabas held that two of the presumptive connecting factors applied. The defendant was well aware that it was attracting Ontario clients through representations made in Ontario. The defendant represented that it would ensure the living, safety, security, and emergency needs of the sisters. At least some of the representations relied on were alleged to have been made to them in Ontario.

Appeal dismissed. Claim to proceed in Ontario. When companies conduct business through the Internet, they can sometimes be sued in Ontario, even if they have no physical presence in Ontario.

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[24] 2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, *(*sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572, *(*sub nom. *Charron Estate v. Village Resorts Ltd.)* 114 O.R. (3d) 79 (note), 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 343 D.L.R. (4th) 577, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, [2012] A.C.S. No. 17, [2012] S.C.J. No. 17 (S.C.C.)

Enforcement of Foreign Judgments

While this issue does not arise frequently in Small Claims Court given the limited monetary jurisdiction, it is possible in law for a judgment creditor from another province or country to sue in Ontario to enforce the foreign judgment and this can occur in Small Claims Court — subject to the monetary jurisdiction. In such cases, the claimant need not establish any legal connection between the original case or the defendant and Ontario, but must only establish that the original court had jurisdiction over the case. The court may decline recognition and enforcement where the defendant establishes that the foreign judgment was obtained through fraud or denial of natural justice, or on the grounds of public policy: *Chevron Corp. v. Yaiguaje*, 2015 CSC 42, 2015 SCC 42, 2015 CarswellOnt 13353, 2015 CarswellOnt 13354, [2015] 3 S.C.R. 69, 136 O.R. (3d) 384 (note), 38 B.L.R. (5th) 171, 22 C.C.L.T. (4th) 1, 73 C.P.C. (7th) 1, 388 D.L.R. (4th) 253, (sub nom. *Yaiguaje v. Chevron Corp.)* 474 N.R. 1, (sub nom. *Yaiguaje v. Chevron Corp.)* 335 O.A.C. 201 (S.C.C.). See also *Beals v. Saldanha*, 2003 CSC 72, 2003 SCC 72, 2003 CarswellOnt 5101, 2003 CarswellOnt 5102, REJB 2003-51513, [2003] 3 S.C.R. 416, 70 O.R. (3d) 94 (note), 70 O.R. (3d) 94, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1, 234 D.L.R. (4th) 1, 113 C.R.R. (2d) 189, 314 N.R. 209, 182 O.A.C. 201, [2003] S.C.J. No. 77 (S.C.C.).

The Small Claims Court recognized and enforced a Quebec judgment in *Jutras v. Bulut Construction Ltd.*, [2006] O.J. No. 5200 (Ont. Sm. Cl. Ct.).

Choice of Law

The related questions of jurisdiction *simpliciter* and *forum non conveniens* should not be confused with the question choice of law. For torts which occurred outside Ontario but which are nevertheless addressed by an Ontario court, the usual choice of law rule is the *lex loci delicti* (law of the place of tort) as held in *Tolofson v. Jensen*, 1994 CarswellBC 1, 1994 CarswellBC 2578, EYB 1994-67135, (sub nom. *Lucas (Litigation Guardian of) v. Gagnon)* [1994] 3 S.C.R. 1022, 100 B.C.L.R. (2d) 1, 26 C.C.L.I. (2d) 1, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 120 D.L.R. (4th) 289, 7 M.V.R. (3d) 202, [1995] 1 W.W.R. 609, 51 B.C.A.C. 241, 175 N.R. 161, 77 O.A.C. 81, 84 W.A.C. 241, [1994] S.C.J. No. 110 (S.C.C.). In such cases the substantive law of the province or country where the tort occurred must be established, and then applied by the Ontario court. Theoretically such a case could occur in Small Claims Court although this may be rare in practice.

Case Law: *Douez v. Facebook, Inc.*, 2017 CSC 33, 2017 SCC 33, 2017 CarswellBC 1663, 2017 CarswellBC 1664, [2017] 1 S.C.R. 751, 97 B.C.L.R. (5th) 1, 71 B.L.R. (5th) 1, 1 C.P.C. (8th) 213, 3 C.P.C. (8th) 1, 411 D.L.R. (4th) 434, [2017] 7 W.W.R. 637 (S.C.C.).

The Supreme Court refused to enforce foreign forum selection and choice of law in an agreement, otherwise known as a contract of adhesion. The case raises doubts about the enforceability of forum selection clauses in consumer agreements.

H.M.B. Holdings Limited v. Antigua and Barbuda, 2020 ONCA 12, 2020 CarswellOnt 74; (sub nom. *H.M.B. Holdings Ltd. v. Antigua and Barbuda (Attorney General)*, 149 O.R. (3d) 440, 1 B.L.R. (6th) 232, 442 D.L.R. (4th) 241, 14 L.C.R. (2d) 177 (Ont. C.A.); leave to appeal allowed *H.M.B. Holdings Limited v. Attorney General of Antigua and Barbuda*, 2020 CarswellOnt 16729, 2020 CarswellOnt 16730 (S.C.C.)).

Ontario's top court refuses to enforce judgment against Antigua and Barbuda. The Court of Appeal for Ontario upheld Mr. Justice Paul Perell's decision to dismiss H.M.B. Holdings Ltd.'s application to register its British Columbia judgment in Ontario against the Caribbean nations of Antigua and Barbuda. Specifically, the Court of Appeal held that the judge did not err in finding that Antigua was not "carrying on business" in British Columbia at the relevant time and therefore it did not have jurisdiction.

Nevsun Resources Ltd. v. Araya, 2020 CSC 5, 2020 SCC 5, 2020 CarswellBC 447, 2020 CarswellBC 448, 32 B.C.L.R. (6th) 1, 44 C.P.C. (8th) 225, 443 D.L.R. (4th) 183, [2020] 4 W.W.R. 1, 462 C.R.R. (2d) 87 (S.C.C.)

The Court found that the act of state doctrine is not part of Canadian common law. When asked to rule upon the acts of foreign states, Canadian courts have taken a distinct approach, relying on both conflict of law principles and judicial restraint. The act of state doctrine therefore has no application to the matter.

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The case will return to the Supreme Court of British Columbia. The court will hear the merits of the plaintiff's case and determine if the facts justify findings of breaches of customary international law and, if so, the appropriate remedies.

Companies doing business in foreign jurisdictions will have to exercise caution and conduct due diligence to ensure that they are not implicated in human rights abuses by their foreign operations, subsidiaries and partners.

H.M.B. Holdings Limited v. Antigua and Barbuda, 2020 ONCA 12, 2020 CarswellOnt 74, (sub nom. *H.M.B. Holdings Ltd. v. Antigua and Barbuda (Attorney General)*, 49 O.R. (3d) 440, 1 B.L.R. (6th) 232, 442 D.L.R. (4th) 241, 14 L.C.R. (2d) 177 (Ont. C.A.); leave to appeal allowed *H.M.B. Holdings Limited v. Attorney General of Antigua and Barbuda*, 2020 CarswellOnt 16729, 2020 CarswellOnt 16730 (S.C.C.)

In 2007, Antigua and Barbuda (Antigua), a country comprised of several islands in the Caribbean, expropriated property owned by H.M.B. Holdings Limited (HMB). The Judicial Committee of the Privy Council ordered Antigua to compensate HMB for the expropriation in 2014. In 2016, HMB brought an action in British Columbia to enforce the Privy Council judgment. Antigua did not defend this action and the B.C.S.C. granted default judgment. HMB then brought an application in Ontario under the *Reciprocal Enforcement of Judgments Act* to recognize the B.C. judgment, which Antigua opposed.

The Ontario Superior Court of Justice: application to recognize and enforce foreign judgment in Ontario dismissed; C.A. appeal dismissed; leave to SCC dismissed January 9, 2021.

GIAO Consultants Ltd. v. 7779534 Canada Inc., 2020 ONCA 778, 2020 CarswellOnt 18298 (Ont. C.A.)

The Ontario Court of Appeal in *GIAO Consultants Ltd. v 7779534 Canada Inc.* provides some key considerations for parties in *forum non conveniens* disputes. The contract at issue had a clause providing that the governing law would be the laws of the Province of Quebec. The clause provided.

Justice Cameron found that an Ontario court was entitled to assume jurisdiction based on the presumptive connecting factors set out in *Van Breda v. Village Resorts Ltd.*[24] The Court of Appeal reiterated that a motion judge's decision on a *forum non conveniens* issue is a discretionary one, and that an appellate court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision (citing *Haaretz.com v. Goldhar*, 2018 CSC 28, 2018 SCC 28, 2018 CarswellOnt 8883, 2018 CarswellOnt 8884, [2018] 2 S.C.R. 3, 153 O.R. (3d) 64 (note), 46

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[24] ~~2012 SCC 17, 2012 CarswellOnt 4268, 2012 CarswellOnt 4269, (sub nom. *Club Resorts Ltd. v. Van Breda)* [2012] 1 S.C.R. 572, (sub nom. *Charron Estate v. Village Resorts Ltd.)* 114 O.R. (3d) 79 (note), 91 C.C.L.T. (3d) 1, 17 C.P.C. (7th) 223, 343 D.L.R. (4th) 577, 10 R.F.L. (7th) 1, 429 N.R. 217, 291 O.A.C. 201, [2012] A.C.S. No. 17, [2012] S.C.J. No. 17 (S.C.C.)~~

C.C.L.T. (4th) 177, 18 C.P.C. (8th) 1, 423 D.L.R. (4th) 419, [2018] S.C.J. No. 28 (S.C.C.) at para. 49).

Even where contractual provisions explicitly set out the governing law of a contract, this may not be determinative with respect to issues related to jurisdiction and *forum non conveniens*.

6.02 A cause of action shall not be divided into two or more actions for the purpose of bringing it within the court's jurisdiction.

Commentary: At common law, a single cause of action cannot be divided into two lawsuits: *Cahoon v. Franks*, 1967 CarswellAlta 48, [1967] S.C.R. 455, 63 D.L.R. (2d) 274, 60 W.W.R. 684 (S.C.C.). If a plaintiff were to sue twice on the same cause of action, one of the proceedings would generally be dismissed as an abuse of process or as barred by a judgment in the other proceeding: *Cox v. Robert Simpson Co.*, 1973 CarswellOnt 888, 1 O.R. (2d) 333, 40 D.L.R. (3d) 213 (Ont. C.A.).

Rule 6.02 deals specifically with the possibility that plaintiffs might try to split a cause of action in Small Claims Court in an attempt to sue for more than the monetary limit. The rule specifically prohibits such a splitting of a cause of action, which would, in any event, also violate the common law rule. Plaintiffs who try to split their cases in Small Claims Court run the risk that one or both cases could be dismissed for want of jurisdiction, in addition to the potential costs liability which could result from such a strategy.

Rule 6.02 prevents a single plaintiff from splitting a single cause of action into two or more proceedings: *Kent v. Conquest Vacations Co.*, 2005 CarswellOnt 335, 194 O.A.C. 302, [2005] O.J. No. 312 (Ont. Div. Ct.); additional reasons 2005 CarswellOnt 1312, [2005] O.J. No. 1311 (Ont. Div. Ct.); *KNP Headwear Inc. v. Levinson*, 2005 CarswellOnt 7346, 205 O.A.C. 291, [2005] O.J. No. 5438 (Ont. Div. Ct.); additional reasons 2006 CarswellOnt 3464 (Ont. Div. Ct.).

6.03 [Repealed O. Reg. 78/06, s. 8(2).]

Rule 7 — Commencement Of Proceedings

7.01 (1) Plaintiff's Claim — An action shall be commenced by filing a plaintiff's claim (Form 7A) with the clerk, together with a copy of the claim for each defendant.

(1.1) Electronic Filing of Claim — If the plaintiff's claim is filed electronically, the requirement to also file a copy of the claim for each defendant does not apply.

(2) Contents of Claim, Attachments — The following requirements apply to the claim:

1. It shall contain the following information, in concise and non-technical language:

i. The full names of the parties to the proceeding and, if relevant, the capacity in which they sue or are sued.

ii. The nature of the claim, with reasonable certainty and detail, including the date, place and nature of the occurences on which the claim is based.

iii. The amount of the claim and the relief requested.

iv. If the plaintiff is self-represented, the plaintiff's address, telephone number and email address (if any).

iv.i If the plaintiff is represented by a representative, the representative's name, address, telephone number, email address (if any) and Law Society of Ontario registration number (if any).

v. The address where the plaintiff believes the defendant may be served.

2. If the plaintiff's claim is based in whole or in part on a document, a copy of the document shall be attached to each copy of the claim, unless it is unavailable, in which case the claim shall state the reason why the document is not attached.

Commentary: To start a case in Small Claims Court, the plaintiff must prepare a Plaintiff's Claim (Form 7A) for issuance by the clerk under rule OReg258/98 7.03. The Plaintiff's Claim must contain the information required by rule 7.01(2) and if the claim is based on whole or in part on a document (such as a contract) a copy of the document shall be attached to the Plaintiff's Claim.

The most important part of the Plaintiff's Claim is the plaintiff's description, in concise and plain non-technical language, of the nature of the claim. It is important to be concise. Lengthy recitation of the history of communications between the parties about the dispute is unnecessary, and tends to be unhelpful to the judge or judges who must read the document for settlement conference, motion or trial.

For example, in a breach of contract case, the plaintiff should identify the parties, the date of contract formation, whether the contract was oral or in writing, identify the relevant terms and the nature of the alleged breach of contract by the defendant, and briefly describe the nature and amount of damages claimed.

If the claim is based on a liquidated demand, sufficient detail should be included to ensure the claim qualifies as a liquidated demand. For example, a claim on a lawyer's account will be unliquidated if the claim merely alleges the fact of an unpaid account, but will be liquidated it if pleads the agreed terms of contract as including agreement on hourly rates or other basis for the charges which appear in the unpaid account.

The document should be double-spaced. Handwritten documents are accepted but they must be legible.

Be clear about the remedy requested and ensure that the claim is pleaded within the monetary jurisdiction of the Small Claims Court. The entry on page 3 beside the question "How much?" requires insertion of the amount of damages claimed and that amount cannot exceed $35,000.

If there are more than one plaintiff or defendant, use Form 1A to fill in the identity and information of each additional plaintiff or defendant. Form 1A must then be attached between pages 1 and 2.

The Plaintiff's Claim may be filed in paper form, in which case the plaintiff must file enough copies for each defendant, with the original to remain in the court file. Plaintiffs will also need a copy for themselves. Once the claim is issued, the copies must be served on the defendants under Rule 8.

Alternatively, the Plaintiff's Claim may be issued electronically under rule OReg258/98 7.02, unless interest is claimed at more than 35% or the defendant is a party under disability. Note however that court files are not maintained in electronic format, nor do deputy judges have access to any electronically-issued documents. Paper copies are required if and when a judge must deal with the file. A plaintiff who issues a Plaintiff's Claim electronically is responsible to ensure that a paper copy is filed when required by any of the triggering events listed under rule 7.02(5).

Electronic issuance of a Plaintiff's Claim is done through the Service Ontario website at www.ontario.ca/page/file-small-claims-online.

The court fee to issue a Plaintiff's Claim is currently $102, but provided that "frequent claimants" must pay a higher fee of $215. A frequent claimant is a party who issues over 10 claims in a calendar year in the same Small Claims Court location. The 11th and subsequent claims issued at that location are subject to the higher fee.

Case Law: *Rana v. Unifund Assurance Co.*, 2014 ONCA 711, 2014 CarswellOnt 14441 (Ont. C.A.); leave to appeal refused 2015 CarswellOnt 3023, 2015 CarswellOnt 3024 (S.C.C.).

Motion judge correct to require a fresh Statement of Claim in Superior Court. Small Claims Court Claim improper because it included references to settlement discussions. Court has jurisdiction over its own process and was within the discretion of the motion judge to make the order she did.

Del Giudice v. Thompson, 2020 ONSC 2676, 2020 CarswellOnt 6043 (Ont. S.C.J.); additional reasons 2020 ONSC 3623, 2020 CarswellOnt 8153 (Ont. S.C.J.).

In a recent class carriage motion, Justice Perell, having regard to the idea of simple pleadings, admonished the language used in the plaintiffs' claims as:

> *prolix, tedious, whiningly-polemic, conceited, pompously preachy, wanting in objectivity, and grossly overstated . . . the prose in the immediate case may be designed to please the Class Members or to vilify the Defendants in the media, but, speaking for myself, the prose in the immediate case, particularly in the Statement of Claim, is disappointing and unprofessional.*

Pleading are characterized as "a framework for the action, to be used for the purpose of disclosure and then, at trial. Pleadings should be viewed more as the synopsis rather than the book. They should, therefore, be as precise as possible."

(3) [Repealed O. Reg. 78/06, s. 9(2).]

O. Reg. 461/01, s. 5; 78/06, s. 9; 56/08, s. 1; 230/13, s. 6; CTR 12 FE 20 - 1; 108/21, s. 5; 249/21, s. 2

7.02 (1) Issuing Claim — On receiving a plaintiff's claim, the clerk shall immediately issue it by dating, signing and sealing it and assigning it a court file number.

(2) When Electronic Issuance Required — A plaintiff's claim that is filed electronically shall be issued electronically.

(3) Copies of the Claim — If a plaintiff's claim is issued electronically,

(a) the clerk shall save a copy of the issued claim in the court's case tracking system; and

(b) the issued claim shall be provided to the plaintiff in electronic format.

(4) If a plaintiff's claim is not issued electronically, the original claim shall remain in the court file and the clerk shall give copies for service on the defendant to the plaintiff.

O. Reg. 461/01, s. 6; 44/14, s. 3; 38/16, s. 2; 249/21, s. 3

7.03 [Repealed O. Reg. 249/21, s. 3.]

7.04 [Repealed O. Reg. 249/21, s. 3.]

Rule 8 — Service

Summary: Rule 8 governs service of court documents in the Small Claims Court and deals with both service between the parties and service or delivery of documents by the clerk to the parties. Four main concepts should be understood:

(i) Personal service;

(ii) Alternative service;

(iii) Substituted service; and

(iv) Unsuccessful service.

Personal service (rule 8.01(1)) is the general rule for service of a plaintiff's claim and defendant's claim, but provided that alternative service is also permitted as an option (rule 8.01(1)). Where necessary and appropriate, substituted service may be ordered on motion to a judge (rule 8.04).

The methods of personal service vary depending on the type of defendant and are stipulated under rule 8.02. Whichever method may apply, care should be taken to follow the procedure under the applicable subrule as service not in accordance with the procedure provided can result in wasted time and expense if a default judgment is challenged later. Claims must be served within six months after issuance, subject to potential extension of that time (rule 8.01(2)).

Alternative service of claims is available and consists of the methods stipulated under rule 8.03. No specific reason is needed before a claim may be served by alternative rather than personal service, but personal service may be viewed as generally preferable since it is more difficult for a defendant to deny receipt of a claim if it was served personally.

Substituted service is available where necessary to effect service of a plaintiff's claim or defendant's claim, with leave of the court under rule 8.04. There should be no need to request substituted service unless personal service or alternative service are not feasible. The plaintiff must satisfy the court that the specific method of service proposed is likely to bring to the claim to the defendant's attention.

Certain specific documents are given their own rules for service under subrules 8.01(4) to 8.01(13). For example, a notice of contempt hearing must be served personally and unlike the rule for service of claims, alternative service is not an acceptable option for a notice of contempt hearing.

Defences and other documents not referred to in subrules 8.01(1) to (13) may be served by the full range of recognized methods: service by mail, courier, email, personally or by alternative service, unless the court orders otherwise: see subrule 8.01(14).

Effective March 1, 2021, service by fax was abolished as a recognized method of service of documents not referred to in subrules 8.01(1) to (13) and was replaced with service by email. Service by email is subject to the terms of rule 8.08 dealing with that method of service specifically.

Unsuccessful service can occur when the serving party thinks a document has been properly served, but the court later finds that proper service is not established. Regardless of the type of document or method of service used, it is always possible for a recipient to deny receipt or timely receipt of the document (rule 8.10). Despite the serving party's belief that service was effected, and despite an affidavit of service (whether valid on its face or otherwise), it will sometimes turn out that actual notice of the document did not reach the intended recipient. Such instances of unsuccessful service are not unusual in themselves but the likelihood of a dispute over service will tend to vary with the method of service used. In general, personal service is least likely to be disputed, while service by email is probably the most likely to give rise to disputes (for example, the document was never received, the email was not seen

because it went to a junk folder, the email was not from a recognized sender so was not read, or the attachment could not be opened).

8.01 (1) Service of Particular Documents — Plaintiff's or Defendant's Claim — A plaintiff's claim or defendant's claim (Form 7A or 10A) shall be served personally as provided in rule 8.02 or by an alternative to personal service as provided in rule 8.03.

Case Law: *Butler v. Roberts* (1995), [1996] 3 W.W.R. 198 (Sask. Q.B.).

The plaintiff obtained default judgment in Small Claims Court. The defendant applied to set aside the judgment. She alleged a counterclaim or set off. She also swore that as the plaintiff had not served her with the small claims summons she had not known of the action. The plaintiff swore that he had served the defendant personally. Where there is an issue as to service and one party has sworn a false affidavit, the court should not make an order that would ignore the issue. Here either the plaintiff or the defendant swore a false affidavit as to service. The defendant was entitled to proceed to the trial of the issue as to whether service was properly effected.

Teskey v. Ricciardella (July 27, 1999), Doc. Toronto 93-CT-023447, Brampton C23447/93 (Ont. Master).

The defendant was served by alternate to personal service, upon his brother, at his place of residence. The defendant failed to explain why statement of claim did not come to his knowledge until almost one year later. The defendant did not deny that it was his place of residence at relevant time. He asserted the existence of the agreement and limitation period defence, without further particular. Motion denied.

Kraft v. Kraft (1999), 121 O.A.C. 331, 48 R.F.L. (4th) 132, 1999 CarswellOnt 1620, [1999] O.J. No. 1995 (Ont. C.A.).

The husband served the wife a divorce petition by service on the son. The son stated by affidavit that he did not advise the wife of the documents. The Court of Appeal allowed the wife's appeal on terms and ordered a trial on equalization payment issue. The material before the motions judge reflected issue that ought to be tried to avoid miscarriage of justice.

Chiarelli v. Wiens (1999), 122 O.A.C. 147, 34 C.P.C. (4th) 227, 1999 CarswellOnt 1168, [1999] O.J. No. 1456 (Ont. Div. Ct.); reversed (2000), 46 O.R. (3d) 780, (sub nom. *Chiarelli v. Weins)* 129 O.A.C. 129, 43 C.P.C. (4th) 19, 2000 CarswellOnt 280 (Ont. C.A.).

The plaintiffs applied for an extension of time to serve a claim in action for damages. The claim was not served on time because of the plaintiffs' lawyer's delay. The Divisional Court allowed the appeal and dismissed the motion for an extension of time for service.

Long v. Carl (2000), 2000 CarswellOnt 1004 (Ont. S.C.J.).

The defendant failed to rebut evidence as to service upon him filed by process server by way of explanation as to where he was living at the time.

Farrell v. Hewitt (2001), 2001 CarswellOnt 3248 (Ont. S.C.J.).

Plaintiff sought to extend time to serve co-defendant estate of spouse of main defendant who was now also deceased. Only witness was main defendant, who was now dead, such that estate was prejudiced. No explanation for failure to estate was given. Motion to extend time refused.

P.I.I.M. Canada Corp. v. Poetry in Motion (Canada) Inc. (2000), 1 C.P.C. (5th) 339, 2000 CarswellOnt 962 (Ont. S.C.J.).

Plaintiff unable to effect personal service on defendant. Served claim on adult who identified himself as living at defendant's address. Defendant failed to file statement of defence. Plain-

tiff obtained default judgment. Motion granted. Defendant's evidence indicated he never resided there and that address incorrect in any event.

Goodkey v. Dynamic Concrete Pumping Inc., 2003 CarswellBC 1025, 2003 BCSC 546 (B.C. S.C.).

Employment standards regime not overriding ability of Courts to deal with severance pay in alleged wrongful dismissal action. Leading decision on whether a determination of an issue by an administrative tribunal will bind a Court in civil litigation is *Danyluk v. Ainsworth Technologies Inc.*, REJB 2001-25003, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, [2001] S.C.J. No. 46, 2001 SCC 44, 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 7 C.P.C. (5th) 199, 272 N.R. 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 34 Admin. L.R. (3d) 163, [2001] 2 S.C.R. 460 (S.C.C.).

Bank of Nova Scotia v. Baker (2003), 2003 CarswellOnt 1616 (Ont. S.C.J.); affirmed (2004), 2004 CarswellOnt 2954 (Ont. C.A.).

Credit line granted to spouses in 1990 provided for increases by written notice to either spouse. Statements provided only to husband, and increase made in 1994 arranged by him. Spouses separated in 1999. Husband declared bankruptcy. Wife remained liable pursuant to terms of loan.

Belsar Corp. v. Simonin (2003), 2003 CarswellOnt 1566, [2003] O.J. No. 1601 (Ont. S.C.J.).

Plaintiff obtained default judgment after service on defendant through service on sister of Defendant. Such service did not constitute effective alternative to personal service to rely on default judgment. Plaintiff did not comply with *Rule of Civil Procedure* (Ont.), Rule 16.03(5)(a), and (b) regarding sealed envelope and mailing of claim. Default judgment set aside.

Peel Financial Holdings Ltd. v. Western Delta Lands Partnership, 2003 CarswellBC 1205, 37 C.P.C. (5th) 115, 2003 BCSC 784 (B.C. S.C.).

Plaintiffs in two actions were identical. Defendants in two actions almost identical. The lawsuits arose out of contractual disputes between the parties. The Defendants applied to have both actions tried together. Application granted.

Ontario v. Deutsch (2004), [2004] O.J. No. 535, 2004 CarswellOnt 482 (Ont. S.C.J.).

Order pursuant to section 140 of the CJA, R.S.O. c. C.43, "no further proceedings may be instituted . . . continued . . . by 1(i), the Respondent Melvyn Philip Deutsch. He cannot appear" . . . as a representative or in any court . . . either directly . . . or indirectly. See also *Ontario (Attorney General) v. Fleet Rent-A-Car Ltd.*, 2002 CarswellOnt 4286, 29 C.P.C. (5th) 315, [2002] O.J. No. 4693 (Ont. S.C.J.) where Her Honour made a similar decision in a very lengthy, well-reasoned judgment.

Matton v. Yarlasky (2007), 2007 CarswellOnt 1137 (Ont. C.A.); affirming (2007), 2006 CarswellOnt 2821 (Ont. S.C.J.).

Plaintiff sent defendant statement of claim by regular mail with receipt. Receipt not returned. No personal service effected and no order for substitutional service obtained. Plaintiff brought motion to validate service, which was dismissed. Plaintiff appealed. Appeal dismissed.

Bargain Club Inc. v. Co-Operators General Insurance Company, 2018 ONSC 3402, 2018 CarswellOnt 11310, 83 C.C.L.I. (5th) 357, 26 C.P.C. (8th) 336, Trimble J. (Ont. S.C.J.)

Insured provided explanation for failure to serve notice of action and statement of claim on time. Insured brought motion for order extending time for service of notice of action and statement of claim *nunc pro tune*. Motion granted. Insured provided explanation for failure to serve on time. Insured explained it did not want to upset settlement negotiations, and there was inadvertence in counsel's failure to diarize or enter dates in tickler system. Insured re-

butted presumption of prejudice because delay in serving originating process was only two months and insured had access to property early on and had resolved contents claim.

Tran v. Zaharis, 2013 ONSC 6338, 2013 CarswellOnt 15095 (Ont. S.C.J.). G.E. Taylor J.

Defendants actively tried to avoid being served with statement of claim. Defendants presented no evidence that amounts claimed by plaintiff were not accurate. Defendants required to put forward more than bald unsubstantiated statement that amount owing to plaintiff must be reduced by certain unquantified set off amounts. Defendants did not meet necessary burden to cause motion judge to exercise his discretion and set aside default judgment.

(2) Time for Service of Claim — A claim shall be served within six months after the date it is issued, but the court may extend the time for service, before or after the six months has elapsed.

(3) [Repealed O. Reg. 44/14, s. 4(1).]

(3.1) [Repealed O. Reg. 78/06, s. 10.]

(4) Default Judgment — A default judgment (Form 11B) shall be served by the clerk on all parties named in the claim by mail or by email.

(4.1) [Repealed O. Reg. 38/16, s. 3(1).]

(4.1.1) [Repealed O. Reg. 78/06, s. 10.]

(5) Assessment Order — An order made on a motion in writing for an assessment of damages under subrule 11.03(2) shall be served by the clerk on the plaintiff by mail or by email.

(5.1) A plaintiff who wishes for service under subrule (5) by mail shall provide a stamped, self-addressed envelope with the notice of motion and supporting affidavit.

(6) Settlement Conference Order — An order made at a settlement conference shall be served by the clerk by mail or by email, on all parties that did not attend the settlement conference.

(7) Summons to Witness — A summons to witness (Form 18A) shall be served personally by the party who requires the presence of the witness, or by the party's representative, at least 10 days before the trial date; at the time of service, attendance money calculated in accordance with the regulations made under the *Administration of Justice Act* shall be paid or tendered to the witness.

(8) Notice of Garnishment — A notice of garnishment (Form 20E) shall be served by the creditor,

> **(a) together with a sworn affidavit for enforcement request (Form 20P), on the debtor, by mail, by courier, personally as provided in rule 8.02 or by an alternative to personal service as provided in rule 8.03; and**
>
> **(b) together with a garnishee's statement (Form 20F), on the garnishee, by mail, by courier, personally as provided in rule 8.02 or by an alternative to personal service as provided in rule 8.03.**

(9) Notice of Garnishment Hearing — A notice of garnishment hearing (Form 20Q) shall be served by the person requesting the hearing on the creditor, debtor, garnishee and co-owner of the debt, if any, and any other interested persons by mail, by courier, personally as provided in rule 8.02 or by an alternative to personal services as provided in rule 8.03.

(10) Notice of Examination — A notice of examination (Form 20H) shall be served by the creditor on the debtor or person to be examined, personally as provided in rule 8.02 or by an alternative to personal service as provided in rule 8.03.

Case Law: *Clarke v. P.F. Collier & Son Ltd.* (1993), 23 C.P.C. (3d) 397 (N.S. S.C.).

The appellant had served a notice of appeal of default judgment by fax. The *Small Claims Court Act* (N.S.) did not allow for service of a notice of appeal by fax. The appellant had not filed an affidavit of service. The appeal was premature in that he could have brought an application in Small Claims Court to set aside the default judgment but had not done so. The appeal was dismissed.

Kryzanowksi v. Sadlowski (1996), 149 Sask. R. 261 (Q.B.); affirmed (1997), 152 Sask. R. 242, 140 W.A.C. 242 (Sask. C.A.).

Respondent had attempted unsuccessfully to serve applicant at his parents' house. Registered mail returned. Respondent obtained order to effect substituted service by sending summons by regular mail and by serving applicant's father. Father did not give summons to son and mailed summons was apparently not received by him. However, where applicant knew of possibility of litigation, yet did not check to see whether registered mail related to litigation, he had simply avoided litigation. Application dismissed.

Toronto Dominion Bank v. Machado (1998), 28 C.P.C. (4th) 289, 1998 CarswellOnt 4659 (Ont. Master).

Process server served claim on the wife by serving the husband and completing service by sending a copy by mail next day. The default judgment against the wife was set aside. The wife was not properly served. The husband was properly served.

Laframboise v. Woodward (2002), 2002 CarswellOnt 1448, 59 O.R. (3d) 338 (Ont. S.C.J.).

Plaintiff's motion without notice for subservice on automobile insurer granted. Counsel had to show unable to effect prompt personal service. "Impractical" in Rule 16.04(1) of *Rules of Civil Procedure* (Ontario) meant "unable to be carried out or done." Difficulty in serving defendant personally not sufficient. All reasonable steps must be taken to locate party and to personally serve party.

(11) Financial Statement — If the person to be examined is the debtor and the debtor is an individual, the creditor shall serve the notice of examination on the debtor together with a blank financial information form (Form 20I).

(12) The notice of examination,

(a) shall be served, together with the financial information form if applicable, at least 30 days before the date fixed for the examination; and

(b) shall be filed, with proof of service, at least three days before the date fixed for the examination.

(13) Notice of Contempt Hearing — A notice of a contempt hearing shall be served by the creditor on the debtor or person to be examined personally as provided in rule 8.02.

(14) Defence and Other Documents — The following documents may be served by mail, by courier, by email, personally as provided in rule 8.02 or by an alternative to personal service as provided in rule 8.03, unless the court orders otherwise:

1. A defence.

2. Any other document not referred to in subrules (1) to (13).

O. Reg. 461/01, s. 7 [s. 7(4) repealed O. Reg. 330/02, s. 4(2).]; 330/02, s. 4(1), (3); 440/03, s. 5, item 3; 78/06, s. 10; 393/09, s. 4; 230/13, s. 7; 44/14, s. 4; 38/16, s. 3; 108/21, s. 6

Commentary: Service of court documents is addressed by Rule 8. Service of initiating process — that is, Plaintiff's Claims and Defendant's Claims — is the key service issue given the importance of notice to a party that a legal proceeding has been commenced against them. Once that notice is given, less formal service of future documents may be satisfactory, with the exception of Notices of Garnishment, Notices of Garnishment Hearing, and Notices of Examination — which must be served personally or by alternative service: rules 8.01(8), (9) & (10). A Notice of Contempt Hearing must be served personally: rule 8.01(13).

Plaintiff's Claims and Defendant's Claims must be served personally or by alternative service: rule 8.01(1). Note that formal service is unnecessary if the defendant files a defence. Or service may be accepted by a lawyer or paralegal acting for the defendant: rule 8.03(5) & (6).

Personal service is governed by rule 8.02, and takes different forms depending on the defendant's legal status.

Personal service on an individual (other than a person under disability) is accomplished by leaving a copy of the document with him or her: rule 8.02(a). Such service can be accomplished anywhere, although the usual place for service will be the place of residence. Personal service at the individual's place of employment or at other locations (for example, a coffee shop) is equally valid personal service.

Personal service on a person under disability is accomplished by one of the methods stated in subrules 8.02(h), (i) or (j) — depending on whether the person under disability is an absentee, a minor or a mentally incapable person, respectively. Each of those methods requires personal service on an agent of the person under disability. Note that alternative service under rule 8.03 is not available for parties under disability: *Co-operators ~~Gen.~~ Ins. Co. v. Jones*, [2018] O.J. No. 545 (Ont. Sm. Cl. Ct.).

Alternative service on an individual (other than a person under disability), if an attempt is first made to effect personal service at the individual's place of residence but personal service cannot be effected, can be accomplished by leaving a copy of the document in a sealed envelope addressed to the individual with anyone who appears to be an adult member of the same household and sending by mail or courier another copy on the same day or the next day: rule 8.03(2). Alternative service of a Plaintiff's Claim or Defendant's Claim on an individual may also be accomplished by sending a copy by registered mail or by courier to the individual's place of residence, but only if receipt is acknowledged and a signature provided to the courier service or Canada Post: rules 8.03(7) & (8). The signature acknowledging receipt does not have to be the signature of the individual.

Personal service on a corporation (other than a municipal corporation) is accomplished by leaving a copy of the document with an officer, director, or another person authorized to act on behalf of the corporation, or by leaving a copy with a person at any place of business of the corporation who appears to be in control or management of the place of business: rule 8.02(c). In other words it is not necessary for service to take place at a corporation's head office if the corporation, for example, has a retail location in a local shopping mall: the manager or other person who appears to be in control of that location can be validly served. Service on a non-managerial employee is not recommended given it may or may not comply with rule 8.02(c).

Alternative service on a corporation is available where the corporation cannot be found at the last address recorded with the Ministry of Government Services, by sending a copy by mail or courier to that last address, along with further copies to each director as recorded with that Ministry at the directors' addresses as recorded with that Ministry: rule 8.03(3). Parties who wish to effect service by this method should first obtain a Corporation Profile Report from the Ministry: see *www.services.gov.on.ca*. Note that alternative service of a

Plaintiff's Claim or Defendant's Claim by mail or courier is no longer available for service on corporations.

Personal service on a partnership or sole proprietorship is accomplished by leaving a copy of the document with any one or more partners or the sole proprietor, or with a person at the principal place of business who appears to be in control or management of that place of business: rules 8.02(k) & (l).

Defences and any other documents not mentioned in subrules 8.01(1) to (13) may be served either by mail, by courier, by email, personally, or by alternative service: rule 8.01(14).

Substituted service of a claim is available only where personal service or alternative service is required and cannot be effected promptly, and requires leave of the court obtained on motion. See the further commentary under rule 8.04.

Alternative service on the Crown in right of Ontario or Attorney General of Ontario, Children's Lawyer and Public Guardian and Trustee is effected by email directed to the email addresses indicated on their applicable websites, under subrules 8.03(9), (10) and (11), respectively.

8.02 Personal Service — If a document is to be served personally, service shall be made,

(a) Individual — on an individual, other than a person under disability, by leaving a copy of the document with him or her;

Commentary: If a document is to be served personally on an individual pursuant to subrule 8.02(a), the document can be served by leaving a copy with the individual, unless the individual is under a disability. A person can be served with the document at their place of employment. If a document is to be served by mail, see Rule 8.07(1). If a document is to be served by courier, see Rule 8.07.1(1).

Case Law: *Darlind Construction Inc. v. Rooflifters LLC* (2009), 2009 CarswellOnt 1618, 76 C.P.C. (6th) 339, 84 C.L.R. (3d) 299 (Ont. S.C.J.).

Plaintiff's process server left claim at defendant's premises with receptionist who actually worked for a company sharing premises. Claim came to defendant's attention following day. Plaintiff obtained default judgment 21 days after claim given to receptionist, on same day that defendant attempted to file notice of intent to defend. Plaintiff issued notices of garnishment to satisfy judgment. Defendant brought motion to set aside default judgment and notices of garnishment. Motion granted. Plaintiff did not complete service under R. 16.02(1)(c) of Rules of Civil Procedure. R. 16.07 provided for setting aside consequences of default where document did not come to person's notice. Plaintiff attempting to take advantage of technical error or misunderstanding. Since other defendants in lawsuit had filed defence, appropriate that actions proceed together.

(b) Municipality — on a municipal corporation, by leaving a copy of the document with the chair, mayor, warden or reeve of the municipality, with the clerk or deputy clerk of the municipality or with a lawyer for the municipality;

(c) Corporation — on any other corporation, by leaving a copy of the document with,

(i) an officer, a director or another person authorized to act on behalf of the corporation, or

(ii) a person at any place of business of the corporation who appears to be in control or management of the place of business;

Case Law: *Firestone Tire Co. v. Douglas*, [1940] O.W.N. 143 (Ont. H.C.).

A corporation resides where its head office is situated. See also *Miles Transport Co. v. Mail Printing Co.*, [1935] O.W.N. 541 (Ont. H.C.).

Dana Classic Fragrances Inc. v. Consolidated Group of Cos., 2009 CarswellOnt 6957 (Ont. Sm. Cl. Ct.).

A corporation is served by leaving a copy of the Claim or document. Mail not an option. If the corporation cannot be found, then Claim can be mailed to the last known address, in which case it must also be mailed to the directors. Service on a corporation can be made by delivery (Rule 8.02(c)); by mail on last registered address and all directors (Rule 8.03(3)); or on a lawyer (Rule 8.03(5)).

(d) Board or Commission — on a board or commission, by leaving a copy of the document with a member or officer of the board or commission;

(e) Person Outside Ontario Carrying on Business in Ontario — on a person outside Ontario who carries on business in Ontario, by leaving a copy of the document with anyone carrying on business in Ontario for the person;

(f) Crown in Right of Canada — on Her Majesty the Queen in right of Canada, in accordance with subsection 23(2) of the *Crown Liability and Proceedings Act* (Canada);

Case Law: *Luo v. Canada (Attorney General)*, 1996 CarswellOnt 3936 (Ont. Sm. Cl. Ct.).

Rule 8.03(f) contemplates that Small Claims Court has jurisdiction to hear cases pursuant to the *Crown Liability and Proceedings Act*.

(g) Crown in Right of Ontario — on Her Majesty the Queen in right of Ontario, in accordance with section 15 of the *Crown Liability and Proceedings Act, 2019*;

(g.1) Attorney General — on the Attorney General of Ontario, by leaving a copy of the document with an employee of the Crown at the Crown Law Office (Civil Law) of the Ministry of the Attorney General;

(h) Absentee — on an absentee, by leaving a copy of the document with the absentee's committee, if one has been appointed or, if not, with the Public Guardian and Trustee;

(i) Minor — on a minor, by leaving a copy of the document with the minor and, if the minor resides with a parent or other person having his or her care or lawful custody, by leaving another copy of the document with the parent or other person;

(j) Mentally Incapable Person — on a mentally incapable person,

(i) if there is a guardian or an attorney acting under a validated power of attorney for personal care with authority to act in the proceeding, by leaving a copy of the document with the guardian or attorney,

(ii) if there is no guardian or attorney acting under a validated power of attorney for personal care with authority to act in the proceeding but there is an attorney under a power of attorney with authority to act in the proceeding, by leaving a copy of the document with the attorney and leaving an additional copy with the person,

(iii) if there is neither a guardian nor an attorney with authority to act in the proceeding, by leaving a copy of the document bearing the person's name and address with the Public Guardian and Trustee and leaving an additional copy with the person;

(k) Partnership — on a partnership, by leaving a copy of the document with,

(i) any one or more of the partners, or

(ii) a person at the principal place of business of the partnership who appears to be in control or management of the place of business; and

(l) Sole Proprietorship — on a sole proprietorship, by leaving a copy of the document with,

(i) the sole proprietor, or

(ii) a person at the principal place of business of the sole proprietorship who appears to be in control or management of the place of business.

Case Law: *Medd v. Farm No. One Ltd.* (1987), 62 O.R. (2d) 170 (Ont. Div. Ct.).

An order was made for service of a statement of claim by ordinary mail. Two defendants were additionally served personally. Rule 16.03(1) of the *Rules of Civil Procedure* is similar to Rule 8.03 and Rule 16.01(1) is similar to Rule 8.01. Since the primary method of service contemplated by the rules is personal service, the time for filing the statement of defence runs from the date of personal service.

Action Auto Leasing & Gallery Inc. v. Boulding, 2009 CarswellOnt 8657, [2009] O.J. No. 1768, 88 C.P.C. (6th) 91 (Ont. Sm. Cl. Ct.).

The plaintiff commenced claim in Small Claims Court. The plaintiff purported to serve claim on defendants by mail. No defence filed. The plaintiff had defendants noted in default and obtained default judgment. The defendants denied receipt of claim and learned of lawsuit after garnishments effected. Motion granted. The plaintiff could not establish valid service by mail pursuant to r. 8.03 of *Small Claims Court Rules*. Affidavits of service failed to indicate requirements of r. 8.03(8). If requirements of rr. 8.03(7) and (8) were not satisfied, then default judgment was irregularly obtained and had to be set aside as of right. It was unnecessary to determine whether defendants had arguable defence on merits. Motion was brought as soon as reasonably possible.

The defendants moved, pursuant to r. 11.06 of the *Small Claims Court Rules*, O. Reg. 258/98 ("SCCR"), to set aside the clerk's default judgment.

Recent authorities for proposition that irregularly-obtained default judgment must be set aside automatically, or as of right, without terms, are *Royal Trust Corp. of Canada v. Dunn*, [1991] O.J. No. 2231, 1991 CarswellOnt 468, 6 O.R. (3d) 468, 6 C.P.C. (3d) 351, 86 D.L.R. (4th) 490 (Ont. Gen. Div.), and *Benlolo v. Barzakay*, 169 O.A.C. 39, 2003 CarswellOnt 658, [2003] O.J. No. 602 (Ont. Div. Ct.); additional reasons at 170 O.A.C. 115, 2003 CarswellOnt 1260 (Ont. Div. Ct.). In such cases, there is no requirement on moving party to show, as there is in cases of regularly-obtained judgments, that he or she has an arguable defence on the merits. That is because irregularly-obtained judgments must be set aside *ex bebito justitiae* (for the sake of justice).

Onus to prove valid service is on the party asserting that proper service was effected: *Ivan's Films Inc. v. Kostelac*, 29 C.P.C. (2d) 20, 1988 CarswellOnt 441 (Ont. Master); leave to appeal refused (1988), 30 C.P.C. (2d) lv (Ont. H.C.); *Don Bodkin Leasing Ltd. v. Rayzak*, [1993] O.J. No. 503, 1993 CarswellOnt 4016 (Ont. Gen. Div.); reversed 1994 CarswellOnt 2220, [1994] O.J. No. 280 (Ont. Gen. Div.) at para. 10; and *Ryan (In Trust) v. Kaukab*, [2004] O.J. No. 5656, 2004 CarswellOnt 5898 (Ont. S.C.J.); additional reasons at [2005] O.J. No. 603, 2005 CarswellOnt 643 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 644 (Ont. S.C.J.); leave to appeal refused 2005 CarswellOnt 653 (Ont. Div. Ct.) at para. 9.

O. Reg. 56/12, s. 1; 230/13, s. 8; 108/21, s. 7

8.03 (1) Alternatives to Personal Service — If a document is to be served by an alternative to personal service, service shall be made in accordance with this rule.

(2) At Place of Residence — If an attempt is made to effect personal service at an individual's place of residence and for any reason personal service cannot be effected, the document may be served by,

(a) leaving a copy in a sealed envelope addressed to the individual at the place of residence with anyone who appears to be an adult member of the same household; and

(b) on the same day or the following day, mailing or sending by courier another copy of the document to the individual at the place of residence.

(3) Corporation — If the head office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Ontario cannot be found at the last address recorded with the Ministry of Government Services, service may be made on the corporation,

(a) by mailing or sending by courier a copy of the document to the corporation or to the attorney for service in Ontario, as the case may be, at that address; and

(b) by mailing or sending by courier a copy of the document to each director of the corporation as recorded with the Ministry of Government Services, at the director's address as recorded with that Ministry.

(4) When Effective — Service made under subrule (2) or (3) is effective on the fifth day after the document is mailed or verified by courier that it was delivered.

(5) Acceptance of Service by Lawyer or Paralegal — Service on a party who is represented by a lawyer or paralegal may be made by leaving a copy of the document with the lawyer or paralegal, or with an employee in the lawyer's or paralegal's office, but service under this subrule is effective only if the lawyer, paralegal or employee endorses on the document or a copy of it an acceptance of service and the date of the acceptance.

(6) By accepting service, the lawyer or paralegal is deemed to represent to the court that he or she has the client's authority to accept service.

(7) Service of Claim — Service of a plaintiff's claim or defendant's claim on an individual against whom the claim is made may be made by sending a copy of the claim by registered mail or by courier to the individual's place of residence, if the signature of the individual or any person who appears to be a member of the same household, verifying receipt of the copy, is obtained.

(8) Service under subrule (7) is effective on the date on which receipt of the copy of the claim is verified by signature, as shown in a delivery confirmation provided by or obtained from Canada Post or the commercial courier, as the case may be.

(9) Crown in Right of Ontario, Attorney General — Service of a document on the Crown in Right of Ontario or on the Attorney General of Ontario may be made by emailing a copy of the document to the email address for service specified for the Crown or the Attorney General, as the case may be, on the website of the Ministry of the Attorney General.

(10) Children's Lawyer — Service of a document on the Children's Lawyer may be made by emailing a copy of the document to the email address for service specified for the Children's Lawyer on the website of the Ministry of the Attorney General.

(11) Public Guardian and Trustee — Service of a document on the Public Guardian and Trustee, and any service of a document that involves leaving a copy with the Public Guardian and Trustee, may be made with respect to the Public Guardian and Trustee by emailing a copy of the document to the email address for service specified for the Public Guardian and Trustee on the website of the Ministry of the Attorney General.

O. Reg. 78/06, s. 11; 393/09, s. 5; 440/10, s. 1; 230/13, s. 9; 108/21, s. 8

8.04 Substituted Service — If it is shown that it is impractical to effect prompt service of a claim personally or by an alternative to personal service, the court may allow substituted service.

Commentary: Substituted service is the exception and should not be necessary in most cases, particularly given the flexible methods of alternative service available as of right where personal service is impractical or problematic.

If substituted service is desired the plaintiff must bring a motion and obtain leave of the court. The specific method of service, the place or address for service, and the effective date of such service must be addressed in such an order. The motion must be supported by an affidavit which contains sufficient evidence to satisfy the motions judge that prompt personal or alternative service is impractical and that the proposed method of substituted service is likely to bring the claim to the defendant's attention: see *Laframboise v. Woodward*, 2002 CarswellOnt 1448, 59 O.R. (3d) 338, [2002] O.J. No. 1590 (Ont. S.C.J.). Plaintiffs bringing such a motion should also consider whether an extension of the time for service under rule 8.01(2) and/or an extension of the time for automatic dismissal under rule 11.1 is also required and if so, address those issues in the motion materials.

In *Malatesta v. 2088675 Ontario Inc.*, 2014 ONSC 1793, 2014 CarswellOnt 3532 (Ont. S.C.J.), substituted service was denied where the two-year delay was unexplained, the defendants would be prejudiced, and if any real effort had been made the defendants could have been located and served in time.

Note that substituted service is not applicable in situations where the plaintiff simply does not know where the defendant resides or carries on business. If the defendant's location for service is unknown, any proposed method of substituted service will not be likely to bring the claim to the defendant's attention. The usual bottom line for such situations is that the plaintiff must either pursue further investigation to determine where the defendant may be served, or consider abandonment of the claim. Possibly in highly unusual cases, service could be dispensed with under rule 2.02, in which case the authorities under rule 16.04 of the *Rules of Civil Procedure* might be considered.

Substituted service by electronic delivery to social media accounts such as Facebook are increasingly requested in recent years. Such requests have been granted and denied, depending on the evidence presented and perhaps also on the subjective assumptions the deputy judges may be prepared to make concerning the mechanics of those methods of delivery. The evidence should include specific information on what is known about the defendant's use of the specific account. Increasingly, individuals have multiple email and social media accounts, some of which may have fallen into disuse while appearing to be active accounts. In some cases it may be unclear whether the account holder is the defendant, particularly for relatively common names.

Substituted service by Facebook was allowed by Deputy Judge Joe in *Eastview Properties Inc. v. Mohamed* (April 22, 2014), Doc. 13-SC-129502, [2014] O.J. No. 4220 (Ont. Sm. Cl. Ct.), which is often referred to on this subject.

On the other hand, substituted service by Facebook was denied by Deputy Judge Kelford in *Cash Flow Recoveries Inc. v. Crate* (January 31, 2017), Doc. 16-258, [2017] O.J. No. 931

(Ont. Sm. Cl. Ct.). In that case the court was not satisfied that the Facebook account holder was the defendant, nor that the account was active.

Those authorities were considered in *Kitchener-Wilmot Hydro Inc. v. Tismanar*, [2019] O.J. No. 5107 (Sm. Cl. Ct.), where based on the evidence the court elected to follow *Eastview Properties*. The court observed at para. 9 that often these motions for substituted service by Facebook amount to a request for leave to "press send and hope for the best."

In *Preferred Credit Resources Ltd. v. Weber* (March 12, 2020) (Ont. Sm. Cl. Ct.) [unreported], it was held that rule 8.04 allows for substituted service of a claim, and no other documents.

8.05 Service Outside Ontario — If the defendant is outside Ontario, the court may award as costs of the action the costs reasonably incurred in effecting service of the claim on the defendant there.

O. Reg. 78/06, s. 12

8.06 Proof of Service — An affidavit of service (Form 8A) made by the person effecting the service constitutes proof of service of a document.

O. Reg. 461/01, s. 8 [s. 8(2) revoked O. Reg. 330/02, s. 5(2); s. 8(4) revoked 330/02, s. 5(4).]; 330/02, s. 5(1), (3); 440/03, s. 5, item 4; 78/06, s. 13

8.07 (1) Service by Mail — If a document is to be served by mail under these rules, it shall be sent, by regular lettermail or registered mail, to the last address of the person or of the person's representative that is,

(a) on file with the court, if the document is to be served by the clerk;

(b) known to the sender, if the document is to be served by any other person.

(2) When Effective — Service of a document by mail is deemed to be effective on the fifth day following the date of mailing.

(3) Exception — This rule does not apply when a claim is served by registered mail under subrule 8.03(7).

O. Reg. 78/06, s. 14; 393/09, s. 6; 230/13, s. 10

8.07.1 (1) Service by Courier — If a document is to be served by courier under these rules, it shall be sent by means of a commercial courier to the last address of the person or of the person's representative that is on file with the court or known to the sender.

(2) When Effective — Service of a document sent by courier is deemed to be effective on the fifth day following the date on which the courier verifies to the sender that the document was delivered.

(3) Exception — This rule does not apply when a claim is served by courier under subrule 8.03(7).

O. Reg. 78/06, s. 15; 393/09, s. 7; 230/13, s. 11

8.08 (1) Service by Email — Except as otherwise specified in any other rule, if a document is to be served by email under these rules, it shall be sent to,

(a) the last email address provided by the person to be served or the person's representative or, if no email address is provided, to the person's or representative's last known email address; or

(b) in the case of a lawyer or paralegal whose email address is not provided, the email address for the lawyer or paralegal as published on the Law Society of Ontario's website.

(2) Service by Clerk — In the case of a document to be served by the clerk by email, the document shall, except as otherwise specified in any other rule, be sent to the email address provided for under subrule 1.05.2(1).

(3) Requirements re Email Message — The email message to which a document served by email in accordance with these rules is attached shall include,

(a) the sender's name, address, telephone number, and email address;

(b) the name of the person or representative being served;

(c) the date and time of the email; and

(d) the name and telephone number of a person to contact in the event of a transmission problem.

(4) When Effective — Service of a document by email is deemed to be effective,

(a) on the day the email is sent; or

(b) if the email is sent between 4 p.m. and midnight, on the following day.

O. Reg. 393/09, s. 8; 108/21, s. 9

8.09 Notice of Change of Address — (1) A party whose address for service changes shall serve notice of the change on the court and other parties within seven days after the change takes place.

(2) Service of the notice may be proved by affidavit if the court orders that proof of service is required.

(3) [Repealed O. Reg. 78/06, s. 16.]

(4) [Repealed O. Reg. 78/06, s. 16.]

(5) [Repealed O. Reg. 78/06, s. 16.]

O. Reg. 461/01, s. 9 [s. 9(2) revoked O. Reg. 330/02, s. 6(2).]; 330/02, s. 6(1); 440/03, s. 5, item 5; 78/06, s. 16

Commentary: A party whose address for service changes during a proceeding is responsible to notify the other parties and the court office. In the absence of such notice, communications remain directed to the existing contact information on the court file. Failure to notify the other parties and the court of a change of address may result in that party not receiving notice of further proceedings including notice of trial and such proceedings could then occur without notice in fact to the party who has failed to update his or her contact information.

8.3 — Service Chart — Litigants

Document and Service Rule(s)	Who Serves*	How Service May be Made	Time for Service
Plaintiff's Claim (Form 7A) Defendant's Claim (Form 10A)	Party	• Personal service [r. 8.02]	Within 6 months after date issued (or longer with leave of court)

Document and Service Rule(s)	**Who Serves***	**How Service May be Made**	**Time for Service**
r. 8.01(1), (2) r. OReg258/98 10.02		• Alternative to personal service, (including registered mail, courier and other methods) [r. 8.03] • Substituted service (with leave of court) [r. 8.04]	
Defence (Form 9A) r. 9.01(a) r. 10.03(a)	Defendant	• Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1] • Email [r. 8.08]	On every other party within 20 days of being served with the claim, or defandant's claim, as the case may be
Summons to Witness (Form 18A) r. 8.01(7)	Party	Personal service [r. 8.02]	
Notice of Garnishment (Form 20E) r. 8.01(8) r. 20.08(6) and Notice of Renewal of Garnishment (Form 20E.1)	Creditor	On the debtor together with a sworn Affidavit for Enforcement Request (Form 20P), and On the garnishee together with a Garnishee's Statement (Form 20F) by: • Personal service [r. 8.02]	On the debtor within 5 days of service on the garnishee

Document and Service Rule(s)	**Who Serves***	**How Service May be Made**	**Time for Service**
		• Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1]	
Notice of Termination of Garnishment (Form 20R) r. 20.08(20.2)	Creditor	On the garnishee and the clerk by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1]	Immediately after the amount owing under the order is paid
Garnishee's Statement (Form 20F) r. 20.08(13)	Garnishee	On creditor and debtor	
Notice of Garnishment Hearing (Form 20Q) r. 8.01(9) r. 20.08(15.1)	Party	On creditor, debtor, garnishee, co-owner of debt (if any) and any other interested persons by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1]	

Document and Service Rule(s)	**Who Serves***	**How Service May be Made**	**Time for Service**
Notice of Examination (Form 20H) r. 8.01(10), (11), (12) r. 20.10(3)	Creditor	On debtor (together with a blank Financial Information Form [Form 20I] if the debtor is an individual) by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03]	At least 30 days before the date fixed for the examination and filed with proof of service at least 3 days before date fixed for examination.
Notice of Contempt Hearing (Not a prescribed form, generated by the system) r. 8.01(13) r. 20.11(3), (6)	Creditor	On debtor by: • Personal service [r. 8.02]	Affidavit of Service filed at least 7 days before the date of the hearing.
"Amended" claim or defence r. 8.01(14) r. 12.01(2)	Party making amendment	On all parties including parties noted in default by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1] • Email [r. 8.08] On any newly added parties that have not been served with the amended claim previously by:	Filing and service at least 30 days before the originally scheduled trial date unless the court, on motion allows a shorter notice period or a clerk's order permitting the amendment is obtained under subrule 11.2.01(1).

Document and Service Rule(s)	**Who Serves***	**How Service May be Made**	**Time for Service**
		• Personal service [r. 8.02] • Alternative to personal service [r. 8.03]	
Notice to Co-owner of Debt (Form 20G) r. 20.08(14) r. 8.01(14)	Creditor	On co-owners of the debt by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1] • Email [r. 8.08]	
Notice of Discontinued Claim (Form 11.3A)	Plaintiff	On clerk and all defendants served with the claim by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1]	After time for filing defence has elapsed (and no defence is filed).
Notice of Motion and Supporting Affidavit (Form 15A) r. 15.01(3),(6 r. 8.01(14)	Party filing motion	Prior to Judgment: On every party who has filed a claim and any defendant who has not been noted in default, or After Judgment: On all parties, including those noted in default, by:	At least 7 days before the hearing. Filed with proof of service at least 3 days before the hearing date.

Document and Service Rule(s)	**Who Serves***	**How Service May be Made**	**Time for Service**
		• Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1] • Email [r. 8.08]	
Order on Motion made without Notice r. 15.03(2) r. 8.01(14)	Party obtaining order on motion without notice	On all affected parties by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1] • Email [r. 8.08]	Within 5 days after order signed
Other Documents r. 8.01(14)	Party	• Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1] • Email [r. 8.08]	
Request to Clerk (Form 9B) (for a terms of payment hearing) r. 8.01(14) r. 9.03(3)	Plaintiff	To defendant by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03]	Within 20 days after service of the defence

Document and Service Rule(s)	Who Serves*	How Service May be Made	Time for Service
		• Mail [r. 8.07] • Courier [r. 8.07.1] • Email [r. 8.08]	
Written Submissions (not a prescribed form) pursuant to r. 12.02(4)	A party who receives a copy of the plaintiff's or moving party's submission	On the plaintiff or on the request of any other party by: • Mail [r. 8.07(1)]	Within 10 days after the responding party receives written submissions from the plaintiff or moving party
Completed Financial Information Form (Form 20I) (for an examination hearing)	Person served with a Notice of Examination (where the debtor is an individual)	On the creditor requesting the examination hearing by: • Personal service [r. 8.02] • Alternative to personal service [r. 8.03] • Mail [r. 8.07] • Courier [r. 8.07.1] • Email [r. 8.08]	

Notes:

* Service by the party includes service by his or her representative.

8.4 — Service Chart — Staff

Generally when serving documents staff will not fax or courier documents.

Document and Service Rule(s)	Who Serves	How Service May be Made	Time for Service
Default Judgment (Form 11B) r. 11.02(3) r. 8.01(4)	Staff	On all parties named in the claim by; • Mail [r. 8.07] • Email [r. 8.08]	

Document and Service Rule(s)	**Who Serves**	**How Service May be Made**	**Time for Service**
r. 8.01(4.1)		• Email ([r. 8.01(4.1)] on the plaintiff) [applicable to online service pilot project only]	
Notice of Assessment Hearing (not a prescribed form, generated by the system) r. 11.03(4) r. 8.01(14)	Staff	On plaintiffs who requested the Assessment Hearing by; • Mail [r. 8.07] • Email [r. 8.08] • Courier [r. 8.07.1]	
Assessment Order set out in (Endorsement Record/Order of the Court) (not a prescribed form, generated by the system) r. 11.03(6) r. 8.01(5)	Staff	On the moving party if the party provides a stamped, self-addressed envelope with the notice of motion and supporting affidavit	
Notice of Terms of Payment Hearing (not a prescribed form, generated by the system) r. 9.03(4) r. 9.03(4.1)	Staff	On all parties by: • Mail [r. 8.07] • Email [r. 8.08]	Reasonable notice period after the date the request is served
Financial Information Form (Form 20I) r. 9.03(4.2) r. 9.03(4.1)	Staff	On the defendant(s) by: • Mail [r. 8.07] • Email [r. 8.08] (Debtor to also serve on creditor before hearing [r. 9.03(4.3)])	

Document and Service Rule(s)	**Who Serves**	**How Service May be Made**	**Time for Service**
The clerk shall serve on the defendant, together with the notice of terms of payment hearing, if the defendant is an individual.			
Dismissal Order(s) (not a prescibed form, generated by the system) r. 11.1.01(1) 1. r. 11.1.01(2) 1. r. 8.01(14)	Staff	For undefended actions on the plaintiffs by: • Mail [r. 8.07] • Email [r. 8.08] • Courier [r. 8.07.1] For defended actions on all parties by: • Mail [r. 8.07] • Email [r. 8.08] • Courier [r. 8.07.1]	
Notice that Claim (and/or Motion) May be Stayed or Dismissed (not a prescribed form, available on CSD website) r. 12.02(4)1	Staff	On plaintiff or moving party: • Mail [r. 8.07(1)]	Upon direction of the court.
Stay and/or Dismissal Order (Endorsement Record/Order of the court) (not a prescribed form) r. 12.02(5) r. 12.03(3)	Staff	On all parties to the action: • Mail [r. 8.07(1)]	As soon as possible after the order is made.
Written Submission (not a prescribed form) r. 12.02(4)4	Staff	On every other party to the action: • Mail [r. 8.07(1)]	Upon direction of the court.

Document and Service Rule(s)	**Who Serves**	**How Service May be Made**	**Time for Service**
Notice of Settlement Conference (not a prescribed form, generated by the system) r. 13.01(2) r. 13.02(4) r. 8.01(14)	Staff	On all parties by: • Mail [r. 8.07] • Email [r. 8.08] • Courier [r. 8.07.1]	
List of Proposed Witnesses (Form 13A) r. 13.01(2) r. 8.01(14)	Staff	On all parties by: • Mail [r. 8.07] • Email [r. 8.08] • Courier [r. 8.07.1]	List of proposed witnesses to be served with settlement conference notice [r. 13.01(2)].
Request for Clerk's Order on Consent (Form 11.2A) r. 11.2.01(2) r. 11.2.01(3) r. 8.01(14)	Staff	If granted, on the party that requests it and provides a stamped self-addressed envelope, by: • Mail [r. 8.07] • Email [r. 8.08] • Courier [r. 8.07.1] If refused on all parties by: • Mail [r. 8.07] • Email [r. 8.08] • Courier [r. 8.07.1]	
Notice to Set Action Down for Trial	Staff	On all parties by:	

Document and Service Rule(s)	**Who Serves**	**How Service May be Made**	**Time for Service**
(not a prescribed form, available on CSD website) r. 13.07 r. 8.01(14)		• Provide to all parties at or after the settlement conference together with the Settlement Conference Order (Endorsement Record/Order of the Court) • Mail [r. 8.07] • Email [r. 8.08] • Courier [r. 8.07.1]	
Notice of Trial (not a prescribed form, generated by the system) r. 16.01(1) r. 16.01(2)	Staff	On each party who has filed a claim or defence by: • Mail [r. 8.07] • Fax [r. 8.08]	After a settlement conference has been held and a party has requested that the clerk fix a date for trial and has paid the required fee
Termination of consolidation order (not a prescribed form, generated by the system) r. 20.09(11.1)	Staff	On creditors named in consolidation order by: • Mail [r. 8.07] • Email [r. 8.08]	
Warrant of Committal (Form 20J) r. 20.11(8)(b)	Staff	Forwarded to Police Services for execution of Warrant	
Settlement Conference Order (Endorsement Record/Order of the court) (not a prescribed form, generated by the system)	Staff	Provide to all parties at settlement conference, or mail or fax to all parties immediately after settlement conference • Mail [r. 8.07] • Email [r. 8.08]	At or after settlement conference

Document and Service Rule(s)	Who Serves	How Service May be Made	Time for Service
r. 13.05(5) r. 8.01(6)			

8.10 Failure to Receive Document — A person who has been served or who is deemed to have been served with a document in accordance with these rules is nevertheless entitled to show, on a motion to set aside the consequences of default, on a motion for an extension of time or in support of a request for an adjournment, that the document,

(a) did not come to the person's notice; or

(b) came to the person's notice only at some time later than when it was served or is deemed to have been served.

O. Reg. 461/01, s. 9(1)

Rule 9 — Defence

9.01 Defence — A defendant who wishes to dispute a plaintiff's claim shall, within 20 days of being served with the claim,

(a) serve on every other party a defence (Form 9A); and

(b) file the defence, with proof of service, with the clerk.

O. Reg. 461/01, s. 10 [s. 10(3) revoked O. Reg. 330/02, s. 7(2).]; 330/02, s. 7(1); 440/03, ss. 2, 5, item 6; 78/06, s. 17; 440/10, s. 2; 44/14, s. 5

Commentary: Effective July 1, 2014, defendants are required to serve their defence before filing it with proof of service. A defence may be served by mail, courier, fax, personally or by alternative service: rule 8.01(14).

If the defendant admits all or part of the amount (including interest) claimed by the plaintiff, this should be indicated in the relevant section on page 2 of the Defence (Form 9A), with a proposal for terms of payment of the admitted amount. Such an admission saves time and money in the case and triggers the procedure under rule 9.03.

The body of the defence should start by setting out those facts in the plaintiff's claim that are admitted, followed by those which are denied and those as to which the defendant has no knowledge.

The Defence should then set out the material facts on which the defendant relies in response to the Plaintiff's Claim. Material facts, as in the Plaintiff's Claim, are allegations which the defendant makes in response to the claim. It is not necessary, and it is generally undesirable, to plead the evidence on which the defendant relies, as this tends to result in an unduly lengthy Defence making it less clear to the court what the key elements of the defence position are.

The exception is documentary evidence. Where the defendant's position is based in whole or in part on a document, a copy of the document must be attached to the Defence unless the document is unavailable in which case the defence shall state the reason why it is unavailable: see rule 9.02(1)2. In addition to attaching the document, the Defence should also explain, in plain language, its importance to the defendant's position in response to the claim.

As a general rule of thumb, the body of a Defence (that is the section where the defendant sets out the factual position and allegations in response to the claim) should not need to be more than one to four pages in length (double-spaced with extra space between each numbered paragraph).

Occasionally defences which are drafted as flat denial of everything alleged in the Plaintiff's Claim are challenged on the basis of failure to set out a proper legal defence. However, under the modern law of pleadings, denial is a legally sufficient basis for a defence: *Patym Holdings Ltd. v. Michalakis*, 2005 BCCA 636, 2005 CarswellBC 3045, 48 B.C.L.R. (4th) 73, 21 C.P.C. (6th) 279, 220 B.C.A.C. 230, 362 W.A.C. 230, [2005] B.C.J. No. 2771 (B.C. C.A.); additional reasons 2006 BCCA 192, 2006 CarswellBC 936, 51 B.C.L.R. (4th) 254, 32 C.P.C. (6th) 218, 224 B.C.A.C. 157, 370 W.A.C. 157 (B.C. C.A.). Particularly given the flexible approach to pleadings in the Small Claims Court and the high incidence of self-represented parties, it will not generally be useful to try and hold defendants to a higher level of legal particularity in their pleadings at least in simple cases where the defendant denies all allegations but advances no positive defence. However, defendants are well-advised to avoid unparticularized bald denial defences as much as possible given they tend to give the impression of a lack of substance or sincerity and are unlikely to help the defendant's case.

The requirement under rule 9.02(2), subparagraph 1i, is to state the "reasons why the defendant disputes the plaintiff's claim, expressed in non-technical language with a reasonable amount of detail."

The Defence must be served on all other parties and then filed, with an Affidavit of Service and payment of the applicable filing fee.

In credit card claims and other simple debt claims, occasionally some self-represented defendants will plead that they cannot afford to pay the debt. In law, if money is owed pursuant to a contract, inability to pay the debt does not affect liability for that debt and is no defence. A defendant who has no defence other than inability to pay will be exposed to a larger adverse costs order if he or she causes wasted expense or a trial for no reason other than ability to pay. Questions of ability to pay should be addressed at a Terms of Payment hearing if the matter cannot be settled between the parties. Admitting all or part of the claim in the Defence with proposed terms of payment gives the plaintiff the option to request a Terms of Payment Hearing where that proposal is disputed. At the hearing, the parties can negotiate a settlement including a viable payment plan, or can have the court impose a judgment and payment plan if they cannot agree.

A Payment Plan gives the defendant the benefit of a stay of enforcement of the judgment so long as the payment plan is in good standing: see rule 20.02(2). In addition, where the claim never proceeds to a trial or assessment hearing, a representation fee under rule 19.04 is not available and therefore the defendant's potential liability for that cost is avoided.

A defendant who is unable to pay one or more debts may wish to consult a trustee in bankruptcy about the potential option to file a consumer proposal or assignment in bankruptcy. Depending on the person's specific financial circumstances, obtaining professional advice from a trustee may be a more practical step than trying to defend a simple debt claim to which there is no defence as a matter of law when the real problem is inability to pay. When a consumer proposal or bankruptcy is filed, a court claim against the person cannot continue and is instead handled by the trustee in bankruptcy.

9.02 (1) Contents of Defence, Attachments — The following requirements apply to the defence:

1. It shall contain the following information:

i. The reasons why the defendant disputes the plaintiff's claim, expressed in concise non-technical language with a reasonable amount of detail.

ii. If the defendant is self-represented, the defendant's name, address, telephone number and email address (if any).

iii. If the defendant is represented by a representative, the representative's name, address, telephone number, and email address (if any) and Law Society of Ontario registration number (if any).

2. If the defence is based in whole or in part on a document, a copy of the document shall be attached to each copy of the defence, unless it is unavailable, in which case the defence shall state the reason why the document is not attached.

(2) [Repealed O. Reg. 78/06, s. 19.]

O. Reg. 461/01, s. 11; 78/06, ss. 18, 19; 56/12, s. 2; 230/13, s. 12; CTR 12 FE 20 - 1; 108/21, s. 10

Case Law: *Patym Holdings Ltd. v. Michalakis*, 2005 CarswellBC 3045, 48 B.C.L.R. (4th) 73, 2005 BCCA 636, 21 C.P.C. (6th) 279, 220 B.C.A.C. 230, 362 W.A.C. 230 (B.C. C.A.).

No indication defendant trying to be intentionally evasive. Pleadings not improper. Statement of defence was one paragraph that generally denied allegations. Master struck statement of defence. Defendant appealed to a judge. Appeal dismissed. The defendant appealed to the Court of Appeal. Appeal allowed.

Canadian Imperial Bank of Commerce v. Murphy, 2006 CarswellNB 108, 294 N.B.R. (2d) 194, 765 A.P.R. 194, 2006 NBQB 69 (N.B. Q.B.).

Application by plaintiff to strike out defence as not disclosing a reasonable defence and for judgment allowed. Defendants did not deny they owed money to plaintiff. Fact that they did not have money not a defence and was insufficient to deny the plaintiff judgment. Plain and obvious that the defence did not disclose a reasonable defence.

De Shazo v. Nations Energy Co., 2006 CarswellAlta 1716, 2006 ABCA 400, 401 A.R. 142, 391 W.A.C. 142, 36 C.P.C. (6th) 190, 68 Alta. L.R. (4th) 57, 276 D.L.R. (4th) 559 (Alta. C.A.).

One of the defendants brought application for summary judgment dismissing action. Before application heard, plaintiff filed discontinuance of action. Application judge held that plaintiff's right to discontinue action subject to overriding fairness to all parties, which the court can police under its inherent jurisdiction. Court granted summary judgment. The plaintiff appealed. Appeal dismissed.

Glover v. Leakey, 2018 BCCA 56, 2018 CarswellBC 313, 7 B.C.L.R. (6th) 1, 13 C.P.C. (8th) 221, 420 D.L.R. (4th) 422, 21 M.V.R. (7th) 21, [2018] 9 W.W.R. 593 (B.C. C.A.), per Willcock J.A.

An admission of liability in an action is not a formal admission binding the party making it in a subsequent action relating to the same accident, only evidence in the second action to attribute such weight as the Court decides. It is not necessarily an abuse of process for the defendant who admits liability in one action to deny it in another one relating to the same accident.

9.03 (1) Admission of Liability and Proposal of Terms of Payment — A defendant who admits liability for all or part of the plaintiff's claim but wishes to arrange terms of payment may in the defence admit liability and propose terms of payment.

(2) Where No Dispute — If the plaintiff does not dispute the proposal within the 20-day period referred to in subsection (3),

(a) the defendant shall make payment in accordance with the proposal as if it were a court order;

(b) the plaintiff may serve a notice of default of payment (Form 20L) on the defendant if the defendant fails to make payment in accordance with the proposal; and

(c) the clerk shall sign judgment for the unpaid balance of the undisputed amount on the filing of an affidavit of default of payment (Form 20M) by the plaintiff swearing,

(i) that the defendant failed to make payment in accordance with the proposal,

(ii) to the amount paid by the defendant and the unpaid balance, and

(iii) that 15 days have passed since the defendant was served with a notice of default of payment.

(3) Dispute — The plaintiff may dispute the proposal within 20 days after service of the defence by filing with the clerk and serving on the defendant a request to clerk (Form 9B) for a terms of payment hearing before a referee or other person appointed by the court.

(4) The clerk shall fix a time for the hearing, allowing for a reasonable notice period after the date the request is served, and serve a notice of hearing on the parties.

(4.1) Manner of Service — The notice of hearing shall be served by mail or email.

(4.2) Financial Information Form, Defendant an Individual — The clerk shall serve a financial information form (Form 20I) on the defendant, together with the notice of hearing, if the defendant is an individual.

(4.3) Where a defendant receives a financial information form under subrule (4.2), he or she shall complete it and serve it on the creditor before the hearing, but shall not file it with the court.

(5) Order — On the hearing, the referee or other person may make an order as to terms of payment by the defendant.

(6) Failure to Appear, Default Judgment — If the defendant does not appear at the hearing, the clerk may sign default judgment against the defendant for the part of the claim that has been admitted and shall serve a default judgment (Form 11B) on the defendant in accordance with subrule 8.01(4).

(6.1) [Repealed O. Reg. 78/06, s. 20(5).]

(7) Failure to Make Payments — Unless the referee or other person specifies otherwise in the order as to terms of payment, if the defendant fails to make payment in accordance with the order, the clerk shall sign judgment for the unpaid balance on the filing of an affidavit by the plaintiff swearing to the default and stating the amount paid and the unpaid balance.

O. Reg. 461/01, s. 12 [s. 12(2) revoked O. Reg. 330/02, s. 8(2); s. 12(4) revoked 330/02, s. 8(4).]; 330/02, s. 8(1), (3); 440/03, s. 5, item 7; 78/06, s. 20; 108/21, s. 11

Commentary: A defendant can serve and file a Defence in which all or part of the plaintiff's claim is admitted, along with a proposal for terms of payment such as a fixed monthly amount for a specified number of months starting on a specified date (see page 2 of Form 9A). Rule 9.03 creates a simple procedure for terms of payment proposals to either be accepted or disputed by the plaintiff.

A plaintiff who wishes to accept the terms of payment proposal does not need to file anything with the court to do so. After 20 days from service of the Defence, the proposed terms of payment are deemed to be accepted and subrule 9.03(2) applies. The defendant shall then make the payments as if there was a court order to make them in accordance with the terms of payment.

If the defendant defaults on the accepted terms of payment, the plaintiff can serve a Notice of Default of Payment (Form 20L). As the Notice states, this gives the defendant 15 days to negotiate agreement with the plaintiff to remedy the default and/or for the plaintiff to waive the default. If no such agreement is reached the plaintiff may seek default judgment for the unpaid balance under rule 9.03(2)(c) by filing an Affidavit of Default of Payment (Form 20M).

If the plaintiff wishes to dispute the terms of payment proposed in the Defence, then under rule 9.03(3), within 20 days of service of the Defence, the plaintiff must serve and file a Request to Clerk (Form 9B) to request a Terms of Payment Hearing. The clerk then schedules the hearing and sends a Notice of Hearing to the parties and a Financial Information Form (Form 20L) to the defendant if the defendant is an individual.

The defendant must complete the Financial Information Form and give a copy to the plaintiff before the hearing.

At the Terms of Payment Hearing the court expects the Financial Information Form to have been properly completed and provided to the plaintiff, and expects the parties or representatives to have made good faith efforts to settle the matter before the hearing proceeds. Discussions should occur before the day of hearing but often they happen in the courthouse before the session commences.

If the matter is settled the parties will report the fact and terms of settlement to the presiding judge and request the appropriate order.

If the parties are unable to settle, they will have to briefly each address the judge to state their respective positions on what they each want the court to order and why. The most obvious and frequently seen options are (i) judgment on the amount that is admitted, with a payment plan imposed by the court after hearing submissions; or (ii) where the entire claim is admitted but no payment plan appears workable, judgment for the plaintiff, leaving payment arrangements for further discussion between the parties and/or formal enforcement under Rule 20 such as by way of a judgment-debtor examination at a later date. The latter option produces a final order so that the matter need not proceed to a settlement conference or trial, and leaves the option for a payment plan to be agreed or ordered to a later date.

Where the Defence contains an admission of only part of the claim, some defendants have argued that the effect of rule 9.03 is to dispose of the disputed part of the claim if the plaintiff does not request a Terms of Payment Hearing within the 20 days under subrule 9.03(3). For example, if the plaintiff claims $3,000 and the Defence contains an admission of $300 with proposed terms of payment which the plaintiff does not dispute, the claim for the $2,700 balance, so it has been argued, is effectively dismissed. This interpretation is in error.

Such an interpretation of the rule may accord with wishful thinking on a defendant's part but is inconsistent with the terms and purpose of rule 9.03 and would be unfair to plaintiffs: see *Law Society of Ontario v. Goodman*, 2020 ONLSTH 101.

Nothing in subrule 9.03(2) says that part of the plaintiff's claim will be dismissed or deemed dismissed if the plaintiff does not dispute proposed terms of payment where only part of the amount claimed is admitted. Subrule 9.03(2)(a) merely directs that where the plaintiff does not dispute the proposal within the 20 days, "the defendant shall make payment in accordance with the proposal as if it were a court order" — meaning an order for payment of the admitted part of the claim. By its terms rule 9.03 does not dispose of the portion of the plaintiff's claim that is not admitted by the defendant. That portion of the claim is left to proceed in the normal course to a settlement conference and trial. This conclusion is confirmed by rule 13.01(4) which provides that there is no need for a settlement conference if the Defence "contains an admission of liability for all of the plaintiff's claim". If part of the claim is not admitted, a settlement conference is required.

If parties disagree over the effect of rule 9.03(2) on the disputed part of a claim where the plaintiff does not dispute the proposed terms of partial payment, it would in any event be open to the court to simply extend time for the plaintiff to request a Terms of Payment Hearing, or waive the requirement to do so as occurred in *Cumming v. Miceli Estate*, [2006] O.J. No. 1204 (Sm. Ct. Ct.).

Rule 10 — Defendant's Claim

Commentary: The Defendant's Claim in Small Claims Court is an amalgamation of counterclaims, crossclaims, and third party and subsequent party claims as they are known under the *Rules of Civil Procedure*. All of those claims are called Defendant's Claims under Rule 10 of the *Small Claims Court Rules*.

A Defendant's Claim (Form 10A) is issued by the clerk in the same way as a Plaintiff's Claim, and is given a court file number that is the same as that of the Plaintiff's Claim only with a "D1" added (and if there are multiple Defendant's Claims in the same proceeding, "D2", "D3" and so on): see rule 10.01(6).

The Defendant's Claim must be served personally or by alternative service (rule 8.01(1)), although if the defendant to the defendant's claim is a plaintiff, the plaintiff or the plaintiff's representative may simply accept service informally and file a defence without the need for formal service.

A Defence to a Defendant's Claim uses the same form (Form 9A) as a Defence to a Plaintiff's Claim. The time for defence is 20 days after service of the Defendant's Claim, and the defence must be both served and filed with proof of service within that 20 days: rule 10.03.

Where a defendant to a Defendant's Claim is not already a plaintiff or defendant, but is a third party, that third party may defend the Defendant's Claim and in addition may elect to defend the Plaintiff's Claim. Where that is done, the third party has the right at trial to dispute the Plaintiff's Claim as against the defendant who issued the Defendant's Claim: rules 10.03 & 10.04(3).

10.01 (1) Defendant's Claim — A defendant may make a claim,

(a) against the plaintiff;

(b) against any other person,

(i) arising out of the transaction or occurrence relied upon by the plaintiff, or

(ii) related to the plaintiff's claim; or

(c) against the plaintiff and against another person in accordance with clause (b).

Case Law: *Wellisch v. Duerrschnabel* (1988), 14 W.D.C.P. 222 (Ont. Prov. Ct.).

An action for $2,802.72 was transferred to the Ottawa Small Claims Court without notice to the third party. The third party objected, by motion, to exposure to a damage claim having a potential of $2800 when the monetary jurisdictional limit in Ottawa was $1,000. The court declined jurisdiction in both the main action and the third party claim.

London Motor Products Ltd. v. Smith (1993), 4 W.D.C.P. (2d) 460 (Ont. Sm. Cl. Ct.).

The Small Claims Court rules do not require a defendant that wishes to add a third party to establish that the addition of the third party will resolve an issue between the plaintiff and the defendant.

To Optimize The Environment Inc. v. Canada Cart Inc. (January 9, 1998), Doc. 94-CU-77754 (Ont. Gen. Div.).

Leave to issue third party proceedings not granted where trial was imminent, and plaintiff would be prejudiced by delay. Defendant aware of nature of third party's involvement at examinations for discovery two years before.

Métivier v. Toulon Development Corp., 2002 CarswellNB 110, 2002 NBBR 89 (N.B. Q.B.).

Defendant granted extension for filing third party notice. Plaintiff should not be prejudiced as to trial date. Third party proceedings could only be heard together with main action if ready for trial on date already set for main action.

Pilot Pacific Developments Inc. v. Albion Securities Co., 2002 CarswellBC 648, 2002 BCSC 372 (B.C. S.C.).

Defendants in this action were plaintiffs in first action. Defendants claimed equitable set-off against first action on Promissory Note. Equitable claim related to merits of first action. Court ordered stay of further proceedings pursuant to counterclaim pending determination of trial of other issues raised in two proceedings.

Poche v. Henkel, 2004 CarswellSask 858, 2004 SKPC 127 (Sask. Prov. Ct.).

Tort of abuse of process requires defendant to have used legal process for collateral or illicit purpose. See *Norman v. Soule*, 1991 CarswellBC 801, 7 C.C.L.T. (2d) 16 (B.C. S.C.). Judgment to Henkel. Claim dismissed.

Wilkings v. Velocity Group Inc. (2008), 2008 CarswellOnt 1665, 55 C.P.C. (6th) 321, 235 O.A.C. 30, 89 O.R. (3d) 751 (Ont. Div. Ct.).

The appellant defendants brought a motion for an order compelling the corporate plaintiffs to post security for costs of the underlying action on the basis that they had insufficient assets in Ontario. Appeal allowed.

The existence of a counterclaim raising the same issues as the defence to the initiating plaintiff's claim is a relevant fact to be considered in the exercise of discretion when considering whether to order security for costs against the plaintiff by counterclaim. However, the fact of a counterclaim should not be a relevant factor for consideration by the court in exercising discretion in respect of a motion for security for costs against an initiating plaintiff in the main action. The motion judge erred in relying on the fact that the defence to the counterclaim was closely related to the statement of claim in the main action. Assuming that such a close relationship did, in fact, exist, it was not a relevant factor in determining whether or not the initiating plaintiffs should post security for costs.

In *Beckford v. Bathia*, 2016 ONSC 5115, 2016 CarswellOnt 12973 (Ont. S.C.J.), the plaintiff sued the defendant, Bathia, for damages arising from a motor vehicle accident. The defendant then commenced a third party claim against the Ministry of Transportation of Ontario (MTO) and alleged that dust and/or debris was present in the laneway and caused and/or contributed to the accident. The MTO then issued a fourth party claim against its contractor Brennan Paving & Construction Ltd. (Brennan) as the MTO has retained Brennan to perform maintenance and general repair work to the highway.

The Court addressed the Court of Appeal for Ontario's decision of *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 2014 CarswellOnt 7670, 120 O.R. (3d) 438, 322 O.A.C. 322, [2014] O.J. No. 2745 (Ont. C.A.), where it was held that summary judgment was appropriate when it would lead to a fair and just result and would serve the goals of timeliness, affordability and proportionality *in light of the litigation as a whole*.

As the defendant failed to lead independent evidence to support his allegations of negligence beyond the defendant's evidence and as his evidence was found to not be credible, summary judgment was granted on behalf of the MTO and Brennan and the dismissal of the third and fourth party claims was granted.

Siket v. Milczek, 1993 CarswellOnt 489, 23 C.P.C. (3d) 204, [1993] O.J. No. 3161 (Ont. Gen. Div.); additional reasons 1994 CarswellOnt 3665, [1994] O.J. No. 1963 (Ont. Gen. Div.).

Third party claim. Rule 29.02 of the Rules of Court Procedure provides time constraints for when third party claims must be issued: within ten days after the delivery of the statement of defence, within ten days after the plaintiff delivers a reply in the main action, or at any time after this, either with the plaintiff's consent or with leave of the court. Leave must be granted according to the Rule, unless the plaintiff would be prejudiced thereby, which the court has interpreted as needing to be "more than mere inconvenience." Examples include when examinations for discovery have long been completed or when the trial for the matter is imminently approaching and the addition of a third party claim would cause an inordinate delay to same.

Blue Canty v. B & B Environmental Services Ltd., [2020] N.B.J. No. 125.

Appeal by defendant solicitors from decision refusing addition of a third party. A former client, B & B Environmental Services Ltd., sued the appellants for damages for professional negligence. The appellants moved to commence a third-party claim against Scotiabank on the basis that any damages were recoverable against Scotiabank. The motion judge found no issue in the present action to which Scotiabank should be bound. The solicitors appealed.

Appeal allowed. Both actions involved the same set of transactions, with common issues of damages and Scotiabank's negligence.

(2) The defendant's claim shall be in Form 10A and may be issued,

(a) within 20 days after the day on which the defence is filed; or

(b) after the time described in clause (a) but before trial or default judgment, with leave of the court.

Case Law: *Jones v. Craig* (June 8, 2009), Doc. 712/08, 712D1/08 and 1337/08, [2009] O.J. No. 2365 (Ont. Sm. Cl. Ct.).

While the point may not be free from doubt, rule 10.01(2)(b) does not appear to contemplate leave to issue a defendant's claim being granted after a trial has started but before it is completed. In this case leave was requested on the third day of trial, and was denied.

(3) Copies — The defendant shall provide a copy of the defendant's claim to the court.

(4) Contents of Defendant's Claim, Attachments — The following requirements apply to the defendant's claim:

1. It shall contain the following information:

i. The full names of the parties to the defendant's claim and, if relevant, the capacity in which they sue or are sued.

ii. The nature of the claim, expressed in concise non-technical language with a reasonable amount of detail, including the date, place and nature of the occurrences on which the claim is based.

iii. The amount of the claim and the relief requested.

iv. If the defendant is self-represented, the defendant's name, address, telephone number and email address (if any).

v. If the defendant is represented by a representative, the representative's name, address, telephone number, email address (if any) and Law Society of Ontario registration number (if any).

vi. The address where the defendant believes each person against whom the claim is made may be served.

vii. The court file number assigned to the plaintiff's claim.

2. If the defendant's claim is based in whole or in part on a document, a copy of the document shall be attached to each copy of the claim, unless it is unavailable, in which case the claim shall state the reason why the document is not attached.

(5) [Repealed O. Reg. 78/06, s. 21(4).]

(6) Issuance — On receiving the defendant's claim, the clerk shall immediately issue it by dating, signing and sealing it, shall assign it the same court file number as the plaintiff's claim and shall file it in the court file.

(7) [Repealed O. Reg. 78/06, s. 21(4).]

(8) [Repealed O. Reg. 78/06, s. 21(4).]

O. Reg. 461/01, s. 13 [s. 13(5) revoked O. Reg. 330/02, s. 9(2).]; 330/02, s. 9(1); 440/03, s. 3; 78/06, s. 21; 56/12, s. 3; 230/13, s. 13; CTR 12 FE 20 - 1; 108/21, s. 12; 249/21, s. 4

10.02 Service — A defendant's claim shall be served by the defendant on every person against whom it is made, in accordance with subrules 8.01(1) and (2).

10.03 Defence — A party who wishes to dispute the defendant's claim or a third party who wishes to dispute the plaintiff's claim shall, within 20 days after service of the defendant's claim,

(a) serve on every other party a defence (Form 9A); and

(b) file the defence, with proof of service, with the clerk.

O. Reg. 461/01, s. 14 [s. 14(3) revoked O. Reg. 330/02, s. 10(2).]; 330/02, s. 10(1); 440/03, ss. 4, 5, item 8; 78/06, s. 22; 44/14, s. 6

Commentary: By virtue of rule 10.05(1), the *Small Claims Court Rules* apply to a defence to a defendant's claim as if it were a defence to a plaintiff's claim. Therefore, the requirements for a defence to a defendant's claim are defined by rule 9.02.

Where the party sued by defendant's claim is not a plaintiff, that party is a third party. If the defendant's claim seeks to make the third party liable for all or part of the plaintiff's claim, then under rule 10.03 that third party (defendant to the defendant's claim) has the right to contest the plaintiff's claim at trial but only if that third party has filed a defence to the plaintiff's claim under rule 10.04(3).

10.04 (1) Defendant's Claim to be Tried with Main Action — A defendant's claim shall be tried and disposed of at the trial of the action, unless the court orders otherwise.

(2) Exception — If it appears that a defendant's claim may unduly complicate or delay the trial of the action or cause undue prejudice to a party, the court may order separate trials or direct that the defendant's claim proceed as a separate action.

(3) Rights of Third Party — If the defendant alleges, in a defendant's claim, that a third party is liable to the defendant for all or part of the plaintiff's claim in the action, the third party may at the trial contest the defendant's liability to the plaintiff but only if the third party has filed a defence in accordance with subrule 10.03(1).

O. Reg. 78/06, s. 23

Commentary: As a general rule a defendant's claim will be tried at the same time as the trial of the plaintiff's claim. This could mean trial together or separate trials heard one after the other. In practice trial together is far more common, and more economical, but the parties and the trial judge should consider at or before the start of trial what mode of trial is more appropriate for the particular case. In any event the trial judge should generally indicate to the parties the court's intention even if a ruling has not been requested and invite submissions if appropriate before determining whether it will be trial together or trial one after the other. Failure to do so could result in difficulty if a party has held back evidence based on an erroneous assumption that a second opportunity to present evidence will be offered.

For example, if the defendant's claim is a counterclaim against the plaintiff, some defendants may wrongly assume that there will be a separate hearing of his or her counterclaim after the hearing of the plaintiff's claim. It is incumbent on the trial judge to clarify, before trial gets underway, how the claims will be heard so as to dispel any risk of misunderstanding, particularly with self-represented parties. In most cases in Small Claims Court, it will be entirely fair and sensible to encourage or require the parties to lead all their respective evidence in a single presentation, without the need for the plaintiff to reserve any separate evidence in defence of the counterclaim for presentation after the defendant's evidence. In any event, any potential misunderstanding should be avoided.

Case Law: *Seaside Chevrolet Oldsmobile Ltd. v. VFC Inc.*, 2005 CarswellNB 397, 2005 NBQB 233, 22 C.P.C. (6th) 374, 761 A.P.R. 61, 292 N.B.R. (2d) 61 (N.B. Q.B.).

Clerk of Small Claims Court refused to allow a third party (Seaside) to file a fourth-party claim. The parties agreed case not complex. Seaside applied to transfer action to Court of Queen's Bench.

Court denied application, matter with the addition of a fourth-party claim within the jurisdiction of the Small Claims Court.

Zurich Insurance Co. v. Precision Surfacing Ltd., 2007 CarswellAlta 503, 2007 ABQB 252, 73 Alta. L.R. (4th) 326 (Alta. Q.B.).

Application to set aside third-party notice. Triable issue existed as whether third party owed defendant duty to inform during dispute resolution. No prejudice which was not compensable in costs to plaintiff or third party would be triggered by inclusion of third-party claim.

Cameron v. Equineox Technologies Ltd., 2009 BCSC 221, 66 C.P.C. (6th) 361, 2009 CarswellBC 436 (B.C. S.C. [In Chambers]).

Defendant brought third party claim against company. Company applied for order striking out third party notice. Application dismissed. Third party claim did not lie against company for allegation of negligent supervision, which could be raised directly against plaintiff as contributory negligence.

Strata Plan LMS 3851 v. Homer Street Development Ltd. Partnership, 2011 BCSC 1127, 2011 CarswellBC 2167, 8 C.L.R. (4th) 186 (B.C. S.C.).

Third party procedure. The proposed amendments to amended third party notice were insufficient to set out a reasonable claim against any of the third parties with respect to defects, and the amendments in present form on that issue were denied.

10.05 (1) Application of Rules to Defendant's Claim — These rules apply, with necessary modifications, to a defendant's claim as if it were a plaintiff's claim, and to a defence to a defendant's claim as if it were a defence to a plaintiff's claim.

(2) Exception — However, when a person against whom a defendant's claim is made is noted in default, judgment against that person may be obtained only in accordance with rule 11.04.

(3) Exception, Electronic Filing and Issuance — Despite subrule (1), rules 1.05.3 and 1.05.4 do not apply to a defendant's claim as if it were a plaintiff's claim.

O. Reg. 56/08, s. 2; 44/14, s. 7; 249/21, s. 5

Rule 11 — Default Proceedings

11.01 (1) Noting Defendant in Default — If a defendant to a plaintiff's claim or a defendant's claim fails to file a defence to all or part of the claim with the clerk within the prescribed time, the clerk may note the defendant in default on the filing of,

(a) a request to note the defendant in default, which may be made in Form 9B; and

(b) proof that the claim was served within the court's territorial division, subject to subrule (3).

(1.1) [Repealed O. Reg. 249/21, s. 6(1).]

(2) Leave Required for Person under Disability — A person under disability may not be noted in default under subrule (1), except with leave of the court.

Commentary: Rule 11 provides a procedure to pursue a judgment against one or more defendants who, although served with a claim (whether Plaintiff's Claim or Defendant's Claim), fail to deliver a Defence within the prescribed time. Such a judgment is known as a default judgment.

The prerequisite to proceeding to default judgment against a defendant is proper service of the claim under Rule 8. The time for service and filing of a Defence is 20 days after the date service was effective. While personal service is effective immediately, other methods of service may require counting the days before service is effective, before the 20-day period starts to run. See Rule 8, Rule 3.01, and the chart under rule 3.01 above, entitled Effective Dates for Various Methods of Service, for the calculation of days.

Noting in default can be done immediately after the 20 days have expired. However, it is generally neither necessary nor desirable for plaintiffs to note default so quickly, given the chance that a defendant is simply late through inadvertence. Better to avoid an otherwise unnecessary motion to set aside the noting in default. Often the plaintiff is well-advised to remind the defendant in writing that a Defence is overdue and give some additional time if there is no legal urgency. A Defence can be filed after the 20 days has expired if default has not yet been noted.

Once the decision to note default is taken, the plaintiff initiates that step by filing a Request to Clerk (Form 9B) and an affidavit of service (Form 8A). If the defendant was served outside the territorial jurisdiction where the claim was commenced, the plaintiff must also prove that the action was properly brought in that territorial jurisdiction by filing an Affidavit for Jurisdiction (Form 11A). See Rule 6 dealing with the territorial jurisdiction(s) where a claim may be commenced.

Noting a defendant in default formally recognizes that the defendant has chosen not to participate or has failed to participate in the action. After default is noted, the defendant can still deliver a Defence either (i) with the plaintiff's consent under rule 11.05(1); (ii) with a clerk's order on consent under rule 11.2.01(1); or (iii) with or without consent, by order of a judge on motion under rule 11.06.

Having noted a defendant in default, the second step in a default proceeding is to seek default judgment. This can be sought either from the clerk or from a judge depending on the nature of the claim. The difference between debts and other liquidated claims, on the one

hand, and unliquidated claims on the other, determines the correct route for default judgment.

A default judgment on a claim for a debt or liquidated demand in money can be granted by the clerk under rule 11.02, but only in a Plaintiff's Claim (see rule 11.04). The plaintiff's Request to Clerk (Form 9B) to note default can be filled out to also request that default judgment be issued by the clerk, and the plaintiff must also file the requested Default Judgment (Form 11B).

If the claim is not for a debt or liquidated demand in money, or if the claim is a Defendant' Claim, the clerk lacks jurisdiction to grant default judgment and the request must be made to a judge. This usually done by motion in writing under rule 11.03, after the plaintiff first has the defendant noted in default by the clerk. However rule 11.03 only applies if "all defendants have been noted in default"; if a Defence has been filed by any of the defendants.

If the claim is also against one or more defendants who have filed a defence, rule 11.03(7) prevents a motion for default judgment against the defendant in default and requires that the claims proceed together to a settlement conference and if the defended claims are not settled, to trial: see *Belair Insurance Co. v. Dias*, 2013 CarswellOnt 1806, 47 C.P.C. (7th) 160 (Ont. S.C.J.).

Whether a claim is for a debt or liquidated demand in money depends on how the claim is pleaded in the Plaintiff's Claim or Defendant's Claim. Perhaps the simplest illustration of the concept is found in *Holden Day Wilson v. Ashton*, 1993 CarswellOnt 1834, 14 O.R. (3d) 306, 104 D.L.R. (4th) 266, 64 O.A.C. 4, [1993] O.J. No. 1195 (Ont. Div. Ct.). The plaintiff law firm sued for unpaid invoices for legal services rendered, which is a debt. The appellate court held that such a claim could qualify for a clerk's default judgment but only if the amount claimed (including interest if claimed at a contractual rate) was on the basis of a set of fixed charges or was ascertainable by reference to an agreed basis of calculation in the terms of retainer, and if those particulars were pleaded in the Plaintiff's Claim. In that case the pleading merely claimed the unpaid amount of an invoice and therefore lacked the necessary particulars to fall within the clerk's jurisdiction.

A claim is liquidated if the amount owing can be ascertained by the contract itself or fixed by a scale of charges agreed within or implied by the terms of contract. Subject to the requirement to be pleaded with sufficient particulars of the agreed calculation of amounts payable, examples of liquidated claims are as follows:

- Claim for balance due on loan, credit card or line of credit
- Unpaid accounts for professional and other services rendered

Examples of unliquidated claims which must be assessed by a judge are as follows:

- Claims of negligence
- Restitution claims
- General damages claims (unless ascertained through fixed charges or calculation agreed by contract)
- Aggravated or mental distress damages
- Punitive damages
- Claims of director liability or vicarious liability
- Claims for contribution or indemnity

If a claim is partly for a liquidated amount but also includes unliquidated claims, rule 11.02(3) suggests that a clerk's default judgment can be obtained for the liquidated portion and the "remainder of the claim" and any claims against defendants who have filed a defence can proceed to trial.

(3) Service Outside Territorial Division — If all the defendants have been served outside the court's territorial division, the clerk shall not note any defendant in default until it is proved by an affidavit for jurisdiction (Form 11A) filed with the clerk, or by evidence presented before a judge, that the action was properly brought in that territorial division.

(4) [Repealed O. Reg. 249/21, s. 6(3).]

O. Reg. 78/06, s. 24; 44/14, s. 8; 249/21, s. 6

11.02 (1) Default Judgment, Plaintiff's Claim, Debt or Liquidated Demand — If a defendant has been noted in default, the clerk may sign default judgment (Form 11B) in respect of the claim or any part of the claim to which the default applies that is for a debt or liquidated demand in money, including interest if claimed.

Commentary: *Solicitor's Accounts*: If a claim involves an action to recover unpaid legal fees, the right to prejudgment interest is governed by section 33 of the *Solicitors Act*.

- A solicitor has no entitlement to prejudgment interest if the rate of interest is not shown on the account delivered to the defendant. It is not sufficient to state "interest in accordance with section 33 of the *Solicitors Act*";
- Where a rate is shown on the account, it will be the applicable rate of prejudgment interest as long as it does not exceed the rate permitted by the *Courts of Justice Act*;
- The rate of prejudgment interest is the rate in effect on the date that the account was delivered to the defendant by the solicitor; and
- If the parties have agreed to a contractual rate, the contractual rate will apply.

It is the responsibility of the claimant to seek prejudgment interest in the claim and insert the full amount of interest. It is the responsibility of the claimant to calculate the amount of post-judgment interest owing.

A solicitor who has obtained a judgment for unpaid legal fees is entitled to post-judgment interest pursuant to section 129 of the *Courts of Justice Act*, even if there is no mention of it in the account delivered to the defendant(s).

Where the plaintiff seeks to obtain a default judgment in the Superior Court of Justice on a claim that is within the monetary jurisdiction of the Small Claims Court, the registrar shall assess costs in accordance with that court's tariff [r. 57.05(03)].

Default Judgment Scenarios

In each, assume that:

a. it is not against a party under disability (or leave of a judge has been obtained);

b. it is not against a defendant to a cross-claim who has been noted in default;

c. it is not against a third party claim in a third party claim who has been noted in default;

d. no Defence is filed;

e. Affidavit of Service filed complies with applicable rules of service;

f. the defendant has been noted in default;

g. The Crown in right of Ontario is not a party (or leave of the court has been obtained); and

h. Her Majesty the Queen in right of Canada is not a party (or leave of the court has been obtained).

The clerk can sign default judgment because the claim is for:

- a debt or liquidated demand in money, including interest if claimed in the statement of claim;
- recovery of possession of land;
- recovery of possession of personal property; or
- foreclosure, sale or redemption of a mortgage.

A liquidated claim is a claim for a sum of money due under an express agreement where the amount is fixed and does not depend on any subsequent evaluation by the court. An unliquidated claim is a claim where the amount in dispute is not fixed and the court must determine the amount that the plaintiff is entitled to receive.

SCENARIO 1: Person A makes a verbal agreement with Person B for the restoration of an automobile for $30,000. The automobile is restored. Person B sends to Person A an invoice for $30,000 which is not paid and subsequently Person B makes a claim for $30,000, attaching a copy of the invoice.

A: This is a liquidated claim. Person A obligated himself to pay Person B a specific sum of money for the restoration of the automobile. Person A neither paid for the restoration nor filed a defence denying that the repairs were made.

SCENARIO 2: Person A makes a verbal agreement with Person B to repair a motorcycle. Person B makes the repairs and is paid $12,000 by Person A. Person A makes a claim stating that the repairs are faulty and seeks the full return of his payment.

A: This is an unliquidated claim. The court must assess the value of the repairs done in order to arrive at a final figure owing to the plaintiff.

SCENARIO 3: Person A rents a house to Person B for $3,500 per week. There is no lease or other written agreement. For six months the cash payments are made each Friday. Person B does not make the payment for 3 weeks (although he promises he will do so) and then vacates the house. Person A subsequently makes a claim for the unpaid rental amount of $10,500. No supporting documentation is attached to the claim.

A: This is a liquidated claim. Person B obligated himself to pay Person A for rental of the house pursuant to a verbal agreement. The amount of the claim is capable of being ascertained as a simple arithmetical calculation (*i.e.*, $3,500 x 3 weeks). There is no general requirement to attach supporting documentation to a claim unless the claim is specifically based on a document.

SCENARIO 4: Person A sees Person B's son throwing garbage into Person A's well. Person B offers to repair the well. Person A repairs it herself and pursues a claim against Person B for the cost of materials plus hourly rate for performing the repairs.

A: This is an unliquidated claim. Person B did not obligate himself to pay a specific sum of money for the repairs of the well. A judge would be required to determine whether the amount claimed for the repairs was reasonable in the circumstances.

SCENARIO 5: Person A repairs person B's car under a verbal agreement. Person B pays for the cost of the repairs by cheque, which is dishonoured and returned by the bank marked "NSF." Person A makes a claim for recovery of the amount of the NSF cheque and associated bank charges and attaches a copy of the returned cheque including the statement of charges.

A: This is a liquidated claim. The amount of the claim is fixed and verified by the returned cheque and statement of charges.

SCENARIO 6: Lawyer A files a claim against Person B for an unpaid legal account.

A: Lawyers' accounts can be considered liquidated claims, and default judgment can be signed if the claim or appended material indicates that:

- the legal account is for a fixed amount or fixed estimated amount and that the amount was agreed upon in advance; *OR*
- the legal account is capable of mathematical calculation based upon an hourly rate and number of hours worked, and the hourly rate was agreed to in advance.

It is not sufficient for the claim to simply state that the lawyer was retained and to append an account; the claim and appended material (if any) must show how the account was arrived at. If insufficient information were available to determine the fixed amount owing, or to make a mathematical calculation, the plaintiff would be required to make a motion to a judge to obtain judgment.

SCENARIO 9: Person A paid Person B in advance to renovate his kitchen. A signed contract with details of the work agreed upon to be done is attached to the claim. Person A makes a claim against Person B for failing to renovate Person A's home according to the terms of the contract.

A: This is an unliquidated claim. The amount of the claim would depend on a subsequent valuation by the court. Evidence would be required to determine the value of the renovations completed.

Case Law: *Eades v. Kootnikoff* (1995), 13 B.C.L.R. (3d) 182 (S.C.).

Whether a claim can be identified as a "liquidated demand" such that, upon default of appearance, final judgment may be taken for the amount of the claim depends upon whether the amount to which the plaintiff is entitled can be ascertained from the contract itself or by calculation or fixed by a scale of charges agreed upon by the contract or implied by it. Some lawyers' accounts for legal services may be liquidated demands and others may not. Where the pleadings do not claim that there was an agreement as to the amount the lawyer was to be paid or as to the method of calculation of the lawyer's fee, a lawyer's claim for legal services is not a liquidated demand. *Holden Day Wilson v. Ashton* (1993), 14 O.R. (3d) 306, 104 D.L.R. (4th) 266, 64 O.A.C. 4 (Div. Ct.) applied.

Rule 19.02(1) of the *Rules of Civil Procedure* provide that a defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the claim. In default hearings, facts going to liability deemed to be true but facts going to damages must be proven. Judgment amended to read that the wife and brother were jointly and severally liable to plaintiff for the damages suffered. *Umlauf v. Umlauf* (2001), 197 D.L.R. (4th) 715, 53 O.R. (3d) 355, 142 O.A.C. 328, 9 C.P.C. (5th) 93, 2001 CarswellOnt 851, [2001] O.J. No. 1054 (Ont. C.A.), *per* Finlayson J.A. (O'Connor and MacPherson JJ.A. concurring).

Benesch v. Fairmont Hotels Inc. (2001), 2001 CarswellOnt 1916 (Ont. S.C.J.).

Plaintiff acting in person noted individual defendant in default before time limit. Plaintiff obtained default judgment against other defendants in breach of agreement to notify before taking steps. Plaintiff made intimidating communications to represented parties and counsel. Judgment set aside and restraining order granted.

David Wilson Consulting v. Cesar Pedro TV Productions (2001), 2001 CarswellOnt 3157 (Ont. C.A.).

No basis for interference with decision of motions judge. Plaintiff's claim was liquidated demand in money and had complied with Rule 19.04(1)(a) of the *Rules of Civil Procedure*. Appellant had not explained circumstances which led to default and did not present a triable defence on the merits.

Beaucage v. Grand & Toy Ltd. (2001), 2001 CarswellOnt 4568, 19 B.L.R. (3d) 196, 17 C.P.R. (4th) 125, [2001] O.J. No. 5128 (Ont. S.C.J.); additional reasons at (2002), 2002 CarswellOnt 49 (Ont. S.C.J.).

To withstand motion to strike out pleading, there must be sufficient particulars in statement of claim to enable defendant to know specifically what facts plaintiffs relied on in their claims.

Temple v. Riley, 6 C.P.C. (5th) 116, 2001 CarswellNS 64, 2001 NSCA 36, 191 N.S.R. (2d) 87, 596 A.P.R. 87, [2001] N.S.J. No. 66 (N.S. C.A.).

Applicant seeking to set aside default judgment must show both defence on merits and reasonable excuse for delay in filing defence. Defendant provided ample evidence of arguable defence on merits, and reasonable explanation for delay in applying to set aside orders. Default judgment entered without notice to insurer or it's insured. Neither received notice of intended assessment of damages.

Sonnenschein v. Kramchynski, 8 C.P.C. (5th) 80, 2000 CarswellSask 329, 2000 SKQB 181, 192 Sask. R. 279 (Sask. Q.B.).

Plaintiff lawyer brought action against defendant clients for payment of account. Lawyer's account not taxed. Clients noted in default and brought application to set aside default judgment. Application dismissed. Judgment should not be set aside as matter of public policy merely because it represents account for solicitor's fees and disbursements.

P.I.I.M. Canada Corp. v. Poetry in Motion (Canada) Inc. (2000), 1 C.P.C. (5th) 339, 2000 CarswellOnt 962 (Ont. S.C.J.).

Plaintiff unable to effect personal service on defendant. Served claim on adult who identified himself as living at defendant's address. Defendant failed to file statement of defence. Plaintiff obtained default judgment. Motion granted. Defendant's evidence indicated he never resided there and that address incorrect in any event.

Tyo Law Corp. v. White (1999), 1 C.P.C. (5th) 323, 1999 CarswellBC 1569 (B.C. S.C.).

Solicitor accepted $1,000 from client in payment of outstanding accounts. Solicitor released file contents to client and filed notice of withdrawal of Small Claims action concerning outstanding accounts. Client filed application to review accounts. Application dismissed. Solicitor entitled to accord and satisfaction as client bargained with solicitor and settled matter. Client estopped by his conduct regarding outstanding accounts. Retainer agreement should be construed *contra proferentum*. Mutual intent of solicitor and client was that accounts represented payment on account of fees or disbursements in respect of entire contract.

Protect-A-Home Services Inc. v. Heber (2001), 2001 CarswellMan 530, [2001] M.J. No. 466, 2001 MBCA 171, [2002] 3 W.W.R. 281, 160 Man. R. (2d) 100, 262 W.A.C. 100 (Man. C.A.).

Plaintiff noted defendant in default after giving notice of its intention to do so if defence not served, and after defendant failed to comply with interim order obtained by plaintiff restraining defendant from infringing plaintiff's exclusive right to use business name and related relief. Where defendant flouted interim orders lack of defence on merits was fatal.

Halow Estate v. Halow (2002), 2002 CarswellOnt 1062, 158 O.A.C. 125, 59 O.R. (3d) 211 (Ont. C.A.).

Appellant noted in default under Rule 19.01(2) of *Rules of Civil Procedure* (Ontario) and sought to appeal to Court of Appeal. No jurisdiction lay in appeal court as appellant had to set aside default judgment under Rule 19.08. Default was not final judgment pursuant to section 6.(1)(b) of *Courts of Justice Act* (Ontario).

Kaplin v. Gottdenker (2003), 2003 CarswellOnt 1831 (Ont. S.C.J.).

Self-represented plaintiff provided post office box address and no address for personal service. Defendant's motion to strike statement of claim was sent to incorrect postal code and was not served. Claim defective but not entirely devoid of merit. Order striking claim was set aside, on terms.

Suwinski v. Porcupine (Rural Municipality) No. 395, 2002 CarswellSask 824, 2002 SKPC 113, 229 Sask. R. 293 (Sask. Prov. Ct.).

After failure of plaintiff to attend court on day of trial, he applied to revive original summons requiring Defendant to appear in court. Trial struck from docket constituted dismissal of action. Such dismissal was without prejudice to Plaintiff's right to recommence proceedings by having new summons issued. Not appropriate to simply adjourn matter to new date. Plaintiff required to issue and serve new summons if he wished to pursue claim.

B & S Publications Inc. v. Gaulin, 2002 CarswellAlta 1227, 2002 ABCA 238, 317 A.R. 397, 284 W.A.C. 397 (Alta. C.A.).

Order consolidated two actions. Appeal dismissed. Separate trial would result in duplication of process because likely same witnesses would testify. Inconsistent verdicts were to be avoided.

Van Moorsel v. Tomaszeski, 2002 CarswellAlta 1258, 2002 ABQB 905 (Alta. Q.B.).

Trial judge found in favour of Respondent. Respondent did not appear on appeal. Appellants attempted to pay judgment but registered letter containing cheque was returned to them. Respondent gave false address to Court. Appeal dismissed.

Burchell Hayman Parish v. Sirena Canada Inc., 2006 CarswellNS 520, 2006 NSSM 28 (N.S. Sm. Cl. Ct.).

Taxation of legal fees.

Time spent as set out in two accounts totalled 44.1 hours, too high for work done. Reason lawyer spent so much time is that, as a young lawyer just starting out, she lacked the knowledge, experience and confidence of a more senior lawyer.

Client should not be required to pay for the learning experience of a junior: see *Goodman & Carr v. Tempra Management Ltd.* (1991), 25 A.C.W.S. (3d) 169 (Ont Assess. O.), and *Canada Trustco Mortgage Co. v. Homburg*, 1999 CarswellNS 354, [1999] N.S.J. No. 382, 44 C.P.C. (4th) 103, 180 N.S.R. (2d) 258, 557 A.P.R. 258 (N.S. S.C.) at paras. 17-18. Test simply whether charge for a new lawyer's time is "fair and reasonable and stand the test of taxation, if requested": *Toulany v. McInnes, Cooper & Robertson*, [1989] N.S.J. No. 99, 1989 CarswellNS 298, 90 N.S.R. (2d) 256, 230 A.P.R. 256, *(*sub nom. *Toulany, Re)* 57 D.L.R. (4th) 649 (N.S. T.D.) at p. 4.

Witten LLP v. Arsenault, 2006 CarswellAlta 132, 393 A.R. 216, 2006 ABPC 29, 27 C.P.C. (6th) 174 (Alta. Prov. Ct.).

Plaintiff solicitors brought action for payment of their account. Defendant sought referral of solicitor's account for taxation. Taxation of solicitor's account directed. Line of cases that held Provincial Court judge not bound by R. 626 of *Alberta Rules of Court*, which prohibited default judgment with respect to solicitor's accounts, was unsound. Public policy, basis of R. 626, should be same in Provincial Court as in Court of Queen's Bench. R. 626 should apply to all accounts between lawyers and their clients both in Court of Queen's Bench and in Provincial Court.

Ford v. Thorold (City), 2006 CarswellOnt 4129 (Ont. S.C.J.).

Plaintiff's solicitor not able to obtain instructions from plaintiff and was removed from record. Plaintiff did not appoint new solicitor or serve notice of intention to act in person. Facts did not show active interest of plaintiff to prosecute action. Order to dismiss action was to issue after filing of affidavit of service. Costs were fixed at $750 plus GST.

D & S Developments Inc. v. Gamble, 329 Sask. R. 247, 2009 SKQB 187, 81 C.L.R. (3d) 134, 2009 CarswellSask 339 (Sask. Q.B.); leave to appeal refused 337 Sask. R. 114, 464 W.A.C. 114, 81 C.L.R. (3d) 149, 2009 CarswellSask 456, 2009 SKCA 82 (Sask. C.A. [In Chambers]).

Third party brought application to set aside noting of default of August 19, 2004, and judgment granted by Court on February 18, 2009, and to grant third party leave to defend third party claim. Application granted. Court not satisfied that setting aside judgment will seriously prejudice plaintiff that cannot be compensated to her by way of adequate costs security. There was no suggestion delay in participating in this litigation has resulted in loss of witness availability or evidence.

Coinage Distribution Inc. v. Royal Canadian Mint, 2011 BCSC 352, 2011 CarswellBC 646 (B.C. S.C.), Gropper J.; leave to appeal refused 2011 BCCA 296, 2011 CarswellBC 1549, 307 B.C.A.C. 296, 519 W.A.C. 296, 21 B.C.L.R. (5th) 4 (B.C. C.A. [In Chambers]); affirming on reconsideration 2010 BCSC 1245, 2010 CarswellBC 2342 (B.C. S.C. [In Chambers]); affirming on reconsideration 2010 BCSC 1244, 2010 CarswellBC 2341 (B.C. S.C. [In Chambers]).

The defendant advised the plaintiff that requirements of section 25 *Crown Liability and Proceedings Act* prevented his obtaining of a default judgment. The defendant gave notice of intention to set a stay motion down at the same time as an anticipated motion for leave to obtain default judgment. The defendant applied for a stay of proceedings and an order setting aside a default judgment. The applications were granted and the plaintiff was ordered to pay special costs to the defendant. The plaintiff applied to set aside the orders. The application was dismissed. The obtaining of a default judgment without notice deserves a rebuke. The plaintiff's counsel had not provided an explanation. Special costs were payable by the plaintiff to the defendant.

Housser v. Niagara Regional Police Services Board, 2016 ONSC 996, 2016 CarswellOnt 2098 (Ont. S.C.J.); affirmed *Housser v. Niagara Regional Police Service*, 2017 ONSC 1010, 2017 CarswellOnt 1839, 6 M.V.R. (7th) 282 (Ont. Div. Ct.).

The plaintiff sued unsuccessfully [2016 ONSC 589, 2016 CarswellOnt 2099 (Ont. S.C.J.); additional reasons 2016 ONSC 996, 2016 CarswellOnt 2098 (Ont. S.C.J.); affirmed *Housser v. Niagara Regional Police Service*, 2017 ONSC 1010, 2017 CarswellOnt 1839, 6 M.V.R. (7th) 282 (Ont. Div. Ct.)].

Damages fixed at $5,000 but no liability.

Originally plaintiff got default judgment against the defendants in Small Claims Court in the amount of $1,300. The defendants moved successfully to set aside the default judgment. The plaintiff then amended his claim and had it transferred to the Superior Court. The defendants on the other hand offered to settle for $25,000.

Amount that might reasonably have been contemplated as partial indemnity would be $35,000.

Abramovitz v. Lee, 2018 ONSC 3684, 2018 CarswellOnt 9359, 142 O.R. (3d) 454, *(*sub nom. *Abramovitz c. Lee)* 142 O.R. (3d) 464 (Fr.), 48 C.C.L.T. (4th) 154 (Ont. S.C.J.).

A defendant who has been noted in default is deemed to admit the truth of all allegations of fact made in the statement of claim: Rule 19.02(1). A defendant who has been noted in default is not entitled to notice of any step in the action and need not be served with any document in the action, except where the court orders otherwise: Rule 19.02(3). Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect to any claim for which default judgment has not been signed: Rule 19.05(1). Such a motion for judgment shall be supported by evidence given by affidavit if the claim is for unliquidated damages: Rule 19.05(2). "The

law to be applied in torts is the law of the place where the activity occurred, i.e., the lex loci delecti." Quebec law is "foreign law" in the courts of Ontario. The substance of this law is a question of fact in Ontario, to be proved by evidence. It is assumed to be the same as domestic law (that is, Ontario law). The substance and application of Quebec law was not pleaded in claim. There are therefore no deemed facts respecting the law of Quebec.

(2) The fact that default judgment has been signed under subrule (1) does not affect the plaintiff's right to proceed on the remainder of the claim or against any other defendant for all or part of the claim.

(3) Manner of Service of Default Judgment — A default judgment (Form 11B) shall be served in accordance with subrule 8.01(4).

(4) [Repealed O. Reg. 78/06, s. 24.]

O. Reg. 78/06, s. 24; 44/14, s. 9; 38/16, s. 4

Commentary: If the claim is for a debt or liquidated claim and a defence is received for part of the claim only, the clerk may note the defendant in default and sign default judgment on the undefended part of the claim. (The undefended part is the admitted debt.)

11.03 (1) Default Judgment, Plaintiff's Claim, Unliquidated Demand — If all defendants have been noted in default, the plaintiff may obtain judgment against a defendant noted in default with respect to any part of the claim to which rule 11.02 does not apply.

(2) To obtain judgment, the plaintiff may,

(a) file a notice of motion and supporting affidavit (Form 15A) requesting a motion in writing for an assessment of damages, setting out the reasons why the motion should be granted and attaching any relevant documents; or

(b) file a request for an assessment hearing, which may be in Form 9B.

(2.1) [Repealed O. Reg. 249/21, s. 7(2).]

(2.2) [Repealed O. Reg. 249/21, s. 7(2).]

(3) Inadequate Supporting Affidavit — On a motion in writing for an assessment of damages under clause (2)(a), a judge who finds the plaintiff's affidavit inadequate or unsatisfactory may order that,

(a) a further affidavit be provided; or

(b) an assessment hearing be held.

(4) Assessment Hearing — If an assessment hearing is to be held under clause (2)(b) or (3)(b), the clerk shall fix a date for the hearing and send a notice of hearing to the plaintiff, and the assessment hearing shall proceed as a trial in accordance with rule 17.

(5) Matters to be Proved — On a motion in writing for an assessment of damages or at an assessment hearing, the plaintiff is not required to prove liability against a defendant noted in default, but is required to prove the amount of the claim.

(6) Service of Order — An order made on a motion in writing for an assessment of damages shall be served by the clerk in accordance with subrule 8.01(5).

(7) No Assessment where Defence Filed — If one or more defendants have filed a defence, a plaintiff requiring an assessment of damages against a defendant

noted in default shall proceed to a settlement conference under rule 13 and, if necessary, a trial in accordance with rule 17.

O. Reg. 78/06, s. 24; 393/09, s. 9; 38/16, s. 5; 249/21, s. 7

Commentary: On a motion for default judgment, the plaintiff bears an onus to establish entitlement to the requested judgment as a matter of fact and law: *Segraves v. Fralick*, 1951 CarswellOnt 88, [1951] O.R. 871, [1952] 1 D.L.R. 544, [1951] O.W.N. 917 (Ont. C.A.); *Stamm Investments Ltd. v. Hobbs*, [2016] O.J. No. 5226 (Div. Ct.). The motions judge cannot be expected to rubber stamp whatever judgment is requested, but will review the pleadings and the evidence presented to determine the claim on its merits. An undefended claim does not prove itself merely because of the absence of the defendant.

If the motion material is unsatisfactory or fails to establish the plaintiff's entitlement to the requested judgment, the court has a discretion to adjourn the motion under Rule 11.03(3) and allow further evidence to be filed. The court has a discretion but is not automatically required to give the plaintiff a further chance to prove its claim: *Stamm Investments Ltd. v. Hobbs*, *supra*. If the motion materials fail to establish entitlement to default judgment, the usual remedy is a dismissal of the motion and a direction that the matter proceed to an assessment hearing. At an assessment hearing, unlike a motion in writing, the plaintiff can present all necessary information, by way of in-person evidence if required, and can make submissions and answer any questions the court may have concerning the case.

Occasionally the plaintiff's claim and/or affidavit evidence on the motion may positively disprove entitlement to judgment; for example if the claim discloses no reasonable cause of action, or the evidence relies on a cause of action that is not pleaded in the claim, or the evidence proves that no damages were sustained: *Grand River Natural Stone Ltd. v. Armour Masonry*, 2011 CarswellOnt 15934, [2011] O.J. No. 5707 (Ont. Sm. Cl. Ct.); *Stamm Investments Ltd. v. Hobbs*, [2015] O.J. No. (Ont. Sm. Cl. Ct.); affirmed [2016] O.J. No. 5226 (Ont. Div. Ct.). When that happens, the court may dismiss the claim or strike it out with leave to amend and necessary ancillary terms such as dismissal of the motion, setting aside the noting in default and directing a timeframe for service of the amended claim along with a copy of the order.

Rule 11.03(5) states that the plaintiff is required to prove "the amount of the claim" but is not required to prove liability. In many cases liability and damages are intertwined and cannot be treated as watertight compartments; for example, damages must be caused by the defendant's actionable conduct. Some causes of action including negligence define damages as a material element of the cause of action. Rule 11.03(5) does nothing to eliminate those practical realities. The bottom line is that the court cannot be expected to grant a default judgment where the material establishes that the plaintiff is not entitled to the judgment: *Canadian-Automatic Data Processing Services Ltd. v. CEEI Safety & Security Inc.*, 2004 CarswellOnt 207, [2004] O.J. No. 440 (Ont. S.C.J.); affirmed 2004 CarswellOnt 4993, 50 B.L.R. (3d) 31, 246 D.L.R. (4th) 400, 192 O.A.C. 152, [2004] O.J. No. 4879 (Ont. C.A.); *Stamm Investments Ltd. v. Hobbs*, [2015] O.J. No. (Ont. Sm. Cl. Ct.); affirmed [2016] O.J. No. 5226 (Ont. Div. Ct.).

Default judgment under Rule 11.03(1) is available only where all the defendants have been noted in default. If a defence has been filed the matter should proceed to a single trial of both the defended and undefended claims: *Belair Insurance Co. v. Dias*, 2013 CarswellOnt 1806, 47 C.P.C. (7th) 160 (Ont. Sm. Cl. Ct.). Rule 11.03(7) clarifies that where at least one defendant has been noted in default and at least one has filed a defence, the matter shall proceed to a settlement conference and if necessary a trial, rather than an assessment hearing against only the defendants noted in default.

While the similar Rule 19.03 of the Rules of Civil Procedure does not require that defendants NOTED IN DEFAULT be given notice of a motion for default judgment, it may still be best

to give notice. See *Elekta Ltd. v. Rodkin* (2012), 2012 ONSC 2062, 2012 CarswellOnt 3928, [2012] O.J. No. 1439 (Ont. S.C.J. [Commercial List]) at para. 10 referred to in *Canada Mortgage and Housing Corporation v. CMC Medical Centre Inc.*, 2017 ONSC 7551, 2017 CarswellOnt 20149, 37 C.P.C. (8th) 219 (Ont. S.C.J.).

Bell v. Chatri, 2019 ONSC 251, 2019 CarswellOnt 525 (Ont. S.C.J.)

"Where a claim for unliquidated damages proceeds by way of a motion for judgment, facts going to liability are deemed to be true BUT the facts going to damages must be proven. See *Umlauf v. Umlauf*, [2001) O.J. No 1054 (Ont. C.A.), para. 8. In such cases the plaintiff must adduce evidence to prove the measure or value of damages that it has sustained: *Family Trust Corp. v. Harrison*, [1986] O.J. No. 2555 (Ont. Dist. Ct.), para. 10".

Case Law: *Segraves v. Fralick* (1951), 1951 CarswellOnt 88, [1951] O.R. 871, [1952] 1 D.L.R. 544, [1951] O.W.N. 917 (Ont. C.A.).

It was held that a default judgment declaring a marriage null and void, which was premised on deemed admissions resulting from the defendant's noting in default, had to be set aside. The fact of a prior marriage ought to have been strictly proved by evidence at trial. There is no magic in the default rules which would compel the court to act on allegations made by a plaintiff which become deemed admissions.

Umlauf v. Umlauf, 2001 CarswellOnt 851, 53 O.R. (3d) 355, 9 C.P.C. (5th) 93, 197 D.L.R. (4th) 715, 142 O.A.C. 328, [2001] O.J. No. 1054 (Ont. C.A.).

At an undefended trial, the action was dismissed on the ground that no basis for liability in negligence was established. On appeal, that decision was reversed and judgment granted for the plaintiff. It was held that in default hearings, facts going to liability are deemed to be true but facts going to damages must be proved, and that the trial judge was wrong to enter into an inquiry as to liability.

Canadian-Automatic Data Processing Services Ltd. v. CEEI Safety & Security Inc., 2004 CarswellOnt 4993, 50 B.L.R. (3d) 31, 246 D.L.R. (4th) 400, 192 O.A.C. 152, [2004] O.J. No. 4879 (Ont. C.A.).

On a motion for default judgment, Carnwath J. dismissed the plaintiff's claim for unjust enrichment on the basis that no such unjust enrichment was proved. The Court of Appeal agreed and the appeal was dismissed.

Englefield v. Wolf, 2005 CarswellOnt 6609, 33 B.L.R. (4th) 267, 20 C.P.C. (6th) 157, [2005] O.J. No. 4895 (Ont. S.C.J.); additional reasons 2006 CarswellOnt 1962, 33 B.L.R. (4th) 288, 26 C.P.C. (6th) 103 (Ont. S.C.J.); additional reasons 2006 CarswellOnt 4983, 33 B.L.R. (4th) 294, 31 C.P.C. (6th) 174 (Ont. S.C.J.).

The default judgment procedure under Rule 19 of the *Rules of Civil Procedure* does not require the court to accept a legally-untenable theory of liability on a motion for judgment. If liability is pleaded on the basis of facts that would not constitute a cause of action known to law, the plaintiff is not entitled to a default judgment.

Plouffe v. Roy, 2007 CarswellOnt 5739, 50 C.C.L.T. (3d) 137, [2007] O.J. No. 3453 (Ont. S.C.J.).

An undefended trial is not merely an assessment of damages, even if the defendant is deemed to have admitted the allegations of fact made in the statement of claim. The court is not obliged to accept that ludicrous or erroneous allegations of fact are true. The court is not relegated to the role of a rubber stamp. While the defendant's absence means that there is no one to attack or challenge the plaintiff's evidence, the plaintiff still has to prove that he or she is entitled to the judgment sought as a matter of fact and law.

Viola v. Hornstein, 2009 CarswellOnt 1963, [2009] O.J. No. 1486 (Ont. S.C.J.).

At an undefended trial, the trial judge not only must consider the deemed admissions flowing from the default, but should also perform the general tasks of considering credibility, weighing the evidence and making findings of fact, in order to determine whether the plaintiff is entitled to judgment. If the trial judge concludes that the plaintiff has proved liability, the trial judge can proceed to assess damages on the evidence adduced.

Nikore v. Jarmain Investment Management Inc., 2009 CarswellOnt 5258, 97 O.R. (3d) 132 (Ont. S.C.J.).

An undefended trial is not limited to an assessment of damages. The fact that allegations of law or mixed fact and law are not defended does not bind the court. It is for the court to determine whether the evidence is sufficient to entitle a plaintiff to judgment, whether on the basis of deemed admissions or when considered together with all the other evidence.

Cobean v. Jannit Developments Inc. (April 26, 2010), Doc. 67/10, [2010] O.J. No. 1705 (Ont. Sm. Cl. Ct.).

On an assessment hearing, the plaintiff is required to satisfy the court that he or she is entitled to judgment as a matter of fact and law.

Barber-Collins Security Services Ltd. v. Vranki Family Holdings Ltd., 2011 CarswellOnt 16002, [2011] O.J. No. 1268 (Ont. Sm. Cl. Ct.).

Where the plaintiff's evidence and pleading established a contract with a party other than the defendant against who default judgment was sought, the claim was dismissed.

Grand River Natural Stone Ltd. v. Armour Masonry, 2011 CarswellOnt 15934, [2011] O.J. No. 5707 (Ont. Sm. Cl. Ct.).

Plaintiff sought default judgment against a company and an alleged guarantor. The court held that there was no separate guarantee and dismissed the claim as against that defendant. Discussion of authorities relating to default judgment in the Small Claims Court.

627220 Ontario Inc. v. Waterloo North Hydro Inc., 2007 CarswellOnt 6666, [2007] O.J. No. 4109 (Ont. Sm. Cl. Ct.).

At this assessment hearing, the claim was dismissed. The Plaintiff's Claim contained no allegations of negligence or particulars of negligence and failed to disclose a reasonable cause of action. The affidavit filed in an attempt to prove damages was found to affirmatively prove that no damages were sustained. When default judgment is requested, the court's duty is to examine the material before it and determine whether the plaintiff has established a legally-tenable claim and a proper evidentiary foundation for its undefended request. Discussion of legislation applicable to requests for default judgment in the Small Claims Court.

Capitol Hill I v. Stieler (August 31, 2009), Doc. 850/09, [2009] O.J. No. 3562 (Ont. Sm. Cl. Ct.).

The plaintiff's supporting affidavit was not in proper form, attaching an unsworn statement to an empty affidavit stating only "See attached Schedule 'A'". The substance of the statement was a bald assertion that the former tenant "left damages beyond normal wear and tear to the premises." There was a request for rent arrears which was not pleaded in the Plaintiff's Claim, and supporting documentation was lacking. The court found that no damages were proved and the claim was dismissed.

Bennett Leasing Ltd. v. Jennings (October 23, 2009), Doc. 927/09, [2009] O.J. No. 4418 (Ont. Sm. Cl. Ct.).

The assessment hearing was previously adjourned at the plaintiff's request, to permit better affidavit evidence to be filed, but none was filed. The sole affidavit was so poorly drafted and unintelligible as to leave considerable doubt whether the deponent could possibly have read and understood its content before signing. No supporting documentation was attached

as exhibits to the affidavit in support of an unparticularized figure representing the alleged net arrears on a motor vehicle lease. No evidence of what the plaintiff's position would have been but for the alleged breach of contract was provided, nor was the disposition of the vehicle disclosed. The claim was dismissed.

Orangehen.com v. Collins (December 2, 2009), Doc. 1027/09, [2009] O.J. No. 5160 (Ont. Sm. Cl. Ct.).

At an assessment hearing, the plaintiff is required to satisfy the court that it is entitled to judgment as a matter of fact and law. The court granted, in part, a default judgment but declined to allow several charges which were found to constitute illegal interest charges contrary to s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46.

Panza v. Bayaty (October 6, 2009), Doc. 78072/08, [2009] O.J. No. 4163 (Ont. Sm. Cl. Ct.).

On a motion for default judgment, the court found that the claim was commenced after expiry of the applicable limitation period. However, a limitation defence must be pleaded by the defendant. Since the defendant had entered no defence, judgment was granted for the plaintiff.

Theralase Technologies Inc. v. Lanter, 2020 ONSC 205, 2020 CarswellOnt 288, 149 O.R. (3d) 153, F.L. Myers J. (Ont. S.C.J.)

Anonymous internet posters not immune to default judgment. This is the first reported case in Ontario in which default judgment has been entered against anonymous online defendants who could not be identified by the plaintiffs.

The Court noted that while civil claims are frequently initiated against unnamed "John Doe" defendants, it is unusual for judgment to be entered against a party whose name is unknown. The closest analogous case decided in Ontario was *Manson v. John Doe*, 2013 ONSC 628, 2013 CarswellOnt 1308, *(*sub nom. *Mason v. John Doe No. 1))* 114 O.R. (3d) 592, [2013] O.J. No. 530 (Ont. S.C.J.), but the anonymous defendant in that proceeding had responded to an email from the plaintiff's lawyer before default judgment was obtained against him/her.

Drawing on the reasoning of the U.K. Supreme Court in *Cameron v. Liverpool Victoria Insurance Co. Ltd.*, [2019] UKSC 6 (U.K. S.C.), the Court held that so long as the form of service "can reasonably be expected to bring the proceedings to the attention" of a defendant, the Court has jurisdiction over the defendant regardless of how they are identified in a pleading. The Court added that since the defendants had created anonymous profiles to make their defamatory remarks, they could hardly complain if they failed to notice legal documents that were sent directly to those profiles.

Prejudgment Interest

Two years after the Court of Appeal's considerations of the prejudgment interest rate for both non-pecuniary and pecuniary damages in auto cases in *Cobb v. Long Estate*, 2014 SCC 6, in light of changes to the Insurance Act, the Court considered the issue in the non-auto context in *MacLeod v. Marshall*, 2019 ONSC 2547 (Ont. S.C.J.).

Despite rule 53.10 of the *Rules of Civil Procedure* stating that the prejudgment interest rate on non-pecuniary damages in personal injury actions is 5% per year, the Court held that using 5% as the default prejudgment interest rate is not correct in law. The Court indicated that the market interest rates need to be considered when judges exercise their discretion under section 130 of the *Courts of Justice Act* with respect to interest to be awarded.

11.04 Default Judgment, Defendant's Claim — If a party against whom a defendant's claim is made has been noted in default, judgment may be obtained against the party only at trial or on motion.

O. Reg. 78/06, s. 24

Commentary: The clerk can note default but cannot issue default judgment in a Defendant's Claim even if it is a liquidated claim. An undefended Defendant's Claim must go before a judge either on motion or at the trial of the Plaintiff's Claim.

11.05 Consequences of Noting in Default — (1) A defendant who has been noted in default shall not file a defence or take any other step in the proceeding, except making a motion under rule 11.06, without leave of the court or the plaintiff's consent.

(2) Any step in the proceeding may be taken without the consent of a defendant who has been noted in default.

(3) A defendant who has been noted in default is not entitled to notice of any step in the proceeding and need not be served with any other document, except the following:

1. **Subrule 11.02(3) (service of default judgment).**
2. **Rule 12.01 (amendment of claim or defence).**
3. **Subrule 15.01(6) (motion after judgment).**
4. **Postjudgment proceedings against a debtor under rule 20.**

O. Reg. 78/06, s. 24

Commentary: If a party has been noted in default, staff will refuse to file any further documents from the party noted in default except as ordered by the court or with the consent of the plaintiff [r. 11.05(1)].

If one defendant is served within the territorial division where the claim was issued, the plaintiff is not required to establish that the claim was filed in the appropriate territorial division. However, if all defendants were served outside the territorial division, prior to having any party noted in default, the plaintiff must establish that the action was brought in the proper territorial division by filing an affidavit for jurisdiction before staff may note a defendant in default [r. 11.01(3)].

Affidavit(s) of service must provide that:

- Service has been made and the time set out in the Rules for filing a defence has elapsed.
    a. When service is deemed to have been made under the service Rules [r. 8];
    b. That a defendant is to file a defence within 20 days of being served with the claim [r. 9.01(1)] and [r. 10.03(1)]; and
    c. Whether a delay may be associated with a requirement for French/English translation.

Regular mail includes postal services provided by Canada Post, including Priority Courier and Xpresspost, unless otherwise ordered by a judge. Although the service provided by Canada Post is called "Priority Courier," it is not courier service for the purposes of this Rule. It is considered to be regular mail service.

11.06 Setting Aside Noting of Default by Court on Motion — The court may set aside the noting in default or default judgment against a party and any step that has been taken to enforce the judgment, on such terms as are just, if the party makes a motion to set aside and the court is satisfied that,

(a) the party has a meritorious defence and a reasonable explanation for the default; and

(b) the motion is made as soon as is reasonably possible in all the circumstances.

O. Reg. 461/01, s. 15; 78/06, s. 24

Commentary: Rule 11.06 codifies the common law test for setting aside a default judgment and establishes the test to set aside the noting in default in Small Claims Court.

The moving defendant must satisfactorily explain the failure to defend within the prescribed time, and must make the motion as soon as is reasonably possible.

The most important factor in most cases will be the requirement to establish that the moving defendant has "a meritorious defence" because if there is a meritorious defence justice will generally favour a determination on the merits: *Morgan v. Toronto (Municipality) Police Services Board*, 2003 CarswellOnt 1105, 34 C.P.C. (5th) 46, 169 O.A.C. 390, [2003] O.J. No. 1106 (Ont. C.A.). If it is clear the defendant has no defence, there is little point in setting aside the default judgment and the net effect of doing so may simply be to increase the defendant's liability by exposing him or her to the risk of a representation fee at trial. Generally, the system favours a determination of the issues at a trial so that both parties have a full opportunity to present their respective sides of the story: *Ward v. Landmark Inn Limited Partnership*, [2013] O.J. No. 3424 (Ont. Sm. Cl. Ct.); *Maly v. Hanniman* (October 26, 2012), Doc. SC-11-116748, [2012] O.J. No. 5130 (Ont. Sm. Cl. Ct.).

Given the costs involved on appeal if a motion to set aside default judgment is dismissed, plaintiffs will often be well-advised to consent to the motion and to perhaps consider pressing for terms rather than a dismissal of the motion: *620369 Ontario Inc. v. Kreuzer*, [2006] O.J. No. 1486 (Ont. Div. Ct.).

A "meritorious defence" means an arguable defence: *Coombs v. Curran*, 2010 ONSC 1312, 2010 CarswellOnt 1175, 100 O.R. (3d) 554 (Ont. Div. Ct.). Whatever the standard, it does not require the moving defendant to establish that the defence is likely to succeed at trial: *Heasman v. Mac's Convenience Store Inc.*, [2015] O.J. No. 1746 (Ont. Div. Ct.).

If a default judgment has been irregularly obtained, it will be set aside as of right due to the plaintiff's failure to follow the established procedures: *Benlolo v. Barzakay*, 2003 CarswellOnt 658, 169 O.A.C. 39, [2003] O.J. No. 602 (Ont. Div. Ct.); additional reasons 2003 CarswellOnt 1260, 170 O.A.C. 115, [2003] O.J. No. 1430 (Ont. Div. Ct.); *Action Auto Leasing & Gallery Inc. v. Boulding*, 2009 CarswellOnt 8657, 88 C.P.C. (6th) 91, [2009] O.J. No. 1768 (Ont. Sm. Cl. Ct.). Examples of irregularly-obtained judgments are as follows: default judgment was granted based on improper or invalid service of the plaintiff's claim; *Action Auto Leasing & Gallery Inc. v. Boulding*, *supra*; the clerk granted the default judgment but part or all of the claim is unliquidated and falls outside the clerk's jurisdiction: *Ronan v. Stevensville Auto Truck Marine*, [2010] O.J. No. 2686 (Ont. Sm. Cl. Ct.); the claim was not brought in the proper venue under Rule 6.01(1): *MCAP Service Corp. v. Milner*, 2009 CarswellOnt 8969, [2009] O.J. No. 2366 (Ont. Sm. Cl. Ct.); *Cash 4 You Corp. v. Power*, 2014 CarswellOnt 5814, [2014] O.J. No. 2131 (Ont. Sm. Cl. Ct.); or the court has no jurisdiction over the claim: *Lungo v. Ehioghae*, 2015 CarswellOnt 12771, [2015] O.J. No. 4442 (Ont. Sm. Cl. Ct.).

Moving defendants should be careful about the quality of their affidavit evidence in support of a motion to set aside default judgment. Bald conclusory statements and unsupported hearsay assertions in an affidavit, or a deponent lacking firsthand knowledge of the facts, may undermine the moving defendant's ability to persuade the court there is a meritorious defence. In addition to providing proper affidavit evidence, the best practice is to also include a draft defence in the motion materials. See *Thompson v. Hergott* (April 28, 2015), Doc. 482/2014, [2015] O.J. No. 2120 (Ont. Sm. Cl. Ct.).

Forgotten Treasures International Inc. v. Lloyd's Underwriters, 2020 BCCA 341, 2020 CarswellBC 3066, 42 B.C.L.R. (6th) 217, 7 C.C.L.I. (6th) 15, 453 D.L.R. (4th) 276 (B.C. C.A.)

Appeal by the plaintiff from a decision setting aside the appellant's default judgment against the respondent. The chambers judge found that default judgment should not have been sought or taken.

Appeal dismissed. The chambers judge did not err in concluding that communications between the parties had made it perfectly clear that there was an active, ongoing dispute between the parties with a substantial defence forthcoming that was not merely worthy of investigation, but which had been communicated clearly and precisely.

Moore v. Apollo Health & Beauty Care, 2017 ONCA 383, 2017 CarswellOnt 6742, 2017 C.L.L.C. 210-048 (Ont. C.A.)

Moore v. Apollo Health and Beauty Care is a case that started in small claims court. Ms. Moore, the plaintiff, was denied her wage claim on the basis that she had abandoned it. Her appeal to the Divisional Court was dismissed. She then appealed to the Court of Appeal that agreed with her that her evidence had been misapprehended but more importantly these previous courts ". . . failed to take the proper approach in ascertaining whether Ms. Moore, a self-represented person, in fact had abandoned part of her claim".[25] The CA in Moore stated at para. 47 that the trial judge must make specific inquiries to clarify whether the claim for unpaid wages had in fact been abandoned. She was awarded damages that the parties agreed to.[26] The CA quoted extensively from the Canadian Judicial Council's Statement of Principles on Self-represented Litigants and Accused Persons, which had been approved by the Supreme Court of Canada in *Pintea v. Johns*.[9] A justification for assisting a self-represented litigant is based on fairness at trial.[27]

Litigants who represent themselves however "are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case" and "to prepare their own case", as the Statement of Principles states.[28] Recent issues of self-represented litigants and vexatious litigants were addressed in the Alberta Court of Appeal, in fact they were all argued together, *Jonsson v. Lymer*,[29] *Makis v. Alberta Health Services*,[30] and *Vuong Van Tai Holding v. Alberta (Minister of Justice and Solicitor General)*.[31] Jonsson at para. 9 indicates that once a vexatious litigant order is made leave of the court is necessary to take further steps or proceedings. These decisions addressed in part as to the Court's inherent jurisdiction to restrain vexatious litigation. The Court of Appeal in *Jonsson* stated that the court should only institute vexatious litigant proceedings on its own motion in exceptional circumstances. Accordingly, in *Jonsson*, at para. 11, "it follows that any restriction or impediment to court access must be carefully monitored."

Vexatious litigant orders should rarely be used and as a last result when other procedures are not effective. The *Judicature Act of Alberta* still stands tall, RSA 2000, c. J-2. It is the common law approach that is wavering. At the end of the day what the court implied was that case management can often identity and correct issues at an early stage. Interestingly of course it is the self-represented who may well benefit from a judge's intervention even to such an extent as "explain[ing] the relevant law in the case" (Moore, CA, at para. 45, citing

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9 ~~2017 CSC 23, 2017 SCC 23, 2017 CarswellAlta 680, 2017 CarswellAlta 681, [2017] 1 S.C.R. 470, [2017] S.C.J. No. 23 (S.C.C.)~~

25 ~~*Ibid.*~~ *at para. 36.*

26 ~~*Ibid.*~~ *at para. 50.*

27 See e.g., *Dewing v. Kostiuk*, 2017 MBCA 22, 2017 CarswellMan 92, 4 C.P.C. (8th) 276, [2017] 6 W.W.R. 717 (Man. C.A.) at para. 17.

28 See e.g., *Clark v. Pezzente*, 2017 ABCA 220, 2017 CarswellAlta 1170 (Alta. C.A.) at para. 13.

29 2020 ABCA 167, 2020 CarswellAlta 843, 7 Alta. L.R. (7th) 146, 448 D.L.R. (4th) 275 (Alta. C.A.)

30 2020 ABCA 168, 2020 CarswellAlta 792, 5 Alta. L.R. (7th) 22, 446 D.L.R. (4th) 460, [2020] 11 W.W.R. 31 (Alta. C.A.)

31 2020 ABCA 169, 2020 CarswellAlta 793 (Alta. C.A.)

footnotes should be renumbered 26 - 32

the Statement of Principles) but the paying customer, the litigant who hires counsel, may have to simply struggle with the law.

Case Law: *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 2014 CarswellOnt 3011, 119 O.R. (3d) 561, 56 C.P.C. (7th) 133, 372 D.L.R. (4th) 526, 317 O.A.C. 255, [2014] O.J. No. 1197 (Ont. C.A.).

A motions judge declined to set aside a default judgment but varied the interest rate from a contractual rate of 24 per cent to 5 per cent. On appeal that variation of the judgment was set aside and the defendant was granted leave to file a defence to the claim for contractual interest at 24 per cent. The motions judge erred by setting aside the interest provision of the default judgment and substituting a final determination on that issue in the defendant's favour. If the issue was arguable, a final determination was inappropriate and the issue should proceed to trial.

Thompson v. Hergott (April 28, 2015), Doc. 482/2014, [2015] O.J. No. 2120 (Ont. Sm. Cl. Ct.).

The defendant's motion to set aside a default judgment was supported by an unsatisfactory affidavit replete with bald conclusory statements. No draft defence was provided. The defendant's paralegal sought to supplement the affidavit evidence dealing with the alleged merit of the defence, by her own representations from the counsel table. The court declined to treat such representations as evidence. *Courts of Justice Act*, s. 27 permits the Small Claims Court to act on unsworn material, but should not be treated as an invitation for voluminous evidence to be given by representatives.

Toronto Dominion Bank v. Nawab, 2014 ONCA 152, 2014 CarswellOnt 2301 (Ont. C.A.).

The court declined to set aside a default judgment signed before the 20-day period to file a defence had elapsed. The defendant was not prejudiced by the irregularity and it was not in the interests of justice to set aside the default judgment as of right.

Bank of Nova Scotia v. Kostuchuk, 2002 CarswellMan 230, 2002 MBQB 134, [2002] 8 W.W.R. 173, 164 Man. R. (2d) 295 (Man. Q.B.); reversed 2003 CarswellMan 169, 2003 MBCA 66, 173 Man. R. (2d) 262, 293 W.A.C. 262, [2003] 8 W.W.R. 589, 34 C.P.C. (5th) 210 (Man. C.A.).

Defendant took two bank loans on behalf of a friend who later defaulted. Bank obtained default judgment against defendant in two actions, for $2,762 and $3,505. Defendant aware of judgments and paid in full. Bank later realized error in second action, which should have been for $26,285. Bank failed to show defendant should have been aware of error. Bank's application to set aside judgment dismissed.

Kemp v. Prescesky, [2006] N.S.J. No. 174, 2006 CarswellNS 175, 244 N.S.R. (2d) 67, 744 A.P.R. 67, 28 C.P.C. (6th) 361, 2006 NSSC 122 (N.S. S.C.) 2006-03-21.

Issue whether rules in Small Claims Court for filing defences, setting down hearings, and setting aside default judgments, fail to meet the requirements of natural justice.

Small Claims Court created by Act of Nova Scotia Legislature in 1980. It came into effect on January 1, 1981. The monetary jurisdiction at that time was $3,000.

The Legislature passed a law to increase the limit to $25,000. That monetary limit came into effect on April 1, 2006. While s. 3(1) of the *Small Claims Court Act* says the Small Claims Court is a court of law and of record, there is no recording of the proceedings. The only record is the summary report of the Adjudicator, prepared only in response to an appeal of his or her decision.

It is a breach of the requirements of natural justice *not* to have a mechanism in Small Claims Court whereby, if a defendant does not file a defence or appear at a hearing by mistake, but can show that he or she has an arguable defence that should be heard on its merits, and he or

she has a reasonable excuse for defaulting and is not just stalling, and there is no prejudice to the claimant's ability to prove its case, the judgment cannot be set aside.

The requirements for natural justice in the Small Claims Court system have increased with the increase in the monetary jurisdiction of the court.

Decision of Adjudicator set aside.

Small Claims Court does not have a system for costs. New hearing ordered.

620369 Ontario Inc. v. Kreuzer, 2006 CarswellOnt 2261 (Ont. Div. Ct.).

Appeal from judgment of Deputy Judge dismissing a motion to set aside a default judgment. Kreuzer filed an affidavit indicating when he received claim and understood he had 20 days to defend. Both counsel on appeal were not counsel in the court below. There the plaintiff was represented by an agent and the defendants were self-represented by Mr. Kreuzer. Appeal allowed. The fact Kreuzer was never properly served is itself reason to set aside default judgment against him.

Sinnadurai v. Laredo Construction Inc., 2005 CarswellOnt 7305, [2005] O.J. No. 5429, 38 R.P.R. (4th) 7, 20 C.P.C. (6th) 234, 78 O.R. (3d) 321, 206 O.A.C. 235 (Ont. C.A.).

Appeal from order dismissing motion to set aside a default judgment with added issue of jurisdiction.

Motions judge addressed the three-part test for setting aside a default judgment. See *Morgan v. Toronto (Municipality) Police Services Board*, 2003 CarswellOnt 1105, 169 O.A.C. 390, 34 C.P.C. (5th) 46 (Ont. C.A.) at para. 19.

Section 19(1)(a)(i) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that an appeal lies to the Divisional Court from a final order of a judge of the Superior Court "for a single payment of *not more* than $25,000, exclusive of costs."

Appeal within the jurisdiction of the Divisional Court, but Court of Appeal not prepared to send the matter back.

The factors governing the setting aside of a default judgment are not to be applied rigidly: see *Chitel v. Rothbart*, 1988 CarswellOnt 451, [1988] O.J. No. 1197, 29 C.P.C. (2d) 136 (Ont. C.A.). There have been cases where the explanation for the default has been given less weight because the defence had merit: see *441612 Ontario Ltd. v. Albert*, 1995 CarswellOnt 135, [1995] O.J. No. 271, 36 C.P.C. (3d) 198 (Ont. Gen. Div.) at para. 48 and *D.R. McKay Financial Group Inc. v. Klad Enterprises Ltd.*, [2004] O.J. No. 4288, 2004 CarswellOnt 4261, 193 O.A.C. 281 (Ont. Div. Ct.).

See also *Janssen-Ortho Inc. v. Novopharm Ltd.*, [2005] S.C.C.A. No. 189, 2005 CarswellNat 2110, 2005 CarswellNat 2111, 2005 SCC 33, 42 C.P.R. (4th) 385, [2005] 1 S.C.R. 776, 345 N.R. 174 (S.C.C.), where LeBel J. refused an application to extend the time of an application for leave to appeal to the Supreme Court of Canada.

The decision to set aside a default judgment is a discretionary one. See Rule 19.08(1) of the *Rules of Civil Procedure*.

A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just. See *Bottan v. Vroom*, 2002 CarswellOnt 1044, [2002] O.J. No. 1383 (Ont. C.A.).

Appeal dismissed.

Wan v. Wan, 2005 CarswellOnt 5637 (Ont. Div. Ct.).

Deputy Judge erred in setting aside default judgment granted to plaintiff. Deputy Judge noted that there were number of actions in Small Claims Court between same parties and became concerned about monetary jurisdiction of that court because claims could not be

divided to come within $10,000 limit. However, no motion existed to set aside default judgment. Plaintiff had no notice that her judgment was at risk. Order made without jurisdiction. Appeal allowed.

TD Meloche Monnex / Security National Insurance Co. v. Donavan, 2006 CarswellNB 389, 2006 NBQB 251, 306 N.B.R. (2d) 90, 793 A.P.R. 90 (N.B. Q.B.).

Four months after claim served on defendant, plaintiff noted defendant in default. Defendant unsuccessfully tried to file statement of defence one week after being noted in default. Defendant brought motion to set aside noting in default. Motion granted. Defendant clearly illustrated ongoing intention to defend action, immediately retained services of solicitor, expert witness and filed notice of intent to defend. Defendant provided justifiable explanation for default.

Lukenda v. Campbell, [2003] O.J. No. 5022, 2003 CarswellOnt 4787, 67 O.R. (3d) 688, 48 C.P.C. (5th) 372 (Ont. S.C.J.).

Registrar signing default judgment against defendant in July 1988. Defendant moving in 2003 to set aside default judgment. Defendant not moving as soon as possible and not adequately explaining circumstances giving rise to default. No defence on merits. Motion dismissed.

Rangi v. Rangi, 2006 CarswellBC 1541, 2006 BCSC 947, 33 C.P.C. (6th) 347, 57 B.C.L.R. (4th) 171 (B.C. S.C.).

KSR brought application to set aside orders made despite failure to appear at hearings, application granted. KSR not guilty of wilful delay or default because he was not aware of application for judgment. Service of application ineffective. KSR provided reasonable explanation for delay, wife was diagnosed with cancer. Defence worthy of investigation.

Burzan v. Burzan (August 9, 2005) (B.C. C.A.).

While there was a defence worthy of investigation, the chambers judge had been correct in dismissing claim on grounds that father deliberately failed to file a defence, and had no good explanation for applying to set aside the judgment in a timely way. Further, with respect to the defence issue, matter of quantum had been referred to the trial list, so matters of causation and damages would be determined at that stage.

Lariviere v. Clarke, [2005] O.J. No. 4024, 2005 CarswellOnt 4549 (Ont. S.C.J.).

Defendant moved to set aside judgment while plaintiff moved to enforce judgment. Defendant alleged he had not been served despite process server's affidavit. Defendant failed to discharge onus of rebutting plaintiff's evidence of service. Defendant's motion dismissed.

Vuu v. Andrade, 2005 CarswellOnt 7235 (Ont. S.C.J.).

Defendant illiterate. Defendant sought to set aside default judgment. Defendant's affidavit deposing defendant illiterate did not have attachment indicating that affidavit was explained to defendant. No weight was given to affidavit. Motion dismissed. Affidavits containing conflicting evidence as to when defendant first learned of action caused court to doubt reliability of everything asserted by defendant.

Larry Penner Enterprises Inc. v. Lake St. Martin First Nation, 2006 CarswellMan 53, [2006] 2 C.N.L.R. 93, 202 Man. R. (2d) 213, 2006 MBQB 30 (Man. Master).

Plaintiffs moved *ex parte* on default judgment to garnish moneys allegedly owed by Province to defendants. Claim for continuing garnishing order dismissed. Subject moneys owed by Province were tax rebates from goods sold on reservation. Money payable by Province to defendants subject to Crown immunity.

Gill v. Szalay, 2006 CarswellOnt 3807 (Ont. S.C.J.).

Self-represented defendant applied to set aside default judgment. Defendant at all times intended to defend action and had arguable case. Defendant claimed not to have been advised

by trial coordinator of date on which trial was to commence. Circumstances appropriate to set aside judgment but on terms. Defendant ordered to pay judgment amount into plaintiffs' solicitor's trust account pending new trial plus $5,000 in costs to be held in trust.

Royal Bank v. Goebel, 2006 CarswellAlta 612, 30 C.P.C. (6th) 141, 2006 ABQB 369 (Alta. Q.B.).

Statement of claim alleged defendants issued Visa card and that they jointly and severally owed $26,205. Plaintiff obtained default judgment against both defendants who disputed liability. Accumulation of defects, both procedural and ethical, that favoured setting aside default judgment. Default judgment set aside.

Okanagan Aggregates Ltd. v. Boake, 2006 CarswellBC 718, 2006 BCSC 466 (B.C. S.C. [In Chambers]).

Application to set aside a default judgment not granted because party duly served intentionally refrained from appearing.

Phan v. Jevco Insurance Co., 2006 CarswellOnt 3937, [2006] O.J. No. 2614, 39 C.C.L.I. (4th) 293 (Ont. S.C.J.).

Motion for default judgment heard on December 12 and plaintiff granted judgment on December 22, 2005. Application by defendant to set aside noting of default and default judgment dismissed. Defendant did not prove it had valid reason for default. Only explanation was that through inadvertence its adjuster failed to assign counsel to defend matter. Not a particularly compelling explanation and not adequate.

Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd., [2007] O.J. No. 1685, 2007 CarswellOnt 2713, 41 C.P.C. (6th) 316, 87 O.R. (3d) 479, 2007 ONCA 333 (Ont. C.A.).

Appeal allowed. Motion judge ultimately determines whether interests of justice favour order setting aside default judgment, having regard to potential prejudice to parties and effect on overall integrity of administration of justice. Affidavit of defendants, while perhaps deficient, sufficient to put detailed defence set out in statement of defence "in play" on motion to set aside default judgment. Statement of defence had been served and filed in timely fashion and contained detailed and full defences to claims. Prejudice to defendants in refusal of motion was obvious. Defendants were denied any opportunity to present defence on merits.

Heaps Estate v. Jesson, 2007 CarswellOnt 2322, 47 C.C.L.I. (4th) 271, 42 C.P.C. (6th) 334 (Ont. S.C.J.).

Motion granted. Extension would advance just resolution of serious dispute. Claim involving fatal injuries not to be discarded lightly. Plaintiffs should not be unduly penalized for counsel's inadvertence in not serving statement of claim. Despite lengthy delay, defendants would not suffer undue prejudice in having to defend action. Defendants would have access to expert report which would help facilitate defence. Defendants made well aware of particulars of plaintiffs' claim by own insurer and well within any limitation period.

Nobosoft Corp. v. No Borders Inc., 2007 CarswellOnt 3903, 2007 ONCA 444, 43 C.P.C. (6th) 36, 225 O.A.C. 36, [2007] O.J. No. 2378 (Ont. C.A.).

Appeal allowed, noting in default set aside. Motions judge erred by only inquiring as to whether B Inc. had intent to defend prior to expiry of time for delivery of its defence. No evidence that B Inc. formed intent to defend within requisite period. No evidence that B Inc. sought to flout or abuse Rules. B Inc. moved relatively promptly to set aside noting in default, and at very least, its delay in seeking relief was not inordinate.

British Columbia v. Ismail, 2007 CarswellBC 172, 235 B.C.A.C. 299, 388 W.A.C. 299, 2007 BCCA 55 (B.C. C.A. [In Chambers]).

Wilson J. set aside judgment for a liquidated amount entered by plaintiff in default of appearance by defendants. The plaintiff sought directions as to whether leave to appeal from

that order was required and if leave was required, sought leave. Leave required. Leave to appeal dismissed. A decision setting aside a default judgment was an interlocutory order and leave to appeal such order required.

Ravnyshyn v. Drys, 2007 CarswellBC 1731, 33 E.T.R. (3d) 189, 2007 BCCA 400, 44 C.P.C. (6th) 64, 405 W.A.C. 127, 245 B.C.A.C. 127 (B.C. C.A.); leave to appeal refused (2008), 2008 CarswellBC 94, 2008 CarswellBC 95, [2007] S.C.C.A. No. 485, 384 N.R. 393 (note), 452 W.A.C. 317 (note), 268 B.C.A.C. 317 (note) (S.C.C.).

R informed court she might be late for hearing of motion. Judge did not receive message and dismissed motion on basis that no one was there to pursue it. Application to set aside order granted. Unjust to allow order to stand because of administrative error. Had judge received message that she would be arriving late, she would have set down application so that it could be heard on merits.

Srdoc v. Ayres, 2006 CarswellOnt 7740 (Ont. Div. Ct.).

Lack of reasons for motion judge's decision not to set aside default judgment.

Canadian Imperial Bank of Commerce v. Csorba, 2007 CarswellOnt 1687, [2007] O.J. No. 1081, 2007 ONCA 211 (Ont. C.A.).

Application to set aside default judgment. Discretion of court.

Altman v. St. Gelais, 2006 CarswellSask 757, 38 C.P.C. (6th) 120, 2006 SKQB 495, 290 Sask. R. 156 (Sask. Q.B.).

Plaintiff in Small Claims Court action failed to attend for case management conference. Judge dismissed claim for want of prosecution. Plaintiff appealed. Appeal dismissed for want of jurisdiction. Provincial Court had jurisdiction to set aside its own default judgments whether made at trial or case management conference. Legislature failed to make consequential amendment after introduction of conferences. Reference in section to "any party" gave plaintiff right to apply despite further reference to having "valid defence." Section was not well drafted. No logical reason to exclude plaintiff from operation of section.

See *Trull v. Midwest Driveways Ltd.*, 2004 CarswellSask 857, [2004] S.J. No. 800, 2004 SKQB 528, 4 C.P.C. (6th) 324, 256 Sask. R. 314 (Sask. Q.B.). On that appeal, Mr. Justice Baynton reviewed the purpose and effect of s. 37 of the *Small Claims Act, 1997*. At paras. 10-12 he concluded that: a) where a party failed to appear for a small claims trial in Provincial Court, and then wished to set aside the judgment granted in his or her absence, that party effectively was asking to set aside a default judgment. Court of Queen's Bench does not have jurisdiction to hear appeal. Altman's remedy is under s. 37 of *the Small Claims Act, 1997*, asking the Provincial Court to consider setting aside the judgment that was granted in his absence. Appeal dismissed.

100578 P.E.I. Inc. v. Label Construction Ltd., 2008 CarswellPEI 16, 2008 PESCTD 15, 274 Nfld. & P.E.I.R. 292, 837 A.P.R. 292 (P.E.I. T.D.).

Motion by defendant ("Label") for order setting aside default judgment by plaintiff on July 4, 2007. Motion allowed, but with costs to plaintiff on a full indemnity basis.

Rule 19.08(3) states:

> (3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under Rule 19.03.

See *Jorand Holdings Inc. v. Pecoskie*, 2007 CarswellPEI 78, 2007 PESCTD 17, 285 Nfld. & P.E.I.R. 243, 879 A.P.R. 243 (P.E.I. T.D.) and *Bank of Montreal v. Dockendorff*, 2003 CarswellPEI 23, 2003 PESCTD 19, 224 Nfld. & P.E.I.R. 4, 669 A.P.R. 4 (P.E.I. T.D.).

Inadvertence may be a plausible explanation for failure to file a defence on time. Plaintiff's evidence strong, but not up to court to weigh competing evidence. An "arguable" case is a low threshold.

Whitehorse Wholesale Auto Centre Ltd. v. Clark, 2007 CarswellYukon 63, 2007 YKSM 2 (Y.T. Sm. Cl. Ct.).

Section 53 of the *Consumers Protection Act*, R.S.Y. 2002, c. 40, s. 53(1) states, in part:

> . . . if a seller under a time sale repossesses the goods comprised in the time sale, . . . no action is thereafter maintainable by the seller to recover the balance or any part thereof.

Whitehorse Wholesale Auto Centre's claim for amount owing under *Consumers Protection Act* barred by statute.

Claimant had recovered default judgment. Matter was set down only for assessment of damages. However, where on assessment hearing claim unfounded in law, abuse of process of court to allow action to continue. Court could on its own motion set aside judgment. Claimant has suffered no damages. Damages fixed at zero.

Webster v. Stewart, 2008 CarswellNB 335, 332 N.B.R. (2d) 288, 2008 NBQB 232, 852 A.P.R. 288, 73 C.L.R. (3d) 270 (N.B. Q.B.).

Motion by defendants to set aside default judgment. Defendants moved to set aside noting of default as soon as it came to their attention. Court satisfied that there was a good and valid defence or triable issue with respect to the slander of title action brought against them. There was a reasonable excuse for the default, namely their solicitor's inadvertence. Their actions showed an intention to defend the action throughout, and no prejudice arose to the plaintiff from the delay.

Stoughton Trailers Canada Corp. v. James Expedite Transport Inc., 2008 ONCA 817, 2008 CarswellOnt 7214 (Ont. C.A.); reversing (2008), 2008 CarswellOnt 7344 (Ont. S.C.J.).

Plaintiff brought motion for default judgment. Default judgment awarded and defendants brought motion to set aside default judgment. Defendants sought to adjourn motion. Motion adjourned on consent order. Defendants brought motion to vary or set aside consent adjournment order. Motion allowed. As moneys in issue had been paid, proper to adjourn motion to set aside to time fixed on consent of parties.

Daum v. Elko (2009), 2009 CarswellBC 834, 2009 BCSC 349 (B.C. S.C. [In Chambers]).

Defendant applied to set aside default judgment. Application granted. Defendant applied as soon as reasonably possible after learning of default judgment. Defendant did not wilfully or deliberately fail to file statement of defence. Failure to file statement of defence could give rise to inference of ignoring action, but this was not the case in view of steps taken by defendant prior to deadline.

Coombs v. Curran (2010), 2010 CarswellOnt 1175, 2010 ONSC 1312, 100 O.R. (3d) 554 (Ont. Div. Ct.).

Appeals of Small Claims Court judge dismissing motion defendant sought to set aside default judgment.

Three-part test for setting aside a default judgment set out in *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp.*, 2008 ONCA 894, 2008 CarswellOnt 7956, [2008] O.J. No. 5345, 245 O.A.C. 47 (Ont. C.A.), at para. 21; leave to appeal refused (2009), 2009 CarswellOnt 3642, 2009 CarswellOnt 3641, 262 O.A.C. 398 (note), 399 N.R. 398 (note) (S.C.C.), citing *Morgan v. Toronto (Municipality) Police Services Board* (2003), 169 O.A.C. 390, [2003] O.J. No. 1106, 34 C.P.C. (5th) 46, 2003 CarswellOnt 1105 (Ont. C.A.), at para. 19, the Court of Appeal described the test in these words:

> a) Whether the motion was brought without delay after the defendant learned of the default judgment;
>
> b) Whether the circumstances giving rise to the default were adequately explained; and
>
> c) Whether the defendant has an arguable defence on the merits.

Setting aside default judgment is discretionary judicial power.

A court is a world of words, and is subject to the polar pull of precision and precedent. It cannot be ascertained whether motion judge regarded "meritorious" to be synonymous with "arguable." Proper test not applied. Error in law made. Appeal allowed and default judgment set aside.

Royal Bank v. Sheikh (2010), 2010 CarswellOnt 97, 2010 ONSC 131 (Ont. S.C.J. [Commercial List]).

Defendant/appellant ("Biela"), appeals decision of Small Claims Court judge dismissing motion she sought to set aside default judgment.

The three-part test for setting aside a default judgment. See *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp.*, 245 O.A.C. 47, 2008 CarswellOnt 7956, 2008 ONCA 894 (Ont. C.A.) at para. 21; leave to appeal refused 262 O.A.C. 398 (note), 399 N.R. 398 (note), 2009 CarswellOnt 3642, 2009 CarswellOnt 3641 (S.C.C.), citing *Morgan v. Toronto (City) Police Services Board* (2003), 34 C.P.C. 95th 46 (Ont. C.A.), at para. 19, the Court of Appeal described the test in these words:

(a) Whether the motion was brought without delay after the defendant learned of the default judgment;

(b) Whether the circumstances giving rise to the default were adequately explained; and

(c) Whether the defendant has an arguable defence on the merits.

Setting aside default judgment exercise of a discretionary judicial power.

Motion judge said that, in addition to giving "a reasonable explanation for the default" and bringing motion "as soon as reasonably possible," Biela also "must show that there is a meritorious defence." "Meritorious" represents a higher threshold than "arguable."

Appeal allowed; default judgment set aside.

Healey v. Robert McIntosh Family Trust, 2009 CarswellOnt 4597 (Ont. S.C.J.).

The lawyer commenced action to collect legal fees from defendants, who were formerly husband and wife, and their family trust. Default judgment granted after defendants' statement of defence struck for failure to serve their affidavit of documents and to reply to demands for particulars. They did not appeal. Motion dismissed. Wife knew about judgment for at least two years before bringing motion. None of the principles governing the exercise of discretion to set aside default judgment satisfied and interests of justice did not favour setting it aside.

Action Auto Leasing & Gallery Inc. v. Boulding, 2009 CarswellOnt 8657, [2009] O.J. No. 1768, 88 C.P.C. (6th) 91 (Ont. Sm. Cl. Ct.).

The plaintiff commenced claim in Small Claims Court. The plaintiff purported to serve claim on defendants by mail. No defence filed. The plaintiff had defendants noted in default and obtained default judgment. The defendants denied receipt of claim and learned of lawsuit after garnishments effected. Motion granted. The plaintiff could not establish valid service by mail pursuant to r. 8.03 of *Small Claims Court Rules*. Affidavits of service failed to indicate requirements of r. 8.03(8). If requirements of rr. 8.03(7) and (8) were not satisfied, then default judgment was irregularly obtained and had to be set aside as of right. It was unnecessary to determine whether defendants had arguable defence on merits. Motion was brought as soon as reasonably possible.

The defendants moved, pursuant to r. 11.06 of the *Small Claims Court Rules*, O. Reg. 258/98 ("SCCR"), to set aside the clerk's default judgment.

Recent authorities for proposition that irregularly-obtained default judgment must be set aside automatically, or as of right, without terms, are *Royal Trust Corp. of Canada v. Dunn*,

[1991] O.J. No. 2231, 1991 CarswellOnt 468, 6 O.R. (3d) 468, 6 C.P.C. (3d) 351, 86 D.L.R. (4th) 490 (Ont. Gen. Div.), and *Benlolo v. Barzakay*, 169 O.A.C. 39, 2003 CarswellOnt 658, [2003] O.J. No. 602 (Ont. Div. Ct.); additional reasons at 170 O.A.C. 115, 2003 CarswellOnt 1260 (Ont. Div. Ct.). In such cases, there is no requirement on moving party to show, as there is in cases of regularly-obtained judgments, that he or she has an arguable defence on the merits. That is because irregularly-obtained judgments must be set aside *ex bebito justitiae* (for the sake of justice).

Onus to prove valid service is on the party asserting that proper service was effected: *Ivan's Films Inc. v. Kostelac*, 29 C.P.C. (2d) 20, 1988 CarswellOnt 441 (Ont. Master); leave to appeal refused (1988), 30 C.P.C. (2d) lv (Ont. H.C.); *Don Bodkin Leasing Ltd. v. Rayzak*, [1993] O.J. No. 503, 1993 CarswellOnt 4016 (Ont. Gen. Div.); reversed 1994 CarswellOnt 2220, [1994] O.J. No. 280 (Ont. Gen. Div.) at para. 10; and *Ryan (In Trust) v. Kaukab*, [2004] O.J. No. 5656, 2004 CarswellOnt 5898 (Ont. S.C.J.); additional reasons at [2005] O.J. No. 603, 2005 CarswellOnt 643 (Ont. S.C.J.); additional reasons at 2005 CarswellOnt 644 (Ont. S.C.J.); leave to appeal refused 2005 CarswellOnt 653 (Ont. Div. Ct.) at para. 9.

Garten v. Kruk, 2009 CarswellOnt 6477, 257 O.A.C. 59 (Ont. Div. Ct.).

Some six months after initial court appearance, without notifying the defendant, plaintiff's counsel had defendant noted in default. Six months later, the plaintiff's lawyer notified the defendant's lawyer of the noting in default. The defendant moved to set aside the noting of default. Master dismissed motion. Divisional Court, *per* Wilson J., allowed appeal. The defendant demonstrated intent to defend. She had immediately obtained counsel. The fact that she appeared before Master and was now before Divisional Court spoke volumes of her desire to defend. Defendant should not be punished for her lawyer's errors. Her lawyer's affidavit clearly stated that his office inadvertently failed to deliver the statement of defence. Master did not accept the lawyer's sworn statement. Master's order reinforced sharp practice.

Zammit Semple LLP v. Attar, [2009] O.J. No. 5044, 2009 CarswellOnt 7369 (Ont. S.C.J.).

The plaintiff obtained default judgment against the defendant. The defendant brought the motion to set aside default judgment. Motion dismissed. The plaintiff waited over one-and-a-half years. The circumstances were not obstacle to granting the defendant relief sought. The defendant met test, being whether motion brought forthwith after default judgment came to the defendant's attention. The defendant failed, however, to meet branch of test, whether the defendant could present viable defence on merits.

Canadian Imperial Bank of Commerce v. Darmantchev, 2010 BCCA 247, 2010 CarswellBC 1523, 488 W.A.C. 100, 288 B.C.A.C. 100 (B.C. C.A.).

The defendants unsuccessfully applied to set aside default judgments in favour of plaintiff bank. The defendants appealed. Appeal dismissed. The defendants gave up right to challenge claim when they did not file defences which application judge found was intentional. Beyond bare assertion that the application judge failed to account for fact that they were laypersons, the defendants offered no basis upon which this could be said and how they were prejudiced.

George L. Mitchell Electrical v. Rouvalis, 2010 NSSC 203, 2010 CarswellNS 398, 10 C.P.C. (7th) 316 (N.S. S.C.).

The defendants had reasonable excuse for failing to file defence within required time. The plaintiff appealed. Appeal allowed. Order for default judgment reinstated. The defendants offered no ancillary reason for failure to file defence beyond fact that they did not read claim. Adjudicator erred in law.

Wagner v. East Coast Paving Ltd., 2010 NSSM 63, 2010 CarswellNS 699 (N.S. Sm. Cl. Ct.).

The application was pursuant to section 23(2) of the Nova Scotia *Small Claims Court Act* to set aside a *quick* judgment. Notice of claim filed on July 20, 2010, and served on July 27, 2010. It indicated hearing of claim set for August 31, 2010. Reference to 10 days on the form was in fact incorrect. Application for quick judgment filed August 17 and, on August 18, a quick judgment granted on basis of written material filed with application. The application to set aside quick judgment was filed on August 24, 2010.

The defendant argued that evidence showed defendant was a self-represented litigant who simply did not understand that she was required to file a document defending the matter. Her clear evidence was that she intended to defend and to be present on August 31.

The defendant must provide some evidence showing it had a reasonable excuse for not filing a defence. Not *any* excuse but a *reasonable* excuse. The issue is whether there is shown to be a reasonable excuse for not filing a defence. The evidence does not satisfy requirement that there be a reasonable excuse for failing to file a defence. The application was dismissed pursuant to section 23.

1000728 Ontario Ltd. v. Kakish, 2010 ONSC 538, 2010 CarswellOnt 599, 88 C.P.C. (6th) 108 (Ont. S.C.J.).

Finance company relied on provisions of *Mercantile Amendment Act* to sue the consignee. The consignee brought motion to transfer action from Small Claims Court to Superior Court. Motion granted. Case was complex. Small Claims Court could not provide consecutive trial dates and it was reasonable to expect trial to last more than one day.

See also *Alexandrov v. Csanyi*, 247 O.A.C. 228, 2009 CarswellOnt 1325 (Ont. Div. Ct.); *Csanyi v. Alexandrov*, 2009 CarswellOnt 5446 (Ont. S.C.J.); *Haines, Miller & Associates Inc. v. Foss*, 1996 CarswellNS 301, 153 N.S.R. (2d) 53, 450 A.P.R. 53, 3 C.P.C. (4th) 349 (N.S. S.C. [In Chambers]); additional reasons at 1996 CarswellNS 304, 158 N.S.R. (2d) 389, 466 A.P.R. 389 (N.S. S.C. [In Chambers]).

In *Alexandrov*, Court said that the jurisprudence on transfer is that a plaintiff may be forced, in very exceptional cases, into the Superior Court against the wishes of the plaintiff.

In *Farlow v. Hospital for Sick Children*, 2009 CarswellOnt 7124, [2009] O.J. No. 4847, 100 O.R. (3d) 213, 83 C.P.C. (6th) 290 (Ont. S.C.J.), Court held that on a motion to transfer an action from Small Claims Court to the Superior Court, there must be a balancing of the various factors enumerated in that decision.

Expert evidence necessary to determine issues to be tried. Expert evidence can be given in the Small Claims Court. The Small Claims Court does *not* have procedural framework similar to rr. 53.03 and 76.10(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for the timely exchange of expert reports in advance of the trial.

In *Crane Canada Co. v. Montis Sorgic Associates Inc.*, 2005 CarswellOnt 9989, [2005] O.J. No. 6247 (Ont. S.C.J.); affirmed 2006 CarswellOnt 3051, [2006] O.J. No. 1999 (Ont. C.A.), the court found that expert evidence would be central to the determination of the claims and that such evidence would likely be complex, and decided accordingly that claims would be more appropriately dealt with in the Superior Court.

Infolink Technologies Ltd. v. IVP Technology Corp., 2011 ONSC 2781, 2011 CarswellOnt 6371 (Ont. S.C.J.), Cumming J.; additional reasons at 2011 ONSC 5425, 2011 CarswellOnt 9452 (Ont. S.C.J.).

Default proceedings. Judgment following default. By motion for judgment. General principles. Action allowed. Rule 19.02(1)(a) of *Rules of Civil procedure* was provided as a consequence of having been noted in default, as T deemed to admit the truth of all allegations of fact made in the claim. Therefore, judgment was granted pursuant to r. 19.05 of rules against T as to the issue of liability.

Rifici v. Sitebrand Inc., 2011 ONSC 4049, 2011 CarswellOnt 5745 (Ont. S.C.J.).

The employer terminated the employee without cause. The employee agreed to the payment terms for amounts owing under the employment agreement. The employer only made one payment. The employee commenced an action for the amount owing. The employee noted that the employer was in default and obtained a default judgment. The employer brought a motion for an order setting aside the default judgment. The motion was dismissed. The employer waited 5 1/2 months before bringing the motion and had not provided an adequate explanation for the delay. The employer failed to explain why the defence was not filed in a timely manner, and failed to establish arguable defence on merits. The employer had not committed to pursue particular defences, and even the employer's purported possible defences had no merit.

Misir v. Baichulall, 2012 ONSC 893, 2012 CarswellOnt 1449 (Ont. S.C.J.).

This action proceeded as an undefended trial because all of the defendants were noted to be in default. Conway J. ordered that the plaintiff's trial proceed pursuant to Rule 19 of the *Rules of Civil Procedure*.

The plaintiff submitted that because it was an undefended trial and the defendants were noted as in default, it was not open to enter into an inquiry about the liability of the defendants. See decision in *Umlauf v. Umlauf*, 2001 CarswellOnt 851, [2001] O.J. No. 1054, 53 O.R. (3d) 355, 142 O.A.C. 328, 9 C.P.C. (5th) 93, 197 D.L.R. (4th) 715 (Ont. C.A.). D.M. Brown J. considered this issue in *Viola v. Hornstein*, 2009 CarswellOnt 1963 (Ont. S.C.J.). The approach set out in *Plouffe* and *Fuda* gives effect to Rule 19.06. Findings were based on deemed admissions arising as a result of Rule 19.02(1)(a). For the reasons outlined above, the plaintiff was awarded damages of $5,000 and costs in the amount of $1,500 against all of the defendants.

Canadian Imperial Bank of Commerce v. Petten, 2010 ONSC 6726, 2010 CarswellOnt 9126, 6 C.P.C. (7th) 429 (Ont. S.C.J.).

The defendants did not defend the action. Summary judgment was issued in the plaintiff's favour. The defendants brought a motion to set aside the judgement almost five months later. The motion was dismissed. The defendants chose to ignore the proceeding until it was too late and then attempted to manipulate the system in their favour. The defence on merits was weak, but the matter turned on the triable issue of credibility.

Aguas v. Rivard Estate, 2011 ONCA 494, 2011 CarswellOnt 5822, [2011] O.J. No. 3108, 107 O.R. (3d) 142, 335 D.L.R. (4th) 365, 7 C.P.C. (7th) 16, 282 O.A.C. 39 (Ont. C.A.).

There were sufficient grounds for setting the order aside. The plaintiff's motion to set aside the order by the registrar pursuant to R. 48.14 of *Rules of Civil Procedure* was dismissed. The plaintiff appealed. The appeal was allowed. The motion judge placed unreasonable emphasis on prejudice. The defendant's counsel's lack of display of any sense of urgency undercut the claim of actual prejudice.

Royal Bank of Canada v. US Distribution Services Inc., 2012 ONSC 7261, 2012 CarswellOnt 16817 (Ont. S.C.J.).

Motion to set aside a default judgment brought by the defendant, Linda Earle-Barron.

A motions judge must ultimately determine whether the interests of justice favour the granting of the order (see *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.*, 2007 ONCA 333, 2007 CarswellOnt 2713, 87 O.R. (3d) 479, 41 C.P.C. (6th) 316, [2007] O.J. No. 1685 (Ont. C.A.) and *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp.*, 2008 ONCA 894, 2008 CarswellOnt 7956, 245 O.A.C. 47, [2008] O.J. No. 5345 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 3641, 2009 CarswellOnt 3642, 399 N.R. 398 (note), 262 O.A.C. 398 (note) (S.C.C.)).

The judgment obtained against Ms. Earle-Barron was only $14,537.46. However, the overall judgment was $49,830.63. That amount is well in excess of the Small Claims Court's maxi-

mum jurisdiction of $25,000. Rule 57.05(3) has no application as the default judgment is for a total amount in excess of the Small Claims Court's jurisdiction. Ms. Earle-Barron simply did not defend the action because she was busy with other matters, specifically waiting for a court decision. Motion dismissed.

1775323 Ontario Inc. v. AAH Gas Inc., 2012 ONSC 6735, 2012 CarswellOnt 14854 (Ont. C.J.).

The plaintiff secured a default judgment against defendant Mohammad Asghar. That judgment flowed from an order striking the Statement of Defence. The defendant was then noted in default and the default judgment was issued.

Rule 37.14(1)(b) allows a party to move to set aside an order on a motion when the person has failed to appear on the motion through accident, mistake or insufficient notice. In this case, Court satisfied that there was a mistake or accident and that Mr. Asghar, if properly advised and fully aware of the legal process, would have attended on January 6.

Rule 19.03(1) allows the court to set aside the noting of default on such terms as are just.

The discretion to award costs is found under section 131 of the *Courts of Justice Act*, and the provisions of rule 57.01 list a variety of factors to be considered in exercising that discretion.

Costs order in favour of the plaintiff against the defendant Mohammad Asghar fixed in the amount of $7,500 inclusive of HST and disbursements.

William Hannah Heating and Cooling Inc. v. Evans Estate, 2013 ONSC 517, 2013 CarswellOnt 524 (Ont. S.C.J.).

This is a lien proceeding for an amount that would otherwise be well within the jurisdiction of the Small Claims Court. Motion to set aside a default judgment.

If leave is required to bring motion under s. 67(2) of the Act meets test of a necessary step if the defendant can show that refusing to set aside the default judgment is unjust. That is the moving party must show the motion was brought promptly, that there is a reasonable explanation for the failure to defend, and there exists a genuine defence. The latter should be set out in a proposed statement of defence compliant with subrules 25.06 and 25.07. But in a lien action the defendant must also meet the test for setting aside the noting of default under s. 54 of the Act. That requires the court to be satisfied that the proposed defence is supported by actual evidence. See *Metaldoor Hardware & Installations Ltd. v. York Region District School Board*, 2012 ONSC 3067, 2012 CarswellOnt 7143, 25 C.L.R. (4th) 21 (Ont. S.C.J.).

There is little prejudice to the plaintiff in setting aside the judgment because the full amount of the lien plus 25 per cent for security for costs has been paid into court.

Always an intent to defend and that was known to the plaintiff. Default judgment set aside as will the noting of default, defendants have 15 days to file their defence.

Stealth Web Designs Inc. v. Wildman, 2012 SKPC 73, 2012 CarswellSask 344, 397 Sask. R. 17 (Sask. Prov. Ct.).

The applicant (defendant) Melanie Wildman applies to set aside a judgment in favour of the respondent (plaintiff) Stealth Web Designs Inc.

Section 7.1 of *The Small Claims Act* gives authority to a judge to make any appropriate order or give judgment against a party who does not attend a case management conference.

At the case management conference on October 27, 2011, pursuant to section 7.1, this Court awarded judgment in favour of the respondent in the amount of $6,017.83, along with pre-judgment interest in the amount of $63.36 and costs of issuing and serving the claim in the amount of $230.00, for a total of $6,311.19.

Section 37(2) of *The Small Claims Act* provides that after the expiry of 90 days from the date of judgment, the court may allow an application to be made to set aside the judgment, in exceptional circumstances. The term "exceptional" is defined in the *Canadian Oxford Dic-*

tionary (2d ed.) as: "(1) forming an exception; (2) unusual; not typical (exceptional circumstances)."

The business-related reasons cannot be characterized as unusual or atypical. It is the court's view that they would not be sufficient to meet the test of "exceptional circumstances" as required by section 37(2). Something more or different must be demonstrated to allow an application to proceed after 90 days has expired.

Once the court has allowed the application to proceed, the applicant must satisfy the court that she had a reasonable excuse for failing to attend the case management conference and that she has a valid defence to the respondent's claim.

The court is of the view that the defence is valid, in that it discloses a triable issue and is not without reasonable grounds, frivolous, vexatious or an abuse of the court's process.

The applicant had a reasonable excuse for not attending the case management conference and has a valid defence.

Fundamental to our system of justice is the principle that parties to a dispute have the opportunity to be heard. However, the court recognizes the hardship that further delay of these proceedings poses to the respondent, a small, fledgling business.

Having found the applicant had a reasonable excuse for not attending the case management conference and has a valid defence, judgment set aside, and new case management conference to be scheduled.

Mayo v. Veenstra, 2003 CarswellOnt 9, 63 O.R. (3d) 194, Belch J. (Ont. S.C.J.).

The defendant in a Small Claims Court action moved to set aside noting in default. The defendant was ordered to submit to cross-examination or motion to be dismissed. The order was made in error; there was no authority to order cross-examinations prior to judgment in Small Claims Court.

2272546 Ontario Inc. v. Garnett, 2013 CarswellOnt 5765 (Ont. S.C.J.).

Motion to set aside order striking statement of defence and subsequent order granting judgment. Defence struck at settlement conference and judgment granted after assessment of damages. Defendant relies upon Rule 11.06 on motion. Proper remedy in the Superior Court of Justice is to move under Rule 19.08 before the same court. See *Halow Estate v. Halow*, 2002 CarswellOnt 1062, *(*sub nom. *Halow Estate v. Halow, Sr.)* 59 O.R. (3d) 211, 158 O.A.C. 125, [2002] O.J. No. 1446 (Ont. C.A.). Rule 11.06 is to preclude appeals to the Divisional Court from the multitude of default judgments. A defendant in the Small Claims Court must exhaust the setting aside remedies of the Small Claims Court before an appeal lies to the Divisional Court. See also *Ketelaars v. Ketelaars*, 2011 ONCA 349, 2011 CarswellOnt 2887, 2 R.F.L. (7th) 296, [2011] O.J. No. 2009 (Ont. C.A.) at para. 5. See also *Maly v. Hanniman* (October 26, 2012), Doc. No. SC-11-116748, [2012] O.J. No. 5130 (Ont. Sm. Cl. Ct.).

When a defence is struck for whatever reason and judgment thereafter obtained *ex parte*, the judgment in the nature of a default judgment.

Under Rule 11.06, the defendant must satisfy the court that he has a reasonable explanation for his default. The defendant must also show that a meritorious defence to put forward.

Tests governing the setting aside of default judgments are not to be applied rigidly. See *Chitel v. Rothbart*, 1988 CarswellOnt 451, 29 C.P.C. (2d) 136, [1988] O.J. No. 1197 (Ont. C.A.); leave to appeal refused (1989), 98 N.R. 132 (note), *(*sub nom. *Rothbart v. Chitel)* 34 O.A.C. 399 (note), [1988] S.C.C.A. No. 427 (S.C.C.), at para. 1. In *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.*, 2007 ONCA 333, 2007 CarswellOnt 2713, 87 O.R. (3d) 479, 41 C.P.C. (6th) 316, [2007] O.J. No. 1685 (Ont. C.A.), at para. 2, the court held that tests are a

guide and that governing principle whether interests of justice favour or do not favour setting aside default judgment.

The motion was dismissed with costs to the plaintiff.

Ward v. Landmark Inn Limited Partnership (April 17, 2013), Doc. No. SC-12-1031, Deputy Judge Cleghorn, K. (Ont. Sm. Cl. Ct.).

Motion to set aside noting in default and permission to file a defence.

See Rule 11.06 of the *Small Claims Court Rules*. A motion was brought as soon as reasonably possible.

I do not equate the word "meritorious" with "arguable". See J.W. Quinn J. in *Coombs v. Curran*, 2010 ONSC 1312, 2010 CarswellOnt 1175, [2010] O.J. No. 815, 100 O.R. (3d) 554 (Ont. Div. Ct.), quoting the New Shorter Oxford English Dictionary, "meritorious" is defined as "entitling a person to reward; well-deserving, meriting commendation, having merit" (at para. 30).

Rule 1.03(1) of the *Rules of the Small Claims Court* provides:

> 1.03(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the *Courts of Justice Act*. O. Reg. 258/98, r. 1.03(1).

This is a matter of judicial discretion. Motion granted. Noting of default set aside and defendants have permission to file their defence.

Dubé v. Lee (March 25, 2014), Doc. SC-13-50552 (Ont. S.C.S.M.).

Motion seeking to set aside Motion made on dismissing Claim. Plaintiff's Claim was dismissed in his absence. Is it the test for a new Trial under Rule 17.04 or it is the test for setting aside a default judgment? Rule 11.06 essentially codifies the long established 3-part test for setting aside a default judgment. What took place was more akin to a default judgment than a Trial. Therefore, application of the 3-part test for setting aside a default judgment more appropriate than the application of Rule 17.04(4).

In keeping with fundamental principles in Rule 1.03(1) and section 25 of the *Courts of Justice Act*, interests of the administration of justice best served by setting aside decision of the Motion Judge of February 5, 2014 and ordering that Defendant's Motion be rescheduled and reheard with both parties present.

Male v. Business Solutions Group, 2013 ONCA 382, 2013 CarswellOnt 7657, 115 O.R. (3d) 359 (Ont. C.A.).

Appellants seek to have the respondent's default judgment against them, which was sustained by the motion judge, set aside.

This court's approach to setting aside default judgment on appeal is set out in *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp.*, 2008 ONCA 894, 2008 CarswellOnt 7956, 245 O.A.C. 47, [2008] O.J. No. 5345 (Ont. C.A.) at paras. 21, 22 and 30; ; leave to appeal refused 2009 CarswellOnt 3641, 2009 CarswellOnt 3642, 399 N.R. 398 (note), 262 O.A.C. 398 (note), [2009] S.C.C.A. No. 81 (S.C.C.).

The default judgment ought to have been set aside as a matter of justice without an inquiry into the merits of a defence, and the defendants ought to have been permitted to file a statement of defence and a counterclaim, if so advised, with the action proceeding in the normal course.

Akagi v. Synergy Group (2000) Inc., 2015 ONCA 44, 2015 CarswellOnt 658, [2015] O.J. No. 278 (Ont. C.A.).

Order made without notice is *not* nullity but remains valid order of court until set aside. In this case, trial judge had given judgment in favour of plaintiff at undefended trial. On appeal,

defendants sought to have this judgment set aside on grounds that they had not been properly served with notice of trial. But the Court of Appeal could find no evidence that defendants lacked knowledge of proceedings. Court of Appeal dismissed defendants' request to have trial judgment set aside.

L-Jalco Holdings Inc. v. Bell, 2017 ONSC 1035, 2017 CarswellOnt 1713, 45 C.B.R. (6th) 320, F. L. Myers J. (Ont. S.C.J. [Commercial List]); additional reasons 2017 ONSC 1504, 2017 CarswellOnt 3228, 46 C.B.R. (6th) 167 (Ont. S.C.J. [Commercial List])

Defendant moved to set aside the judgment granted against him without notice. The judgment included a declaration under s. 178 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 that the defendant committed fraud so that the judgment will survive his bankruptcy.

Rule 37.07 (1) of the *Rule of Civil Procedure* requires a party who brings the motion in a proceeding to provide notice of the motion to the opposing party.

Rule 19.02 (3) provides that where a party has been noted in default, it is not entitled to any further notice except in specifically listed cases. Similarly, Rule 19.05 (1) allows a party to move before a judge for default judgment where the defendant has been noted in default.

The plaintiff had no right to move under s. 178 of the *BIA* without notice. The Court of Appeal set out the test to set aside a default judgment in *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 2014 CarswellOnt 3011, 119 O.R. (3d) 561, 56 C.P.C. (7th) 133, 372 D.L.R. (4th) 526, 317 O.A.C. 255, [2014] O.J. No. 1197 (Ont. C.A.). See also *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.*, 2007 ONCA 333, 2007 CarswellOnt 2713, 87 O.R. (3d) 479, 41 C.P.C. (6th) 316, [2007] O.J. No. 1685 (Ont. C.A.).

Judgment set aside for non-disclosure under Rule 39.01 (6); for failure to give notice under Rule 37.07 (1); and for improper use of s. 178 of the *BIA*. To the extent that the order can be conceived of as a default judgment, it is set aside under the test set out in *Mountain View Farms Ltd.*

Settlement Lenders Inc. v. Blicharz, 2016 ABCA 109, 2016 CarswellAlta 659, [2016] A.J. No. 367 (Alta. C.A.); leave to appeal refused *Blicharz v. Settlement Lenders Inc.*, 2016 CarswellAlta 2042, 2016 CarswellAlta 2043, [2016] S.C.C.A. No. 275 (S.C.C.).

In 2007 and 2008, Ms. Blicharz executed three promissory notes in favour of Settlement Lenders Inc. and Settlements Lenders of Canada Inc., who lent money to people pursuing legal actions. Settlement Lenders issued a claim alleging Ms. Blicharz had defaulted on all three loans. She did not file a statement of defence and default judgement was granted. Ten months later, she applied to set aside the default judgment. The application was dismissed. Her appeal was struck for failure to file the appeal record. A request for a further adjournment was denied. The appellate judge also determined the appeal could not be restored and denied Ms. Blicharz's application for leave to appeal that decision to a pane of three judges. The application for leave to appeal to the SCC dismissed.

The circumstances in which a default judgment may need to be set aside may arise through inadvertence or failure of an insured to report a claim in a timely manner. The insurer may be the respondent in a motion to lift default judgment that was obtained by way of subrogated. See *Summerside (City) v. Total Machine Works Inc.*, 2016 PESC 41, 2016 CarswellPEI 73 (P.E.I. S.C.) [*Total Machine Works*]. The established guidelines for setting aside default are: 1) timeliness of the set aside motion; 2) a plausible explanation for the default; and 3) an arguable defence on the merits. Although the Court emphasized the discretionary nature of the decision, it denied the motion and rested its decision on its finding that the companies' defence was not an arguable defence on the merits and had no possibility of success at trial. Each case will depend on its facts.

Male v. Business Solutions Group, 2013 ONCA 382, 2013 CarswellOnt 7657, 115 O.R. (3d) 359 (Ont. C.A.).

This court's approach to setting aside default judgment on appeal is set out in *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp.*, 2008 ONCA 894, 2008 CarswellOnt 7956, 245 O.A.C. 47, [2008] O.J. No. 5345 (Ont. C.A.) at paras. 21, 22 and 30; ; leave to appeal refused 2009 CarswellOnt 3641, 2009 CarswellOnt 3642, 399 N.R. 398 (note), 262 O.A.C. 398 (note), [2009] S.C.C.A. No. 81 (S.C.C.). The default judgment ought to have been set aside as a matter of justice without an inquiry into the merits of a defence, and the defendants ought to have been permitted to file a statement of defence and a counterclaim, if so advised, with the action proceeding in the normal course. The motion judge erred in principle by failing to take into account the fact that the defendants were actively defending the case at the time that the noting in default occurred and at the time the default judgment was taken out. See *LeBlanc c. York Catholic District School Board*, 2002 CarswellOnt 4122, 2002 CarswellOnt 4123, 61 O.R. (3d) 686, 61 O.R. (3d) 698, 28 C.P.C. (5th) 377, [2002] O.J. No. 4641, [2002] O.J. No. 4640 (Ont. S.C.J.) at paras. 21; ; additional reasons 2002 CarswellOnt 4214, 2002 CarswellOnt 4215 (Ont. S.C.J.): "It is well accepted that the bringing of a motion before the court to obtain a stay or the dismissal of an action is recognized as a step in the defence of the proceeding. See *Cafissi v. Vana*, 1973 CarswellOnt 921, [1973] 1 O.R. 654 (Ont. S.C.) at p. 655 [O.R.]." It was unreasonable for counsel for the respondent to have noted the appellants in default and to have pursued default judgment without notice to appellants' counsel, with whom he was actively engaged, when he knew that the appellants were defending. The publication issued by the Advocates' Society, entitled *The Principles of Civility for Advocates*, has been endorsed by this court on a number of occasions. Section 19 provides:

> 19. Subject to the Rules of Practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known.

Appeal allowed, default judgment set aside, and set aside the noting of the defendants in default.

Action Auto Leasing & Gallery Inc. v. Crawford, 2013 ONSC 6299, 2013 CarswellOnt 14270, [2013] O.J. No. 4684 (Ont. S.C.J.). R.J. Nightingale J.

Deputy judge should not have ignored admission of liability of respondents under lease. Respondents failed to defend and were noted in default. Appeal allowed. Decision set aside. Matter referred back for assessment of appellant's damages on appellant providing further and better affidavit. Deemed admission by respondents of liability in law to appellant because of default meant respondents were admitting to liability to it in all respects.

Foremost Cranberry Mews Limited Partnership v. Ferreri, 2015 ONSC 2827, 2015 CarswellOnt 6296, [2015] O.J. No. 2198 (Ont. S.C.J.). Faieta J.

There was plausible excuse for failure to defend claim. Defendants brought motion to set aside noting in default, default judgment and stay notice of garnishment. Motion granted.

Defendants brought motion without delay upon learning of default judgment. Defendants believed action being defended by their insurer. Defendants had arguable defence that damages occurred outside one-year warranty provided for work performed.

Ur-Rahman v. Mahatoo, 2016 ONCA 555, 2016 CarswellOnt 10716, 3 C.P.C. (8th) 127 (Ont. C.A.).

Appeal to set aside default judgment dismissed. Landlords applied to set aside default judgment. Landlords claimed they acted promptly after learning of default and had meritorious case. Landlords were found to have evaded service.

Clarke v. Toronto Transit Commission, 2018 ONSC 6453, 2018 CarswellOnt 18087 (Ont. S.C.J.).

The Ontario Superior Court dismissed the moving defendant's motion for Summary Judgment in a case involving a collision between a motor vehicle and a pedestrian. When the disputed facts call for an assessment of credibility, such an assessment may not be available during a motion for Summary Judgment. Further, while expert reports are often considered and encouraged during a motion for Summary Judgment, thought must be taken as to whether the content of the reports may require further detailed explanations that can only be provided for during a trial.

Ozugowski v. Lake Stars Corp. et al., 2019 ONSC 2032, 2019 CarswellOnt 5439, 52 C.P.C. (8th) 209, 47 E.T.R. (4th) 97, Sossin J. (Ont. S.C.J.)

Application to set aside default judgment. *Threshold for setting aside noting of default less onerous than setting aside default judgment.*

Threshold for setting aside noting of default was less onerous than setting aside default judgment under Rule 19.08 of Rules of Civil Procedure. Little would be served at this stage by requiring plaintiff to take additional step of separate motion to set aside noting of default in these circumstances. Plaintiff moved promptly once aware of default judgment and provided satisfactory explanation for overall delay.

Segura Mosquera v. Rogers Communications Inc., 2019 ONSC 6187, 2019 CarswellOnt 17394, Kane Justice (Ont. S.C.J.); additional reasons 2020 ONSC 3397, 2020 CarswellOnt 8338 (Ont. S.C.J.)

Plaintiff by motion pursuant to Rules 37.14 and 1.04, sought to set aside the November 23, 2018 order dismissing her motion to transfer her Small Claims Court proceeding, and to add the "CCTS" and the "CRTC" as defendants. The requirements under R. 38.11 to set aside a judgment on the basis of mistake or accident, have been held to be the same as the requirements to set aside default judgment under R. 19.08. See *1493201 Ontario Ltd. v. Giannoylis*, 2016 ONSC 1210, 2016 CarswellOnt 2431, 129 O.R. (3d) 616 (Ont. S.C.J.). See also *1202600 Ontario Inc. v. Jacob*, 2012 ONSC 361, 2012 CarswellOnt 1335 (Ont. S.C.J.) at para. 76.

The plaintiff, pursuant to s. 107(1)(c) to (4) of the *Courts of Justice Act* R.S.O. 1990, Chapter C.34 (the "*CJA*") and R. 37.17, may seek the transfer of her SC Action to this court by motion. Although she could have, she was not required to and did not commence an application seeking such transfer to this court.

Dismissing a self-represented litigant's motion, or proceeding, because they arrived five to ten minutes after commencement of motions court, then prohibiting that late party the right to address the court and thereby requiring this motion to set aside the dismissal order does not:

(a) encourage access to the courts;

(b) enhance confidence in the administration of justice; nor

(c) promote the efficient use of public resources.

Rules 1.04 and 2.01

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).
>
> . . .
>
> **2.01** (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> > (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

> (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part. R.R.O. 1990, Reg. 194, r. 2.01 (1) (emphasis added).

The objective under R. 1.04 is to be considered in regard to the requirements under R. 38.11 to set aside a judgment obtained on default or by error or accident.

Dismissal of a motion should preferably be determined on its merits. Subject to the plaintiff's late arrival in the correct courtroom on November 23, 2018, all parties had prepared and intended to argue the motion that day.

The November 23, 2018 dismissal order. The plaintiff shall forthwith reschedule her transfer motion in this court

Rule 11.1 — Dismissal by Clerk

11.1.01 (1) Dismissal — Unless the court orders otherwise, the clerk shall make an order dismissing an action for delay if, by the second anniversary of the commencement of the action,

(a) the action has not been disposed of by order; and

(b) no step has been taken by the plaintiff under rule 11.03 to obtain judgment, nor has a trial date been requested.

(2) Exceptions — Subrule (1) does not apply if,

(a) an offer to settle the action has been accepted and filed;

(b) the defence contains an admission of liability for the plaintiff's claim in the action and a proposal of terms of payment under subrule 9.03(1); or

(c) at the time the clerk would otherwise be required under that subrule to dismiss the action, the plaintiff is under disability.

(2.1) [Repealed O. Reg. 108/21, s. 13.]

(3) Service of Order — The clerk shall serve a copy of an order made under subrule (1) on the parties.

(4) [Repealed O. Reg. 488/16, s. 1(3).]

(5) [Repealed O. Reg. 194/15, s. 3.]

(6) [Repealed O. Reg. 194/15, s. 3.]

Commentary: The *Small Claims Court Rules* were amended in 2006 to provide that cases which have been stagnant for a certain period of time will be automatically dismissed by the court clerk. This means that plaintiffs must move their cases along or face dismissal under Rule 11.1.

Rule 11.1 establishes a case management procedure for Small Claims Court. The parties must move through the litigation process in the timelines set out in the Rule. If they fail to do so, the clerk as per Rule 11.1.01 sends an order dismissing claim for delay.

As of September 1, 2015, (see O. Reg. 194/15) unless the court orders or the Rules provide otherwise, an action will be automatically dismissed if:

- more than two years have passed since the date the Plaintiff's Claim (Form 7A) was issued;
- the plaintiff is not under disability;
- no offer to settle has been accepted and filed;

- the defendant has not admitted liability and proposed terms of payment;
- the action has not been disposed of by order;
- a motion in writing for an assessment of damages has not been filed; and
- a trial or assessment hearing date has not been requested (with payment).

A motion to set aside a dismissal order obviously affects the interests of the defendant, and must be brought on notice. See also rule 15.01(6), which requires notice of a motion made after judgment even on defendants who have been noted in default.

There has been an abundance of recent case law from the Court of Appeal dealing with the considerations which apply to a motion to set aside a clerk's automatic dismissal for delay order. Although arising under the *Rules of Civil Procedure* and not from the *Small Claims Court Rules*, the principles apply in Small Claims Court.

In the leading case of *Scaini v. Prochnicki*, 2007 ONCA 63, 2007 CarswellOnt 408, [2007] O.J. No. 299, 85 O.R. (3d) 179, 39 C.P.C. (6th) 1, 219 O.A.C. 317 (Ont. C.A.), the court held that the overriding consideration was the justice of the case, which should be assessed contextually. Four criteria may be considered in making that contextual assessment: (i) explanation of the litigation delay; (ii) inadvertence in missing the deadline; (iii) the motion is brought promptly; and (iv) no prejudice to the defendant. In that case, the action was reinstated.

In *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 2007 CarswellOnt 6522, [2007] O.J. No. 3872, 87 O.R. (3d) 660, 47 C.P.C. (6th) 233, 247 O.A.C. 22, 286 D.L.R. (4th) 487 (Ont. C.A.), those principles were applied and in that case the action was not reinstated. It was held that the plaintiff's delay was inordinate, the interest of the administration of justice in finality was a proper part of the contextual analysis, and the plaintiff could pursue a negligence claim against its lawyer if the action were dismissed for delay. The action was not reinstated.

The panel in *Finlay v. Van Paassen*, 2010 ONCA 204, 2010 CarswellOnt 1543, [2010] O.J. No. 1097, 101 O.R. (3d) 390, 266 O.A.C. 239, 318 D.L.R. (4th) 686 (Ont. C.A.), found that speculation about whether a plaintiff has a potential negligence claim against his or her representative is unhelpful and should not inform the decision whether to set aside an automatic dismissal for delay order. Other recent decisions of the Court of Appeal include *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, 2010 CarswellOnt 3521, [2010] O.J. No. 2225, 102 O.R. (3d) 555, 319 D.L.R. (4th) 412, 262 O.A.C. 349, 90 C.P.C. (6th) 101 (Ont. C.A.); additional reasons at 2010 ONCA 513, 2010 CarswellOnt 5182, 88 C.P.C. (6th) 206 (Ont. C.A.); *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, 2010 CarswellOnt 9774, [2010] O.J. No. 5572, 104 O.R. (3d) 689, 97 C.L.R. (3d) 1, 271 O.A.C. 205, 328 D.L.R. (4th) 540, 2 C.P.C. (7th) 114 (Ont. C.A.); *Aguas v. Rivard Estate*, 2011 ONCA 494, 2011 CarswellOnt 5822, [2011] O.J. No. 3108, 107 O.R. (3d) 142, 335 D.L.R. (4th) 365, 7 C.P.C. (7th) 16, 282 O.A.C. 39 (Ont. C.A.).

An excellent discussion of these principles as applicable in the Small Claims Court is provided by Deputy Judge Abraham Davis in *Cozzi v. Cordeiro* (August 21, 2008), Doc. 48211/07, [2008] O.J. No. 3199 (Ont. Sm. Cl. Ct.), extension of time to appeal denied *Cozzi v. Cordeiro*, 2009 CarswellOnt 5648, [2009] O.J. No. 3914 (Ont. Div. Ct.). See also *Groscki v. Bell Mobility* (October 31, 2011), Doc. SC-10-00007592-0000, [2011] O.J. No. 5317 (Ont. Sm. Cl. Ct.).

Evans v. Triserve Management Inc., 2013 CarswellOnt 7648, [2013] O.J. No. 2651 (Ont. Sm. Cl. Ct.).

The plaintiffs moved to set aside the clerk's order dismissing the claim as abandoned dated April 23, 2013. Motion granted. Whether a notice and subsequent dismissal order under Rule

11.1 of the *Small Claims Court Rules*, O.Reg. 258/98, when issued only under the court file number of the plaintiff's claim, also affect a defendant's claim? In this case, the clerk issued a notice under rule 11.1(2) in the plaintiff's claim only, and subsequently issued a dismissal order using that same court file number only. It is unfair to interpret Rule 11.1 in a manner that would fail to give due notice to defendants who have issued defendants claims that their claims are in jeopardy of dismissal for delay.

The order was set aside dismissing the plaintiff's claim as abandoned and directed that they set the action down for trial within ten days.

The best practice for plaintiffs is to plan ahead for the 180-day deadline after issuance of their claims, and to take steps to avoid the deadlines under Rule 11.1. If a 45-day Notice of Pending Dismissal is issued by the court clerk, steps should be taken immediately to avoid issuance of the clerk's dismissal order, which may require a motion. If the dismissal order is issued the remedy is a motion to a judge to set it aside, but as the case law indicates, the judge's discretion may result in a denial of reinstatement of the action.

An action that has been automatically dismissed for delay does not necessarily preclude a fresh action for the same cause of action; however, if a limitation period has expired in the meantime, the fresh action may be precluded by virtue of that fact.

A clerk's automatic dismissal order under Rule 11.1 is a dismissal without costs.

In *Dewan v. Burdet (In Trust)*, 2013 ONSC 793, 2013 CarswellOnt 4115, [2013] O.J. No. 1668 (Ont. S.C.J.), it was held that a claim and a counterclaim are independent actions and where a registrar's order purported to dismiss the action, it did not dismiss both proceedings. The order was set aside. In Small Claims Court, a defendant's claim has a slightly different court file number than the associated plaintiff's claim. Where a clerk's notice of pending dismissal and dismissal order referenced only the plaintiff's claim, it was held that they had no effect on and did not dismiss the defendant's claim. The order dismissing only the plaintiff's claim for delay was set aside: *Evans v. Triserve Management Inc.*, 2013 CarswellOnt 7648, [2013] O.J. No. 2651 (Ont. Sm. Cl. Ct.).

Madisen v. Nindon Investments Ltd., 2015 ONSC 3786, 2015 CarswellOnt 9274, 126 O.R. (3d) 611 (Ont. S.C.J.); additional reasons 2015 ONSC 4575, 2015 CarswellOnt 11036 (Ont. S.C.J.).

Plaintiff establishing that she had always intended action to proceed. Plaintiff failing to provide satisfactory explanation for delay but that failure not determinative. Plaintiff's lawyer missing deadline through inadvertence. Lawyer not receiving status notice. Plaintiff rebutting presumption of prejudice to defendants and establishing that defendants had suffered no significant prejudice as result of delay. Order dismissing action set aside.

Appropriate analytical framework with respect to plaintiff's request set out by Master Dash in *Reid v. Dow Corning Corp.*, 2001 CarswellOnt 2213, 11 C.P.C. (5th) 80, [2001] O.T.C. 459, [2001] O.J. No. 2365 (Ont. Master); additional reasons 2001 CarswellOnt 2328, [2001] O.T.C. 459, [2001] O.T.C. 2757 (Ont. Master); reversed 2002 CarswellOnt 5899, 48 C.P.C. (5th) 93, [2002] O.J. No. 3414 (Ont. Div. Ct.), and modified by the Ontario Court of Justice of Appeal in *Scaini v. Prochnicki*, 2007 ONCA 63, 2007 CarswellOnt 408, 85 O.R. (3d) 179, 39 C.P.C. (6th) 1, 219 O.A.C. 317, [2007] O.J. No. 299 (Ont. C.A.).

In *Reid*, at para. 41, Master Dash listed four "criteria" which had to be satisfied by a plaintiff seeking to set aside an administrative dismissal, namely:

> A satisfactory explanation for the litigation delay;
>
> Inadvertence in missing the deadline;
>
> Promptness in bringing the motion to set aside; and
>
> No significant prejudice to the defendant as a result of the delay.

Triggering Timelines

Triggering Code	*Data Definition*	*Result*	*Explanation*
NOBR — Notice of Bankruptcy	When a trustee in bankruptcy provides written notice to the court or enforcement staff of a stay of proceedings against a particular debtor under the *Bankruptcy and Insolvency Act*. Written notice of the stay may be received in a notice of intention to make a proposal; a proposal; a consumer proposal; a receiving order; an assignment in bankruptcy.	Timeline cancelled.	When notice of stay is filed, the case has been stayed against a particular debtor and all timelines are cancelled. See *Bankruptcy and Insolvency Act*.
TS — Terms of Settlement	When a Terms of Settlement (Form 14D) is filed indicating the claim, and any Defendant's Claim, is withdrawn.	Timeline cancelled.	Where the Plaintiff's Claim, and any Defendant's Claim, is withdrawn, there is no need to track timelines any longer.

Event Result/Order Detail Code			
JU — Judgment	When a court has rendered final judgment in an action, disposing of the claim(s) against all parties.	Timeline cancelled.	Where judgment has been obtained, all timelines are cancelled since the matter has been disposed of against all parties. See r. 11.1.01(2)3.
JUC — Judgment on Consent	When a court has rendered final judgment in an action, disposing of the claim(s) against all parties, on consent of all parties.	Timeline cancelled.	Where judgment has been obtained, all timelines are cancelled since the matter has been disposed of against all parties. See r. 11.1.01(2)3.
Triggering Code	*Data Definition*	*Result*	*Explanation*
Judgment default (against all defendants)	When a clerk has issued default judgment against all defendants in an action.	Timeline cancelled.	Where a default judgment has been obtained, all timelines are cancelled since the matter has been disposed of against all parties. See r. 11.1.01(2)3.
Judgment reserved	When a court has reserved issuing its judgment after the hearing of a motion or trial.	Timeline cancelled.	Where judgment has been obtained, all timelines are cancelled since the matter has been disposed of against all parties. See r. 11.1.01(2)3.
Order Dismissing Claim (On Consent)	When a judge or clerk makes an order dismissing a claim on consent of all parties.	Timeline cancelled.	Where a final order is made dismissing a claim on consent, all timelines are cancelled. See r. 11.1.01(2)3.

Order Dismissing Claim	When a judge makes an order dismissing a claim of all parties.	Timeline cancelled.	Where a final order is made dismissing a claim, all timelines are cancelled. See r. 11.1.01(2)3.
Order stay of proceeding	When an order to stay a proceeding is made.	Timeline cancelled.	Where a claim has been stayed, it has effectively been disposed of against all parties and there is no need to track timelines any longer. See r. 11.1.01(2)3.

(7) [Repealed O. Reg. 194/15, s. 3.]

O. Reg. 78/06, s. 24; 56/08, s. 3; 393/09, s. 10; 56/12, s. 4; 194/15, s. 3; 38/16, s. 6; 488/16, s. 1; 108/21, s. 13; 249/21, s. 8

Case Law: *Ohayon v. Airlift Limousine Service Ltd.* (November 8, 2007) (Ont. Sm. Cl. Ct.).

Plaintiff issued claim in May 1996. The defendant's claim, with a reply and defence to defendant's claim were all filed in 1997. The amended claim was filed January 1998 and the trial was adjourned in July, October and December 1998, with a further adjournment in April 1999 "*sine die*." Negotiations occurred sporadically in May 1999 and late 2005 and 2006.

Claim never struck. Not put on trial list due to a court error. Delay in noticing court's delay not intentional.

The defendant, in the absence of complaint, condoned the delay and court error by not bringing motion to dismiss earlier or by requesting defendant's claim be placed on trial list.

Claim and defendant's claim against to be placed on trial list. Plaintiff's right to interest under the *Courts of Justice Act* is abrogated by the delay during the years 2002 to 2007 inclusive.

Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd., 2007 CarswellOnt 6522, [2007] O.J. No. 3872, 2007 ONCA 695, 47 C.P.C. (6th) 233, 286 D.L.R. (4th) 487, 87 O.R. (3d) 660 (Ont. C.A.).

Dismissal for delay. Excusing delay risked undermining public confidence and overlooking lawyer's conduct risked legal system being seen as protecting its own. As five years had passed since dismissal, defendants entitled to assurance that judicial system had finally disposed of plaintiff's action. As years passed, defendants' interest in finality had to trump plaintiff's plea for indulgence, especially since plaintiffs had another remedy, and even though order was not on merits.

The court has the authority to dismiss action or defence as a sanction for default of court orders and failure to comply with case management timetables. The decision to strike claim or defence one of discretion, must be exercised on proper principles: *Starland Contracting Inc. v. 1581518 Ontario Ltd.*, 252 O.A.C. 19, 83 C.L.R. (3d) 1, [2009] O.J. No. 2480, 2009 CarswellOnt 3431 (Ont. Div. Ct.).

Brandon Forest Products Ltd. v. 2121645 Ontario Inc. (April 10, 2012), Doc. SC-1O-00001961-0000, [2012] O.J. No. 2337 (Ont. Sm. Cl. Ct.).

Effect should be given to dismissal orders under Rule 11.1 unless otherwise indicated. Where the cause of action arise five years earlier and the motion to set aside the dismissal order was not brought until one year after it was issued and was based on poor quality affidavit evidence, the motion to set it aside was dismissed.

Cozzi v. Cordeiro (August 21, 2008), Doc. Whitby 48211/07, [2008] O.J. No. 3199 (Ont. Sm. Cl. Ct.); extension of time to appeal denied 2009 CarswellOnt 5648, [2009] O.J. No. 3914 (Ont. Div. Ct.).

A motion to set aside an automatic dismissal order, which was brought about one year after the dismissal order, was dismissed. The plaintiff's affidavit evidence failed to satisfactorily explain the delay leading up to the dismissal order, and the motion was brought after further unexplained delay. Applying a contextual analysis, the appropriate order was to dismiss the motion.

Contact Resource Services Inc. v. Rampersad (November 27, 2009), Doc. 843/08, [2009] O.J. No. 5893 (Ont. Sm. Cl. Ct.).

An *ex parte* motion to set aside an automatic dismissal order was dismissed. Orders setting aside automatic dismissal orders may be granted in appropriate cases but they are not granted automatically. The motion was heard 17 months after the action was started and the claim had not yet been served on the defendant. The plaintiff did not request the necessary extension of the time for service. The applicable limitation period had expired. The supporting affidavit failed to provide any meaningful explanation for the delay, the motion was launched 9 months after the automatic dismissal order was issued, and was brought without notice to the defendant. For 17 months to have elapsed in a Small Claims Court action without even accomplishing service of the claim on the defendant could hardly be described as summary proceedings.

FCT Insurance Co. v. Knibb (October 28, 2009), Doc. 52/09, [2009] O.J. No. 4486 (Ont. Sm. Cl. Ct.).

A motion to set aside an automatic dismissal order was dismissed. The supporting affidavit provided no evidence of any steps taken following receipt of the clerk's 45-day notice, but contained a vague reference to oversight on the part of the plaintiff's lawyer. In addition the motion ought to have been brought on notice to the defendant.

LTP Tracer Corp. v. Newhook (August 25, 2009), Doc. 1374/08, [2009] O.J. No. 3524 (Ont. Sm. Cl. Ct.).

An *ex parte* motion to set aside an automatic dismissal order was dismissed. The supporting affidavit indicated that the plaintiff did nothing to move the action forward from issuance of the claim until after the dismissal order. The plaintiff claimed to have mailed the claim in to the court office for issuance, but never received it back. There was no evidence the plaintiff did not receive the clerk's 45-day notice prior to dismissal, or that the plaintiff took any steps in response to that notice. The plaintiff needed but did not request extensions of the time for service under rule 5.01(2) and under rule 11.1.01, and the motion ought to have been brought on notice to the defendant.

Multan v. 381713 B.C. Ltd., 2012 BCSC 1743, 2012 CarswellBC 3737 (B.C. S.C.).

There are two applications before the court in relation to this Small Claims appeal. The respondent seeks to have the appeal dismissed for want of prosecution. The appellants seek an order that the appeal be heard as a new trial.

At the conclusion of the trial judge's reasons, he invited the parties to make submissions on whether he ought to impose a penalty under Rule 20(5) of the *Small Claims Rules*. That Rule permits the judge to order a party to pay up to 10 per cent of the amount claimed if the proceeding was carried through trial with no reasonable basis and no reasonable prospect of success.

Test to be applied on an application for dismissal of an appeal for want of prosecution is the same as that which is to be applied on an application made in the first instance, that is, an application to dismiss an action for want of prosecution.

A delay of two-and-a-half years is inordinate.

The next issue involves an assessment of the reasons for the delay and, based on that assessment, a determination of whether the delay is excusable.

Court not persuaded that justice requires that, provided clear conditions are imposed which will result in the matter being brought to a conclusion in the reasonably near future.

Krauck v. Shoppers Drug Mart, 2014 CarswellOnt 672, [2014] O.J. No. 343 (Ont. Sm. Cl. Ct.).

The court dismissed a motion to set aside the clerk's dismissal order. The action was 2.5 years old, the delay was unexplained, and the motion was not brought promptly. In addition, the claim failed to disclose a reasonable cause of action.

Evans v. Triserve Management Inc., 2013 CarswellOnt 7648, [2013] O.J. No. 2651 (Ont. Sm. Cl. Ct.).

A notice of approaching dismissal and clerk's dismissal order were issued in the plaintiff's claim. It was held that since no notice and order were issued in the defendant's claim, that claim was unaffected by the dismissal of the plaintiff's claim.

Davies v. Hodgins, 2013 ONSC 6444, 2013 CarswellOnt 14276, [2013] O.J. No. 4687 (Ont. S.C.J.).

A prior claim in Small Claims Court was dismissed for delay under Rule 11.1. Then the plaintiffs brought a fresh action in the Superior Court of Justice seeking substantially the same relief. The plaintiffs had not moved to set aside the dismissal order in Small Claims Court. On motion by the defence, the action in the Superior Court of Justice was stayed as an abuse of process; it was a collateral attack on the earlier dismissal order.

Gilchrist v. Meraw, 2016 ONSC 1645, 2016 CarswellOnt 3450, [2016] O.J. No. 1195 (Ont. Div. Ct.).

A deputy judge's decision dismissing a motion to set aside a clerk's dismissal order is a discretionary order and is entitled to appellate deference.

Aguas v. Rivard Estate, 2011 ONCA 494, 2011 CarswellOnt 5822, 107 O.R. (3d) 142, 7 C.P.C. (7th) 16, 335 D.L.R. (4th) 365, 282 O.A.C. 39, [2011] O.J. No. 3108 (Ont. C.A.).

On application to set aside dismissal order motion judge found delay not adequately explained. Prejudice could be inferred and presumed, and respondents entitled to relay on finality of registrar's order. Appeal allowed. It was palpable and overriding error to say the appellant did not give any reason for slow progress of matter up to date of status hearing notice. Respondents did not proceed as if they were acting on principle of finality, they continued to participate in litigation. Registrar's order should have been set aside.

Wayne v. 1690416 Ontario Inc., 2012 ONSC 4861, 2012 CarswellOnt 11410, [2012] O.J. No. 4323, Leach J. (Ont. S.C.J.); affirmed 2013 ONCA 108, 2013 CarswellOnt 1704, [2013] O.J. No. 705 (Ont. C.A.).

Giving landlord one last chance would have been collateral attack on prior order. Motion by landlord for order setting aside order striking out statement of defence and counterclaim with prejudice. Landlord chose not to respond to motion for order requiring landlord to fulfil undertaking. Landlord had repeatedly demonstrated reluctance to address litigation in prompt and proper way.

Education Invention Centre of Canada v. Algoma University, 2015 ONSC 1200, 2015 CarswellOnt 2574, [2015] O.J. No. 855, Perell J. (Ont. S.C.J.)

University satisfied test for setting aside default judgment, writ of execution and garnishment. There was a genuine issue for trial about whether relationship between parties was fiduciary.

Morrison v. Galvanic Applied Sciences Inc., 2019 ABCA 207, 2019 CarswellAlta 1025, 86 Alta. L.R. (6th) 221 (Alta. C.A.)

Alberta court of appeal dismisses self-represented action for delay. In *Morrison v. Galvanic Applied Sciences Inc.*, the Alberta Court of Appeal (Court) reaffirmed that the Alberta *Rules of Court* (Rules) apply in full force to self-represented litigants. The Court upheld the dismissal of the plaintiffs' claim, which had been commenced by the originating application when the plaintiffs were self-represented. The claim was dismissed on both the long delay rule, R. 4.31, and the "drop dead" rule, R. 4.33. The decision confirms the Court's limited tolerance for plaintiffs who fail to prosecute their actions in a timely manner.

The Court emphasized that self-represented litigants are expected to comply with the Rules. It stated that although courts will consider the special challenges that these litigants face, courts cannot ignore clear noncompliance with the Rules, especially when the opposing party has been prejudiced. Explanations that merely seek forgiveness for delay because a party is self-represented are unacceptable.

11.1.02 Effect of dismissal on defendant's claim — If an action against a defendant who has made a defendant's claim is dismissed for delay under subrule 11.1.01(1), the defendant's claim shall be deemed to be dismissed 60 days after the order under that subrule is served, unless the court orders otherwise during the 60-day period.

O. Reg. 202/17, s. 1

Rule 11.2 — Request for Clerk's Order on Consent

11.2.01 (1) Consent Order — The clerk shall, on the filing of a request for clerk's order on consent (Form 11.2A), make an order granting the relief sought, including costs, if the following conditions are satisfied:

1. The relief sought is,

i. amending a claim or defence less than 30 days before the originally scheduled trial date,

ii. adding, deleting or substituting a party less than 30 days before the originally scheduled trial date,

iii. setting aside the noting in default or default judgment against a party and any specified step to enforce the judgment that has not yet been completed,

iv. restoring a matter that was dismissed under rule 11.1 to the list,

v. noting that payment has been made in full satisfaction of a judgment or terms of settlement, or

vi. dismissing an action.

2. The request is signed by all parties (including any party to be added, deleted or substituted) and states,

i. that each party has received a copy of the request, and

ii. that no party that would be affected by the order is under disability.

3. [Repealed O. Reg. 393/09, s. 11(3).]

4. [Repealed O. Reg. 393/09, s. 11(3).]

(2) Service of Order — The clerk shall serve a copy of an order made under subrule (1) by mail or by email on a party who requests it.

(2.1) A party who wishes for service under subrule (2) by mail shall provide a stamped, self-addressed envelope for the purpose.

(3) Same, Refusal to Make Order — Where the clerk refuses to make an order, the clerk shall serve a copy of the request for clerk's order on consent (Form 11.2A), with reasons for the refusal, on all the parties.

Commentary: Rule 11.2.01 regarding clerk's orders on consent now clearly states that parties only need a clerk's order when they wish to amend a claim or defence within 30 days of the originally scheduled trial date. Amendments to a claim or defence made more than 30 days before the originally scheduled trial date can be filed without a clerk's order under Rule 12.

(4) Notice of Setting Aside of Enforcement Step — Where an order is made setting aside a specified step to enforce a judgment under subparagraph 1 iii of subrule (1), a party shall file a copy of the order at each court location where the enforcement step has been requested.

O. Reg. 78/06, s. 24; 393/09, s. 11; 108/21, s. 14

Commentary: Small Claims Court clerks can make orders only in the specific circumstances set out in the Rules. These orders can only be made if the written consent of all parties has been provided to the clerk. The clerk makes the order based on the Request for Clerk's Order on Consent [Form 11.2A] filed with the court. No hearing is required.

The consent form must state that no party who would be affected by the order is under legal disability, and that all parties to the action have received a copy of the request for clerk's order on consent form.

The clerk can make an order for the following:

- amending a claim or defence where the originally scheduled trial date is less than 30 days away (otherwise see rule 12 for amendments);
- adding, deleting or substituting a party where the originally scheduled trial date is less than 30 days away;
- setting aside a noting in default or default judgment against a party, and any specified step to enforce the judgment that has not yet been completed;
- restoring a matter that was dismissed under rule 11.1 to the list;
- noting payment is made in full satisfaction of a judgment or terms of settlement; or
- dismissing an action.

See rule 11.2 of the Rules.

The Request for Clerk's Order on Consent [Form 11.2A] will indicate which order you are seeking.

Each party must sign the request for clerk's order on consent form in the presence of a witness. If a party is being added or substituted, the signature of that new party is also required. If a party is being deleted, that party must also sign. If all parties do not consent, the clerk cannot make the order requested. If a party has been noted in default, his or her consent is not required.

The form states that each party has received a copy of the form, and no party who would be affected by the order is under legal disability.

The clerk will review the documents and, if the legal requirements of the Rules are met, the clerk will sign the order. The clerk will mail a copy of the order to a party who requested it if a stamped self-addressed envelope was provided.

The clerk may refuse to make a clerk's order if:

- the criteria set out in rule 11.2 (discussed above) are not met;
- the consent of all parties is not obtained; or
- the form is incomplete.

When the clerk refuses to sign an order, the clerk will serve a copy of the request for clerk's order, with reasons for the refusal, on all parties.

Case Law: *Robb-Simm v. RE/MAX Real Estate Centre Inc.*, 2012 CarswellOnt 13437, [2012] O.J. No. 5232 (Ont. Sm. Cl. Ct.).

The clerk's powers to grant consent orders to not include any jurisdiction to grant adjournments of trials. In this case the parties had filed a Request to Clerk asking for consent adjournment of a full-day trial, and then failed to show up on the day of trial. The court dismissed the plaintiff's claim. Discussion on scheduling of trials in the Small Claims Court.

Smith v. Duca Financial Services Credit Union Ltd., 2017 ONSC 825, 2017 CarswellOnt 1334, Master D. E. Short (Ont. S.C.J.)

The plaintiff's action was administratively dismissed by the registrar in February 2013 (the "dismissal order"). See, e.g., *Deutsche Rentenvericherung Nord v. Branicky* (February 19, 2015), Doc. SC-11-8623-00 (Ont. S.C.J.) and *744142 Ontario Ltd. v. Ticknor Estate*, 2012 ONSC 1640, 2012 CarswellOnt 2791, 76 E.T.R. (3d) 134, [2012] O.J. No. 1119 (Ont. S.C.J.); additional reasons 2012 ONSC 2003, 2012 CarswellOnt 3690, 76 E.T.R. (3d) 155 (Ont. S.C.J.).

The Court of Appeal in *Mader v. Hunter*, 2004 CarswellOnt 827, 7 C.C.L.I. (4th) 167, 44 C.P.C. (5th) 83, 183 O.A.C. 294, [2004] O.J. No. 748 (Ont. C.A.) reiterated that the court "is always reluctant to dismiss a potentially meritorious claim on grounds that do not address its merits." Unless the defendant can demonstrate prejudice in the sense that to grant the plaintiff the indulgence he or she seeks will prejudice the defendant's ability to defend the claim, the indulgence will usually be granted on appropriate terms. Plausible explanation for failure to avoid administrative dismissal. Result complies with the direction of Rule 1.04 to allow matter to be determined "on its merits".

Registrar's dismissal set aside.

In February 2016, the Superior Court dismissed a plaintiff's motion to set aside a registrar's dismissal order, upheld by the Court of Appeal in *Jadid v. Toronto Transit Commission*, 2016 ONCA 936, 2016 CarswellOnt 19661 (Ont. C.A.); affirming 2016 ONSC 1176, 2016 CarswellOnt 2462 (Ont. S.C.J.).

The defendant did not oppose the motion. In determining whether to set aside the order, the Court contemplated the test for setting aside an order made under Rule 48.14(3) as set out in *Reid v. Dow Corning Corp.*, 2002 CarswellOnt 5899, 48 C.P.C. (5th) 93, [2002] O.J. No. 3414 (Ont. Div. Ct.).

The Court of Appeal dismissed the plaintiff's appeal, concluding that the motion judge made no errors in reasoning. Rule 48.14, recently amended, indicates that the registrar will automatically dismiss an action for delay where the action has not been set down for trial or terminated *within five years* from the commencement of the action. The registrar will no longer send status hearing notices to alert counsel that this deadline is approaching.

Rule 11.3 — Discontinuance

[Heading added O. Reg. 393/09, s. 12.]

11.3.01 Discontinuance by Plaintiff in Undefended Action — (1) A plaintiff may discontinue his or her claim against a defendant who fails to file a defence to all or part of the claim with the clerk within the prescribed time by,

(a) serving a notice of discontinued claim (Form 11.3A) on all defendants who were served with the claim; and

(b) filing the notice with proof of service.

(2) A claim may not be discontinued by or against a person under disability, except with leave of the court.

(3) [Repealed O. Reg. 249/21, s. 9.]

O. Reg. 393/09, s. 12; 44/14, s. 10; 249/21, s. 9

11.3.02 Effect of Discontinuance on Subsequent Action — The discontinuance of a claim is not a defence to a subsequent action on the matter, unless an order granting leave to discontinue provides otherwise.

O. Reg. 393/09, s. 12

Commentary: Rule 11.3 allows a plaintiff to file a Notice of Discontinued Claim (Form 11.3A) where no defence has been filed within the prescribed time and the plaintiff, for a variety of reasons, no longer wishes to proceed. The discontinuance only applies against those defendants that have not filed a defence to all or part of the claim with the clerk within the prescribed time period. If default judgment has been issued against the name defendant or final judgment/order has been granted by the court, the notice of discontinued claim cannot be filed unless he or she obtains a judge's order granting leave to discontinue, if parties have settled the claim. See Rules 11.201(v), 20.08 (20.2) and 20.12 with respect to the satisfaction of an order/judgment. Note, however, that Rule 13.09 provides that after a settlement conference has been held, a claim may be withdrawn only on consent or by leave of the court. That appears to imply that prior to a settlement conference, a claim may be withdrawn by the plaintiff unilaterally. Such withdrawals may be effected simply by sending a letter to the court office with a copy to the defendant.

Rule 12 — Amendment, Striking Out, Stay and Dismissal

[Heading amended O. Reg. 44/14, s. 11(1).]

12.01 (1) Right to Amend — A plaintiff's or defendant's claim and a defence to a plaintiff's or defendant's claim may be amended by filing with the clerk a copy that is marked "Amended", in which any additions are underlined and any other changes are identified.

Commentary: Pleadings (both claims and defences) may be amended as of right, without the consent of the other parties or leave of the court, if the amendment is filed and served at least 30 days before the originally scheduled trial date: see rule 12.01(3). If a trial date has previously been set but adjourned, the new trial date does not trigger the automatic right to amend: that right expires 30 days before the first trial date is set.

After the automatic amendment right has expired, a party may amend with the consent of the other parties by obtaining a clerk's order on consent under rule 11.2.01(1). Or a party may obtain a judge's order, on motion, for an abridgment of the 30-day period or for leave to amend.

The practice with respect to the 30-day automatic amendment right does in fact permit amendments to a claim regardless of any limitation issue flowing from the amendments, including adding a defendant after limitation has expired. But the fact that such an amendment can be made over-the-counter does not and cannot have any legal effect on the statutory limitation period, since the substantive limitations statute cannot be overruled by the procedural rules of the court. It has been held that if an amendment as of right gives rise to a limitation issue, the date of the amendment must be deemed to be the date of commencement of the amendments for limitation purposes: *Snider v. Home Style Furnishings Inc.*, 2009 CarswellOnt 10053, [2009] O.J. No. 4734 (Sm. Cl. Ct.). Nothing in the amendment rule makes an amendment retroactive to the date of issuance of the claim — or *nunc pro tunc*, to use the Latin expression. Traditionally any such provision would have been an express term of the order granting leave to amend.

In Small Claims Court, due to the high incidence of self-represented parties, the rigidity of the pleadings rules applicable in the Superior Court of Justice is unworkable. A more flexible approach is appropriate, to the point that the Small Claims Court may decide unpleaded issues that flow from the facts as pleaded by the parties: *936464 Ontario Ltd. v. Mungo Bear Ltd.*, 2003 CarswellOnt 8091, 74 O.R. (3d) 45, 258 D.L.R. (4th) 754 (Ont. Div. Ct.).

But unpleaded issues should not be decided where different evidence relating to such issues would be required or where a party would be unfairly prejudiced: *Brighton Heating & Air Conditioning Ltd. v. Savoia*, 2006 CarswellOnt 340, 79 O.R. (3d) 386, 49 C.L.R. (3d) 235, 207 O.A.C. 1, [2006] O.J. No. 250 (Ont. Div. Ct.).

In *McCracken v. Jacan Investments Canada Inc.*, [2018] O.J. No. 3664 (Ont. Div. Ct.), the defendant sought to rely at trial on a release as a defence to a breach of contract claim. The release was addressed in the defence and the evidence at trial, but the defence did not seek to argue that the release affected the plaintiff's rights under an earlier contract until partway through trial. The trial judge disallowed cross-examination addressed at this unpleaded issue. On appeal that decision was upheld. In Small Claims Court, a minimum level of pleading is required and unpleaded issues may be disallowed where they would result in unfairness. Here the unpleaded issue was raised partway through trial and the trial judge made no error in disallowing evidence on that issue. He made no error in failing to grant leave to amend to plead the issue when leave to amend was not requested. In any event the release did not have the effect contended for by the defence.

In *Jaldhara v. Hussain*, 2018 ONSC 6715, 2018 CarswellOnt 18871 (Ont. Div. Ct.), the trial judge decided an unpleaded agency issue and his judgment was reversed on appeal. The appeal judge restricted the longstanding authority of *Mungo Bear*, finding the flexible approach to pleadings in Small Claims Court did not apply where both parties are represented.

With respect, it is submitted that the correctness of *Jaldhara* is open to very serious debate. It is facially inconsistent with *Mungo Bear*, first because *Mungo Bear* contains no suggestion that it is restricted to cases in which one or both parties are self-represented, and second because it relies on pleadings authority under the *Rules of Civil Procedure* which was specifically distinguished in *Mungo Bear* (namely *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada*, 1998 CarswellOnt 4255, 41 O.R. (3d) 528, *(*sub nom. *Kalkinis v. Allstate Insurance Co. of Canada)* 117 O.A.C. 193, [1998] O.J. No. 4466 (Ont. C.A.); leave to appeal refused 2000 CarswellOnt 1201, 2000 CarswellOnt 1202, 255 N.R. 199 (note), *(*sub nom. *Kalkinis v. Allstate Insurance Co. of Canada)* 135 O.A.C. 197 (note), [1999] S.C.C.A. No. 253 (S.C.C.)). The notion that different procedural rules should apply to represented and self-represented parties appears inconsistent with the basic principle of equal justice — a principle which is specifically endorsed in the Statement of Principles on Self-Represented Litigants and Accused Persons (2006), established by the Canadian Judicial Council and recently approved by the Supreme Court of Canada in *Pintea v. Johns*, 2017 CSC 23,

2017 SCC 23, 2017 CarswellAlta 680, 2017 CarswellAlta 681, [2017] 1 S.C.R. 470, [2017] S.C.J. No. 23 (S.C.C.).

A practical difficulty flowing from *Jaldhara* is that if the flexible approach to pleadings does not apply where both parties are represented, what happens if only one party is represented? Does the flexible approach apply to the self-represented party but not to the represented party? Applying different standards to the parties within a single proceeding would seem neither fair nor consistent in principle. It is submitted that *Mungo Bear* remains good law and should continue to be followed by the Small Claims Court.

The prospect for unpleaded issues to be decided does create some uncertainty. For example it is noted that the same trial judge decided both *Jaldhara* (allowing an unpleaded issue) and *McCracken* (disallowing the unpleaded issue). Obviously different cases can produce different results, but from the perspective of the litigants it cannot be easy to predict how unpleaded issues may be treated by the court. The best course is to plead all the issues which are worth pleading.

The other important point is that if an unpleaded issue emerges during the course of a trial, even in closing submissions, the parties should ask for leave to amend if desired. Leaving the unpleaded issue unpleaded even after it has become apparent will often be an unnecessary risk for any party wanting the issue to be decided by the trial judge.

Amending to the new monetary limit

The amendment process may be used to increase the amount of damages claimed, after the monetary limit is increased by the legislature, in the absence of non-compensable prejudice: see *M.Y.A. Contracting Inc. v. Cavé City Developers Corp.*, [2020] O.J. No. 1155 (Sm. Cl. Ct.) at para. 24, where leave to increase the damages claim to $35,000 was granted at trial after completion of the plaintiff's evidence.

For earlier cases to the same effect, see *Johanson v. Williamson*, 1977 CarswellOnt 184, 18 O.R. (2d) 585, 22 C.P.C. 191 (Ont. Sm. Cl. Ct.), *(*sub nom. *Commisso v. 1132165 Ontario Ltd.)* 2004 CarswellOnt 3208, [2004] O.J. No. 2235 (Ont. Sm. Cl. Ct.); *Fast Money ATM Inc. v. Inkas Security Services Ltd.*, 2011 CarswellOnt 13168, [2011] O.J. No. 5279 (Ont. Sm. Cl. Ct.).

Adding Parties

Sloan v. Sauve Heating Ltd., 2011 ONCA 91, 2011 CarswellOnt 515, [2011] O.J. No. 402 (Ont. C.A.)

The Court of Appeal held that the plaintiff's application to add the independent contractor and truck driver should be dismissed. The only step the plaintiff took was to question Sauve Heating Ltd. on discovery. The plaintiff failed to provide a reasonable explanation as to why proposed defendants were not identifiable and therefore not named prior to the expiry of the *Limitations Act, 2002*.

Lockett v. Boutin, 2011 ONSC 2098, 2011 CarswellOnt 2261, [2011] O.J. No. 1530 (Ont. S.C.J.); affirmed 2011 ONCA 809, 2011 CarswellOnt 14466, [2011] O.J. No. 5844 (Ont. C.A.)

There was no evidence of any effort by plaintiffs, prior to expiry of the limitation period, to determine identity and potential liability of persons who owned, supplied, installed, or maintained the water heater.

Trench v. Parmat Investments Ltd., 2010 ONSC 1564, 2010 CarswellOnt 1416 (Ont. S.C.J.)

The plaintiff tripped and fell at her community mailbox. She moved to add Canada Post as a defendant two and one half years after the accident. The impetus was a letter from the defendant in Brampton suggesting that Canada Post be sued as the "occupier." The application

was dismissed. The plaintiff failed to demonstrate she could not have discovered Canada Post's liability with the exercise of due diligence.

Felker v. Gateway Property Management Corp., 2010 ONSC 4513, 2010 CarswellOnt 5917 (Ont. S.C.J.)

The plaintiff was injured in a slip and fall accident on a condominium property in December, 2005. The plaintiff slipped on debris. The plaintiff sued the condominium's manager. The defendant third party worked for the Toronto Star. The plaintiff moved in late 2009 to have the Toronto Star and its paper carrier as defendants. The newspaper carrier argued that his identity could have been discovered long before 2009.

The court held that the plaintiff, with reasonable diligence, could *not* have been expected to know about the newspapers or the carrier before the third party notice was filed in February, 2009.

What is or is not a new cause of action?

Dee Ferraro Ltd. v. Pellizzari, 2012 ONCA 55, 2012 CarswellOnt 816, 346 D.L.R. (4th) 624, [2012] O.J. No. 355 (Ont. C.A.); reversing 2011 ONSC 3995, 2011 CarswellOnt 8211 (Ont. S.C.J.)

This judgment illustrates the difference between amending a statement of claim to allege a new cause of action (impermissible if the new claim is stature barred), and amending the statement of claim to add new remedies or heads of damages (permissible), provided there is no non-compensable prejudice.

The original pleading contained all the facts necessary to support the amendments. The amendments simply claimed additional forms of relief, or clarified the relief sought, based on the same facts as originally pleaded. The court relied on *Canadian National Railway v. Canadian Industries Ltd.*, 1940 CarswellOnt 213, [1940] 4 D.L.R. 629, 52 C.R.T.C. 31, [1940] O.W.N. 452, [1940] O.J. No. 266 (Ont. C.A.); affirmed 1941 CarswellOnt 84, [1941] S.C.R. 591, [1941] 4 D.L.R. 561, 53 C.R.T.C. 162 (S.C.C.), and distinguished *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3, 2008 CarswellOnt 66, 88 O.R. (3d) 401, 62 C.C.E.L. (3d) 161, 49 C.P.C. (6th) 209, 289 D.L.R. (4th) 639, 232 O.A.C. 146, [2008] O.J. No. 17 (Ont. C.A.).

This was not a case in which new and unrelated causes of action were being asserted based on new facts. The claims flow directly from the facts previously pleaded. Therefore, the claims were not statute-barred and the amendments should have been permitted, since there was no evidence of non-compensable prejudice.

Misnomer

Streamline Foods Ltd. v. Jantz Canada Corp., 2012 ONCA 174, 2012 CarswellOnt 3333, [2012] O.J. No. 1213 (Ont. C.A.); affirming 2011 ONSC 1630, 2011 CarswellOnt 1674, 6 C.P.C. (7th) 399, 280 O.A.C. 152 (Ont. Div. Ct.); affirming 2010 ONSC 6393, 2010 CarswellOnt 8790, [2010] O.J. No. 4988 (Ont. Master).

This judgment establishes that s. 21(1) of the *Limitations Act, 2002 does* apply to plaintiffs (as opposed, as some have argued, only to defendants). The court refused to allow for the plaintiff's parent corporation to be added as a party plaintiff after the limitation period had expired.

This was not a misnomer. The plaintiffs sought to add the parent corporation of the original plaintiff because it was the parent corporation which incurred certain losses, not the original plaintiff. The plaintiffs were not seeking to correct the name of a party; rather, they were seeking to add a party and to pursue that party's claims.

Livingston v. Williamson, 2011 ONSC 3849, 2011 CarswellOnt 5872, 107 O.R. (3d) 75, 99 C.C.L.I. (4th) 331 (Ont. Master)

The plaintiff sued the TTC in its capacity as owner of the bus, employer of the driver, and provider of uninsured motorist coverage.

The TTC was not the insurer. The plaintiff was unaware that TTC Insurance was a separate company. The plaintiff brought a motion to correct the name of the insurer by adding TTC Insurance as a party defendant. TTC Insurance took the position that this was a motion to add a party after the limitation period had expired. Motion allowed both the TTC legal department and TTC Insurance operated from the same building, had identical postal codes and were represented by the same lawyer on the argument of the motion. Master Hawkins found that a representative of the TTC Insurance would have known immediately that insofar as unidentified motorist coverage was concerned, TTC Insurance was intended. Neither TTC nor TTC Insurance suffered any actual prejudice.

Stekel v. Toyota Canada Inc., 2011 ONSC 6507, 2011 CarswellOnt 11971, 107 O.R. (3d) 431 (Ont. S.C.J.); leave to appeal refused 2012 ONSC 2572, 2012 CarswellOnt 5718 (Ont. Div. Ct.); affirming 2011 ONSC 2211, 2011 CarswellOnt 2378, [2011] O.J. No. 1591 (Ont. Master)

Plaintiff injured due to an apparent mechanical malfunction in Lexus vehicle she was driving. She sued Toyota Canada Inc., believing it was both the distributor and manufacturer of the vehicle. More than two years after the accident, the plaintiff learned that the vehicle was in fact manufactured by Toyota Motors Canada. She moved to add Toyota Manufacturers Canada (TMC) as a party defendant in the action.

While the limitation period in respect of the plaintiff's claim against TMS has expired, s. 21(2) of the *Limitations Act 2002* permitted the plaintiffs to correct their "misnomer" with respect to the manufacturer of their vehicle and add TMC as a defendant to the litigation. The plaintiffs had always intended to include the manufacturer of the vehicle as a defendant in their action. Equally importantly, TMC knew that the plaintiffs were pointing at the manufacturer of the vehicle, even though they had misnamed the manufacturer.

Ontario (Attorney General) v. Pembina Exploration Canada Ltd., 1989 CarswellOnt 970, 1989 CarswellOnt 970F, EYB 1989-67481, [1989] 1 S.C.R. 206, 57 D.L.R. (4th) 710, *(*sub nom. *William Siddall & Sons Fisheries v. Pembina Exploration Can. Ltd.)* 92 N.R. 137, *(*sub nom. *William Siddall & Sons Fisheries v. Pembina Exploration Can. Ltd.)* 33 O.A.C. 321 (S.C.C.)

Appeal raised the question whether a province may grant jurisdiction to a small claims court to hear a case involving an admiralty or maritime matter.

Case Law: *1760357 Ontario Ltd. v. 1789316 Ontario Ltd.*, 2013 CarswellOnt 7863, [2013] O.J. No. 2748 (Ont. Sm. Cl. Ct.).

In Small Claims Court, leave is required where a defendant seeks to advance at trial an unpleaded position which is inconsistent with an admission pleaded in its defence.

Decoration J.M. Laflamme Inc. v. Arra Chemicals Inc. (1993), 44 A.C.W.S. (3d) 226 (Ont. Div. Ct.).

The defendant had brought a motion to amend the defence and it was denied. Pursuant to Rule 11.01(1) of the Small Claims Court Rules, absent prejudice to the plaintiff that could not be compensated for in costs, the court must grant leave to amend the defence. In this case, any prejudice to the plaintiff could have been compensated for in costs and the amendment should have been granted.

The defendant sought an order extending time to deliver a notice of appeal. The defendant proceeded expeditiously in attempting to have the matter heard by way of appeal. The applicant had a bona fide intention to appeal and the length of delay in not doing so would be explained and was not such as to cause prejudice to the plaintiff. Merits of appeal also militated in favour of the defendant.

Tkachuk v. Janzen (1996), 191 A.R. 275, 204 A.R. 386, 51 Alta. L.R. (3d) 34 (Master); affirmed [1997] 7 W.W.R. 672 (Alta. Q.B.).

Application by plaintiff to amend statement of claim for second time. Defendant argued against amendment as over two years had passed since accident. Court allowed amendment based on functional approach for amendment following expiration of limitation period. Defendant was not prejudiced.

Hanlan v. Sernesky (1996), 37 C.C.L.I. (2d) 262, 1 C.P.C. (4th) 1 (Ont. Gen. Div.); reversed (1996), 39 C.C.L.I. (2d) 107, 95 O.A.C. 297, 3 C.P.C. (4th) 20 (C.A.).

Motions judge refused amendment to statement of defence to plead law of place where tort occurred, as result of recent Supreme Court of Canada decision in *Tolofson v. Jensen*, 120 D.L.R. (4th) 289. There was no prejudice resulting from amendment.

Ragno Excavating Ltd. v. Granville Constructors Ltd. (December 16, 1997), Doc. 97-CV-130613-CM (Ont. Gen. Div.).

Amendment to statement of claim permitted plaintiff to argue at trial that company was known by another name. Amendment was relevant in light of changes of corporations' names.

Gajic v. Wolverton Securities Ltd., [1996] B.C.W.L.D. 2490 (B.C. S.C.).

Unrepresented and allegedly impecunious plaintiff claimed damages for substantial losses from stockbroker. Plaintiff should have final opportunity to file adequate pleadings, on same terms as to security as imposed by previous judge.

Vigna v. Toronto Stock Exchange, 1998 CarswellOnt 4560, [1998] O.J. No. 4924, 115 O.A.C. 393, 28 C.P.C. (4th) 318 (Ont. Div. Ct.).

In statement of defence, Honda Canada denied designing or manufacturing the vehicle in question. Through inadvertence, the plaintiff's solicitor did not notice the denial until several months later. Reasonable inference could be drawn that Honda Canada had advised the other companies of the claim and that they were not prejudiced. Plaintiff permitted to add the other companies as defendants after the limitation period had expired.

Cowsill v. Strohmeyer (April 23, 1999), Doc. Welland 8886/97 (Ont. S.C.J.).

The plaintiffs sought to amend pleadings. The defendants sought an expedited trial and an order requiring the plaintiffs to pay all outstanding arrears on mortgage at issue. The plaintiffs were stalling. The plaintiffs were allowed to amend pleadings. No payments were required up to March 1, 1999 until the main action was heard. The payments were to restart as of April 1, 1999. Expedited trial ordered.

White v. Atlantic Home Improvement Ltd. (1999), 211 N.B.R. (2d) 182, 539 A.P.R. 182 (N.B. Q.B.).

The Rules of Court allowed discretion to amend pleadings unless prejudice will result that cannot be compensated for by costs or adjournment. The plaintiff was permitted to amend the statement of claim to conform to the evidence.

Smith v. Sliwa (August 23, 1999), Doc. 96-CU-108908 (Ont. S.C.J.); leave to appeal refused (November 24, 1999), Doc. Toronto 617/99 (Ont. S.C.J.).

An order dismissing the plaintiff's action for delay was set aside based on new facts. The plaintiff relied upon improper advice of his agent. The plaintiff did not become aware that he was given wrong advice until some time later. The delay in bringing the motion was not the plaintiff's fault. Had the Master been aware of all circumstances, the decision would have been different.

Strata Plan NW 580 v. Canada Mortgage & Housing Corp., 2000 BCCA 507, 144 B.C.A.C. 161, 236 W.A.C. 161, 2000 CarswellBC 1906 (B.C. C.A.).

Defendant applying to strike out claim on grounds of no cause of action. The application was granted. Plaintiff successfully appealing that defects could be cured by amendments.

Bruno v. Canada (Customs & Revenue Agency), 2000 BCSC 1255, [2000] 4 C.T.C. 57, 2000 CarswellBC 1734 (B.C. S.C.); affirmed 2002 BCCA 47, [2002] 2 C.T.C. 142, 162 B.C.A.C. 293, 264 W.A.C. 293, 2002 CarswellBC 208 (B.C. C.A.).

The claim had already been dismissed. The plaintiff was applying to amend the claim. The application was dismissed; cannot amend claim after dismissal.

Andersen Consulting Ltd. v. Canada (Attorney General) (2001), 150 O.A.C. 177, 2001 CarswellOnt 3139, 13 C.P.C. (5th) 251, [2001] O.J. No. 3576 (Ont. C.A.).

Well-established rule that amendments should be presumptively approved unless they would occasion prejudice that could not be compensated by costs or an adjournment. They were shown to be scandalous, frivolous, vexatious or an abuse of the court's process, or they displaced no reasonable cause of action.

G.C. Rentals Ltd. v. Falco Steel Fabricators Inc. (2000), 132 O.A.C. 70, 2000 CarswellOnt 1040 (Ont. Div. Ct.).

G.C. Rentals Ltd. was the plaintiff lien claimant in two actions. The plaintiff sought order amending its name to "G.C. Rentals & Repairs" and to make the appropriate and necessary amendments to the statements of claim. The Ontario Divisional Court ordered that the plaintiff substitute "G.C. Rentals & Repairs" wherever "G.C. Rentals Ltd." appeared. The Divisional Court stated that it was not prepared to say that a defective affidavit of verification respecting a construction lien necessarily invalidated a claim for lien, which claim for lien might otherwise be validated by the curative provisions of s. 6 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

Graham v. Moore Estate, 2002 CarswellBC 1676, 2002 BCSC 637, [2002] B.C.J. No. 1660 (B.C. S.C.).

Party amending pleading. Amendment causing other parts of pleading to be inconsistent. Party required to amend inconsistent parts.

Perkins-Aboagye v. Chadwick, 2002 CarswellOnt 1084, [2002] O.J. No. 1248, [2002] O.T.C. 244 (Ont. S.C.J.).

Second action brought by unrepresented plaintiff nothing more than attempt to collaterally attack decision of judge on defendant bank's motion in first action. Second action dismissed. Plaintiff granted 20 days to serve amended statement of claim in first action.

Corlett v. Matheson, 2001 CarswellAlta 1723, 2001 ABQB 963, 302 A.R. 139 (Alta. Q.B.).

Plaintiff having default judgment sought to amend statement of claim without reopening default judgment. Application dismissed.

Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 2001 CarswellOnt 4133, [2001] O.J. No. 4567, 207 D.L.R. (4th) 492, 56 O.R. (3d) 768, 152 O.A.C. 201, 15 C.P.C. (5th) 235 (Ont. C.A.).

Appeal from decision permitting amendment to change identity of plaintiff from individual party to corporate entity after expiry of limitation period dismissed. Amendment properly allowed as no prejudice to defendant by reason of name change.

Ager v. Canjex Publishing Ltd., 2003 CarswellBC 430, [2003] B.C.J. No. 431, 2003 BCSC 305 (B.C. S.C.).

Defendant sought to amend defence five weeks before trial. Application was dismissed as proposed amendment would not substantially change evidence to be given at trial.

Hilton v. Norampac Inc. (2003), 176 O.A.C. 309, 2003 CarswellOnt 3111, 26 C.C.E.L. (3d) 179, 2004 C.L.L.C. 210-030 (Ont. C.A.); leave to appeal refused (2004), 2004 CarswellOnt 1608, 2004 CarswellOnt 1609 (S.C.C.).

Before Plaintiff cross-examined, the trial judge gave parties "some comments" on what he had heard so far. Comments would have been far better left unsaid but they did *not* show he had prejudged the case. Views tentative and he had *not* closed his mind to the employer's position.

Seaside Chevrolet Oldsmobile Ltd. v. VFC Inc., 2005 CarswellNB 397, 2005 NBQB 233, 22 C.P.C. (6th) 374, 761 A.P.R. 61, 292 N.B.R. (2d) 61 (N.B. Q.B.).

Place of trial. Fourth party claims in Small Claims Court. No provisions comparable to R. 30.13 of Rules of Court, but Small Claims Court has jurisdiction to hear fourth or subsequent party claims. Amount of Claim was within jurisdiction of Small Claims Court. Parties agreed that action was not complex and was not rendered complex by participation of counsel and addition of fourth party.

Samson v. Insurance Corp. of British Columbia, 2006 CarswellBC 678, 2006 BCPC 99 (B.C. Prov. Ct.).

Claimant made application to increase amount claimed from $10,000 to $15,000 on grounds that when claim filed monetary jurisdiction of Small Claims Court limited to $10,000, but as of September 1, 2005 jurisdiction increased to $25,000.

Claimant's application made *after* completion of trial, judgment reserved and not yet delivered.

No cases where an amendment of pleadings was allowed after trial.

Nowhere there any reference to amendments to pleadings after trial or after judgment.

Under *Small Claims Rule* as compared to the *Supreme Court Rule*, not permissible because *Small Claims Rule* specifically calls for filing and serving of amended document, and option for Reply to be filed.

Application dismissed.

Leonard v. Labrador City (Town), 2006 CarswellNfld 150, 2006 NLTD 82 (N.L. T.D.).

What is being asked is that the court permit an amendment to the most recent Statement of Claim allowing Plaintiffs to add "reinstatement" to their former employment positions as a potential remedy.

See *Rees v. Royal Canadian Mounted Police*, [2004] N.J. No. 59, 2004 CarswellNfld 41, 2004 NLSCTD 32 (N.L. T.D.) and *Petten v. E.Y.E. Marine Consultants*, 1994 CarswellNfld 358, 120 Nfld. & P.E.I.R. 313, 373 A.P.R. 313 (N.L. T.D.) at paragraphs 85 to 100.

Test to be met before an amendment is permitted is that the amendment: (1) Must not cause injustice to the other side; (2) Must raise a triable issue; (3) Must not be embarrassing; and (4) Must be pleaded with particularity.

An amendment should be allowed if it does not do an injustice to the other party which cannot be compensated in costs.

The court, before allowing an amendment, ought to be satisfied that the presence of the amendment could not lead to a successful application by other parties.

The party proposing an amendment must pass the threshold requirement of being able to show that the amendment discloses a reasonable cause of action. The court must not try the merits of the claim. The threshold test is a low one.

There is no potential injustice that cannot be compensated for in costs and the amendment to the Statement of Claim is permitted.

Dempsey v. Envision Credit Union, 2006 CarswellBC 1172, 2006 BCSC 750 (B.C. S.C.).

Applications made to dismiss some of the actions and in others to strike out and dismiss counterclaims.

Where it is "plain and obvious" that the claims, as pleaded, or as they might be amended, disclose no reasonable claim, the court has the discretion to dismiss the claim. Any doubt is to be resolved in favour of allowing the pleadings to stand (see *Hunt v. T & N plc*, 1990 CarswellBC 759, 1990 CarswellBC 216, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) at p. 980).

Pleadings will be struck out if they abuse the process of the court. (See *Toronto (City) v. C.U.P.E., Local 79*, REJB 2003-49439, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, [2003] S.C.J. No. 64, 2003 SCC 63, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 31 C.C.E.L. (3d) 216, 9 Admin. L.R. (4th) 161, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276 (S.C.C.) at para. 37.)

One way in which these principles are violated is where parties make allegations in subsequent proceedings that are *res judicata*.

See *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100, [1843-60] All E.R. Rep. 378 (Eng. V.-C.), 114 to 115 (Hare).

James v. British Columbia, 2006 CarswellBC 1395, 2006 BCSC 873 (B.C. S.C.).

In the statement of defence to the plaintiff's statement of claim, the defendant pleaded:

> 7. In the further alternative and in further answer to the whole of the Statement of Claim, the issues giving rise to this action were resolved in Supreme Court of British Columbia and the Crown says matter *res judicata* and an abuse of process. In the alternative, the Crown says plaintiff, is estopped from bringing this claim as a result of the resolution of the action in Action No. S012533.

There are three pre-conditions which must be satisfied to establish the necessary and sufficient condition for estoppel:

i) the cause of action in both proceedings must be identical;

ii) the judgment which is said to create the estoppel must be final; and

iii) the parties to that judgment or their privies are the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Although the parties are not the same, their privies are the same.

In *Cahoon v. Franks*, [1967] S.C.R. 455, 1967 CarswellAlta 48, 60 W.W.R. 684, 63 D.L.R. (2d) 274 (S.C.C.), all damages arising out of the same negligent act must be asserted by the claimant in one action, and any subsequent action was barred by the doctrine of *res judicata*.

Taken cumulatively, the factors identified by the plaintiff do not bring this case within any of the precedents in which the court has *declined* to prevent relitigation notwithstanding the preconditions of estoppel, either action or issue, have been established. The plaintiff has not discharged the burden imposed upon him. Accordingly, the defendant's application is allowed. The action is dismissed.

Chudzik v. Fehr, 2006 CarswellOnt 4, 20 C.P.C. (6th) 38, 79 O.R. (3d) 205 (Ont. S.C.J.).

Plaintiffs brought motion for leave to amend statement of claim to correct name of defendant. Motion granted. Presumption of prejudice had been rebutted. S Ltd. was aware of accident from outset, and commenced investigation and shared information with B Ltd., which was a related sister company.

Garth v. Halifax (Regional Municipality), [2006] N.S.J. No. 300, 2006 CarswellNS 316, 271 D.L.R. (4th) 470, 2006 NSCA 89, 31 C.P.C. (6th) 124, 245 N.S.R. (2d) 108, 777 A.P.R. 108 (N.S. C.A.).

Plaintiff sought amendment to add party after expiry of limitation period. Overriding general power to allow amendment not limited by specific instances in rules. Broad general discretionary power not limited by specific instances where amendment permitted after a limitation period had expired.

1225145 Ontario Inc. v. Kelly (2007), 2007 CarswellOnt 97 (Ont. C.A.).

Appeal from order denying application by appellant to amend pleadings. Appellant sought to amend counterclaim by adding a claim for specific performance. No reference made to Rule 26.01 of the *Rules of Civil Procedure*. Respondents did not make out case for prejudice sufficient to provide a basis to deny amendment. Appeal allowed.

Burtch v. Barnes Estate, [2006] O.J. No. 1621, 2006 CarswellOnt 2423, 27 C.P.C. (6th) 199, 80 O.R. (3d) 365, 20 M.P.L.R. (4th) 160, 209 O.A.C. 219 (Ont. C.A.).

Discoverability and reasonable diligence. Plaintiff injured in car accident. Plaintiff issued notice of action naming several defendants. Motion judge exercised discretion reasonably in granting plaintiffs leave to amend statement of claim to add M as defendant. Order appropriate, as plaintiffs put forward some evidence of their diligence.

Ryan (In Trust) v. Kaukab, 2005 CarswellOnt 6806 (Ont. Master).

Plaintiff's motion for leave to amend statement of claim to add plaintiff allowed. Concern that proposed defendant would be required to be witness too hypothetical. Plaintiff's claims arose out of same series of transactions, had common factual issues and balance of convenience favoured plaintiff.

Riddell v. Pasini, 2005 CarswellOnt 7939 (Ont. Sm. Cl. Ct.).

In having clerk of Small Claims Court issue amended claim, plaintiff simply retaliating to criminal charges laid less than month before plaintiff's pleading was amended. Plaintiff could amend his pleading as a result of criminal charges laid against him so long as no intention to use civil process to undermine criminal process. Doctrine of abuse of process did not apply. Civil proceedings ordered stayed, albeit on temporary basis, until criminal proceedings came to an end or until court ordered otherwise.

Sicard v. Sendziak, 2006 CarswellAlta 1358, 2006 ABQB 725, 34 C.P.C. (6th) 320 (Alta. Q.B.).

Plaintiff ordered to amend his pleadings to include better particulars of his claim only as raised by expert reports and within scope of existing pleadings. *Limitations Act* did not prevent plaintiff from amending his pleadings since no new cause of action was contemplated and Act permitted amendments that were related to events in original pleadings.

Sable Offshore Energy Inc. v. Ameron International Corp., [2006] N.S.J. No. 442, 2006 CarswellNS 496, 2006 NSSC 332, 57 C.L.R. (3d) 163, 792 A.P.R. 122, 249 N.S.R. (2d) 122 (N.S. S.C.).

Application to strike dismissed. Jurisprudence in Canada with respect to recovery for economic loss is in continuing state of evolution and development. There were facts pleaded that could lead trial judge to conclude that there was such proximity so that defendants could reasonably contemplate that carelessness of their part was likely to cause damage to plaintiffs.

Reynolds v. Smith, [2007] O.J. No. 2161, 2007 CarswellOnt 3133, *(*sub nom. *Reynolds v. Kingston Police Services Board)* 225 O.A.C. 112, *(*sub nom. *Reynolds v. Kingston (Police Services Board))* 86 O.R. (3d) 43, 2007 ONCA 375, 47 C.C.L.T. (3d) 200 (Ont. C.A.); additional reasons to 2007 CarswellOnt 1424, *(*sub nom. *Reynolds v. Kingston Police Services*

Board) 221 O.A.C. 216, 2007 ONCA 166, 45 C.C.L.T. (3d) 19, *(*sub nom. *Reynolds v. Kingston (City) Police Services Board)* 84 O.R. (3d) 738, *(*sub nom. *Reynolds v. Kingston (City) Police Services Board)* 280 D.L.R. (4th) 311 (Ont. C.A.); reversing [2006] O.J. No. 2039, 2006 CarswellOnt 3105, *(*sub nom. *Reynolds v. Kingston (City) Police Services Board)* 267 D.L.R. (4th) 409, *(*sub nom. *Reynolds v. Kingston Police Services Board)* 212 O.A.C. 299, 39 C.C.L.T. (3d) 257 (Ont. Div. Ct.); reversing 2002 CarswellOnt 7809 (Ont. S.C.J.), Coo J.; reversing 2005 CarswellOnt 3781 (Ont. Master).

Given permissive right to amend pleadings in r. 26.01 of *Rules of Civil Procedure*, Divisional Court erred in reversing order to amend pleadings. Claim for misfeasance of public office should be allowed to proceed to trial to be fully considered on basis of proper factual record and in light of other claims asserted by plaintiff. It was not plain and obvious that action for misfeasance of public office would fail.

Ross v. Charlottetown (City), 2006 CarswellPEI 51, 2006 PESCAD 24, 790 A.P.R. 316, 261 Nfld. & P.E.I.R. 316 (P.E.I. C.A.).

Motions judge correctly cited law with respect to application of rules and noted that amendment to pleadings is mandatory unless prejudice is found. Motions judge was not patently wrong in his conclusion that proposed amendments would cause undue delay and prejudice to city that could not be compensated for by costs or adjournment.

CT Comm Edmonton Ltd. v. Shaw Communications Inc., 2007 CarswellAlta 971, 2007 ABQB 482 (Alta. Q.B.).

Plaintiff's application to amend pleadings and defendants' application to strike portions of the statement of claim was allowed in part. It is not permitted to bring new causes of action outside of the limitation period that are not related to the initial claim, or pleadings that constitute an opinion, is an attempt to plead evidence or that merely repeated the relief sought in the statement of claim. The plaintiff is permitted to make amendments that enlarged and particularized allegations in the initial claim.

Canadian Bar Assn. v. British Columbia, 2008 CarswellBC 379, 290 D.L.R. (4th) 617, 422 W.A.C. 76, 252 B.C.A.C. 76, 2008 BCCA 92, 167 C.R.R. (2d) 161, 76 B.C.L.R. (4th) 48, [2008] 6 W.W.R. 262 (B.C. C.A.); leave to appeal refused [2008] S.C.C.A. No. 185, 2008 CarswellBC 1610, 2008 CarswellBC 1611, 180 C.R.R. 372 (note), 390 N.R. 381 (note), 463 W.A.C. 319 (note), 274 B.C.A.C. 319 (note) (S.C.C.).

The appellant challenged the legal aid system in British Columbia. On a preliminary motion, the action was dismissed on the dual basis that the Association lacked standing to bring the claims and that the statement of claim should be struck under Rule 19(24) of the Rules of Court as disclosing no reasonable claim.

The Court of Appeal dismissed the Association's appeal. The pleadings were too general to permit the relief sought. The broadly-directed pleadings of a systematic problem violating unwritten constitutional principles did not raise a reasonable claim. The court cannot resolve appellants standing to bring the action absent to a reasonable statement of claim.

Club Pro Adult Entertainment Inc. v. Ontario, 2008 CarswellOnt 1106, [2008] O.J. No. 777, 233 O.A.C. 355, 2008 ONCA 158, 42 B.L.R. (4th) 47 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 5426, 2008 CarswellOnt 5427, 390 N.R. 390 (note) (S.C.C.).

Plaintiffs sought damages under several private law causes and challenged constitutionality of the *Smoke-Free Ontario Act*. The judge found the claims disclosed no tenable cause of action, however allowed the Plaintiff to amend the pleadings to argue breach of contract and did not strike the claim the Act was *ultra vires*. The plaintiffs appealed the orders striking the majority of their claims against Ontario. Appeal dismissed. There was no uncertainty in the jurisprudence, either with respect to the private law claims or the appellants' constitutional arguments. There was no error in motion's judge decision to strike claims she did.

Frohlick v. Pinkerton Canada Ltd., 2008 CarswellOnt 66, [2008] O.J. No. 17, 2008 ONCA 3, 62 C.C.E.L. (3d) 161, 49 C.P.C. (6th) 209, 232 O.A.C. 146, 88 O.R. (3d) 401, 289 D.L.R. (4th) 639 (Ont. C.A.).

The Appellant sought to amend her claim against the respondent. The motion judge refused to allow the amendments on the basis that they advanced a new and unrelated claim and that this new claim was statute-barred. Appeal dismissed. Rule 26.01 did not contemplate the addition of unrelated statute-barred claims by way of amendment to an existing statement of claim. Appellant failed to show the existence of special circumstances that rebutted the presumption that the defendant would suffer prejudice from the loss of a limitation defence.

Miller v. Squires, 2008 CarswellNfld 43, 2008 NLTD 25 (N.L. T.D.).

The plaintiff commenced an action for defamatory statements made by the two defendants. The plaintiff amended the statement of claim to include the third and fourth defendant. Statement was struck down as there was no connection between the first defendant's alleged defamatory statements and his directorships of the third and fourth defendant companies. However, the court held that although the pleadings failed to state alleged defamatory statements these deficiencies were not necessarily fatal to the action and demonstrate more than a skeleton or a ghost of a chance of success. Plaintiff was invited to amend the statement of claim.

Moore v. Bertuzzi (2008), [2008] O.J. No. 347, 2008 CarswellOnt 422 (Ont. Master); additional reasons at (2008), 2008 CarswellOnt 2590 (Ont. Master).

Motion by plaintiffs to amend pleadings allowed. Plaintiff a professional hockey player who suffered serious injury as result of conduct of opposing team player. Based on discovery evidence, the plaintiffs sought to plead direct liability on the part of the corporate defendants that owned the opposing team. Defendants objected to certain of the proposed amendments as prolix, repetitive, pleaded evidence, scandalous, vexatious, inflammatory and an abuse of process. The court found that the proposed amendments were relevant to the cause of action respecting the alleged tortious conduct and were not legally scandalous or vexatious. No evidence amendments sought for an improper purpose. No abuse of process.

Peardon v. Long, 2008 CarswellPEI 40, 2008 PESCAD 13, 279 Nfld. & P.E.I.R. 32, 856 A.P.R. 32 (P.E.I. C.A.).

Appellant's submission is that the motions judge made an error of law by failing to provide appropriate compensation for the prejudice incurred by the appellant as a result of the amendment of pleadings by the respondents after oral discovery of a respondent.

Appeal dismissed. Pursuant to R. 26.01 of Rules of Civil Procedure, the motion judge had discretion to grant leave to amend pleading "on such terms as are just." The standard of review of the exercise of discretion is reasonableness, which means that a reviewing court would only interfere if the motions judge exercised his discretion on a wrong principle or misapprehended the facts, which is the same as saying he was clearly wrong.

The motions judge did not make error in principle when he determined that defendant's revelations were within scope of original examination, and that plaintiff had opportunity to examine on them.

Pinsky v. Julien (2008), 2008 CarswellOnt 1024 (Ont. Div. Ct.).

Applicant, a practicing lawyer representing himself, brought a motion for declaration that settlement did not preclude examination of further witnesses. Motion granted.

The settlement was confined to the examination of parties and did not affect the applicant's right to examine non-parties. The applicant was awarded costs of the motion. As he is a practising lawyer he is entitled to an allowance for those costs which he has incurred by acting as his own counsel, but not for the time and expense which any litigant incurs as litigant. The costs should be moderate and it is appropriate for the motion judge to fix them as he is in the best position to do so.

Rare Charitable Research Reserve v. Chaplin (2008), 2008 CarswellOnt 5658, [2008] O.J. No. 3764, 241 O.A.C. 208 (Ont. Div. Ct.).

Application for leave to appeal the decision to add two solicitors and their law firms as parties with the right to intervene, dismissed.

In private, as opposed to public litigation, the discretion to add parties should be exercised sparingly or rarely, depending upon the facts of this case. The "bench mark of caution" test with respect to adding parties in the context of private litigation should apply, yet the court should be concerned with maximizing efficiency and avoiding multiplicity of proceedings.

The motions court judge concluded that the facts of this case met the test for the exercise of his discretion under Rule 13.01(1) of the *Rules of Civil Procedure*, having regard to the principle of the "bench mark of caution." Thus, the lawyers were not only participating, but were legally bound by any factual and legal conclusions reached in these applications.

Spirito Estate v. Trillium Health Centre (2007), [2007] O.J. No. 3832, 2007 CarswellOnt 6366 (Ont. S.C.J.), van Rensburg J.; affirmed 246 O.A.C. 150, 302 D.L.R. (4th) 654, [2008] O.J. No. 4524, 69 C.P.C. (6th) 36, 2008 ONCA 762, 2008 CarswellOnt 6684 (Ont. C.A.).

Test for determining whether amendment new defendant is whether the "litigating finger" pointed at proposed defendant in Claim. Would a person having knowledge of the facts be aware of the true identity of a misnamed party by reading the Statement of Claim? Here motion by plaintiff for leave to amend claim in medical malpractice action to substitute defendant doctors for unnamed doctors allowed. Statement of claim issued December 4, 2004, included description of four defendant doctors without naming them. No prejudice demonstrated where the defendant doctors had the same counsel as doctors who were involved with action from its commencement.

Collins v. R. (2010), 2010 ONSC 6542, 2010 CarswellOnt 9265, 223 C.R.R. (2d) 370, [2011] 3 C.T.C. 211, [2010] O.J. No. 5210 (Ont. S.C.J.); affirmed 2011 ONCA 461, 2011 CarswellOnt 4984 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 251, 2012 CarswellOnt 252, *(*sub nom. *Collins v. Canada)* 432 N.R. 390 (note), *(*sub nom. *Collins v. Canada)* 294 O.A.C. 396 (note) (S.C.C.).

Defendant, Justice Elizabeth Heneghan, moved to have claim struck insofar as it asserts a claim against her.

For the purpose of motion under r. 21.01(1)(b) of the *Rules of Civil Procedure* facts pleaded must be accepted and are capable of being proven.

The law respecting judicial immunity was reviewed by Karakatsanis J. in *Tsai v. Klug*, 2005 CarswellOnt 2359, [2005] O.J. No. 2277, [2005] O.T.C. 480 (Ont. S.C.J.); additional reasons at [2005] O.J. No. 2889, 2005 CarswellOnt 2914 (Ont. S.C.J.); leave to appeal refused 2006 CarswellOnt 1020, [2006] O.J. No. 665, 207 O.A.C. 225 (Ont. C.A.); leave to appeal refused 2006 CarswellOnt 5001, 2006 CarswellOnt 5002, [2006] S.C.C.A. No. 169, 225 O.A.C. 399 (note), 358 N.R. 391 (note) (S.C.C.). The plaintiffs alleged that two Deputy Small Claims Court judges acted fraudulently, unlawfully and unconstitutionally. Karakatsanis J. struck the claim, and dismissed the action.

The Court of Appeal in *Tsai* expressed agreement with the reasons of Karakatsanis J.

See *Baryluk v. Campbell*, 2008 CarswellOnt 6355, [2008] O.J. No. 4279, 61 C.C.L.T. (3d) 292 (Ont. S.C.J.); additional reasons at 2009 CarswellOnt 3900, [2009] O.J. No. 2772, 66 C.C.L.T. (3d) 160 (Ont. S.C.J.), Hackland J., referring to *Tsai*, stated:

> [31] Like Karakatsanis J., I specifically reject the argument that a pleading of bad faith or deliberate excess of jurisdiction can defeat the principle of judicial immunity. If it were otherwise, mere allegations in pleadings could place judges in the position of having to defend the manner in which they have discharged their judicial duties in subsequent legal proceedings

> commenced by disaffected litigants. To place judges in this position would be seriously to undermine the principle of judicial independence.

See also *Taylor v. Canada (Attorney General)*, 2000 CarswellNat 3253, 253 N.R. 252, 184 D.L.R. (4th) 706, [2000] F.C.J. No. 268, 2000 CarswellNat 354, 37 C.H.R.R. D/368, 44 C.P.C. (4th) 1, [2000] 3 F.C. 298, 21 Admin. L.R. (3d) 27 (Fed. C.A.); leave to appeal refused 263 N.R. 399 (note), [2000] S.C.C.A. No. 213, 2000 CarswellNat 2567, 2000 CarswellNat 2566 (S.C.C.) the Federal Court of Appeal concluded, contrary to the Ontario authorities cited, that there is an exception to judicial immunity in the event that a judge knowingly acts beyond jurisdiction. The claim against Heneghan J. discloses no reasonable cause of action.

The plaintiff to file a fresh as amended Statement of Claim.

Butera v. Fragale, 2010 ONSC 3702, 2010 CarswellOnt 4669 (Ont. S.C.J.).

Defendants move to strike out Statement of Claim and the Reply to Statement of Defence without leave to amend for failing to disclose a reasonable cause of action pursuant to r. 21.01(1)(b) of the *Rules of Civil Procedure*.

Party may move under r. 21.01(3)(d) to dismiss an action on basis action frivolous or vexatious or is otherwise an abuse of the process. Court will only dismiss or stay action as being frivolous, vexatious or abusive in the "clearest of cases where, on the face of the action and circumstances, it is plain and obvious that the case cannot succeed." See *Butera v. Fragale*, 2010 ONSC 3702, 2010 CarswellOnt 4669 (Ont. S.C.J.).

A party may also move under r. 25.11(b) and (c) to strike out or expunge all or part of a pleading with or without leave to amend on ground that the pleading is scandalous, frivolous, vexatious or an abuse of process of the court. See *Currie v. Halton Regional Police Services Board*, 233 D.L.R. (4th) 657, 2003 CarswellOnt 4674, 179 O.A.C. 67, [2003] O.J. No. 4516 (Ont. C.A.). See also, *Canam Enterprises Inc. v. Coles*, [2000] O.J. No. 4607, 194 D.L.R. (4th) 648, 51 O.R. (3d) 481, 2000 CarswellOnt 4739, 5 C.P.C. (5th) 218, 139 O.A.C. 1 (Ont. C.A.); leave to appeal allowed 202 D.L.R. (4th) vi, 155 O.A.C. 200 (note), 276 N.R. 394 (note), [2001] S.C.C.A. No. 50, 2001 CarswellOnt 3074, 2001 CarswellOnt 3073 (S.C.C.); reversed REJB 2002-34843 296 N.R. 257, 220 D.L.R. (4th) 466, 2002 CarswellOnt 3262, 2002 CarswellOnt 3261, 2002 SCC 63, [2002] 3 S.C.R. 307, 61 O.R. (3d) 416 (note), [2002] S.C.J. No. 64, 24 C.P.C. (5th) 1, 167 O.A.C. 1 (S.C.C.).

Attempting to re-litigate actions or determine issues which have already been determined by a court of competent jurisdiction constitute vexatious proceedings and are an abuse of process. See *Baryluk v. Campbell*, 61 C.C.L.T. (3d) 292, 2008 CarswellOnt 6355, [2008] O.J. No. 4279 (Ont. S.C.J.); additional reasons at [2009] O.J. No. 2772, 66 C.C.L.T. (3d) 160, 2009 CarswellOnt 3900 (Ont. S.C.J.). See also *Canadian National Railway v. Brant*, 96 O.R. (3d) 734, [2009] O.J. No. 2661, [2009] 4 C.N.L.R. 47, 2009 CarswellOnt 3720 (Ont. S.C.J.); additional reasons at 2009 CarswellOnt 5106 (Ont. S.C.J.).

The issues had already been determined by the Ontario Labour Relations Board and the Small Claims Court. Consequently, action vexatious and abuse of process.

In *Lehan v. St. Catharines (City)*, 2009 CarswellOnt 6794, [2009] O.J. No. 4643 (Ont. S.C.J.) at para. 17 summarized the established body of law relating to amending pleadings:

> . . . It was well established that Amendments . . . should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment; they are shown to be scandalous, frivolous, vexatious or an abuse of the court's process or they disclose no reasonable cause of action.

Leave not granted to plaintiff to amend pleadings. The plaintiff's action dismissed.

Callinan Mines Ltd. v. Hudson Bay Mining & Smelting Co., 2011 MBQB 159, 2011 CarswellMan 341, 8 C.P.C. (7th) 100, 266 Man. R. (2d) 214, [2011] 11 W.W.R. 537 (Man. Q.B.).

C Ltd. brought an Application for leave to amend its statement of claim. The Application was granted. The nature of the amendments would not cause any prejudice to H Ltd. The amendments sought did not preclude a meaningful response. There was no obvious delay. The amendments raised a valid and arguable point that went to the central issue in the matter.

Gordon v. Krieg, 2011 BCSC 916, 2011 CarswellBC 1825 (B.C. Master); reversed 2011 BCSC 1248, 2011 CarswellBC 2461 (B.C. S.C.); additional reasons to 2011 BCSC 882, 2011 CarswellBC 1704 (B.C. Master).

This case dealt with adding or substituting parties and general principles. The defendants WK and KK brought an Application for leave to file a third party notice. All applications were dismissed. As events involving I Ltd. happened 22 years ago, two months was not sufficient time to prepare. It would have been prejudicial to I Ltd. to force it to trial. If any third parties were added, the trial would have to be adjourned. If the trial was adjourned, it would be highly prejudicial to the plaintiff.

Boisvert v. Korczynski, 2011 ONSC 4423, 2011 CarswellOnt 7210 (Ont. S.C.J.).

The plaintiffs brought a motion to amend their statement of claim seeking to delete the words "inherently dangerous." The motion was granted. Rule 26.01 of the *Rules of Civil Procedure* is mandatory and amendments must be allowed unless the responding party can demonstrate a prejudice that cannot be compensated by costs. Prejudice must arise from the amendment. The defendants did not demonstrate prejudice would result from the proposed amendment.

Streamline Foods Ltd. v. Jantz Canada Corp., 2011 ONSC 1630, 2011 CarswellOnt 1674, 280 O.A.C. 152, 6 C.P.C. (7th) 399 (Ont. Div. Ct.).

Where a limitation period has expired, a party's name can only be changed if there is a misnomer. A new party cannot be added. Principles which have been articulated in cases prior to the *Limitations Act, 2002*, are to be treated with caution. It is no longer possible to add parties after the expiry of a limitation period even in the face of special circumstances. The correct test was applied.

The *Limitations Act, 2002*, came into effect on January 1, 2004. See *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 2008 CarswellOnt 3495, [2008] O.J. No. 2339, 90 O.R. (3d) 401, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 241 O.A.C. 29 (Ont. C.A.). This case did not involve a misnomer. The plaintiff's counsel failed to issue a statement of claim within the limitation period. The case involved section 21 of the Act and the doctrine of special circumstances. An appeal was allowed.

Marks v. Ottawa (City), 2011 ONCA 248, 2011 CarswellOnt 2165, [2011] O.J. No. 1445, 81 M.P.L.R. (4th) 161, 280 O.A.C. 251 (Ont. C.A.).

The Court of Appeal found that, although general rule amendments to pleadings were presumptively approved, there was no absolute right to amend the pleadings. The court has a residual right to deny amendments where appropriate. An amendment should be allowed unless it would cause an injustice not compensable in costs. A proposed amendment has to be shown to be an issue worthy of trial and prima facie meritorious. No amendment should be allowed which, if originally pleaded, would have been struck. The proposed amendment has to contain sufficient particulars. See also *Daniele v. Johnson*, 1999 CarswellOnt 2096, [1999] O.J. No. 2562, 45 O.R. (3d) 498, 90 O.T.C. 240 (note), 123 O.A.C. 186 at paras. 11-15 (Ont. Div. Ct.).

Transwest Roofing Ltd. v. Isle of Mann Construction Ltd., 2012 BCPC 136, 2012 CarswellBC 1434 (B.C. Prov. Ct.).

Defendant seeks to file amended reply and counterclaim. The Claimant opposes the application. Rule 8(1) of the Provincial Court Small Claims Rules requires leave of the court for this to occur if a settlement conference has taken place which is the case here.

No prejudice to Claimant in now confronting an argument from the only party with whom it says a contract existed that there never was a contract formed.

There is no suggestion that memories have so dimmed or that the number or identity of witnesses is so complicated that the Claimant would be greatly prejudiced by the amendment. There is no evidence that substantial additional documents would be required to now address this issue.

The interest of justice is best served by granting leave to the Defendant to file and serve an amended Reply and Counterclaim in the form proposed.

Dee Ferraro Ltd. v. Pellizzari, 2012 ONCA 55, 2012 CarswellOnt 816, 346 D.L.R. (4th) 624, [2012] O.J. No. 355 (Ont. C.A.); reversing 2011 ONSC 3995, 2011 CarswellOnt 8211 (Ont. S.C.J.).

This judgment illustrates the difference between amending a statement of claim to allege a new cause of action (impermissible if the new claim is stature barred), and amending the statement of claim to add new remedies or heads of damages (permissible), provided there is no non-compensable prejudice.

The original pleading contained all the facts necessary to support the amendments. The amendments simply claimed additional forms of relief, or clarified the relief sought, based on the same facts as originally pleaded. The court relied on *Canadian National Railway v. Canadian Industries Ltd.*, 1940 CarswellOnt 213, [1940] 4 D.L.R. 629, 52 C.R.T.C. 31, [1940] O.W.N. 452, [1940] O.J. No. 266 (Ont. C.A.); affirmed 1941 CarswellOnt 84, [1941] S.C.R. 591, [1941] 4 D.L.R. 561, 53 C.R.T.C. 162 (S.C.C.), and distinguished *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3, 2008 CarswellOnt 66, 88 O.R. (3d) 401, 62 C.C.E.L. (3d) 161, 49 C.P.C. (6th) 209, 289 D.L.R. (4th) 639, 232 O.A.C. 146, [2008] O.J. No. 17 (Ont. C.A.).

This was not a case in which new and unrelated causes of action were being asserted based on new facts. The claims flow directly from the facts previously pleaded. Therefore, the claims were not statute-barred and the amendments should have been permitted, since there was no evidence of non-compensable prejudice.

Streamline Foods Ltd. v. Jantz Canada Corp., 2012 ONCA 174, 2012 CarswellOnt 3333, [2012] O.J. No. 1213 (Ont. C.A.); affirming 2011 ONSC 1630, 2011 CarswellOnt 1674, 6 C.P.C. (7th) 399, 280 O.A.C. 152 (Ont. Div. Ct.); affirming 2010 ONSC 6393, 2010 CarswellOnt 8790, [2010] O.J. No. 4988 (Ont. Master).

This judgment establishes that s. 21(1) of the *Limitations Act, 2002 does* apply to plaintiffs (as opposed, as some have argued, only to defendants). The court refused to allow for the plaintiff's parent corporation to be added as a party plaintiff after the limitation period had expired.

This was not a misnomer. The plaintiffs sought to add the parent corporation of the original plaintiff because it was the parent corporation which incurred certain losses, not the original plaintiff. The plaintiffs were not seeking to correct the name of a party; rather, they were seeking to add a party and to pursue that party's claims.

Livingston v. Williamson, 2011 ONSC 3849, 2011 CarswellOnt 5872, 107 O.R. (3d) 75, 99 C.C.L.I. (4th) 331 (Ont. Master).

The plaintiff sued the TTC in its capacity as owner of the bus, employer of the driver, and provider of uninsured motorist coverage.

The TTC was not the insurer. The plaintiff was unaware that TTC Insurance was a separate company. The plaintiff brought a motion to correct the name of the insurer by adding TTC Insurance as a party defendant. TTC Insurance took the position that this was a motion to add a party after the limitation period had expired. Motion allowed both the TTC legal department and TTC Insurance operated from the same building, had identical postal codes and were represented by the same lawyer on the argument of the motion. Master Hawkins found that a representative of the TTC Insurance would have known immediately that insofar as unidentified motorist coverage was concerned, TTC Insurance was intended. Neither TTC nor TTC Insurance suffered any actual prejudice.

Stekel v. Toyota Canada Inc., 2011 ONSC 6507, 2011 CarswellOnt 11971, 107 O.R. (3d) 431 (Ont. S.C.J.); leave to appeal refused 2012 ONSC 2572, 2012 CarswellOnt 5718 (Ont. Div. Ct.); affirming 2011 ONSC 2211, 2011 CarswellOnt 2378, [2011] O.J. No. 1591 (Ont. Master).

Plaintiff injured due to an apparent mechanical malfunction in Lexus vehicle she was driving. She sued Toyota Canada Inc., believing it was both the distributor and manufacturer of the vehicle. More than two years after the accident, the plaintiff learned that the vehicle was in fact manufactured by Toyota Motors Canada. She moved to add Toyota Manufacturers Canada (TMC) as a party defendant in the action.

While the limitation period in respect of the plaintiff's claim against TMS has expired, s. 21(2) of the *Limitations Act 2002* permitted the plaintiffs to correct their "misnomer" with respect to the manufacturer of their vehicle and add TMC as a defendant to the litigation. The plaintiffs had always intended to include the manufacturer of the vehicle as a defendant in their action. Equally importantly, TMC knew that the plaintiffs were pointing at the manufacturer of the vehicle, even though they had misnamed the manufacturer.

Ernst v. EnCana Corp. (2014), 2014 ABQB 672, 2014 CarswellAlta 2089, 598 A.R. 331, 6 Alta. L.R. (6th) 233, [2015] 1 W.W.R. 719 (Alta. Q.B.).

Alberta brought application to strike all paragraphs of Fresh Statement of Claim containing allegations against it on basis that it fails to disclose a reasonable cause of action. In the alternative, Alberta requests summary judgment dismissing action as against it on basis no merit to Ernst's claims against it. Neither EnCana nor the ERCB participated in application.

No absolute rule governing the order in which party may attack the opposing party's pleadings. Most convenient to bring all attacks at the same time. Failure to do so may be the subject of a costs award. See *Alexander v. Pacific Trans-Ocean Resources Ltd.*, 1993 CarswellAlta 883, 93 C.L.L.C. 16, [1993] A.J. No. 142 (Alta. C.A.) at para. 7. Multiple attacks on the same pleading should be discouraged. See *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, [2011] 3 S.C.R. 45, 25 Admin. L.R. (5th) 1, 21 B.C.L.R. (5th) 215, 83 C.B.R. (5th) 169, 86 C.C.L.T. (3d) 1, *(*sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, [2011] 11 W.W.R. 215, *(*sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, *(*sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 419 N.R. 1, *(*sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 521 W.A.C. 1, [2011] A.C.S. No. 42, [2011] S.C.J. No. 42 (S.C.C.), where the court considered a motion to strike claims brought pursuant to British Columbia *Supreme Court Rules*.

A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. See *Odhavji Estate v. Woodhouse* (2003), 2003 CSC 69, 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, [2003] 3 S.C.R. 263, 70 O.R. (3d) 253, 70 O.R. (3d) 253 (note), 11 Admin. L.R. (4th) 45, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 312 N.R. 305, 180 O.A.C. 201, [2004] R.R.A. 1,

[2003] S.C.J. No. 74 (S.C.C.) at para. 15 and *Hunt v. T & N plc*, 1990 CarswellBC 216, 1990 CarswellBC 759, EYB 1990-67014, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 4 C.O.H.S.C. 173, 117 N.R. 321, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93 (S.C.C.) at p. 980 [S.C.R.]. Does claim have a reasonable prospect of success? Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.

Test for summary judgment in *Hryniak v. Mauldin*, 2014 CSC 7, 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641, *(*sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, *(*sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, *(*sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7 (S.C.C.) ["*Hryniak*"], where the court will grant summary judgment if "there is no genuine issue requiring a trial": r 20.04(2)(a). Alberta's application for summary judgment dismissed. Alberta's application to strike portions of Fresh Claim is dismissed.

(1.1) [Repealed O. Reg. 249/21, s. 10.]

(1.2) [Repealed O. Reg. 249/21, s. 10.]

(2) Service — The amended document shall be served by the party making the amendment on all parties, including any parties in default, in accordance with subrule 8.01(14).

Commentary: An amended document shall be served by the party making the amendment on all parties, including any parties in default, by mail, courier, or email, personally, or by an alternative to personal service [r. 12.01(2), 11.05(3)] unless the court orders otherwise. Filing and service of the amended document shall take place at least 30 days before the originally scheduled trial date, unless:

- The clerk makes an order (on filing of request for clerk's order) on consent within 30 days of the scheduled trial date [r. 11.2.01(1)l i]; or
- The court, on motion, allows a shorter notice period [r. 12.01(3)].

A party who is served with an amended document is not required to amend the party's defence or claim, *e.g.*, where a plaintiff files and serves an amended claim, the defendant is not required to file another defence if there is already one on file respecting the original claim, pursuant to rule 12.01(5). The defendant may file an amended defence if he or she wishes to do so, pursuant to rule 12.01(1).

(3) Time — Filing and service of the amended document shall take place at least 30 days before the originally scheduled trial date, unless,

(a) the court, on motion, allows a shorter notice period; or

(b) a clerk's order permitting the amendment is obtained under subrule 11.2.01(1).

Commentary: A party may amend a Plaintiff's Claim (Form 7A), a Defendant's Claim (Form 10A), and a Defence (Form 9A), at least 30 days before the originally scheduled trial date (unless otherwise ordered by the court or by a clerk's order or consent). The party requesting such a substitution must amend the party's pleading in accordance with rule 12.01. A party who takes issue with the procedure may make a motion to a judge for direction.

(4) Service on Added Party — A person added as a party shall be served with the claim as amended, except that if the person is added as a party at trial, the court may dispense with service of the claim.

(5) No Amendment Required in Response — A party who is served with an amended document is not required to amend the party's defence or claim.

O. Reg. 78/06, s. 25; 393/09, s. 13; 38/16, s. 7; 249/21, s. 10

Commentary: While amendment of a pleading in response to amendment of the opponent's pleading is not mandatory, it may be desirable in some cases. If an unpleaded defence to an issue pleaded by amendment to a claim is advanced at trial, it could give rise to objection, prejudice, potential adjournment with costs, or theoretically even a mistrial. Any party who faces an amended pleading from the opponent should consider whether it is desirable to amend their own pleading even if such amendment, by virtue of rule 12.01(5), is not mandatory.

12.02 Motion to Strike out or Amend a Document — (1) The court may, on motion, strike out or amend all or part of any document that,

(a) discloses no reasonable cause of action or defence;

(b) may delay or make it difficult to have a fair trial; or

(c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process.

(2) In connection with an order striking out or amending a document under subrule (1), the court may do one or more of the following:

1. In the case of a claim, order that the action be stayed or dismissed.

2. In the case of a defence, strike out the defence and grant judgment.

2.1 In the case of a motion, order that the motion be stayed or dismissed.

3. Impose such terms as are just.

Commentary: Rule 12.02 provides for motions to strike all or part of a claim or defence, whether on the basis of pleadings law or based on factual merit. If compared to similar provisions under the *Rules of Civil Procedure*, it is like an amalgam of rules 20.04, 21.01 and 25.11 under those rules.

In *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.); additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.), the court held that rule 12.02 must be interpreted within the specific context of Small Claims Court procedure and that the terminology and case law developed under Rules 20 and 21 of the *Rules of Civil Procedure* should not be applied to rule 12.02 motions. It was held that rule 12.02 is conceptually somewhere in between a pleadings motion and a summary judgment motion under Rules 21 and 20 of the Rules of Civil Procedure. In that case, the dismissal of a claim based on limitation and absolute immunity defences by a motions judge was restored.

In *O'Brien v. Ottawa Hospital*, 2011 ONSC 231, 2011 CarswellOnt 88, [2011] O.J. No. 66 (Ont. Div. Ct.), the court upheld the dismissal of a claim based on there being "no meaningful chance of success at trial." It was a medical malpractice claim in which the motions judge had found that the plaintiff had no supportive expert evidence and could not succeed on liability. See also *Vuong v. Toronto East General & Orthopaedic Hospital*, 2010 ONSC 6827, 2010 CarswellOnt 10206, 328 D.L.R. (4th) 759 (Ont. Div. Ct.); *Diler v. Uppal* (May 7, 2010), Doc. 110/10, [2010] O.J. No. 1903 (Ont. Sm. Cl. Ct.); *Dougherty v. Goad & Goad Barristers & Solicitors*, 2011 CarswellOnt 15742, [2011] O.J. No. 2423 (Ont. Sm. Cl. Ct.).

The pleading must contain sufficient detail so that the parties and the court can ascertain the exact nature of the questions to be tried and so the opposing party can meet the charge and respond accordingly. (See *Copland v. Commodore Business Machines Ltd.* (1985), 1985 CarswellOnt 410, 3 C.P.C. (2d) 77, 52 O.R. (2d) 586 (Ont. Master); affirmed (1985), 3 C.P.C. (2d) 77n, 52 O.R. (2d) 586n (Ont. H.C.)).

The pleadings may be challenged "because it has failed to allege the necessary elements of a claim that, if properly pleaded, would constitute a reasonable cause of action." (See *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 20 R.P.R. (3d) 207, 1998 CarswellOnt 3202, 164 D.L.R. (4th) 257, 111 O.A.C. 201, [1998] O.J. No. 3240, 26 C.P.C. (4th) 1 at para. 10 (Ont. C.A.).).

A claim can be dismissed under rule 12.02 where the plaintiff has no evidence capable of proving an essential element of his or her case. In a medical malpractice claim, where the plaintiff was given ample opportunity but produced no evidence to establish a breach of the standard of care, the claim was properly dismissed on motion under rule 12.02: *Adams* (2017), 2017 ONSC 5297, 2017 CarswellOnt 14043 (Ont. Sm. Cl. Ct.); leave to appeal refused (2018), 2018 ONCA 443, 2018 CarswellOnt 7190 (Ont. C.A.). A claim can also be dismissed on motion under rule 12.02 or at a settlement conference if the plaintiff has sustained no provable damages: *Roskam v. Rogers Cable*, 2008 CarswellOnt 2958, *(*sub nom. *Roskam v. Rogers Cable (A Business))* 173 C.R.R. (2d) 157, [2008] O.J. No. 2049 (Ont. Div. Ct.).

(2) — Motions for Judgment on Limitation Defence

A common form of motion under rule 12.02 is a motion by the defendant seeking to dismiss the claim based on a limitation defence. Care must be taken to properly interpret and apply the limitation period under ss. 4 & 5 of the *Limitations Act, 2002*. The inherent danger of such a motion for judgment is that if the claim is dismissed and an appeal is allowed, significant costs and judicial resources may be wasted before the case is restored to the position it was in before the motion and appeal. The wiser course may be to simply let the case, including the limitation defence, be decided at trial.

Frederick v. Van Dusen, 2019 ONCA 66, 2019 CarswellOnt 1091, 144 O.R. (3d) 305, 89 C.L.R. (4th) 52, 432 D.L.R. (4th) 712 (Ont. C.A.), provides a vivid illustration of both the inherent flexibility of the limitation period under the new Act, and the prospect for error in its application. That case arose from septic work in 2010. The claim was not issued until 2015, suggesting a limitation defence based on the two-year limitation period under s. 4. However the focus must always be on the statutory definition in ss. 5(1)(a) and (b) of when a claim is "discovered". The two-year clock does not start until the claim is "discovered". The evidentiary presumption in s. 5(2) is helpful but does not eliminate the need for factual analysis on a case-by-case basis.

In *Frederick*, the factual issue around discovery of the claim was a combination of the timing of discovery by the plaintiffs of signs of a problem with the septic system, and the timing of assurances by the defendant that he would address the problem. As noted above, on a simple level the defendant's negligence occurred in 2010 and the claim was issued two years plus a further three years later. The limitation defence succeeded at trial and was upheld on appeal to the Divisional Court. On further appeal the Court of Appeal reversed the lower courts and found that the limitation defence was not made out. The focus of the analysis was on s. 5(1)(a)(iv) which makes the time when the plaintiff knew that a legal proceeding would be an appropriate means to remedy the loss or damage, a factor in determining when a claim is discovered. The Court of Appeal held that both the trial judge and the Divisional Court had overlooked that section.

This is by no means the first appellate consideration of s. 5(1)(a)(iv). The Court of Appeal stated at para. 15:

> 15 This court has repeatedly held that consideration of when a proceeding was an appropriate means to remedy a claim is an essential element in the discoverability analysis and that failure to consider s. 5(1)(a)(iv) is an error of law . . . [citations omitted]

Frederick was an appeal from a trial. The fact that both a trial judge and a Divisional Court judge were found to have erred in the limitation analysis only emphasizes the risk of error on a motion analysis where the facts and circumstances may not be fully described in the affidavit evidence.

Another useful illustration of the flexibility of the concept of discovery under s. 5(1) is found in *New Tec Building Envelopes Ltd. v. Deciantis Construction Ltd.*, 2015 ONSC 5462, 2015 CarswellOnt 14666, 53 C.L.R. (4th) 52, 340 O.A.C. 127, [2015] O.J. No. 4995 (Ont. Div. Ct.). As is typical of many simple debts and invoices, payment on the invoice in this case was due within 30 days. However discovery of the claim did not occur on the 31st day. That is because as held by Justice Vallee at para. 24, "A claimant may be allowed a reasonable time to deliver an invoice to the defendant and account for a reasonable time for the defendant to pay that invoice." Applying s. 5(1)(b), it was held that the claim for failure to pay the invoice was discovered 60 days after it was delivered. The plaintiff's position that discovery did not occur until months later when the defendant expressly refused to pay the invoice, was rejected.

The statutory concept of discovery under the *Limitations Act, 2002* contains inherently factual and subjective aspects. The precise effect of those aspects on any specific case needs to be carefully assessed based on the evidence. The mere fact that a limitation defence is arguable does not necessarily mean that a motion under rule 12.02 is appropriate.

Case Law: *Tuka v. Butt*, 2014 CarswellOnt 2035, [2014] O.J. No. 852 (Ont. Sm. Cl. Ct.).

The defendant's claim was dismissed under rule 12.02. The court held that the claim fell within the exclusive jurisdiction of the Landlord and Tenant Board, which had heard several prior applications between these parties. Her claims for an abatement of rent and for damages for personal property left on the premises when she was evicted were dismissed for want of jurisdiction, and her claim for personal property was also dismissed as barred by s. 41 of the *Residential Tenancies Act, 2006*.

Camm v. Kirkpatrick (August 19, 2013), Doc. 13-SC-125385, [2013] O.J. No. 3830 (Ont. Sm. Cl. Ct.).

A debt claim was dismissed under rule 12.02 based on the limitation defence. The court held that despite some complexity in the limitations law relating to demand obligations, no further or different evidence could be expected if a trial was held. The claim had no meaningful chance of success at trial.

W.J. Realty Mgmt. Ltd. v. Price (1973), 1 O.R. (2d) 501 (Ont. C.A.).

Where an original plaintiff has no cause of action, a new plaintiff who is alleged to have a cause of action cannot be substituted for the original plaintiff under this section.

Turgeon v. Border Supply (EMO) Ltd. (1977), 16 O.R. (2d) 43 (Ont. Div. Ct.).

Where an action is brought in the name of a partnership which had been dissolved prior to the commencement of the action and the chose in action assigned, the original plaintiff had no cause of action and an order cannot be made adding the assignee as plaintiff at the trial of the small claims court action. Griffiths J. (dissenting) stated,

> It could not be said that the action was a nullity in that the plaintiffs had legal status to sue. While the original plaintiffs may not have had a cause of action, denial of the amendment adding the assignee as plaintiff would defeat the very spirit and purpose of the small claims procedure.

Grimshaw v. Grimshaw (1983), 32 C.P.C. 11 (Ont. H.C.).

Plaintiff brought action as an administratrix. Plaintiff allowed to amend style of cause to substitute herself as a next friend. *Bona fide* mistake and not a case where a new plaintiff was being substituted for the original plaintiff.

Frobisher Ltd. v. Can. Pipelines & Petroleums Ltd. (1957), 10 D.L.R. (2d) 338 (Sask. C.A.); sustained [1960] S.C.R. 126 (S.C.C.).

If there are no injustices to the other side and if it can be compensated in costs, amendments can be allowed after all evidence is in, but before argument.

Amer. Express Can. Inc. v. Engel (1983), 39 O.R. (2d) 600 (Ont. Div. Ct.).

The defence did not comply with Rule 26 of the Provincial Court (Civil Division) Project Regulations, R.R.O. 1980, Reg. 806, because no reasons why the dispute was put forward were included and accordingly, no true defence had been filed. A claim for harassment was not a defence to a claim for debt. (See also *Gillman v. Vic Tanny*.)

Joly v. Pelletier (May 16, 1999), Doc. 99-CV-166273, 99-CV-167339 (Ont. S.C.J.).

Motion to strike out the plaintiff Rene Joly's Statements of Claim and thereby dismiss the actions (Rule 21.01(3) (b) or Rule 25.11, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194). Joly's claim asserts that he is not a human being, but a martian. The court must accept the facts alleged in the Claim as proven unless patently ridiculous and incapable of proof and must read these generously in the Statement of Claim with allowance for inadequacies due to drafting deficiencies. See *Falloncrest Financial Corp. v. Ontario* (1995), *(*sub nom. *Nash v. Ontario)* 27 O.R. (3d) 1 (Ont. C.A.) and *Hunt v. T & N plc* (1990), *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321 (S.C.C.) and *Steiner v. R.* (1996), *(*sub nom. *Steiner v. Canada)* 122 F.T.R. 187 (Fed. T.D.). Actions patently ridiculous. Statements of Claim in both actions are struck and the actions are dismissed.

Skolnik v. Arviv (2000), 2000 CarswellOnt 3880 (Ont. C.A.).

Appeal by defendants from decision that struck out their statement of defence and counterclaim on grounds that it alleged that the main action was brought maliciously and in abuse of process. The defendants' pleading adequately pleaded elements of causes of action it asserted.

Zeus v. Spick (2000), 2000 CarswellOnt 3623 (Ont. S.C.J.); affirmed (2001), 2001 CarswellOnt 2470 (Ont. C.A.).

Endorsement. The plaintiff uttered death threats against the landlord. The plaintiff pleaded guilty and subsequently brought an action against the landlord and police officer for damages for wrongful arrest and conviction. Cause of action was not properly pleaded; the claim was frivolous and vexatious and struck out.

Wakeford v. Canada (Attorney General) (2001), 81 C.R.R. (2d) 342, 2001 CarswellOnt 352 (Ont. S.C.J.); affirmed (2001), 156 O.A.C. 385, 2001 CarswellOnt 4368 (Ont. C.A.); leave to appeal refused (2002), 2002 CarswellOnt 1097, 2002 CarswellOnt 1098, 300 N.R. 197 (note), 169 O.A.C. 196 (note) (S.C.C.).

The defendant brought a motion to strike out claim, as there was Supreme Court case law squarely on point. The plaintiff was unable to show realistic possibility that the earlier case would be overruled.

C. (V.) v. Edwards (2001), 2001 CarswellOnt 2362 (Ont. Master).

Motion to strike out paragraph in claim alleging that Criminal Injuries Compensation Board found defendant guilty of sexual assault. Board neither criminal nor quasi-criminal tribunal.

Mills v. Gibbs, 2003 CarswellSask 383, 2003 SKQB 245 (Sask. Q.B.).

Defendants sought Order striking the claim against each of them pursuant to Rule 173 of *The Queen's Bench Rules*. Principles clearly set out in *Collins v. McMahon*, 2002 SKQB 201, [2002] S.J. No. 318, 2002 CarswellSask 342 (Sask. Q.B.) paragraphs 11 to 13.

The jurisdiction to strike a claim should only be exercised in plain and obvious cases where the matter is beyond doubt. *Milgaard v. Kujawa*, 123 Sask. R. 164, 1994 CarswellSask 243, [1994] 9 W.W.R. 305, 118 D.L.R. (4th) 653, 74 W.A.C. 164, 28 C.P.C. (3d) 137 (Sask. C.A.); leave to appeal refused (1995), [1994] S.C.C.A. No. 458, 32 C.P.C. (3d) 101 (note), [1995] 2 W.W.R. lxiv (note), 119 D.L.R. (4th) vi (note), 186 N.R. 77 (note), 134 Sask. R. 320 (note), 101 W.A.C. 320 (note) (S.C.C.).

The Plaintiff must state sufficient facts to establish the requisite legal elements for a cause of action. (See *Sandy Ridge Sawing Ltd. v. Norrish*, 140 Sask. R. 146, 1996 CarswellSask 72, [1996] 4 W.W.R. 528, 28 C.C.L.T. (2d) 113, 46 C.P.C. (3d) 316 (Sask. Q.B.)).

The proper course of action here to allow to amend claim further to properly defind the cause or causes of action.

Benoit v. Akert, 2003 CarswellSask 558, 2003 SKPC 113 (Sask. Prov. Ct.).

The plaintiff brought action under *The Small Claims Act* against defendant, with respect to damages done to rental property pursuant to agreement for sale which was not concluded.

Subs. 3(1) and subs. 3(1.1) of the *Land Contract (Actions) Act* states:

> "No action shall be commenced except by leave of the Court granted upon application under this section."

Section 11 of *The Small Claims Act* provides that a judge may order that matter be transferred to the Court of Queen's Bench. Proceedings of Court to the Court of Queen's Bench.

Furlong v. Avalon Bookkeeping Services Ltd., 2003 NLSCTD 140, 2003 CarswellNfld 230, 231 Nfld. & P.E.I.R. 68, 686 A.P.R. 68, 42 C.P.C. (5th) 315 (N.L. T.D.); reversed 2004 CarswellNfld 237, 2004 NLCA 46, 243 D.L.R. (4th) 153, 49 C.P.C. (5th) 225, 6 M.V.R. (5th) 79, 239 Nfld. & P.E.I.R. 197, 709 A.P.R. 197 (N.L. C.A.).

Small Claims action was an adjustication of only the vehicle owner's claim for property damages, injured Plaintiff not a necessary party to Small Claims action. Claim not adjudicated on by Small Claims Court — *res judicata* not made out. Issue estoppel found against the Defendants. Summary judgment entered for Plaintiff with damages to be assessed.

Six and a half years elapsed since collision. Claim of prejudice purely speculative.

Charlottetown (City) v. MacIsaac, 2003 CarswellPEI 9, 2003 PESCTD 7, 35 M.P.L.R. (3d) 271, 223 Nfld. & P.E.I.R. 95, 666 A.P.R. 95 (P.E.I. T.D.).

City pleads, *inter alia*, that the Plaintiff's claim should be struck as it discloses no cause of action. City moved for Order pursuant to Rule 74.01(4)(b) to have Rule 20, the summary judgment Rule, and Rule 21.01(1)(b), apply in this case.

A municipal council is a trustee of municipal property, including funds, for all inhabitants of the municipality. Statement of claim is struck out.

Allen v. College of Dental Surgeons (British Columbia), 2005 CarswellBC 1382, 2005 BCSC 842, 31 Admin. L.R. (4th) 118, 32 C.C.L.T. (3d) 256 (B.C. S.C.).

Defendant College applied under Rule 19(24) of the *Rules of Court* to strike out plaintiff's writ of summons and amended statement of claim as disclosing no reasonable cause of action.

Test whether, assuming facts set out in pleadings could be proven, it is plain and obvious that claim as it reads or as it may reasonably be amended discloses no reasonable claim. See *Hunt v. T & N plc*, 1990 CarswellBC 759, 1990 CarswellBC 216, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4

C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.). See also *Rogers v. Faught*, 2002 CarswellOnt 1068, [2002] O.J. No. 1451, 212 D.L.R. (4th) 366, 159 O.A.C. 79, 93 C.R.R. (2d) 329 (Ont. C.A.). Court concluded that the governing body of dentists did not owe a private law duty of care to individual patients of dentists.

Plaintiff has no reasonable claim against the College in negligence, that aspect of her pleadings struck out.

Plaintiff's claim in libel discloses no reasonable cause of action against College, that claim struck out.

D'Andrea v. Schmidt, 2005 CarswellSask 304, 2005 SKQB 201, 263 Sask. R. 290, 130 C.R.R. (2d) 282, [2006] 2 W.W.R. 251, 20 R.F.L. (6th) 246 (Sask. Q.B.).

Defendant applied for order striking out part of claim of former fiancé, Troy D'Andrea, for return of engagement ring.

In England Parliament abolished actions for breach of promise of marriage in the discretely named *Law Reform (Miscellaneous Provisions) Act, 1970*, (U.K.) 1970, c. 33, s. 1. The Legislature of New Brunswick has not yet formally abolished it.

See *Iliopoulos v. Gettas*, 1981 CarswellOnt 1224, 32 O.R. (2d) 636 (Ont. Co. Ct.) relating to the giving of an engagement ring in contemplation of marriage.

If cause of action can be modified to conform with underlying values, then court has jurisdiction to make that incremental change to the common law. See *Hill v. Church of Scientology of Toronto*, EYB 1995-68609, 1995 CarswellOnt 396, 1995 CarswellOnt 534, [1995] S.C.J. No. 64, 25 C.C.L.T. (2d) 89, 184 N.R. 1, *(*sub nom. *Manning v. Hill)* 126 D.L.R. (4th) 129, 24 O.R. (3d) 865 (note), 84 O.A.C. 1, [1995] 2 S.C.R. 1130, *(*sub nom. *Hill v. Church of Scientology)* 30 C.R.R. (2d) 189, 1995 SCC 67 (S.C.C.).

Very different where two private parties are involved in a civil suit. See also the comments of Mr. Justice Iacobucci in *R. v. Salituro*, EYB 1991-67635, 1991 CarswellOnt 124, 1991 CarswellOnt 1031, 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 50 O.A.C. 125, [1991] 3 S.C.R. 654 at 670, 131 N.R. 161, 68 C.C.C. (3d) 289 (S.C.C.):

> . . . Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Walkins* [*v. Olafson*, 1989 CanLII 36 (S.C.C.), [1989] 2 S.C.R. 750], in a constitutional democracy such as ours it is the legislature, not the courts which has the major responsibility for law reform. Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

Application to strike out claim dismissed.

Fitzpatrick v. Durham Regional Police Services Board, 2005 CarswellOnt 2155, [2005] O.J. No. 2161, 76 O.R. (3d) 290 (Ont. S.C.J.).

No cause of action for negligent prosecution. Pleadings containing only bald assertions of malice. Malice not to be inferred from fact Crown continued prosecution following recantation by complainant. Damages for Charter breach depending on finding of malicious prosecution. Application granted, statement of claim struck.

Motion under rule 21.01(1) to strike claim.

Rule 25.06(8) provides that where malice is alleged, the pleadings shall contain full particulars.

Legal framework in motion to strike pleadings for failure to disclose reasonable cause of action summarized by Epstein J. in *Aristrocrat Restaurants Ltd. (c.o.b. Tony's East) v. Ontario*, 2003 CarswellOnt 5574, [2003] O.J. No. 5331 (Ont. S.C.J.).

Allegations in the nature of assumptions and speculations not to be taken as true (*Holland v. Ontario (Ministry of the Attorney General)*, 2000 CarswellOnt 542, [2000] O.J. No. 566 (Ont. S.C.J.)).

No cause of action in law exists for negligent prosecution. Even "gross negligence" not sufficient to ground malicious prosecution claim against a Crown Attorney. See *Proulx c. Québec (Procureur général)*, REJB 2001-26159, 2001 CarswellQue 2187, 2001 CarswellQue 2188, [2001] S.C.J. No. 65, 2001 SCC 66, 46 C.R. (5th) 1, 7 C.C.L.T. (3d) 157, *(*sub nom. *Proulx v. Quebec (Attorney General))* 206 D.L.R. (4th) 1, *(*sub nom. *Proulx v. Quebec (Attorney General))* 159 C.C.C. (3d) 225, *(*sub nom. *Proulx v. Québec (Procureur général))* 276 N.R. 201, *(*sub nom. *Proulx v. Quebec (Attorney General))* [2001] 3 S.C.R. 9 (S.C.C.). See also *Nelles v. Ontario*, EYB 1989-67463, 1989 CarswellOnt 963, 1989 CarswellOnt 415, [1989] S.C.J. No. 86, 69 O.R. (2d) 448 (note), [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1 (S.C.C.), where Lamer J., as he then was, reviewed law as to what is required for plaintiff to succeed in action for malicious prosecution.

Spillane v. United Parcel Service Canada Ltd., 2006 CarswellBC 1150, 2006 BCSC 687 (B.C. S.C. [In Chambers]).

Defendants applied to have plaintiff's action dismissed as against all defendants, alternatively defendants sought dismissal of action as against the personal defendants.

The test for striking a claim is whether, assuming that the facts set out in the statement of claim can be proved, it is plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action; see *Hunt v. T & N plc*, 1990 CarswellBC 759, 1990 CarswellBC 216, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) at 979. The test in *Hunt* must be applied after the claims have been carefully considered and analyzed in the context of the applicable law. Where the pleadings disclose a "triable issue," either as they are, or as they may be amended, they should not be struck out: see *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, 1999 CarswellBC 2111, [1999] B.C.J. No. 2160, 36 C.P.C. (4th) 266 (B.C. S.C. [In Chambers]) at para. 34; *Minnes v. Minnes*, 1962 CarswellBC 78, 39 W.W.R. 112, 34 D.L.R. (2d) 497 (B.C. C.A.). Certain passages of writ and statement of claim struck.

Kaukinen v. Sonntag, 2006 CarswellSask 281, 2006 SKQB 199 (Sask. Q.B.).

Defendants apply for an order striking plaintiff's claims against them as disclosing no reasonable cause of action. Test set out in *Sagon v. Royal Bank*, 1992 CarswellSask 439, [1992] S.J. No. 197, 105 Sask. R. 133, 32 W.A.C. 133 (Sask. C.A.) at 139. The defendants should not be in a position of having to guess as to what the cause or causes of action are. "Pleading" means stating material facts which are the constituent elements of the cause of action. Rather than strike statement of claim, Court prepared to grant a period of time within which to file proper pleadings.

Wolker v. Ogilvie Realty Ltd., 2006 CarswellOnt 512, 23 C.P.C. (6th) 154 (Ont. S.C.J.).

Plaintiff brought motion pursuant to R. 25.11 of *Rules of Civil Procedure* to strike out reference to store as being scandalous, inserted for colour and to embarrass plaintiff. Motion granted. Actual identification of store had no probative value and not relevant to issues. Location of slip and fall could be readily established without reference to name of store.

Young v. Borzoni, 2007 CarswellBC 119, [2007] B.C.J. No. 105, 2007 BCCA 16, 388 W.A.C. 220, 277 D.L.R. (4th) 685, 235 B.C.A.C. 220, 64 B.C.L.R. (4th) 157 (B.C. C.A.).

Plaintiffs losing protracted litigation against housing corporation. Bringing action against barrister and solicitor who represented housing corporation. Defendant moved to dismiss action. Action unnecessary, scandalous, frivolous, vexatious, and abuse of process. Action dismissed. There was no relationship of proximity.

Englund v. Pfizer Canada Inc., 2007 CarswellSask 288, 2007 SKCA 62, [2007] 9 W.W.R. 434, 43 C.P.C. (6th) 296, 408 W.A.C. 298, 299 Sask. R. 298, 284 D.L.R. (4th) 94, [2007] S.J. No. 273 (Sask. C.A.).

Well established that commencement of more than one action in the same jurisdiction against defendant in relation to same matter is an abuse of process. The same concerns may apply where multiple actions have been commenced in two or more jurisdictions. Although the status of a Saskatchewan proceeding which has an extra-jurisdictional counterpart is normally resolved through the application of the *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1, the doctrine of abuse of process may still be engaged in appropriate circumstances. Both actions sought the certification of a national class and sought certification in respect of the same individuals. The respondents might have avoided the problem if the Ontario action had been brought by different proposed representative plaintiffs. Appeal allowed.

Reynolds v. Smith, [2007] O.J. No. 2161, 2007 CarswellOnt 3133, *(*sub nom. *Reynolds v. Kingston Police Services Board)* 225 O.A.C. 112, *(*sub nom. *Reynolds v. Kingston (Police Services Board))* 86 O.R. (3d) 43, 2007 ONCA 375, 47 C.C.L.T. (3d) 200 (Ont. C.A.); additional reasons to 2007 CarswellOnt 1424, *(*sub nom. *Reynolds v. Kingston Police Services Board)* 221 O.A.C. 216, 2007 ONCA 166, 45 C.C.L.T. (3d) 19, *(*sub nom. *Reynolds v. Kingston (City) Police Services Board)* 84 O.R. (3d) 738, *(*sub nom. *Reynolds v. Kingston (City) Police Services Board)* 280 D.L.R. (4th) 311, [2007] O.J. No. 2161 (Ont. C.A.).

Pathologist moved under rule 21.02(1)(b) of the *Rules of Civil Procedure* to strike mother's statement of claim for failure to disclose a reasonable cause of action. Ontario Court of Appeal restored Masters' decisions allowing the mother's motion and dismissing the pathologist's. It was not plain and obvious that the mother's claims would fail. Issue for trial respecting ambit of both the witness immunity rule and the "constantly evolving" tort of misfeasance in public office. Claims should be allowed to proceed to trial for resolution on basis of a complete factual record.

Marcoccia v. Marcoccia, 2008 CarswellOnt 7783, 60 R.F.L. (6th) 1, 2008 ONCA 866 (Ont. C.A.).

Appeal by husband from order striking answer to wife's support and equalization claim allowed. Husband's failure to fully disclose information about the sale of his business was not so egregious as to warrant striking the pleadings. He acted under an understandable, although erroneous assumption that the wife had received the required disclosure. Wife would not have had sufficient information to stop the sale in any event. A remedy striking a pleading is a serious one and should only be used in unusual cases. Husband was ordered to pay costs because he could have been more forthcoming with information.

Johnston v. Charlottetown Area Development Corp., 2005 CarswellPEI 76, 20 C.P.C. (6th) 30, 2005 PESCTD 40 (P.E.I. T.D.).

Motions by the defendants in two separate but related actions to strike out the statements of claim of plaintiff for 1) failure to disclose a reasonable cause of action, and 2) because the statement of claim is frivolous, vexatious and an abuse of the process of the court, and 3) plaintiff failed to conform with *Prince Edward Island Rules of Civil Procedure* respecting pleadings.

See *Patterson & Hidson v. Livingstone et al.*, [1930] S.C.J. No. 75, at paragraph two, whether ". . . enough can be collected from the statement of claim to make it impossible to affirm, at this stage of the proceedings, that there are no facts alleged which entitle the plaintiffs to call upon the defendants for their defence . . ."

See also *Hunt v. T & N plc*, 1990 CarswellBC 216, 1990 CarswellBC 759, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93, EYB 1990-67014, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.C.L.T. (2d) 1 (S.C.C.), at para. 30, [Wilson J.], for the court, confirmed the "plain and obvious" test described by Estey J. in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, 1980 CarswellNat 633, 1980 CarswellNat 633F, [1980] 2 F.C.R. 735, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304 (S.C.C.), at page 740 [S.C.R.].

Vicarious liability not specified in pleadings, but should be.

Where plaintiff claims *Charter* violation but does not specify both the section(s) of the *Charter* and particulars of how section(s) was/were violated, that part of claim should be struck as disclosing no cause of action. Nothing in claim suggest[s] plaintiff not in possession of any of the material facts necessary to found a claim within the limitation period . . .". See *Central & Eastern Trust Co. v. Rafuse*, 1986 CarswellNS 40, 1986 CarswellNS 135, EYB 1986-67369, [1986] S.C.J. No. 52, 37 C.C.L.T. 117, *(*sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 42 R.P.R. 161, 34 B.L.R. 187, *(*sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only), *(*sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, *(*sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, *(*sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, *(*sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109 at para. 77 (S.C.C.).

Not plain and obvious statements of claim do not disclose a reasonable cause of action. Plaintiff to amend both statements of claim.

Hubbard v. Acheson (2009), 458 W.A.C. 215, 271 B.C.A.C. 215, 2009 BCCA 251, 2009 CarswellBC 1439, 93 B.C.L.R. (4th) 315 (B.C. C.A.).

Appeal from order of Supreme Court of British Columbia granting the petitioner Hubbard's application for judicial review of proceedings in the Provincial Court of British Columbia, and remitting it back to the Provincial Court for a rehearing.

Court to assess decision of Provincial Court Judge in light of correct standard of review. See *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 5 W.W.R. 1, *(*sub nom. *Dr. Q., Re)* 295 W.A.C. 170, *(*sub nom. *Dr. Q., Re)* 179 B.C.A.C. 170, *(*sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia)* [2003] 1 S.C.R. 226, *(*sub nom. *Dr. Q., Re)* 302 N.R. 34, 48 Admin. L.R. (3d) 1, 223 D.L.R. (4th) 599, REJB 2003-39403, 11 B.C.L.R. (4th) 1, 2003 CarswellBC 743, 2003 CarswellBC 713, 2003 SCC 19, [2003] S.C.J. No. 18 at para. 43 (S.C.C.) and *Housen v. Nikolaisen*, REJB 2002-29758, [2002] S.C.J. No. 31, [2002] 2 S.C.R. 235, 272 W.A.C. 1, 219 Sask. R. 1, 30 M.P.L.R. (3d) 1, 2002 SCC 33, 2002 CarswellSask 179, 2002 CarswellSask 178, [2002] 7 W.W.R. 1, 286 N.R. 1, 211 D.L.R. (4th) 577, 10 C.C.L.T. (3d) 157 (S.C.C.); *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, *(*sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65, 64 C.C.E.L. (3d) 1, 2008 CarswellNB 125, 2008 CarswellNB 124, *(*sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, *(*sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, 329 N.B.R. (2d) 1, [2008] A.C.S. No. 9, [2008] S.C.J. No. 9, D.T.E. 2008T-223, *(*sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, 844 A.P.R. 1, *(*sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1 (S.C.C.) and *Delmas v. Vancouver Stock Exchange* (1995), [1995] B.C.J. No. 2449, 1995 CarswellBC 1011, 108 W.A.C. 200, 66 B.C.A.C. 200, 34 Admin. L.R. (2d) 313, 130

D.L.R. (4th) 461, [1996] 4 W.W.R. 293, 42 C.P.C. (3d) 167, 15 B.C.L.R. (3d) 136, 9 C.C.L.S. 1 (B.C. C.A.).

Hubbard applied in provincial Court to set aside default judgment. Provincial Court Judge palmer dismissed the application to set aside the default judgment. Respondent had failed to establish that she had not wilfully or deliberately failed to enter her appearance or reply, and respondent had failed to establish that she had a meritorious defence to appellants' claim.

Supreme Court judge did not err in holding that it was unreasonable for the Provincial Court judge to rule that there was no defence worthy of investigation.

Appeal dismissed. Case remitted to Provincial Court for a rehearing on the application to set aside the default judgment.

Loojune v. Bailey (2009), 2009 CarswellOnt 6254 (Ont. S.C.J.).

Appeal by plaintiff allowed from an order of motions judge striking his claim as disclosing no reasonable cause of action and dismissing claim. Motions judge erred in applying the test for the summary judgment motion rather than the motion to strike and made findings of credibility of the plaintiff which should have been left to trial judge. Not plain and obvious that plaintiff's claim raised no reasonable cause of action.

Vollant c. R., *(*sub nom. *Vollant v. Canada)* 393 N.R. 183, 2009 CarswellNat 1900, 2009 CAF 185, 2009 CarswellNat 1622, 2009 FCA 185 (F.C.A.); reversing 2008 CarswellNat 1799, 2008 CarswellNat 2675, 2008 CF 729, 2008 FC 729 (F.C.).

Motion judge struck out amended claim in its entirety without leave to amend. Plaintiffs appealed. Appeal allowed. Federal Court had jurisdiction to hear claims for declarations made against federal Crown. Court had no jurisdiction to make declarations against provincial Crown. Decisions of motion judge set aside. Motion to strike dismissed and stay of proceedings ordered.

McLellan v. Martin, 2009 ONCA 657, 2009 CarswellOnt 5437 (Ont. C.A.); leave to appeal refused (2010), 2010 CarswellOnt 430, 2010 CarswellOnt 429, [2009] S.C.C.A. No. 443, 270 O.A.C. 393 (note), 404 N.R. 397 (note) (S.C.C.).

Motion judge did not err by dismissing the action as being frivolous, vexatious and abuse of process. Second action brought by appellants against respondent, their former employee, for statements she made as to alleged irregularities in the appellants' affairs. First action settled and the appellants provided the respondent with a broadly worded release. Action brought for an improper purpose, namely, "to harass her and suborn her testimony in the oppression proceeding."

Toronto District School Board v. Molson Breweries Properties Ltd. (2009), 2009 CarswellOnt 3661 (Ont. S.C.J.).

West Harbour refused to pay costs on a substantial indemnity basis to the School Boards and Molson. Court inclined to make punitive award because substantial costs may be awarded where a party has behaved in an abusive manner bringing proceedings devoid of merit and running up the costs of the litigations: *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221 (S.C.J.). Motions to strike under rule 21 went beyond proper resort to that rule because it was plain and obvious that it was not plain and obvious that the School Boards' claims and Molson's crossclaims were bound to fail and West Harbour's motions were singularly unproductive in advancing the litigation. Order made pursuant to rule 20.06(1).

Elgammal v. Toronto French School, 2010 CarswellOnt 1298, 2010 ONSC 1435 (Ont. Master).

Motion to strike paragraphs of Amended Amended Statement of Claim for failure to comply with Rules 25.06 and 25.11 of the *Rules of Civil Procedure*. Impugned Paragraphs not to be struck.

See *Quizno's Canada Restaurant Corp. v. Kileel Developments Ltd.*, 241 O.A.C. 148, 92 O.R. (3d) 347, 2008 CarswellOnt 5525, 2008 ONCA 644, [2008] O.J. No. 3674 (Ont. C.A.) ("Quizno's") at para. 14; *Canadian National Railway v. Brant*, 96 O.R. (3d) 734, [2009] O.J. No. 2661, [2009] 4 C.N.L.R. 47, 2009 CarswellOnt 3720 at para. 27 (Ont. S.C.J.); additional reasons at 2009 CarswellOnt 5106 (Ont. S.C.J.) ("CNR").

If the allegations in question are relevant and material, the court should exercise this power with "considerable caution": *Quizno's*, at para. 15; *C.N.R.*, at para. 30; and *Wolker v. Ogilvie Realty Ltd.* (2006), [2006] O.J. No. 381, [2006] O.T.C. 102, 2006 CarswellOnt 512, 23 C.P.C. (6th) 154 (Ont. S.C.J.) ("Walker") at para. 10.

Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. A material fact is a fact that is necessary for a complete cause of action. Material facts include facts that establish the constituent elements of the claim or defence.

Mercier v. Summerside Police Department, 2010 CarswellPEI 1, 2010 PESC 1 (P.E.I. S.C.).

Motion by defendant to dismiss or strike out claim of plaintiff. Claim struck out, with leave to plaintiff to re-file. Claim not presented chronologically, not in any apparent sequence, rambling and unreadable. Claim full of completely irrelevant evidence and evidence which ought not to be in claim. Claim sought "unspecified (punitive) damages," but does not specify amount claimed.

Limitation period should always be considered in deciding whether to strike, or order amendments.

Van de Vrande v. Butkowsky, 2010 ONCA 230, 2010 CarswellOnt 1777, [2010] O.J. No. 1239, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 260 O.A.C. 323, 319 D.L.R. (4th) 132 (Ont. C.A.); additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.).

Pursuant to Rule 12.02 of the *Small Claims Court Rules*, O. Reg. 258/98, the appellant, Butkowsky, brought a motion for summary judgment. The trial judge granted the motion. The Divisional Court set aside the order, finding that the trial judge erred by making findings of fact on the motion.

Summary judgment not available under the *Small Claims Court Rules* but the motion judge's decision sustainable under r. 12.02.

Motion had been granted pursuant to rr. 1.03(2) and 12.02 of the *Small Claims Court Rules.*

The Divisional Court set aside the motion judge's order based on Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Failure to provide for summary judgment motions in the *Small Claims Court Rules* deliberate omission. Rule 12.02 of the *Small Claims Court Rules* is more akin to a r. 21 motion than a r. 20 motion.

Rule 12.02 applies in a different context than the *Rules of Civil Procedure*. Section 25 of the *Courts of Justice Act*, provides that the court is to "hear and determine in a summary way all questions of law and fact." The court can make "such order as is considered just and agreeable to good conscience." In addition, r. 1.03(1) of the *Small Claims Court Rules*, provides that the rules shall be "liberally construed to secure the just, most expeditions and least expensive determination of every proceeding on its merit in accordance with s. 25".

Appeal allowed. Motion judge's dismissal of claim reinstated.

Garth v. Halifax (Regional Municipality), 777 A.P.R. 108, 245 N.S.R. (2d) 108, 31 C.P.C. (6th) 124, 2006 CarswellNS 316, 2006 NSCA 89, [2006] N.S.J. No. 300, 271 D.L.R. (4th) 470 (N.S. C.A.).

Plaintiff seeking amendment to add party after expiry of limitation period. Overriding general power to allow amendment not limited by specific instances in rules.

Both rr. 5.04 and 15 are relevant. Rule 5.04(2)(b) permits the court to order any party who ought to have been joined to be added. It provides:

> 5.04 . . .
>
> (2) At any stage of a proceeding the court may, on such terms as it thinks just and either of its own motion or on application . . .
>
> (b) order an person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added as a party;

The discretion to amend must be exercised judicially in order to do justice between the parties. Generally amendments should be granted if they do not occasion prejudice which cannot be compensated in costs.

Nothing in a pleading can be scandalous if it is relevant: *Quizno's Canada Restaurant Corp. v. Kileel Developments Ltd.*, 241 O.A.C. 148, 92 O.R. (3d) 347, 2008 CarswellOnt 5525, 2008 ONCA 644, [2008] O.J. No. 3674 (Ont. C.A.) ("*Quizno's*") at para. 14. See also *Canadian National Railway v. Brant*, 96 O.R. (3d) 734, [2009] O.J. No. 2661, [2009] 4 C.N.L.R. 47, 2009 CarswellOnt 3720 (Ont. S.C.J.); additional reasons at 2009 CarswellOnt 5106 (Ont. S.C.J.) ("*CNR*") at para. 27.

The court must balance the rights of the parties on the particular facts of the case and must consider carefully the extent to which the particulars attacked are necessary to enable the party to prove its case and their probative value in establishing that case. If allegations in question are relevant and material, the court should exercise this power with "considerable caution": *Quizno's*, at para. 15; *CNR*, at para. 30; *Wolker v. Ogilvie Realty Ltd.*, [2006] O.J. No. 381, [2006] O.T.C. 102, 2006 CarswellOnt 512, 23 C.P.C. (6th) 154 (Ont. S.C.J.); "*Wolker*" at para. 10.

Every pleading shall contain concise statement of material facts on which party relies for the claim or defence, but not the evidence by which those facts are to be proved (see r. 25.06(1) and see *Cavanaugh v. Grenville Christian College*, [2009] O.J. No. 875, 2009 CarswellOnt 1127 (Ont. S.C.J.); reversed 2009 CarswellOnt 6606, 2009 ONCA 753, [2009] O.J. No. 4502 (Ont. C.A.) ("*Cavanaugh*"), at para. 21).

Coote v. Ontario (Human Rights Commission), [2009] O.J. No. 4264, 2009 CarswellOnt 6165 (Ont. S.C.J.), Daley J; additional reasons at 2009 CarswellOnt 9410 (Ont. S.C.J.); leave to appeal refused 2010 ONCA 460, 2010 CarswellOnt 4324 (Ont. C.A.).

Two statements of claim were struck entirely. Causes of action asserted unsustainable at law, inconsistent with notion of justice to grant leave to amend, as no amount of improved drafting would cure deficiencies. All actions were dismissed against Commission. It was plain and obvious and beyond doubt that employee could not succeed.

Veerella v. Khan, 2009 CarswellOnt 5658 (Ont. Div. Ct.); additional reasons at 2009 CarswellOnt 5980 (Ont. Div. Ct.), Jennings J.; affirming 2009 CarswellOnt 8624 (Ont. Master).

The plaintiff brought motion to amend statement of claim by substituting V Inc. as the plaintiff in place of himself. Motion was dismissed. The Master found that motion was to replace one party with another and did not involve misnomer. Appeal dismissed. The plaintiff put no evidence before Master regarding his intentions in bringing claim in his name. The choice of plaintiff was a conscious decision, not error.

Rose v. British Columbia, 2009 CarswellBC 2157, 2009 BCSC 1116 (B.C. S.C.).

Facts pleaded were unlikely to be proven. Applications granted; actions dismissed. All main allegations in actions were substantially same and about same subject matter as those made

in previous action. Finding in previous action that no reasonable claim was disclosed applied as estoppel in these two subsequent actions with respect to common defendants. No cause of action was disclosed against other defendants.

Jaffer v. York University, 268 O.A.C. 338, [2010] O.J. No. 4252, 326 D.L.R. (4th) 148, 2010 CarswellOnt 7531, 2010 ONCA 654 (Ont. C.A.); leave to appeal refused 2011 CarswellOnt 1270, 2011 CarswellOnt 1269, 418 N.R. 395 (note), 284 O.A.C. 399 (note), [2010] S.C.C.A. No. 402 (S.C.C.).

The motion judge concluded there was no jurisdiction to hear action, both because the complaint was academic in nature and because it belonged before the OHRC. A r. 21 motion must be based upon the facts alleged in the Statement of Claim unless they are patently ridiculous or incapable of proof: see *e.g.*, *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.*, 2008 ONCA 196, 2008 CarswellOnt 1427, *(*sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.)* 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, *(*sub nom. *Slater Steel Inc. (Re))* 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.), at para. 22; additional reasons at 2008 ONCA 347, 2008 CarswellOnt 2471, 66 C.C.P.B. 315, 65 C.C.L.I. (4th) 171 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 5185, 2008 CarswellOnt 5186, [2008] S.C.C.A. No. 230, *(*sub nom. *Morneau Sobeco Limited Partnership v. AON Consulting Inc.)* 257 O.A.C. 396 (note), 390 N.R. 387 (note) (S.C.C.) . A pleading should only be struck under r. 21 where it is "plain and obvious" that the claim has no chance of success: *Freeman-Maloy v. York University*, 267 D.L.R. (4th) 37, [2006] O.J. No. 1228, 79 O.R. (3d) 401, 208 O.A.C. 307, 2006 CarswellOnt 1888 (Ont. C.A.), at para. 18; leave to appeal refused [2006] 2 S.C.R. ix (note), [2006] S.C.C.A. No. 201, 227 O.A.C. 396 (note), 359 N.R. 391 (note), 267 D.L.R. (4th) ix (note), 2006 CarswellOnt 5559, 2006 CarswellOnt 5558 (S.C.C.), citing *Hunt v. T & N plc*, 1990 CarswellBC 216, 1990 CarswellBC 759, EYB 1990-67014, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93, [1990] 2 S.C.R. 959, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, 4 C.C.L.T. (2d) 1 (S.C.C.). Appeal allowed in part. Pleadings struck but Jaffer permitted to amend Statement of Claim in accordance with reasons.

Boldt v. Law Society of Upper Canada, 2010 ONSC 3568, 2010 CarswellOnt 4353 (Ont. S.C.J.).

On both a motion to dismiss or stay an action for want of jurisdiction and a motion to strike out an action as an abuse of the process of the court, the facts pleaded in the statement of claim are presumed to be true and provable. The court will strike out an action as an abuse of process *only* when it is plain and obvious or beyond doubt that the action must fail. This is a stringent test and is applicable even in respect of novel claims.

See *Odhavji Estate v. Woodhouse* (2003), 180 O.A.C. 201, 312 N.R. 305, 2003 CarswellOnt 4852, 2003 CarswellOnt 4851, 2003 SCC 69, 70 O.R. (3d) 253 (note), [2003] 3 S.C.R. 263, 11 Admin. L.R. (4th) 45, 233 D.L.R. (4th) 193, [2004] R.R.A. 1, [2003] S.C.J. No. 74, 19 C.C.L.T. (3d) 163 (S.C.C.), Iacobucci J. (at para. 15):

> . . . The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

Motion to dismiss or stay for want of jurisdiction.

The Supreme Court of Canada, in *Bella v. Young*, [2006] R.R.A. 1, [2006] 1 S.C.R. 108, 37 C.C.L.T. (3d) 161, 764 A.P.R. 26, 254 Nfld. & P.E.I.R. 26, 261 D.L.R. (4th) 516, 21 C.P.C.

(6th) 1, 2006 CarswellNfld 20, 2006 CarswellNfld 19, 2006 SCC 3, 343 N.R. 360, [2006] S.C.J. No. 2 (S.C.C.), wrote (at para. 31):

> . . . The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound in both contract and tort: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

Based upon the evidence before her, Hennessy J. made the following finding:

> I, therefore, find that Maureen Boldt carried on the unauthorized practice of law in direct contravention to the clear and plain terms of the injunction. *It is regrettable that she thought she could ignore the injunction simply by changing the title on her document. This is a flagrant breach of the order of Bolan J.* [Emphasis added.]

Hennessy J.'s order was appealed by Boldt to the Court of Appeal which dismissed her appeal on February 16, 2007.

The Court of Appeal rejected Boldt's application, and delivered the following endorsement:

> The appellant seeks to introduce fresh evidence with a view to having her appeal, determined against her on February 16, 2007, re-opened for another hearing. The proposed fresh evidence relates to an affidavit from Mr. Sangster and the testimony of Ms. Labbé in a subsequent small claims proceeding, which, the appellant contends, conflicts with her testimony before the trial judge in this matter.

We disagree.

Boldt issued a claim for damages for malicious prosecution, and other alleged wrongs arising from the same facts, against most of the defendants in this action in September 2008, in Court File CV-08-362049. All defendants in that suit moved to strike the claim.

The Court of Appeal stated in *Canam Enterprises v. Coles*:

> The principle of *res judicata* applies where a judgment rendered by a court of competent jurisdiction provides a conclusive disposition of the merits of the case and acts as an absolute bar to any subsequent proceedings involving the same claim, demand or cause of action. Issue estoppel is one aspect of *res judicata*. The oft-cited requirements of issue estoppels are attributed to Lord Guest in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 at 935 (U.K. H.L.): (1) That the same question has been previously decided; (2) that the judicial decision which is said to create the estoppels was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Canam Enterprise Inc. v. Coles (2000), 51 O.R. (3d) 481 (C.A.); reversed on other grounds (2002), 220 D.L.R. (4th) 466, [2002] S.C.C. 63, at para. 19.

As between Boldt and the Law Society, all elements of *res judicata* were satisfied.

The Law Society is not liable for the erroneous exercise of its discretion so long as it acted *bona fide* and without malice: see *Calvert v. Law Society of Upper Canada*, 1981 CarswellOnt 782, 121 D.L.R. (3d) 169, 32 O.R. (2d) 176 (Ont. H.C.) per Steele J., at paras. 20 and 21.

The jurisprudence clearly establishes a judicial immunity from negligence for the Law Society's discipline process, including the investigative function at the front end. The Law Society's disciplinary powers must respond to its statutory mandate and the requirements of due process, not to a private law duty of care: see *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, 2001 CarswellOnt 3962, 2001 CarswellOnt 3963, REJB 2001-26863, [2001] S.C.J. No. 77, [2001] 3 S.C.R. 562, *(*sub nom. *Edwards v. Law Society of Upper Canada (No. 2))* 56 O.R. (3d) 456 (headnote only), 34 Admin. L.R. (3d) 38, 8 C.C.L.T. (3d) 153, 13 C.P.C. (5th) 35, 206 D.L.R. (4th) 211, 277 N.R. 145, 153 O.A.C. 388 (S.C.C.); (2000).

It is not actionable for the Law Society to require a good character hearing in the context of Boldt's application to become a licensed paralegal. Equally, it is not actionable for the Law

Society to act in the public interest by restraining untrained, uninsured and unlicensed persons such as Boldt from practising law.

In *Brignolio v. Desmarais, Keenan* (1995), 1995 CarswellOnt 4761, [1995] O.J. No. 3499 (Ont. Gen. Div.), at paras. 7, 8, 15 to 17; affirmed (1996), 1996 CarswellOnt 5875, [1996] O.J. No. 4812 (Ont. C.A.); leave to appeal refused (1996), [1996] S.C.C.A. No. 326 (S.C.C.), Lane J., in a decision affirmed on appeal, held that an action in negligence against the solicitor for one's adversary in litigation is not tenable under the law of Ontario, because there is no duty of care, and because such an action is contrary to public policy. Further, Lane J. held that a party to litigation cannot bring an action against the adverse party's solicitor based upon alleged breaches of ethical duties since such duties are owed to the court and, in Ontario, to the Law Society, but not to the opposite party in the litigation.

Tiwana v. Sandhu, 2010 ONCA 592, 2010 CarswellOnt 6822, [2010] O.J. No. 3862 (Ont. C.A.).

Husband was ordered on three different occasions before three different judges to make financial disclosure. Motion judge gave husband one last chance but he failed again to do so. Motion to strike pleadings was heard *ex parte* and was successful. Court of Appeal stated that the decision to strike pleadings and determine the parameters of trial participation was discretionary that deserved deference on appeal when exercised on proper principles. Ordinarily, striking any pleadings on *ex parte* basis where that party purports to have made required disclosure was practice that Court of Appeal could not endorse, preferring that striking order be on notice to affected party so that he or she could explain or assert compliance with prior disclosure order. Compare with *Stephens v. Stephens*, 2010 ONCA 586, [2010] O.J. No. 3765, 2010 CarswellOnt 6690, 89 R.F.L. (6th) 260, 324 D.L.R. (4th) 169 (Ont. C.A.).

O'Brien v. Ottawa Hospital, 2011 CarswellOnt 88, 2011 ONSC 231, [2011] O.J. No. 66 (Ont. Div. Ct.).

Appeals from decision dismissing action against Respondents pursuant to r. 20.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, on basis of no genuine issue for trial.

The court held, in *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, [2010] O.J. No. 1239, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 260 O.A.C. 323, 319 D.L.R. (4th) 132 (Ont. C.A.); additional reasons at 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.), that the procedure of a motion for summary judgment is *not* available under the *Rules of the Small Claims Court*. In that case, the motion had actually been brought under r. 1.03(2) and 12.02 of the *Rules of the Small Claims Court*.

MacNeil v. Humber River Regional Hospital, 2011 ONSC 2094, 2011 CarswellOnt 4011 (Ont. Master), Master Thomas R. Hawkins; reversed in part 2011 ONSC 6691, 2011 CarswellOnt 12141 (Ont. S.C.J.).

Case contained general principles relating to amending an application.

Abrahim v. Sliwin, 2011 ONCA 754, 2011 CarswellOnt 13237, [2011] O.J. No. 5324 (Ont. C.A.); affirming 2011 ONSC 1905, 2011 CarswellOnt 2039, [2011] O.J. No. 1370 (Ont. S.C.J.).

The affected party failed to appear through accident or inadequate notice. The defendant in this civil claim chose the litigation strategy of wearing the plaintiff down with delaying and stonewalling. When the defendant's lawyer failed to appear on the day of the initial motion, the judge struck out the defendant's statement of defence. The rules of the court would allow a re-instatement of pleadings if the affected party could show that the lawyer's failure to appear on the critical day was due to "mistake or accident." Misguided litigation strategy did not qualify as a "mistake or accident." The motion for re-instatement was dismissed.

A. (D.K.) v. H. (T.), 2011 YKCA 5, 2011 CarswellYukon 74, 309 B.C.A.C. 277, 523 W.A.C. 277 (Y.T. C.A.); affirming 2010 YKSC 63, 2010 CarswellYukon 172 (Y.T. S.C.).

Pleadings. Statement of claim. Striking out for absence of reasonable cause of action. Cause not known in law. Although the application of this tort to the case at the bar was novel, the court should not strike out a statement of claim simply based on novelty alone. However, the employee did not plead sufficient facts to support this allegation; there were no facts relating to economic harm. Wilful incitement of hatred is not a recognized tort in Canada. Regarding defamation, the employee only appeared to take issue with the alleged comment that he was physically black.

Alessandro v. Smith, 2013 ONSC 6471, 2013 CarswellOnt 15039 (Ont. Div. Ct.).

The defendants brought a motion to strike out the claim pursuant to Rule 12.02(1) of the Rules of the Small Claims Court. Communications which take place during, incidental to or in furtherance of judicial proceedings are absolutely privileged. (See *Fraleigh v. RBC Dominion Securities Inc.*, 2009 CarswellOnt 9155, 99 O.R. (3d) 290, [2009] O.J. No. 5120 (Ont. S.C.J. [Commercial List]). This privilege extends to all of the causes of action pleaded by the plaintiff. (See *Web Offset Publications Ltd. v. Vickery*, 1998 CarswellOnt 5379, 40 O.R. (3d) 526, 34 C.P.C. (4th) 343, [1998] O.J. No. 6478 (Ont. Gen. Div.); affirmed 1999 CarswellOnt 2270, 43 O.R. (3d) 802, 123 O.A.C. 235, [1999] O.J. No. 2760 (Ont. C.A.); leave to appeal refused 2000 CarswellOnt 1808, 2000 CarswellOnt 1809, 43 O.R. (3d) 802 (note), 256 N.R. 200 (note), 136 O.A.C. 199 (note), [1999] S.C.C.A. No. 460 (S.C.C.).) This was a sufficient basis to dismiss the claim. Appeal dismissed.

Camm v. Kirkpatrick (July 12, 2013), Doc. No. 13-SC-125385 (Ont. Sm. Cl. Ct.).

The defendant moved for a dismissal of the plaintiff's claim on the basis that the limitation period had expired before the claim was commenced. An application of Rule 12 of the *Small Claims Court Rules* regarding possible dismissal of claim by motion. Applicable test for dismissal under Rule 12.02(1) is: no meaningful chance of success at trial": *O'Brien v. Ottawa Hospital*, 2011 ONSC 231, 2011 CarswellOnt 88, [2011] O.J. No. 66 (Ont. Div. Ct.). In *Metcalfe v. Khanna*, 2012 CarswellOnt 4737, [2012] O.J. No. 34 (Ont. Sm. Cl. Ct.), Deputy Judge Winny dismissed the claim under Rule 12.02 on the basis of the Act where it was "inescapable" on what date the cause of action became known to the plaintiff. Similarly, in *1528590 Ontario Ltd. v. Ferrera Concrete Ltd.*, 2011 CarswellOnt 15745, [2011] O.J. No. 4845 (Ont. Sm. Cl. Ct.), a claim was dismissed by Deputy Judge Koprowski under Rule 12.02 on the basis of the Act where the date on which the limitation began to run was readily determinable on the basis of material filed. The defendant's motion was granted, and the claim was dismissed.

See also *Hryniak v. Mauldin*, 2014 CSC 7, 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641, *(*sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, *(*sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, *(*sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7 (S.C.C.). Summary judgment may not be granted where a genuine issue for trial exists; summary judgment is OK where: (1) the judge can make the necessary findings of fact; (2) the judge can apply the law to the facts; and (3) the judgement is a proportionate, more expeditious, and less expensive means to achieve a just result. Based only on the record, the judge can ask if the need for a trial can be avoided by the new powers provided under Rules 20.04(2.1) and (2.2). See *Combined Air Mechanical Services Inc. v. Flesch* (2014), 2014 CSC 8, 2014 SCC 8, 2014 CarswellOnt 642, 2014 CarswellOnt 643, *(*sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* [2014] 1 S.C.R. 126, 128 O.R. (3d) 799 (note), 21 B.L.R. (5th) 311, 12 C.C.E.L. (4th) 63, 27 C.L.R. (4th) 65, 47 C.P.C. (7th) 1, *(*sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 366 D.L.R. (4th) 671, 37 R.P.R. (5th) 63,

*(*sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 453 N.R. 101, *(*sub nom. *Bruno Appliance and Furniture Inc. v. Hryniak)* 314 O.A.C. 49, [2014] S.C.J. No. 8 (S.C.C.) and *Hryniak v. Mauldin*, 2014 CSC 7, 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641, *(*sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, *(*sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, *(*sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7 (S.C.C.).

Local Service District of Bay St. George South v. Harris, 2014 NLPC 1412, 2014 CarswellNfld 321, *(*sub nom. *Bay St. George South (Local Service District) v. Harris)* 356 Nfld. & P.E.I.R. 354, *(*sub nom. *Bay St. George South (Local Service District) v. Harris)* 1108 A.P.R. 354 (N.L. Prov. Ct.).

An application to set aside the default judgment was granted where the applicant claimed not to know that he could be served by mail and that he must have thrown away the statement of claim. Additional costs of $150 were assessed to offset the Plaintiff's expenses in responding to the application. There are no prescribed criteria by which a court may determine the adequacy of a defendant's explanation for not having a reply.

Can v. Calgary Police Service (2014), 2014 ABCA 322, 2014 CarswellAlta 1836, *(*sub nom. *Can v. Calgary Chief of Police)* 584 A.R. 147, 3 Alta. L.R. (6th) 49, 315 C.C.C. (3d) 337, [2015] 2 W.W.R. 695, *(*sub nom. *Can v. Calgary Chief of Police)* 623 W.A.C. 147, [2014] A.J. No. 1112 (Alta. C.A.)

Appeal dismissed. Master and Queen's Bench judge concluded that there were no genuine issues for trial. Summary judgment warranted. To succeed on a fact-finding point, the appellant must demonstrate that the contested fact finding represents a palpable and overriding error. See *Hryniak v. Mauldin*, 2014 CSC 7, 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641, *(*sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, *(*sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, *(*sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7 (S.C.C.) at p. 116 [S.C.R.] and; *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.) at p. 262 [S.C.R.].

The high costs and extensive delays associated with civil trials and barriers to justice represent to ordinary Canadians caused the Supreme Court of Canada, reflected in *Hryniak v. Mauldin*, 2014 CSC 7, 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641, *(*sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, *(*sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, *(*sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7 (S.C.C.) at p. 93 [S.C.R.], to declare that "summary judgment rules must be interpreted broadly, favoring proportionality and fair access to the affordable, timely and just adjudication of claims". A summary trial is not part of Ontario's expedited dispute resolution procedures. *Hryniak v. Mauldin*, 2014 CSC 7, 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641, *(*sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, *(*sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, *(*sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7 (S.C.C.) at p. 103 [S.C.R.] (Ontario rejected the Civil Justice Reform Project report's recommendation to adopt a summary trial procedure and "the legislature made the choice to maintain summary judgment as the accessible procedure").

There have been a number of successful applications for summary judgment by police officers in Canada who have been sued for false arrest. *E.g.*, *Moak v. Haggerty*, 2008 CarswellOnt 7, [2008] O.J. No. 8 (Ont. S.C.J.); additional reasons 2008 CarswellOnt 770 (Ont. S.C.J.); *Wong v. Toronto Police Services Board*, 2009 CarswellOnt 7412, [2009] O.J. No. 5067 (Ont. S.C.J.); *Lawrence v. Peel Regional Police Force*, 2009 CarswellOnt 2161, [2009] O.J. No. 1684 (Ont. S.C.J.); additional reasons 2009 CarswellOnt 3077 (Ont. S.C.J.); affirmed 2010 ONSC 6317, 2010 CarswellOnt 8941 (Ont. Div. Ct.).

Korb v. McCeachran, 2014 CarswellOnt 7060 (Ont. S.C.J.).

Motion to strike plaintiff's amended statement of claim on basis that it discloses no reasonable cause of action and that it is statute-barred. Motion brought under Rule 12.02. See *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.) at para. 19; ; additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.). The specific rule that applies to this motion is Rule 12.02(1)(a). Test under the "no reasonable cause of action" rule in the Small Claims Court same as in Rule 21.01(1)(b). It must be plain and obvious that it discloses no reasonable cause of action. See *Hunt v. T & N plc*, 1990 CarswellBC 216, 1990 CarswellBC 759, EYB 1990-67014, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 4 C.O.H.S.C. 173, 117 N.R. 321, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93 (S.C.C.) at paras. 18, 27, 33. Following *Hunt* test whether it is plain and obvious or *beyond reasonable doubt* that statement of claim discloses no reasonable cause of action. See *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*, 1991 CarswellOnt 735, 5 O.R. (3d) 778, 57 O.A.C. 81, [1991] O.J. No. 1962 (Ont. C.A.) at para. 5.

The court is not to take an overly technical approach to pleading. See *728654 Ontario Inc. v. Ontario*, 2005 CarswellOnt 4889, 202 O.A.C. 4, [2005] O.J. No. 4227 (Ont. C.A.) at paras. 2-3. Rule 12.02 not supporting motion under Rule 12.02(1)(c) namely that the action "is inflammatory, a waste of time, a nuisance or an abuse of the court's process." Motion dismissed with costs.

Peciukaitis v. Forest Harbour Ratepayers Inc., 2014 ONCA 200, 2014 CarswellOnt 3090 (Ont. C.A.).

Parties involved in dispute concerning property line of Applicant's land. In late 2005 or early 2006, parties reached a settlement and exchanged mutual releases. Soon after, Applicant informed Respondent she would not follow the settlement. She attempted to reopen claim by filing motion to rescind the settlement but was unsuccessful. In 2012, the Applicant filed Motion in Superior Court seeking a jury trial on same matter. Respondent brought motion to strike her claim. Applicant's claim struck and action dismissed. Appeal dismissed. "The application for leave to appeal . . . is dismissed with costs." Leave to appeal to the Supreme Court dismissed (2015).

Alexander v. Neville (April 17, 2014), Doc. 13-SC-125401, [2014] O.J. No. 1867 (Ont. S.C.J.).

The claim was dismissed on motion pursuant to rule 12.02. Having apparently been informed by the court staff that he could not appeal that ruling but should return to the Small Claims Court for a remedy, he brought a motion to set aside the dismissal order. The motions judge held that the only available recourse was an appeal to Divisional Court and the motions judge had no jurisdiction to overturn the prior order, which was both final and appealable. If the court staff had informed the plaintiff otherwise, they were mistaken.

Roffey v. Hunter Corp., 2015 ONCA 824, 2015 CarswellOnt 18053 (Ont. C.A.).

Striking of pleadings — defendants had not satisfied any long overdue undertaking, nor did they indicate that they were working on problem. Plaintiffs made successful motion to strike out defence. What Court of Appeal found missing was any explanation from defendants for failure to satisfy their undertakings or their inability to comply with order that lead to strike-out or any indication that they would promptly do so if appeal were allowed.

Hervieux v. Huronia Optical, 2015 ONSC 1810, 2015 CarswellOnt 3839, [2015] O.J. No. 1377, Mulligan J. (Ont. S.C.J.); affirmed 2016 ONCA 294, 2016 CarswellOnt 8096, 399 D.L.R. (4th) 63, 348 O.A.C. 205 (Ont. C.A.).

The parties attended two Settlement Conferences, and orders were made requiring Hervieux to provide expert reports within certain timelines. When he failed to do so, the respondents brought a motion seeking to have the action dismissed. The deputy judge dismissed the action on February 21, 2014, after a full hearing with respect to the issue of Mr. Hervieux's failure to deliver expert reports as required at the Settlement Conferences. The matter has not been set down for trial.

The respondents brought a motion to dismiss the action pursuant to the provisions of Rule 12 of the *Small Claims Court Rules*. Rule 18 provides that a report of an expert must be served at least 30 days before the trial.

The Court of Appeal considered the availability of a summary judgment motion within the Small Claims Court in *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.); additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.). It was a denial of natural justice to have the appellant's claim dismissed upon the Rule 12.02 motion.

The Small Claims Court judge erred and exceeded his jurisdiction in striking out the Statement of Claim pursuant to rule 12.02(1). The claim itself was not inflammatory, a waste of time, a nuisance, or an abuse of the court's process. Rather, it was the appellant's failure to produce an expert report, and by inference, his failure to put his best foot forward, that led to the dismissal of the action. There were other tools available to the deputy Small Claims Court judge, such as giving the appellant a further opportunity to provide expert reports, including setting the matter down for trial, which would have established Rule 18 timelines upon the appellant.

Appeal granted. Matter remitted back to Small Claims Court for a hearing.

Hakoopian v. Konrad, 2017 CarswellOnt 2728, J. Prattas D.J. (Ont. Sm. Cl. Ct.)

Motion to dismiss the plaintiff's claim pursuant to Rule 12.02 (1) (a) and (c) and paragraph 1 of Rule 12.02 (2) because the plaintiff has failed to produce an expert medical report to establish the standard of care and any breach by the defendant which caused the plaintiff's damages.

The settlement conference judge merely noted that "it is useful" for the parties "to rely on expert report for trial". Therefore, the plaintiff did not fail to comply with a court order. The availability of a summary judgment in our court was considered by the Ontario Court of Appeal in *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.); additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.).

It would be a denial of natural justice to have the Plaintiff's Claim dismissed at this stage. The plaintiff is self-represented and he has not abandoned his action. Motion dismissed.

Wong v. Grant Mitchell Law Corp., 2016 MBCA 65, 2016 CarswellMan 225, 98 C.P.C. (7th) 239, 330 Man. R. (2d) 143, 675 W.A.C. 143 (Man. C.A.); leave to appeal refused 2017 CarswellMan 53, 2017 CarswellMan 54 (S.C.C.).

In a judgment giving rise to a R. 59.06 motion to amend, set aside, or vary under the Manitoba Civil Procedure Rules, the judge found Mr. Wong's lawyers negligent for failing to file a medical malpractice claim prior to the expiry of the statutory limitation period. Mr. Wong's motion in part argued his trial was unfair because the judge failed to provide him with adequate assistance as a self-represented litigant. The Court of Queen's Bench dismissed the R. 59.06 motion. The C.A. dismissed the appeal, finding the two allegations of error by the judge below could only be heard and considered in an appeal of the judgment which the applicant had not sought, and not on a motion brought under R. 59.06. The application for leave to appeal dismissed with costs.

D'Onofrio v. Advantage Car & Truck Rentals Ltd., 2017 ONCA 5, 2017 CarswellOnt 15, 135 O.R. (2d) 270, 135 O.R. (3d) 260, 97 C.P.C. (7th) 223, 409 D.L.R. (4th) 39 (Ont. C.A.) dealt with a party who took "no position" on a summary judgment motion.

On appeal, the Court of Appeal allowed the plaintiff appeal, set aside the summary judgment order and the clarification order, and dismissed the summary judgment motion, without prejudice to the insurer's right to renew it.

Despite the findings, the Court of Appeal held that the rental company and its employee were not precluded from raising defences at trial. This was because there had been no judicial determination of the identity defences on the summary judgment motion, so the doctrines of estoppel and *res judicata* dis not apply. The summary judgment motion judge had erroneously based his decision on the belief that the parties had consented to the order, based on the insurer's submissions at the hearing of the motion. Findings on a summary judgment motion can subsequently bind the parties at trial, even those who remain neutral on the motion.

Rizvi v. Urban Studio Inc., 2018 ONSC 484, 2018 CarswellOnt 693 (Ont. Div. Ct.).

Motion for an order extending the time to appeal the order of Thomson J. of the Small Claims Court dated July 26, 2017. Thomson J. acted contrary to Small Claims Court Rule 12.02(3) and (4). This rule allows the court on its own initiative to issue an order, but only if Rule 12.02(4) is followed. A judge can decide not to follow rule 12.02(4), but only if the judge "orders otherwise". Pursuant to Rule 61.04(1) of the *Rules of Civil Procedure* an appeal to an appellate court shall be commenced within 30 days after the order was made. Rule 3.02(3) of the *Rules of Civil Procedure* governs a motion to extend the time to appeal. Appeal allowed and order of Thomson J. set aside.

Elguindy v. St. Joseph's Health Care London, 2017 ONSC 5360, 2017 CarswellOnt 14109 (Ont. S.C.J.).

Did the deputy judge err by presiding over a motion under rule 12.02 of the Rules of the Small Claims Court after presiding over a settlement conference? Rule 12 of the Rules of the Small Claims Court allows a moving party to, among other things, move to strike a document or dismiss an action. Rule 12.02 motion is not equivalent or analogous to a Rule 20 summary judgement motion under the Rules of Civil Procedure. The stay and dismissal powers in Rule 12 are meant to facilitate the objectives of the Small Claims Court, including hearing and determining all questions of law and fact in a summary way, and having matters proceed in such a way to secure the most just expeditious and least expensive determination of every proceeding. The legislature has recently strengthened the power of a deputy judge to end proceedings at an early stage. In 2014, by O. Reg 44/14 the legislature added rule 12.02(3) which grants the court the power to, "on its own initiative, make the order referred to in paragraph 1 of subrule (2) staying or dismissing an action, if the action appears on its face to be inflammatory, a waste of time, a nuisance or an abuse of the court's process." This rule expands the authority of a deputy judge to control the court's process and reflects the summary nature of Small Claims proceedings by weeding out unmeritorious actions. Meanwhile, rule 13.01 mandates that a settlement conference be held in every defended action.

The *Small Claims Court Rules* grant a deputy judge conducting a settlement conference the broad power to make "any order relating to the conduct of the action that the court could make." Rule 13.05(2) (a) further provides that "without limiting the generality of subrule (1)", a settlement conference judge may make an order "amending or striking out a claim or defence under subrule 12.02(1)". The deputy judge in this case had the authority to order the dismissal of the action and was not barred from doing so because he had, on a previous day, presided over the settlement conference. Appeal dismissed.

Keremelevski v. Ukranian Orthodox Church of St. Mary, 2018 CF 406, 2018 FC 406, 2018 CarswellNat 1515, 2018 CarswellNat 1836 (F.C.). E. Susan Elliott J.

Statement of claim struck out as essentially devoid of facts. Applicant's statement of claim was struck without leave to amend. Applicant brought motion for order setting aside judgment, or in alternative, for opportunity to amend his statement of claim. Motion dismissed. Prothonotary reasonably applied correct test to claim which was essentially devoid of facts. No merit to applicant's allegations of bias and lack of jurisdiction. No basis to set aside judgment.

Canadian Tire Bank v. Barna, 2019 ONSC 1533, 2019 CarswellOnt 3288 (Ont. Div. Ct.). Swinton J.

Appeal from judgment of deputy judge who granted a motion pursuant to Small Claims Court Rule 12.02 and struck the appellant's amended defence and granted judgment on a credit card debt. Rule 12.02 (1)(c) allows a Small Claims Court judge to strike a defence where it is found to be a "waste of time". The deputy judge found that going to trial, in this case, would be a waste of time. Appellant argued there was a "triable issue". However, this is not a Rule 20 motion and that is not the test (see *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.) at para. 19; ; additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.)). The deputy judge concluded that the defence should be struck, a trial would be a waste of time and cause delay and prejudice to the plaintiff. Appeal dismissed.

AARC Society v. Canadian Broadcasting Corp., 2019 ABCA 125, 2019 CarswellAlta 2916, 11 Alta. L.R. (7th) 42, 449 D.L.R. (4th) 208, McDonald J.A. (Alta. C.A.); leave to appeal refused 2019 CarswellAlta 2279, 2019 CarswellAlta 2280, [2019] S.C.C.A. No. 221 (S.C.C.)

Pleadings — Amendment of — To alter or add to claim relief. Appeal by the plaintiff from a decision denying it permission to amend its defamation action. Appeal allowed.

The chambers judge failed to explain how the proposed amendments would prejudice the respondents and, if they did, why a costs order would not adequately ameliorate this prejudice. The fact that the respondents would have to spend more time going forward responding to the new claims than if the claim was not amended did not constitute significant prejudice.

Gustafson v. Future Four Agro Inc., 2019 SKCA 68, 2019 CarswellSask 357, 47 C.P.C. (8th) 34, 438 D.L.R. (4th) 647, [2019] 11 W.W.R. 50 (Sask. C.A.)

Striking out pleadings or allegations. Appellant served his affidavit of documents, 12 days late, and applied for an order extending the deadline to the date of which it was served.

Chambers judge did not err in law in failing to find the consent order was vitiated by reason of illegality or by frustration. The contract embodied in the consent order was not contrary to public policy. Appellant and his counsel were not sufficiently diligent.

Potis Holdings Ltd. v. The Law Society of Upper Canada, 2019 ONCA 618, 2019 CarswellOnt 11598, M. Jamal J.A. (Ont. C.A.)

Striking out pleadings. None of the causes of action pleaded by the appellants involved bad faith as an essential element. The motion judge exercised his discretion to refuse leave to

amend as the appellants already twice pleaded no allegations of bad faith against the Law Society. His decision to refuse to afford a third opportunity to fashion a tenable plea was reasonable in the circumstances. There were also no amendments that the appellants could make that might resuscitate their claim.

Stein v. Waddell, 2020 BCSC 253, 2020 CarswellBC 430, Gropper J. (B.C. S.C.)

Defendants apply to strike Ms. Stein's amended notice of civil claim, without leave to amend, and that the plaintiff's claim against them be dismissed. Stein's amended notice of civil claim struck her action against the defendants dismissed. She did not seek leave to make this application as she is required to do as a vexatious litigant; second, the application for document disclosure arises only in the context of her amended notice of civil claim; and, third, the anonymization application rests on grounds substantially similar to those rejected by Madam Justice Fitzpatrick in *Stein v. British Columbia (Human Rights Tribunal)*, 2020 BCSC 70, 2020 CarswellBC 111, 72 Admin. L.R. (6th) 206 (B.C. S.C.).

Stein's assertion that the defendants' service of the documents in accordance with the *Court of Appeal Rules* constitutes harassment must be struck as disclosing no reasonable claim. It is not harassment for an opposing party to follow the *Court of Appeal Rules* for service of documents in an appeal. Further, no tort of harassment has been recognized in Canada: *Merrifield* at para. 105.

Baig v. Mississauga, 2020 ONCA 697, 2020 CarswellOnt 15923 (Ont. C.A.).

The Ontario Court of Appeal i reinforced a well-established principle of limitation periods in Ontario: once you understand you have injuries, you will have two years to decide whether to start a lawsuit. Baig's initial Claim Report was dated May 29, 2013. Over four years later, on September 1, 2017, Baig sued the City of Mississauga. The City of Mississauga moved for summary judgment. Motion granted. The Court of Appeal dismissed the plaintiff's appeal.

Kleiman v. 1788333 Ontario Inc. o/a BMW Toronto, 2020 ONSC 6470, 2020 CarswellOnt 15463 (Ont. Div. Ct.).

Kleiman appealed from Deputy Judge. An "appellate standard of review" is used on an appeal to this court from the Small Claims Court. Questions of law are reviewed on a correctness standard. Questions of fact are reviewed on the "palpable and overriding error" standard. Mixed questions of fact and law are reviewed on a deferential standard, except for "extricable questions of law", which are reviewed on a standard of correctness.

The Small Claims Court is a court of equity. The failure to cite the statutory tests in the *Limitations Act*and the test for summary judgment are not, in themselves, reversible errors. The Deputy Judge is taken to know the law and is not required to cite chapter and verse in every oral decision she gives. On the record it seems clear that there is a good arguable case here on the issues of discoverability and tolling of the limitation period, and these issues should have been sent to trial.

Appeal allowed and dismissal order set aside.

Reimer v. Toronto (City), 2020 ONSC 1661, 2020 CarswellOnt 4766, 59 C.P.C. (8th) 34 (Ont. S.C.J.).

Motion for order granting leave to further amend statement of claim to add defendants to action in place of the defendant John Doe Maintenance Company. The plaintiff relied on the doctrine of misnomer. Alternatively, the plaintiff sought to add defendants pursuant to Rule 5.04 of the *Rules of Civil Procedure* on the basis of discoverability.

Principles applicable to misnomer recognize that a pleading may be amended to reflect that a person named in a statement of claim is actually another person or the person identified in a generic manner as John Doe or similar is actually a specific person. Misnomer does not add

a party to an action. It inserts a new name into an action as a substitute for another named party.

Plaintiff did not satisfy onus to show that Maple and Royal should be substituted for the defendant John Doe Maintenance Company on the basis of misnomer. Maple and Royal not added as defendants to this action on the basis of discoverability.

Michaud v. Comeau, 2020 NBCA 47, 2020 CarswellNB 310, 2020 CarswellNB 311 (N.B. C.A.).

Appeal by plaintiff from the dismissal of this motion for summary judgement on the claim of negligence.

Appeal dismissed. Once the summary judgement relating the cause of action in assault was granted, where it rested on the same facts as the cause of action based in negligence and resulted in the same injuries and damages, the negligence action merged with the summary judgement in the assault action, and it could not form the basis for a separate judgement.

Pleading two different causes of action in one Statement of Claim, based on the same facts which resulted in the same injuries and damages, never entitled a party to two distinct judgements.

(3) General Power to Stay, Dismiss Action — The court may, on its own initiative, make the order referred to in paragraph 1 of subrule (2) staying or dismissing an action, if the action appears on its face to be inflammatory, a waste of time, a nuisance or an abuse of the court's process.

(4) Unless the court orders otherwise, an order under subrule (3) shall be made on the basis of written submissions in accordance with the following procedures:

1. The court shall direct the clerk to send notice by mail to the plaintiff that the court is considering making the order.

2. The plaintiff may, within 20 days after receiving the notice, file with the court a written submission, no more than four pages in length, responding to the notice.

3. If the plaintiff does not file a written submission that complies with paragraph 2, the court may make the order without any further notice to the plaintiff or to any other party.

4. If the plaintiff files a written submission that complies with paragraph 2, the court may direct the clerk to send a copy of the submission by mail to any other party.

5. A party who receives a copy of the plaintiff's submission may, within 10 days after receiving the copy, file with the court a written submission, no more than four pages in length, responding to the plaintiff's submission, and shall send a copy of the responding submission by mail to the plaintiff, and, on the request of any other party, to that party.

(5) The clerk shall send a copy of an order made under subrule (1) by mail to all the parties as soon as possible after the order is made.

(6) A document required under this rule to be sent by mail shall be mailed in the manner described in subrule 8.07(1), and is deemed to have been received on the fifth day after it is mailed.

(7) General Power to Stay, Dismiss Motion — The court may, on its own initiative, make the order referred to in paragraph 2.1 of subrule (2) staying or dismissing a motion, if the motion appears on its face to be inflammatory, a waste of time, a nuisance or an abuse of the court's process.

(8) Subrules (4) to (6) apply, with necessary modifications, to the stay or dismissal of a motion under subrule (7) and, for the purpose, a reference to the plaintiff shall be read as a reference to the moving party.

(9) Clerk to Notify Court — If the clerk becomes aware that an action could be the subject of an order under subrule (3), or that a motion could be the subject of an order under subrule (7), the clerk shall notify the court.

O. Reg. 78/06, s. 26; 44/14, s. 11(2), (3)

Commentary: Subrule 12.02(3) and the procedure under subrules 12.02(4) to (9) address the court's power to stay or dismiss an action or motion on the court's own initiative. This limited procedure applies where the action or motion "appears on its face to be inflammatory, a waste of time, a nuisance or an abuse of the court's process." That test tracks the language of the motion for judgment procedure under subrule 12.02(1)(c) and is analogous (though differently worded) to the procedure under Rule 2.1 of the *Rules of Civil Procedure*.

This procedure is most likely to be applied in those few courthouses where a judge routinely reviews new claims — being Toronto, which has both the Small Claims Court Administrative Judge and an Administrative Deputy Judge, and Brampton, Hamilton and Ottawa which have Administrative Deputy Judges. In other places, defendants have the option to write a concise letter or email to the clerk suggesting under subrule 12.02(9) that the action is appropriate for stay or dismissal. The clerk will then bring the matter to a judge's attention to determine whether this procedure should be triggered. If the judge so determines then the process for written submissions under subrule 12.02(4) is launched starting with written notice that the court is considering making an order under subrule (3), followed by submissions in writing.

This procedure is analogous to that under Rule 2.1 of the *Rules of Civil Procedure*, which has been the subject of appellate pronouncements. In *Scaduto v. Law Society of Upper Canada*, 2015 ONCA 733, 2015 CarswellOnt 16545, 81 C.P.C. (7th) 258, 343 O.A.C. 87, [2015] O.J. No. 5692 (Ont. C.A.); leave to appeal refused 2016 CarswellOnt 21905, 2016 CarswellOnt 21906, [2015] S.C.C.A. No. 488 (S.C.C.), the Court of Appeal endorsed the notion that Rule 2.1 is not designed to deal with "close calls". Rather, the court said at para. 8:

> . . . the use of the rule should be limited to the clearest of cases where the abusive nature of the proceeding is apparent on the face of the pleading and there is a basis in the pleadings to support the resort to the attenuated process.

Similarly the court in *Khan v. Krylov & Company LLP*, 2017 ONCA 625, 2017 CarswellOnt 16235, 138 O.R. (3d) 581, 12 C.P.C. (8th) 74, [2017] O.J. No. 4073 (Ont. C.A.), directed that a cautious approach be taken. A plaintiff's allegations may be distasteful without being entirely implausible. The court may ask itself "what if the plaintiff's allegations are true?" Rule 2.1 is an extremely blunt instrument reserved for the clearest of cases.

In *Visic v. Elia Associates Professional Corporation*, 2020 ONCA 690, 2020 CarswellOnt 15816 (Ont. C.A.) at para. 8~~:~~; additional reasons 2020 ONCA 779, 2020 CarswellOnt 18299 (Ont. C.A.), the court repeated that the focus is on the pleadings and any submissions filed by the parties; evidence is inadmissible under this process. Rule 2.1 does not replace other mechanisms to weed out claims summarily.

There appear to be no reported decisions from the Small Claims Court dealing with the standard for stay or dismissal under that court's rule 12.02(3).

While the procedure seems analogous to that under Rule 2.1 of the *Rules of Civil Procedure*, the nature of Small Claims Court proceedings may warrant particular caution. The comparatively lesser cost of an action in Small Claims Court compared to the cost of potential appeal from a stay or dismissal order, and the alternative options (i) for a defendant to bring a motion under rule 12.02(2) which would permit consideration of an evidentiary record, or

(ii) for a settlement conference judge to stay or dismiss a claim under subrules 13.05(2)(a)(iii) or (iv), may make those options preferable to the "extremely blunt instrument" of summary dismissal on the court's own motion.

Where the procedure under subrule 12.02(3) is initiated, procedural fairness will generally require notice to the plaintiff and the opportunity to make submissions as provided under subrule 12.02(4). The appeal court in *620369 Ontario Inc. v. Borroto*, [2020] O.J. No. 5128 (Div. Ct.), set aside a motions judge's orders dismissing one action and staying others by a plaintiff whose counsel had attended motions court simply for the hearing of a default judgment motion. The motions judge had concerns that the first and other actions had been brought in the wrong venue and were abuses of process based on the plaintiff's apparent disregard of the law of venue under Rule 6. The appeal judge held that given his concern for potential abuse of process under Rule 6, the motions judge ought to have followed the process for notice and submissions under subrule 12.02(4) and that the failure to do so was unfair. The orders were set aside.

What cases could properly be terminated under rule 12.02(3)? The answer must be cases in which it is utterly clear that the claim on its face is doomed in law to fail, and therefore no legitimate or useful purpose would be served by allowing the action to continue. In plain English one could say the rule applies to claims which on their face are completely meritless if not ridiculous. Claims which are arguable, have some chance of success or are "close calls" should not be dismissed under this procedure.

There is a certain if imperfect overlap between the concerns applicable under rule 12.02(3) and the law relating to vexatious litigants. But rule 12.02(3) deals with an individual action and "even a vexatious litigant can have a legitimate complaint": see *Khan v. Krylov & Company LLP*, 2017 ONCA 625, 2017 CarswellOnt 16235, 138 O.R. (3d) 581, 12 C.P.C. (8th) 74, [2017] O.J. No. 4073 (Ont. C.A.) at para. 7.

Even where an action appears doomed to failure on the basis of some prior ruling or litigation under the doctrines of *res judicata* and/or abuse of process, it should not be forgotten that both of those doctrines, even when they are found to apply, are nevertheless subject to a residual judicial discretion to allow relitigation: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 CSC 44, 2001 SCC 44, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, REJB 2001-25003, [2001] 2 S.C.R. 460, 54 O.R. (3d) 214 (headnote only), 34 Admin. L.R. (3d) 163, 10 C.C.E.L. (3d) 1, 7 C.P.C. (5th) 199, 201 D.L.R. (4th) 193, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, [2001] S.C.J. No. 46 (S.C.C.) at para. 80; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, REJB 2003-49439, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216, 17 C.R. (6th) 276, 232 D.L.R. (4th) 385, 120 L.A.C. (4th) 225, 2003 C.L.L.C. 220-071, 311 N.R. 201, 179 O.A.C. 291, [2003] S.C.J. No. 64 (S.C.C.) at para. 53, respectively. Summary dismissal may be tempting in cases of relitigation but on closer consideration, may in some (perhaps many) cases be declined in favour of trial or a potential motion for judgment under rule 12.02(2) with an evidentiary record and a more fulsome opportunity for submissions.

Perhaps a clear example for summary dismissal under rule 12.02(3) would be the disgruntled litigant who reacts to a prior judicial ruling by attacking it collaterally by way of a fresh action against the judge who made it. In such a case, it may be clear on its face that the action is waste of time not only because it violates one or more finality doctrines but also because the doctrine of judicial immunity is absolute in nature. See *Raji v. Myers*, 2015 ONSC 4066, 2015 CarswellOnt 9803, 75 C.P.C. (7th) 115, [2015] O.J. No. 3436 (Ont. S.C.J.); *Tripp v. Robertson*, [2019] O.J. No. 932 (Sm. Cl. Ct.). In such a case, one could view the relitigation bar subject to a narrow discretionary chance to avoid that bar as a 90% chance of dismissal, coupled with absolute immunity as a 100% chance of dismissal, as more than sufficient to warrant dismissal.

The bottom line is that summary determination on the court's own motion under rule 12.02(3) is a blunt instrument reserved for the very clearest of cases. Generally, a trial or perhaps a motion for judgment under rule 12.02(2) will be the preferable procedure.

12.03 (1) Stay or Dismissal if No Leave under *Courts of Justice Act* — If the court determines that a person who is subject to an order under subsection 140(1) of the *Courts of Justice Act* has instituted or continued an action without the order having been rescinded or leave granted for the action to be instituted or continued, the court shall make an order staying or dismissing the action.

(2) Request for Order — Any party to the action may file with the clerk a written request for an order under subrule (1).

(3) Service of Order — An order under subrule (1) may be made without notice, but the clerk shall send a copy of the order by mail, in the manner described in subrule 8.07(1), to every party to the action as soon as possible after the order is made.

O. Reg. 44/14, s. 11(4)

Commentary: Rule 12.03 operates in tandem with *Courts of Justice Act* s. 140. Where a plaintiff has been declared a vexatious litigant under section 140 but nevertheless commences or continues an action in Small Claims Court without first having obtained leave or a rescission of that declaratory order (from a judge of the Superior Court of Justice), the Small Claims Court shall stay or dismiss the action.

This provision clarifies the jurisdiction of the Small Claims Court in these circumstances, despite the remedy being in substance a form of enforcement of orders of the Superior Court of Justice.

The rule is mandatory — "the court shall make an order staying or dismissing the action." The court must so order once the court determines that a person has commenced or continued an action contrary to a declaratory order under section 140. Such a determination may be made after a party files a written request pursuant to subrule 12.03(2).

Rule 13 — Settlement Conferences

[Heading amended O. Reg. 78/06, s. 27.]

13.01 (1) Settlement Conference Required in Defended Action — A settlement conference shall be held in every defended action.

Commentary: Rule 13.01(2) states that the clerk serves the Notice of Settlement Conference and List of Proposed Witnesses "on the parties." There is an exception in r. 11.05(3), which allows the clerk to *not* serve any party who was noted in default with the Notice of Settlement Conference and List of proposed Witnesses. However, clerks are required to serve all defendants who have *not* been noted in default.

Clerks do not have the authority to adjourn matters. Scheduling is a judicial matter and SCC staff responsible for scheduling will act under the direction of the Regional Senior Judge or his or her designate.

If there is an admission of *all* of the plaintiff's claim and a proposal of terms of payment under r. 9.03(1) then staff would not schedule a settlement conference. However, if there were only a partial admission of liability and a proposal of terms of payment, the clerk would schedule a settlement conference for the part of the claim the defendant does not admit.

(2) Duty of Clerk — The clerk shall fix a time, date and place for the settlement conference and serve a notice of settlement conference, together with a list of proposed witnesses (Form 13A), on the parties.

(3) Timing — The settlement conference shall be held within 90 days after the first defence is filed.

Commentary: If the defendant files a defence, the parties will receive a notice of settlement conference in the mail from the court office indicating the date, time and location of the settlement conference. A settlement conference should be held within 90 days after the first defence is filed.

If there is going to be a trial, the settlement conference is also an opportunity to get prepared for the trial. The judge may make recommendations and there are a number of orders the judge might make.

At the end of the settlement conference, if the parties do not settle the case, the Rules provide that the judge will give the clerk a memorandum listing the issues remaining in dispute, matters agreed on, and information related to scheduling. The memorandum will be provided to the trial judge. The judge who conducts your settlement conference will not preside at the trial.

After the settlement conference, the clerk will provide the parties with a copy of the Endorsement Record/Order of the Court, either in person, by mail or by fax. The Endorsement Record/Order of the Court contains any orders that the judge made at the settlement conference.

The people who attend must have the authority to settle the case.

A settlement conference can be heard or conducted by telephone or video conference if the facilities are available at the court. A party can file a Request for Telephone or Video Conference [Form 1B].

If all parties agree on a final settlement, the judge may make an order that disposes of the case and you will not need to go to trial. If a settlement is not reached, the settlement conference is an opportunity to try to resolve some issues before the trial and to assist in preparing for the trial.

The Endorsement Record/Order of the Court will include a Notice to Set Action Down for Trial that states that one of the parties must request a trial date and pay the fee for setting the action down for trial. Failure to set the action down for trial will result in the clerk eventually sending you a notice of approaching dismissal.

If the claim is for $3,500 or less ($3,500 is the minimum claim that can be appealed under the *Courts of Justice Act*), there is a special procedure available to parties who consent to it. The parties can file a signed Consent [Form 13B] (before the settlement conference) indicating that they wish to have final judgment at the settlement conference. If the parties do not reach a settlement, the judge can then make a final judgment at the settlement conference. If you consent to this procedure, this will be the final judgment in your case and you will not have to attend again for a trial, or pay the trial fee.

(4) Exception — Subrules (1) to (3) do not apply if the defence contains an admission of liability for all of the plaintiff's claim and a proposal of terms of payment under subrule 9.03(1).

(5) [Repealed O. Reg. 78/06, s. 27.]

(6) [Repealed O. Reg. 78/06, s. 27.]

(7) [Repealed O. Reg. 78/06, s. 27.]

O. Reg. 78/06, s. 27

13.02 (1) Attendance — A party and the party's representative, if any, shall, unless the court orders otherwise, participate in the settlement conference,

(a) by personal attendance; or

(b) by telephone or video conference in accordance with rule 1.07.

(2) Authority to Settle — A party who requires another person's approval before agreeing to a settlement shall, before the settlement conference, arrange to have ready telephone access to the other person throughout the conference, whether it takes place during or after regular business hours.

(3) Additional Settlement Conferences — The court may order the parties to attend an additional settlement conference.

Commentary: There is nothing to prevent a pre-trial judge from setting out for unrepresented litigants a schedule of time limits within which they must begin or complete certain steps or to deliver certain documents. See *Charlebois v. Leadbeater* (1993), 4 W.D.C.P. (2d) 195 (Ont. Gen. Div.), per Justice E. Stach. Nor is there any prohibition on a judge's scheduling or arranging of preliminary issues (such as statutory bars or limitation periods) at the outset, so that the litigants know exactly where they stand before they commit themselves to the expense and risk of trial; see *Newlove v. Petrie* (June 29, 1995), Doc. Toronto 39122/89 (Ont. Gen. Div.), per Justice J. Wilkins.

One of the purposes of a pre-trial conference as set out in subrule 13.02(1) is to facilitate settlement of the action. Where the parties agree to settle, the practice in Metropolitan Toronto is to have the parties sign minutes of settlement which state that, in the event of default, judgment may be signed by the clerk. If default subsequently occurs, judgment is entered by the clerk on the filing of an affidavit from the party requesting judgment. The minutes of settlement do not have to be approved by a judge as required by subrule 13.03(4). When minutes of settlement are prepared as a result of a hearing before a judge in Toronto, the court record may be endorsed as being settled in accordance with the minutes of settlement. Again, the minutes contain a proviso that judgment will only be issued by the clerk on the filing of an affidavit from the party requesting judgment.

(4) The clerk shall fix a time and place for any additional settlement conference and serve a notice of settlement conference, together with a list of proposed witnesses (Form 13A) on the parties.

(5) Failure to Attend — If a party who has received a notice of settlement conference fails to attend the conference, the court may,

(a) impose appropriate sanctions, by way of costs or otherwise; and

(b) order that an additional settlement conference be held, if necessary.

(6) If a defendant fails to attend a first settlement conference, receives notice of an additional settlement conference and fails to attend the additional settlement conference, the court may,

(a) strike out the defence and dismiss the defendant's claim, if any, and allow the plaintiff to prove the plaintiff's claim; or

(b) make such other order as is just.

Commentary: Subrules 13.02(5) and (6) deal with the failure of parties to attend the settlement conference. In many cases the party will be given a second chance and the court will refrain from striking out that party's claim or defence on a first failure to appear. Depending on the circumstances of the failure to appear, however, the court is not obligated to grant a "second chance" in every case. The language of these subrules implies that a second

chance will often if not usually be appropriate but does not foreclose the making of a final order (i.e. "appropriate sanctions, by way or costs or otherwise"). See *Mortazavi v. Wilfred Laurier University Faculty*, [2020] O.J. No. 1147 (Sm. Cl. Ct.).

(7) Inadequate Preparation, Failure to File Material — The court may award costs against a person who attends a settlement conference if,

(a) in the opinion of the court, the person is so inadequately prepared as to frustrate the purposes of the conference;

(b) the person fails to file the material required by subrule 13.03(2).

O. Reg. 78/06, s. 27; 230/13, s. 14

Commentary: As reviewed below under rule 13.10, the settlement conference is mandatory and is for the benefit of all parties, so the general rule is that no party is required to pay a costs order for the settlement conference. Subrule 13.02(7) contemplates a possible costs order if a party attends but is so inadequately prepared as to frustrate the purposes of the conference, or fails to file the List of Proposed Witnesses with any attached documents required by rule 13.02(2).

13.03 (1) Purposes of Settlement Conference — The purposes of a settlement conference are,

(a) to resolve or narrow the issues in the action;

(b) to expedite the disposition of the action;

(c) to encourage settlement of the action;

(d) to assist the parties in effective preparation for trial; and

(e) to provide full disclosure between the parties of the relevant facts and evidence.

(2) Disclosure — At least 14 days before the date of the settlement conference, each party shall serve on every other party and file with the court,

(a) a copy of any document to be relied on at the trial, including an expert report, not attached to the party's claim or defence; and

(b) a list of proposed witnesses (Form 13A) and of other persons with knowledge of the matters in dispute in the action.

(3) At the settlement conference, the parties or their representatives shall openly and frankly discuss the issues involved in the action.

Commentary: The settlement conference provides an opportunity for the parties to discuss settlement of their dispute with the assistance of a judge of the court. The conference is mandatory for all cases.

The formal requirements for the conference include delivery at least 14 days beforehand of the List of Proposed Witnesses (Form 13A). The list requires disclosure of the names and contact information of all relevant witnesses who the party may call to give evidence at trial, which includes both intended witnesses and potentially intended witnesses. Disclosure is also required of the names and contact information of "other persons with knowledge of the matters in dispute in the action." That requirement requires disclosure of relevant witnesses even if the party has no intention of calling them to testify at trial.

The purpose of the witness and potential witness disclosure requirement is to permit the opposing party to contact and interview the witnesses, and summons them to testify at trial. Failure to provide proper disclosure in the List of Proposed Witnesses can have cost consequences at trial: see *Geensen v. KAG Developments Ltd.*, [2017] O.J. No. 1970 (Sm. Cl. Ct.).

The List of Proposed Witnesses also must have attached to it copies of any documents that the party intends to rely on at trial (unless they are already filed as attachments to the party's claim or defence). That requirements includes any expert reports to be relied on at trial.

By its terms, the disclosure requirement under rule 13.03(2) like the disclosure requirement under Rule 30 of the *Rules of Civil Procedure* does not require the creation of new documents. The requirement is to disclose documents in existence at the time of the conference. In circumstances where a party may intend after the conference to obtain or generate a new document for use at trial, such as an expert report, this may undermine the utility of the settlement conference. In such circumstances the settlement conference judge has a discretion to adjourn the conference to continue after the document is served and filed, or to order a second conference, or may extend time under rule 18.02 to more than 30 days before trial if a party intends to use that rule for admission of documents at trial. The *Small Claims Court Rules* contain no requirement for service of an expert report as a prerequisite to calling the expert to give in-person evidence at trial: *Richard v. 2464597 Ontario Inc.*, [2019] O.J. No. 1625 (Div. Ct.).

Rule 13 by its terms does not preclude reliance at trial on documents which were not part of the disclosure given at the conference, and the document disclosure requirements under Rule 13 have no effect on the parties' rights to call in-person witnesses at trial.

Case Law: *Shannon v. Shannon* (1995), 6 W.D.C.P. (2d) 534 (Ont. Gen. Div.).

At a pre-trial, a provincial judge ordered that a psychiatric assessment be conducted by the Clarke Institute and that the husband pay to the wife costs of $150 in the absence of the consent of the parties. The pre-trial rule only authorizes the judge to resolve or to narrow the issues or to settle the procedure at trial and is confined to procedural matters in the interest of expediting the trial process. It cannot be expanded to include substantive matters affecting parties' rights. The Ontario Court (Prov. Division) is a statutory court and can act only under statutory authority. Although it does have some inherent jurisdiction to control its own process, such jurisdiction cannot be extended to include matters affecting parties' rights.

McGinty v. Toronto Transit Commission (1996), 7 W.D.C.P. (2d) 101 (Ont. Div. Ct.).

The pre-trial judge, on his own motion, ordered action transferred to the Small Claims Court. The endorsement transferring the action allowed for the possibility that the plaintiff's damages could exceed the Small Claims Court limit. In granting motion, the court found that there was reason to doubt the correctness of the pre-trial judge's decision. Neither ss. 23(2) or 110(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 nor the judge's inherent jurisdiction afforded authority for ordering the transfer of the action under those terms. Pre-trial judges were not to make significant, contentious rulings without clear notice and an opportunity to respond. The court also found that the matter transcended the interests of the particular litigants.

Kamloops Dental Centre v. McMillan (1997), 68 A.C.W.S. (3d) 270 (B.C. S.C.).

The plaintiff had brought an action in small claims court against the defendants for money owed. At a settlement conference, the plaintiff sent a person who the provincial court judge found did not have authority to enter into a settlement. The judge consequently dismissed the claim. The plaintiff appealed. Held, the appeal was allowed. Under R. 7(14) of the Small Claims Rules a judge can only dismiss a claim after discussing the merits of the case and finding that there is no reasonable claim. It did not appear that the judge had heard evidence or discussed the merits of the claim.

The Law Society has published the *Articling Handbook for Principals and Students* (the "handbook") which sets out in detail the objectives of the bar admission course and the authority of articled students-at-law to appear before courts and tribunals.

Wei Estate v. Dales (1998), 37 O.R. (3d) 548, 16 C.P.C. (4th) 29 (Ont. Gen. Div.).

The issue was whether there was a reasonable apprehension of bias of the judge who was to hear the trial because the judge had been improperly informed by plaintiff's counsel of the pre-trial judge's views as to liability. The judge held that there was no statutory restriction prohibiting him from hearing the trial and further, he could not see how knowing of the pre-trial judge's views on liability would preclude him from conducting the trial of the action in an entirely impartial manner. See Rules 50.03 and 50.04 of the *Rules of Civil Procedure* (Pre-trials), and the problems of correspondence being sent by counsel to judges in advance of the trial or after the trial and before the final decision has been reached.

Rumbaua v. Byrne (January 11, 1999), Doc. Vancouver 96-30864 (B.C. Prov. Ct.).

Application by Rumbaua to dismiss the defence and enter a default judgment. Application dismissed. There was no express or implied authority to grant a default judgment at settlement conference. The consequences for failure to be prepared were limited to an order for costs. The defendants were ordered to pay costs of $300 to Rumbaua.

Webb v. Stewart (January 19, 1998), Doc. Vancouver A970068 (B.C. S.C.).

Appeal of a dismissal of an action. The appeal was granted. Webb was told to disclose the documents to Stewart and the others before the settlement conference. He complied with the strict wording of the order. The presiding judge was restricted in her jurisdiction to dismiss Webb's action at the settlement conference. Webb had a reasonable claim. Liability and damages were triable issues.

M.R.S. Trust Co. v. 835099 Ontario Ltd. (November 18, 1998), Doc. St. J. 2393/93 (Nfld. T.D.).

The court ruled it was premature to award costs of a pretrial hearing to the defendants, who were successful in having claims. Relevance of evidence taken and documents produced at a pretrial hearing should be determined at the conclusion of the proceeding.

Baird v. Taylor (2000), 2000 CarswellOnt 3804 (Ont. S.C.J.).

A lawyer refused to attend a settlement conference after the judge refused his request to proceed by way of telephone conference. The judge had jurisdiction to award costs of abortive conference against the lawyer.

Giza v. Eastwood & Co., 2001 BCSC 199, 2001 CarswellBC 476, [2001] B.C.J. No. 192 (B.C. S.C.).

The defendant was unwilling to settle. The judge ordered a $100 penalty, which exceeded jurisdiction. A default judgment was ordered against the defendant. The defendant misunderstood the procedure but made no effort to follow up or to clarify what was going on. The judgment was upheld.

Wood v. Siwak, 2000 BCSC 397, 21 Admin. L.R. (3d) 310, 2000 CarswellBC 559 (B.C. S.C. [In Chambers]).

There is general obligation on a settlement conference judge to facilitate a settlement process and ensure that all legal issues are properly canvassed and that parties are dealt with fairly. The settlement conference judge must make all reasonable inquiries to determine the validity of the claim and consider all relevant facts and issues before summarily dismissing the claim.

To v. Toronto (City) Board of Education (2001), 55 O.R. (3d) 641, 2001 CarswellOnt 3048, 204 D.L.R. (4th) 704, 150 O.A.C. 54 (Ont. C.A.); additional reasons at (2001), 2001 CarswellOnt 3727 (Ont. C.A.).

Failure to respond meaningfully to request to admit might constitute relevant factor if it prolonged trial or otherwise added to trial costs. Defendant's appeal from costs order allowed. Plaintiffs awarded party-and-party costs throughout subject to direction to assessment

officer to assess solicitor-and-client costs for any time that trial extended because of defendant's failure to respond appropriately to request to admit.

Yannacoulias v. Yannacoulias, 17 C.P.C. (5th) 260, 2002 CarswellSask 219, 2002 SKQB 163, 34 C.B.R. (4th) 145, 218 Sask. R. 251 (Sask. Q.B.).

Y made assignment in bankruptcy, and was not yet discharged. Y's former partners G and T brought several actions against Y. Y refused to participate in pre-trial conference. G and T brought application for order setting pre-trial conference. Application granted. Not all claims against Y were provable in bankruptcy. Focus of pre-trial conferences had become settlement and issues best dealt with if all litigants were present.

Comrie v. Comrie, 2001 CarswellSask 130, [2001] S.J. No. 136, [2001] 7 W.W.R. 294, 2001 SKCA 33, 197 D.L.R. (4th) 223, 203 Sask. R. 164, 240 W.A.C. 164, 17 R.F.L. (5th) 271 (Sask. C.A.).

Following pre-trial conferences, husband and wife agreed to consent judgment. Five years later, husband applied to end spousal support. Rules provided that communications in pre-trial conferences privileged and inadmissible in all proceedings. Trial judge not allowing husband to adduce evidence. Appeal allowed. Evidence relevant and admissible, related to factors and objectives taken into account in fixing spousal support. Procedural rules such as Queen's Bench (Saskatchewan) Rule 191(14), (15), cannot change substantive law (*i.e.*, material change in circumstances).

Scheuneman v. R., 2003 CarswellNat 88, 2003 CarswellNat 4763, 2003 FCT 37, 2003 CFPI 37 (Fed. T.D.); affirmed 2003 CarswellNat 3741, 2003 CarswellNat 4624, 2003 FCA 440, 2003 CAF 440 (F.C.A.); leave to appeal refused (2004), 2004 CarswellNat 378, 2004 CarswellNat 379 (S.C.C.).

Self-represented plaintiff sought to be relieved from obligation of attending pre-trial conference in person because of alleged disability. Plaintiff incapable of representing himself. Plaintiff directed to appoint solicitor. Such solicitor ordered to file further pre-trial conference memorandum in conformity with Rules.

Pete v. Lanouette, 2002 BCSC 75, 2002 CarswellBC 98 (B.C. Master).

Disclosure of documents relating to "any matter in question in the action." Public interest may trump any privilege if wrongdoing may result from the failure to disclose.

519080 Alberta Ltd. v. Turtle Mountain Tire & Battery, 2002 ABPC 108, 2002 CarswellAlta 1312, [2002] A.J. No. 1316 (Alta. Prov. Ct.).

Pre-trial conference ruling dealing with issue of taking a single cause of action arising out of one factual situation and splitting same to be the subject of several actions. Choices provided to the plaintiff. *Cahoon v. Franks*, [1967] S.C.R. 455, 1967 CarswellAlta 48, 60 W.W.R. 684, 63 D.L.R. (2d) 274 (S.C.C.); *Maple Lodge Farms Ltd. v. Penny Lane Fruit Market Inc.*, [1997] O.J. No. 4401, 1997 CarswellOnt 4306 (Ont. Gen. Div.); *Malcolm v. Carr*, [1997] 7 W.W.R. 371, 1997 CarswellAlta 481, [1997] A.J. No. 485, 200 A.R. 53, 146 W.A.C. 53, 51 Alta. L.R. (3d) 66 (Alta. C.A.); and *Wah Loong Ltd. v. Fortune Garden Restaurant (Richmond) Ltd.*, [2000] B.C.J. No. 1581, 2000 BCPC 163, 2000 CarswellBC 2838 (B.C. Prov. Ct.) referred to.

OBP Realty (Pickering Centre) Inc. v. Ladowsky (2003), 2003 CarswellOnt 1877 (Ont. S.C.J.).

Defendant brought motion to set aside default judgment that was entered against him as a result of his failure to pay costs. Motion dismissed. Defendant did not suffer from hardship, and because he was consulting with solicitor, he understood consequences of his failure to pay.

Homewood Enterprises Ltd. v. 147486 Canada Ltd., 2003 CarswellNS 70, 2003 NSSC 24, 212 N.S.R. (2d) 390, 665 A.P.R. 390 (N.S. S.C.).

Plaintiff discontinued one week before trial. Defendant had completed trial preparation. Defendant awarded costs of $1,700. Plaintiff prohibited from commencing fresh action until costs paid.

Lowe v. Redding, 2003 CarswellBC 778, 2003 BCSC 356, 14 B.C.L.R. (4th) 192 (B.C. S.C. [In Chambers]).

Plaintiff suing for defamation. Defendant making offer to settle for zero dollars and costs. Plaintiff seeking award of costs. Application allowed. While amount within jurisdiction of Small Claims Court, action for defamation not permitted in Small Claims Court.

Eco-Tourism 2010 Society v. Vancouver 2010 Bid Corp., 2005 CarswellBC 245, 2005 BCPC 23, [2005] B.C.J. No. 203 (B.C. Prov. Ct.).

Dismissal of claim at a settlement conference is a remedy to be used sparingly and only in clear cases. When it is clear the court has no jurisdiction to hear the claim brought, appropriate to dismiss the claim at this stage. The facts supporting the jurisdictional claim must be "plain and obvious." See *Hunt v. T & N plc*, 1990 CarswellBC 759, 1990 CarswellBC 216, *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] S.C.J. No. 93, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), *(*sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, *(*sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.); the party against whom the application is made, particularly an unrepresented party, ought to be given a reasonable opportunity to obtain legal advice, and a reasonable explanation as to the argument and case law the other side will be relying on. The court must be satisfied generally that there is no purpose to be served by proceeding to a settlement conference. Appropriate case to make order under Rule 7(14)(i) dismissing claim brought by Claimant.

Halsey v. Milton Keynes General NHS Trust, [2004] E.W.C.A. Civ. 576 (C.A.).

The refusal of a party to participate in mediation can result in costs being awarded against that party even if that party is ultimately successful at trial, according to the Court of Appeal (Civil Division) of the English Supreme Court of Judicature.

Halsey ultimately unsuccessful at trial and costs were awarded to the Hospital. Halsey argued that Hospital acted unreasonably in refusing to agree to attend mediation and, for that reason, trial judge wrong to award Hospital its costs. Scope for court to deprive party ultimately successful in action, of some or all of its costs on the ground that it refused to agree to ADR. This is important where parties ask Court to consider the implications of an offer to settle (Rule 49). Given current requirement that parties attend mandatory mediation in case managed actions, this case of relevance in actions where the quantum of damages is less than $50,000 or in non-case managed actions.

Hagel v. Giles, 2006 CarswellOnt 805, 80 O.R. (3d) 170 (Ont. S.C.J.).

Defendants seek judgment in accordance with alleged settlement of proceeding which, they say, was reached at a mediation. They say parties agreed to an order or judgment dismissing this action on a without costs basis and upon delivery by the Plaintiff of a written full and final release of the Defendants.

The purpose of mandatory mediation is to "reduce cost and delay in litigation and facilitate the early and fair resolution of disputes." (See r. 24.1.01.) The mediator's role is to "act as a neutral third party to facilitate communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution." (See r. 24.1.02.) See *Rogacki v. Belz*, [2003] O.J. No. 3809, 2003 CarswellOnt 3717, 232 D.L.R. (4th) 523, 177 O.A.C. 133, 67 O.R. (3d) 330, 41 C.P.C. (5th) 78 (Ont. C.A.), Borins J.A. at para. 18.

See also Lederman J. in *Rudd v. Trossacs Investments Inc.*, [2004] O.J. No. 2918, 2004 CarswellOnt 2863, 244 D.L.R. (4th) 758, 72 O.R. (3d) 62, 7 C.P.C. (6th) 1 (Ont. S.C.J.).

There is a large body of common law precedent permitting a court to enforce an oral settlement under r. 20 and r. 49.09, as well as beyond the scope of these two rules.

Second thoughts do not constitute a valid reason for refusing to enforce agreements. (See, *e.g.*, *Belanger v. Southwestern Insulation Contractors Ltd.*, 1993 CarswellOnt 507, [1993] O.J. No. 3095, 16 O.R. (3d) 457, 32 C.P.C. (3d) 256 (Ont. Gen. Div.); *Stoewner v. Hanneson*, [1992] O.J. No. 697, 1992 CarswellOnt 3695 (Ont. Gen. Div.); and *Trembath v. Trembath*, [1993] O.J. No. 202, 1993 CarswellOnt 3974 (Ont. Gen. Div.).)

Defendants entitled to judgment in accordance with the settlement effected between the parties. Action dismissed without costs and Plaintiff to execute a full and final release of the Defendants.

McRandall v. Burzic, 2006 CarswellOnt 5321 (Ont. Sm. Cl. Ct.).

Motion by plaintiff that order made on June 16, 2006 by Deputy Judge MacKenzie be set aside. During pre-trial Deputy Judge MacKenzie struck plaintiff's claim for disclosing no reasonable cause of action.

The matter pre-tried by Deputy Judge Lepine who ordered particulars.

Case came before Deputy Judge MacKenzie for a third pre-trial or a second resumption of the pre-trial or what some call a "reference."

Question whether relief sought in motion properly before this court or be before the appeal court.

Court reluctant to pass judgment on Deputy Judge Little or Deputy Judge MacKenzie. Unacceptable that any judge be put in position of passing judgment on other judges of the same rank.

394705 Ont. Ltd. v. Moerenhout, 1983 CarswellOnt 452, 35 C.P.C. 258, 41 O.R. (2d) 637 (Ont. Co. Ct.).

Section 31 of the *Courts of Justice Act* grants a right of appeal to the Divisional Court "from a final order of the Small Claims Court." Order of Deputy Judge MacKenzie is a final order because it disposes of a substantive right of a party. See *Bachmann Trust Co. v. Singer*, [2005] O.J. No. 612, 2005 CarswellOnt 9183 (Ont. Div. Ct.).

Motion dismissed. Costs in the cause.

Greeley v. Town Council for Conception Bay South (Town), 2006 CarswellNfld 194, 2006 NLTD 109, 779 A.P.R. 254, 258 Nfld. & P.E.I.R. 254, 36 C.P.C. (6th) 280 (N.L. T.D.).

Powers of settlement conference judge. Settlement conference judge dismissed appellant's claim against respondent on basis limitation period expired. Judge did not have power to dismiss without considering evidence and arguments of parties which could only take place during trial. Dismissal set aside and matter remitted to Provincial Court for trial.

Moudry v. Moudry, 2006 CarswellOnt 6010, 216 O.A.C. 84, 33 R.F.L. (6th) 52 (Ont. C.A.).

Mother appealed regarding custody and contempt. Court of Appeal allowed appeal, set aside the portions of the trial judge's decision dealing with custody and contempt. Although mother clearly had an obligation to attend mini pre-trial, her failure to do so should not have resulted in her losing the right to be present at the trial. The mother was denied the right to be heard as she could not participate at the trial or give evidence.

Appellant denied right to be heard, fundamental to our justice system, as she could not participate at the trial or give evidence. See *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, EYB 1987-67731, 1987 CarswellQue 89, 1987 CarswellQue 94, 43

D.L.R. (4th) 1, 78 N.R. 201, [1987] 2 S.C.R. 219, 28 Admin. L.R. 239, 9 Q.A.C. 161, 87 C.L.L.C. 14,045 (S.C.C.), at para. 46.

Enns v. Caithcart, 2006 CarswellSask 131, [2006] S.J. No. 145, 2006 SKQB 102, 277 Sask. R. 1, 30 C.P.C. (6th) 135 (Sask. Q.B.).

Pre-trial conference respecting two actions between parties held and agreement respecting all outstanding issues negotiated and signed by parties. Party brought application for summary judgment based on agreement reached at pre-trial conference. Application dismissed with leave to bring further application. Since party did not seek resumption of pre-trial conference but sought instead judicial ruling respecting agreement, judge presiding over reconvened pre-trial conference had no jurisdiction to make any judicial rulings that were binding on parties except those of trial management nature.

IPL Inc. c. Hofmann Plastics Canada Inc., 2006 CarswellNat 3648, 2006 CF 1343 (F.C.).

Pre-trial procedures. Motion dismissed. Court may try issues separately where it is of opinion that doing so will lead to just result in most expeditious and economical way. Court could not draw conclusion at this stage of proceedings that patent was invalid.

Brar v. Trevren Enterprises Ltd., 2008 CarswellBC 290, 2008 BCPC 18 (B.C. Prov. Ct.).

At settlement conference to be held on November 15, 2007 neither of named claimants attended, nor did anyone attend on behalf of corporate claimant. Claim dismissed.

Failure of claimants to appear at settlement conference not wilful, but inadvertent. They acted promptly in taking steps to set the order aside.

Applicant must also satisfy court claim worthy of investigation. Claimants would not succeed in action for return of deposit. Application to set aside dismissal order dismissed.

Canada (Attorney General) v. Ketenjian (2007), 2008 CarswellOnt 1356 (Ont. Div. Ct.).

Respondent Attorney General of Canada awarded judgment in Small Claims Court against appellant Ketenjian (self represented on this appeal), for $3,167.82, plus postjudgment interest for monies owing for an outstanding Canada-Ontario integrated student loan issued January 7, 2005.

Judgment given by Deputy Judge by endorsement at a settlement conference. She also struck Mr. Ketenjian's defence and claim without leave to amend at that time, pursuant to Rule 13.05(1) and (2) of the *Small Claims Court Rules*. No real defence to the Attorney General of Canada's claim. Deputy Judge had jurisdiction to make endorsement she made.

Appeal dismissed.

Oz Merchandising Inc. v. Lianos (2007), 2007 CarswellOnt 2463, 49 C.P.C. (6th) 158, [2007] O.J. No. 1565 (Ont. S.C.J.).

Plaintiff sought to set aside a prior order by a case management master dismissing its action for failure to file a settlement conference memorandum, which was not filed due to change of plaintiff's solicitors. The default judgment was set aside.

There was no real prejudice to defendant apart from loosing benefit that accrued from default. Justice could not be achieved where one party seeks to take advantage of an honest mistake of the other, particularly where the party who enjoys the benefit of a default judgment resulting from something as simple as the failure to file a settlement conference memorandum.

Jacobs v. Ottawa Police Services Board (2008), 2008 CarswellOnt 1635, 234 O.A.C. 140 (Ont. Div. Ct.).

The plaintiff appealed a decision of a Small Claims Court judge in which he dismissed her claim as disclosing no cause of action at a settlement conference. Appeal allowed. A judge conducting a settlement conference may make any order relating to the conduct of the action

that the court could make. The word "conduct" suggests that such orders be limited to procedural issues, not substantive issues unless on consent. In the absence of the consent of the parties at the settlement conference the trial judge exceeded his jurisdiction.

R. v. Gregoire, 2008 CarswellOnt 3377, 2008 ONCA 459, [2008] O.J. No. 2261 (Ont. C.A.); leave to appeal refused (2009), [2008] S.C.C.A. No. 489, 2009 CarswellOnt 436, 2009 CarswellOnt 437, 395 N.R. 383 (note) (S.C.C.).

Judges who conduct pre-trials should avoid conducting the trial. However, it is not per se reversible error to do so. It is possible for a pre-trial judge to preside over the trial where there is the absence of any clear objection from counsel and prejudice.

R. v. Li (2008), 2008 CarswellOnt 1568, 231 C.C.C. (3d) 563 (Ont. S.C.J.).

As part of the application, the accused sought the notes of the judges who presided at the two pre-trials. The accused submitted that the records would shed some light on why a second pre-trial was necessary. Application dismissed. The actions of a pre-trial judge, including note-taking, enjoyed complete immunity. This was not a case where there was no other extrinsic evidence to establish the pre-trial information, and neither was this an exceptional case where privilege must give way to ensure confidence in the administration of justice.

Sabo v. Clément, 2008 CarswellYukon 44, 2008 YKCA 6, 436 W.A.C. 7, 259 B.C.A.C. 7 (Y.T. C.A.).

Plaintiff brought action against various government officials in relation to alleged meteorite found by plaintiff. Case management judge who presided over ten case management conferences refused to become involved in plaintiff' allegations at last conference. Plaintiff applied to have case management judge recuse himself from case on grounds of bias or reasonable apprehension of bias. Case management judge dismissed plaintiff's recusal motion and plaintiff appealed. Appeal dismissed.

Informed person would not conclude that it was more likely that case management judge would not decide case fairly. Judge explained his refusal to become involved in plaintiff's allegations of misconduct on basis that cases could be sidetracked by such allegations. Judge made every effort to explain process and rules to plaintiff; if plaintiff misunderstood judge's comments, it could not be laid at court's feet. Although case management judge did not err in restricting his consideration to last conference, there was no basis for allegations of bias in transcripts of earlier conferences either.

Landmark Realty Corp. v. 0763486 B.C. Ltd., 2009 BCSC 810, 2009 CarswellBC 1606 (B.C. S.C.).

Petitioner sought judicial review of order made by a Provincial Court judge during a mandatory Small Claims settlement conference conducted under Rule 7 of the *Small Claims Rules*. Petitioner contended settlement conference judge exceeded his jurisdiction by making a final order granting judgment in favour of Respondent in the absence of notice, evidence and submissions.

Judge dismissed Reply and awarded judgment in favour of Landmark for $6,477.41 plus costs. He did so under the authority of Rule 7(14)(i) of the *Small Claims Rules*:

> (14) At a settlement conference, a judge may do one or more of the following: . . .
>
> (i) dismiss a claim, counterclaim, reply or third party notice if, after discussion with the parties and reviewing the filed documents, a judge determines that it
>
> (i) is without reasonable grounds,
>
> (ii) discloses no triable issue, or
>
> (iii) is frivolous or an abuse of the court's process; . . .

Provincial Court judge is entitled to deference in the exercise of his or her discretion.

Appropriate standard of review in this case is reasonableness.

Proceedings in Small Claims Court are designed to be relatively simple and affordable, recognizing that many litigants are self-represented but are still governed by substantive law and the *Small Claims Act* and *Rules*.

Obligation on settlement conference judge to facilitate the settlement process, ensure that all legal issues are properly canvassed and treat all parties fairly, particularly where a litigant is self-represented.

Judge made order on his own motion, after discussing the case with the parties.

Rule 7(14) does not permit a settlement conference judge to dismiss a claim against a party where there is a factual dispute which must be determined through the receipt of evidence.

Decision by settlement conference judge to dismiss the Developer's Replay not "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir* New Brunswick, 2008 SCC 9 at para. 47), and is therefore unreasonable. Decision quashed and the matter remitted back to the Provincial Court for trial.

Aronowicz v. EMTWO Properties Inc., 64 B.L.R. (4th) 163, 2010 ONCA 96, 2010 CarswellOnt 598, *(*sub nom. *Aronowicz v. Emto Properties Inc.)* 316 D.L.R. (4th) 621, *(*sub nom. *Aronowicz v. Emto Properties Inc.)* 258 O.A.C. 222, [2010] O.J. No. 475, 98 O.R. (3d) 641 (Ont. C.A.).

Proper test for summary judgment, as articulated in *Irving Ungerman Ltd. v. Galanis* (1991), 1991 CarswellOnt 370, 83 D.L.R. (4th) 734, 20 R.P.R. (2d) 49 (note), 1 C.P.C. (3d) 248, *(*sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176, 4 O.R. (3d) 545, [1991] O.J. No. 1478 (Ont. C.A.), at pp. 550-551, is whether there is a genuine issue of material fact that requires a trial for its resolution. See also *Aguonie v. Galion Solid Waste Material Inc.* (1998), [1998] O.J. No. 459, 156 D.L.R. (4th) 222, 17 C.P.C. (4th) 219, 1998 CarswellOnt 417, 107 O.A.C. 114, 38 O.R. (3d) 161 (Ont. C.A.) and *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 20 R.P.R. (3d) 207, 1998 CarswellOnt 3202, 164 D.L.R. (4th) 257, 111 O.A.C. 201, [1998] O.J. No. 3240, 26 C.P.C. (4th) 1 (Ont. C.A.).

See *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 CarswellAlta 398, 2008 CarswellAlta 399, [2008] S.C.J. No. 14, *(*sub nom. *Lameman v. Canada (Attorney General))* 372 N.R. 239, [2008] 5 W.W.R. 195, 2008 SCC 14, [2008] 2 C.N.L.R. 295, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, *(*sub nom. *Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372, *(*sub nom. *Lameman v. Canada (Attorney General))* 429 A.R. 26, *(*sub nom. *Lameman v. Canada (Attorney General))* 421 W.A.C. 26, 86 Alta. L.R. (4th) 1 (S.C.C.) and *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 39 C.P.C. (4th) 100, 1999 CarswellOnt 3172, 1999 CarswellOnt 3171, [1999] S.C.J. No. 60, 178 D.L.R. (4th) 1, 15 C.C.L.I. (3d) 1, [1999] 3 S.C.R. 423, 49 B.L.R. (2d) 68, 247 N.R. 97, 126 O.A.C. 1, [2000] I.L.R. I-3741 (S.C.C.). Defendants moved for summary judgment under rule 20.04 and for the determination of a question of law under rule 21.01(1)(a).

Generally courts reluctant to determine unsettled matters of law at a pre-trial stage — including on motions for summary judgment, on theory new or important questions of law should not be determined on an incomplete factual records. See *e.g.*, *Romano v. D'Onofrio* (2005), 262 D.L.R. (4th) 181, [2005] O.J. No. 4969, 77 O.R. (3d) 583, 2005 CarswellOnt 6725 at para. 7 (Ont. C.A.) and *Bendix Foreign Exchange Corp. v. Integrated Payment Systems Canada Inc.* (2005), [2005] O.J. No. 2241, 2005 CarswellOnt 2224, 18 C.P.C. (6th) 15 at para. 6 (Ont. C.A.).

Court may determine question of law on motion for summary judgment if it has the necessary undisputed factual record before it, is in just as good a position as the trial judge would be to do so, and is satisfied the only genuine issue is a question of law. See *e.g.*, *Bader v. Rennie* (2007), [2007] O.J. No. 3441, 2007 CarswellOnt 5778, 229 O.A.C. 320 at para. 22 (Ont. Div. Ct.); additional reasons at (2008), 2008 CarswellOnt 700, 233 O.A.C. 390 (Ont.

Div. Ct.); *Robinson v. Ottawa (City)* (2009), 2009 CarswellOnt 280, 55 M.P.L.R. (4th) 283 at paras. 63-64 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 2669 (Ont. S.C.J.); *Alexis v. Darnley*, 79 C.P.C. (6th) 10, 2009 ONCA 847, 2009 CarswellOnt 7518, 259 O.A.C. 148, [2009] O.J. No. 5170, 100 O.R. (3d) 232 (Ont. C.A.) at para. 19; leave to appeal refused 407 N.R. 397 (note), 2010 CarswellOnt 2638, 2010 CarswellOnt 2637, 271 O.A.C. 399 (note) (S.C.C.).

Attornment is when a person appears as a defendant in a court that would not ordinarily have personal jurisdiction over the respondent and pleads to the merits of an applicant's case. The appearance and pleading on the merits taken as a waiver of any objection to the court's personal jurisdiction over defendant. A party who attorns is still *not* prevented from raising the issue of the proper forum: *Follwell v. Holmes*, [2006] O.J. No. 4387, 2006 CarswellOnt 6776 (Ont. S.C.J.), where the court found Nicaragua (a non-reciprocating jurisdiction) to be a more appropriate jurisdiction to hear case than Ontario, and stayed the Ontario case.

Tiwana v. Sandhu, 2010 ONCA 592, 2010 CarswellOnt 6822, [2010] O.J. No. 3862 (Ont. C.A.).

Husband was ordered on three different occasions before three different judges to make financial disclosure. Motion judge gave husband one last chance but he failed again to do so. Motion to strike pleadings was heard *ex parte* and was successful. Court of Appeal stated that the decision to strike pleadings and determine the parameters of trial participation was discretionary that deserved deference on appeal when exercised on proper principles. Ordinarily, striking any pleadings on *ex parte* basis where that party purports to have made required disclosure was practice that Court of Appeal could not endorse, preferring that striking order be on notice to affected party so that he or she could explain or assert compliance with prior disclosure order. Compare with *Stephens v. Stephens*, 2010 ONCA 586, [2010] O.J. No. 3765, 2010 CarswellOnt 6690, 89 R.F.L. (6th) 260, 324 D.L.R. (4th) 169 (Ont. C.A.).

Watch Lake North Green Lake Volunteer Fire Department Society v. Haskins, 2010 CarswellBC 1605, 2010 BCPC 114, 71 B.L.R. (4th) 101 (B.C. Prov. Ct.).

Former directors acted in good faith and within scope of their authority. The court had jurisdiction to hear application to dismiss proceedings. Rule 16(6)(o) of B.C. *Small Claims Rules* gave authority to dismiss proceedings. Fact that application brought prior to settlement conference not fatal.

Elliott v. Turbitt, 2011 ONSC 3637, 2011 CarswellOnt 6117, [2011] O.J. No. 3116 (Ont. Master).

Pre-trial procedures. Severance. Of actions. The defendants brought a motion for the severance of a counterclaim from the main action. The motion was granted. This was a rare case in which the relief claimed was appropriate. The plaintiffs were guilty of excessive delay and did not appear to be serious about pursuing the action. The result of the counterclaim might resolve the main action.

A recent decision from the U.S. District Court of Montana examines when a court can compel settlement after a party settles in principle but then reconsiders before executing a written agreement. See *U.S. Fid. & Guar. Co. and Cont'l Ins. Co. v. Soco W., Inc.* The decision also highlights the problems that occur when clients and their counsel fail to clearly communicate about the details of settlement agreements. A party is bound to a settlement agreement if he or she manifested assent to the terms and did not manifest an intent not to be bound. The district court stated, "It is presumed that an attorney-of-record who enters into a settlement agreement had authority to do so."

Kedzior v. Pond, 2014 ONSC 6157, 2014 CarswellOnt 14889 (Ont. Div. Ct.).

The Appellant appealed from an order of the deputy judge as well as a putative appeal claimed as alternate relief from the order of the deputy judge of court dismissing appellant's claim at a settlement conference. The deputy judge had dismissed the appellant's claim in action as a settlement conference. The Respondents sought costs in their favour, either on a substantial or partial indemnity basis. The Respondents sought an answer to the question of whether they were entitled to costs in view that their counsel had argued their case on appeal on a *pro bono* basis. No offers to settle within the meaning of the *Rules of Civil Procedure* were made by either party. $2,500 award of costs on a *pro bono* basis. Dicta from the Ontario Court of Appeal in *1465778 Ontario Inc.*

Rana v. Unifund Assurance Co., 2014 ONCA 711, 2014 CarswellOnt 14441 (Ont. C.A.); leave to appeal refused 2015 CarswellOnt 3023, 2015 CarswellOnt 3024 (S.C.C.).

Appellant appealed order requiring her to file a fresh Statement of Claim. Appellant's Small Claims Court Claim improper because it included references to settlement discussions. Procedural issues would be avoided with a fresh claim and appellant not in any way prejudiced. The court has jurisdiction over its own process and it was within the discretion of the motion judge to make order she did. Appeal dismissed with costs.

Discussions at a settlement conference are intended to be frank and without prejudice. Accordingly, they are privileged, and Rule 13.03(4) prohibits disclosure of the discussions to others "except as otherwise provided or with the consent of the parties" until after the action has been disposed of. The rule does not say whether the trial judge is included within the "others" referenced, or whether it simply addresses disclosure to others such as friends and family of the litigants, or other members of the general public.

In *Bell Canada v. Olympia & York Developments Ltd.*, 1994 ONCA 239, 1994 CarswellOnt 520, 17 O.R. (3d) 135, 26 C.P.C. (3d) 368, 111 D.L.R. (4th) 589, 70 O.A.C. 101, [1994] O.J. No. 343 (Ont. C.A.), it was held that pretrial conference discussions cannot be disclosed to the trial judge, even on consent. In *Lucy v. Kitchener (City)*, 2013 CarswellOnt 381, 6 M.P.L.R. (5th) 285 (Ont. Sm. Cl. Ct.), it was held that settlement conference discussions should not be disclosed to the trial judge during costs submissions. In *Filippova v. Arvato Digital Services, Canada Inc.* (August 1, 2012), Doc. Kitchener 1212/11, [2012] O.J. No. 3623 (Ont. Sm. Cl. Ct.), the trial judge declined to hear the plaintiff's intended disclosure of the settlement conference judge's statements concerning the likely outcome of the case. The parties are responsible for their own assessments of the case apart from any comments by the settlement conference judge. In that case the cost consequences under Rule 14.07(2) were triggered by a defence offer and the comments of a settlement conference judge were irrelevant to the trial judge's costs ruling.

Hakoopian v. Konrad, 2017 CarswellOnt 2728, J. Prattas D.J. (Ont. Sm. Cl. Ct.)

Motion to dismiss the plaintiff's claim pursuant to Rule 12.02 (1) (a) and (c) and paragraph 1 of Rule 12.02 (2) because the plaintiff has failed to produce an expert medical report to establish the standard of care and any breach by the defendant which caused the plaintiff's damages.

The settlement conference judge merely noted that "it is useful" for the parties "to rely on expert report for trial". Therefore, the plaintiff did not fail to comply with a court order. The availability of a summary judgment in our court was considered by the Ontario Court of Appeal in *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.); additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.).

It would be a denial of natural justice to have the Plaintiff's Claim dismissed at this stage. The plaintiff is self-represented and he has not abandoned his action. Motion dismissed.

The purpose of a pre-trial conference is to provide parties with a forum to obtain an appraisal from a judge of their respective positions on the outstanding issues between them, and to provide an opportunity to openly negotiate a resolution of these issues.

The Rules of Civil Procedure do not expressly prohibit the pre-trial conference judge from hearing a subsequent summary judgment motion in the same matter. In *Royal Bank of Canada v. Hussain*, 2016 ONCA 637, 2016 CarswellOnt 13307, 133 O.R. (3d) 355, 403 D.L.R. (4th) 376, 352 O.A.C. 375 (Ont. C.A.), the Ontario Court of Appeal held that such a prohibition should be implied into the Rules to ensure the continued productivity of pre-trial conferences.

The Court of Appeal recognized that the policy rationale for these Rules (to ensure that parties are free to engage in without prejudice discussions at pre-trial conferences) clearly supports that they were intended to apply to these circumstances as well.

While the Court of Appeal in *Hussain* restricted the prohibition to subsequent summary judgment motions, there is a case that the prohibition should also apply to other subsequent motions that may dispose of an action or application, such as:

- Rule 21.01(1)(a) motions for the determination of a question of law before trial;
- Rule 21.01(1)(d) abuse of process motions; and
- Rule 24.01 motions to dismiss an action for delay.

In addition to information about the merits of the proceeding, the pre-trial conference judge may be privy to information about the parties and their conduct both within and outside the proceedings.

(4) Further Disclosure Restricted — Except as otherwise provided or with the consent of the parties (Form 13B), the matters discussed at the settlement conference shall not be disclosed to others until after the action has been disposed of.

(5) Subrule (4) does not prevent the review, by a regional senior judge or a person designated by a regional senior judge, of an audio recording by the court of a settlement conference, for the purpose of reviewing a complaint made under section 33.1 of the *Courts of Justice Act*.

(6) [Repealed O. Reg. 78/06, s. 27.]

O. Reg. 78/06, s. 27; 108/21, s. 15

13.04 Recommendations to Parties — The court may make recommendations to the parties on any matter relating to the conduct of the action, in order to fulfil the purposes of a settlement conference, including recommendations as to,

(a) the clarification and simplification of issues in the action;

(b) the elimination of claims or defences that appear to be unsupported; and

(c) the admission of facts or documents without further proof.

O. Reg. 78/06, s. 27

Commentary: Mandatory attendance is prescribed. Both the representative and party must be present personally at the settlement conference. Telephone conference under subrule 1.07 can also ensure personal presence.

If the person to approve a settlement is not present, that person must be available by "ready telephone access."

If a party fails to attend, the sanctions include costs and ordering an "Additional Settlement Conference." Failure by the defendant to attend the additional settlement conference can result in the striking of the defence and an order dismissing the defendant's claim. The plain-

tiff may be allowed to prove their claim for a liquidated amount, and obtain judgment. The powers to make orders under subrule 13.05(2)(a)(v) will be invoked with respect to dismissing the claim or striking the defence to a defendant's claim.

Since July 1, 2006 for matters up to $3,500, the parties may file written consent in advance of the settlement conference date to have a mediator grant Judgment, should a settlement not be reached (subrule 13.05(4)).

The mediator cannot be the trial judge even on consent. Matters "discussed" may not be disclosed until the action is disposed of (subrule 13.02(4)).

A claim may not be withdrawn after a settlement conference unless there is consent or an order is made at a motion.

The settlement conference judge can make recommendations on the Settlement Conference Memorandum (subrule 13.06). They can endorse various Orders (subrules 13.05(1), (2) and (4)) on the Endorsement Record.

Notice with respect to setting the matter down and paying the trial fee is contained in the Settlement Conference Endorsement Record. The clerk only sends the Endorsement Record to absent parties.

The costs sanction at each settlement conference is $100 exclusive of disbursements. Disbursements might include accommodation expenses in addition to court fees and parking or travel expenses.

Section 29 of the *Courts of Justice Act* only applies if there is a further "need" to penalize someone. The limit of 15 per cent of the amount claimed applies to each costs award.

The $100 can be increased where "the court orders otherwise because there are special circumstances." A costs award under rules 13 or 15 is not considered part of the 15 per cent limit set by section 29 in an award of costs after trial.

It is worthwhile considering the purposes of the former rule for Discovery process since in many ways the pre-trial process in the Small Claims Court serves the same purposes:

1. to enable the examining party to know the case to be met;
2. to enable the procuring of admissions which will dispense with other formal proof of the case;
3. to procure admissions that will destroy an opponent's case;
4. to facilitate settlement, pre-trials and trials;
5. to eliminate or narrow issues;
6. to avoid surprises at trial; and
7. to request parties to provide witness lists within specified time.

See *Modriski v. Arnold*, [1947] O.W.N. 483 (Ont. C.A.) and *Malofy v. Andrew Merrilees Ltd.* (1982), 37 O.R. (2d) 711 (Ont. Div. Ct.).

At or after the pre-trial conference, the clerk must provide a Notice to the pre-trial parties stating that the parties must request a trial date if the action is not disposed of within 30 days after the pre-trial conference, and pay the fee required for setting the action down for trial. At the end of the pre-trial, the judge or designated person may file with the clerk a memorandum summarizing the pre-trial conference. A copy of the memorandum must be given to the trial judge. This document is public record.

Green v. Green (August 19, 2008), Doc. Toronto 110/08 (Ont. Div. Ct.)

The motion to adjourn to obtain a transcript of the trial management conference was denied. The presence of the court reporter at the conference is a practice adopted when a litigant is unrepresented. The transcript cannot be ordered without the permission of the conference

judge. To grant an adjournment based on the hope that the permission would be granted makes no sense.

Rule 38.15 of the *Rules of Civil Procedure* does not assist. It contemplates a transcript of oral evidence — nothing more. No one gave oral evidence at the case management conference.

Neddow v. Weidemann, 2008 CarswellAlta 886, 2008 ABQB 378, 56 C.P.C. (6th) 193, 92 Alta. L.R. (4th) 331 (Alta. Q.B.)

Defendant's lawyer drafted order which plaintiff's lawyer refused to sign. Defendant brought an application for advice and directions on signing court order resulting from conference. Application granted. Plaintiff's lawyer had professional obligation to sign the court order as there were no circumstances, such as fraud, lack of capacity or the form of order being inaccurate, which required fresh instructions from the client.

Elguindy v. St. Joseph's Health Care London, 2016 ONSC 2847, 2016 CarswellOnt 8374, [2016] O.J. No. 2742, L. A. Patillo J. (Ont. Div. Ct.).

Application by Emad Elguindy (the applicant) for judicial review of the Deputy Judge.

The Order was made at a settlement conference and provides for, among other things, third party production of the applicant's medical records, production of the reports the Applicant intends to rely on at trial to address the standard of care of the defendants within 90 days, amending the title of proceedings to correct the defendants' names and setting the action down for trial.

The Order is interlocutory. While there is no appeal from an interlocutory order of the Small Claims Court, judicial review is available, but only with respect to the narrow issue of jurisdiction: *Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.).

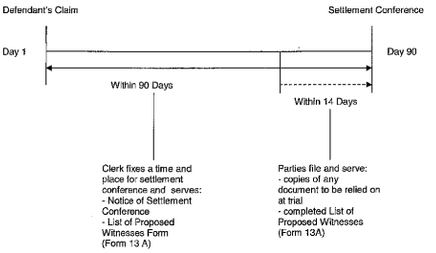
A Small Claims Court Judge derives his or her jurisdiction from stature. The jurisdiction of the Small Claims Court is set out in the *Courts of Justice Act*, R.S.O. 1990, Chap. C.43 (the *CJA*), ss. 22 to 33.1 and in the Rules of the Small Claims Court, O. Reg. 258/98, as amended (the SCC Rules). The procedure to be followed in the Small Claims Court is set out in the SCC Rules: *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.); additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.).

There is no jurisdiction in the Small Claims Court to issue a third party order for production.

The judge did not have the jurisdiction to issue that portion of the Order requiring third party production of the applicant's medical records.

The applicant's application is therefore allowed in part. Only that portion of the Order providing for the production of medical records from the third party doctors and hospitals is set aside, without prejudice to the respondents requesting an order for production of the third party records from the applicant at a further case conference.

A SMALL CLAIMS COURT CLAIM - 2006 (Amended Rules)
MANDATORY SETTLEMENT CONFERENCES - Rule 13
A Case Flow Chart



Settlement Conference

Purposes of Settlement Conference:
- resolve or narrow issues
- expedite disposition
- encourage settlement
- assist parties in effective preparation for trial
- provide full disclosure

At Settlement Conference: clerk will provide parties with a notice stating that one of the parties must request a trial date if the matter is not disposed of in 30 days

After Settlement Conference:

Orders will be endorsed (standardized Endorsement Record)
Clerks will serve order on parties not in attendance
Court shall prepare a memorandum summarizing:
- recommendations
- issues still in dispute
- matters agreed on by parties
- relevant, evidentiary matters
- information relating to the scheduling of the remaining steps

Parties will be given, as appropriate:
- Memorandum
- E.R
- What To Do Next form

Prepared by: patti cross
Office of the Chief Justice
March 2, 2006

Case Law: *Marcon Custom Metals Inc. v. Arlat Environmental Inc.* (2001), 2001 CarswellOnt 2928 (Ont. S.C.J.).

At pre-trial for debt action defendants sought to amend defence and counterclaim and add new parties. Plaintiffs failed to show prejudice not compensable in costs. Amendment allowed on terms including immediate payment of solicitor-client costs of joinder and amendment.

Ryan v. Charters Estate (2001), 2001 CarswellOnt 4347 (Ont. S.C.J.).

Trial judge dismissed motion to set aside his judgment on basis he had conducted pretrial conference. Whether meeting between trial judge and counsel and clients was pretrial conference and, if so, whether new trial should be ordered were issues to be addressed on appeal.

Cridge v. Turner, 2006 CarswellBC 578, 2006 BCSC 407 (B.C. S.C.).

In 2004, Cridge brought action in Small Claims Court for return of alleged $1,000 retainer held by Turner, a lawyer. Turner pled the $1,000 was provided as security for legal fees of Cridge's previous lawyer. At a second settlement conference, Challenger J. dismissed the action. Cridge asserted Challenger J. held a bias against her as a "lay litigant" and that she should therefore disqualify herself.

Test to be applied in determining whether or not a reasonable apprehension of bias exists was set out by the Supreme Court of Canada in *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434, 1976 CarswellNat 434F, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.) at para. 40. The test has subsequently been affirmed in a number of cases, including *R. v. S. (R.D.)*, 1997 CarswellNS 301, 1997 CarswellNS 302, [1997] S.C.J. No. 84, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.).

Standard to be applied when reviewing preliminary dismissal of claim by a Provincial Court judge at a settlement conference is that of "patent unreasonableness." *Markel Insurance Co. of Canada v. Kamloops Freightliner Ltd.*, 1997 CarswellBC 1094 (B.C. S.C.); *Atlas Van Lines (Canada) Ltd. v. Strachan*, 1996 CarswellBC 709 (B.C. S.C.).

Decision of judge not patently unreasonable. Relief sought denied.

Kee v. MacDonald, 2006 CarswellPEI 32, 2006 PESCTD 35, 781 A.P.R. 202, 259 Nfld. & P.E.I.R. 202 (P.E.I. T.D.).

Pre-trial procedures. Consolidation or hearing together. Hearing together or sequentially.

Government brought motion to consolidate actions. Motion granted.

Jamani v. Encore Promotions Ltd., 2005 CarswellBC 2032, 2005 BCSC 1211 (B.C. S.C.).

Claim against corporation dismissed at settlement conference. Claimant unrepresented at time and appealing dismissal. Appeal adjourned. Small claims court having jurisdiction to dismiss claim. Issue whether claimant properly advised of arguments of corporation prior to settlement conference. Appeal adjourned for further evidence on this issue.

Greeley v. Town Council for Conception Bay South (Town), 2006 CarswellNfld 194, 2006 NLTD 109, 779 A.P.R. 254, 258 Nfld. & P.E.I.R. 254, 36 C.P.C. (6th) 280 (N.L. T.D.).

Plaintiff commenced action in Small Claims Division of Provincial Court. Judge presiding at settlement conference dismissed action on ground that limitation period expired. Plaintiff disputed jurisdiction to dismiss claim. Plaintiff appealed. Appeal allowed. Matter remitted for trial. Object and purpose of settlement conference is to attempt to reach settlement of as many issues as possible with aid of judge. Judge did not have power to dismiss claim without considering evidence and arguments which could only take place during trial of action.

Hawkes v. Aliant Telecom/Island Tel, 2004 CarswellPEI 29, 2004 PESCAD 5 (P.E.I. C.A.).

Appeal of decision of Prothonotary striking out a Statement of Claim on the ground that it discloses no reasonable cause of action. Appeal allowed. The decision of the Prothonotary to strike out the Plaintiff's claim was a quasi-judicial function performed within a required step in the proceeding. While the impugned act of the Prothonotary occurred within a pre-trial conference as contemplated by the Small Claims Section Rules, and as such there was no record, there should be a record regarding this kind of matter. This was a substantive decision that terminated the Plaintiff's claim. A hearing and decision regarding that portion of a pre-trial conference should be recorded.

Wood v. Wong, 2011 BCSC 794, 2011 CarswellBC 1507 (B.C. S.C.).

There was an appeal from the Provincial Court of British Columbia (Civil Claims Division). The judge dismissed the appellant's application to cancel Order for Seizure and Sale and to set aside an Affidavit of Non-Compliance. The case proceeded to mediation. The parties entered into a Mediation Agreement. Wong filed an Affidavit of Non-Compliance with the Provincial Court deposing he had not received payment.

Wood brought an application to cancel the Order.

The application was dismissed. The judge accepted that Wood was in breach of the Mediation Agreement.

Wassouf v. Executive Stay Inc., 2018 CarswellOnt 1323 (Ont. L.R.B.).

On September 12, 2017, the parties signed Minutes of Settlement ("MOS") in Brampton Small Claims Court. In exchange for monetary consideration, the applicant agreed to withdraw this application and settle two small claim court matters. Substantial factual overlap between this application and the small claims court actions.

13.05 (1) Orders at Settlement Conference — A judge conducting a settlement conference may make any order relating to the conduct of the action that the court could make.

(2) Without limiting the generality of subrule (1), the judge may,

(a) make an order,

(i) adding or deleting parties,

(ii) consolidating actions,

(iii) with written reasons, staying or dismissing the action,

(iv) amending or striking out a claim or defence under subrule 12.02(1),

(v) [Repealed O. Reg. 44/14, s. 12(3).]

(vi) directing production of documents,

(vii) changing the place of trial under rule 6.01,

(viii) directing an additional settlement conference under subrule 13.02(3), and

(ix) ordering costs; and

(b) at an additional settlement conference, order judgment under subrule 13.02(6).

Commentary: The settlement conference judge may make any order relating to the conduct of the action that the court could make, including the specific orders listed in Rule 13.05(2). Such orders may not be needed in every case and the settlement conference endorsement or memorandum may simply note that the conference was held and give an estimate of the trial time needed if the parties fail to settle their dispute.

Probably the most common form of settlement conference order is an order for the production of additional documents which a party may have failed to produce previously as attachments either to a pleading under Rules 7.01(2)2, 9.02(1)2 or 10.01(4)2, or to the List of Proposed Witnesses under Rule 13.03(2). Note that those disclosure rules only apply to documents on which the claim or defence is based or on which the party intends to rely at trial. Reliance is a narrower scope of disclosure than relevance: *Perini Ltd. v. Toronto Parking Authority*, 1975 CarswellOnt 916, 6 O.R. (2d) 363, 52 D.L.R. (3d) 683 (Ont. C.A.).

The settlement conference provides an opportunity for the parties to request additional documents which were not required to be produced under those rules. Any party considering such a request should make the request to the party in question prior to the conference. Such matters may be worked out on consent in many cases. Any contested document production requests can be put to the settlement conference judge. The requesting party will need to establish that the requested documents exist, are within the possession, control or power of the other party and should be produced on the basis of relevance or materiality.

If the parties intend to commission and serve expert reports but have not yet done so, the settlement conference judge may order deadlines for service of such reports. It is doubtful that the court has jurisdiction to order a party to commission and serve an expert report that the party had no intention of obtaining, since the Small Claims Court has no jurisdiction to make an injunction or mandatory order: *Moore v. Canadian Newspapers Co.*, 1989 CarswellOnt 423, 69 O.R. (2d) 262, 37 C.P.C. (2d) 189, 60 D.L.R. (4th) 113, 34 O.A.C. 328, [1989] O.J. No. 948 (Ont. Div. Ct.). Particularly with self-represented parties, such orders raise practical problems which may be insurmountable. For example, the party may be unable to afford to retain a qualified expert or may not know how to go about doing so.

Recent cases suggest that the current practice of settlement conference judges is to recommend or encourage parties to obtain expert evidence in appropriate cases rather than to order them to obtain such evidence: *Hakoopian v. Konrad*, [2017] O.J. No. 927 (Ont. Sm. Cl. Ct.); *Schafer v. Wagner*, [2016] O.J. No. 6526 (Ont. Sm. Cl. Ct.). This is consistent with the absence of any provision in the *Small Claims Court Rules* precluding in-person expert evidence in the absence of prior service of an expert report: *Riddell v. Apple Canada Inc.*, 2016 ONSC 6014, 2016 CarswellOnt 14847, [2016] O.J. No. 4934 (Ont. Div. Ct.) at para. 21; affirmed 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.); leave to appeal refused 2018 CarswellOnt 9253, 2018 CarswellOnt 9254 (S.C.C.). Even under Rule 53.03 of the *Rules of Civil Procedure*, which don't apply in Small Claims Court, certain forms of expert evidence may be called by in-person evidence at trial without advance service of a report: *Hervieux v. Huronia Optical*, 2016 ONCA 294, 2016 CarswellOnt 8096, 399 D.L.R. (4th) 63, 348 O.A.C. 205 (Ont. C.A.). A common form of settlement conference order, in cases where expert evidence will be important, is to extend the time for service of any expert reports which are intended to be tendered under Rule 18.02 to more than 30 days before trial.

Under Rules 13.05(2)(a)(iii) and (iv), a settlement conference judge may make a final order under Rule 12.02, and may stay or dismiss an action in an appropriate case. See *Roskam v. Rogers Cable*, 2008 CarswellOnt 2958, 173 C.R.R. (2d) 157, [2008] O.J. No. 2049 (Ont. Div. Ct.).

Case Law: *Kedzior v. Pond*, 2014 ONSC 1561, 2014 CarswellOnt 3155, [2014] O.J. No. 1184 (Ont. S.C.J.); additional reasons 2014 ONSC 6157, 2014 CarswellOnt 14889 (Ont. Div. Ct.).

After the settlement conference judge dismissed the claim under rule 13.05(2)(a)(v), the plaintiff brought a motion to set aside that order. The motions judge ruled that he had no jurisdiction to hear such a motion because it was in substance an appeal from a final order. On appeal from the motions judge's order, Justice MacKenzie agreed that the settlement

conference judge had made a final order which could have been appealed but which the motions judge had no jurisdiction to set aside. The appeal was dismissed.

Doerr v. Sterling Paralegal, 2014 ONSC 2335, 2014 CarswellOnt 4782, [2014] O.J. No. 1732 (Ont. Div. Ct.).

Appeal from a final order made in the Small Claims Court, dismissing the appellant's action. The Appeal was allowed. Appellant Doerr had no notice in advance of the settlement hearing in which the defendant would be seeking an order dismissing her claim. The paucity of reasons given by the deputy judge for a complete and final dismissal of Doerr's claim is, in itself, a serious concern. See *R. v. Sheppard*, 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, REJB 2002-29516, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 162 C.C.C. (3d) 298, 50 C.R. (5th) 68, 210 D.L.R. (4th) 608, 633 A.P.R. 50, 284 N.R. 342, [2002] S.C.J. No. 30 (S.C.C.) at para. 55.

The Divisional Court repeatedly has emphasized that similar considerations apply to decisions of Small Claims Court, see Justice Griffiths in *Thompson v. Butkus*, 1980 CarswellOnt 829, 28 O.R. (2d) 368, 110 D.L.R. (3d) 224 (Ont. H.C.) at pp. 369-370 [O.R.]. By way of O.Reg. 44/14, ss. 12(1) and 12(16), formal amendments will be made to Rule 13.05 of the Small Claims Court rules, so as to indicate, expressly, that a judge who conducts a settlement conference and makes an order dismissing an action must do so "with written reasons".

See *Van de Vrande v. Butkowsky*, 2010 ONCA 230, 2010 CarswellOnt 1777, 99 O.R. (3d) 648, 99 O.R. (3d) 641, 85 C.P.C. (6th) 205, 319 D.L.R. (4th) 132, 260 O.A.C. 323, [2010] O.J. No. 1239 (Ont. C.A.) at paras. 17 and 20; ; additional reasons 2010 ONCA 400, 2010 CarswellOnt 3629, 85 C.P.C. (6th) 212 (Ont. C.A.), the criteria of an action being "inflammatory", "a waste of time", or "a nuisance", found in Rule 12.02(1)(c), are conceptually distinct from and in additional to the comparatively narrow grounds of an action being "frivolous", "vexatious" or "an abuse of process", referenced in Rule 21.01(3) of Ontario's *Rules of Civil Procedure*.

The Appeal was allowed. The order of the deputy judge dismissing Doerr's action against Sterling Paralegal was set aside, and the action is to proceed to trial. Rule 13.08 of Small Claims Court rules dictates that "a judge who conducts a settlement conference in an action shall not preside at trial of action".

Burke v. Lauzon Sound and Automatization Inc.; Brian Lauzon (March 4, 2016), Doc. SC-14-00132443, P. Lepsoe, Deputy Judge (Ont. Sm. Cl. Ct.).

The plaintiff sought an order for production of certain specific documents by the defendants.

There is jurisdiction in the Small Claims Court to grant the order. Will-say statements are a species of discovery. Inconsistency in the case law and practice as to whether there is any "discovery" power beyond the specific provision of Rule 13.05(2)(vi). The proper interpretation of the Rule 13.05(2)(vi) is not that it *limits* production orders to settlements conferences, but rather that it affirms that even at a settlement conference a judge may make such a mandatory order, it being one of a type, in the words of the Rule, "relating to the conduct of the action that the court could make", i.e. that the court *outside of a settlement conference* could make.

Defendants to provide copies to the plaintiff, within thirty (30) days of the date of the decision.

Ehizode v. Ivanhoe Cambridge II Inc. et al., 2018 BCPC 17, 2018 CarswellBC 230 (B.C. Prov. Ct.).

The power to dismiss a claim is normally reserved for a judge at a settlement conference but a number of decisions of this court have confirmed that this power can be exercised outside of a settlement conference. See *Lura v. Jazz Forest Products (2004) Ltd.*, 2014 BCPC 14,

2014 CarswellBC 431 (B.C. Prov. Ct.) and *Chen v. Melville*, 2014 BCPC 380, 2014 CarswellBC 4196 (B.C. Prov. Ct.). Section 19(4) of the Small Claims Court Rules states:

> (4) The Provincial Court must not order that one party in a proceeding under this Act or the rules pay counsel or solicitor's fees to another party to the proceeding.

The legislation is clear then that the Provincial Court cannot make an order for payment of legal fees. However, a distinction may be drawn between a claim for legal fees which is covered by section 19(4) and a claim to enforce a contractual agreement to pay legal fees.

Hervieux v. Huronia Optical, 2016 ONCA 294, 2016 CarswellOnt 8096, 399 D.L.R. (4th) 63, 348 O.A.C. 205 (Ont. C.A.).

Appeal from the order of the Divisional Court that allowed the respondent's appeal from the dismissal of his action, and remitted his claim back to the Small Claims Court for a hearing. The respondent failed to produce expert reports in accordance with orders made during settlement conferences on March 1 and May 31, 2013. The appellants brought a motion under r. 12.02 of the *Rules of the Small Claims Court*, O. Reg. 258/98 ("*Small Claims Court Rules*"), to dismiss the respondent's claim. A deputy judge has the jurisdiction to alter the time deadlines otherwise provided under the *Small Claims Court Rules* and even to dismiss an action. In particular, in accordance with the provisions of r. 13.05(1) and (2)(a)(vi), open to deputy judge during settlement conferences to require the respondent to provide his expert evidence to the appellants in advance of the trial. Further, under r. 13.05(2), if the circumstances warranted it, the deputy judge, with written reasons, could have stayed or dismissed the action. It would also be open to a deputy judge in the appropriate case to dismiss an action under r. 12.02 for a party's failure to comply with a court production order or any other order. Deputy judge's dismissal of the respondent's claim was an error and a breach of natural justice in the circumstances of this case. Appeal dismissed.

Creighton v. Creighton, 2019 ONSC 5706, 2019 CarswellOnt 16448, Justice R. M. Raikes (Ont. Div. Ct.)

Can a judge make an order for spousal support at a settlement conference in the absence of a filed application or supporting affidavit? The case of *Creighton v. Creighton*, 2019 ONSC 5706, 2019 CarswellOnt 16448 (Ont. Div. Ct.) answers that question in the affirmative.

The only issue before the conference judge was the husband's adjournment application and the order for support was a term of the husband's successful adjournment application. They noted that the judge could have made a costs order; made the return date peremptory on the husband; or ordered other terms, given his broad discretion where a party is delinquent with respect to financial disclosure.

Elguindy v. St. Joseph's Health Care London, 2016 ONSC 2847, 2016 CarswellOnt 8374, [2016] O.J. No. 2742, L.A. Pattillo J. (Ont. Div. Ct.)

Discovery rights at small claims court. Jurisdiction to Order Production from Non-Party.

The Superior Court asserted that, while there is no provision in the Rules of the Small Claims Court for discovery generally, Rule 13.05(2)(a)(vi) provides that a judge conducting a settlement conference may make an order relating to the conduct of an action that the court could make, including directing production of materials. As such, the Superior Court held that the Deputy Judge had jurisdiction to order the plaintiff to produce the expert reports that were intended to be relied upon at trial.

The Superior Court was careful to say, however, that Rule 13.05(2)(a)(vi) only applies in the context of a settlement conference and only permits an order for production by a party to the action as part of the settlement conference. In regard to the issue of whether the Small Claims Court has jurisdiction to order documentary production from a non-party, the Superior Court held that the Small Claims Court has no such jurisdiction.

Riddell v. Apple Canada Inc., 2016 ONSC 6014, 2016 CarswellOnt 14847, [2016] O.J. No. 4934, Nordheimer J. (Ont. Div. Ct.); affirmed 2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.); leave to appeal refused *Matthew Riddell v. Apple Canada Inc.*, 2018 CarswellOnt 9253, 2018 CarswellOnt 9254 (S.C.C.)

The Superior Court upheld the Deputy Judge's order in light of the fact that the examination of the iPhone was critical to a proper determination regarding causation of damages. In doing so, however, the Superior Court cautioned that such orders should be made sparingly and only when justice cannot possibly be done between the parties without such discovery.

The Superior Court distinguished the issues in *Riddell* from that of *Elguindy*, noting that favour is to be given to not making pre-trial orders for discovery type relief, especially when those orders seek information from non-parties to an action, as was the case in *Elguindy*. This decision was upheld by the Ontario Court of Appeal (2017 ONCA 590, 2017 CarswellOnt 10368, 139 O.R. (3d) 595, 11 C.P.C. (8th) 275 (Ont. C.A.); leave to appeal refused *Matthew Riddell v. Apple Canada Inc.*, 2018 CarswellOnt 9253, 2018 CarswellOnt 9254 (S.C.C.)).

(3) Recommendations to Judge — If the settlement conference is conducted by a referee, a judge may, on the referee's recommendation, make any order that may be made under subrules (1) and (2).

(4) Consent to Final Judgment — A judge may order final judgment at a settlement conference where the matter in dispute is for an amount under the appealable limit and a party files a consent (Form 13B) signed by all parties before or at the settlement conference indicating that they wish to obtain final determination of the matter at the settlement conference if a mediated settlement is not reached.

(5) Service of Order — Within 10 days after the judge signs an order made at a settlement conference, the clerk shall serve the order on the parties that were not present at the settlement conference in accordance with subrule 8.01(6).

O. Reg. 78/06, s. 27; 44/14, s. 12; 108/21, s. 16

13.06 Memorandum — (1) At the end of the settlement conference, the court shall prepare a memorandum summarizing,

(a) recommendations made under rule 13.04;

(b) the issues remaining in dispute;

(c) the matters agreed on by the parties;

(d) any evidentiary matters that are considered relevant; and

(e) information relating to the scheduling of the remaining steps in the proceeding.

(2) The memorandum shall be filed with the clerk, who shall give a copy to the trial judge.

O. Reg. 78/06, s. 27

Commentary: The use of the memorandum contemplated by Rule 13.06 is inconsistent and the memorandum has fallen out of use in some locations.

Where the memorandum is used, care must be taken to avoid disclosure of the settlement conference judge's views of the merits of the case. The memorandum will be seen by the trial judge and is a public document like anything else in the court file. Settlement conference discussions cannot be disclosed to the trial judge: see Rule 11.03(4) and the commentary under that rule (above). Improper disclosure to the trial judge of a settlement conference judge's opinions concerning the appropriate disposition of the case or issues within a case could justify a mistrial or an order for a new trial. Trial judges are duty-bound to provide

their own determinations of fact and law and to arrive at their own judgment in each case, and cannot defer or delegate that duty to another judge such as a settlement conference judge.

Where the memorandum is used, with or without recommendations under Rule 13.04, it should be neutrally drafted and should not leave the impression of any attempt to influence the trial judge's independent determination of the substantive issues.

13.07 Notice of Trial — At or after the settlement conference, the clerk shall provide the parties with a notice stating that one of the parties must request a trial date if the action is not disposed of within 30 days after the settlement conference, and pay the fee required for setting the action down for trial.

O. Reg. 78/06, s. 27

Commentary: Parties are encouraged to make further attempts to settle after the settlement conference if settlement at the conference is not accomplished. There is no fixed time period for any potential further settlement discussions. The reference to a 30-day period in rule 13.07 does not prevent a party from setting the action down for trial during those 30 days, but simply encourages parties to consider a 30-day period for further potential settlement discussions after the settlement conference. If no party sets the action down for trial, the action may be eligible for a clerk's dismissal order under Rule 11.1.01(2).

13.08 Judge Not To Preside At Trial — A judge who conducts a settlement conference in an action shall not preside at the trial of the action.

O. Reg. 78/06, s. 27

Case Law: *Elguindy v. St. Joseph's Health Care London*, [2017] O.J. No. 4661 (Ont. Div. Ct.).

A deputy judge who presided over the settlement conference later heard a motion under rule 12.02 and dismissed the plaintiff's claim based on non-compliance with prior orders of the court. On appeal it was held that the deputy judge was not prohibited from hearing the rule 12.02 motion by virtue of his having presided over the settlement conference.

13.09 Withdrawal of Claim — After a settlement conference has been held, a claim against a party who is not in default shall not be withdrawn or discontinued by the party who brought the claim without,

(a) the written consent of the party against whom the claim is brought; or

(b) leave of the court.

O. Reg. 78/06, s. 27

Case Law: *Glycobiosciences Inc. v. MarcM Consulting Canada*, 2015 CarswellOnt 12769, [2015] O.J. No. 4440 (Ont. Sm. Cl. Ct.); further proceedings 2015 CarswellOnt 14824, [2015] O.J. No. 5041 (Ont. Sm. Cl. Ct.); further proceedings 2015 CarswellOnt 15366, [2015] O.J. No. 5226 (Ont. Sm. Cl. Ct.).

One day before the trial, the defendant serve a motion asking for leave to discontinue its defendant's claim, by reason of another proceeding it had launched in the Superior Court of Justice for the same cause of action but seeking damages of $500,000. The motion was dismissed on the basis that it was brought too late, the issues in the plaintiff's claim and defendant's claim were intertwined so that *res judicata* could bar the defendant's claim in the Superior Court of Justice based on a judgment in the plaintiff's claim, and there was no evidence the alleged damages might exceed $25,000.

Tuka v. Butt, 2014 CarswellOnt 2035, [2014] O.J. No. 852 (Ont. Sm. Cl. Ct.).

On motion, the plaintiff was granted leave to discontinue her claim, without costs. The defendant was self-represented and the potential costs award would have been perhaps $100.

Ever Fresh Direct Foods Inc. v. Schindler, 2012 CarswellOnt 9843, [2012] O.J. No. 3673 (Ont. Sm. Cl. Ct.).

The plaintiff made an oral motion for leave to discontinue its claim in Small Claims Court after it issued a related claim in the Superior Court of Justice. The motion was made on the morning of the third scheduled trial date, and after the plaintiff itself had caused the two prior adjournments before retaining counsel who issued the new claim in the Superior Court of Justice. There had also been a settlement conference and a significant motion. The motion to discontinue was denied. Review of applicable case law.

Vance v. Bartlett, 2012 BCPC 266, 2012 CarswellBC 2350 (B.C. Prov. Ct.).

This is an application pursuant to Rule 8(6) of the *Small Claims Rules*, to set aside a notice of withdrawal filed in this proceeding. The notice of withdrawal was part of the settlement of a disputed claim between Mr. and Mrs. Vance and the defendant solicitor and his corporate entity.

The decisions in *Northwest Waste Systems Inc. v. Szeto*, 2003 BCPC 431, 2003 CarswellBC 3093, Dhillon J. (B.C. Prov. Ct.) and *Wilson v. Regoci*, 2009 BCPC 170, 2009 CarswellBC 1468 (B.C. Prov. Ct.), Romilly J., confirm the jurisdiction of this Court to set aside the notice of withdrawal.

On the balance of the material there are sufficient grounds in the particular context of this case to exercise my discretion to grant permission to the claimants to proceed pursuant to Rule 8(6).

Order requesting transfer of claim to the Supreme Court of British Columbia.

13.10 Costs — The costs of a settlement conference, exclusive of disbursements, shall not exceed $100 unless the court orders otherwise because there are special circumstances.

O. Reg. 78/06, s. 27

Commentary: The default position is that the parties bear their own costs of the mandatory settlement conference in Small Claims Court.

For civil cases in the Superior Court of Justice, the *Rules of Civil Procedure* provide that in the absence of a costs order by the pretrial conference judge, "the costs shall be assessed as part of the costs of the proceeding." (see rule 50.12 of the *Rules of Civil Procedure*). In other words the default position in the Superior Court of Justice is that costs of the pretrial conference are costs in the cause, to be included in the overall costs awarded to the successful party as costs of the action.

In Small Claims Court, there is no equivalent provision. Rule 13.10 merely provides that where costs of a settlement conference are awarded, they shall not exceed $100 plus disbursements, unless the court orders otherwise because there are special circumstances.

If the settlement conference judge makes no order for costs of the settlement conference, there is no order as to costs. The court cannot revisit the issue and award those costs on a later occasion such as a motion, or at trial: *Islam v. Rahman*, 2007 ONCA 622, 2007 CarswellOnt 5718, 41 R.F.L. (6th) 10, 228 O.A.C. 371, [2007] O.J. No. 3416 (Ont. C.A.) at para. 2; *Riddell v. Belair Insurance Company Inc. (C.O.B. Belair Direct)* (2017), 2017 ONSC 7833, 2017 CarswellOnt 21977 (Ont. Div. Ct.). The exception is if the settlement conference judge made an order reserving those costs for later determination by the trial judge. Such an order would be unusual in practice.

Costs of a settlement conference may be awarded under rule 13.02(5)(a), where a party who has received notice of the settlement conference fails to attend, or under rule 13.02(7), where a person attends but fails to file the material required by rule 13.03(2) or is so inadequately prepared as to frustrate the purposes of the conference. The amount of costs, apart from disbursements, is limited by rule 13.10 to $100 unless there are special circumstances.

In the event the settlement conference results in a final order, such as an order striking out a claim or defence (without leave to amend) under rule 13.05(2)(iv), the settlement conference judge may also award the applicable disbursements under rule 19.01 to the successful party: see *Hasselsjo v. CBI Home Health Care*, 2013 ONSC 2684, 2013 CarswellOnt 5630, [2013] O.J. No. 2064 (Ont. S.C.J.).

A costs order may be expressed as payable within 30 days or by a fixed date. Alternatively the settlement conference costs may be made payable:

- in the cause (payable as part of the overall costs order made after trial)
- by a specified party in any event of the cause (that party owes the costs regardless of the outcome at trial, but is not required to make payment until after trial)
- to a specified party in the cause (that party will become entitled to the costs only if and when that party is awarded costs of the proceeding after trial)
- in the trial judge's discretion or reserved to the trial judge (the trial judge then has discretion to award or not award costs of the settlement conference)
- where a party has failed to attend the settlement conference and a further settlement conference is directed, costs of the wasted conference may be reserved to the next conference (giving the defaulting party an incentive to attend the next date)

Parties requesting settlement conference costs, and judges considering such requests, may wish to consider the reality that small costs orders of $100 can sometimes cause more trouble than they are worth. Among other things the court fees to enforce such an order can double or exceed the amount of the order. In some cases, the costs order could result in further proceedings such a motion to set aside the costs order (for example where the liable party did not receive notice of the settlement conference).

To assist self-represented parties in understanding the settlement conference, the Chief Justice of the Superior Court of Justice published the following memorandum in 2012:

Superior Court of Justice, Small Claims Court Branch — Important Information about Your Settlement Conference

1. Parties and their representatives (if any) **must** attend the settlement conference on the date indicated in the Notice of Settlement Conference.

2. A settlement conference is an informal, confidential meeting between the parties in the presence of a judicial officer (a judge or deputy judge). The judicial officer at your settlement conference will **not** be the judge at your trial.

3. At a settlement conference, you do not need to stand up when you address the judicial officer; you need only do so in court. You should address a judge or deputy judge as "Your Honour".

4. The purpose of your settlement conference is to:

a) Resolve some or all of the issues in the action.

b) Encourage settlement of the action.

c) Help you get ready for trial.

d) Provide full disclosure among the parties of all the relevant facts and evidence.

5. You may feel free to discuss your case openly at your settlement conference. What you say **cannot** be repeated at trial. Your discussions at a settlement conference are strictly confidential, and will remain so. Unless you consent, the matters discussed at the settlement conference, and during any negotiations, shall not be disclosed to anyone. You must *never* mention the settlement conference during the actual trial.

6. The role of the judicial officer at a settlement conference is to listen to your story, to deal with any procedural problems, and to give you his or her opinion of how your case will likely be decided if it goes to trial. That opinion will be based on their experience as a lawyer, judge or deputy judge. You have the right to know what that opinion is, and you also have the right to ignore that opinion. However, you should carefully consider what they say because their opinion is based upon years of experience.

7. There are many good reasons why parties should try to settle their dispute before going to trial:

a) It saves time;

b) It saves money;

c) It avoids the stresses of a trial; and

d) It gives you the power to resolve your dispute on your own, rather than have a stranger resolve it for you.

8. There is no obligation to settle. However, you owe it to yourselves to think about it. A good settlement is one where both parties have engaged in a fair compromise.

9. Before you appear at your settlement conference, you are encouraged to talk to the other side, to see if you can settle all or any part of your dispute, or if you can agree on any facts.

Osgoode Hall, June 21, 2012
Superior Court of Justice, Office of the Chief Justice

Case Law: *Hasselsjo v. CBI Home Health Care*, 2013 ONSC 2684, 2013 CarswellOnt 5630, [2013] O.J. No. 2064 (Ont. S.C.J.)

The settlement conference judge consolidated and then dismissed two claims for $25,000 each, and awarded costs of $1,000 to the defendant based on special circumstances. Leave to appeal that costs order was denied. The order amounted to fees of $400 plus disbursements and HST, and reflected no error in principle.

Giza v. Eastwood & Co., 2001 BCSC 199, 2001 CarswellBC 476, [2001] B.C.T.C. 199, [2001] B.C.J. No. 192 (B.C. S.C.)

A settlement conference judge wanted the defendant to settle by payment of $300. The defendant declined to offer that or any amount to the plaintiff. The settlement conference judge then made a penalty costs order of $100 payable by the defendant. That order was set aside on appeal. It was held that the imposition of such a penalty represented an excess of jurisdiction. The settlement costs rule contemplates a costs order where a party's lack of preparation frustrates the purposes of the conference. At para. 33 the court stated:

> The settlement conference process provides an opportunity for settlement. It does not require a party to accept a settlement offer, even if the judge thinks the offer is a reasonable one.

Hale v. Noa, 2002 BCSC 144, 2002 CarswellBC 543, [2002] B.C.J. No. 1210 (B.C. S.C.)

In this personal injury action, at the settlement conference the plaintiff offered to settle for $3,000. The defendant declined to make any offer of payment. The settlement conference judge then imposed a $500 penalty costs order on the defendant, finding that he attended the conference "not prepared to settle." On appeal that costs order was set aside. The defendant attended the conference fully prepared to discuss settlement. The settlement conference

judge exceeded his jurisdiction by making a costs order as a penalty for the defendant's decision not to make an offer.

Kovac v. Royal Botanical Gardens (2019), 2019 ONSC 4151, 2019 CarswellOnt 11083, [2019] O.J. No. 3603 (Div. Ct.)

At the settlement conference the insured defendant offered to settle by a dismissal of the claim without costs, but declined to make any offer of payment to the plaintiff. The judge made a penalty costs order of $500 against the defendant and directed that a further settlement conference take place before him. On application for judicial review, the court found that the costs order was made in error if it was based on the defendant's failure to better their initial offer. However the error did not amount to a breach of procedural fairness warranting judicial review. The order for a further settlement conference was set aside as inappropriate.

Rososhansky v. Williams (2018), 2018 ONSC 1964, 2018 CarswellOnt 5427, [2018] O.J. No. 1862 (S.C.J.)

In this motor vehicle personal injury case, the insured defendant declined to make any offer of payment to the plaintiff at the pretrial conference. The pretrial judge awarded costs of $5,000 for the pretrial conference to the plaintiff under rule 50.12 of the *Rules of Civil Procedure*. There was nothing wrong with a defendant taking the position that there was no risk of liability. However if the defendant takes a position that is contrary to an objective view of the evidentiary record and refuses any compromise other than to dismiss without costs, the pretrial conference is a waste of time and expense. That defence strategy should not be encouraged.

Bradley (Re), [2017] Q.J. No. 6210 (C.A.) at para. 44~~,~~; application for leave to appeal discontinued [2017] S.C.C.A. No. 451

The trial judge's refusal to hear a small claims trial and his costs order against the defendant following the judge's unsuccessful attempts to cajole a settlement between the parties, formed a proper basis for disciplinary action against the judge. Duval Hesler C.J.Q. stated at para. 45:

> [45] [The judge's] conduct in this case cannot however be justified by the mere fact that he was presiding over a hearing in the Small Claims Division and had to conciliate the two parties. The courts' mission in mediation and conciliation in no way changes the fact that these modes of settlement cannot be imposed upon the parties . . .

Rule 14 — Offer To Settle

14.01 A party may serve on any other party an offer to settle a claim on the terms specified in the offer.

Commentary: An "Offer to Settle" is the name given to a formal written offer made by one party to the other party. Either party can make a written offer to settle to the other party at any time until a judge disposes of the case. The party may use the Offer to Settle [Form 14A] or may write a letter setting out the terms of the offer.

If you have made or received an offer to settle and it has not been accepted you must not mention the offer to settle or any negotiations relating to it to the judge during the trial until a final disposition has been made of all issues of liability and relief, except for costs.

If a party fails to comply with the terms of an accepted offer, the other party may move for judgment under the terms of the accepted offer, or continue the proceeding as if there had been no accepted offer. If such a motion is brought, the judge "may grant judgment accordingly". On such a motion, evidence will be put before the court by both parties, and the court must decide whether the parties have settled the case. Sometimes the affidavit evidence will be contradictory, and there will be issues of credibility; in such case the court may be unable

to make findings of fact on the motion, and instead will order the trial of an issue on the settlement.

Regarding the authority of a lawyer, the normal rule is that a solicitor may bind his or her client in a settlement unless the client has given limited authority and the opposing side has knowledge of the limitation: *Belanger v. Southwestern Insulation Contractors Ltd.*, 1993 CarswellOnt 507, [1993] O.J. No. 3095, 16 O.R. (3d) 457, 32 C.P.C. (3d) 256 (Ont. Gen. Div.). However, if there is clear and uncontradicted evidence that the solicitor did not have authority, the court will not grant judgment pursuant to Rule 49.09(1)(a) even though opposing counsel had no knowledge of the lack of authority: *Smith v. Robinson* (1992), 7 O.R. (3d) 550, 4 C.P.C. (3d) 262, 87 D.L.R. (4th) 360 (Ont. Gen. Div.). Where an offer to settle has been accepted based on a solicitor's misconception of the offer and where the offeror will suffer no prejudice, it would be inequitable to allow the moving party to take advantage of the mistake: *Draper v. Sisson* (1991), 50 C.P.C. (2d) 171 (Ont. Gen. Div.); *Milios v. Zagas*, 1996 CarswellOnt 2951, 3 C.P.C. (4th) 149, 11 O.T.C. 398 (Ont. Gen. Div); reversed 1998 CarswellOnt 810, [1998] O.J. No. 812, 38 O.R. (3d) 218, 108 O.A.C. 224, 18 C.P.C. (4th) 13 (Ont. C.A.).

In performing the vital exercise of determining whether the judgment at trial is as favourable as or more favourable than the offer to settle, the court must consider the matter of accruing prejudgment interest. This is because the amount of the damage award at trial (which will include both a principal and an interest component) is being compared with an offer that in many cases will have been made many months, or even years, before. The interest component of the offer to settle will probably be less than the amount of interest awarded at trial, not because the interest component of the offer was unreasonably low, but because the interest to which the plaintiff is entitled increases with the passage of time. See *Orsini v. Sherri* (1987), 16 C.P.C. (2d) 194 (Ont. H.C.); *Mathur v. Commercial Union Assurance Co. of Canada* (1988), 24 C.P.C. (2d) 225, 28 O.A.C. 55 (Ont. Div. Ct.); *Merrill Lynch Canada Inc. v. Cassina* (1992), 15 C.P.C. (3d) 264 (Ont. Gen. Div.); *Emery v. Royal Oak Mines Inc.* (1995), 26 O.R. (3d) 216, 15 C.C.E.L. (2d) 49 (Ont. Gen. Div.).

Case Law: *Parente v. Van Holland* (1988), 8 A.C.W.S. (3d) 200 (Ont. Dist. Ct.).

Having regard to Rule 16.08 of the Rules of Practice, service by the defendant of an offer to settle with the plaintiff by means of a telecopier or fax machine was validated as a proper service even though the rules do not specifically allow such service. It was also recommended that a confirming letter follow such procedure.

Merrill v. Royal Bank of Canada (October 30, 1997), Doc. Toronto T24613/96 (Ont. Small Claims Ct.).

Defendant made offer for dismissal without costs. Offer made within context of threat to bring motion for dismissal on basis of want of prosecution, for failure to transfer action to another jurisdiction. Plaintiff's transferral was, by its nature, rejection of offer. Further, offer was for immediate consent to dismissal. Consent to dismissal 14 months later was not one given immediately. There was no offer open for acceptance.

Sea Vision Marine Products Ltd. v. McKitrick (June 9, 1999), Doc. Thunder Bay 97-0736 (Ont. S.C.J.).

The court ruled that the defendant's "without prejudice" letter of November 4, 1998, which suggested possibility of settling at lower figure, was not an offer to settle capable of acceptance by the plaintiff in the manner in which it was submitted, thus it in no way affected the validity of the March 27, 1998 offer, which complied with Rule 49.01(1).

Rosero v. Huang (1999), 44 O.R. (3d) 669 (Ont. S.C.J.).

The defendant offered to settle an action with "costs to be assessed or agreed upon." The offer was expressly stated to be in accordance with *Rules of Civil Procedure* (Ontario). The

issue was whether the plaintiff was entitled to costs of action up to the date of the offer or the date of the acceptance. The ambiguity was to be resolved in manner consonant with Rule 49.07(5). The plaintiff was entitled to costs up to the date of the offer.

Shelanu Inc. v. Print Three Franchising Corp. (2000), 11 B.L.R. (3d) 100, 2000 Carswell-Ont 4407 (Ont. S.C.J.).

The plaintiff recovered judgment more favourable than an offer to settle. The plaintiff was awarded party-and-party costs up to September 7, 2000, and solicitor-and-client costs thereafter.

Scanlon v. Standish (2002), 2002 CarswellOnt 128, [2002] O.J. No. 194, 155 O.A.C. 96, 57 O.R. (3d) 767, 24 R.F.L. (5th) 179 (Ont. C.A.).

Prior to commencement of litigation, wife making offer to settle and husband making counter-offer. Pre-litigation offer was not Rule 49 offer. Delivery of counter-offer destroyed power to accept wife's original offer.

Blanchard v. Canada Life Assurance Co. (2001), 7 C.P.C. (5th) 98, 2001 CarswellNB 45, [2001] N.B.J. No. 42, 235 N.B.R. (2d) 153, 607 A.P.R. 153 (N.B. Q.B.).

Defendant moved for order that plaintiff's claim be dismissed for failure to comply with terms of settlement or alternatively that terms of settlement be adopted by Court. Motion granted. Plaintiff bound by settlement. While plaintiff denied having accepted offer and her former solicitor did not testify nor was his affidavit filed, former solicitor had retainer and had accepted offer on behalf of his client in course of retainer.

Catalanotto v. Nina D'Aversa Bakery Ltd. (2001), 2001 CarswellOnt 4058 (Ont. S.C.J.).

Issues at trial not complex and matter ultimately within jurisdiction of Small Claims Court. Plaintiff acted unreasonably in not offering settlement. Failure of plaintiff to continue proceeding under simplified rules in Ontario justified that plaintiff pay defendant's party-and-party costs.

Low v. North Shore Taxi (1996) Ltd., 2005 CarswellBC 117, 2005 BCPC 7 (B.C. Prov. Ct.).

Application brought by defendants for judgment to be granted to the claimant for full amount set out in the Claim. Defendants filed Offer to Settle for a total of $10,216 "in full and final settlement under the jurisdiction of the Provincial Court of British Columbia, Small Claims Division." Order to go.

Icecorp International Cargo Express Corp. v. Nicolaus, 2006 CarswellBC 15, 2006 BCSC 25, 30 C.P.C. (6th) 396 (B.C. S.C.).

Offer to settle made October 15, 2002, but not accepted until October 27, 2004. Rule 37(37) amended effective July 1, 2003.

Plaintiff claims Rule 37(37) in force at time offer was accepted governs. Form of the Rule that existed at time of acceptance must prevail. Rule 37 complete code in respect of offers to settle, and actual consequences associated with offer defined by acceptance. See *Brown v. Lowe*, 2002 CarswellBC 72, [2002] B.C.J. No. 76, 2002 BCCA 7, 97 B.C.L.R. (3d) 246, 14 C.P.C. (5th) 13, 162 B.C.A.C. 203, 264 W.A.C. 203 (B.C. C.A.).

These applications highlight benefit to be derived from use of transitional rules when the Rules of Court are amended in a manner that will alter or have an effect on pre-existing facts or circumstances.

Effect of accepted settlement offer upon such pre-trial orders considered by Low J., as he then was, in *Tomkin v. Tingey*, 2000 CarswellBC 1573, 2000 BCSC 1133, 2 C.P.C. (5th) 56 (B.C. S.C. [In Chambers]). Plaintiff entitled to costs and disbursements to October 15, 2004.

Reischer v. Insurance Corp. of British Columbia, 2006 CarswellBC 270, [2006] B.C.J. No. 235, 2006 BCSC 198 (B.C. S.C. [In Chambers]).

Plaintiff appeals final order of Master dismissing her claim to entitlement to costs other than disbursements having accepted Offer to Settle for an amount, including interest, within monetary jurisdiction of the Small Claims Court.

Until July 2003, Rule 37(37) read as follows:

> 37. (37) Notwithstanding subrule (22), if an offer is accepted for a sum within the jurisdiction of the Provincial Court under the *Small Claims Act*, the plaintiff is not entitled to costs other than disbursements.

Appeal dismissed.

Menduk v. Ashcroft, 2006 CarswellBC 380, 2006 BCSC 274 (B.C. S.C.).

How does the September 1, 2005 increase in the monetary jurisdiction of the Provincial Court from $10,000 to $25,000 affect the application of Rule 37(37) of the Rules of Court, where an action was commenced in Supreme Court before the change took effect, but an offer of settlement was accepted after the change?

On September 1, 2005, the monetary jurisdiction of the Provincial Court in civil matters was increased to $25,000 by *B.C. Reg.* 179/2005.

On November 7, 2005, the defendant delivered to the plaintiff a formal offer to settle for $24,100. On December 9, 2005, the plaintiff accepted the defendant's offer to settle.

Where an offer is accepted that is within the jurisdiction of the Provincial Court, Rule 37(37) may apply to deprive the plaintiff of its costs other than disbursements, even if it would normally have been entitled to those costs under Rule 37(22). The plaintiff's claim is one which could not appropriately have been brought in Provincial Court. Plaintiff *not* disentitled to his costs by reason of Rule 37(37).

Wood v. Kabaroff, 2006 CarswellBC 2345, 2006 BCSC 1391, 59 B.C.L.R. (4th) 69, 36 C.P.C. (6th) 308 (B.C. S.C.).

Issue whether sum of an offer to settle was within the jurisdiction of the Provincial Court under the *Small Claims Act*. If it was, plaintiff not entitled to costs under Rule 37.

Offer to settle was for $26,000. Amount of the accepted offer was for a sum not within the jurisdiction of the Provincial Court. Case whether the monetary jurisdiction was $10,000 or $25,000.

Chytros v. Standard Life Assurance Co., 2006 CarswellOnt 6289, 83 O.R. (3d) 237 (Ont. S.C.J.).

Counsel for both parties informed trial judge just before trial commenced that settlement reached. Plaintiff subsequently taking position that she had not given her counsel authority to enter into settlement. Any limitation on ostensible authority of counsel for plaintiff should have been made known to trial judge and was not. Settlement held enforceable.

Counsel who are retained by and represent a party in an action have ostensible authority to conduct all matters in the action. See *Scherer v. Paletta*, 1966 CarswellOnt 119, [1966] 2 O.R. 524, 57 D.L.R. (2d) 532, [1966] O.J. No. 1017 (Ont. C.A.). If there are limitations on the authority of counsel they are only effective against an opposing party if they are made known to that opposing party. Any dispute between a client and counsel is an issue only between those parties. See *Sign-O-Lite v. Bugeja*, 1994 CarswellOnt 4796, [1994] O.J. No. 1381 (Ont. Gen. Div.).

Counsel who agrees to a settlement on behalf of a client and has no specific authority with respect to the client but believes, however, that his recommendation to the client will be accepted has made a settlement binding on his client. See *Fabian v. Bud Mervyn Construction Ltd.*, 1981 CarswellOnt 395, 35 O.R. (2d) 132, 23 C.P.C. 140, 127 D.L.R. (3d) 119, [1981] O.J. No. 3205 (Ont. Div. Ct.).

Even when a party alleges that it was not fully advised of the proceedings by its counsel and that counsel did not have authority to settle the case, the courts have held that such breach of duty or lack of authority is an issue only between the party and its counsel. See *Dos Santos v. Waite*, 1995 CarswellOnt 3384, [1995] O.J. No. 1803 (Ont. Gen. Div.), at para. 9.

Love v. News Datacom Ltd., [2006] M.J. No. 360, 2006 CarswellMan 277, [2006] 9 W.W.R. 729, *(*sub nom. *Love v. Bell ExpressVu Ltd. Partnership)* 383 W.A.C. 24, *(*sub nom. *Love v. Bell ExpressVu Ltd. Partnership)* 208 Man. R. (2d) 24, 2006 MBCA 92, *(*sub nom. *Kudelski, S.A. v. Love)* 273 D.L.R. (4th) 761 (Man. C.A.).

With respect to first appeal, the settlement agreement, consent to judgment arising out of it, and all the court proceedings intertwined. Defendants had to rely on pleadings, affidavits and other material filed in the original proceedings for the Anton Piller injunction. Defendant not entitled to rely upon material and evidence from the earlier proceedings due to the doctrine of absolute privilege.

St. Louis-Lalonde v. Carleton Condominium Corp. No. 12, 2005 CarswellOnt 4709, [2005] O.J. No. 4164 (Ont. S.C.J.); additional reasons to 2005 CarswellOnt 2731, Lalonde J. (Ont. S.C.J.); affirmed 2007 CarswellOnt 836 (Ont. C.A.).

After three-day trial, action dismissed. Rule 49.10 of *Rules of Civil Procedure* sets out cost consequences of failing to accept offer but has no application where plaintiff fails to recover any judgment at all. In such situations, courts rely on their discretion under s. 131 of *Courts of Justice Act*. Combination of both partial and substantial indemnity costs more appropriate.

363066 Ontario Ltd. v. Gullo, 2007 CarswellOnt 7374, 88 O.R. (3d) 170, 2007 ONCA 785 (Ont. C.A.).

Rule 49.04(1) expressly provides that an offer to settle may be withdrawn at any time before it is accepted. 2004 offer not accepted at time that 2006 offer made and 2006 offer complied with requirements of rule 49.04(1); the appellants were entitled to withdraw the 2004 offer despite the fact that it was stated to be irrevocable.

Downey v. St. Paul's Hospital, 2007 CarswellBC 1080, 47 C.C.L.T. (3d) 112, 2007 BCSC 695, 71 B.C.L.R. (4th) 232, [2007] 12 W.W.R. 154 (B.C. S.C.).

Pursuant to r. 37(24), if plaintiff's claim dismissed, defendant who has made offer to settle claim that has not expired or been withdrawn or accepted is entitled to costs assessed to date offer was delivered and to double costs assessed thereafter. See *Rules of Court, 1990*, B.C. Reg. 221/90.

Sidorsky v. Lowry, 2009 CarswellAlta 567, 2009 ABQB 197, 73 C.P.C. (6th) 58, 463 A.R. 183 (Alta. Q.B.).

Defendant offered to settle with plaintiff for $75,000 plus costs but offer only open until start of trial. Plaintiff awarded $2,265.41 plus costs. Plaintiff awarded costs up to date of offer while defendant was awarded costs for steps taken after date of offer. Rule 169(1) permitted service of offer any time before trial. Rule 169(2) stipulated offer could only be accepted before start of trial. Fact that R. 169(3) precluded withdrawal of offer within 45 days of service except with leave of court not relevant.

Smagh v. Bumbrah, 2009 CarswellBC 1226, 2009 BCSC 623, 73 C.P.C. (6th) 70 (B.C. S.C.).

Application by defendant for costs. Defendant made an offer to settle. Jury awarded substantially less than the offer. Plaintiff in difficult financial circumstances. See *Radke v. Parry*, 90 B.C.L.R. (4th) 132, [2008] B.C.J. No. 1991, 2008 BCSC 1397, 2008 CarswellBC 2204, 64 C.P.C. (6th) 176 (B.C. S.C.), where Madam Justice Boyd made note of the "substantial disparity in financial circumstances between the parties": at para. 42. Circumstances militate against an award of double costs.

Bomhof v. Eunoia Inc., 2012 ONSC 4091, 2012 CarswellOnt 8765 (Ont. S.C.J.).

The lack of an element of compromise in the Offer to Settle militates against the exercise of a discretion in favour of substantial indemnity costs (see *Data General (Canada) Ltd. v. Molnar Systems Group Inc.*, 1991 CarswellOnt 402, 6 O.R. (3d) 409, 3 C.P.C. (3d) 180, 85 D.L.R. (4th) 392, 52 O.A.C. 212, [1991] O.J. No. 1857 (Ont. C.A.); *Walker Estate v. York-Finch General Hospital*, 1999 CarswellOnt 667, 43 O.R. (3d) 461, 44 C.C.L.T. (2d) 205, 31 C.P.C. (4th) 24, 169 D.L.R. (4th) 689, 118 O.A.C. 217, [1999] O.J. No. 644 (Ont. C.A.); affirmed 2001 SCC 23, 2001 CarswellOnt 1209, 2001 CarswellOnt 1210, [2001] 1 S.C.R. 647, 6 C.C.L.T. (3d) 1, 5 C.P.C. (5th) 1, 198 D.L.R. (4th) 193, 268 N.R. 68, 145 O.A.C. 302, [2001] S.C.J. No. 24 (S.C.C.)).

Fair and appropriate to permit trial judge to rule on question of the costs of motion in the context of a global costs consideration following trial. Such a consideration could encompass the effect of the possibility that the plaintiff's recovery may not exceed the Small Claims Court limit.

Issue of costs of motion for summary judgment reserved to the trial judge.

2964376 Canada Inc. v. Bisaillon, 2012 ONSC 4447, 2012 CarswellOnt 9372 (Ont. S.C.J.).

The plaintiff was successful in its action for defamation against the defendant. The defendant's cross-claim was dismissed.

The plaintiff submits that it is entitled to substantial indemnity costs, and puts these at $39,795.49. The defendant submits that the substantial indemnity rate inappropriate. It was not granted aggravated damages. Award of costs on a substantial indemnity basis appropriate. The offer made by plaintiff reasonable, that by the defendant not. Malice found.

Evans v. Complex Services Inc., 2013 ONSC 120, 2013 CarswellOnt 144, 10 C.C.E.L. (4th) 73 (Ont. S.C.J.).

The plaintiff, who was dismissed by the defendant without cause, obtained judgment awarding her damages. Although the claim was commenced using ordinary procedure and rules, the damages award was well within the ambit of the Simplified Procedure rules. The quantum of damages was only slightly more than the maximum permitted in a Small Claims Court action.

Counsel for the defendant points out that the damages award obtained by the plaintiff is not very significantly more than the rule 49 offer of the defendant. Nevertheless, the plaintiff had a modest success and should not be deprived of costs. A partial indemnity claim for costs in the amount of $43,700 for less and $2,253.66 for disbursement, however, is excessive and disproportionate. The plaintiff's judgment is for $30,360.20.

Costs awarded to plaintiff, fixed at $17,500.

Costs Consequences: The Ontario Superior Court recently sent a message with respect to costs awards in *Hoang v. Vicentini*. The Plaintiffs did not "beat" their Rule 49 (Rules of Civil Procedure) offer at trial. The issue of costs was complicated by the finding of liability only against one defendant, Hoang.

Justice Wilson considered the various factors enumerated under Rule 57 of the Rules of Civil Procedure in exercising her discretion on costs. The court found that the plaintiffs' counsel had "unrealistic expectations" which forced a lengthy and very expensive trial. The conduct of the plaintiff's counsel was noted as not being "conducive to resolutions." Justice Wilson was critical of the excessive hours spent by the plaintiffs' counsel which violated the rule of proportionality in awarding costs.

After consideration of Rule 57 factors and the principle of proportionality, Justice Wilson fixed the plaintiffs' costs on a partial indemnity basis at $575,000 plus taxes. As to disbursements, Justice Wilson found that certain items claimed as disbursements were "excessive".

The unsuccessful defendant father was ordered to pay the plaintiffs' costs of $575,000 plus taxes and $250,000 in disbursements.

As to which party would pay the costs of the successful defendants, Justice Wilson ordered the plaintiffs to pay those costs. Her Honour declined to have them visited on the unsuccessful defendant father as sought by the plaintiffs by way of a Sanderson order. Unreasonable time and money was spent and unrealistic settlement offers made by the plaintiffs' counsel which forced the action on to a disproportionately lengthy and expensive trial. The plaintiffs were ultimately made to bear the costs as a consequence of their litigation strategy. It was asserted that Hoang's ability to pay costs was relevant and central to the costs decision, given that *Sanderson v. Blyth Theater Co.*, [1903] 2 K.B. 533 (Eng. C.A.)) or *Bullock v. London General Omnibus Co.* (1906), [1907] 1 K.B. 264 (Eng. C.A.)) orders were being requested.

In *Elbakhiet v. Palmer*, 2014 ONCA 544, 2014 CarswellOnt 9411, 121 O.R. (3d) 616, 323 O.A.C. 300, [2014] O.J. No. 3302 (Ont. C.A.); leave to appeal refused 2015 CarswellOnt 641, 2015 CarswellOnt 642, [2014] S.C.C.A. No. 427 (S.C.C.), the court found it neither fair nor reasonable to award the plaintiffs costs of $1.5 million for a claim the jury assessed at about half of that. Costs awards must be proportionate to amounts recovered. The unsuccessful defendant(s) could not reasonably have expected to pay costs in this range should their liability arguments have been unsuccessful at trial. In *Galganov v. Russell (Township)*, 2012 ONCA 410, 2012 CarswellOnt 7400, 350 D.L.R. (4th) 679, 294 O.A.C. 13, [2012] O.J. No. 2679 (Ont. C.A.), the court noted that costs are intended to compensate the successful party, not punish a lawyer: "Rule 57 57.07(1) of the Rules of Civil Procedure is not concerned with the discipline or punishment of a lawyer, but only with compensation for conduct which has caused unreasonable costs to be incurred."

König v. Hobza, 2015 ONCA 885, 2015 CarswellOnt 19169, 129 O.R. (3d) 57, 84 C.P.C. (7th) 24, 343 O.A.C. 331 (Ont. C.A.).

Offer to settle must strictly comply with 7-day window set out in Rule 49.03 (time for making offer) of *Rules of Civil Procedure* before mandatory cost consequences of Rule 49.10 are engaged. Offer served mere four days before start of trial could not engage cost consequences of Rule 49.10.

1029865 B.C. Ltd. v. 1007442 B.C. Ltd., 2017 BCSC 926, 2017 CarswellBC 1484, 88 R.P.R. (5th) 121 (B.C. S.C.); additional reasons 2017 BCSC 2381, 2017 CarswellBC 3618 (B.C. S.C.).

This case highlights the role of credibility as a factor to an award in double costs. The award of double costs, referred to as a "punitive measure", to the successful defendant is that where credibility is important. Formal offers of settlement should specifically identify credibility issues are properly identified, the offer of settlement stands a better chance for double costs.

Catford v. Catford, 2014 ONSC 133, 2014 CarswellOnt 278 (Ont. S.C.J.). S.E. Healey J.~~:~~; additional reasons 2013 ONSC 7147, 2013 CarswellOnt 15918 (Ont. S.C.J.).

No individuals involved should absorb costs of motion other than lawyers. Respondent brought motion to enforce settlement arising from accepted offer to settle. Court determined binding settlement, but it should exercise its discretion to set aside settlement because weighing of potential prejudice favoured applicants. Lawyer who represented applicants made innocent slip by accepting respondent's offer. Costs incurred were caused solely by lawyers. Amounts billed were commensurate with time required by complexity of matter.

Matthew Brady Self Storage Corp. v. InStorage Limited Partnership, 2014 ONCA 858, 2014 CarswellOnt 16809, 125 O.R. (3d) 121, 36 B.L.R. (5th) 41, 379 D.L.R. (4th) 368, 49 R.P.R. (5th) 1, 327 O.A.C. 313 (Ont. C.A.); leave to appeal refused *InStorage Limited Partnership*

v. Matthew Brady Self Storage Corp., 2015 CarswellOnt 9611, 2015 CarswellOnt 9612, [2015] S.C.C.A. No. 50 (S.C.C.).

Lack of service on solicitors of offer to settle did not render offer nullity. Trial judge entitled to take offer to settle into account in determining costs. Trial judge entitled to exercise discretion to increase amount based on defendants' conduct that unnecessarily prolonged trial. No basis for interfering with quantum of costs awarded.

Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc., 2018 ONCA 839, 2018 CarswellOnt 17347, 41 C.P.C. (8th) 246 (Ont. C.A.).

The Ontario Court of Appeal considered the principles relating to the enforcement of an accepted Rule 49 offer to settle. The Court upheld a motion judge's decision granting judgment in accordance with an accepted Rule 49 offer. Open to motion judge to find that counsel for one of the parties had intentionally submitted inaccurate information to advance her clients' position. The Court found that a motion for enforcement of an accepted Rule 49 offer involves a two-step analysis, as set out in *Capital Gains Income Streams Corp. v. Merrill Lynch Canada Inc.*, 2007 CarswellOnt 6003, 87 O.R. (3d) 464, 230 O.A.C. 5, [2007] O.J. No. 3618 (Ont. Div. Ct.). The first step is to consider whether an agreement has been reached. The motion should be treated as a Rule 20 summary judgment motion. The second step is to consider whether, on all the evidence, the agreement should be enforced.

National Telecommunications Inc., Re, 2017 ONSC 2376, 2017 CarswellOnt 5573, 47 C.B.R. (6th) 103 (Ont. S.C.J. [Commercial List]); additional reasons 2017 ONSC 1475, 2017 CarswellOnt 3184, 45 C.B.R. (6th) 181 (Ont. S.C.J. [Commercial List]).

Trustee's offer to settle proceeding for $100,000 met procedural requirements of Rule 49 of *Rules of Civil Procedure*. No basis to depart from usual approach of ordering costs payable to winner or from enhancement of costs provided under Rule 49. Trustee beat amount of its offer and was entitled to costs to day of offer on partial indemnity basis and thereafter on substantial indemnity basis.

14.01.1 (1) Written Documents — An offer to settle, an acceptance of an offer to settle and a notice of withdrawal of an offer to settle shall be in writing.

(2) Use of Forms — An offer to settle may be in Form 14A, an acceptance of an offer to settle may be in Form 14B and a notice of withdrawal of an offer to settle may be in Form 14C.

(3) Terms of Settlement — The terms of an accepted offer to settle may be set out in terms of settlement (Form 14D).

O. Reg. 78/06, s. 28

Commentary: The requirement for settlement offers, acceptances and withdrawals to be in writing seeks to avoid disputes over whether settlements have occurred and disputes over terms of settlement. Such disputes occur more frequently if such key communications are not put in writing. The need for written communication does not necessarily require use of the applicable Forms, although their use is encouraged and the use of less formal written communications such as email may increase the chance of errors and resulting disputes over alleged settlement, which should be avoided as much as possible.

14.02 (1) Time for Making Offer — An offer to settle may be made at any time.

(2) Costs Consequences — The costs consequences referred to in rule 14.07 apply only if the offer to settle is served on the party to whom it is made at least seven days before the trial commences.

O. Reg. 78/06, s. 29

14.03 (1) Withdrawal — An offer to settle may be withdrawn at any time before it is accepted, by serving a notice of withdrawal of an offer to settle on the party to whom it was made.

(2) Deemed Withdrawal — If an offer to settle specifies a date after which it is no longer available for acceptance, and has not been accepted on or before that date, the offer shall be deemed to have been withdrawn on the day after that date.

(3) Expiry When Court Disposes of Claim — An offer may not be accepted after the court disposes of the claim in respect of which the offer is made.

O. Reg. 461/01, s. 16; 78/06, s. 29

14.04 No Disclosure to Trial Judge — If an offer to settle is not accepted, no communication about it or any related negotiations shall be made to the trial judge until all questions of liability and the relief to be granted, other than costs, have been determined.

O. Reg. 78/06, s. 29

Commentary: Offers to settle cannot be disclosed to the trial judge until after the court's judgment has been issued. Offers may be disclosed during costs submissions, and particularly if a party takes the position that cost consequences under rules 14.07(1) or 14.07(2) are triggered. Note however that any settlement discussions at the settlement conference, including any settlement recommendations by the settlement conference judge, remain absolutely privileged and cannot be disclosed even to the trial judge during costs submissions, and even on consent: *Bell Canada v. Olympia & York Developments Ltd.*, 1994 ONCA 239, 1994 CarswellOnt 520, 17 O.R. (3d) 135, 26 C.P.C. (3d) 368, 111 D.L.R. (4th) 589, 70 O.A.C. 101, [1994] O.J. No. 343 (Ont. C.A.); *Lucy v. Kitchener (City)*, 2013 CarswellOnt 381, 6 M.P.L.R. (5th) 285, [2013] O.J. No. 190 (Ont. Sm. Cl. Ct.).

14.05 (1) Acceptance of an Offer to Settle — An offer to settle may be accepted by serving an acceptance of an offer to settle on the party who made it, at any time before it is withdrawn or before the court disposes of the claim in respect of which it is made.

(2) Payment Into Court As Condition — An offer by a plaintiff to settle a claim in return for the payment of money by a defendant may include a term that the defendant pay the money into court; in that case, the defendant may accept the offer only by paying the money into court and notifying the plaintiff of the payment.

(3) If a defendant offers to pay money to a plaintiff in settlement of a claim, the plaintiff may accept the offer with the condition that the defendant pay the money into court; if the offer is so accepted and the defendant fails to pay the money into court, the plaintiff may proceed as provided in rule 14.06.

(4) Costs — If an accepted offer to settle does not deal with costs, the plaintiff is entitled,

(a) in the case of an offer made by the defendant, to the plaintiff's disbursements assessed to the date the plaintiff was served with the offer;

(b) in the case of an offer made by the plaintiff, to the plaintiff's disbursements assessed to the date that the notice of acceptance was served.

O. Reg. 78/06, s. 30

Commentary: Offers to settle will and should generally deal expressly with costs rather than leaving room for potential disagreement on that issue if an unclear or ambiguous offer

is accepted. However, if an accepted offer "does not deal with costs" then subrule 14.05(4) creates a default position making costs payable but limited to the plaintiff's disbursements: if the offer was made by the defendant, the plaintiff is entitled to the plaintiff's disbursements to the date of service of the offer, and if the offer was made by the plaintiff, the plaintiff is entitled to the plaintiff's disbursements to the date of acceptance.

The desirability of express reference to costs in drafting offers to settle is illustrated by the decision in *Puri Consulting Ltd. v. Kim Orr Barristers PC*, 2015 ONCA 727, 2015 Carswell-Ont 16419, 128 O.R. (3d) 14, 78 C.P.C. (7th) 257, 393 D.L.R. (4th) 199, 341 O.A.C. 87 (Ont. C.A.). There the plaintiff's accepted offer was in the form "$50,000 all-inclusive" — the precise language was "$50,000 plus HST in full and complete satisfaction of the plaintiff's claim". To the surprise of many practitioners, those words were interpreted on appeal to be silent on the matter of costs, with the result that the plaintiff was entitled to $50,000 plus HST, plus costs, despite the defendant having accepted the offer under the belief that only $50,000 plus HST was payable. In light of that decision, it appears desirable that offers should always expressly mention costs, whether they are to be in addition to or included in a dollar amount expressed in an offer to settle.

14.06 Failure to Comply With Accepted Offer — If a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,

(a) make a motion to the court for judgment in the terms of the accepted offer; or

(b) continue the proceeding as if there had been no offer to settle.

Commentary: where parties are alleged to have reached a settlement but one party fails to comply with the terms of settlement, rule 14.06 gives the innocent party a right of election. That party may elect to continue the proceeding as if there had been no settlement, or may bring a motion seeking to enforce the settlement by way of a motion for judgment on the settlement.

A party moving for judgment on a settlement must establish by affidavit evidence that a binding contract of settlement was reached between the parties, and that the respondent failed to comply with the terms of settlement. The general rules of contract law apply to determine whether a valid and binding settlement has been reached. On such a motion the moving party seeks judgment to give effect to the terms of settlement which have not been complied with.

The rule does however give the court a discretion to decline to enforce the settlement. That discretion differs from the common law of contracts, which does not provide a general discretion for courts to decline to give effect to an otherwise valid contract. It is noted that the wording of rule 14.06 differs slightly from that of rule 49.09 of the *Rules of Civil Procedure*, in that the phrase "and the judge may grant judgment accordingly" is omitted from the language of rule 14.06(a). However that basic discretion is implicit in the subrule; there is no suggestion that the court must enforce a settlement where one is found to have been reached.

The leading case is *Milios v. Zagas*, 1998 CarswellOnt 810, 38 O.R. (3d) 218, 18 C.P.C. (4th) 13, 108 O.A.C. 224, 56 O.T.C. 45, [1998] O.J. No. 812 (Ont. C.A.), confirming the discretion to not enforce an otherwise valid settlement and stating that all relevant factors revealed by the evidence should be considered. In that case a miscommunication between the plaintiff and his counsel occurred which resulted in acceptance of a defence offer the plaintiff had not intended to accept. The Court of Appeal found that the settlement should not have been enforced.

It must however be recognized that as a general matter the law favours settlements and it is comparatively rare that a settlement is found to have been reached but the court declines to

enforce it. In *Srebot v. Srebot Farms Ltd.*, 2013 ONCA 84, 2013 CarswellOnt 1376, [2013] O.J. No. 584 (Ont. C.A.) at para. 6, the court stated:

> 6 The discretionary decision not to enforce a concluded settlement, especially where the settlement has been partially or fully performed, should be reserved for those rare cases where compelling circumstances establish that the enforcement of the settlement is not in the interests of justice . . .

One unfortunate aspect of disputes over whether a settlement was reached is that occasionally it will be necessary for the parties' representatives (lawyers or paralegals) to be witnesses on the motion. It is usually communications between representatives which give rise to allegations of offer and acceptance. If those communications took place less formally, such as by telephone or by email, there may be legitimate grounds for honest misunderstanding. The best practice is for offers and acceptances to be made in writing and formally; this is accomplished by using the forms prescribed by rule 14.01.1(1) — Forms 14A (Offer to Settle) and 14B (Acceptance of Offer to Settle).

One practice which tends to give rise to disagreements over whether a settlement is reached is acceptances in the form: I accept your offer but I want this new or different term. Such a communication although couched as an acceptance will almost invariably constitute a counteroffer if it amounts to a request for new or different terms. In many cases the best practice may be to serve a responding Offer to Settle rather than dressing up a new set of terms as an acceptance if that is not its real substance or effect.

Apart from the potential for wasted resources if parties have to litigate a motion over whether they have a settlement, it should be noted that the result of such a motion, whatever the result, is a final order which may be appealed under *Courts of Justice Act* s. 31. In other words, whether the motions judge finds that no valid and binding settlement was reached, or finds that a settlement was reached and should be enforced, or find that a settlement was reached but should not be enforced, the parties may end up on appeal from that order. That is because the determination respecting a contract of settlement is a final determination of substantive rights between the parties, whether the motion is granted or dismissed: see *Chertow v. Chertow*, 2001 CarswellOnt 1606, 146 O.A.C. 141 (Ont. C.A.). Note however that if the motions judge's decision is interpreted as leaving a substantive decision over the existence and enforceability of the alleged settlement to the trial judge, the order may be deemed interlocutory — as was held by the majority in *Capital Gains Income Streams Corp. v. Merrill Lynch Canada Inc.*, 2007 ONCA 497, 2007 CarswellOnt 4222, 87 O.R. (3d) 443, 44 C.P.C. (6th) 136, 225 O.A.C. 210 (Ont. C.A.).

In any event the parties' costs of an appeal, and the unsuccessful party's costs liability, may be disproportionate in Small Claims Court appeals. For example, in *All Canadian Mechanical & Electrical Inc. v. Henderson*, 2012 ONSC 5620, 2012 CarswellOnt 12786, [2012] O.J. No. 4761 (Ont. S.C.J.), the plaintiffs were unsuccessful on appeal from a ruling on a motion under rule 14.06, and were ordered to pay appeal costs in the amount of $10,495.

If a dispute over an alleged settlement is not finally resolved on motion, the issue remains for determination at trial. In that event the parties' allegations concerning the alleged settlement should be pleaded. In some such cases the representatives may develop a conflict of interest if their own personal evidence concerning the alleged settlement is material to the matter.

Case Law: *Huma v. Mississauga Hospital*, 2020 ONCA 644, 2020 CarswellOnt 14815 (Ont. C.A.)

In determining whether a settlement was reached, the language used by the parties in communications of offer and acceptance should be viewed objectively. One party's subjective belief that a binding settlement would not result from an offer or acceptance does not prevent a finding of settlement. A party's request for an overly broad form of release was not a term

of settlement. The implied obligation is to provide a release consistent with the terms of settlement unless the settlement was conditional on obtaining such a form of release.

Srebot v. Srebot Farms Ltd., 2013 ONCA 84, 2013 CarswellOnt 1376, [2013] O.J. No. 584 (Ont. C.A.).

The discretion not to enforce a concluded settlement should be reserved for those rare cases where compelling circumstances establish that the enforcement of the settlement would not be in the interests of justice.

All Canadian Mechanical & Electrical Inc. v. Henderson, 2011 CarswellOnt 15950, [2011] O.J. No. 1456 (Ont. Sm. Cl. Ct.); further proceedings (2011), 218 A.C.W.S. (3d) 85, 2011 CarswellOnt 15906, [2011] O.J. No. 3252 (Ont. Sm. Cl. Ct.); affirmed 2012 ONSC 1370, 2012 CarswellOnt 2953 (Ont. S.C.J.); affirmed 2012 ONSC 5620, 222 A.C.W.S. (3d) 344, 2012 CarswellOnt 12786, [2012] O.J. No. 4761 (Ont. Div. Ct.).

The court rejected the plaintiff's contention that several related actions had been settled through correspondence between counsel. Even where an accepted settlement offer is established, the court has a discretion to decline to enforce the resulting settlement. Review of relevant authorities.

14.07 (1) Costs Consequences of Failure to Accept — When a plaintiff makes an offer to settle that is not accepted by the defendant, the court may award the plaintiff an amount not exceeding twice the costs of the action, if the following conditions are met:

1. The plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer.

2. The offer was made at least seven days before the trial.

3. The offer was not withdrawn and did not expire before the trial.

Commentary: Rule 14.07(1) deals with the costs consequences of an offer made by the plaintiff. To qualify for the usual consequence of double costs the offer must be made in writing (see rule 14.01.1(1)), at least seven days before the trial, and must have remained open until the start of trial (often expressed as being open until one minute after the start of trial). Provided those formal requirements are met, the main question then is whether the judgment at trial is as favourable or more favourable than the terms of the offer. If so, the court may and usually will award a representation fee that is doubled under rule 14.07(1).

The relationship between rule 14.07 cost consequences and the *prima facie* limit on costs under *Courts of Justice Act* s. 29 is addressed in a number of reported decisions which are annotated earlier in this work, under s. 29. Please refer also to the Self-Help Overview (Ch. 1) in section 20 — Costs. The Divisional Court has accepted that rule 14.07 cost consequences can be applied so as to make an award of costs (apart from disbursements) that is more than 15 per cent of the amount claimed, by applying that rule in tandem with a penalty costs order under s. 29: see *Melara-Lopez v. Richarz*, 2009 CarswellOnt 6333, 255 O.A.C. 160, [2009] O.J. No. 4362 (Ont. Div. Ct.); *Barrie Trim & Mouldings Inc. v. Country Cottage Living Inc.*, 2010 ONSC 2598, 2010 CarswellOnt 2783, 93 C.L.R. (3d) 166, [2010] O.J. No. 1836 (Ont. Div. Ct.); *Propane Levac Propane Inc. v. Macaulay*, 2011 ONSC 293, 2011 CarswellOnt 108, [2011] O.J. No. 105 (Ont. Div. Ct.); *Conestoga Roofing & Sheet Metal Ltd. v. Baranski* (June 1, 2012), Doc. DC-11-304, [2012] O.J. No. 3371 (Ont. Div. Ct.).

Case Law: *Diefenbacher v. Young* (1995), 22 O.R. (3d) 641 (C.A.).

A decreasing offer to settle by a plaintiff, and an increasing offer by a defendant without reference to an earlier offer, is by implication a withdrawal of the earlier offer.

Sona Computer Inc. v. Carnegie (March 7, 1995), Doc. Ottawa 596/94 (Ont. Gen. Div.).

Defendant failed to make payment as directed by the pre-trial judge. No error in law by trial judge in awarding judgment of on-half plaintiff's claim (recommended at pre-trial).

Wilkinson v. Sneddon Insurance Brokers Ltd. (December 22, 2014), Doc. 92-14, [2014] O.J. No. 6248 (Ont. S.C.J.).

Plaintiff was successful at trial and had made two offers to settle which qualified for cost consequences under rule 14.07(1). Review of case law. A failure to accept an offer which triggers rule 14.07 consequences can be unreasonable conduct within the meaning of *Courts of Justice Act* s. 29. Costs to plaintiff awarded at $2,500 (approximately 25 per cent of the amount claimed and recovered), plus HST and disbursements, for total of $3,000.

Magnotta et al. v. Yuetal, 2020 ONSC 1049, 2020 CarswellOnt 3571, 49 C.P.C. (8th) 303 (Ont. S.C.J.); additional reasons 2020 ONSC 2217, 2020 CarswellOnt 5172 (Ont. S.C.J.).

Rule 49 of the *Rules of Civil Procedure* provides that an offer made during litigation (that meets the requirements of Rule 49) remains open for acceptance indefinitely, *evenif rejected*, unless the offer is withdrawn or expired — even if it is not called a Rule 49 Offer. See *Magnotta et al. v. Yuetal*.

Even though the Plaintiffs rejected the offer and made a new offer, the Court wrote that, "in a departure from the common law, under Rule 49.07 even if an offer is rejected it remains open for acceptance in accordance with its terms **unless it is withdrawn**."[32]

While the Defendants argued that Rule 49 did not apply since the offer did not make any reference to Rule 49, the Court held that "any offer made in writing [in the course of litigation] is presumptively a Rule 49 offer."[33]

(2) When a defendant makes an offer to settle that is not accepted by the plaintiff, the court may award the defendant an amount not exceeding twice the costs awardable to a successful party, from the date the offer was served, if the following conditions are met:

1. The plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer.

2. The offer was made at least seven days before the trial.

3. The offer was not withdrawn and did not expire before the trial.

Case Law: *Prohaska v. Howe*, 2016 ONSC 48, 2016 CarswellOnt 13, [2016] O.J. No. 13 (Ont. Div. Ct.).

The language of Rule 14.07(2) is the same as that under the *Rules of Civil Procedure*. Therefore, the Court of Appeal's decision in *S & A Strasser Ltd. v. Richmond Hill (Town)*, 1990 CarswellOnt 435, 1 O.R. (3d) 243, 49 C.P.C. (2d) 234, 45 O.A.C. 394, [1990] O.J. No. 2321 (Ont. C.A.) applies. Where a plaintiff's claim is dismissed, the plaintiff did not obtain a judgment and the cost consequences under Rule 14.07(2) are not triggered.

King v. Royal Insurance Co. (1987), 10 W.D.C.P. 126 (Ont. Prov. Ct.).

Although the defendant's offer to settle for $750 was not accepted and the plaintiff's action was dismissed at trial, the fact that the plaintiff attempted to negotiate at the pretrial mitigated against the court awarding double costs to the defendant. Although the defendant used its own process server it could only recover the same costs as if the service had been by the court. See also Rule 20.03.

Niagara Structural Steel (St. Catharines) Ltd. v. W.D. LaFlamme Ltd. (1987), 1987 CarswellOnt 440, [1987] O.J. No. 2239, 58 O.R. (2d) 773, 19 O.A.C. 142, 19 C.P.C. (2d) 163 (Ont. C.A.).

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[32] ~~*Ibid.*~~, *at para 23. [Emphasis added]*

[33] ~~*Ibid.*~~, *at para 34.*

Rule 49.10 (similar to Rule 15.07) of the Rules of Practice does not apply to cases pending appeal. Exceptions to the normal cost consequences with respect to offers to settle should only be made where it appears the interests of justice requires a departure.

Roberts v. Dresser Industries Can. Inc. (1988), 9 A.C.W.S. (3d) 290 (Ont. Dist. Ct.).

An award at trial exceeded the offer of settlement by only $78.12. Pursuant to rule 49.10(1) of the Rules of Practice, (compare with Civil Division Rule 15), the plaintiff in question was entitled to costs on a solicitor and client basis. It is the rule itself that draws the line where "minimal" becomes "sufficient."

Shah v. Mohr (September 14, 1998), Doc. Kitchener 2148/94 (Ont. Gen. Div.).

The claim and the counterclaim were dismissed. The defendant was granted costs on party-and-party basis in main action to date of second offer and solicitor-and-clients costs thereafter. The second offer revoked the first offer. Failure to award costs to the successful defendant would encourage unmeritorious litigation.

Kenny v. Summerside (City), 2000 PESCTD 31, 45 C.P.C. (4th) 258, 2000 CarswellPEI 31 (P.E.I. T.D.).

The plaintiff brought an action for damages in the amount of $100,000. The plaintiff was awarded $3,500 in damages. Within court's discretion to accept offer to settle was not made within time limits. The plaintiff was awarded party-and-party costs until point of $5,000 offer and the city was awarded party-and-party costs after that point.

Soulis v. Samaras (2000), 2000 CarswellOnt 314 (Ont. S.C.J.).

Prior to trial, the plaintiff had made an offer of settlement, which the defendant did not accept. The defendant fared less well. The plaintiff was entitled to solicitor-client costs on *prima facie* application of Rule 49.10.

978011 Ontario Ltd. v. Cornell Engineering Co. (2001), 2001 CarswellOnt 2749, 148 O.A.C. 250 (Ont. C.A.).

Plaintiff entitled to party-and-party costs to date of offer and solicitor-and-client costs after date of offer which expired ten minutes after trial commenced. Fact that costs component not ascertainable not fatal to offer being effective as offer capable of acceptance. Fact some relief obtained by defendant's voluntary payment just prior to trial did not affect success of offer.

George v. Imagineering Ltd. (2001), 2001 CarswellOnt 3832 (Ont. S.C.J.).

Costs awarded to plaintiff on party-and-party basis. Assessment officer directed to assess reasonable articling student fees in preparation for trial itself.

Schaer v. Barrie Yacht Club, 2003 CarswellOnt 2531, [2003] O.J. No. 2673 (Ont. S.C.J.).

Appeal of matters originating in the Small Claims Court where cost recovery is restricted. Where a party has escalated the expense of litigation so disproportional to modest claims, he cannot then be heard to complain that he should have the benefit of limitations. The Appellant/Plaintiff resoundingly impolite. Worst example of a litigator demanding the time, attention and tolerance. Self-represented litigants may be held to the standards of civility expected of lawyers. A proper reprimand for failure to do so is award of costs on a substantial indemnity basis. Costs fixed against the Appellant/Plaintiff at $10,000.

Martin v. Martin, 2003 CarswellNB 573, 2003 NBQB 464, 50 C.B.R. (4th) 120 (N.B. Q.B.).

Claims which survive discharge from bankruptcy. Section 178(1)(a.1)(i) exempted judgment in respect of bodily harm intentionally inflicted. Application that judgment not released by discharge dismissed.

Vandenelsen v. Merkley (2003), [2003] O.J. No. 3577, 2003 CarswellOnt 3483 (Ont. C.A.).

After decision refusing to waive court administrative fees, for lack of jurisdiction, that ground was held unconstitutional in another case. Decision was also based on lack of evidence that refusal of waiver would frustrate ability to proceed with appeal. Appeal from refusal dismissed.

Seymour v. Jenkins, 2003 CarswellNS 69, 2003 NSSC 23 (N.S. S.C.).

Adjudicator's omission of reasons for finding in favour of claimant constituted error of law. Matter ordered returned to Small Claims Court for rehearing.

Morrell v. Boulton, 2006 CarswellOnt 7940, 39 C.P.C. (6th) 203 (Ont. S.C.J.).

Defendants brought motion for costs on substantial indemnity basis and submitted two detailed bills of costs. Motion granted. Defendants awarded costs on substantial indemnity basis of $17,000 for main action and $11,500 for motion to dismiss. Plaintiffs claimed $90,000, which was substantial amount, and recovered nothing. Plaintiffs' claim not complex. They were responsible for outlandish delays while defendants acted in proper and sensible manner. Defendants made five offers to consent to dismissal without costs but plaintiffs accepted none. Plaintiffs' solicitor gave little response to defendants' solicitor's many letters.

Reischer v. Insurance Corp. of British Columbia, 2006 CarswellBC 270, [2006] B.C.J. No. 235, 62 B.C.L.R. (4th) 353, 2006 BCSC 198, 34 C.P.C. (6th) 83 (B.C. S.C. [In Chambers]).

Plaintiff brought action against insurer in Supreme Court. Plaintiff accepted offer to settle action for amount within monetary jurisdiction of Provincial Court. Under r. 37(37) of *Rules of Court, 1990*, plaintiff not entitled to costs other than disbursements if offer is accepted for sum within jurisdiction of Provincial Court and proceeding could appropriately have been brought in Provincial Court. Intent of rule to avoid unfairness that could arise where party had no choice of forum in which to bring claim, yet would be subject to costs consequences for accepting offer within monetary jurisdiction of Provincial Court. Whether plaintiff had sufficient reason to bring action in Supreme Court was irrelevant.

Wood v. Kabaroff, 2006 CarswellBC 2345, 2006 BCSC 1391, 59 B.C.L.R. (4th) 69, 36 C.P.C. (6th) 308 (B.C. S.C.).

Registrar determined that advance payment of $1,000 placed offer to settle at $26,000, properly within jurisdiction of Supreme Court. He allowed units for costs including unit for negotiations. Monetary jurisdiction of provincial court was $10,000 for purposes of r. 37(37) since this was jurisdiction at time when plaintiff commenced his action. Registrar erred in principle by allowing costs under r. 37(22)(b) for negotiations until time offer was delivered to plaintiff since no evidence existed that settlement was result of any negotiations up to time offer was accepted by plaintiff.

Authorson (Litigation Guardian of) v. Canada (Attorney General), 2007 CarswellOnt 4221, 2007 ONCA 501, 86 O.R. (3d) 321, 60 C.C.P.B. 280, 41 C.P.C. (6th) 114, *(*sub nom. *Authorson (Litigation Administrator of) v. Canada (Attorney General))* 283 D.L.R. (4th) 341, *(*sub nom. *Authorson v. Canada (Attorney General))* 226 O.A.C. 4 (Ont. C.A.); additional reasons at 2007 CarswellOnt 5501, 61 C.C.P.B. 319, 43 C.P.C. (6th) 253, 2007 ONCA 599 (Ont. C.A.); leave to appeal refused 2008 CarswellOnt 179, 2008 CarswellOnt 180, *(*sub nom. *Authorson v. Canada (Attorney General))* 384 N.R. 391 (note), *(*sub nom. *Authorson v. Canada (Attorney General))* 249 O.A.C. 399 (note), [2008] 1 S.C.R. v (note) (S.C.C.).

Decision that statutory bar to damages claim operable. Statutory bar applying to entire damages claim. Judgment constituting final judgment. "General acceptance" not sufficient to ground judicial notice where dispute amongst reasonable persons on subject. Application for leave to appeal to Supreme Court of Canada filed on September 26, 2007 (Court File No. 32262).

Baliwalla v. York Condominium Corp. No. 438, 2007 CarswellOnt 4096, 63 C.L.R. (3d) 169, 226 O.A.C. 66, [2007] O.J. No. 2484 (Ont. Div. Ct.).

Deputy Small Claims Court Judge allowed the action and awarded Baliwalla damages of $5,350.29. The condominium corporation appealed.

The Ontario Divisional Court, per Greer J., in a decision reported at 224 O.A.C. 192, allowed the appeal and dismissed Baliwalla's action. The condominium corporation sought costs of $52,943.48 on a substantial indemnity basis or $46,830.98 on a partial indemnity basis. The court fixed the condominium corporation's total costs at $7,452.73 for the action and appeal.

Appellant had made an offer to settle under r. 49 of the *Rules of Civil Procedure*. Relying on the decision in *Niagara Structural Steel (St. Catharines) Ltd. v. W.D. LaFlamme Ltd.* (Ont. C.A.), the respondent argued that r. 49.10 did not apply to offers to settle made pending an appeal. The rule speaks to obtaining "a judgment" by a plaintiff in the operation of the rule, and these terms do not apply to appeals.

"The amount in question fell within the jurisdiction of the Small Claims Court. Appellant entitled to the full amount of disbursements and GST of $1,014.21 expended on the appeal. Weighing the factors in this case and applying the principles set down by the Court of Appeal, I award the appellant the sum of $3,000 for the appeal."

Anderson v. Routbard, 2007 CarswellBC 647, [2007] B.C.J. No. 627, 2007 BCCA 193, 396 W.A.C. 98, 239 B.C.A.C. 98, 41 C.P.C. (6th) 95, 67 B.C.L.R. (4th) 66 (B.C. C.A.).

Trial judge found offer did not afford plaintiff meaningful opportunity to assess amount he would receive if offer accepted as he could not know at time of offer what pt. 7 benefits, if any, would be subject of dispute. Plaintiff appealed. Appeal allowed. Costs increased to $8,640. Despite difficulties in calculating actual amount offered, agreement was not vague. Settlement proposal was not uncertain, based on objective standard which takes legal context into account. Offer to settle under r. 37 constitutes circumstances in which discretion can be used to depart from fixed costs as set out in r. 66(29). As matter was one of general importance to profession, no costs awarded on appeal.

Icecorp International Cargo Express Corp. v. Nicolaus, 2007 CarswellBC 444, 236 B.C.A.C. 294, 390 W.A.C. 294, 38 C.P.C. (6th) 26, 2007 BCCA 97 (B.C. C.A.).

Defendants made offer to settle plaintiff's action October 15, 2002 for "$100 and costs in accordance with rule 37(22)." Rule 37(37) provided that plaintiff not entitled to costs other than disbursements, on accepting an offer made by the defendant, if (a) the offer was accepted for a sum within the jurisdiction of the Provincial Court under the *Small Claims Act*, and (b) the proceeding in which the offer was made could appropriately have been brought in the Provincial Court. The plaintiff claimed its costs and disbursements to the date of the offer, arguing that the action could not appropriately have been brought in Provincial Court. The British Columbia Supreme Court, in a decision reported at 2006 CarswellBC 15, agreed with plaintiff. The defendants sought leave to appeal. Appeal dismissed.

Kolasa v. 1408803 Ontario Ltd. (2007), 2007 CarswellOnt 2968 (Ont. Div. Ct.); additional reasons at (2007), 2007 CarswellOnt 4060 (Ont. Div. Ct.).

Leave granted to appeal award of costs. Appellant submits that he erred as damages recovered within the monetary jurisdiction of the Small Claims Court. It successfully defended most of the substantive claims against it and made an offer to settle for $7,000 all-inclusive.

Section 134(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that an appeal court may make any order that ought to have been made by the court appealed from. See *340812 Ontario Ltd. v. Canadian National Railway*, 1997 CarswellOnt 2743, 102 O.A.C. 230, 149 D.L.R. (4th) 575 (Ont. C.A.).

Given that appellant's offer to settle included costs, court unable to determine whether the respondent received amount at trial that was as favourable or less favourable than the offer, as required by Rule 49.10.

Costs fixed at $5,000 all-inclusive. Appeal allowed in part. Paragraph 1 of judgment varied to substitute an order for damages of $4,996.75. Paragraph 2 varied to substitute an order of costs to the respondent in amount of $5,000.

Gardiner v. Mulder, 2007 CarswellOnt 2829, 224 O.A.C. 156 (Ont. Div. Ct.).

An offer to settle a claim in Small Claims Court does not continue to remain open after disposition, even if not withdrawn.

In the wording of Rule 14.03(3) of the *Small Claims Court Rules*, it provides the following:

> (3) Expiry when court disposes of claim — An offer may not be accepted after the court disposes of the claim in respect of which the offer is made.

See *The Law of Costs*, 2nd ed. (Ontario: Canada Law Book, 2005) at pp. 8-16, Orkin, in respect of costs in appeals where the party is partly successful:

> **Costs where divided success**
>
> The general rule is that an appellant is entitled to costs where he or she has substantially succeeded on the appeal, but where the appellant succeeds only partially, or success is divided, no costs should be allowed.

Delco Projects Ltd. v. Young, 2008 CarswellBC 291, 2008 BCPC 19 (B.C. Prov. Ct.).

If claimant made offer to settle pursuant to Rule 10.1 of *Small Claims Rules* and served on defendants and rejected by them, the defendants might face a penalty of up to 20 per cent of the amount of the offer to settle. If such offer made, claimant to file offer to settle and proof of service of offer on the defendant. Court would then deal with the issue of whether penalty appropriate and how much it should be.

Rigitano Estate v. Western Assurance Co., 2007 CarswellOnt 6412, 54 C.C.L.I. (4th) 163, *(*sub nom. *Western Assurance Co. v. Rigitano Estate)* 229 O.A.C. 351 (Ont. Div. Ct.).

Small Claims Court allowed action and awarded judgment to estate of $3,500 plus prejudgment and postjudgment interest. Western Assurance appealed. The estate cross-appealed interest award. Fedak J. dismissed appeal and allowed cross-appeal.

The deputy judge gave adequate reasons for finding offer to settle valid. Even though the deputy judge did not expressly refer to the issue of consensus, he wrote: "[Western Assurance] intended to settle all claims, past, present and future, and did so with the lawful representative for their insured namely, his Estate Trustee."

Qubti v. Reprodux Ltd., 2010 CarswellOnt 2192, 2010 ONSC 2200 (Ont. S.C.J.).

The employee's offer to settle that remained open at trial far exceeded amount awarded and was therefore outside boundaries of r. 49.10 of *Rules of Civil Procedure*. Costs awarded ought to be proportionate to degree of success achieved. The employee recovered 4 per cent of amount claimed. Court awarded $40,000 in costs plus $11,360 in disbursements.

Melara-Lopez v. Richarz, 2009 CarswellOnt 6333, 255 O.A.C. 160 (Ont. Div. Ct.).

The employee's offer to settle that remained open at trial far exceeded amount awarded and was therefore outside boundaries of r. 49.10 of *Rules of Civil Procedure*. Costs awarded ought to be proportionate to degree of success achieved. The employee recovered 4 per cent of amount claimed. Court awarded $40,000 in costs plus $11,360 in disbursements.

The appellants sued respondent solicitor for negligence. They recovered $1,393.53 plus prejudgment and post-judgment interest. The respondent had made offer before litigation began to settle action for $2,000, and then subsequent to litigation, he offered to settle for $3,000. Trial judge applied r. 14.07 of the *Small Claims Court Rules*. He concluded that both offers would have surpassed the appellants' recovery at trial and awarded respondent costs fixed at $3,298.88. The appellants appealed costs award. Divisional Court dismissed appeal. Small Claims Court r. 14.02.1 specified that an offer to settle could be made at any time. No prohibition on offers made before start of litigation. No over-arching principle costs must follow

the event. Early offers to settle were to be encouraged. The trial judge determined that failure to accept reasonable and timely offer constituted unreasonable behaviour and crafted a costs award accordingly.

Qubti v. Reprodux Ltd., 2010 CarswellOnt 2192, 2010 ONSC 2200 (Ont. S.C.J.).

The employee's offer to settle that remained open at trial far exceeded amount awarded and was therefore outside boundaries of r. 49.10 of *Rules of Civil Procedure*. Costs awarded ought to be proportionate to degree of success achieved. The employee recovered 4 per cent of amount claimed. Court awarded $40,000 in costs plus $11,360 in disbursements.

Habib v. Jack, 2011 BCSC 1294, 2011 CarswellBC 2621, 25 B.C.L.R. (5th) 162 (B.C. S.C.), Ross J.; additional reasons to 2011 BCSC 399, 2011 CarswellBC 731, 19 B.C.L.R. (5th) 207 (B.C. S.C.).

Offers to settle. Failure to accept offer. The plaintiff brought an action for damages against the defendants. The defendants offered to settle for $1,000, six weeks before the trial. The plaintiff refused. The action was dismissed. The trial judge ordered costs to the defendants. Double costs were not appropriate. At the time of the offer, it was clear that the plaintiff had suffered an injury and there was dispute related to liability. The offer was nominal given the extent of the plaintiff's injury. It could not be said that the offer should have been accepted, as it was not clear that the action had little chance of success.

Cairns v. Gill, 2011 BCSC 420, 2011 CarswellBC 787, 8 C.P.C. (7th) 240 (B.C. S.C.).

The defendants made an offer to settle, which was refused by the plaintiff. The matter proceeded to trial. The plaintiff was the successful party at trial, but was awarded less than the defendants had offered in their offer to settle. The defendants brought an Application for payment of their costs and disbursements from the date of their offer to settle. The Application was dismissed. There were sufficient reasons for the plaintiff to proceed in Supreme Court.

The plaintiff would not have obtained much, if any, benefit from the offer at the time it was made or afterward, because of the costs component. Although the jury awarded an amount roughly two-thirds of defendants' offer, the size of the offer was so small that any amount awarded would have represented a significant portion. The defendants were in a better financial position to cover their costs of litigation.

Until recently, the funding of litigation costs by an insurer, as a matter of the relative financial circumstances of the parties under 9-1(6)(c) of the B.C. Rules, was not a proper consideration in relation to costs. This is no longer the case. See *Smith v. Tedford*, 2010 BCCA 302, 2010 CarswellBC 1527, [2010] B.C.J. No. 1236, [2010] I.L.R. I-5009, 488 W.A.C. 227, 288 B.C.A.C. 227, 7 B.C.L.R. (5th) 246, 88 C.P.C. (6th) 199 (B.C. C.A.).

Hayes v. Silva, 2011 ONSC 3109, 2011 CarswellOnt 3575, 6 C.L.R. (4th) 156 (Ont. Master).

Hayes was successful in obtaining judgment for $14,272.90 and defending against the counterclaim of $37,000.

As a general principle, costs in a proceeding under the *Construction Lien Act* are in the absolute discretion of the court. The court must consider the facts and circumstances of the particular case; it is not a mechanical exercise. The court must be fair and reasonable in exercising its discretion to award costs.

Rule 57.01(1) describes factors for the court to consider when fixing costs. The list is non-exhaustive. Proportionality must also be considered. Costs should be proportionate to the importance and complexity of the issues and to the amount involved in the proceeding. See Rule 1.04.

The court disagreed with submissions of Silva's counsel that a paralegal could have represented the plaintiff because quantum was within jurisdiction of Small Claims Court. Having

regard to the *Construction Lien Act*, section 67(5), the *Law Society Act*, and the regulations thereunder, paralegals have no standing in trials in the Superior Court of Justice under the *Construction Lien Act*. In any event, it is not unreasonable for a plaintiff to choose to be represented by a lawyer rather than by a paralegal in a construction lien claim that goes to trial.

The plaintiff served an offer to settle.

Silva submitted that cost consequences of rule 49 should not apply because the quantum of the claim was within the monetary jurisdiction of the Small Claims Court. That argument ignored the requirement under the *Construction Lien Act* that a claimant who seeks the remedies *only available* under that *Act must* bring the claim in the Superior Court of Justice.

The plaintiff successfully defended the counterclaim for an amount greater than the Small Claims Court limit. The Rules applied except where inconsistent with the *Construction Lien Act*. Rule 1.04, as recently amended, provides:

> 1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Costs were fixed at $10,750.

Cairns v. Gill, 2011 BCSC 420, 2011 CarswellBC 787, 8 C.P.C. (7th) 240 (B.C. S.C.).

The plaintiff declined to accept the defendants' offer to settle her claim for $1,292 (the "offer to settle") plus costs, and proceeded to a three-day trial before a judge and jury. The plaintiff, although successful at trial, received a total award of $851.

See McLachlin J.A., as she then was, in *Houweling Nurseries Ltd. v. Fisons Western Corp.*, 1988 CarswellBC 471, [1988] B.C.J. No. 306, 29 C.P.C. (2d) 168, 49 D.L.R. (4th) 205, 37 B.C.L.R. (2d) 2 (B.C. C.A.) at p. 25 [B.C.L.R.]; leave to appeal refused [1988] S.C.C.A. No. 200, [1988] 1 S.C.R. ix (note), 37 B.C.L.R. (2d) 2 (note), 30 C.P.C. (2d) lv (note), 89 N.R. 398 (note) (S.C.C.):

> Costs in our system of litigation serve the purpose, not only of indemnifying the successful litigant to a greater or lesser degree, but indemnifying the successful litigant to a greater or lesser degree, but of deterring frivolous actions or defences. Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful. Moreover, there is a sound reason for keeping costs within relatively modest limits. The possibility of high costs may unduly deter a party from bringing an uncertain but meritorious claim or defence.

The defendant's offer to settle cannot be ignored. The plaintiff cannot avoid some consequences.

Pursuant to Rule 7.1(1) of the *Small Claims Rules*, B.C. Reg. 261/93, a judge, on an application at any time or on their own motion, if satisfied that the monetary outcome of a claim may exceed $25,000, not including interest and expenses, must transfer a claim to the Supreme Court. The defendants' claim for costs after the date of offer to settle was dismissed.

There was sufficient reason, at the commencement of the action, to proceed in Supreme Court. The plaintiff denied all of her disbursements incurred after the date of the offer to settle. Each party was to bear its own costs.

Meltz v. 2157689 Ontario Inc. (July 18, 2014), Doc. SC-12-93205-00, [2014] O.J. No. 5854 (Ont. S.C.J.).

Plaintiff claimed $9,000 but recovered a judgment for only $219. Defendant had offered to settle for $500, which triggered cost consequences under rule 14.07(2). The court awarded costs to the defendant consisting of a representation fee in the amount of $500 for each of the two days of trial, doubled under rule 14.07(2), for a total of $2,000 plus disbursements. Rule 14.07(2) was applied in tandem with *Courts of Justice Act* s. 29.

Wray v. Pereira, 2019 ONSC 3354, 2019 CarswellOnt 8773, Justice M. McKelvey (Ont. S.C.J.)

The plaintiff, Douglas Wray, brought this action for damages as a result of a motor vehicle accident. The action was tried before a jury. After taking into account the statutory deductible, the plaintiff's recovery at trial was $2,000.

The plaintiff made a Rule 49 offer to settle for the sum of $75,000 plus pre-judgment interest and costs shortly before the commencement of trial. The plaintiff's offer was a sincere effort to try and resolve the action, whereas the defendants left the plaintiff in a situation where he either had to abandon his claim entirely and face a claim for costs, or alternatively take the case to trial. The issue is not what a counsel is entitled to charge his or her own client, but rather what amount is reasonable to impose upon the loser.

It was reasonable for the plaintiff to bring his action in Superior Court under the regular rules. The defendants' approach to a resolution of this case made it almost impossible to avoid a trial and their conduct at trial did increase by several days, the length of the trial. A reasonable amount of partial indemnity costs in this case is $40,000 inclusive of HST and disbursements.

ILI's Painting Services Ltd. v. Homes by Bellia Inc., 2020 ABQB 372, 2020 CarswellAlta 1285 (Alta. Q.B.).

In *ILI's Painting Services Ltd. v. Homes by Bellia Inc.*, the plaintiff made settlement offers of $50,000, which the defendant refused. At trial, the court found in the plaintiff's favour and awarded it $58,652, exclusive of costs and interest.

The court found Alberta no longer requires formality around informal offers. The court emphasized that costs rules are necessary to encourage reasonable settlement. The court ultimately awarded double costs.

(3) If an amount is awarded under subrule (1) or (2) to a self-represented party, the court may also award the party an amount not exceeding $500 as compensation for inconvenience and expense.

O. Reg. 78/06, s. 31

Commentary: Since July 1, 2006 all offers must be in writing to affect the cost consequences pursuant to subrule 14.07. There are also optional forms now available that may be used for offers, acceptance, and withdrawal. Further subrule 14.04 has been expanded to include communications relating to on-going negotiations until liability is determined and relief granted.

No communication of an offer, if it is not accepted, may be made to the trial judge until after the decision on the merits. Acceptance of an offer must be served before it is withdrawn or is disposed of. A plaintiff's offer may include a condition that the defendant pay money into court and, if so, the defendant must pay in and advise the plaintiff.

The party initiating the offer is responsible for service either personally at least seven days before the hearing or by mail at least twelve days in advance. Where monies are paid into court as a condition, they will not be paid out unless there is a judge's order or written consent of all the parties. The clerk will also ensure that any reference to the offer to settle will be removed from the file before the action proceeds to trial.

If the defendant's offer includes money, the plaintiff may accept on the condition of payment into court and, if the defendant defaults,the plaintiff may move under Rule 15.06 for judgment or to continue the action.

If the accepted offer is silent, and if the plaintiff makes the offer,he is entitled to his disbursements to the date of acceptance; and if the defendant makes the offer, the plaintiff is entitled to disbursements to date of offer.

If there is any default under the accepted offer, the other party may move for judgment on the offer or proceed with the action as if no offer had been made.

Where an amount is awarded under subrule 14.07(1) or 14.07(2) to a party who is not represented by another person, the court may also award the party an amount not exceeding $500 as compensation for expense and inconvenience.

Rules 13 and 15 provide for costs to be awarded when pre-trials and motions, respectively, frustrate the process. They also place a limit of $100 plus disbursements on the award. It is proposed that those limits be removed and the court decide the amount.

Rule 14 deals with cost and compensation consequences of a failure to accept an offer to settle. It is proposed that the basis for calculating an award of costs and compensation in the case of unrepresented parties from an amount up to double the costs be changed to a more generic wording which would allow the court to impose costs or compensation sanctions for the failure to accept a reasonable settlement offer. The compensation clause, 14.07(3), will then become unnecessary.

Case Law: *Brockman v. Sinclair* (1979), 26 O.R. (2d) 276 (Ont. Sm. Cl. Ct.); affirmed (1980), 31 O.R. (2d) 436 (Ont. Div. Ct.).

The provisions of the *Small Claims Courts Act*, R.S.O. 1970, c. 439, s. 83, requiring a plaintiff to pay to the defendant costs in the event that the plaintiff recovers judgment for less than the amount of money paid into court by the defendant are mandatory. Accordingly, although the trial judge awarded judgment to the plaintiff and costs, where the amount of such judgment was for less than the amount the defendants paid into court, by virtue of the statute, the defendants are entitled to tax their costs after the date of payment.

Gibson v. McAdams (July 13, 1998), Doc. CA C21575 (Ont. C.A.).

The offer to settle contained in the pretrial memorandum was held to constitute an offer to settle under Rule 49 of the *Rules of Civil Procedure* (Ontario). The plaintiffs obtained more than that offered in the pretrial memorandum at trial. The order for solicitor-and-client costs was affirmed.

Ron's Electric Ltd. v. Harder Burke, 13 C.P.C. (5th) 328, 2000 CarswellAlta 1269, 2000 ABPC 172 (Alta. Prov. Ct.).

Contractor brought action against homeowner for payment under contract. Action allowed in amount of $3,332.08 and counterclaim allowed in amount of $4,204.24. Contractor ordered to pay to difference of $872.16 plus costs of $600. Contractor offered to settle counterclaim for $1,500, two days prior to commencement of trial, with offer specified to be withdrawn upon commencement of trial if not accepted. No appropriate to apply Rule 174 of Alberta Rules of Court, by way of section 19.1 of *Provincial Court Act*. Existing costs award was fair and reasonable in circumstances.

Jama v. Bobolo, 2002 CarswellAlta 435, 2002 ABQB 216, [2002] 7 W.W.R. 523, 19 C.P.C. (5th) 284, 2 Alta. L.R. (4th) 186, 311 A.R. 362, [2002] A.J. No. 398 (Alta. Q.B.).

Plaintiffs brought action against defendants with respect to personal injuries arising out of motor vehicle accident, dismissed by jury with costs to defendants. Defendants filed offer to settle for one dollar, inclusive of all damages, prejudgment interest, and costs. Defendants applied for double costs. Defendants' offer of settlement was *bona fide* offer.

Rooney (Litigation Guardian of) v. Graham, 2001 CarswellOnt 887, [2001] O.J. No. 1055, 198 D.L.R. (4th) 1, *(*sub nom. *Rooney v. Graham)* 144 O.A.C. 240, 9 C.P.C. (5th) 50, 53 O.R. (3d) 685 (Ont. C.A.).

Plaintiff bringing successful action against defendant driver. Plaintiff's offer seeking party-and-party costs to date of offer and solicitor-and-client costs thereafter. Damages awarded at trial exceeding offer. Offer to settle fell within Rule 49. Uncertainty of provision for ongoing

costs did not deprive party of benefits of rule. Costs payable on solicitor-and-client scale. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.

Corporate Cars v. Parlee (2002), 2002 CarswellOnt 3170 (Ont. S.C.J.).

Plaintiff made formal offer to settle. Judgment more favourable than terms of offer. Issues not complex. Claim was for $12,339. Costs fixed at $6,000 plus $993 for disbursements. Counsel could not expect to receive same remuneration for smaller amounts under simplified rules as for litigation of larger amounts with much greater complexity.

Kuzyk v. Fireman LoFranco, 2005 CanLII 25771 (Ont. S.C.J.).

For cost consequences of Rule 49 to be invoked, Offer to Settle must be clear and unambiguous. Offer to Settle proposed dismissal of plaintiff's action without costs to any party. An Offer to Settle that offers a dismissal of a plaintiff's claim, is not a formal offer engaging the cost consequences of rule 49: see *Rooney (Litigation Guardian of) v. Graham*, 2001 CarswellOnt 887, [2001] O.J. No. 1055, 198 D.L.R. (4th) 1, *(*sub nom. *Rooney v. Graham)* 144 O.A.C. 240, 9 C.P.C. (5th) 50, 53 O.R. (3d) 685 (Ont. C.A.).

Relevant factors under rule 57 reviewed.

With regard to disbursements, see *3664902 Canada Inc. v. Hudson's Bay Co.*, 2003 CarswellOnt 869, 169 O.A.C. 283, [2003] O.J. No. 950 (Ont. C.A.), at para. 17. Disbursements are to be assessed "upon the basis of what was actually spent, reduced if appropriate to what is reasonably spent."

Sharpe v. Brokerhouse Distributors Inc., 2005 CarswellBC 1020, 12 C.P.C. (6th) 370, 2005 BCSC 629 (B.C. S.C. [In Chambers]).

Application by plaintiff for costs of action concluded by the plaintiff's acceptance of a formal offer to settle, pursuant to Rule 37 of the *Rules of Court* for $5,000. Defendant argued amount of settlement jurisdiction of the Small Claims Court and therefore plaintiff not entitled to costs other than disbursements.

Defendant contends offer and acceptance resolved *only* the plaintiff's claim against the defendant and *not* counterclaims. See *Charest Construction Ltd. v. McKay (c.o.b. Ken McKay Enterprises)*, 1985 CarswellBC 599, [1985] B.C.J. No. 90, 6 C.P.C. (2d) 61 (B.C. Co. Ct.) (cited to C.P.C.) when Provenzano Co. Ct. J. found that it was "conceivable and reasonable" in the circumstances for the plaintiff to assume that the payments into court were made in regard to the claim and not the counterclaim.

In *Immocreek Corp. v. Pretiosa Enterprises Ltd.*, 1996 CarswellOnt 4044, *(*sub nom. *Immo Creek Corp. v. Pretiosa Enterprises Ltd.)* 14 O.T.C. 391, [1996] O.J. No. 3436 (Ont. Gen. Div.), the Ontario Court, General Division, reached the opposite conclusion to that in *Charest*. In *Immocreek*, the court found that the plaintiff's offer to settle "all outstanding issues in this action" amounted to an offer to settle both the claim and the counterclaim.

See also *Demitri v. Niemann*, 1981 CarswellBC 92, 22 C.P.C. 112, 28 B.C.L.R. 74 (B.C. S.C.) where Locke J. found that where offer to settle not specific on which aspects of the claim it aimed at settling, the defendant "had no means of knowing to what claim the offer was directed" and therefore the plaintiff could not benefit from a rule which otherwise would have allowed her double costs. The defendant in *Demitri* did not accept the plaintiff's offer.

In this case the style of cause refers to the counterclaim. The offer refers to "this proceeding," which language generally connotes the whole proceeding.

Defendant's offer ambiguous and such ambiguity should be resolved against it as the author of the "ambiguous" document. Ambiguity results in imperfect compliance with Rule 37.

Plaintiff's application for costs as assessed allowed.

Clark v. Sidhu, 2005 CarswellBC 1488, [2005] B.C.J. No. 1373, 51 B.C.L.R. (4th) 119, 2005 BCSC 914, 18 C.P.C. (6th) 66 (B.C. S.C.).

Defendant claimed double costs after offer to settle. Trial judge ordered double costs not appropriate. Offers to settle must be reasonable as policy. Defendant's offer not reasonable as there was some evidence of injury, albeit slight injury, to plaintiff.

Bader v. Rennie (2008), 2008 CarswellOnt 700, 233 O.A.C. 390 (Ont. Div. Ct.).

Defendant moved for summary judgment and lost. Leave to appeal allowed. Court asked for submissions as to costs. Rule 49 does not apply to offers to settle appeals. See *Jones v. Kansa General Insurance Co.*, [1992] O.J. No. 1597, 1992 CarswellOnt 664, 93 D.L.R. (4th) 481, 57 O.A.C. 213, 11 C.C.L.I. (2d) 194, 10 O.R. (3d) 56 (Ont. C.A.) at paragraph 58; *Douglas Hamilton Design Inc. v. Mark*, [1993] O.J. No. 1856, 1993 CarswellOnt 459, 20 C.P.C. (3d) 224, 66 O.A.C. 44 (Ont. C.A.).

At the end of the day, what is the total for fees and disbursements that would be a fair and reasonable amount to be paid by unsuccessful parties in the particular circumstances of case?

The Queen v. Henderson, 292 D.L.R. (4th).

The matter of costs was considered *de novo* since there was a complete absence of any submissions on the issues of costs before trial judge. The court declined to increase costs due to plaintiff's settlement offer because Crown reasonable in its approach and offer not a substantial compromise of plaintiff's claim. Important points of principle involved and issues related to liability. Costs of trial fixed at $645.50.

The trial judge awarded costs to Henderson in amount of $175.00. He did not ask for submissions. Henderson was entitled to be heard. Failing to give him that opportunity was breach of natural justice and fairness and warrants granting leave to appeal on issue of costs.

The trial judge had further discretion under the *Rules of the Small Claims Court*, O. Reg. 258/98, to award Henderson up to $500.00 as compensation for inconvenience and expense and a further $50.00 as a fee for preparation of pleadings. Henderson made settlement offer re section 14.07 of the *Rules of Small Claims Court*. Total amount recoverable for costs, however, is capped at 15 per cent of the judgment recovered.

Appeal by Her Majesty the Queen dismissed. Leave granted to Henderson to appeal costs award and judgment of trial judge varied to increase the costs award to $645.50.

10.1 Inc. v. 2248951 Ontario Inc., 2018 ONSC 381, 2018 CarswellOnt 346 (Ont. Div. Ct.).

Appeal of decision of the Ontario Small Claims Court dated December 6, 2016. In favour of the plaintiff, 2248951 Ontario Inc., in sum of $10,576. Small Claims Court Judge indicated rule 14.07 of the Rules of the Small Claims Court (O.Reg. 258/98) applied because the plaintiff had beaten his offer to settle. Request to make written submissions was denied by the trial judge. The standard of review on an appeal from the order of a judge is correctness for a question of law and palpable and overriding error for findings of fact. A question of mixed fact and law is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle which may amount to an error of law (See *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.)). Reasons that are delivered orally and transcribed qualify as written reasons. The issue of the relationship between rule 14.07 and s. 29 of the *Courts of Justice Act* has been considered in various Small Claims Court decisions and in at least two Superior Court decisions. Both Superior Court decisions have concluded that rule 14.07 and s. 29 can be read harmoniously, although they have come to this result by somewhat different paths. Section 29 was not intended to cap the costs at 15% in the circumstances of an offer that gives rise to the cost consequences outlined in R. 14.07. the award of $10,500 in costs in this case appears to be disproportionate to any additional costs actually incurred. Where the court exercises its discretion to increase costs above the 15% maximum set by s.

29 of the *Courts of Justice Act*, it must provide sufficient reasons for the party ordered to pay costs to understand what unreasonable behaviour is being penalized, and to understand the correlation between the additional costs ordered and the unreasonable behaviour. The total costs should equal $7,420.

NAT-CAP Construction Inc. v. Perley and Rideau Veteran's Health Centre (May 31, 2019), Doc. 16-SC-139797, R. Julien, Deputy Judge (Ont. Sm. Cl. Ct.)

Rule 14. Offer to settle. The costs consequences of a failure to accept a defendant's Offer to Settle are outlined in Rule 14.07 of the Rules of the Small Claims Court and more particularly at sub-rule 14.07(2).

By virtue of Rule 29 of the Rules of the Small Claims Court, an award of costs in the Small Claims Court shall not exceed 15% of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceedings.

Defendant is entitled to an award of costs that is double the amount awarded, as a result of the plaintiff's failure to accept the defendant's Offers to Settle and not for allegedly having behaved unreasonably in the proceedings. Proper representation fee is $900.00 for each day of trial, for a total of $1,800.00. As the plaintiff failed to accept the defendant's offers to settle, defendant is entitled to double that amount.

Rule 15 — Motions

15.01 (1) Notice of Motion and Supporting Affidavit — A motion shall be made by a notice of motion and supporting affidavit (Form 15A).

(2) The moving party shall obtain a hearing date from the clerk before serving the notice of motion and supporting affidavit under subrule (3).

Motions [R. 15.01(2)]

(3) The notice of motion and supporting affidavit,

(a) shall be served on every party who has filed a claim and any defendant who has not been noted in default, at least seven days before the hearing date; and

(b) shall be filed, with proof of service, at least three days before the hearing date.

(4) Supporting Affidavit in Response — A party who prepares an affidavit (Form 15B) in response to the moving party's notice of motion and supporting affidavit shall serve it on every party who has filed a claim or defence and file it, with proof of service, at least two days before the hearing date.

(5) Supplementary Affidavit — The moving party may serve a supplementary affidavit on every party who has filed a claim or defence and file it, with proof of service, at least two days before the hearing date.

(6) Motion After Judgment Signed — A motion that is made after judgment has been signed shall be served on all parties, including those who have been noted in default.

O. Reg. 78/06, s. 32; 393/09, s. 14(1)–(3), (6)

Commentary: motions are available where a party needs to seek any of the various forms of orders which are available on motion under the *Small Claims Court Rules*. Motions are generally made to a judge under rule 15, although certain orders can be obtained from the clerk, if requested on consent, under rule 11.2.

Examples of common types of motions in Small Claims Court are as follows:

Type of Motion	**Applicable Rule**
Motion for substituted service	8.04
Motion for default judgment	11.03
Motion to set aside noting in default	11.06
Motion to set aside default judgment	11.06
Motion to extend time	3.02(1) or 11.1.01(1)
Motion for judgment	12.02
Motion for judgment on a settlement	14.06
Motion to vary or set aside judgment	17.01(4)
Motion for a new trial	17.04
Motion for a payment plan	20.02(1)(b)
Motion to renew writ	20.06(1.1) or 20.07(1.1)

Motions are brought using the Notice of Motion and Supporting Affidavit (Form 15A). This form provides for notice to the responding parties of both (i) the order(s) requested; and (ii) the evidence relied on in support of the motion.

The moving party must prepare the Notice of Motion and Supporting Affidavit, before obtaining a return date from the court office to be noted on the Notice of Motion. Motions are not necessarily scheduled on the same days or times at the various courthouses across Ontario.

The affidavit should be limited to factual matters within the deponent's personal knowledge, except that where evidence is given based on information obtained from another person or source, the affidavit should disclose that source and state the fact of the deponent's belief in the truth of that information. Affidavits should not contain argument or references to legislation or caselaw, since affidavits are simply an evidentiary vehicle for the presentation of factual matters, which the deponent can swear or affirm to be true.

In appropriate cases, additional motion affidavits (Form 15B) may be relied on by the moving party and served together with the Notice of Motion and Supporting Affidavit.

The Notice of Motion and Supporting Affidavit must be served on the responding parties a minimum of seven days before the hearing date and filed, with proof of service, at least three days before the hearing date. The court fee to file a motion is currently $120.

A responding party may if necessary serve and file one or more responding affidavits (Form 15B), with proof of service, at least two days before the hearing date.

The moving party may reply to any responding affidavits by service and filing of a supplementary affidavit (Form 15B), with proof of service, at least two days before the hearing date. In practice it is most unusual for supplementary affidavits to be required.

Note that the timeline for service of motion materials under rule 15.01 only provides minimum timelines. In general, ample notice should be given and the minimums may be inadequate in some cases and can lead to otherwise unnecessary adjournments. It is always preferable to given as much notice as feasible.

Moving parties should attempt wherever possible to resolve motion issues before launching a motion. For example, where a defendant has been noted in default and wishes to file a defence will need to bring a motion under rule 11.06 to set aside the noting in default only if the plaintiff does not consent to the filing of a defence: rule 11.05 permits the defence to be filed with the plaintiff's consent. If the plaintiff consents, the parties need not spend resources on what may be a wasteful motion dispute; nor are motion costs including the $120 motion filing fee incurred.

For further reference dealing with motions for judgment or to strike pleadings, see rule 12.02, above.

For further reference dealing with motions for interlocutory relief, and the related question of jurisdiction, see *Courts of Justice Act* s. 23, above, under the heading "Jurisdiction — Interlocutory Orders".

Case Law: *Mortazavi v. Monod*, [2020] O.J. No. 1147 (Sm. Cl. Ct.)

The plaintiff filed a Notice of Motion and Supporting Affidavit but the affidavit contained no evidence. Instead it merely stated the plaintiff's intention to file evidence at a later time. Later he filed a brief of unsworn material including written argument, but no affidavit, and the responding party denied having received a copy. The court dismissed the motion, holding that it was unsupported by evidence. The purpose of the Notice of Motion and Supporting Affidavit is to provide contemporaneous notice to the responding party of both the orders sought and the evidence relied on in support of that request. It was not open to a moving party to bifurcate the process by unilaterally reserving a right to file an affidavit at a later time, nor was the court prepared to treat a brief of unsworn documents as evidence in the absence of any affidavit as required by rule 15.01(1).

15.02 Method of Hearing — (1) A motion may be heard,

(a) in person;

(b) by telephone or video conference in accordance with paragraph 2 of subrule 1.07(1);

(c) by a judge in writing under clause 11.03(2)(a);

(d) by any other method that the judge determines is fair and reasonable.

(2) The attendance of the parties is not required if the motion is in writing under clause (1)(c).

O. Reg. 78/06, s. 32; 38/16, s. 8; 249/21, s. 11

15.03 (1) Motion Without Notice — Despite rule 15.01, a motion may be made without notice if the nature or circumstances of the motion make notice unnecessary or not reasonably possible.

(2) Service of Order — A party who obtains an order on motion without notice shall serve it on every affected party, together with a copy of the notice of motion and supporting affidavit used on the motion, within five days after the order is signed.

(3) Motion to Set Aside or Vary Motion Made Without Notice — A party who is affected by an order obtained on motion without notice may make a motion to set aside or vary the order, within 30 days after being served with the order.

O. Reg. 78/06, s. 32

Commentary: Most motions must be brought on notice to the opposing and affected parties. The occasional exceptions are addressed by rule 15.03.

A common error in this regard is plaintiffs bringing motions, without notice, to set aside clerks' dismissal orders issued under Rule 11.1. A motion seeking to re-open a claim which has been dismissed clearly affects the interests of the defendant and must be brought on notice. Serving the motion may also have the added benefit of getting the defendant to respond to an otherwise dormant case, which could lead to settlement discussions and is in any event desirable.

Moving parties must realize that without notice motions (other than motions for default judgment under Rule 11) are very much the exception. In the language of rule 15.03(1), the test is

whether "the nature or circumstances of the motion make notice unnecessary or not reasonably possible." It should also be kept in mind that personal service of a motion is not required, and service by regular mail or courier to the respondent's last known address, or service by fax, is sufficient: rules 8.07 and 8.08.

15.04 No Further Motions Without Leave — If the court is satisfied that a party has tried to delay the action, add to its costs or otherwise abuse the court's process by making numerous motions without merit, the court may, on motion, make an order prohibiting the party from making any further motions in the action without leave of the court.

O. Reg. 78/06, s. 32

15.05 Adjournment of Motion — A motion shall not be adjourned at a party's request before the hearing date unless the written consent of all parties is filed when the request is made, unless the court orders otherwise.

O. Reg. 78/06, s. 32

15.06 Withdrawal of Motion — A motion shall not be withdrawn without,

(a) the written consent of all the parties; or

(b) leave of the court.

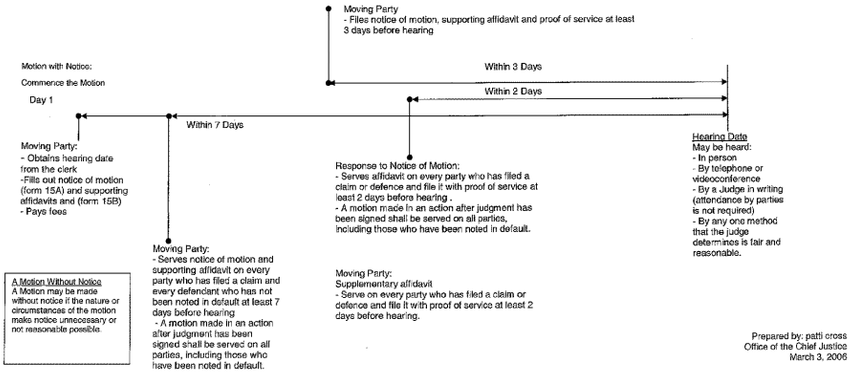
O. Reg. 78/06, s. 32

15.07 Costs — The costs of a motion, exclusive of disbursements, shall not exceed $100 unless the court orders otherwise because there are special circumstances.

O. Reg. 78/06, s. 32

Commentary: Motion costs cannot exceed $100 plus disbursements unless there are special circumstances. It is an error of law for the court to award more than that limit without making a finding of special circumstances: *Platinum Stairs Ltd. v. Laranjeira*, 2017 ONSC 6107, 2017 CarswellOnt 16032, [2017] O.J. No. 5362 (Ont. Div. Ct.). Motion costs of $500 were awarded and special circumstances found to exist where the motion material was voluminous, a point of law required argument, and the other party would have asked for $1,200 in motion costs if successful: *Schaefer v. Wagner*, [2016] O.J. No. 6526 (Ont. Sm. Cl.Ct.).

A SMALL CLAIMS COURT CASE - 2006 (Amended Rules)
MOTIONS
A Case Flow Chart



Rule 16 — Notice of Trial

16.01 (1) Clerk Fixes Date and Serves Notice — The clerk shall fix a date for trial and serve a notice of trial on each party who has filed a claim or defence if,

(a) a settlement conference has been held; and

(b) a party has requested that the clerk fix a date for trial and has paid the required fee.

Commentary

Setting Action Down for Trial

Setting an action down for trial simply means having it put on the list of cases that are ready for trial. That cannot be done until after a settlement conference has been held. It is accomplished by filing a Request to Clerk (Form 9B) and paying the required fee (currently $290 for an infrequent claimant and $380 for a frequent claimant). Any party can do so, although in practice it is usually the plaintiff.

Estimated Trial Time

Orderly trial scheduling is easier if an estimate of the time needed for trial is provided to the court office. The best way to do this is to ask the settlement conference judge to include a time estimate in the settlement conference endorsement or memorandum. Failing such a notation, the parties are at liberty to provide their own estimate to the court office. Without accurate trial estimates, it is more difficult for the court staff to avoid overbooking trial dates, and there is a greater risk in the event of overbooking that the parties and their witnesses may attend the trial date only to find that there isn't enough time and they must return at some later date.

Trial Dates

As provided in rule 16.01(1), it is the court clerk who schedules trial dates; however, the parties are at liberty to provide the court office with a list of available dates or, alternatively, a list of dates which are problematic, when the action is set down but before a notice of trial has been issued. The court staff will generally be able to work with that information to select a trial date that is convenient to the parties. The simple step of communicating with the court office before a trial date is set can avoid the wasted time and money which results if a trial date is fixed and turns out to be problematic for any reason.

Once a trial date has been set, it is expected to proceed on that date: see *Holtzman v. Suite Collections Canada Inc.*, 2013 ONSC 4240, 2013 CarswellOnt 9010, 310 O.A.C. 243 (Ont. Div. Ct.).

Adjournments

Sometimes adjournments are required even though the parties are present and ready to proceed with their trial. This can occur if the trial list simply has more cases on it than the court can hear in one day. Trial lists are often overbooked on purpose, to some extent, based on the usual expectation that some cases will be settled.

Other circumstances may lead a party to request an adjournment. An adjournment request must be made known to the other parties immediately so as to determine if the adjournment will be agreed or contested. The court should also be advised once the need for an adjournment request is identified. The later an adjournment request is left before it is made known to the other party or the court, the greater the risk that it may result in wasted time and money, and that the adjournment may be denied.

Rule 17.02 deals with adjournment requests and provides that the court "may" adjourn. Rule 17.02(2) suggests that after two adjournments, any further adjournment request is less likely to be granted.

If an adjournment is granted by the court, terms such as payment of costs by the requesting party to the other party may be imposed. Particularly for last-minute adjournment requests, there will often been some wasted costs to the other party if the adjournment is granted. A party requesting adjournment runs the risk of paying costs as the price of adjournment.

A court's decision to grant or deny an adjournment request is highly discretionary. It involves a balancing of the interests of the plaintiff, the interests of the defendant, and the interests of the administration of justice.

The highly discretionary nature of the court's power to grant or deny an adjournment request is reflected in two decisions of the Court of Appeal, both of which produced a majority ruling with a strong dissent.

O'Brien v. Griffin, 2006 CarswellOnt 96, [2006] O.J. No. 88, 263 D.L.R. (4th) 412, 22 R.F.L. (6th) 134, (sub nom. *Griffin v. O'Brien)* 206 O.A.C. 121 (Ont. C.A.) was a family law proceeding. At an earlier trial the applicant had been criticized by the trial judge for his failure to present documentation in affidavit form. At a subsequent trial, he presented key information in the form of a notarized letter rather than an affidavit. The trial judge ruled the letter inadmissible and drew an adverse inference from the applicant's failure to call a witness from the company which had produced the letter. On appeal, the majority ordered a new trial, based on their finding that the applicant thought he was responding to the criticism of the first trial judge by presenting the notarized letter. In the view of the majority, it was incumbent on the second trial judge, in the particular circumstances, to adjourn the trial to allow a reasonable opportunity to secure the attendance of the witness. In dissent, Lang J.A. held that the exclusion of the letter resulted in no substantive prejudice to the applicant. She held at para. 53:

> 53. A trial judge has the discretion to adjourn a trial. That discretion must be exercised judicially, balancing the interests of the parties with a view to providing an expeditious and fair hearing. This applies in both the civil and family context and whether dealing with litigants represented by counsel or with self-represented litigants. [citations omitted]

In *Khimji v. Dhanani*, 2004 CarswellOnt 525, [2004] O.J. No. 320, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142 (Ont. C.A.), the trial had been adjourned for the second time, for approximately five weeks, to permit the plaintiff to retain counsel. At the new trial date, a third adjournment request was denied and the plaintiff's claim was dismissed. He had done nothing to retain counsel during the first two weeks of the five-week adjournment, and he had failed to pay the costs of the adjournment. At the new trial date, he had secured the agreement of a lawyer to appear at trial, but only if the trial was adjourned once more. On appeal, the majority found no basis to interfere with the trial judge's decision to deny a third adjournment in the circumstances. In dissent, Laskin J.A. held that the third adjournment request was reasonable and should have been granted. He said at para. 14:

> 14. A trial judge enjoys wide latitude in deciding whether to grant or refuse the adjournment of a scheduled civil trial. The decision is discretionary and the scope for appellate intervention is correspondingly limited. In exercising this discretion, however, the trial judge should balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits. In any particular case, several considerations may bear on these interests. A trial judge who fails to take account of relevant considerations may exercise his or her discretion unreasonably and if, as a result, the decision is contrary to the interests of justice, an appellate court is justified in intervening. In my opinion, that is the case here.

The fact that judges of the Court of Appeal can disagree over whether an adjournment should have been granted in a particular case illustrates the subjectivity of a decision to grant or deny an adjournment request.

There have been a number of cases in which the Divisional Court has upheld decisions by Small Claims Court judges to deny adjournment requests. In *Toste v. Baker*, 2007 Carswell-

Ont 1368, [2007] O.J. No. 835 (Ont. Div. Ct.), the defendant requested adjournment based on a medical procedure, but produced no supporting medical documentation. The judgment was upheld on appeal. In *Vallières c. Samson*, 2009 CarswellOnt 4539, *(*sub nom. *Vallières v. Samson)* 97 O.R. (3d) 761, 97 O.R. (3d) 770, *(*sub nom. *Vallières v. Samson)* 252 O.A.C. 253 (Ont. Div. Ct.), the trial judge's decision to adjourn the trial, but for only one day, was upheld on appeal. The plaintiff bore the duty to be prepared for trial, which had been scheduled long in advance. In *Susman v. Zafir*, 2007 CarswellOnt 6865, 230 O.A.C. 197 (Ont. Div. Ct.); additional reasons at 2008 CarswellOnt 49 (Ont. Div. Ct.), the self-represented defendant decided two days before trial that he needed to retain counsel. The adjournment was denied and judgment granted for the plaintiff. An appeal by the defendant was dismissed.

Even if an adjournment is denied and the appeal court is persuaded that the adjournment should have been granted, the appeal judge may decide to deprive the successful appellant of appeal costs and require payment by the appellant of costs of the first trial: see *Sprostranov v. State Farm Mutual Automobile Insurance Co.*, 2009 CarswellOnt 1217, [2009] O.J. No. 923 (Ont. Div. Ct.).

Particularly for full-day trials, last-minute adjournment requests may be looked on with disfavour by the court, given the waste of valuable judicial resources which results from such adjournments. Adjournment requests may be denied even if made on consent: see *Steckley v. Haid* (March 20, 2009), Doc. 1494/07, [2009] O.J. No. 1167 (Ont. Sm. Cl. Ct.); *Petrykowski v. 553562 Ontario Ltd.* (June 16, 2010), Doc. 886/09, [2010] O.J. No. 2574 (Ont. Sm. Cl. Ct.); motion for new trial dismissed (July 21, 2010), Doc. 886/09, [2010] O.J. No. 3129 (Ont. Sm. Cl. Ct.); extension of time to appeal denied *2011 ONSC 1101*, 2011 CarswellOnt 1014, [2011] O.J. No. 734 (Ont. Div. Ct.). The best way to avoid such difficulties is for the parties to seek a workable trial date before a date is scheduled by the court clerk, and in cases in which a scheduling problem only develops after a trial date is fixed, to identify the problem and make it known to the other parties and to court as soon as possible. The reality is that most scheduling problems can be readily avoided simply by addressing the situation sooner rather than later.

(1.1) [Repealed O. Reg. 78/06, s. 32.]

(1.2) [Repealed O. Reg. 78/06, s. 32.]

(1.3) [Repealed O. Reg. 78/06, s. 32.]

(2) Manner of Service — The notice of trial shall be served by mail or email.

O. Reg. 461/01, s. 17 [s. 17(2) revoked O. Reg. 330/02, s. 11(2).]; 330/02, s. 11(1); 440/03, s. 5, item 9; 78/06, s. 32; 108/21, s. 17

Commentary: The following was prepared by a Special Committee of the Superior Court of Justice.

General Suggestions for Judges Applicable to any Civil Proceeding Involving a Self-Represented Litigant

- Ensure through a court officer that the self-represented litigant understands the basic requirements of decorum and conduct in the courtroom;
- As in any other case, consider any possible security risk and take unobtrusive measures for the safety of the courtroom where suggested or required. Keep in mind the safety of all persons in the courtroom;
- Verify that proper service has been made, particularly where a self-represented litigant fails to appear;

- Scrutinize any consent submitted to the court in a case where the self-represented litigant fails to appear. If present, ensure the self-represented litigant understands the meaning of the consent;
- Explain the nature of the proceeding and how it is to be conducted. While doing so, take the opportunity to put the self-represented litigant at ease, and assure him/her that you will, within the limits of the law, assist as is appropriate;
- Ensure the presence of a court reporter. If prepared to preside without one, tape record the proceedings or take complete notes;
- As with any litigant, represented or not, be scrupulously polite;
- Use simple language avoiding jargon or legalese;
- Take a recess whenever feelings run high; and
- Apply the same legal principles, rules of evidence, and standards of procedure to both sides. Ins doing so, take the extra time to explain to the self-represented litigant the reasons for any ruling.

Additional Suggestions for a Motion or Application

- At the outset, describe how the motion will be conducted and make clear the self-represented litigant will be given a full opportunity to speak at the appropriate time in the proceeding;
- Keep the represented party's presentation as focused and brief as possible, so as not to invite the self-represented litigant to be prolix;
- Avoid dialogue with counsel which might be mistakenly interpreted to reflect some personal relationship or friendship;
- As in any case, avoid humour;
- State what you understand to be the self-represented litigant's position to avoid any misunderstanding;
- Give a decision at the end of the motion, unless there are emotional or security reasons for not doing so;
- If the self-represented litigant is unsuccessful regarding the motion, explain the implication of costs. Consider ordering an assessment to avoid any suggestion of hasty or punitive measures; and
- Where the successful side is represented by counsel, consider the endorsement specifying that the order may be submitted to you for signature without the approval of the unsuccessful party.

Settlement, Case Management and Trial Management Conferences

- As far as possible, hold such conferences in court on the record. Avoid having the self-represented litigant in your chambers. If you are prepared to do so, have a reporter present or tape the proceeding;
- While it is proper for a judge to encourage settlement and express an opinion, avoid any action which could be interpreted as unduly pressuring the self-represented litigant to settle; and
- As in every case, do not see or speak separately with either side in the absence of the opposing party. Where necessary, use the conference as an opportunity to explain what the self-represented litigant must do in preparation for the next stage.

Conference Calls

- Avoid conducting a conference call with a self-represented litigant.

The Trial

- Do not allow another lay person to speak and act for a self-represented litigant, except where permitted by law;
- Avoid asking counsel "what the case is all about", thereby giving the impression that a biased consultative process is already underway. Ask each party to give a brief opening statement;
- Ensure that counsel is fair to the self-represented litigant;
- Warn counsel against the use of complex, incomprehensible, or flowery language;
- Consider assisting the self-represented party in presenting the evidence. Then ask if there is anything else that needs to be added, emphasizing you need to hear everything the litigant wishes you to know;
- Explain to the self-represented litigant, before the commencement of the first cross-examination, the distinction between asking relevant questions of opposing witnesses as opposed to giving evidence or making argument. Stop any inappropriate conduct immediately, emphasizing that the opportunity to testify either will come or has passed, and that argument takes place after all the evidence has been heard;
- Explain the purpose of submissions and point out there is no necessity to repeat earlier testimony when submitting argument;
- Remind counsel for the represented party of counsel's obligation to the court to ensure that all relevant legal principles are canvassed and that, consistent with counsel's duty to the client, counsel's duty is to ensure the judge has all the help to which the judge is entitled;
- As with a motion, consider reserving your decision where the self-represented litigant is unsuccessful. A reserve is appropriate where feelings are high or where there is a security risk; and
- Be no more active in the conduct of the trial than is necessary to do justice to the parties.

Communications Directly from the Self-Represented Litigant with or without a Copy Sent to the Opposing Counsel

- Avoid a personal response. Have either your secretary or a senior administrative official respond with a brief comment about any impropriety in such communication. The language of the communication should be yours or approved by you;
- In a case where the other side has not received a copy of the communication, send it to that counsel (or that self-represented litigant, should that be the case), together with a copy of the reply sent at your direction; and
- Should there be a telephone call, cut it short and indicate that, just as the caller would be upset if he/she came to know that you had been talking to opposing counsel about the case, so it is wrong for you to talk to the self-represented litigant about the case. Say you are confident no impropriety was intended.

Facing the Unrepresented Litigant

Most lawyers hate to try a case against an unrepresented litigant. Unfortunately, the number of cases in which one or the other party is not represented by counsel is forever increasing.

The primary cause for this increase may be the perception that lawyers' hourly rates are exorbitant, at least, that's what those unrepresented often suggest. Many jurisdictions such as Ontario provide small claims courts, where unrepresented litigants can tell their story to the judge often unfettered by many technical considerations.

In theory, statutes, prevailing case law, and the rules of court apply to all litigants equally. In practice, this does not always happen. The lawyer is held to the standards that the court knows the lawyer is aware of, while frequently the unrepresented litigant may not be held to any standards at all.

All lawyers know that certain consequences flow from the failure to follow the rules and procedures. Most unrepresented litigants are not even aware that there are rules and procedures, let alone that there are consequences for the failure to follow them. These are the seeds of a double standard seen by some to be applied by our courts.

How does a lawyer deal with an unrepresented opponent? Very carefully! The potential for ethical problems abounds when a lawyer discusses a case with an unrepresented litigant. Some lawyers refuse to talk to an unrepresented litigant. Other lawyers who meet with unrepresented litigants attempt to put settlement discussions in writing. Lawyers who do so religiously will be prepared for that special occasion where six months after a settlement, an unrepresented litigant decides that the settlement was not favourable to him/her, and that you misled them. At least you have the paperwork documenting the negotiations and how ethical you were in your approach.

Whenever you settle a case with an unrepresented during litigation or a settlement conference, ask the judge to put it on the record and question the unrepresented party about whether he is satisfied with and understands the terms of the agreement. Also ask the judge to confirm on the record that the unrepresented litigant is satisfied that you treated him fairly.

Any trial against an unrepresented litigant can create difficult problems. It is helpful if you know the judge. You need to protect the record. If you object to everything that is objectionable, you will annoy everybody. The better choice is to selectively object to inadmissible testimony that has the potential to be damaging to your case. Letting the unrepresented litigant babble on about irrelevant things makes the problem the judge's, not yours. It also makes you seem rather reasonable, both to the court and to the unrepresented litigant.

Employ a rolling analysis of when to make an objection: Based on what has already happened in the case, is the answer to the unrepresented litigant's question going to help me, hurt me, or be neutral?

There are some don'ts. Don't do anything to cause the unrepresented party to turn the thing about which he/she is angry into an all-consuming cause. If you do that, you may never get rid of them. Don't talk down. Even if they don't have a clue, treat them as your equal. Treat them with respect; kill them with kindness. Surprisingly, good behaviour is frequently reciprocated. Make a brief opening statement outlining the areas where procedural or evidentiary problems could arise. Alert the court to the applicable statute, court rule, or case law. That puts everyone on notice of problem areas. It also reminds the court that you want your case handled just like any other case, *i.e.*, by the rules.

This is Nothing New

William Penn (founder of Pennsylvania), who never obtained an academic degree, represented himself in Bushel's Case (1670) which "established the independence of the jury beyond question in English jurisprudence." "At his trial in the Old Bailey on Sept. 1, 1670 he skilfully exposed the unconstitutionality of the proceedings and inspired the jury to withstand the brutal pressure of the judges for a verdict of guilty." (21 *Encyclopedia Americana* (c. 1992) s.v. "Penn, William").

Lawyers were actually banned outright or faced tight restrictions in many U.S. colonies for much of the 18th century. . . . The "Body of Liberties" adopted by the Massachusetts Bay Colony in 1641 expressed the typical attitudes of the time: "Every man that findeth himselfe unfit to plead to his own cause in any court shall have libertie to employ any man. . ., provided he give him noe fee or reward for his pain. . . ."

In the U.S., the strong tradition that each American should be able to master the laws probably peaked in the years between . . . 1825 and . . . 1865. Most states enforced few if any restrictions on non-lawyers appearing in court on behalf of others, as Lincoln himself did before he talked a judge into granting him attorney status. . . . the American Bar Association convinced states to pass "unauthorized practice of law" statutes in the 1920s and 1930s, which effectively gave lawyers a monopoly over the sale of legal information. . . .

As well as many Canadian cases cited in this publication, there are at least four relatively recent U.S. federal decisions which offer support to the unrepresented litigant.

Picking v. Pennsylvania Railway, 151 F.2d 240, Third Circuit Court of Appeals. In *Picking*, the plaintiffs civil rights was 150 pages and described by a federal judge as "inept." Nevertheless, it was held:

> Where a plaintiff pleads pro-se in a suit for protection of civil rights, the court should endeavor to construe plaintiffs pleading without regard to technicalities.

In *Walter Process Equipment v. Food Machinery*, 382 U.S. 172 (1965) it was held that in a "motion to dismiss, the material allegations of the complaint are taken as admitied (*sic*)." From this vantage point, courts are reluctant to dismiss complaints unless it appears the plaintiff can prove no set of facts in support of his claim which would entitle him to relief (see *Conley v. Gibson*, 355 U.S. 41 (1957)).

In *Puckett v. Cox*, it was held that a *pro-se* complaint requires a less stringent reading than one drafted by a lawyer (456 F.2d 233 (1972 Sixth Circuit USCA)). Said Justice Black in *Conley v. Gibson*, 355 U.S. 41 at 48 (1957): "The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." According to rule 8(f) FRCP all pleadings shall be construed to do substantial justice. The court also cited Rule 8(f) FRCP, which holds that "all pleadings shall be construed to do substantial justice."

Courts have long held that non-lawyers generally should not be held accountable for all of the procedural nuances of the law.

> When a litigant chooses to represent himself, it is the duty of the trial court to insure fairness, allowing reasonable accommodations for the pro se litigant so long as no harm is done an adverse party. . . . Most importantly, the trial court must strive to insure that no person's cause of defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules.

State ex rel. Dillon v. Egnor, 188 W.Va. 221 227423 S.E.2d 624 630 (1992)

> Of course, the court must not overlook the rules of the prejudice of any party. The court should strive, however, to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake. Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not.

Blair v. Maynard, 174 W.Va. 247 253324 S.E.2d 391 396 (1984).

For Myself 36 Years and Counting

From my and our court staffs' perspective to be aware of:

- lack of understanding of rules of procedure, rules of evidence, and courtroom protocol by self-represented litigants
- papers not complete or correct causing delay
- litigants have difficulty presenting their position without getting emotionally involved
- difficulty in remaining fair and impartial when one party is represented by counsel and the other is not

- discomfort after ruling against an unrepresented litigant due to procedural failures
- the use of court staff time
- difficulty in drawing the line between giving legal information and giving legal advice.

From the lawyer's perspective:

- waiting in court with a lengthy docket while another unrepresented litigant in another case wastes everyone's time and my client's money
- difficulty in knowing how to conduct myself when the other party is unrepresented. If I raise all objections, the process goes nowhere, yet, I have a duty to represent my client
- danger that the unrepresented litigant thinks I represent him or her too
- worry over future problems that might arise at a later date and be harder and more expensive to resolve if matters are not correctly resolved at the trial.

From the self-represented litigant's perspective:

- lack of information and the inability to get the right forms or information for what I need to do
- confusion and intimidation
- fear to move forward with my case
- belief that they cannot afford a lawyer
- lack of respect from judges, court staff, and opposing counsel.

Training on the handling of self-represented litigants should become a standard part of the orientation for all judges. This training needs to address the ethical issues that trouble judges in adopting the more engaged judicial role required to effectively handle these cases. It should equip judges with specific techniques they can use in cases involving two unrepresented parties and in the more difficult situation in which one party is represented and the other is not.

For examples of such techniques, see Albrecht, Greacen, Hough & Zorza, "Judicial Techniques for Cases Involving Self-Represented Litigants," 42/1 Judges', J. 16 (Winter 2003). See also Richard Zorza, "The Disconnect Between the Requirements of Judicial Neutrality of Those of the Appearance of Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications," 17 GEO.J.LEGAL ETHICS 423 (2004). See also, *e.g.*, "Conference of State Court Administrators, Position Paper on Self-Represented Litigation" (August 2000), available at www.cosca.ncsc.dni.us; "Conference of Chief Justices and Conference of State Court Administrators, Report of the Joint Task Force on Pro Se Litigation" (July 2002), available at www.cosca.ncsc.dni.us.

Rule 17 — Trial

17.01 (1) Failure to Attend — If an action is called for trial and all the parties fail to attend, the trial judge may strike the action off the trial list.

(2) If an action is called for trial and a party fails to attend, the trial judge may,

(a) proceed with the trial in the party's absence;

(b) if the plaintiff attends and the defendant fails to do so, strike out the defence and dismiss the defendant's claim, if any, and allow the plaintiff to prove the plaintiff's claim, subject to subrule (3);

(c) if the defendant attends and the plaintiff fails to do so, dismiss the action and allow the defendant to prove the defendant's claim, if any; or

(d) make such other order as is just.

(2.1) In the case described in clause (2)(b) or (c), the person with the claim is not required to prove liability against the party who has failed to attend but is required to prove the amount of the claim.

(3) In the case described in clause (2)(b), if an issue as to the proper place of trial under subrule 6.01(1) is raised in the defence, the trial judge shall consider it and make a finding.

Commentary

Trial

1) Ask each party to outline the issues to be determined and their position as to each issue. What order will they ask the court to make?

2) Ask the parties if there are any issues of law, evidentiary issues or scheduling issues. If you are alerted to legal and evidentiary issues, you may be able to outline for a self-represented litigant problems he or she may face during the trial. This also gives the individual an opportunity to think about how to handle the difficulties, *e.g.*, if there are experts being tendered for whom no report has been served or filed. Some, if not all, of these issues should have been dealt with at the Settlement Conference but at times the self-represented party appears for trial still completely unfocused.

3) The procedure of the trial must be explained. This should include:

- Opening addresses
- Plaintiff's case in chief
- Cross-examination
- Difference between questioning and giving evidence or submissions
- Re-examination and scope of it
- Defendant's case in chief
- Reply evidence
- Closing addresses
- Decision
- costs

Adjournments

One of the most common scenarios at trial is the request for an adjournment made by the self-represented litigant. The court will consider various factors but the focus is often on the recalcitrance of the party making the request.

Self-represented litigants may have a hidden agenda or ulterior motive in pursuing litigation. It is not uncommon for them to try and "drag" out a case in the hope of wearing down the other party's endurance or jacking up their legal costs. Habitually, these tactics will include:

- frequent adjournment requests, often under the guise of "wanting to retain counsel"

- wasted court appearances where nothing has been done since the last adjournment was granted at the self-rep's request
- bullying, intimidating, trying to manipulate or constantly interrupting the opposing party or counsel in court
- acting confrontational, evasive or non-responsive with the judge.

Experienced counsel understand that the self-represented people may be entitled to some leeway at the front end of an action, especially in respect to compliance with filing requirements and deadlines pursuant to the Rules and in respect of disclosure. Reasonable lawyers will generally consent to a first adjournment request for this reason. Judges may be vocal to unreasonable counsel who do not agree to such adjournment requests and waste the court's time.

The Rules apply to all litigants, whether represented by counsel or not. A lawyer and a party are entitled to know the case that they have to meet and should not have to be continually blindsided by verbal allegations or inadmissible statements made in court. The interests of fairness and natural justice require that a proper record is before the court, especially in the event of an appeal. The Rules specifically contemplate the avoidance of litigation drift and the judge must be ever mindful of this objective, as drift is not fair to the party seeking judicial intervention.

While it is not appropriate for opposing counsel to give legal advice to a self-represented litigants, if is acceptable, in the absence of available duty counsel, for a judge to simply explain basic procedural requirements to them and, if necessary, ask opposing counsel to reiterate this advice out in the hall.

The Rules of Professional Conduct of the Law Society of Upper Canada mandate lawyers to treat self-represented people courteously and professionally, regardless of how difficult they may be.

Smart lawyers will only communicate with self-represented people outside of the courthouse in writing, so as to preserve a written record of what was disseminated, a very necessary precaution to protect a lawyer from spurious complaints by self-represented people to the law society. If is not uncommon for self-represented litigants to make such a complaint as a tactic to try and force the removal of a solicitor for the opposing party.

If self-represented people pose a genuine physical danger to a retained counsel or the opposing party, lawyers are within their rights to request the assistance of court security, including in the courtroom. From counsel's perspective, it is better if the court clerk notifies the judge that a problem has arisen, so as not to prejudice anyone by having the fact that security is required put on the record, unless absolutely necessary.

Judges should expect lawyers to act ethically in dealing with self-represented people and, in particular, ensure that lawyers do not take unfair advantage of procedural "blunders" by them. Judges should not hesitate to call to task a lawyer who tries to take advantage of these situations. Such conduct by a lawyer is akin to "sharp practice" were it to occur between two counsel rather than a lawyer and a self-represented person.

Counsel have a duty to explore settlement options at every juncture in a proceeding. Counsel may loathe to do so with self-represented people. Judges need to be clear in stating their opinions in plain language vis-à-vis settlement options and in expecting counsel to address those suggestions with the self-rep.

Self-represented litigants will often blurt out the contents of confidential settlement discussions that may have previously taken place with counsel. Sometimes they will try to produce counsel's written offer to settle. They do not understand the nature of "privilege" in settlement context. In such situations, even if it is not a settlement conference, it can be helpful to

counsel to let confidential settlement information in and accord it the weight the judge feels it is worth, especially if the judge endorses all or the essence of the proposal reasonable. Doing this can lead to creative dispute resolution.

Opening Statements

The judge peers over her glasses, mumbles your name and other words you don't hear because your mind is racing, hands trembling. You jerk your head from your notes, breathe deeply, and suddenly you're focused. You stand, thank the court, nod at your adversary, stride to the podium, place your papers, and pause.

It's time to tell your story. Be thorough and logical, detail the facts, touch on the law.

The opening is what you've been anticipating. An opportunity to teach, explain, introduce your client and case.

A polished opening that no one understands is worthless. Years ago, a trial practice guru actually tried a case and kept using the phrase "red herring" in his opening. There was only one problem: no one knew its meaning.

We watch the Super Bowl and *American Idol, Oprah*, and *Dancing with the Stars*; we read tabloids and *People*; we obsess over Angelina and Brad. So save the Shakespearean references, the vocabulary words learned while cramming for the SATs. And no one believes that you really love the History Channel while knowing everything about the latest *Project Runway* episode.

"Show Them the Truck"

It doesn't matter how smart you are if the judge can't hear you. The irreducible minimum of effective courtroom delivery is to be understood, one hopes; to persuade, if at all possible; but, above all, to be *heard*.

The first fundamental of courtroom delivery is orientation. Stage actors learn to speak in the direction of the audience, even when addressing another actor on the stage. Not only is the audience more likely to *hear* a line spoken in their direction, but also they will better understand the line while seeing the actor's facial expression, posture, and other non-verbal clues.

The beginning of proper orientation in the courtroom is a pre-trial visit to the courtroom to see where you will be sitting. If there is any pre-trial jockeying for position to be done, this is the time for it, as well as a first-rate opportunity to acquaint yourself with the clerks, the court reporter, and even the judge. The object of this planning is to orient yourself and your client so that speaking in the direction of the judge and witness will be easy and natural.

The second fundamental is, collectively, projection, enunciation, and pace. Without attention to these three elements of courtroom delivery, any lawyer is in danger of being unheard, misunderstood, and ultimately ignored. *Projection* — as opposed to sheer volume — is the ability to make oneself heard even from across a courtroom with less-than-optimal acoustics. *Enunciation* is the accurate pronunciation and articulation of words so that none are lost on the audience. Pace is the optimal speed and rhythm of the spoken word, neither dizzyingly fast nor ponderously slow.

Enunciation is nothing more or less than speaking your words clearly and distinctly: think Professor Henry Higgins in *My Fair Lady*. Even young lawyers seem to have little trouble with this concept as they are well ready, correctly pronounce words, and have considerable public-speaking experience behind them in trial advocacy or debate.

Speech is a trial lawyer's stock-in-trade. Let's revisit our starting point: It doesn't matter how smart you are if the judge can't hear you.

We are pre-conditioned to speak too fast. We know the case so well that our mouths struggle to keep up with our minds. We're nervous or, at the very least, "adrenalized." We, like high school debaters of yore, are determined to spread the record thick with facts, some repeated

many times. Finally, we feel the judge's eyes upon us, urging "Hurry up, hurry up." Who wouldn't talk too fast?

Here are two suggestions for slowing down the pace that many lawyers lapse into in the courtroom. First, when questioning a witness, look at him while listening — really listening — to his answer, even if you know what it's going to be. Don't have your next question spring-loaded for the moment the witness finishes speaking. Second, when preparing your remarks to the judge, plan to talk at a leisurely pace about the few important points rather than racing through every witness, every exhibit, and every red herring your opponent throws out. If you aren't sure what those few important points are, you still have some deep thinking to do about your case.

The use of concise, grammatical sentences, built upon everyday words and consistent terminology. Think Hemingway, not Faulkner. It is difficult, even for an engaged listener, to follow a complex question, then the answer, then make sense of how both fit into the case on trial. So speak in active voice, not passive, and impose a word limit on your questions and statements. (Hint: If a question can't be asked in 15 words or fewer, it may be more than one question.)

Consistent terminology means calling the same thing by the same name every time, or as close to it as humanly possible. If you're talking about a letter you've chosen to characterize as an agreement, refer to it as an agreement every time, not as an "agreement" the first time and a "contract" the next.

Another fundamental is courtesy. Courtesy may seem out of place in a discussion of courtroom delivery, but courtesy is not only important to effective advocacy, it is *essential*. A genuinely courteous lawyer can make up for shortcomings in her style of speaking, but a lawyer perceived to be discourteous to the judge, opposing counsel, or courtroom staff is doomed. I don't think courtesy can be faked, at least not the kind that favourably disposes a judge to you and your case.

Courtesy was the bedrock of the legal profession until the end of the twentieth century, when it was eroded by the red tide of Rambo litigators. Courtesy then became legislated by bar associations and courts across our country. Everyone understands we should be courteous to judges as a matter of base self-interest, and we are required to cooperate at least grudgingly with opposing counsel or face the court's wrath. What more is there to say about courtesy in the courtroom and its effect on how we are understood by the court?

There are many explanations as to why a lawyer behaves discourteously: I'm tired from preparation; I'm stressed because my client's fate (and, in some respects, my own) hangs in the balance; the judge keeps ruling incorrectly (*i.e.*, against me); the witness isn't cooperating; and opposing counsel is determined to make me look like a fool. Good reasons all, but at least one reason to remain courteous to witnesses and opposing counsel is the judge will turn you off if he or she thinks you are rude.

Some of us grew up watching movies and shows where lying witnesses were broken down by blistering cross-examination, and a lawyer's righteous indignation carried the day. (Atticus Finch in *To Kill a Mockingbird* was a noteworthy exception of steady, chivalrous courtroom demeanour under the most trying circumstances.) But the reality is that it's uncomfortable to be in a room with people who are quarrelling, no matter which side of the quarrel you favour. When your temper rises with a witness or you find yourself bickering with opposing counsel, take a deep breath, count to ten, go to your "happy place," or do anything else you need to do to regain your composure.

Another fundamental of courtroom delivery is humour. Effective humour in the courtroom is almost never the result of planning. Deliberately injecting levity into a court proceeding is a tricky business, and only those with a deft touch should try it. Just as they respond to respect and courtesy, however, a judge may be grateful for an occasional humorous interlude in a

tedious trial. These welcome moments of levity should arise naturally from courtroom events, such as an unintentionally funny answer by a witness or a bit of bumbling with a demonstrative exhibit, but never from inserting a joke or "funny" anecdote into a jury argument. That might work for Seinfeld, but you and I are not Seinfeld. And even if you think you have a sure-fire zinger, you run the risk of treading on the hidden sensitivities of the judge or, worst of all, being perceived by the judge as a buffoon rather than a serious advocate for your client's cause.

"This trial is serious business, and I'm serious about my client's case, but I don't take myself too seriously." Self-deprecation, or the willingness to allow a laugh at your own expense, is part and parcel of the humility that underlies proper respect for the trial process itself. I would encourage a young lawyer not to *try* to be funny, but to be ready to smile and shrug his shoulders when he suffers one of the countless indignities coming his way in the courtroom. Above all, be natural.

There is also the use of demonstrative exhibits, or "show them the truck." For example, in a defective pickup truck case, you put on witness after witness to describe the mechanical shortcomings of the pickup truck your client had been sold. After a couple of hours of this, think: "Show them the truck!" meaning a photograph of the truck in question. A truck's defects are not outwardly visible, so the photos really don't demonstrate anything relevant to the case. But there is a natural curiosity to see the truck being talked about so the judge could mentally file away that image — "red, F-150, long-bed" — and listen to the rest of the evidence.

The value of models, drawings, and other demonstrative exhibits is beyond dispute because there often is a tangible or at least representable object, device, or invention at issue. Commercial cases tend to hinge on documents, which ordinarily don't convert to compelling demonstrative exhibits. But the signature page of a lengthy contract can be quite compelling if you've been arguing that your opponent should be bound by the agreement he signed. And can you try a real estate case without showing the judge a picture or at least a map of the property?

We all relapse into bad habits (or even develop new ones). Thinking about these simple yet sometimes elusive fundamentals enables all of us to sweep away the mental clutter, draw a deep breath, look directly at the judge . . . and *communicate*.

Role of the Judge

Judges have an important role to play as mediators in keeping the parties on track and moving in a principled way towards resolution in all resolvable cases. The back-and-forth, the "negotiation dance," can be difficult and it can also result in very unfair resolution.

When parties simply split the difference in the amount, this usually rewards the most unreasonable or maybe even a dishonest party. We all know that the judge must intervene to balance the inequity between counsel. Nudging the agents/lawyers/parties towards an objective evaluation will promote justice and maybe even a civil relationship between the parties and respect for the deputy judge conducting the settlement conference.

Another way to keep the parties on course is to move them off positional haggling and move them towards not just *objective criteria* but a focus on their *interests*. This can be done by asking them how strong or weak their case is. Do they really want to go to trial? Can they win? Will they aggravate their client's cause by dragging everyone through the trial process?

A trial is sometimes referred to as the Best Alternative To a Negotiated Agreement (BATNA) but is, in fact, the only alternative. By focusing on their BATNA, you quite often will have them realistically consider settlement because of the financial and other costs involved in going to trial.

Another important area to focus on is *authority*. What authority do the parties have? Is the client there as additional authority referred in order to settle the matter? Nothing is more unfair and frustrating than to spend that 45 precious minutes at a settlement conference with the following scenario: the defendant's lawyer has worked his opponent down from $20,000 to $5,000 as a possible settlement figure. However, when Minutes of Settlement are about to be signed, the defendant's lawyer now claims no authority to settle and must check with the client, principal, or their partner.

If judges conduct themselves fairly, firmly and honestly, there will never be any question of their authority.

What about the *relationship* of the parties and the relationship between counsel and the judge? Some counsel/agents do not realize that their reputation is a key building block of relationship. If they are not trusted, they will have a very hard time getting a proper resolution of their cases. Judges, most of whom are human (I think), will react adversely towards parties who are unfair, untrustworthy or even deceitful.

You can do many things to build and maintain proper relationships between the parties. Give lawyers, agents, time to chat together before they enter the discussions. They may not have opened their files for weeks. A face-to-face chat with the other side can do wonders. This pause in proceeding may allow the parties to iron out differences, get to the settlement range and narrow the issues, before the judge even becomes involved.

The two C's of negotiation settlement are: *communication* and *commitment*. They are both important elements in the final stage of any successful case resolution. Commitments cannot be made without the authority to do so. Commitment will not come without a trusting relationship between the parties.

Likewise if the settlement is not properly recorded by the settlement conference judge and then communicated to the parties in an understandable process, the entire procedure can lead to capitulation and confusion that can end any settlement and positive relationship of the parties.

Valerie McNaughton suggests that judges should learn to listen in a manner that will result in better understanding. She offers some suggestions on how to be "active" listeners:

- Resist the impulse to control the pace or content of comments made in the formal courtroom settling.
- Resist the urge to interpret what parties say as a challenge to your authority.
- Ask for clarification of any remarks made that you are not sure you understand.
- Neutrally (non-judgmentally) rephrase parties' statements to test and demonstrate your understanding.
- Give the parties an opportunity to talk about their underlying concerns and to put themselves in the other party's shoes. See Valerie McNaughton, "Active Listening: Applying Mediation Skills in the Courtroom," 38(2) Judges J. 23 (1999).

It is recognized that the Small Claims Court deals routinely with high case volumes and that judges hearing cases do not routinely have the benefit of the arguments of learned counsel. Nevertheless, those circumstances do not negate the general duty to give to the litigants, and in particular to the losing party, some indication, however concise, of why the result went as it did, why they lost (unless, of course, they have already run out of the room/courtroom).

The Small Claims Court has always been intended as an accessible forum for the public. Where orders are made that are not made intelligible to the litigants, the court may fail to discharge one of its central duties and the objectives of economy and speed are thwarted. The absence of reasons itself may provide an impetus to appeal regardless of the result

where the presence of reasons, however brief, may have informed a decision to accept the result. See Bellamy J. in *Vuong v. Toronto East General & Orthopaedic Hospital* (2009), 2009 CarswellOnt 597, [2009] O.J. No. 472 (Ont. Div. Ct.). In *Vuong*, the deputy judge dismissed the plaintiffs' claim without giving reasons. The defendant in the action sought dismissal on the ground of res judicata and on the ground that the action was frivolous or vexatious or otherwise an abuse of the court. Bellamy J. held that appellate review was not possible in the absence of reasons and remitted the matter to the Small Claims Court for a rehearing of the motion before a different judge.

Subrule 17.01 has not been changed other than adding subrule 2.1 providing that where a claim or defence is struck, the person with the claim is not required to prove liability but is required to prove the amount of the claim. See also the assessment hearing provision in subrule 11.03(5).

A defendant, who is sued in a division where he or she does not reside or carry on business and who specifically alleges in the defence that the court sitting in that territorial division is not the proper place of trial, is permitted to have an opportunity to have the defence as to forum considered by the judge even where the defendant is unable to show up at the trial because of the distance involved.

If an issue as to the proper place of trial is raised in the defence,the trial judge shall consider that issue and make a finding notwithstanding that clause 17.01(2)(b) would otherwise authorize the judge to dismiss the defence on the basis of the non-appearance of the defendant. If the judge finds that the territorial division where the judge is sitting is not the proper place of trial, then the rule provides that, automatically, the action must be tried either where the defendant resides or carries on business or in the court's place of sitting that is nearest to the place where the defendant resides or carries on business. The power of the trial judge to order the trial to be held somewhere else on a balance of convenience is preserved.

The effect of the rule is to give defendants who are unable to travel a long distance to attend personally in court an opportunity to dispute the territorial jurisdiction of the division where the action has been brought and if successful, to require that the action be tried in the place where the defendant resides or carries on business.

Case Law: *Taylor v. 2300474 Ontario Inc.*, 2015 CarswellOnt 9808, [2015] O.J. No. 3440 (Ont. Sm. Cl. Ct.).

At trial, the plaintiff failed to appear and the defendant requested an adjournment to which the plaintiff had consented the previous afternoon. The court found there was no good reason for the last-minute adjournment request. The claim was dismissed. A motion by the plaintiff to set aside that order was also dismissed. It was held that the plaintiff's failure to appear was not satisfactorily explained and on the merits the claim was doomed to failure because the plaintiff had no supportive expert evidence.

Poulimenos v. Ashton Realty Inc., 2015 CarswellOnt 12136, [2015] O.J. No. 4228 (Ont. Sm. Cl. Ct.).

After the settlement conference the defendants had moved. They failed to attend for trial and later moved to set aside the resulting judgment. The motion was dismissed. If they failed to receive the notice of trial it was their own fault for failing to notify the court office of their new address. In any event, the court was not satisfied that any triable issue was raised.

Wright v. Bell Can. (1988), 13 W.D.C.P. 228 (Ont. Div. Ct.).

Facts with respect to the cause of action were known at the time of the first action. Since the factors alleged to render the action a continuous cause of action were determinable at the first trial and therefore could have been sought as a remedy at that time, the second judgment was set aside as the matter was *res judicata*.

Hasenclever v. Hoskins (1988), 14 W.D.C.P. 171 (Ont. Div. Ct.).

The plaintiff's action did not support a claim for general damages. The plaintiff did not request an adjournment at trial to amend his pleadings. Since the plaintiff failed to plead the requisite elements, his appeal failed.

Bird v. Kehrig (1990), 43 C.P.C. (2d) 97 (Sask. Q.B.).

The defendant appeared at trial but the plaintiff did not. The Small Claims Court Judge simply endorsed the file "no action taken". The failure of the Judge to give judgment, grant an adjournment or dismiss the claim rendered the first summons a nullity and caused the court to lose jurisdiction of the first proceeding.

St. Mary's Credit Union Ltd. v. General Doors (1991), 42 C.P.C. (2d) 115 (Sask. Q.B.).

Evidence at trial was not given under oath, and there was no cross-examination. Oral evidence is to be given under oath, and the opposite party is to be given the opportunity to cross-examine on the evidence. There was no proper trial of the issues.

DiMenna v. Colborne Auctions (1993), 4 W.D.C.P. (2d) 137 (Ont. Sm. Cl. Ct.).

Rule 18.04 was designed to cure mishaps such as the inadvertent non-appearance of a party. To stretch the rule to the point where apart-time Deputy Judge is passing judgment on the conduct of another part-time Deputy Judge or even a Judge of the General Division sitting in Small Claims Court would not be appropriate.

British Columbia (Ministry of Transportation & Highways) v. L. Steinke & Sons Logging Ltd. (October 22, 1998), Doc. Quesnel 8720 (B.C. Prov. Ct.).

Application by the plaintiff for default judgment against the defendant, L. Steinke & Sons. The Ministry also sought to have the hearing heard by telephone. Steinke was an Alberta company and it was not registered extraprovincially under the *Company Act*, R.S.B.C. 1996, c. 62. Application dismissed. The action against Steinke could not proceed. The court only had jurisdiction over foreign companies registered as an extraprovincial company. Steinke was not registered in this manner. Steinke never attorned to the jurisdiction. Steinke not properly served. Service upon a company could not be effected against its lawyer or the lawyer's office. A default hearing could not be conducted by telephone where *viva voce* evidence was involved.

O'Krane v. Braich (1999), 126 B.C.A.C. 262, 206 W.A.C. 262 (B.C. C.A.).

The appellants failed to attend at trial and a default judgment allowing claim and dismissing the counterclaim was obtained. Motion to set aside the judgment on the claim was dismissed. The dismissal of counterclaim was set aside on the condition that the appellants pay costs. Judge had jurisdiction to impose conditions for setting aside the dismissal. The appeal of refusal to set aside the judgment on claim and costs condition on counterclaim was dismissed.

Prince v. Boulevard Four Fashion (1996) (May 5, 1999), Doc. AI 99-30-04068 (Man. C.A. [In Chambers]).

The plaintiffs failed to appear at a Small Claims Court trial but succeeded on appeal, at which the defendant failed to appear. The defendant alleged that non-attendance was inadvertent and sought leave to appeal. The proper remedy for the defendant was to seek rescission or variation under Queen's Bench Rule 37.11(1) (Manitoba). Leave to appeal not granted.

Spoor v. Nicholls, 2001 CarswellBC 1279, 2001 BCCA 426, 90 B.C.L.R. (3d) 88 (B.C. C.A.); additional reasons at 2002 CarswellBC 337, 2002 BCCA 119 (B.C. C.A.); was additional reasons to (1999), 45 C.L.R. (2d) 95, 1999 CarswellBC 711 (B.C. S.C.).

Once defence evidence concluded at trial, there was evidence upon which trial judge could have assessed damages. By allowing defendant opportunity to present new evidence at subsequent hearing, trial judge had permitted defendant to split case. That was improper.

Mosher v. Ontario (2001), 2001 CarswellOnt 2897 (Ont. S.C.J.).

Unrepresented plaintiff brought motion under Rule 52.01(3) of *Rules of Civil Procedure* to set aside judgment obtained by defendant after plaintiff failed to appear for trial. Court had proposed relocating trial, then denied plaintiff's request for adjournment. Plaintiff attended at proposed new location for trial. After plaintiff left courtroom, Court did not in fact relocate trial. Judgment set aside. Plaintiff under genuine belief trial had been relocated.

Steele v. Campbell, 2001 CarswellNB 298, 2001 NBQB 122 (N.B. Q.B.).

Appellant claimed he believed date of hearing was February 7, when in fact it was February 5. Failed to provide any supporting evidence. No supporting medical evidence adduced. Appeal dismissed.

Emery Customs Brokerage Ltd. v. K. (D.) (2001), 2001 CarswellOnt 4423 (Ont. Master).

Stay of proceedings. Concurrent criminal proceedings. Defendant failed to discharge onus on her to demonstrate exceptional or extraordinary circumstances sufficient to warrant stay of civil proceeding. The mere fact that a defendant at discovery may be required to disclose her defence in a criminal proceeding was not necessarily exceptional.

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 150 O.A.C. 12, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, [2001] S.C.J. No. 61, 2001 SCC 59, 11 C.C.E.L. (3d) 1, [2001] 4 C.T.C. 139, 204 D.L.R. (4th) 542, 274 N.R. 366, 17 B.L.R. (3d) 1, 55 O.R. (3d) 782 (headnote only), 12 C.P.C. (5th) 1, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, 2002 C.L.L.C. 210-013 (S.C.C.); reconsideration refused (2001), 2001 CarswellOnt 4155, 2001 CarswellOnt 4156, 55 O.R. (3d) 782 (headnote only), 18 B.L.R. (3d) 159, 10 C.C.L.T. (3d) 292 (S.C.C.).

Trial judge refused plaintiff's motion to reopen the trial to hear the owner's evidence on the ground that the evidence available at trial and the plaintiff made a tactical decision not to call the owner. The Supreme Court of Canada allowed the appeal and restored the trial judge's decision.

Frampton v. Williams, Roebothan, McKay & Marshall (2002), 2002 CarswellNfld 90, 213 Nfld. & P.E.I.R. 299, 640 A.P.R. 299 (Nfld. T.D.).

Small Claims Court decision set aside where party having work and child care responsibilities given only one clear day's notice of hearing date and had requested teleconference to consider postponement request. Small Claims Rules, Rule 19(4). Fundamental tenet of our justice system that litigants be afforded full opportunity to present evidence and argument in court. If because of practical difficulties litigant prevented from so exercising that right, the right itself becomes illusory.

Earthcraft Landscape Ltd. v. Clayton, 2002 CarswellNS 497, [2002] N.S.J. No. 516, 2002 NSSC 259, 210 N.S.R. (2d) 101, 659 A.P.R. 101 (N.S. S.C.).

Duty to assist unrepresented litigant. Adjudicator failing to advised unrepresented party that letter tendered in evidence would have less weight than oral testimony and that party had right to secure attendance of letter writer to provide oral evidence. Failure to advise constituted denial of natural justice.

Predie v. Paul Sadlon Motors Inc., 2005 CarswellOnt 801 (Ont. S.C.J.).

Notice of Discontinuance as served dated day before case conference. Rule 23.05 of the *Civil Rules of Procedure* sets out consequence of discontinuing an action, Rule 23.05(a).

The Motion by plaintiff for leave to appeal an order made by management judge refusing leave to bring a further motion in this action after he had discontinued it, based on pre-abandonment conduct. Rule 63.01 does not provide an automatic stay in the case of a motion for leave to appeal. All claims have been either discontinued or dismissed and no costs have

been awarded on a final basis, subject only to rights of appeal. No further interlocutory proceedings may be brought.

Lariviere v. Bertrand, 2006 CarswellMan 159, 2006 MBQB 104, 27 C.P.C. (6th) 231 (Man. Q.B.).

Section 11(1) of *Court of Queen's Bench Small Claims Practices Act* provides that where defendant fails to appear at Small Claims hearing, judge or court officer is entitled both to give default judgment against defendant and dismiss any counterclaim by defendant but defendant can apply for leave to appeal and have second chance at trial *de novo* with respect to plaintiff's claim and its own counterclaim. Statute does not give defendant right to appeal or move to set aside order when he/she fails to appear at hearing of appeal. In contrast, plaintiff not given second chance under statute after inadvertently failing to attend at scheduled hearing. *Queen's Bench Rules*, except R. 76.01, do not apply to Small Claims hearing nor to Small Claims appeal unless ordered by judge.

Plaintiff should not be punished for delay attributable to his lawyer. Delay not wilful nor did it result in irreparable harm to defendant. Affidavit set out circumstances of his claim and defence on merits.

Haché v. Canada (Minister of Fisheries & Oceans), 2006 CarswellNat 1005, 2006 CarswellNat 3574, 2006 FC 434, 2006 CF 434 (F.C.).

Various plaintiffs brought action against Ministry of Fisheries before judge who had previously worked for Department of Justice as chief of staff.

Plaintiffs brought motion for recusal of judge at opening of trial. Motion dismissed. Automatic disqualification of judge solely for having been associated with such organization has been rejected in Canada. No actual bias or reasonable apprehension of bias arose.

Alpha-Mar Navigation Inc. v. Prestige International Inc., 2007 CarswellNat 1625, 2007 FC 620 (F.C.), M. Beaudry J. Time of trial. Discretion of trial judge.

X. v. Y., 2004 CarswellYukon 74, 13 C.P.C. (6th) 161, 2004 YKSC 45 (Y.T. S.C.).

Plaintiff brought an application for permission to use initials to describe plaintiff and two defendants, to seal court file or, alternatively, for publication ban on actual initials in connection with sexual allegations. Application allowed in part.

Use of initials was widely accepted in sexual assault cases where reputations of both parties can be adversely affected merely by filing claim. Publication ban was only appropriate where it was necessary to prevent risk to the proper administration of justice and where the benefit of the ban outweighed the negative effects on the open court principle. Use of initials and publication ban was appropriate in this case. However, this was not an appropriate case for sealing the court file.

Shearer v. Hood, 2007 CarswellMan 216, 2007 MBQB 117, 216 Man. R. (2d) 217, 49 C.P.C. (6th) 355 (Man. Master); additional reasons at [2007] M.J. No. 335, 2007 CarswellMan 364, 2007 MBQB 214 (Man. Master).

Moving party brought a motion to for order expunging affidavit of the other party's solicitor from court file. Motion granted. Affidavit from solicitor acting as advocate never should have been filed. Courts developed practice of not allowing solicitors to rely on their own evidence while acting as advocates.

Reilly v. British Columbia (Attorney General), 2008 CarswellBC 768, 77 B.C.L.R. (4th) 230, 2008 BCCA 167, 55 C.C.L.T. (3d) 174, [2008] 10 W.W.R. 287, 254 B.C.A.C. 161, 426 W.A.C. 161 (B.C. C.A.).

Appeal by the plaintiff and cross-appeal by the defendants from a summary trial decision. Plaintiff sued defendant for malicious prosecution and negligence as a result of a criminal investigation by defendant resulting in criminal charges against plaintiff. Plaintiff com-

menced action within two-year limitation period after his acquittal. Defendants cross appealed decision finding negligence claim against defendant police officer was not statute barred.

Appeal allowed. Claim for malicious prosecution could not be determined at summary trial. It was unfair to decide the issue of reasonable and probable grounds without the available circumstantial evidence, when it was known to exist or to be obtainable.

Cross-appeal dismissed. Negligence claim was not statute barred as cause of action did not arise until plaintiff's acquittal.

Doucet v. Spielo Manufacturing Inc., 2008 CarswellNB 612, 69 C.P.C. (6th) 252, 2008 NBQB 413, 340 N.B.R. (2d) 198, 871 A.P.R. 198 (N.B. Q.B.).

After close of defence, plaintiff's counsel applied to call plaintiff in reply. Application dismissed. Plaintiff had full opportunity to adduce proposed evidence during his case. Plaintiff's counsel chose not to ask him any questions on re-direct. Reply was improper notwithstanding defendant bore onus of proof on issue of cause. Plaintiff bound to present all his evidence on issue. A plaintiff cannot "split" his or her case. "As a general rule, all matters which are properly part of the plaintiff's case in chief are to be excluded from reply evidence."

See Schroeder J.A. in *Allcock, Laight & Westwood Ltd. v. Patten* (1966), 1966 CarswellOnt 151, [1967] 1 O.R. 18, [1966] O.J. No. 1067 (Ont. C.A.) at pg. 21 [O.R.].

Canadian National Railway v. Huntingdon Real Estate Investment Trust (2009), 2009 MBQB 232, 2009 CarswellMan 435, 88 C.P.C. (6th) 230, [2010] 1 W.W.R. 307 (Man. Q.B.).

The plaintiff brought action against the defendants. The plaintiff refused to provide witness list at pre-trial disclosure but did provide names and contact information for 77 people. The plaintiff pared down the list to 23, and stated that unspecified 15 would be called as witnesses. The defendants brought motion for order directing that plaintiff provide witness list at least 45 days prior to commencement of trial. Motion dismissed. Disclosure of witness list is not required and there is no specific statutory provision.

See *Canada Deposit Insurance Corp. v. Commonwealth Trust Co.*, 1993 CarswellBC 565, [1993] B.C.J. No. 1804, 22 C.B.R. (3d) 113, 49 W.A.C. 248, 30 B.C.A.C. 248, 83 B.C.L.R. (2d) 49 (B.C. C.A.):

> 64 At common law, there is no power in the court to require a litigant to reveal in advance who the witnesses for his side will be. To that general rule, the *Evidence Act* provides an exception in the case of expert witnesses.

See also Sopinka J. for the court in *R. v. Stinchcombe* (1991), [1991] S.C.J. No. 83, 8 C.R. (4th) 277, 120 A.R. 161, 83 Alta. L.R. (2d) 193, 130 N.R. 277, [1991] 3 S.C.R. 326, [1992] 1 W.W.R. 97, 1991 CarswellAlta 192, 1991 CarswellAlta 559, EYB 1991-66887, 8 W.A.C. 161, 68 C.C.C. (3d) 1, 18 C.R.R. (2d) 210 (S.C.C.), at 6.

Trial efficiency arguments to be made in support of requiring the disclosure of a witness list, but are also risks in so doing described in *Fidelis Fisheries Ltd. v. Thorden*, 12 F.R.D. 179, 1952 U.S. Dist. LEXIS 3601 (U.S. Dist. Ct. S.D. N.Y., 1952).

The nature of a court's inherent jurisdiction considered in *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.*, 21 D.L.R. (3d) 75, 1971 CarswellMan 42, [1971] 4 W.W.R. 542, [1971] M.J. No. 38 (Man. C.A.), wherein Freedman C.J.M., speaking for the court adopted quote from p. 51 of an article by Master I.H. Jacob entitled "The Inherent Jurisdiction of the Court," published in *Current Legal Problems*, vol. 23 (London: Stevens & Sons, 1970):

In this light, the jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever

it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression to do justice between the parties and to secure a fair trial between them.

Turbo Logistics Canada Inc. v. HSBC Bank Canada, 2016 ONCA 222, 2016 CarswellOnt 4317, 401 D.L.R. (4th) 187, 347 O.A.C. 369, [2016] O.J. No. 1504 (Ont. C.A.).

Trial judge did not err in refusing adjournment. Trial judge refused adjournment, finding that trial had been scheduled for a year, it was appellants' obligation to proceed expeditiously, likely another year before another trial could be scheduled. Trial judge gave lengthy reasons for judgment. Appellants appealed. Trial judge could reasonably conclude appellants would be capable of defending claim without assistance of counsel. Bank would be prejudiced by further delay of case already five years old. There was also public interest in efficient use of scarce judicial resources and in timely, efficient and fair resolution of trials.

Beraskow v. TD Insurance and ServiceMaster of Ottawa, 2018 ONSC 6419, 2018 CarswellOnt 19416, 93 C.L.R. (4th) 279, [2018] O.J. No. 1594 (Ont. Div. Ct.). Justice M. O'Bonsawin.

In *College of Optometrists (Ontario) v. SHS Optical Ltd.*, 2008 ONCA 685, 2008 CarswellOnt 6073, 93 O.R. (3d) 139, 300 D.L.R. (4th) 548, 241 O.A.C. 225, [2008] O.J. No. 3933 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 3393, 2009 CarswellOnt 3394, 398 N.R. 400 (note), 262 O.A.C. 396 (note), [2008] C.S.C.R. No. 506, [2008] S.C.C.A. No. 506 (S.C.C.).

The Court of Appeal concluded that a trial judge must attempt to accommodate the self-represented litigant's unfamiliarity with the process in order to permit him or her to present his or her case. However, the trial judge must respect the rights of the opposing party. In addition, the trial judge must not appear to assume or in fact assume the role of counsel for the self-represented litigant (at paras. 57-58).

The questions to be asked are whether the proceedings were fairly conducted and whether or not the self-represented litigant received a fair hearing (at para. 59). Both Rule 17.03 of the *Rules of Small Claims Court* and Rule 52.05 of the *Rules of Civil Procedure* deal with taking a view. Rule 18.02(2) of the *Rules of the Small Claims Court* provides that the trial judge has discretion to accept or reject evidence. Rule 19.02 of the *Rules of Small Claims Court* states: "Any power under this rule to award costs is subject to section 29 of the *Courts of Justice Act* R.S.O. 1990, c. C.43, which limits the amount of costs that may be awarded". Since there was an offer to settle in this matter, the trial judge found that she did "not need to determine if the plaintiff acted unreasonably, as [she] [could] decide this case under Rule 14 (see *Beraskow v. TD Insurance and ServiceMaster of Ottawa*, 2018 ONSC 6419, 2018 CarswellOnt 19416, 93 C.L.R. (4th) 279, [2018] O.J. No. 1594 (Ont. Div. Ct.) at para. 15).

Rule 14.07(2) of the *Rules of the Small Claims Court* discusses the costs consequences of a plaintiff's failure to accept an offer to settle. The overriding principle in awarding costs is of the reasonable expectation of the unsuccessful party, taking into consideration the factors set out in rule 57 of the *Rules of Civil Procedure* and the Court's inherent discretion as per section 131 of the *Court of Justice Act*. A successful party is presumptively entitled to costs in a reasonable amount (*Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201, [2004] O.J. No. 2634 (Ont. C.A.)). Parties often argue that costs should follow the event. This was confirmed in *Schreiber v. Mulroney*, 2007 CarswellOnt 5267, [2007] O.J. No. 3191 (Ont. S.C.J.) at para. 2~~.~~; leave to appeal refused 2007 CarswellOnt 7184 (Ont. Div. Ct.). Substantial indemnity costs are the exception to the rule. Appeal dismissed.

Cecchin v. Lander (July 22, 2019), Doc. 1225/18, 1225D1/18, Deputy Judge Winny (Ont. Sm. Cl. Ct.)

ADS. Reasons for denying a defence request to adjourn trial. As a branch of the Superior Court of Justice, that court's practice direction respecting fixed trial dates applies in Small Claims Court. See *Holtzman v. Suite Collections Canada Inc.*, 2013 ONSC 4240, 2013 CarswellOnt 9010, 310 O.A.C. 243 (Ont. Div. Ct.).

In considering whether to grant an adjournment, the relevant factors include the interest of the administration of justice in the proper processing of civil trials on their merits and the need to balance the interests of the parties. See *Khimji v. Dhanani*, 2004 CarswellOnt 525, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142, [2004] O.J. No. 320 (Ont. C.A.); *O'Brien v. Griffin*, 2006 CarswellOnt 96, 263 D.L.R. (4th) 412, 22 R.F.L. (6th) 134, *(*sub nom. *Griffin v. O'Brien))* 206 O.A.C. 121, [2006] O.J. No. 88 (Ont. C.A.); *Graham v. Vandersloot*, 2012 ONCA 60, 2012 CarswellOnt 815, 108 O.R. (3d) 641, 6 C.C.L.I. (5th) 171, 346 D.L.R. (4th) 266, 288 O.A.C. 342, [2012] O.J. No. 353 (Ont. C.A.). Whether to grant or deny a request to adjourn a trial is a matter of judicial discretion. See *Sabatin v. Ganji*, 2018 ONSC 5680, 2018 CarswellOnt 15754, [2018] O.J. No. 4936 (Div. Ct.) at para. 19~~.~~; additional reasons 2018 ONSC 6356, 2018 CarswellOnt 17993 (Ont. Div. Ct.).

Narayan et al. v. Dhillon, 2020 ONSC 7273, 2020 CarswellOnt 17321, 153 O.R. (3d) 721 (Ont. Div. Ct.).

Chandra Narayan et al. v. Sonya Dhillon. Appeal from the Judgment and Order of Deputy Judge Preet Kaler dated August 16, 2019 and reported at *Dhillon v. Narayan* (August 16, 2019), Doc. SC-16-2726-00 (Ont. Sm. Cl. Ct.).

Amongst issues raised, the appellants argued that the trial judge erred in excluding Ms. Narayan from the courtroom at the beginning of the trial, before any evidence had been called.

The trial judge erred in law in his understanding of his witness exclusions powers. The exclusion of witnesses is governed by Rule 52.06 of the *Rules of Civil Procedure*. The Rule states as follows:

> 52.06 Exclusion of Witnesses — (1) Order for Exclusion — The trial judge may, at the request of any party, order that a witness be excluded from the courtroom until called to give evidence, subject to subrule (2).
>
> (2) Order not to Apply to Party or Witness Instructing the Lawyer — An order under subrule (1) may not be made in respect of a party to the action or a witness whose presence is essential to instruct the lawyer for the party calling the witness, but the trial judge may require any such party or witness to give evidence before any other witnesses are called to give evidence on behalf of that party.

Pertinent to subsection 2, Ms. Narayan was not only a witness, she was a person requested by defendants' counsel to be present to instruct him during the trial. She was a "witness whose presence [was] essential to instruct the lawyer for the party calling the witness."[34] Whether a party or not, based on Rule 52.06, the defendants had the right to choose a person to instruct counsel acting on their behalf. That is the intention of the rule.

Appeal allowed and a new trial ordered.

(4) Setting Aside or Variation of Judgment — The court may set aside or vary, on such terms as are just, a judgment obtained against a party who failed to attend at the trial.

Case Law: *G. Richard Watson v. Crystal Mountain Resources Ltd.* (1988), 9 A.C.W.S. (3d) 238 (B.C. C.A.).

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[34] ~~*Ibid.*~~ *52.06(2)*

Setting aside a default judgement and the imposition of terms is a discretionary matter and, provided there is material capable of supporting the order made by the judge, the appeal court will not legally interfere. The sum of $142,900 was required to be paid into court as a condition of the order.

H.C. Sanders & Sons Ltd. v. Collins (1988), 10 A.C.W.S. (3d) 159 (N.S. Co. Ct.).

This action was dismissed without costs to either party as neither party appeared at trial. By way of stated case, the appeal was allowed. A defendant who attends without the plaintiff would suffer a prejudice if the action is merely adjourned. The defendant is entitled to a dismissal. If neither party attends, the defendant suffers no prejudice upon the adjournment. The "better" way is to strike the matter off the list with proper notice to be given to the defendant.

Mount Royal Painting & Decorating Inc. v. Central Interiors Inc. (1995), 7 W.D.C.P. (2d) 28 (Ont. Sm. Cl. Ct.).

Court considered "failure to attend at trial" under subrule 18.01(5). In this case, the defendant should not be denied relief (an adjournment) sought because a representative of the defendant attended trial to request an adjournment.

Chernick v. Spodek (1997), 37 O.R. (3d) 422 (Ont. Gen. Div.).

Scheduling problem arose in trial. It was incumbent upon counsel to ensure they had reliable staff to keep counsel up to date. Counsel's failure to notify court in timely manner regarding scheduling problem, failure to properly list his three offices in at least one legal directory and failure to advise court of change in address are sufficient to cause counsel to fall into "other default" under *Rules of Civil Procedure*, Rule 57.07(1).

Wilbee v. Baldinelli (1997), 45 O.T.C. 297, 1997 CarswellOnt 3582 (Ont. Gen. Div.).

Automobile insurer which paid claim brought Small Claims Court action for property damage against second driver. Default judgment entered against second driver, who made monthly payments on judgment. Plaintiff obtained order setting aside Small Claims Court judgment, which would have operated as bar to personal injury claim, and withdrew action. Broker not affected by order setting aside judgment, but by payments made on judgment which resulted in denial of coverage by broker's liability insurers. Order setting aside judgment made within jurisdiction.

Caverly v. Popoff (1997), 159 Sask. R. 75, 14 C.P.C. (4th) 265 (Sask. Q.B.).

Application to set aside Small Claims Court judgment obtained by default against defendant who claimed not to have been notified of service of process on wife. Service properly effected upon wife of defendant who signed on his behalf. No other discretion available by statute respecting setting aside of Small Claims Court judgments. Safeguards contained in Queen's Bench Rules (Sask.). Not available to such judgments.

Markel Insurance Co. of Canada v. Kamloops Freightliner Ltd., 1997 CarswellBC 1094 (B.C. S.C.).

Petitioner failed to attend settlement conference as provided by *Small Claims Act* (B.C.). Provincial Court judge refused to set aside default judgment granted to respondent, pursuant to s. 17(2) of Act, on basis that petitioner did not have meritorious defence. There were no grounds for concluding that judge exercised his discretion either wrongly or in breach of rules of natural justice.

Richard v. J & K General (October 28, 1998), Doc. Whitehorse 98-S0070 (Y.T. Terr. Ct.).

Application to set aside a default judgment. Application dismissed. Lavidas had notice of the claim and did not reply. He had notice of the default judgment on September 28. He failed to justify reopening the case.

Skendos v. Igbinosun (1999), 117 O.A.C. 125 (Ont. Div. Ct.).

Rule 19.08(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, "confers a broad discretion to set aside a default judgment 'on such terms as are just'"(at 126).

Ridings Financial Services Inc. v. Singh (September 19, 1998), Doc. C28136/94 (Ont. Master).

Motion to set aside a default judgment signed on December 18, 1995. The grounds are that statement of claim was never served and did not come to the attention of defendant until February 19, 1998 when defendant was faced with garnishee proceedings. Plaintiff produced evidence that on that date, statement of claim served at 2770 Aquitaine Avenue, Apartment 302, in Mississauga, Ontario, while he, Mr. Singh, was actually located at 1034 Haig Blvd., in Mississauga. Corroborated by income tax forms and driver's licence records (kept by the Provincial Government) filed on the motion. Court found that statement of claim was never served on defendant.

Skendos v. Igbinosun (1999), 117 O.A.C. 125 (Ont. Div. Ct.).

The appeal against conditions to setting aside default judgment was dismissed. The *Rules of Civil Procedure* (Ontario), Rule 19.08(1), conferred upon the judge broad discretion to set aside judgment on such terms as are just. Lengthy delay and lack of credibility of defendant as to impecuniosity permitted the judge to make a finding of special circumstances. Costs to the respondent fixed at $1,500.

National Bank v. Royal Bank (1999), 121 O.A.C. 304, 44 O.R. (3d) 533 (Ont. C.A.).

Due to a remedy in Rule 19.08 for setting aside default judgment, a default judgment is not a final order for the purposes of appeal to the Court of Appeal. The default judgment is not a final judgment until a remedy has been sought and refused.

Teskey v. Peraan (1999), 34 C.P.C. (4th) 333, 1999 CarswellOnt 1316 (Ont. Master).

A default judgment on a claim served by registered mail was set aside where the signature of the person receiving the registered mail was not that of the defendant. Had the registrar been aware that the signature was not that of the defendant, the default judgment would not have been signed without an order under Rule 16.08 of Ontario's *Rules of Civil Procedure*.

Lewis v. General Accident Assurance Co. (1997), 36 O.R. (3d) 604, 29 C.P.C. (4th) 357 (Ont. Master).

The plaintiffs submitted a requisition to note the defendant in default and for default judgment. On same day, the defendant was noted in default and the default judgment was signed. The defendant brought a motion returnable two days before the actual entry of the judgment to set aside the noting of default and the default judgment. The motion was adjourned. The judgment was entered two days after the original date for the return of the motion. No proceedings can be taken until an order is entered. Until a default judgment is entered, there is no formal judgment. The defendant met the requisite test. The defendant intended to defend the action. The failure to defend was the result of solicitors' inadvertence. The defendant moved promptly to set aside the noting of default.

The court dismissed a motion to set aside a judgment where it was not shown that the fresh evidence could not have been obtained by reasonable diligence prior to judgment. Judgment in the case of a minor should be given the same force and effect as any other judgment: *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), *(*sub nom. *Tsaoussis v. Baetz)* 112 O.A.C. 78, 165 D.L.R. (4th) 268, 41 O.R. (3d) 257, 27 C.P.C. (4th) 223 (Ont. C.A.); leave to appeal refused (1999), *(*sub nom. *Tsaoussis v. Baetz)* 236 N.R. 189 (note), *(*sub nom. *Tsaoussis v. Baetz)* 122 O.A.C. 199 (note) (S.C.C.).

Schill & Beninger Plumbing & Heating Ltd. v. Gallagher Estate (Litigation Administrator of) (2000), 2000 CarswellOnt 1985 (Ont. S.C.J.); reversed in part (2001), 140 O.A.C. 353, 6 C.P.C. (5th) 80, 2001 CarswellOnt 188, [2001] O.J. No. 260 (Ont. C.A.).

The executor lawyer and the estate solicitor made deliberate informed decision not to defend despite urging of the plaintiff. Default not accidental. Judgment was not set aside.

Hunter Douglas Canada Inc. v. Skyline Interiors Corp. (2000), 2000 CarswellOnt 3300 (Ont. S.C.J.).

The plaintiff caused the defendant to be noted in default only six days after service. The defendants were not afforded minimum time to respond. The default judgment was set aside: *Rules of Civil Procedure* (Ontario), Rule 18.01.

Baltson v. AT&T Canada Inc. (2000), 2000 CarswellOnt 3481 (Ont. Div. Ct.).

The plaintiff was unrepresented throughout, moved before Divisional Court for order setting aside two orders to which he had consented. There was no evidence or basis to set aside consent orders.

Isofab Insulation Inc. v. RSG Mechanical Inc. (2000), 2000 CarswellOnt 4239 (Ont. S.C.J.).

Default judgment was set aside and moneys garnisheed and held by Sheriff were returned to the defendant. Default was without notice after a period of negotiations. Amount in dispute was $1,500. The whole procedure was unnecessary, expensive and over-lawyered. The matter was transferred to Small Claims Court.

Osowsky v. General Refrigeration & Air Conditioning Inc. (1999), 1999 CarswellSask 799 (Sask. Q.B.).

A trial date was set for January 25. The plaintiffs attended. The clerk unsuccessfully attempted to find a telephone number for the defendant. The plaintiffs failed to inform the court and proceeded to obtain default judgment. The defendant showed intent to defend, acted promptly after learning of judgment, and showed meritorious defence. The judgment was set aside and a new trial ordered.

Koffski v. Ashworth, 2001 CarswellBC 2521, 2001 BCSC 1469 (B.C. S.C.).

Defendant had default judgment entered against him and failed to have it set aside. Defendant sought to participate in assessment of damages hearing. Defendant waived right to participate in hearing.

Gehring v. Prairie Co-operative Ltd., 2001 CarswellSask 476, 2001 SKQB 320, 209 Sask. R. 285 (Sask. Q.B.).

Appellant argued it was not served and did not understand that he had been served. Judge refused to set aside default judgment. This was an appeal.

Grinnell Supply Sales Co. v. Heger Contracting Ltd., 2001 CarswellBC 1744, 2001 BCSC 1105 (B.C. S.C.).

Evidence of defendants provided nothing more than statement that proceeding did not come to their attention until June 23, 1999. No explanation as to why the substitutional service did not come to their attention. Their son had been served; no explanation as to why son had not brought the matter to their attention. Dismissed.

Canadian Shareholders Assn. v. Osiel (2001), 2001 CarswellOnt 3226 (Ont. S.C.J.).

Motion to set aside noting of default and default judgment brought within one month. There was arguable defence on several factual and legal matters. Judgment and noting of default set aside.

Watts, Griffis, & McOuat Ltd. v. Harrison Group of Cos. (2001), 2001 CarswellOnt 3377, 18 C.P.C. (5th) 117 (Ont. S.C.J.).

Plaintiff obtained summary judgment for balance of fees against one of several defendants. That defendant sought to adduce fresh evidence from accounting files produced by plaintiff after judgment. Materials available earlier with due diligence, and would not have affected decision. Application dismissed.

Carnegie-Mellon Financial Group Inc. v. Adirondack Technologies Inc. (2001), 2001 CarswellOnt 3818 (Ont. S.C.J.).

Defendant business had failed to file statement of defence through inadvertence. Business appeared to have valid defence and counter-claim. Default judgment set aside.

Corlett v. Matheson, 2001 CarswellAlta 1723, 2001 ABQB 963, 302 A.R. 139 (Alta. Q.B.).

Plaintiff having default judgment sought to amend statement of claim without reopening default judgment. Application dismissed.

Mills v. Scarborough General Hospital (2001), 2001 CarswellOnt 3517 (Ont. C.A. [In Chambers]).

Self-represented appellant aware from February 2000 that order refusing to set aside dismissal of action was final and not interlocutory, and that she was in wrong court in filing in Divisional Court. Failure to file in Court of Appeal until March 2001 insufficiently explained. Extension of time refused.

Huggins v. Nicholson (2001), 156 O.A.C. 158, 2001 CarswellOnt 4845 (Ont. Div. Ct.).

Deputy Judge Barron gave judgment to the plaintiffs in the absence of defendant for $6,000 plus costs and prejudgment interest. The defendant had filed a defence. Notice of trial had never been received by defendant's counsel. Defendant's counsel moved to set aside default judgment. The Divisional Court, per Sills J., allowed the appeal, set aside the judgment, and remitted matter to the Small Claims Court for a new trial date. The court stated that Rule 19 (default proceedings) ought not to have been invoked until an order had been made striking out the defence and then inviting a motion for default judgment.

Atkin v. Clarfield (2002), 2002 CarswellOnt 971 (Ont. S.C.J.).

Defendant brought motion to set aside default judgment. Defendant author of own misfortune by changing addresses and assuming that proceeding had been resolved. Substantial prejudice would accrue to plaintiff. Default not set aside.

Michalakis v. Nikolitsas, 2002 CarswellBC 3258, 2002 BCSC 1708 (B.C. S.C.).

Respondent issued small claims writ against petitioner. Petitioner filed reply. Settlement conference was to take place, petitioner ill, rescheduled. Petitioner did not attend rescheduled settlement conference because he did not receive notice of it. Settlement judge noted petitioner in default. Petitioner applied to set aside default judgment. The chambers judge erred in distinguishing a default judgment obtained without service of originating process from a default judgment obtained without service of notice of an interlocutory proceeding. Natural justice required that a party not be found in default of a proceeding he did not know about. It was patently unreasonable to confirm judgment against him. The result, denial of natural justice.

Credit Union Atlantic Ltd. v. McAvoy, 2002 CarswellNS 481, 2002 NSCA 145, 210 N.S.R. (2d) 207, 659 A.P.R. 207 (N.S. C.A.).

Defendant unable to pay for legal advice and unaware that she could defend on own behalf. Later found counsel on affordable terms. Chambers judge erred in refusing to set aside judgment. Test not whether defendant had decided not to defend, but whether she had reasonable excuse for failure. Appeal allowed and judgment set aside.

Maurice's Service Centre Ltd. v. Ryan, 2005 CanLII 1484 (N.L. Prov. Ct.).

Defendants sought default judgment to set aside. Rule 20 of the *Small Claims Rules* (NLR 52/97) essentially codification of existing case law. For instance, in *Langor v. Spurrell*, 1997 CarswellNfld 238, [1997] N.J. No. 264, 157 Nfld. & P.E.I.R. 301, 486 A.P.R. 301, 17 C.P.C. (4th) 1, Green J.A. (Nfld. C.A.)

"This notion of judicial discretion necessarily imports the concept of power of free decision or latitude of choice within reasonable legal parameters." (Marshall J.A. writing for the ma-

jority in *House of Haynes (Restaurant) Ltd. v. Snook*, 1995 CarswellNfld 16, 13 C.C.E.L. (2d) 149, (sub nom. *Newfoundland Human Rights Commission v. House of Haynes)* 95 C.L.L.C. 230-032, 134 Nfld. & P.E.I.R. 23, 417 A.P.R. 23, (sub nom. *House of Haynes (Restaurant) Ltd. v. Halleran)* 24 C.H.R.R. D/278, [1995] N.J. No. 292 (Nfld. C.A.) at paragraph 19.) Default Judgment set aside.

Trenders Inc. v. Krygier, 2005 CarswellSask 478, 2005 SKPC 66 (Sask. Prov. Ct.), S.C. Carter, PCJ. Application by Trenders Inc. to set aside default judgment of Bekolay P.C.J.

Section 37 of the *Small Claims Act, 1997*, governs the application. See *Gehring v. Prairie Co-operative Ltd.*, 2001 CarswellSask 476, 2001 SKQB 320, 209 Sask. R. 285 (Sask. Q.B.).

Reasonableness of applicant's excuse for not being aware of the small claims action doubtful. No reasonable excuse for failing to attend.

First Citizens Mortgage Corp. v. Felger, 2006 CarswellBC 108, 2006 BCPC 1 (B.C. Prov. Ct.).

On each occasion when Defendant failed to attend court (*i.e.*, the settlement conference, the trial date, and the last application to set aside default judgment), representative for Claimant (Williams) appeared. Williams requested order that Claimant pay costs on a solicitor-client basis. Rule 20(6) of the *Small Claims Act Rules* provides that "A judge may order a party or witness whose conduct causes another party or witness to incur expenses to pay all or part of those expenses."

In *Weeks v. Ford Credit Canada Ltd.* (April 28, 1994), Doc. Vancouver C9303264 (B.C. Prov. Ct.), Judge Baird-Ellan held that "expenses" as that term used in this rule, refers to money actually spent.

Rule 17(4) provides: "In making an order under these rules, a judge may impose any conditions or given any direction that the judge thinks is fair."

Order that Defendant not make any further applications until monies deposited with court registry to be held as security. In event Defendant successful in setting aside default judgment and defending claim, $5,000 to be returned to him.

Lariviere v. Bertrand, 2006 CarswellMan 159, 2006 MBQB 104, 27 C.P.C. (6th) 231 (Man. Q.B.).

Plaintiff moved to set aside decision of Suche J. who dismissed Plaintiff's claim against Defendant and awarded costs against Plaintiff.

Originally Plaintiff successful in obtaining a judgment against Defendant after a hearing before Hearing Officer. That decision was appealed by Defendant and a date for hearing set for November 28, 2005. Plaintiff failed to attend resulting in Suche J. dismissing Plaintiff's claim.

Ultimately wherever possible, parties should be given the opportunity to litigate their claims and have matters resolved on the basis of evidence.

Decision set aside.

Astral Media Radio Atlantic Inc. v. Brewer, 2007 CarswellNB 247, 2007 NBQB 198, 51 C.P.C. (6th) 85 (N.B. Q.B.).

Appeal by defendant from adjudicator's decision refusing to set aside default judgment. Appellant failed to appear at trial and argued he did not receive notice of trial date. The notice was sent by registered mail, but the appellant never picked up registered mail from post office. Although appellant acted unreasonably, notice of hearing date was not required to be sent by registered mail, therefore appealed allowed.

Matthes v. Manufacturers Life Insurance Co., 2008 CarswellBC 7, 52 C.P.C. (6th) 1, 2008 BCSC 6 (B.C. S.C. [In Chambers]).

Application brought by the defendants to set aside a default judgment and for a reassessment of damages was dismissed. The defendant and her companies were served by substituted service which they denied. The court found the defendant could not rely on her own refusal to accept registered mail to explain her lack of a timely response to the judgment. Such refusal was deliberate and willful and thus the explanation for the delay was unreasonable.

McFaull v. Palchinski, 2008 CarswellSask 92, 2008 SKPC 23, 315 Sask. R. 156, [2008] S.J. No. 92 (Sask. Prov. Ct.).

Plaintiff was granted a judgment in absence of the defendant. Defendant brought application to set aside judgment granted against him. Application granted. Judgment was set aside due to appellant's reasonable excuse for not appearing and his defence that can only be sorted out at new trial. New trial was granted in order to attempt to balance interests of both parties. It was fundamental to system of justice that parties to dispute have opportunity to be heard, however when party has not availed himself of that opportunity, other parties should not be prejudiced or put to additional expense.

Sharma v. Giffen LLP, 2012 CarswellOnt 15430, [2012] O.J. No. 5800 (Ont. Sm. Cl. Ct.).

The plaintiff had failed to show up for this two-day trial, having expected it to be adjourned on consent, and his claim was dismissed. He brought a motion to set aside that dismissal. The court held that the test was the same as that to set aside a default judgment under rule 11.06. It was held that the plaintiff's failure to appear for his trial date was not satisfactorily explained, and more importantly, on the merits his claim was doomed to failure on several grounds. The motion was dismissed.

(5) Conditions to Making of Order under Subrule (4) — The court may make an order under subrule (4) only if,

(a) the party who failed to attend makes a motion for the order within 30 days after becoming aware of the judgment; or

(b) the party who failed to attend makes a motion for an extension of the 30-day period mentioned in clause (a) and the court is satisfied that there are special circumstances that justify the extension.

O. Reg. 78/06, s. 33

Commentary: When there is a motion to set aside a judgment given after a trial, and involving matters in excess of $500 exclusive of costs, some judges insist that a copy of a transcript of the reasons for judgment be served with the motion papers and filed with the court. If this is the case, the applicant should be referred to the appropriate court reporter for the transcript. (It is the applicant's responsibility to pay the required fee directly to the court reporter). In these circumstances the notice of motion and supporting affidavit should be filed with the court within 30 days of the trial date (Rule 17.04) and the date of hearing scheduled to allow sufficient time for the transcript to be obtained and served with the other motion papers within the necessary time limits. The applicant should not attempt service until the transcript is obtained. The bringing of a motion does not stay any other proceedings, including enforcement proceedings taken on a judgment, or prevent the commencement of any other proceedings unless the court has ordered otherwise. Moneys standing in court or moneys received after a motion has been filed to set aside a judgment should be held pending the outcome of the motion or an order for their release. Where a judgment is set aside and no order is made as to the disposition of the moneys, staff should continue to hold the moneys pending the outcome of any subsequent trial or an order for their release.

Where a judgment has been transferred to a second small claims court for enforcement, an application may be brought in the home court by the defendant to have the judgment set aside. The usual practice has been to have the home court notify the second court that a notice of motion has been commenced and notify them of the outcome. Once the notice has

been received any monies held by the court are not released until the motion has been dealt with. If the application is successful, the second court often holds the funds in its possession until there is a court order authorizing the release of the funds.

Any suitor funds that are received are returned to the home court once judgment has been set aside until a judge orders otherwise. If a second judgment is awarded in the favour of the plaintiff and a balance remains after the funds are disbursed, then a new certificate of judgment should be issued by the home court before any further enforcement proceedings are brought.

Once a judgment is set aside, the clerk of the home court is responsible for the particular file and the distribution of any funds. No action will be taken by the clerk of the second court until a further certificate of judgment is received and the latter reflects the date and particulars of the new judgment.

17.02 Adjournment — (1) The court may postpone or adjourn a trial on such terms as are just, including the payment by one party to another of an amount as compensation for inconvenience and expense.

(2) If the trial of an action has been adjourned two or more times, any further adjournment may be made only on motion with notice to all the parties who were served with the notice of trial, unless the court orders otherwise.

O. Reg. 78/06, s. 34

Commentary: The power to adjourn a trial is given to "the court" — which means a judge of the court. The court clerk has no jurisdiction to adjourn a trial: see *Robb-Simm v. RE/MAX Real Estate Centre Inc.*, 2012 CarswellOnt 13437, [2012] O.J. No. 5232 (Ont. Sm. Cl. Ct.). For more detailed commentary on adjournments see the discussion on that subject above in the commentary under rule 16.01.

Costs of Adjournment

If an adjournment is granted, terms may be imposed. One common term is payment of wasted costs by the party who has caused the adjournment. Wasted costs, also known as costs thrown away, represent compensation for the unproductive attendance which resulted in an adjournment instead of a trial and can include a component for wasted trial preparation if the preparation must be partly repeated for the adjourned trial date. For self-represented parties, these costs can be an amount to compensate for a lost day of wages if the person has taken the day off work. If there are wasted disbursements such as travel cost these may also be awarded as part of the costs thrown away.

In the absence of any significant waste of trial preparation, often a costs award incidental to an adjournment of trial may be in a modest range of up to $300. But if there has been more significant wasted time, and particularly if the relevant party is represented by a lawyer or paralegal, the costs thrown away are more likely to exceed a more modest range and could fall in the $500 to $1,500 range.

One important factor is whether the adjournment request was made on or shortly before the trial date or was made sufficiently in advance to avoid wasted costs and wasted court time. It is always preferable to deal with adjournment requests as early as possible. Leaving it to the day of trial is unlikely to impress the court and will tend to decrease the chance of adjournment if there is no good reason for the lateness of the request.

The amount of costs is of course subject to the judge's discretion, as is the question of when payment to the costs recipient is required. The most common options for the timing of payment (using X as the party to receive the costs) are these:

- Payable to X by a certain date

- Payable to X within a certain timeframe (i.e., 10 days, 30 days, etc.)
- Payable to X forthwith (meaning within no more than 30 days)
- Payable to X in any event of the cause (payable when the trial judgment is made and regardless of the result at trial)
- Payable to X in the cause (payable only if X is awarded costs of the action)
- Payable in the cause (payable to whichever party is awarded costs of the action)

An award of costs is always subject to the *prima facie* limit on costs in section 29 of the *Courts of Justice Act*. See rule 19.02.

Peremptory Adjournments

Another potential term of adjournment is that the adjournment is made peremptory (on all parties) or peremptory on a certain party (i.e. peremptory on the plaintiffs). Peremptory means that no further adjournments will be granted. Peremptory on a certain party means that no further adjournments requested by that party will be granted. It amounts to the court announcing its intention that this adjournment will be the last.

The court retains a discretion to adjourn a trial even if a previous adjournment was peremptory: *Igbinosun v. Law Society of Upper Canada*, 2009 ONCA 484, 2009 CarswellOnt 3420, *(*sub nom. *Law Society of Upper Canada v. Igbinosun)* 96 O.R. (3d) 138, 93 Admin. L.R. (4th) 249, 265 O.A.C. 27, [2009] O.J. No. 2465 (Ont. C.A.); additional reasons 2009 ONCA 767, 2009 CarswellOnt 6767 (Ont. C.A.); additional reasons 2009 ONCA 818, 2009 CarswellOnt 7186 (Ont. C.A.). But that discretion is very narrow and would require the most exceptional circumstances such as the unexpected death or serious illness of a party or material witness. One might say that it would take "hell or high water" to justify adjournment of a peremptory trial date.

Evidence to Support Adjournment Requests

Generally, adjournment requests are dealt with informally, often in writing if made sufficiently in advance of trial or through brief submissions in court and without formal evidence. Whatever the circumstances, and even on consent, the reason(s) for the adjournment request should be communicated to the court.

A party requesting adjournment is well-advised to deal with the request as soon as possible. A letter to the other side stating the request and reasons for it should be delivered immediately unless consent can be obtained more informally. If the request ends up being opposed, the letter may be the simplest way to show the court both the reasons for the request and when the other side was told about it.

If a medical issue is the reason behind an adjournment request, the requesting party needs to consider the potential need for documentation to support the request. While documentary proof of a medical condition, issue or appointment is not always required, depending on the circumstances, the presence or absence of documentation to support the request could be decisive. For example, if there have been prior adjournments or if the circumstances raise the possibility of deliberate delay tactics being used, the court could view the absence of documentary corroboration as a basis to deny the adjournment.

Rule 17.02(2) provides that a formal motion must be brought if there have already been two or more adjournments. That requires a notice of motion and affidavit evidence (Form 15A) unless the court dispenses with that requirement.

Regardless of prior adjournments, a party requesting adjournment needs to consider what material might be sensibly produced in support of the request.

Case Law: *Cecchin v. Lander*, [2019] O.J. No. 3977 (Sm. Cl. Ct.)

The defendants retained new counsel about three weeks before trial and on day one of the trial estimated to required five days, requested an adjournment essentially for more preparation time. The plaintiffs' first witness was estimated to require the entire first day in-chief, and trial continuation on day two would likely have been a minimum of two weeks in future. Most of the court day would have been wasted had the trial been adjourned. The adjournment was denied.

Sabatin v. Ganji, 2018 ONSC 5680, 2018 CarswellOnt 15754 (Ont. Div. Ct.); additional reasons 2018 ONSC 6356, 2018 CarswellOnt 17993 (Ont. Div. Ct.).

The power to grant or deny an adjournment request is a matter of judicial discretion. A deputy judge's decision to refuse a self-represented party's adjournment request made partway through the hearing of a motion, so that he could be represented by a lawyer, was upheld on appeal. The deputy judge's decision to refuse the adjournment was principled and rational.

Bellissimo v. York Condo. Corp. No. 431, [2018] O.J. No. 3335 (Div. Ct.).

Three days before a trial date which had been set a year earlier after three prior adjournments, the defendant requested a fourth adjournment but consent was refused. At trial the deputy judge refused the adjournment and proceeded without the defendant's paralegal, who had not attended. On appeal the refusal of the adjournment was upheld. The deputy judge considered the circumstances and exercised discretion without reversible error. The fact the last adjournment had not been made peremptory did not mean that this adjournment request had to be granted.

Minniti v. Canadian Tire Bank, 2018 ONSC 2128, 2018 CarswellOnt 5202 (Ont. S.C.J.).

The deputy judge refused the self-represented defendant's adjournment request. On appeal the resulting judgment for the plaintiff on a simple credit card debt was upheld. The trial judge's discretion to grant or deny the adjournment request was properly exercised and the defendant in any event had no defence on the merits.

Holtzman v. Suite Collections Canada Inc., 2013 ONSC 4240, 2013 CarswellOnt 9010, 310 O.A.C. 243 (Ont. Div. Ct.).

Once a trial date has been set in the Small Claims Court, the trial is expected to proceed on that date. The Practice Direction as to Trial Dates and Adjournments dated June 9, 1999, applies to the Small Claims Court. In this case when the matter was called for a trial which had been set months earlier, the defendant requested an adjournment on the basis it had retained a lawyer just four days earlier despite knowing he was not available for the trial. The deputy judge denied the adjournment and proceeded with the trial. An appeal from the denied adjournment was dismissed.

Bond v. Deeb, 2013 CarswellOnt 696, [2013] O.J. No. 287 (Ont. Sm. Cl. Ct.); further proceedings 2013 CarswellOnt 3769, [2013] O.J. No. 1524 (Ont. Sm. Cl. Ct.).

The trial had been adjourned three times before and the last adjournment was made peremptory on all parties. At the peremptory fourth trial date, the plaintiff failed to attend court but left messages stating that she could not attend trial because her mother was in hospital. The action was dismissed. A subsequent motion by the plaintiff to set aside that order was dismissed. The court found that her failure to attend trial was not satisfactorily explained, her claim was doomed to failure and the justice of the case did not favour setting aside the dismissal order.

Oberbichler v. State Farm Mutual Automobile Insurance Co., 2013 CarswellOnt 11871, [2013] I.L.R. I-5481 (Ont. Sm. Cl. Ct.).

The Small Claims Court has a discretion to adjourn a trial and direct that it be heard together with another related action between the same parties. In this case there were two pending actions both involving claims by the same plaintiff against the same insurer for statutory accident benefits arising from the same motor vehicle accident. On motion the court adjourned the trial of one action for hearing together with the trial of the second action.

Campbell v. Maritime Engine Specialists (October 11, 1995), Doc. AD-0607 (P.E.I. C.A.).

If a plaintiff is taken by surprise at trial and needs an adjournment, he should advise the trial judge of that fact. Although proceedings in Small Claims Court are informal, this does not extend to the trial judge conducting the case for the parties.

Strosberg v. Wahl (1994), 6 W.D.C.P. (2d) 86 (Ont. Sm. Cl. Ct.).

A motion for leave to discontinue an action for the purposes of bringing another action in a more senior court was granted where the court found that the responding party would not suffer substantial prejudice if the motion was granted.

In granting the motion, the court found that the abandonment of an excess of a claim or counterclaim was merely a procedural step and was not irreversible. No prejudice to the respondents had been demonstrated other than the inconvenience of having less speedy and costly proceedings, but which could be compensated for by an order of costs. There was no evidence of prejudice substantially disabling the respondents from presenting their defence and counterclaim in any other court proceedings.

R. v. Gregoire (November 18, 1994) (Ont. Prov. Div.).

Client, charged with an offence under the *Highway Traffic Act*, was represented in Provincial Court by HK, a former lawyer who had been disbarred for dishonesty. On behalf of HK, client's mother appeared before the court requesting an adjournment, as HK was not available on the date set for appeal. The judge refused to entertain the application for an adjournment, stating the client was free to be represented by any type of agent, but that he would not allow an appearance by HK in his court. The appeal was to go ahead as scheduled unless another basis for adjournment could be found.

Direk v. Dixon (1999), 236 N.R. 196 (note) (S.C.C.); refusing leave to appeal from (1998), 111 O.A.C. 137 (Ont. C.A.).

On trial date, the plaintiff's new counsel requested an adjournment to allow him to prepare and amend statement of claim. The judge granted the request and fixed a peremptory trial date. Plaintiff failed to amend his pleadings by the new trial date. He sought another adjournment. The trial judge dismissed the motion.Court of Appeal affirmed ruling. Trial judges had responsibility to control the process that was before them. Trial judge's conclusion in respect of unfairness entirely justified in light of history of matter.

Brydon v. Hoskin (November 20, 1998), Doc. Vancouver CA024036 (B.C. C.A).

Appeal by Brydon from the dismissal of his application for judicial review. Attorney General had not been notified as required under s. 16(1) of the *Judicial Review Procedures Act*, R.S.B.C. 1996, c. 244, either with respect to the application for judicial review or the appeal. Appeal dismissed. This was not an appropriate case to exercise the discretion to grant an adjournment.

Mazzobel v. Liebman (May 6, 1998), Doc. 677/97 (Ont. Div. Ct.).

This was an appeal by Mazzobel against the dismissal of a Small Claims Court action. The action was dismissed. The judge held that Mazzobel had no intention of proceeding and the request for adjournment was only a delaying tactic. The appeal was allowed. The trial judge erred in principle when she concluded that the adjournment request was for an improper motive. Any prejudice to Liebman could have been overcome by giving him costs.

Widjojo v. Clifford (1998), 112 B.C.A.C. 254, 182 W.A.C. 254 (B.C. C.A.).

The appellant granted adjournments twice to change solicitors. The subsequent application to adjourn, to submit complete medical records, and to retain new counsel, was refused. The appellant appealed and brought a motion to introduce new evidence. The appeal and the motion were dismissed. The trial judge exercised discretionary jurisdiction properly in declining to adjourn the trial.

Technologie Labtronix inc. c. Technologie Micro Contrôle inc. (24 août 1998), no C.A. Montréal 500-09-004365-979 (Que. C.A.).

The court erred in ordering a visit to the site on its own motion. A better course of action would have been for the court to make a suggestion and then receive submissions. The court exceeded discretion in taking the initiative, which had the effect of transforming the process from an adversarial to an inquisitorial process, which was not contemplated under Code.

Smith v. Garbutt (October 14, 1998), Doc. Vancouver CA023231 (B.C. C.A.).

A motion for non-suit at end of the plaintiff's case resulted in a motion to amend statement of claim. The trial judge did not err in granting an amendment on the basis of conforming to evidence that had been given at trial to date. The amendment did not prejudice the appellant defendants.

Strata Plan VR 2000 v. Shaw (January 8, 1999), Doc. Vancouver C946094 (B.C. S.C.).

The defendants applied for an adjournment of trial. The plaintiff argued that the case was ready for trial. The plaintiff was entitled to have the case heard unless the adjournment accorded with interests of justice. It was reasonable to assume that any adjournment would be for more than a year. This was prejudicial to all parties and to the judicial system.

Banman v. Weipert (1999), 179 D.L.R. (4th) 487, 129 B.C.A.C. 300, 210 W.A.C. 300 (B.C. C.A.).

The appeal was from an order that granted adjournment of trial upon the request of the defendants, who retained new counsel. This was a case where intervention was called for. Prejudice to the appellant far outweighed whatever prejudice the defendants would suffer. Where a discretionary order is clearly created injustice, it was open to the court to set it aside. The trial was directed to proceed at the earliest date.

Bio-Med Waste Disposal System Ltd. v. Disco General Repair Ltd. (April 7, 1998), Doc. 406/97.

The defendant was not ready to proceed and requested an amendment to the defence. The trial judge disallowed the motion on the ground of undue delay and undue prejudice. At trial, the prejudice referred to by the trial judge could have been compensated for by costs and an adjournment. The trial judge therefore erred in not permitting an adjournment on terms.

Mist Management Information Security Tempest International Inc. v. Standard Trust Co. (Liquidator of) (2000), 131 O.A.C. 83, 2000 CarswellOnt 532 (Ont. C.A.).

The judge acted judicially in exercising discretion in refusing to grant an adjournment and did not err in dismissing the appeal for want of prosecution.

McCready v. McCready, 2001 CarswellBC 2034, 2001 BCCA 539 (B.C. C.A.).

Appellant firing counsel prior to hearing and seeking adjournment. No indication action done to delay appeal. Appeal proceeding expeditiously. Adjournment granted.

Holderness v. Gettings, 2002 CarswellBC 226, 2002 BCCA 92, 163 B.C.A.C. 84, 267 W.A.C. 84 (B.C. C.A. [In Chambers]).

Plaintiff served with new expert report just prior to trial. Plaintiff requesting adjournment. Adjournment granted and defendant ordered to pay advance to plaintiff. Defendant seeking leave to appeal. Application dismissed.

Mills v. Scarborough General Hospital (2001), 2001 CarswellOnt 2276 (Ont. Div. Ct.).

Adjournment due to medical condition of unrepresented plaintiff appellant. Leave to appeal had been delayed to considerable future time. Plaintiff given one final chance. Matters adjourned peremptory to plaintiff to set date on terms.

Marbach v. Marbach, 158 B.C.A.C. 219, 2001 CarswellBC 2043, 2001 BCCA 570, 258 W.A.C. 219 (B.C. C.A.).

At a pre-trial conference shortly before the March date, husband assured trial judge that his new solicitor would be available for the March date. When trial opened, the husband sought an adjournment. The Court of Appeal affirmed trial judge was correct in refusing the adjournment.

Prefontaine v. Gosman, 2002 CarswellAlta 846, 2002 ABCA 166 (Alta. C.A.).

Hearing date for May 2002 set in October 2001. Medical information stating inability of two appellants to argue, based respectively on agitated mental state and depression, not sufficient to justify adjournment. Application denied and appeal should proceed.

Canada Photofax Ltd. v. Cuddeback, 2003 CarswellBC 40, 2003 BCSC 51 (B.C. S.C.).

Claimant sued respondent in Small Claims Court. Respondent not appearing and telephoned by trial judge. Respondent requesting adjournment. Trial judge proceeding with trial and claimant awarded judgment. Respondent appealed. Appeal dismissed. Trial judge exercising discretion in refusing to grant adjournment.

1162994 Ontario Inc. v. Bakker (2004), 184 O.A.C. 157, 2004 CarswellOnt 869 (Ont. C.A.).

Tenant Protection Act did not articulate procedure to be followed on appeal and the *Rules of Civil Procedure* therefore applied to appeals originating from the Ontario Rental Housing Tribunal. Conduct of an appeal not governed exclusively by Rule 61 of *Civil Rules*.

Moss v. NN Life Insurance Co. of Canada/Transamerica Life Canada, 2004 CarswellMan 28, 2004 MBCA 10, [2004] 7 W.W.R. 211, 180 Man. R. (2d) 253, 310 W.A.C. 253, 42 C.P.C. (5th) 19, 235 D.L.R. (4th) 735 (Man. C.A.).

Appeal by plaintiff from decision her spouse who was not lawyer not authorized to act on her behalf at trial of her action against insurer. Right being asserted similar to representation by lawyer, which was prohibited. Appeal dismissed.

1335333 Ontario Ltd. v. Residences of Victoria Gardens Inc. (2004), 2004 CarswellOnt 103 (Ont. S.C.J.).

Respondent knowingly and deliberately failed to comply with Order for provision of information and documents, but later purged contempt. Incarceration should only be imposed in extreme circumstances. Respondent ordered to pay funds into Court on receipt, and pay costs on substantial indemnity basis.

Garcia v. Bernath, 2003 CarswellBC 1903, 18 B.C.L.R. (4th) 389, 2003 BCSC 1163 (B.C. Master).

Action for personal injuries commenced in Supreme Court, then transferred to Small Claims Court after examinations for discovery. Plaintiff recovered total of $4,173 and now sought costs on party-and-party basis up to date of transfer. Plaintiff had good reason to commence action in Supreme Court particularly given Defendant's insistence that no injury was sustained, awarded costs up to date of discovery at Scale 3.

Protect-A-Home Services Inc. v. Heber, 2003 CarswellMan 332, 178 Man. R. (2d) 150, 2003 MBQB 181 (Man. Q.B.).

Plaintiff issued garnishing orders to recover its costs. Defendant misnamed in garnishing order. No evidence anyone misled by misname and garnishing order should not be set aside for this reason.

Bank of Nova Scotia v. Johnston, 2002 CarswellNB 305, 2002 CarswellNB 306, 2002 NBCA 57, 251 N.B.R. (2d) 280, 654 A.P.R. 280 (N.B. C.A.).

Trial judge granted four previous adjournments, refused to grant another. Defendant argued that trial judge erred in failing to accommodate defendant's physical ailments and that there was apprehension of bias. Appeal dismissed. Trial judge did not err in refusing further adjournment.

MacNeil v. MacNeil (2002), 2002 CarswellNS 552, 2003 NSSC 44, 212 N.S.R. (2d) 380, 665 A.P.R. 380 (N.S. S.C.).

Small Claims Court Act (N.S.), s. 29(1) provided that adjudicator "may" make Order on claim no later than 60 days after hearing. Provision permissive. Order made 66 days after, not valid. Decision that Defendant was liable based on credibility. Appeal dismissed.

Canada Photofax Ltd. v. Cuddeback, 2003 CarswellBC 40, 2003 BCSC 51 (B.C. S.C.).

Respondent not appearing and telephoned by trial Judge. Respondent requesting adjournment. Trial Judge proceeding with trial and claimant awarded judgment. Respondent appealing. Appeal dismissed.

Scheuneman v. R., 2003 CarswellNat 88, 2003 CarswellNat 4763, 2003 FCT 37, 2003 CFPI 37 (Fed. T.D.); affirmed 2003 CarswellNat 3741, 2003 CarswellNat 4624, 2003 FCA 440, 2003 CAF 440 (F.C.A.); leave to appeal refused (2004), 2004 CarswellNat 378, 2004 CarswellNat 379 (S.C.C.).

Self-represented Plaintiff sought to be relieved from obligation of attending pretrial conference in person because of alleged disability. Plaintiff incapable of representing himself. Plaintiff was directed to appoint solicitor. Such solicitor was ordered to file further pretrial conference memorandum in conformity with Rules.

Charlottetown (City) v. MacIsaac, 2003 CarswellPEI 9, 2003 PESCTD 7, 35 M.P.L.R. (3d) 271, 223 Nfld. & P.E.I.R. 95, 666 A.P.R. 95 (P.E.I. T.D.).

Plaintiff brought small claims action for return of portion of property taxes for garbage collection. No cause of action shown.

Khimji v. Dhanani, 2004 CarswellOnt 525, [2004] O.J. No. 320, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142 (Ont. C.A.).

Trial judge granting adjournment but making matter peremptory and ordering plaintiff to pay defendants' costs thrown away by new trial date. Plaintiff appearing unrepresented on trial date and seeking another adjournment. Trial judge justified in refusing adjournment and dismissing action in light of plaintiff's failure to take reasonable steps to be prepared for trial and to comply with costs order.

Appellant legally blind and not fluent in English language. Neither relevant to the reasonableness of the trial judge's refusal to grant an adjournment. No suggestion that the appellant's physical disability or his difficulties with the English language interfered in any way with his ability to retain and instruct counsel.

The option of dismissal must be available to the trial court to ensure ongoing effective operation of trial lists and to preserve the integrity of court orders. Strong deference due to decisions of those in trial courts who are responsible for the day-to-day maintenance of an efficient and just system of civil trials. The trial court is in a much better position to balance the competing interests than is the appeal court.

O'Brien v. Griffin, 2006 CarswellOnt 96, 22 R.F.L. (6th) 134, (sub nom. *Griffin v. O'Brien)* 206 O.A.C. 121, 263 D.L.R. (4th) 412 (Ont. C.A.).

Appeal by Griffin from judgment of Metivier J. of the Superior Court in which application of Griffin to vary divorce judgment was dismissed. Griffin not a lawyer and acted on his own behalf.

Griffin requested adjournment to permit him to call proposed witness either in person or by way of videoconference. The request was denied.

It was incumbent on the trial judge, in the particular circumstances, to assist Griffin by granting an adjournment for a reasonable period of time to permit him to secure the personal attendance of the witness. This is particularly so in view of the fact that the trial judge drew an adverse inference from his failure to call witness. Appeal allowed and new trial is ordered.

Lang J.A. (dissenting) refers to *Khimji v. Dhanani*, 2004 CarswellOnt 525, [2004] O.J. No. 320, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142 (Ont. C.A.), which sets out the degree of deference paid to the exercise of discretion on the part of a trial judge.

> A trial judge has the discretion to adjourn a trial. That discretion must be exercised judicially, balancing the interests of the parties with a view to providing an expeditious and fair hearing. This applies in both the civil and family context and whether dealing with litigants represented by counsel or with self-represented litigants. See *McLeod v. Castlepoint Development Corp.*, 1997 CarswellOnt 174, [1997] O.J. No. 386, 97 O.A.C. 123, 31 O.R. (3d) 737, 8 R.P.R. (3d) 97, 25 C.P.C. (4th) 256 (Ont. C.A.); leave to appeal refused [1997] S.C.C.A. No. 191, 105 O.A.C. 160 (note), 223 N.R. 394 (note), 34 O.R. (3d) xv (S.C.C.), *Cornfield v. Cornfield*, [2001] O.J. No. 5733 (Ont. C.A.), and *Appiah v. Appiah*, [1999] O.J. No. 500, 1999 CarswellOnt 481, 118 O.A.C. 189, 45 R.F.L. (4th) 172 (Ont. C.A.).
>
> In my view (dissenting), the trial judge did *not* err in exercising her discretion to refuse the adjournment.

Matthews v. Royal & SunAlliance Canada, 2007 CarswellNfld 30, 2007 NLTD 11, 45 C.C.L.I. (4th) 138, *(*sub nom. *Matthews v. Royal & Sun Alliance Insurance)* 798 A.P.R. 255, *(*sub nom. *Matthews v. Royal & Sun Alliance Insurance)* 263 Nfld. & P.E.I.R. 255 (N.L. T.D.).

Appeal of decision of Provincial Court denying request for postponement to retain counsel. No error committed.

Appeal also on ground trial judge did not exclude respondent's only witness from court during appellant's testimony. There had been no request for exclusion.

Judge's decisions discretionary in nature.

Trial judge noted that it was usual that parties in Small Claims Court are not represented by counsel, appellant had represented himself throughout the proceedings and that he had drafted his own documents in an adequate manner.

Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District), 2006 CarswellBC 487, 2006 BCSC 273 (B.C. S.C.).

Defendant seeking adjournment of trial close to trial date. Application allowed. Plaintiff having very large claim. Defendant forced to take on new counsel as a result of prior counsel withdrawing. Defendant entitled to brief period to allow new counsel to get up to speed on issues. Prejudice to defendant of trial going ahead far outweighing prejudice to plaintiff of trial not proceeding.

Toste v. Baker (2007), 2007 CarswellOnt 1368 (Ont. Div. Ct.).

Appeal of Small Claims Court decision of Deputy Judge's refusal to grant an adjournment at defendants' request at hearing such that the decision at the conclusion of the ensuing trial is properly to be set aside.

No medical evidence was presented at the hearing to support the defendant's assertion that the defendant Baker could not attend because of medical problems. Mr. Baker's counsel simply made an oral submission that there was a medical problem as the reason for his absence.

Onus on defendants to establish basis for requested exceptional relief of overturning on appeal a refused request for adjournment by the trial judge. See generally *Thunderstone Quarries Ltd. v. Three Sisters Resorts Inc.*, 2004 CarswellAlta 232, [2004] A.J. No. 232, 2004 ABCA 47 (Alta. C.A.).

No good reason to interfere with discretion exercised by Deputy Judge in refusing the adjournment. Appeal dismissed.

Ramlall v. Salvation Army, 2006 CarswellOnt 1149 (Ont. Div. Ct.).

Respondent advised of hearing date. Respondent made last minute request for adjournment. Respondent self represented. Matter adjourned to specified date on terms. Costs fix at $500 awarded to moving party.

Oudeerkirk v. Clarry, 2005 CarswellOnt 6767 (Ont. S.C.J.).

Defendant sought second adjournment of trial on ground plaintiff had not produced all relevant medical information and this information could impact liability, damages and plaintiff's credibility. Not in interests of justice to proceed with trial and force jury to reach conclusions about issues in absence of potentially significant information which was available about those issues. Adjournment granted.

Kaplun v. Kaplun (2007), 2007 CarswellOnt 5889, 45 R.F.L. (6th) 115 (Ont. S.C.J.).

Adjournment requests should be communicated to opposing counsel well in advance of hearing date.

Request for adjournment of motion by former solicitor of husband relating to costs of motion to remove him as solicitor of record. Wife also sought adjournment. Motions granted.

Ochnik v. Ontario (Securities Commission) (2007), 2007 CarswellOnt 2759, 224 O.A.C. 99 (Ont. Div. Ct.); additional reasons at (2007), 2007 CarswellOnt 3383 (Ont. Div. Ct.).

The Ontario Securities Commission found that Ochnik and 1464210 had traded while unregistered and without a prospectus. Divisional Court awarded Commission costs of $4,000. Although its partial indemnity costs amounted to $12,875, the Commission sought an award of $4,000, indicating that it did not wish to inhibit self-represented parties, such as Ochnik, by seeking prohibitive costs awards.

Ochnik and 1464210 submitting, *inter alia*, that because 1464210 under bankruptcy protection and Ochnik was an undeclared bankrupt at the time of the proceeding, there was a statutory stay. The Divisional Court dismissed appeal. Ochnik asserted that the Commission erred in refusing to grant an adjournment. The decision to grant an adjournment was best made by the tribunal. Ochnik had ample time to retain counsel and to review disclosure. The panel adapted the hearing to recognize that Ochnik was unrepresented and provided him with assistance.The conclusion that an adjournment was not warranted was reasonable.

Stocker v. Linley, 2007 CarswellOnt 4100 (Ont. S.C.J.), Walters J. Adjournment. General principles.

M.C.M. Contracting Ltd. v. Canada (Attorney General), [2002] Y.J. No. 108, 2002 CarswellYukon 112, 2002 YKSC 47 (Y.T. S.C.).

An action was commenced on behalf of corporation which was dissolved on November 3, 2000. Plaintiff's application was adjourned for 14 days at the request of the Plaintiff in order to allow the Plaintiff's company to successfully restore its registration. Plaintiff took no steps to restore itself to the register. Application was made by the Plaintiff for further adjournment. Application for an adjournment dismissed. The delay by the Plaintiff mitigated against the granting of an adjournment, which was also justified by the strength of the defendant's position. An action commenced on behalf of a corporation that had been dissolved was a nullity and not an irregularity that could be cured.

Zynik Capital Corp. v. Faris, 2004 CarswellBC 1784, 41 B.C.L.R. (4th) 190, 2004 BCSC 1032 (B.C. S.C.).

The defendants apply to dismiss the action on the basis that it was commenced in the name of a corporation that had been voluntarily dissolved. Plaintiff lacked capacity to bring action as it was dissolved. It is common ground that an action commenced on behalf of a corporation that has been dissolved is a nullity, unless the corporation has been revived before the action was commenced. Action was nullity and could not be cured by amendment of statement of claim pleading facts of corporate reorganization.

Tulloch v. AmeriSpec Home Inspection Services, 2006 CarswellNS 623, 2006 NSSM 48, 47 C.P.C. (6th) 337, 253 N.S.R. (2d) 37, 807 A.P.R. 37 (N.S. Sm. Cl. Ct.).

Claimant brought action on contract in Small Claims Court. Arbitration clause in contract provided exclusion of jurisdiction of the Small Claims Court. It was held that arbitration clause was void as pursuant to s. 14(1)(a) of *Small Claims Court Act*, provision in agreement excluding, limiting or varying jurisdiction of Small Claims Court is void. There is no jurisdiction in the Small Claims Court to stay claims, although the court may grant an adjournment in some situations.

Canadian Equipment Rentals Ltd. v. G.A.P. Contracting Ltd., 2008 CarswellBC 1977, 2008 BCCA 360, 259 B.C.A.C. 200, 436 W.A.C. 200 (B.C. C.A. [In Chambers]).

Solicitor for defendant unsuccessfully requested adjournment due to absence of principal defendant. Provincial Court judge ruled defendant failed to attend and allowed plaintiff's claim without requiring it to prove its damages. Defendant unsuccessfully appealed to Supreme Court. Defendant commenced second appeal to Supreme Court and brought application for stay of execution pending appeal. Application dismissed. Supreme Court did not have jurisdiction to entertain application as no appeal was available from prior judgment of Supreme Court. Defendant had exercised right of appeal from Provincial Court judgment pursuant to s. 5 of *Small Claims Act*.

Toronto-Dominion Bank v. Transfer Realty Inc., 2010 ONCA 166, 2010 CarswellOnt 1195 (Ont. C.A.).

TD Bank moved for judgment to enforce Minutes of Settlement. Appellants requested adjournment to obtain alternate legal counsel. The motion judge denied appellants' request and granted judgment in favour of TD Bank. Decision to grant adjournment is discretionary. Accordingly, scope for appellate intervention is limited: see *Khimji v. Dhanani* (2004), [2004] O.J. No. 320, 182 O.A.C. 142, 44 C.P.C. (5th) 56, 69 O.R. (3d) 790, 2004 CarswellOnt 525 (Ont. C.A.). Appellants have not demonstrated refusal to grant adjournment contrary to the interests of justice. Appeal dismissed.

Gulati v. Husain, 2011 CarswellOnt 407, 2011 ONSC 706, [2011] O.J. No. 384 (Ont. S.C.J.).

The applicant sought *certiorari* respecting an order from deputy judge of the Small Claims Court (a) denying an adjournment of the motion to set aside default judgment; (b) staying enforcement of the default judgment; (c) setting aside the default judgment; and (d) costs of $300. Order setting aside default judgment, and costs order set aside.

The court has the discretion to refuse a consent adjournment. But this discretion should be exercised sparingly. It is unusual to refuse a request to accommodate counsel's schedule reasonably on a first appearance.

Deputy judge gave no reason for refusing adjournment. Deputy judge then decided the motion to set aside the default judgment without hearing submissions from either side.

Maryland's highest court has held that a trial court abused its discretion by refusing to suspend a civil trial despite a litigant's planned absence during two days of the trial for religious reasons. *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*

The plaintiff asserted that the scheduled trial partially conflicted with an Orthodox Jewish holiday that would occur during two days in the middle of trial. The plaintiff argued that, when he was observing the holiday, he was prohibited from working or relying on agents to work on his behalf. The court held that the trial court's concerns about a negative impact on jurors, judicial resources, and the trial court's docket should not be "unreasonably juxtaposed" against the plaintiff's request for a religious accommodation.

Reland Development Ltd. v. Whitby (Town), 2011 ONCA 661, 2011 CarswellOnt 11771 (Ont. C.A.).

A trial judge enjoys a wide latitude in deciding whether to grant adjournment of scheduled civil trial: see *Khimji v. Dhanani*, 2004 CarswellOnt 525, [2004] O.J. No. 320, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142 (Ont. C.A.). Decision entitled to considerable deference: see *Murphy v. Werry Estate*, 2005 CarswellOnt 313, [2005] O.J. No. 280, *(*sub nom. *Murphy v. Werry)* 193 O.A.C. 356 (Ont. C.A.). The appellant had been granted two adjournments totalling a year and had not secured counsel. He had also applied for, and was denied, additional extensions, including once just two weeks before the trial. Fresh evidence was not admitted. The appellant failed to satisfy the criteria of diligence, relevance, and likelihood of affecting the outcome of the adjournment motion.

Appeal dismissed with costs to the respondent fixed at $9,000.

Leigh v. Belfast Mini-Mills Ltd., 2011 NSSC 23, 2011 CarswellNS 144, 303 N.S.R. (2d) 1, 957 A.P.R. 1, [2011] N.S.J. No. 118, Arthur J. LeBlanc J. (N.S. S.C.).

The defendants were entitled to costs under R. 77.05(2) of Civil Procedure Rules since the motion was abandoned and the defendants were not responsible for the adjournment. The plaintiffs were self-represented, and unable to understand and comply with rules. The adjournment caused unnecessary delay, and thus lost effort and increased work for defendants. Costs were awarded against plaintiffs in the amount of $1,000 payable in any event of cause and at the end of the proceeding.

Graham v. Vandersloot, 2012 ONCA 60, 2012 CarswellOnt 815, 108 O.R. (3d) 641, 6 C.C.L.I. (5th) 171, 346 D.L.R. (4th) 266, 288 O.A.C. 342, [2012] O.J. No. 353 (Ont. C.A.).

The appellant sought to set aside two orders of the Superior Court of Justice: (i) the order dated September 7, 2010, denying the appellant's request for an adjournment of the trial of this action, and (ii) the order dismissing the action.

Adjournment decisions are highly discretionary and appellate courts are rightly reluctant to interfere with them. Laskin J.A. succinctly summarized the operative legal principles in *Khimji v. Dhanani*, 2004 CarswellOnt 525, [2004] O.J. No. 320, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142 (Ont. C.A.). Although he was in dissent, the majority accepted his articulation of the statement of principles. See paras. 14 and 18 in particular. See also *Ariston Realty Corp. v. Elcarim Inc.*, 2007 CarswellOnt 2371, [2007] O.J. No. 1497, 51 C.P.C. (6th) 326 at paras. 33, 36 and 38 (Ont. S.C.J.).

The motion judge gave undue weight to the appellant's lawyer's failure. As Hambley J. noted when granting leave to appeal to the Divisional Court in this matter, "the often applied principle that the sins of the lawyer should not be visited upon the client applies in this case." This principle was enunciated by this Court in *Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd.*, 1985 CarswellOnt 357, [1985] O.J. No. 101, 8 O.A.C. 369, 1 C.P.C. (2d) 24 at para. 11 (Ont. C.A.):

> Undoubtedly counsel is the agent of the client for many purposes . . . but it is a principle of very long standing that the client is not to be placed irrevocably in jeopardy by reason of the neglect or inattention of his solicitor, if relief to the client can be given on terms that protect his innocent adversary as to costs thrown away and as to the security of the legal position he has gained. There may be cases where the plaintiff has so changed his position that this is impossible.

It is the overall interests of justice that, at the end of the day, must govern. See *Ariston Realty Corp.*, at para. 38.

The interests of justice favour the appellant's having her day in court to put forward her claim for damages on the merits.

Kaycan Ltée/Kaycan Ltd. v. R.P.M. Rollforming Ltd., 2011 ONSC 1454, 2011 CarswellOnt 1466 (Ont. S.C.J.); additional reasons at 2011 ONSC 2040, 2011 CarswellOnt 2195 (Ont. S.C.J.).

A motion was made for a summary judgment for payment of the price of goods sold and delivered. The defendant, ("R.P.M."), asked for an adjournment of the motion, which the court declined to grant. Factors for a court to consider in deciding to grant or refuse an adjournment were set out in *Ariston Realty Corp. v. Elcarim Inc.*, 2007 CarswellOnt 2371, [2007] O.J. No. 1497, 51 C.P.C. (6th) 326 (Ont. S.C.J.). Adjournments are not a given right. There was no violation of the principles of natural justice by refusing the adjournment. R.P.M. had been given the right to put its evidence before the court, and it had exercised that right. R.P.M.'s lawyer had been on the case throughout, and he was or ought to have been ready to argue the case with or without a factum.

Fritsch v. Magee, 2012 ONSC 2755, 2012 CarswellOnt 5791, 40 C.P.C. (7th) 320 (Ont. S.C.J.); additional reasons 2012 ONSC 4301, 2012 CarswellOnt 9116 (Ont. S.C.J.).

The defendant brought a motion at the outset of the trial to have the plaintiff's action dismissed as statute barred. The alleged assault occurred on May 13, 2006. The plaintiff issued a claim in Small Claims Court on July 17, 2007, well within that period.

The plaintiff's counsel asked to have the Small Claims Court action "stayed" on consent on July 31, 2008, when the matter was scheduled to be spoken to. On July 30, 2008, the plaintiff's counsel issued a statement of claim in the Superior Court. In these circumstances it was grossly unfair to preclude the plaintiff from proceeding.

See *Waymark v. Barnes*, 1995 CarswellBC 61, 3 B.C.L.R. (3d) 354, 57 B.C.A.C. 249, 94 W.A.C. 249, [1995] B.C.J. No. 658 (B.C. C.A. [In Chambers]), where Taylor J.A. on behalf of the British Columbia Court of Appeal (in chambers) commented at para. 7 that:

> . . . it seems that once the limitation period has expired a claim cannot be moved from that court to the Supreme Court: see also *MacMaster v. Insurance Corp. of British Columbia*, 1994 CarswellBC 206, 91 B.C.L.R. (2d) 276, 24 C.P.C. (3d) 288, 41 B.C.A.C. 306, 66 W.A.C. 306 (B.C. C.A.). In direct contrast, Ontario's *Courts of Justice Act* expressly provides in s. 107 for a transfer from small claims court to Superior Court. And s. 107(6) states that a proceeding that is transferred "shall be continued as if it had been commenced in that court."

The defendant's motion was dismissed.

Holtzman v. Suite Collections Canada Inc., 2013 ONSC 4240, 2013 CarswellOnt 9010, 310 O.A.C. 243 (Ont. Div. Ct.).

Holtzman commenced Small Claims Court action. She alleged that "all of the defendants have been reckless and negligent in their actions" and had breached a regulation made pursuant to the *Collection Agencies Act*, R.S.O. 1990, c. C.14.

Deputy Judge rejected adjournment request by the defendants. The appellants relied on *Khimji v. Dhanani*, 2004 CarswellOnt 525, 69 O.R. (3d) 790, 44 C.P.C. (5th) 56, 182 O.A.C. 142, [2004] O.J. No. 320 (Ont. C.A.). Rule 17.02 of the *Small Claims Court Rules* addresses adjournments. The decision to proceed with the trail was amply supported. The Practice Direction as to trial dates and adjournments dated June 9, 1999 applies to the Small Claims Court as well. Paragraph 1(1) reads:

> Where a date for trial . . . of a matter has been set by the Superior Court of Justice . . . the trial . . . is expected to take place on that date.

The Practice Direction outlines its three objectives:

> i. To ensure that trial lists are respected;
>
> ii. To reduce court delays, the waste of court resources and the unnecessary expense and inconvenience to the public that adjournments cause — especially those requested late; and
>
> iv. To assist parties in having adequate representation by a lawyer acceptable by them.

See J. W. Quinn J. in *Brighton Heating & Air Conditioning Ltd. v. Savoia*, 2006 Carswell-Ont 340, 79 O.R. (3d) 386, 49 C.L.R. (3d) 235, 207 O.A.C. 1, [2006] O.J. No. 250 (Ont. Div. Ct.) at para. 40:

> . . . in the Small Claims Court, a liberal, non-technical approach should be taken to pleadings. Therefore, unpled relief may be granted . . . so long as supporting evidence is not needed beyond what was adduced at trial . . . provided that, in all circumstances, it is not unfair to grant such relief . . . Appeal allowed in part. Award of punitive or exemplary damages set aside. General damages reduced to $565.

Koopmans v. Joseph, 2014 ABQB 721, 2014 CarswellAlta 2161, 603 A.R. 23, 62 C.P.C. (7th) 182 (Alta. Q.B.).

Koopmans appeals from decision of the Small Claims Court judge who dismissed Claim against a lawyer and his law firm. See *Koopmans v. Joseph*, 2014 ABQB 395, 2014 CarswellAlta 1077, 592 A.R. 56 (Alta. Q.B.) at para. 124. Appeal is allowed. Trial judge erred by refusing to grant Koopmans adjournment to find expert witness to testify. In the judgment, at paras. 126–128, court ordered costs in the sum of $10,000 payable to Koopmans. Applicants argue that such an award is prohibited by *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 116, 2013 CarswellAlta 835, 87 Alta. L.R. (5th) 108, [2013] 12 W.W.R. 732 (Alta. C.A.). *Hogarth* found that "a self-represented litigant should generally not receive costs unless that would serve one of the policy reasons for which costs awards are made" (at para. 9).

Relying on *L. (L.) v. B. (G.)*, 2009 ABQB 322, 2009 CarswellAlta 771, 455 A.R. 388, 13 Alta. L.R. (5th) 268, 77 R.F.L. (6th) 83 (Alta. Q.B.); affirmed 2009 ABCA 356, 2009 CarswellAlta 1703, 469 A.R. 33, 14 Alta. L.R. (5th) 254, 77 R.F.L. (6th) 102, 470 W.A.C. 33 (Alta. C.A.), Koopmans argued that it was appropriate to award costs to self-represented litigants to indemnify them for the time and effort exerted beyond what would have been incurred had counsel been retained. Applicants' arguments amount to request for reconsideration of entire judgment. Application dismissed. Costs to Koopmans affirmed in the sum of $5,000 for conduct of trial and $5,000 for conduct of appeal, including present application.

Martin v. Sansome, 2014 ONCA 14, 2014 CarswellOnt 759, 118 O.R. (3d) 522, 372 D.L.R. (4th) 408, 43 R.F.L. (7th) 306, 314 O.A.C. 375, [2014] O.J. No. 279 (Ont. C.A.); additional reasons 2014 ONCA 192, 2014 CarswellOnt 2795, 42 R.F.L. (7th) 23 (Ont. C.A.).

Applicant in matrimonial proceedings serving notice of intention to act in person but unsuccessfully seeking adjournment in order to retain counsel one week before trial and again on day of trial. Trial judge finding applicant's last-minute adjournment request was deliberate ploy. Trial judge not erring in exercise of discretion in denying adjournment. Trial judge's expressions of annoyance with self-represented applicant and his interventions in examination of witnesses in order to focus and clarify evidence and move trial along not giving rise to reasonable apprehension of bias.

Jackson v. Arthur, 2015 ONCA 902, 2015 CarswellOnt 19378 (Ont. C.A.).

Adjournment — duty on party to inform court of reason for non-attendance. Mother had attended court on first two days of trial, but failed to show up on third day. After making unsuccessful efforts to find her, trial judge let trial continue. In fact, mother went to hospital and now argued that trial judge should have adjourned trial for at least for one day. Court of

Appeal rejected her position because she had made no effort to contact anyone at court for six days to explain her absence.

17.03 Inspection — The trial judge may, in the presence of the parties or their representatives, inspect any real or personal property concerning which a question arises in the action.

Commentary: This procedure was formerly known as "taking a view" and involves the judge along with the parties, their representatives and the necessary court staff taking an excursion to look at the property in question. Taking a view is exceptionally rare even in the Superior Court of Justice in cases involving very large stakes, given the ready availability of photographic and video evidence and the relative expense and inconvenience of taking a view. It is difficult to imagine a scenario in which the taking of a view by the Small Claims Court would be appropriate, but the rule remains in place.

Case Law: A deputy judge made no error when she took a view of real property under rule 52.05 of the *Rules of Civil Procedure*. The judge had authority to take a view under rule 17.03 of the *Small Claims Court Rules*, and appropriately did so only as an aid to understanding the evidence presented in court: *Beraskow v. TD Insurance*, 2018 ONSC 6419, 2018 CarswellOnt 19416, 93 C.L.R. (4th) 279, [2018] O.J. No. 1594 (Ont. Div. Ct.).

17.04 (1) Motion for New Trial — A party may make a motion for a new trial within 30 days after a final order is made.

(2) Transcript — In addition to serving and filing the notice of motion and supporting affidavit (Form 15A) required under rule 15.01, the moving party shall serve and file proof that a request has been made for a transcript of,

(a) the reasons for judgment; and

(b) any other portion of the proceeding that is relevant.

(3) Service and Filing of Transcript — If available, a copy of the transcript shall, at least three days before the hearing date,

(a) be served on all parties who were served with the original notice of trial; and

(b) be filed, with proof of service.

(4) Powers of Court on Motion — On the hearing of the motion, the court may,

(a) if the party demonstrates that a condition referred to in subrule (5) is satisfied,

(i) grant a new trial, or

(ii) pronounce the judgment that ought to have been given at trial and order judgment accordingly; or

(b) dismiss the motion.

(5) Conditions — The conditions referred to in clause (4)(a) are:

1. There was a purely arithmetical error in the determination of the amount of damages awarded.

2. There is relevant evidence that was not available to the party at the time of the original trial and could not reasonably have been expected to be available at that time.

O. Reg. 78/06, s. 35; 393/09, s. 16

Commentary [R. 17.04(2)]: In general, a party who is dissatisfied with the judgment rendered at trial is limited to the potential right of appeal to Divisional Court under s. 31 of

the *Courts of Justice Act*. There are however two narrow grounds on which a dissatisfied litigant may instead bring a motion to the trial court for a new trial under rule 17.04.

As set out in rule 17.04(5), the only conditions which support a motion under rule 17.04 are either that there was a purely arithmetical error in the determination of the amount of damages awarded, or there is relevant evidence that was not available to the party at the time of the original trial and could not reasonably have been expected to be available at that time. The rule is restrictive and specific: *Rourke v. Toronto (City)*, 2012 ONSC 2563, 2012 CarswellOnt 5325, [2012] O.J. No. 1896 (Ont. Div. Ct.). These limited grounds are not intended as a substitute for appeal or to permit re-argument of the issues decided at the original trial: *Haig v. Ottawa-Carleton Regional Transit Commission* (January 9, 1995), Doc. OT21343/93, [1995] O.J. No. 4801 (Ont. Sm. Cl. Ct.); *Petrykowski v. 553562 Ontario Ltd.*, 2010 CarswellOnt 11114, [2010] O.J. No. 3129 (Ont. Sm. Cl. Ct.).

The practice is that wherever possible the motion for a new trial will be scheduled before the judge who presided over the original trial: *Christie Mechanical Contracting v. Magine Contracting*, 1997 CarswellOnt 1875, 10 C.P.C. (4th) 330, 101 O.A.C. 316 (Ont. Div. Ct.); *394705 Ontario Ltd. v. Moerenhout*, 1983 CarswellOnt 452, 41 O.R. (2d) 637, 35 C.P.C. 258 (Ont. Co. Ct.).

Care must be taken not to launch what should be an appeal, under the guise of a motion to the trial court for a new trial. Unless the moving party can bring his or her motion within the conditions under rule 17.04(5), based on either a purely arithmetical error or fresh evidence which could not have been presented at the trial, the only recourse from a trial judgment is the right of appeal to Divisional Court.

Case Law [R. 17.04(1)]: *Rourke v. Toronto (City)*, 2012 ONSC 2563, 2012 CarswellOnt 5325, [2012] O.J. No. 1896 (Ont. Div. Ct.).

Rule 17.04 is restrictive and specific. It permits the motions judge to grant a new trial only if the moving party demonstrates that there was a purely arithmetical error in the determination of the amount of damages awarded, or that there is relevant evidence that was not available to the party at the time of trial and could not reasonably have been expected to be available at that time. In this case the plaintiff moved for a new trial based on an allegation that the trial judge had created a reasonable apprehension of bias. That motion was dismissed. On appeal from both that order and the trial judgment, the appeal was dismissed.

Holtzman v. Suite Collections Canada Inc., 2013 ONSC 4240, 2013 CarswellOnt 9010, 310 O.A.C. 243 (Ont. Div. Ct.).

An order for a new trial under rule 17.04 can only be made if one of the preconditions under rule 17.04(5) is present. A trial judge's refusal to grant an adjournment is not properly the subject of a motion under rule 17.04.

Pilling v. Lowerys Ltd. (December 15, 2014), Doc. SC-13-798, [2014] O.J. No. 6001 (Ont. S.C.J.).

Motion for new trial, by which moving plaintiff sought to increase the amount awarded based on new evidence. There was no arithmetical error and the proposed new evidence was available and should have been presented at the trial. The trial judge had no jurisdiction to sit on appeal from his own judgment. Rule 17.04 is narrower than rule 59.06 of the *Rules of Civil Procedure*. Motion dismissed.

Green v. Ferma Construction Co., 1998 CarswellOnt 877, [1998] O.J. No. 1071 (Ont. Sm. Cl. Ct.).

Where the trial judge's appointment had not been renewed, a motion under rule 17.04 may be heard and determined by another judge. In this case the formal order overrode the reasons for judgment, and was corrected from $2,900 to $5,500 on the basis of a discrepancy between the order and reasons.

Best Value Ltd. v. Subway Sandwiches & Salads, 1998 CarswellOnt 2624, 21 C.P.C. (4th) 14, 70 O.T.C. 37, [1998] O.J. No. 2618 (Ont. Sm. Cl. Ct.).

A new trial was ordered under rule 17.04 based on the trial judge's failure to give reasons for dismissing the plaintiff's claim and based on a reasonable apprehension of bias arising from his having acted as counsel for a defendant sued by the plaintiff in a separate proceeding. [Note: this decision appears inconsistent to the appellate decisions in *Rourke*, *supra*, and *Holtzman*, *supra*. An attack on a trial judge's impartiality or on the sufficiency of the reasons for judgment is not properly framed as a motion under rule 17.04 but should be by way of appeal. It is also noted that the motion in *Best Value* was decided by Kurisko J. sitting as a Small Claims Court. Had the matter been properly framed as an appeal, Kurisko J. could have heard the appeal in his capacity as a judge of the Divisional Court.]

Sears Canada Inc. v. Scott, 1994 CarswellOnt 4532, [1994] O.J. No. 2978 (Ont. Sm. Cl. Ct.).

A motion for a new trial was dismissed by Salhany J. sitting as a Small Claims Court judge. If the trial judge held that the defendant could withdraw his own obligation to pay a credit card account after charges were incurred, he erred in law. However the plaintiff's recourse was an appeal to Divisional Court and not a motion for a new trial.

Rule 18 — Evidence At Trial

18.01 Affidavit — At the trial of an undefended action, the plaintiff's case may be proved by affidavit, unless the trial judge orders otherwise.

Commentary: The party calling a witnes should generally use open-ended as opposed to leading questions. "Leading questions are questions that suggest an answer or assume a state of facts that it is in dispute." See *R. v. W. (E.M.)*, 2011 SCC 31, 2011 CarswellNS 392, 2011 CarswellNS 393, [2011] 2 S.C.R. 542, 305 N.S.R. (2d) 1, 270 C.C.C. (3d) 464, 335 D.L.R. (4th) 89, 966 A.P.R. 1, 417 N.R. 171, [2011] S.C.J. No. 31 (S.C.C.). The first kind of leading questions — those that suggest an answer — are easy to identify. They either directly or by implication invite the witness to testify in a way that affirms a proposition suggested in the question by the examiner. These kinds of question are sometimes permitted. The second kind of leading question described in E.M.W.is more subtle, and never permissible. These kinds of leading questions presuppose the existence of a controversial fact not already testified to by the witness. They often contain, buried within the question, a proposition of fact on which the witness is not invited to comment.

Although the answers to leading questions are not inadmissible, the fact that they were obtained by leading questions may affect their weight. As indicated, there are numerous situations where the first kind of leading question is appropriate. These include:

- introductory or undisputed matters;
- the identification of persons or things;
- the contradiction of statements made by another;
- complicated or technical matters;
- where leave has been obtained to cross-examine a witness as adverse or hostile;
- where the witness is having difficulty answering the question and leave has been obtained to lead the witness; and
- where the question will refresh the memory of a witness and leave has been obtained to lead the witness, and any other case where leave has been obtained to lead the witness, in the interests of justice.

Real evidence refers to tangible items exhibited to the judge. This evidence may be directly linked to the occurrence or may be "demonstrative evidence," which refers to aids used to help witnesses better illustrate or explain their evidence. The evidence is admissible provided it is properly authenticated. The trial judge must be satisfied that there is a sufficient basis to support the identification of the exhibit, its continuity, and its integrity.

Real evidence may also be excluded where its potential to arouse undue prejudice outweighs its probative value.

In what way can a document be authenticated?

Documents may be authenticated in a variety of ways:

- by calling the writer;
- by calling a witness who saw the document signed;
- by calling a witness who is familiar with the writer's handwriting;
- by comparison of the writing in dispute with a written specimen proved to the satisfaction of the court to be genuine;
- by the calling of experts; or
- through an admission by the opposing party.

Circumstantial evidence may also point to the genuineness of the document. For example, letters received in reply to an earlier correspondence are accepted as being made by the sender; *Stevenson v. Dandy*, 1920 CarswellAlta 128, [1920] 2 W.W.R. 643 (Alta. C.A.). A second example is that of ancient documents, generally more than thirty years old, which are admissible provided the circumstances raise no suspicions and the documents are produced from a source that would normally have custody of them.

The admissibility of photographs or videotapes depends upon:

a) their accuracy in truly representing the facts;

b) their fairness and absence of any intention to mislead; and

c) their verification on oath by a person capable of doing so. *R. v. Creemer* (1967), 1967 CarswellNS 1, [1968] 1 C.C.C. 14, 1 C.R.N.S. 146, 53 M.P.R. 1, 4 N.S.R. 1965–69 546 (N.S. C.A.) at p. 22 [C.C.C.]. See also: *R. v. Adams*, 2011 NSCA 54, 2011 CarswellNS 363, 303 N.S.R. (2d) 356, 274 C.C.C. (3d) 502, 957 A.P.R. 356, *(*sub nom. *R. v. Murphy)* [2011] N.S.J. No. 302 (N.S. C.A.)

The person verifying the authenticity of the photographs or videotapes need not be the photographer. And eye-witness of the scene or events may confirm that the photograph or videotape is a fair and accurate reproduction. This is true even if the photograph of the scene is taken well after the events, as long as a witness testifies that it is a fair and accurate reproduction of the scene as it looked at the time of the incident.

Case Law: *Les Freeman Farms Ltd. v. R.G.M. Holdings Ltd.* (1998), 171 Sask. R. 287 (Sask. Q.B.).

Affidavit evidence properly rejected by the trial judge. The transcript disclosed that upon learning affidavit evidence would not be admissible, the Appellant took no steps to request an adjournment or additional time to have the witness attend in person. In any event, all facts were entered into evidence through *viva voce* testimony. Real problem was that witness who swore affidavit may have been of assistance in providing additional facts to the court. However, none of this factual information was contained in the rejected affidavit.

Ewaskiw v. Zellers Inc. (1998), 165 D.L.R. (4th) 346, 40 O.R. (3d) 795, 27 C.P.C. (4th) 347 (Ont. Gen. Div.).

The defendants asserted that the plaintiffs had not shown damages arising from the purchase of window blinds that contained lead, and brought a motion to dismiss the proposed class action. The defendants' refund policy allowed the plaintiffs to recover the costs of blinds. There was no evidence of any injury arising from using the blinds. The action was dismissed.

Robb Estate v. St. Joseph's Health Care Centre (May 17, 1999), Doc. 92-CU-54356, 92-CU-59486, 98-CV-139060 (Ont. Gen. Div.).

The case involved multiple defendants and order of presentation. The convention was that the defendants proceeded in order they appeared. Title of proceedings is subject to judicial discretion. The pleadings suggested that deviation from the general rule was appropriate.

Praxair Canada Inc. v. City Centre Plaza Ltd. (2000), 2000 CarswellOnt 4280 (Ont. S.C.J.).

Tenants claimed it was improper for the court to raise an issue not specifically leaded by the landlord. It is always open for the judge to raise legal argument or cause of action arising from facts.

Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources) (2001), 4 C.P.C. (5th) 288, 2001 CarswellOnt 76, [2001] O.J. No. 86, 196 D.L.R. (4th) 367, 142 O.A.C. 231 (Ont. Div. Ct.); reversed (2002), 2002 CarswellOnt 1061, 211 D.L.R. (4th) 741, 158 O.A.C. 255, 93 C.R.R. (2d) 1, [2002] O.J. No. 1445 (Ont. C.A.); leave to appeal refused (2003), 2003 CarswellOnt 1067, 2003 CarswellOnt 1068, 313 N.R. 198 (note), 101 C.R.R. (2d) 376 (note), 181 O.A.C. 198 (note) (S.C.C.).

Although characterized as contextual framework evidence, introduction of newspaper articles amounted to hearsay. Newspaper articles represented opinion of authors who could not be cross-examined, contained controversial material and did not constitute legislative fact. Evidence not new and could have been readily put before motions judge.

Koffski v. Ashworth, 2001 CarswellBC 2521, 2001 BCSC 1469 (B.C. S.C.).

Defendant had default judgment entered against him and failed to have it set aside. Defendant sought to participate in assessment of damages hearing. Defendant waived right to participate in hearing.

Bain v. Rodrigue, 2004 CarswellBC 1752, 2004 BCPC 259 (B.C. Prov. Ct.).

Defendant applied for disclosure of a list of documents in preparation of civil claim. Claimant opposed disclosure of his criminal record. Defendant off-duty Vancouver police officer. Issue one of relevance. It is unusual for a party in a civil trial to request such a record. However unusual such a record is compellable and Provincial Court Judge has the jurisdiction to order production. I am making that Order, decision of trial judge if evidence contained in record is admissible, what use can be made of the contents of the record if it is admitted and what weight if any can be attached to it.

Gardner (Litigation Guardian of) v. Hann, 2011 ONSC 41052011 CarswellOnt 6236 (Ont. S.C.J.).

The plaintiff sought to call a neuroradiologist, C, as an expert witness. The defendant took the position that C lacked the necessary impartiality to provide an expert opinion. The defendant relied in part on an article authored by C about the role of a neuroradiologist as an expert (impugned article). The impugned article appeared in the journal of Ontario Trial Lawyers Association, which comprised lawyers who acted for plaintiffs exclusively. The defendant brought a motion for an order that C not be permitted to testify on the basis of bias. The motion was dismissed. C's participation in seminars organized by associations whose membership might comprise lawyers acting for one party or another did not compromise his ability to offer an unbiased opinion.

Skymark Finance Corporation v. Lukusa (May 2, 2019), Doc., Deputy Judge Winny (Ont. Sm. Cl. Ct.)

Admission of evidence. Rule 18. Reasons for overruling a defence objection at the start of trial to the admissibility of the documents. Rule 18.02, permits the admission of any document which has been served at least 30 days before trial, subject to the requirement for contact information to be provided under subrule 18.02(3). The contact information permits the recipient of such a document to summons the "witness or author" for cross-examination at trial under subrule 18.02(4). It remains that the specific employees who completed the records would not be required to testify before the records were admitted as business records. See *Ares v. Venner*, 1970 CarswellAlta 80, 1970 CarswellAlta 142, [1970] S.C.R. 608, 14 D.L.R. (3d) 4, 73 W.W.R. 347, 12 C.R.N.S. 349, [1970] S.C.J. No. 26 (S.C.C.).

Finding that the "witness or author" of a business record is the business and not the specific employee or agent of the business who created the document.

18.02 (1) Written Statements, Documents and Records — A document or written statement or an audio or visual record that has been served, at least 30 days before the trial date, on all parties who were served with the notice of trial, shall be received in evidence, unless the trial judge orders otherwise.

(2) Subrule (1) applies to the following written statements and documents:

1. The signed written statement of any witness, including the written report of an expert, to the extent that the statement relates to facts and opinions to which the witness would be permitted to testify in person.

2. Any other document, including but not limited to a hospital record or medical report made in the course of care and treatment, a financial record, a receipt, a bill, documentary evidence of loss of income or property damage, and a repair estimate.

(3) Details about Witness or Author — A party who serves on another party a written statement or document described in subrule (2) shall append to or include in the statement or document,

(a) the name, telephone number and address for service of the witness or author; and

(b) if the witness or author is to give expert evidence, a summary of his or her qualifications.

(4) A party who has been served with a written statement or document described in subrule (2) and who wishes to cross-examine the witness or author may summon him or her as a witness under subrule 18.03(1).

(5) Where Witness or Author is Summoned — A party who serves a summons to witness on a witness or author referred to in subrule (3) shall, at the time the summons is served, serve a copy of the summons on every other party.

(6) Service of a summons and the payment or tender of attendance money under this rule may be proved by affidavit (Form 8A).

(7) Adjournment — A party who is not served with a copy of the summons in accordance with subrule (5) may request an adjournment of the trial, with costs.

O. Reg. 78/06, s. 36

Commentary [S. 18.02(7)]: The rules of evidence in Small Claims Court are highly flexible pursuant to the broad discretion of the court to admit and act upon virtually any form

of evidence including evidence that would be inadmissible in other courts: see *Courts of Justice Act*, s. 27.

Perhaps the most frequently used method to admit documents in Small Claims Court is Rule 18.02. It makes any document or written statement or audio or visual record which has been served at least 30 days before trial admissible, unless the court orders otherwise. The name and contact information of the author of a document or statement must be included in or attached to the document, and if the witness or author is to give expert evidence, a summary of his or her qualifications is also required: Rule 18.02(3). So long as that witness information is provided together with a copy of the document at least 30 days before trial, the evidence will be *prima facie* admissible without any need to present the witness or author to testify in person.

The party who is served with such material has the option to summons the witness or author for cross-examination at trial under Rule 18.02(4).

Rule 18.02 is a hearsay exception which contains the cost of trials by permitting documents to be admitted as evidence for the truth of their contents. The tendering party is not required to call the authors of the documents or other in-person witnesses to prove the documents in the formal way that would be required in other courts. This procedure codifies and expands the longstanding practice in Small Claims Court that straightforward documents should be admissible without any need for the in-person evidence of their authors: *Guillemette v. Dube*, 1974 CarswellOnt 378, 6 O.R. (2d) 663, 53 D.L.R. (3d) 656 (Ont. Div. Ct.). In that case, it was held that an automobile mechanic's invoice was sufficient proof of damages and little would be gained by requiring the mechanic's in-person evidence concerning the invoice.

Rule 18.02(4) puts the onus on the party who is served with material under Rule 18.02(1) to summons the witness for cross-examination at trial if that is deemed appropriate. That party must then incur the cost to issue and serve the summons on the witness, with a copy served on every other party. Note that Rule 18.02(4) specifically refers to cross-examination as the purpose of the summons. In the normal course, the document will serve as the evidence-in-chief of the witness, who is then cross-examined by the party who served the summons, and subject to any re-examination by the other party. If the party who served the summons is found to have abused that power, the court may order that party to pay directly to the witness an amount as compensation for inconvenience: Rule 18.03(8).

Note that Rule 18.02 is an enabling provision which permits the admission of evidence. It is not a prohibition against the admission of evidence through other means such as through an in-person witness. The rule does not say that documents not served at least 30 days before trial are inadmissible for that reason or require leave of the trial judge: *Parkkari v. Lakehead Aluminum Ltd.*, 2014 ONSC 4167, 2014 CarswellOnt 10930, 324 O.A.C. 8, [2014] O.J. No. 3711 (Ont. Div. Ct.); *O'Connell v. Custom Kitchen & Vanity*, 1986 CarswellOnt 414, 56 O.R. (2d) 57, 11 C.P.C. (2d) 295, 11 C.P.C. (2d) 303, 17 O.A.C. 157 (Ont. Div. Ct.).

The rule does not require that every document served at least 30 days before trial be admitted. The court retains a discretion to reject evidence where appropriate grounds exist: *MBK Services Inc. v. PowerForward Inc.*, 2013 ONSC 4506, 2013 CarswellOnt 9211, [2013] O.J. No. 3115 (Ont. Div. Ct.).

The 30-day period under Rule 18.02(1) may be extended or abridged under Rule 3.02. See *Filipchuck v. Tirino Corp.*, [1999] O.J. No. 4331 (Ont. Div. Ct.), where the trial judge's decision to allow an expert report into evidence, despite the lack of service prior to trial, was upheld as an exercise of discretion resulting in no prejudice to the other party. It is wrong to exclude an affidavit served less than 30 days before trial without considering a possible abridgment of that time period: *Capital One Bank (Canada Branch) v. Bartley*, 2017 ONSC 2180, 2017 CarswellOnt 5020, [2017] O.J. No. 1701 (Ont. Div. Ct.).

By its terms Rule 18.02 applies to expert reports in the same way as other documents except that a summary of the person's qualifications is required to be provided as part of the witness information, under Rule 18.02(3)(b). Note, however, that some judges take the position that in-person expert evidence is either prohibited or requires leave of the trial judge if the party tendering the expert evidence has not served a report at least 30 days before trial: *Prohaska v. Howe*, 2016 ONSC 48, 2016 CarswellOnt 13, [2016] O.J. No. 13 (Ont. Div. Ct.). But the very recent decision in *Hervieux v. Huronia Optical*, 2016 ONCA 294, 2016 CarswellOnt 8096, 399 D.L.R. (4th) 63, 348 O.A.C. 205 (Ont. C.A.), confirms that Rule 53.03 of the *Rules of Civil Procedure* does not apply in Small Claims Court and finds that it was unfair for a motions judge to dismiss a claim for lack of an expert report where the plaintiff intended to call in-person expert evidence at trial through his treating physicians. This treatment of expert reports is consistent with the prior decisions holding that Rule 18.02 is simply an enabling provision and does not restrict the admissibility of evidence tendered through other means: *Parkkari*, *supra*, and *O'Connell*, *supra*.

By its nature rule 18.02 does not require the party serving an expert report to produce the expert for cross-examination. Instead it gives the recipient of the report the right to summons the expert for cross-examination. It is wrong for a trial judge to discount an expert report admissible under rule 18.02 on the basis that because the report was filed the expert was not made available for cross-examination: *Deverett Law Offices v. Pitney* (2017), 2017 ONSC 6346, 2017 CarswellOnt 16448, [2017] O.J. No. 5513 (Ont. Div. Ct.).

In *Richard v. 2464597 Ontario Inc.*, 2019 ONSC 2104, 2019 CarswellOnt 4889 (Ont. Div. Ct.), the appeal court held that there is no requirement for prior service of an expert report, or for a formal *voir dire* on qualifications, as a prerequisite to the admission of in-person expert evidence in Small Claims Court. Instead the court has a broad general discretion over the admissibility of evidence under *Courts of Justice Act*, s. 27.

In *Skymark Financial Corp. v. Lukusa*, [2019] O.J. No. 2649 (Sm. Cl. Ct.), it was held that in the case of a corporation's documents, the requirement under rule 18.02(3)(a) to provide contact information for the "witness or author" of the document was sufficiently complied with by way of contact information for the corporation. The employee who created the document was no longer available to testify for either party. At common law it was not necessary for the specific employee who created the document to testify that it was a business record; there was no similar requirement under rule 18.02.

Case Law: *MBK Services Inc. v. PowerForward Inc.*, 2013 ONSC 4506, 2013 CarswellOnt 9211, [2013] O.J. No. 3115 (Ont. Div. Ct.).

Documents which may be qualified for admission under rule 18.02 (*i.e.*, served at least 30 days before trial and containing the required witness information) may nevertheless be excluded where appropriate grounds for exclusion exist. The rule gives the court a discretion to admit eligible documents without formal identification evidence from a live witness, but does not require the court to accept all such documents as evidence.

Suganthan v. Calexico Holdings Inc. (August 30, 2012), Doc. SC-11-88015-00, [2012] O.J. No. 6612 (Ont. S.C.J.).

Digital video recordings on DVD may be admitted into evidence in the same way as traditional photographic and video evidence. Modern methods of storage of electronic video and photographic data such as memory sticks, USB drives, etc., can all be admitted as evidence subject to the traditional criteria of accuracy, fairness, and absence of any intention to mislead, and verification under oath by a person capable to do so.

Birch Paving & Excavating Co., Inc. v. Clark (March 31, 2014), Doc. 13-015178 (Ont. S.C.J.).

Rule 18.02 may be applied to admit a document or statement whose author is outside Ontario or in another country. The party who is served with such a statement may take steps to summons an out-of-province witness and should not assume that the statement will be inadmissible under rule 18.02 merely because the author is not located in Ontario.

Trento Motors v. McKinney (1992), 39 M.V.R. (2d) 142, 54 O.A.C. 190 (Div. Ct.).

Compliance with s. 5 of the *Motor Vehicle Repair Act*, R.S.O. 1990, c. M.43 in that information referred by the section was recorded on the mechanic's copy of the invoice. The Act did not apply to towing charges.

Nagle v. Rosman (1986), 6 W.D.C.P. 58 (Ont. Prov. Ct.).

The defendant's motion to set aside a default judgment was dismissed since the key witness for the plaintiff, present at the original trial for assessment of damages, would no longer be available, the transcript not admitted, and, therefore, it would be prejudicial to the plaintiff.

Minto Management Ltd. v. Solomonescu (1986), 5 W.D.C.P. 262 (Ont. Prov. Ct.).

The plaintiff served the defendant with a written statement of a witness pursuant to Rule 19.02(1). The statement was admitted into evidence. Rather than cross-examine the author under Rule 19.02(4), the defendant was permitted, through his own witness, to report something said to her by the author of the statement.

O'Connell v. Custom Kitchen & Vanity (1986), 56 O.R. (2d) 57 (Ont. Div. Ct.).

Documents do not have to be served on all parties 14 days before trial to be admitted. Even if Rule 19.02 was prohibitory, s. 80 of the *Courts of Justice Act* superseded Rule 19.02(1) and permits judicial discretion to allow hearsay. The defendant did not object until the completion of the evidence.

Kapoor, Selnes, Klimm & Brown v. Mitchell (January 11, 1999) (Sask. Prov. Ct.).

Action in debt for fees for professional services rendered by a firm of solicitors. What standard of proof of costs is acceptable under the *Small Claims Act*? The main purpose of the *Small Claims Act* stated in *Burkhart v. Popoff*, [1983], 6 W.W.R. 669 (Sask Q.B.). Party litigants, be they lawyers or not, do not have to prove service fees by affidavit, declaration, certificate or other evidence under oath in uncontested actions. There should be, as there was here, some documentary evidence filed about which discretion may be exercised by the presiding judge as to stated facts.

Mitchell v. Noakes (2003), 2003 CarswellOnt 143, 167 O.A.C. 347 (Ont. Div. Ct.).

Evidence at trial concluded May 22, 2001. Written submissions requested (no time frame indicated). Plaintiff, alone, delivered written submissions September 25, 2001. No substantial wrong or miscarriage of justice. Appeal dismissed. *Carrier v. Cameron*, [1985] O.J. No. 1357, 1985 CarswellOnt 637, 6 C.P.C. (2d) 208, 11 O.A.C. 369 (Ont. Div. Ct.) referred to as well as section 25 of the CJA.

P. (D.) v. Wagg, [2004] O.J. No. 2053, 2004 CarswellOnt 1983, 239 D.L.R. (4th) 501, 120 C.R.R. (2d) 52, 184 C.C.C. (3d) 321, 187 O.A.C. 26, 71 O.R. (3d) 229, 46 C.P.C. (5th) 13 (Ont. C.A.).

Statements made to police and ruled inadmissible in criminal trial may be produced in a civil discovery process, but a screening process must be followed to obtain disclosure of the remainder of the Crown brief.

Court of Appeal emphasized "society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when parties have opportunity to put all relevant evidence before the court." It is a fundamental principle that an accused is not required to assist the state in making out its case. There is, however, no such principle in the civil context.

Farzam v. Canada (Minister of Citizenship & Immigration), [2005] F.C.J. No. 1776, 2005 CarswellNat 3452, 2005 CarswellNat 5863, 282 F.T.R. 238, 2005 FC 1453, 2005 CF 1453 (F.C.).

Shortly before commencement of trial, plaintiff sought court order to allow him to introduce evidence of Iranian witnesses at trial through use of teleconferencing. Court not satisfied that issuance of order that evidence of Iranian witnesses be taken by telephone was in interest of justice. Motion dismissed.

Vointsev v. Irina International Tours Ltd. (2007), 2007 CarswellOnt 6015, 52 C.P.C. (6th) 281 (Ont. S.C.J.).

The issue in this case was whether, in the event of a conflict, Rule 19 of the *Rules of Procedure*, which stated that a party noted in default need not be given notice of any step in the action, prevailed over the requirements of the *Evidence Act*, which required a party seeking to rely on medical records to give notice of an intention to do so. The court held that mandatory provisions of Act requiring notice of intention to introduce medical reports or business records prevail over Rules of Civil Procedure. In addition, plaintiff's documents should not be considered as "medical records", but business records, because the doctor that issued them was not licensed or registered to practice in Canada.

1465778 Ontario Inc. v. 1122077 Ontario Ltd., [2006] O.J. No. 4248, 82 O.R. (3d) 757, 275 D.L.R. (4th) 321, 2006 CarswellOnt 6582, 38 C.P.C. (6th) 1, 216 O.A.C. 339 (Ont. C.A.).

Plaintiffs' counsel was acting *pro bono* and sought costs from losing party. The defendants argued lawyers acting *pro bono* in commercial matters should not be awarded costs. The purpose of costs awards should include access to justice. There is no prohibition on award of costs to *pro bono* counsel in appropriate cases. Costs awarded. Costs could serve purposes other than indemnity, including the objectives of encouraging settlement, preventing frivolous or vexatious litigation, and discouraging unnecessary steps. In this case, plaintiffs impecunious, and it was because they were unable to pay a costs order that the case initially dismissed. No reason why the losing party should not be ordered to pay costs of the appeal.

See Major J. in a speech titled "Lawyers' Obligation to Provide Legal Services" delivered to the National Conference on the Legal Profession and Professional Ethics at the University of Calgary in 1994 (33 Alta. L. Rev. 719) where he said:

> It has long been part of the duty and tradition of the legal profession to provide services gratuitously for those who require them but cannot afford them. The profession, recognizing its commitment to the larger principle of justice, has traditionally not let such cases go unanswered merely because the individual is impecunious. Instead, the profession has collectively accepted the burden of such cases, thereby championing the cause of justice while at the same time sharing the cost that such cases entail. This is a tradition which dates to the very inception of the profession in medieval Europe in the thirteenth century.

Costs have been awarded in cases where the litigant was self-represented (*Skidmore v. Blackmore*, 122 D.L.R. (4th) 330, 35 C.P.C. (3d) 28, 90 W.A.C. 191, 55 B.C.A.C. 191, 27 C.R.R. (2d) 77, [1995] 4 W.W.R. 524, 2 B.C.L.R. (3d) 201, [1995] B.C.J. No. 305, 1995 CarswellBC 23 (B.C. C.A.)); where the winning party was a law firm represented by one of its partners who was not charging fees (*Fellowes, McNeil*); where counsel was salaried (*Solicitors Act*, R.S.O. 1990, c. S.15, s. 36); and, where the responsibility for a party's legal fees was undertaken by a third party (*Lavigne v. O.P.S.E.U.*, 1987 CarswellOnt 1074, 41 D.L.R. (4th) 86, 60 O.R. (2d) 486, 87 C.L.L.C. 14,044 (Ont. H.C.)).

Costs have also been awarded to counsel acting *pro bono* in *Charter* or public interest cases. See *Rogers v. Greater Sudbury (City) Administrator of Ontario Works*, 57 O.R. (3d) 467, [2001] O.J. No. 3346, 2001 CarswellOnt 2934 (Ont. S.C.J.).

In non-public interest cases, see *e.g.*, *Mackay Homes v. North Bay (City)*, [2005] O.J. No. 3263, 2005 CarswellOnt 3367 (Ont. S.C.J.), *Spatone v. Banks*, [2002] O.J. No. 4647, 2002

CarswellOnt 4143 (Ont. S.C.J.), and *Jacks v. Victoria Amateur Swimming Club*, [2005] B.C.J. No. 2086, 2005 CarswellBC 2300, 2005 BCSC 1378 (B.C. S.C. [In Chambers]). In *Ontario (Human Rights Commission) v. Brockie*, 2004 CarswellOnt 1231, 185 O.A.C. 366 (Ont. C.A.), court reversed a decision of the Divisional Court that denied costs to *pro bono* counsel, holding that "[s]uch a policy would act as a severe penalty to lawyers acting in the public interest by making it possible for litigants of modest means to access the courts."

VFC Inc. v. Balchand, 291 D.L.R. (4th) 367, 233 O.A.C. 359, 2008 CarswellOnt 909 (Ont. Div. Ct.).

Defendant appealed judgment of Small Claims Court finding her liable under a bill of sale and conditional sales contract for purchase of motor vehicle. The only witness called by plaintiff was the supervisor of the legal department, not present when bill of sale and conditional sales contract signed but saw documents when forwarded to plaintiff.

Trial judge dismissed defendant's motion for a non-suit, bill of sale and conditional sales contract bearing apparent signature of defendant, in the absence of evidence to the contrary, established defendant was a party to the contract and liable for the amount owing. Appeal dismissed.

Nothing in the *Evidence Act*, R.S.O. 1990, c. E.23, calls into question the admissibility of hearsay at a Small Claims Court trial, even when the hearsay is contained in business records. Section 35 of the *Evidence Act* provides a statutory mechanism for the admission of business records into evidence and section 27(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, permits hearsay evidence to be admitted into evidence. A consideration of these provisions leads to the conclusion that the trial judge did *not* err in law in admitting into evidence the oral and documentary hearsay of the plaintiff's witness. See *Central Burner Service Inc. v. Texaco Canada Inc.*, 1989 CarswellOnt 1427, 36 O.A.C. 239 (Ont. Div. Ct.). Section 27(1) permits the Small Claims Court to admit as evidence at a hearing and act upon any oral testimony and any document or other thing, so long as the evidence is relevant. In *Central Burner*, Steele J. concluded that section 80(1) of the *Courts of justice Act, 1984*, S.O. 1984, c. 11, the predecessor of section 27(1), allows relevant hearsay evidence to be admitted and relied upon in a Small Claims Court trial even in relation to a critical issue. See also *Sathaseevan v. Suvara Travel Canada Inc.*, [1998] O.J. No. 1055, 1998 CarswellOnt 880 (Ont. Div. Ct.).

Section 27(1) is, by its terms, subject to subsections (3) and (4). Section 2 of the *Ontario Evidence Act*, R.S.O. 1990, c. E.23, provides, "This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction."

Section 35 of the *Evidence Act* deals with business records.

If a party to any proceeding governed by the *Ontario Evidence Act* proposes that a business record be received in evidence pursuant to section 35(2), the proponent of the evidence must comply with the section. The record must be made in the usual and ordinary course of business as described in section 35(2), and notice must be given in accordance with section 35(3).

Prior to the liberalizing impact of the decision in *Ares v. Venner*, 14 D.L.R. (3d) 4, 73 W.W.R. 347, 12 C.R.N.S. 349, [1970] S.C.R. 608, 1970 CarswellAlta 142, [1970] S.C.J. No. 26, 1970 CarswellAlta 80 (S.C.C.), the common law rules governing the admissibility of business records were widely felt to be completely out of line with the every-increasing complexity of business organizations.

The object of section 80(1) of the *Courts of Justice Act*, the predecessor of section 27(1) of the Act, was remedial. As stated in *Central Burner*, "The object of s. 80 is to avoid technical procedures and the additional cost of calling extra witnesses in cases involving small claims."

Jones v. Meinema, 2011 SKQB 130, 2011 CarswellSask 225, 100 C.L.R. (3d) 311, 21 C.P.C. (7th) 205 (Sask. Q.B.), A.R. Rothery J.; affirming 2010 SKPC 126, 2010 CarswellSask 576, [2010] S.J. No. 522 (Sask. Prov. Ct.).

The trial judge allowed the contractor's action for payment owing, and allowed in part the homeowners' counterclaim to remedy deficiencies. The trial judge awarded the contractor $7,547.25, and the homeowners $2,000, although they had counterclaimed for $17,000. The trial judge declined to qualify ET as an expert witness to give opinion evidence on the cost to remedy the deficiencies, but accepted the opinion evidence of the building inspector RS. The homeowners appealed. The appeal was dismissed. The trial judge's decision on qualifications of ET did not affect the outcome of trial. Whether qualified as an expert or not, ET had very little to add to the evidence and conceded he did not even prepare an estimate of the costs of repairs.

Parkkari v. Lakehead Aluminum Ltd., 2014 ONSC 4167, 2014 CarswellOnt 10930, 324 O.A.C. 8, [2014] O.J. No. 3711 (Ont. Div. Ct.).

Rule 18.02 is an enabling provision for the admission of documents which might otherwise be excluded as hearsay. It does not say that documents not served at least 30 days before trial are inadmissible. Documents which are not admissible under rule 18.02 can be admitted by other means, such as through an in-person witness.

Deverett Law Offices v. Pitney, 2017 ONSC 6346, 2017 CarswellOnt 16448 (Ont. Div. Ct.).

Appeal by Deverett Law Offices (the "Appellant") from the judgment of Deputy Judge Caplan dated May 13, 2016 dismissing its claim against the defendant, Linda Pitney. The Trial Judge failed to apply r. 18.02 of the Small Claims Court Rules dealing with experts.

18.03 (1) Summons to Witness — A party who requires the attendance of a person in Ontario as a witness at a trial may serve the person with a summons to witness (Form 18A) requiring him or her to attend the trial at the time and place stated in the summons.

Commentary: You will have to request the clerk to issue a notice (summons to witness) requiring them to attend. This will also be proof to an employer, who must allow an employee to attend court during work hours.

(2) The summons may also require the witness to produce at the trial the documents or other things in his or her possession, control or power relating to the matters in question in the action that are specified in the summons.

(3) A summons to witness (Form 18A) shall be served in accordance with subrule 8.01(7).

(4) Service of a summons and the payment or tender of attendance money may be proved by affidavit (Form 8A).

(5) A summons to witness continues to have effect until the attendance of the witness is no longer required.

(5.1) Interpreter — If a party serves a summons on a witness who requires an interpreter, the party shall arrange for a qualified interpreter to attend at the trial unless the interpretation is from English to French or French to English and an interpreter is provided by the Ministry of the Attorney General.

(5.2) If a party does not comply with subrule (5.1), every other party is entitled to request an adjournment of the trial, with costs.

(6) Failure to Attend or Remain in Attendance — If a witness whose evidence is material to the conduct of an action fails to attend at the trial or to remain in attendance in accordance with the requirements of a summons to witness served on him or her, the trial judge may, by warrant (Form 18B) directed to all police officers in Ontario, cause the witness to be apprehended anywhere within Ontario and promptly brought before the court.

(6.1) Identification Form — The party who served the summons on the witness may file with the clerk an identification form (Form 20K) to assist the police in apprehending the witness.

(7) On being apprehended, the witness may be detained in custody until his or her presence is no longer required or released on such terms as are just, and may be ordered to pay the costs arising out of the failure to attend or remain in attendance.

(8) Abuse of Power to Summon Witness — If satisfied that a party has abused the power to summon a witness under this rule, the court may order that the party pay directly to the witness an amount as compensation for inconvenience and expense.

O. Reg. 78/06, s. 37

Commentary: the issuance and service of summonses to witness is often unnecessary but is available where summonsing a non-party witness is felt necessary. The summons may be used to secure evidence in either or both of two forms: in-person evidence and documentary evidence.

Obviously the summons must be directed to persons having material knowledge of matters in issue. Each litigant has a *prima facie* right to summons any person and at first instance that right is simply a matter for the litigants to exercise where so advised. The court retains a discretion to review the summons procedure and in appropriate cases, may quash a summons.

This occurred in *Dietrich v. Home Hardware Stores Ltd.*, 2007 CarswellOnt 319, 46 C.P.C. (6th) 304, [2007] O.J. No. 213 (Ont. Sm. Cl. Ct.). The defendant issued two summonses three weeks before trial seeking to obtain documents. The defendant had previously refused to participate in a pretrial conference (before conferences became mandatory for all actions). The court found that the documentary requests were overly broad and amounted to a fishing expedition, and were also an abuse of process given the earlier refusal of a pretrial conference. The court's process included the limited discovery contemplated by the *Small Claims Court Rules* including the settlement conference provision for document disclosure orders. The process does not contemplate wading through a large volume of new documents at trial.

In *Cecchin v. Lander*, [2019] O.J. No. 5923 (Sm. Cl. Ct.); further proceedings [2019] O.J. No. 5086 (Sm. Cl. Ct.), at trial the defence sought production of a series of various documents including surveillance video during cross-examination of each of two plaintiffs. The requests were denied. The court held that they amounted to a fishing expedition; the defence could not establish that the probative value of the material outweighed the extension of trial time which would have resulted from a production order. A trial is not an examination for discovery. Taking time at trial to fish around for documents which may or may not be worth anything to anyone was unjustified.

Case Law: *Micheli v. Zuppetti* (October 19, 1984), Galligan J. (Ont. Div. Ct.).

Any tribunal has inherent power unless specifically restricted by statute to impose reasonable terms for granting adjournments. Payment into court of $1,000 as a term of adjournment is not considered unreasonable.

York v. T.V. Guide Inc. (1984), 5 O.A.C. 330 (Ont. Div. Ct.).

It is incumbent upon the trial judge to proceed and the plaintiff to call evidence pursuant to subrule 51(92)(1) where the defendant seeks an adjournment and the court cannot simply grant judgment to the plaintiff without calling evidence.

MacInnes v. Leaman (1976), 8 N.R. 297 (S.C.C.).

Adjournments are within the discretionary powers of the trial judge.

Svajlenko v. Appco Paving Ltd. (1985), 3 W.D.C.P. 34 (Ont. Prov. Ct.).

A motion by defendant to set aside judgment pursuant to Rule 18.04 was based on fact that defendant, representing itself, failed to introduce proper evidence. It was held that where there was a total failure to have a trial on merits, because one party was completely incapable of proceeding or because one party failed to attend, this type of motion was proper. However, where there was something that could fairly be described as a trial on the merits, in that both parties had an opportunity to present their own witnesses and give evidence, and where there could be no suggestion that the judge failed to make adjudication on merits, this type of motion was not proper unless it was clear from face of record that there was some lack of jurisdiction.

Johanson v. Williamson (1977), 18 O.R. (2d) 585 (Ont. Sm. Cl. Ct.).

The addition of this section to the Act is an amendment which is procedural in nature and, accordingly, the section may be invoked in an action which was commenced before the amendment took effect. The section is to be read as overriding the procedural aspects of the *Evidence Act* of Ontario.

Howard v. Canadian National Express (1980), 23 C.P.C. 77 (Ont. Dist. Ct.).

Two letters, although hearsay and although opposing counsel were not provided with copies before trial, were admitted in evidence given the purposes of the Small Claims Court, section 96a and the expense of calling the writers of the letters as witnesses.

Borden Ladner Gervais LLP v. Cohen, 2005 CarswellOnt 2444, 199 O.A.C. 8 (Ont. Div. Ct.).

Rodney Cohen appeals judgment of Herman J. dated June 23, 2004, granting summary judgment against him of $19,058.15 plus interest, costs and dismissing his counterclaim in which he sought referral of the plaintiffs' claim for unpaid legal fees to an assessment. BLG acted for the appellant in two actions, the POI action and the Amati action.

At pre-trial in October 2001 judge suggested transferring action to the Small Claims Court and this was finally done on February 1, 2002 upon terms that after judgment in the Small Claims Court, either party could apply to the Superior Court to deal with costs. Right of a client to have solicitor's account assessed is an important right and emphasized by the Commentary to Rule 2.08 of the Rules of Professional Conduct.

Motion judge erred in granting summary judgment when fairness of accounts not conceded and not considered.

Judgment in appeal set aside, bills referred to Assessment Officer for assessment.

Resch v. Canadian Tire Corp., 2006 CarswellOnt 3822 (Ont. S.C.J.).

Application to determine order for cross-examination of witnesses to be called by the Defendant MR. Counsel for other defendants sought to cross-examine first. Court deviated from the usual order for cross-examination and granted the request. Unfair to allow plaintiffs to cross-examine last based on the alliance that existed between the plaintiffs and MR.

Rule 19 — Costs

Commentary: Costs under Rule 19 deals with costs of an action after there has been a trial or assessment hearing. The main costs event in Small Claims Court is the trial itself.

The general rule is that the successful party is entitled to recovery of an amount for costs, and usually this will consist of an amount for disbursements under rule 19.01 and a representation fee under rule 19.04. For self-represented parties, there is no representation fee but the court may award up to $500 as "compensation for inconvenience and expense" under rule 19.05.

A full appreciation of the law of costs in Small Claims Court requires an understanding of the backdrop to Rule 19: in particular, section 131(1) of the *Courts of Justice Act* sets out the general rule that costs are in the discretion of the court, while section 29 establishes the *prima facie* limit on the amount which may be awarded in Small Claims Court — namely 15% of the amount claimed, plus disbursements. The penalty costs proviso in s. 29 permits the court to exceed that benchmark where it is necessary in the interests of justice to penalize a party for unreasonable behaviour in the proceeding. All costs orders are constrained by the indemnity principle however, and the court's power to award costs is accordingly limited to the amount actually incurred by the party entitled to costs.

Rule 14.07 deals with the cost consequences of offers to settle and where triggered, may entitle a party (whether plaintiff or defendant) to an award of double costs. The preconditions for such an award are set out in rule 14.07(1) (for plaintiffs' offers) and 14.07(2) (for defendants' offers), as the case may be.

Motion costs are addressed by rule 15.07 and settlement conference costs by rule 13, and both are subject to a general rule that such costs shall not exceed $100, plus disbursements, unless the court orders otherwise. Where costs of a motion or settlement conference judge are awarded they are dealt with by the motions judge or settlement conference judge. The costs of motions and settlement conferences cannot be claimed after trial unless the motions judge or settlement conference judge specifically reserved the costs issue for later determination by the trial judge.

Therefore as stated above Rule 19 addresses costs after trial or assessment. The main items are disbursements under rule 19.01 and representation fee under rule 19.04, subject to the potential application of rule 14.07 to increase or double the representation fee, and subject to the *prima face* limit under *Courts of Justice Act* s. 29.

Costs are within the court's discretion. The strong general rule is that costs are awarded to the successful party, payable by the unsuccessful party. The amount of costs awarded depends first and foremost on the amount of costs incurred by the successful party, since costs are indemnity for the actual cost of the litigation and cannot be used as a fine imposed on the unsuccessful party: *West End Tree Service Inc. v. Stabryla*, 2010 ONSC 68, 2010 Carswell-Ont 12, 257 O.A.C. 265, [2010] O.J. No. 7 (Ont. Div. Ct.).

Under Rule 19.01, the disbursements incurred by the successful party may be awarded in full and are generally limited only by reasonableness. Disbursements can include court fees, witness fees (including expert witness fees), travel cost, and the cost of preparing copies of documents to be used as exhibits at trial. The only disbursements which are specifically limited to maximum awards are service, which is subject to a *prima facie* maximum of $60 for each person served and preparation of pleadings, which is subject to a maximum of $100 for each pleading prepared. In routine cases, the typical award of disbursements will be in the region of $100 to $300. But when larger items such as expert reports and travel cost are awarded, there is no maximum and the general limit on costs under *Courts of Justice Act*, s. 29 is not a limit on the disbursements which may be awarded.

The normal practice is for the judge to fix costs, including disbursements. However, Rule 19.01 does permit the disbursements to be assessed by the clerk where the judge has awarded costs but has not fixed the amount of disbursements. The clerk's assessment of disbursements is subject to review by the court. In most cases the court fixes costs including disbursements, making the clerk's involvement unnecessary.

Where the successful party is represented at trial or at an assessment hearing by a lawyer, paralegal or student-at-law, the representation fee under Rule 19.04 is usually the largest costs item. The representation fee, formerly known as a counsel fee, is an amount for the representative's services at the trial or assessment hearing and may include a component for preparation. The only limit on the amount of a representation fee which can be requested is the amount for which the party is actually liable to pay his or her representative, and subject to the *prima facie* limit under *Courts of Justice Act*, s. 29, namely 15% of the amount claimed in the proceeding.

Subject to those parameters, the representation fee will be determined through the court's exercise of discretion, which may be affected by the complexity of the case, the duration of the hearing, the seniority of the lawyer, and other relevant factors: *De Fresne v. H.O.P.E. Systems Inc.*, [2016] O.J. No. 5061 (Ont. Sm. Cl. Ct.).

Where the successful party is entitled to cost consequences under Rule 14.07 due to an offer to settle, those consequences typically involve doubling the representation fee. See the commentary and case law under Rule 14.07.

When fixing costs it is an error in principle to simply award 15% of the amount claimed, plus disbursements. Instead the court must determine the appropriate amount given the particular circumstances of each case: *Sivalingam v. Navaratnam*, 2015 ONSC 6619, 2015 CarswellOnt 16294 (Ont. Div. Ct.); *De Fresne v. H.O.P.E. Systems Inc.*, 2016 CarswellOnt 14304 (Ont. Sm. Cl. Ct.). The 15% general limit is not a rule on how to fix costs but only a limit on fixing costs pursuant to Rule 19.

19.01 (1) Disbursements — A successful party is entitled to have the party's reasonable disbursements, including any costs of effecting service or preparing a plaintiff's or defendant's claim or a defence and expenses for travel, accommodation, photocopying and experts' reports, paid by the unsuccessful party, unless the court orders otherwise.

(1.1) For greater certainty, subrule (1) includes costs associated with the electronic filing or issuance of documents under these rules.

(2) The clerk shall assess the disbursements in accordance with the regulations made under the *Administration of Justice Act* and in accordance with subrules (3) and (4); the assessment is subject to review by the court.

(3) The amount of disbursements assessed for effecting service shall not exceed $60 for each person served unless the court is of the opinion that there are special circumstances that justify assessing a greater amount.

(4) The amount of disbursements assessed for preparing a plaintiff's or defendant's claim or a defence shall not exceed $100.

O. Reg. 78/06, s. 38; 440/10, s. 3; 44/14, s. 13

Commentary: The law of costs traditionally distinguishes between legal fees and disbursements. Fees refers to the amounts charged to a party by his or her lawyer or paralegal for legal services, whether charged as an hourly rate, block fee or otherwise. Disbursements refers to out-of-pocket expenses, other than legal fees paid to a lawyer or paralegal, incurred for purposes of the court case. Disbursements may be paid by a lawyer or paralegal and then billed to the client, without losing their nature as disbursements.

There is no specific limitation under rule 19.01 on the types of out-of-pocket expenses which may be allowed as reasonable disbursements. The general limit on costs under *Courts of Justice Act* s. 29 does not apply to disbursements and therefore s. 29 has no direct bearing on what types or amounts of disbursements may be included in a costs award. Section 29 only applies to costs other than disbursements — which means fees.

Examples of the usual items which may be included as allowable disbursements incurred by a party are the following:

- court fees including the fee to issue a claim, file a defence, set the action down for trial or assessment, issue a summons to witness
- amounts paid for preparation of pleadings (subject to the limit of $100 for each pleading prepared, under rule 19.01(4))
- amounts paid to a third party for personal service of court documents (subject to the general limit of $60 for each person served, under rule 19.01(3))
- amounts paid for copying of documents for use at trial (which may include paper copies, computer-printed copies and electronic copies)
- amounts paid for service of documents by courier or other means
- expert witness fees for preparation of expert reports
- travel cost where a party or witness must travel to court for trial
- attendance money paid to a witness who is summonsed pursuant to rule 18.03
- amounts paid for translation of documents required for trial
- amounts paid for an interpreter required for trial
- accommodation or hotel costs where a witness or party is required to stay overnight for purposes of attendance at trial
- parking expenses incurred for trial

Given the traditional distinction between fees and disbursements, the treatment of the cost of preparation of pleadings as a disbursement under rule 19.01 seems anomalous. Usually if a party incurs an out-of-pocket expense for preparation of pleadings it involves the fee charged by a lawyer or paralegal. It may be that this item, limited to $100, could be seen as appropriately modest compensation to self-represented litigants for their own time in preparation of pleadings, as well as for litigants who have paid legal fees for that step. In any event that item is treated as a disbursement under rule 19.01.

Unlike previous versions of the rule, the current rule sets only one general limit on allowable disbursements and that is the requirement that they be "reasonable disbursements". So long as a party's disbursements are reasonable, the general rule is that the disbursements will be allowed in full: *3664902 Canada Inc. v. Hudson's Bay Co.*, 2003 CarswellOnt 869, 169 O.A.C. 283, [2003] O.J. No. 950 (Ont. C.A.) at para. 17.

Typically, absent any larger items such as expert fees or travel cost, a party's allowable disbursements will consist of court fees plus $100 for preparation of pleadings under rule 19.01(4), plus perhaps another $100 for service of documents or miscellaneous smaller items. Based on the current court fees (issue claim $102, set down for trial or assessment $290, file defence $73), in many cases the allowable disbursements for a plaintiff will be approximately $600, and for a defendant approximately $300 (although if the defendant set the action down for trial that figure would increase to $600). Those figures are generalizations only. Note that the higher court fees imposed on plaintiffs who are frequent claimants would increase those figures accordingly for frequent claimants ($215 to issue a plaintiff's claim and $380 to set down for trial or assessment).

Like all costs orders, the disbursements allowed by a judge are discretionary, under *Courts of Justice Act* s. 131(1) and rule 19.01(1).

Disbursements may be disallowed by the court if they were not reasonably incurred or are claimed in excessive amounts which exceed the reasonable expectations of the unsuccessful party.

In *Hadani v. Toronto Standard Condo. Corp. No. 2095*, [2016] O.J. No. 4432 (Sm. Cl. Ct.) at paras. 31-33, an overall claim for disbursements in the total amount of $2,169 was found to be excessive and unreasonable. The disbursements were allowed in the reduced amount of $595.

Expert Fees

Where expert fees are incurred they tend to be the largest disbursements. Parties considering the possibility of expert evidence need to be careful, practical and financially sensible about the matter.

Any party tendering expert evidence must consider the use of rule 18.02: is it really necessary to present the expert to testify in person or can a report simply be filed under rule 18.02? If a party serves an expert report and then calls the expert to testify in-chief in person, there is no guarantee that if that party otherwise recovers costs that the court will allow the full amounts charged by the expert for both the report and the attendance at trial.

The potential loss for a party who chooses to pay for both an expert report and the expert's in-person evidence at trial is illustrated by *Schafer v. Wagner*, [2017] O.J. No. 3405 (Sm. Cl. Ct.) at paras. 13-14. The successful defendant had paid an engineer $2,462 for an expert report and another $2,507 for his attendance at trial. Deputy Judge McGill disallowed both amounts, stating at paras. 13-14 that:

> 13 . . . In Small Claims Court, both a report and attendance are unnecessary and represent duplication. One or the other would be appropriate, the second is overkill . . .
>
> 14 I find that it would be unreasonable to make the unsuccessful party pay for a report & attendance that duplicated each other, carried little weight on the determination of the central issue and cost more than 20% of the amount in dispute . . .

Given the amounts in issue in Small Claims Court, it should rarely be necessary for a party to tender more than one expert. Calling more than one expert in the same area of expertise should almost always be avoided. As in other courts, no party may call more than three experts without leave of the court under section 12 of the *Evidence Act*, R.S.O. 1990, c. E.23.

Sometimes expert fees may be deemed to be excessive as disbursements to be paid by the opposing party — even if the amounts were legitimately paid or payable to the expert by the party who retained the expert. Whether an expert fee for preparation of a report or attendance at trial is excessive is a matter for the court's discretion, and the question of proportionality will often come into play: is the amount proportionate to the issues at which the expert evidence was directed and/or to the amount at stake? Is the amount fair and reasonable and within the reasonable expectations of the losing party? See *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521, 71 O.R. (3d) 291, 48 C.P.C. (5th) 56, 188 O.A.C. 201, [2004] O.J. No. 2634 (Ont. C.A.); *Zesta Engineering Ltd. v. Cloutier*, 2002 CarswellOnt 4020, 21 C.C.E.L. (3d) 161, [2002] O.J. No. 4495 (Ont. C.A.). *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 2009 CarswellOnt 6185, 100 O.R. (3d) 66, 77 C.P.C. (6th) 1, (sub nom. *Davies v. Clarington (Municipality)*) 312 D.L.R. (4th) 278, 254 O.A.C. 356, [2009] O.J. No. 4236 (Ont. C.A.).

In a recent costs ruling following a jury trial in the Superior Court of Justice, the trial judge reduced the amount claimed for a medical expert. The disbursement claim was $10,050 for preparation of a report and another $23,052 for the expert's attendance at two days of trial. The trial judge found those amounts to be excessive given the work performed by the expert. The claimed disbursement was reduced by more than two-thirds and allowed in the total amount of $10,000: *Robichaud v. Constantinidis* (2020), 2020 ONSC 310, 2020 CarswellOnt 906, 1 C.C.L.I. (6th) 246, [2020] O.J. No. 295 (S.C.J.) at para. 35.

In *Lahrkamp v. Metropolitan Toronto Condo. Corp. No. 932* (2017), 2017 CarswellOnt 21445, [2017] O.J. No. 7038 (Sm. Cl. Ct.) at para. 47~~.~~; leave to appeal costs denied (2018), 2018 ONSC 1771, 2018 CarswellOnt 4185, [2018] O.J. No. 1413 (Div. Ct.), a disbursement for a defence legal expert claimed at $3,500 was found to be excessive.

In *Moore v. Brazeau Seller LLP*, 2011 CarswellOnt 15740, [2011] O.J. No. 3171 (Ont. Sm. Cl. Ct.), the lawyer malpractice defendant was successful at trial. The defence legal expert had billed the defence $26,125 for his report and attendance at trial but the defence reduced the amount claimed from the plaintiff for that disbursement to $10,000. The court found that given the complex issues, the stakes involved and the "immensely helpful" nature of the defence expert's evidence, $10,000 was appropriately allowed for that disbursement.

In *Ernst v. Royal Mutual Funds Inc.*, 2011 CarswellOnt 15933, 80 E.T.R. (3d) 39 (Ont. Sm. Cl. Ct.) at para. 51, a defence financial expert fee of $2,175 for a report filed under rule 18.02 was found to be entirely reasonable, particularly given the expert was not called to testify in person thereby avoiding an additional attendance fee.

In *Morehouse Estate v. Mildren* (2016), 2016 CarswellOnt 506, [2016] O.J. No. 212 (Sm. Cl. Ct.) at para. 19, an expert accounting report fee of $3,559 was allowed as reasonable, but a further fee of $650 for the expert's attendance at trial was disallowed since he did not testify.

An expert fee may be disallowed where the expert's qualifications to testify in the relevant field were successfully challenged: *Oxford v. 1231766 Ontario Inc.*, [2011] O.J. No. 2008 (Sm. Cl. Ct.) at para. 26; *Wilson v. Quinn*, 2002 CarswellOnt 78, [2002] O.J. No. 120 (Ont. S.C.J.) at para. 15.

Where the defence summonsed the expert who authored an expert report served by the plaintiff under rule 18.02, that disbursement was disallowed where the court found that cross-examination of the expert added nothing to a proper understanding of his report: *Turner v. Kitchener (City)*, [2011] O.J. No. 4803 (Sm. Cl. Ct.) at para. 43.

As a potentially useful point of comparison, where costs are assessed in the Superior Court of Justice, the daily attendance fee for an expert witness is set at $350 per day, subject to increase in the discretion of the assessment officer: see Item 28 under Part II of Tariff A — Lawyers' Fees and Disbursements Allowable Under Rules 57.01 and 58.05 (under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194).

Online Legal Research

Some lawyers will charge clients for online legal research charges as a disbursement which may then become part of the disbursements claimed from the opponent after trial. A number of cases confirm that just as lawyers cannot charge clients for maintaining a law library, charges for online or internet legal research are considered part of the lawyer's overhead expenses. Overhead is subsumed within the lawyer's hourly rate. Therefore online legal research charges are disallowed as disbursements payable by the unsuccessful party: see *Stark v. Lewis*, [2019] O.J. No. 1940 (Sm. Cl. Ct.) at paras. 73-74; *Schafer v. Wagner*, [2017] O.J. No. 3405 (Ont. Sm. Cl. Ct.) at para. 15; *Lacroix v. Gordon*, [2015] O.J. No. 2766 (Ont. Sm. Cl. Ct.) at para. 16; *De Fresne v. H.O.P.E. Systems Inc.*, 2016 CarswellOnt 14304, [2016] O.J. No. 5061 (Ont. Sm. Cl. Ct.) at para. 15; *Nebete Inc. v. Sanelli Foods Ltd.*, 1999 CarswellOnt 734, 92 O.T.C. 81, [1999] O.J. No. 859 (Ont. Gen. Div.) at para. 27.

Photocopies

Excessive claims for photocopying costs are a relatively frequent occurrence.

Modern-day photocopiers can process massive volumes of photocopying at high speed and at a real cost of perhaps 5 cents per page. Yet one sees copying charges claimed as disbursements at rate of 25 cents or more, even up to 100 cents per page. If there is a markup involved, then these types of charges are not properly described as disbursements.

What is reasonable or unreasonable as copying charges is not the subject of any hard and fast rule. Recently a rate of 10 cents per copy and 25 cents for colour copies was allowed in *Stark v. Lewis*, [2019] O.J. No. 1940 (Sm. Cl. Ct.) at para. 64. There the court also pointed out at para. 62 that not every page produced for a lawyer's file can be charged as a disbursement.

Generally the copying that is chargeable as a disbursement only includes copying for use at trial of documents including document briefs and books of authorities including copies for the parties, witness and judge. This is consistent with the practice in the Superior Court of Justice: see Item 31 under Part II of Tariff A — Lawyers' Fees and Disbursements Allowable Under Rules 57.01 and 58.05 (under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194). It reads as follows:

> 31. For copies of any documents or authorities prepared for or by a party for the use of the court and supplied to the opposite party, a reasonable amount.

It may not be necessary for parties to present a precise page count if the overall amount claimed is facially reasonable. If these and similar disbursements are claimed on a basis that suggests and nickel-and-dime approach has been taken in an attempt to maximize the overall amount, the court is more likely to reduce the allowed amount more significantly.

Photocopies are often allowed based on nothing more complex than a "ballpark figure" as occurred in *Lesniak v. Tomaszewska*, [2016] O.J. No. 5227 (Sm. Cl. Ct.) at para. 170, where $100 was awarded for disbursements for photocopies, faxes and telephone calls on a ballpark basis.

In *Lahrkamp v. Metropolitan Toronto Condo. Corp. No. 932* (2017), 2017 CarswellOnt 21445, [2017] O.J. No. 7038 (Sm. Cl. Ct.) at para. 46~~.~~; leave to appeal costs denied (2018), 2018 ONSC 1771, 2018 CarswellOnt 4185, [2018] O.J. No. 1413 (Div. Ct.), after a 12-day trial the successful defendant requested disbursements of $17,770 of which $4,000 was for photocopies. Despite the voluminous exhibits filed at trial, that amount for photocopies was found to be excessive. The overall total claimed for disbursements was reduced from $17,770 to $4,000.

Photocopying of books of authorities was allowed based on 30 cents per page for a total of $120 in *2377566 Ontario Inc. v. A & A Transport Inc.*, [2017] O.J. No. 6983 (Sm. Cl. Ct.) at para. 17.

Travel and Accommodation

Occasionally a witness is required to travel for trial and stay in a hotel. Where that occurs, and always subject to the reasonableness of those disbursements, the party's liability for the witness's travel and accommodation cost can be claimed as disbursements.

As a potentially useful comparison, where costs are assessed in the Superior Court of Justice, Item 21 under Part II of Tariff A — Lawyers' Fees and Disbursements Allowable Under Rules 57.01 and 58.05 (under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194), the accommodation and meal allowance is fixed at $75 for each overnight stay required for a witness.

Traditionally if a party chooses to retain an out-of-town lawyer or paralegal who must then travel for trial and possibly stay in a hotel, such charges are considered to be an incident of the party's choice of representative, which cannot be passed on to the opposing party as a disbursement: *Stark v. Lewis*, [2019] O.J. No. 1940 (Sm. Cl. Ct.) at paras. 57-61; *Schafer v. Wagner*, [2017] O.J. No. 3405 (Sm. Cl. Ct.) at para. 11. The party could have retained a local lawyer or paralegal.

That cannot be viewed as an absolute rule however. Recently after a trial in the Superior Court of Justice, the successful defendant claimed $14,088 as a disbursement for hotel accommodation and meals for two counsel from London during a 21-day jury trial at Kitchener. The trial judge allowed approximately half of that claimed disbursement: $6,000 for

hotel accommodation and $1,200 for meals: *Loye v. Bowers Estate*, [2020] O.J. No. 275 (S.C.J.) at paras. 38-45.

Witness Attendance Money

When a witness is served with a summons to witness, he or she must also be served with the necessary attendance money under rule 18.03. These amounts are determined with reference to Item 21 under Part II of Tariff A — Lawyers' Fees and Disbursements Allowable Under Rules 57.01 and 58.05 (under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194). Attendance money is calculated based on $50 for each day of necessary attendance, plus travel allowance. The travel allowance is $3 for each day of necessary attendance if the witness resides in the city or town where the trial is held. If the witness resides within 300 kilometres of the courthouse (but not in the same city or town as the courthouse), the allowance is 24 cents each way between his or her residence and the courthouse. If the witness resides more than 300 kilometres away, the travel allowance is "the minimum return air fare" plus 24 cents per kilometre each way between his or her residence and the airport nearest to that residence and between the courthouse and the airport nearest to the courthouse.

If a witness resides elsewhere than the city or town where the trial is held and is required to remain overnight, the accommodation and meal allowance is fixed at $75 for each overnight stay.

Witness attendance money therefore has three components: the base amount of $50 per day, plus a travel allowance (calculated under Item 21 of Tariff A) based on where the witness resides, together with an accommodation and meal allowance, if applicable, fixed at $75 for each overnight stay.

In practice it may be wise for a party to pay a witness more than $75 for each overnight stay given the price of accommodation and meals has increased substantially since that figure was enacted. The same may be true of 24 cents a kilometre given the increased cost of travel.

Amounts paid to witnesses as attendance money are treated the same as court fees and are generally recoverable on a 100% basis as disbursements, subject to reasonableness.

For out-of-town witnesses, the option to present their evidence through a written statement or affidavit under rule 18.02 should always be considered.

Daily Transcripts

Occasionally parties may choose to obtain daily transcripts of trial proceedings as an aid to preparation for subsequent trial days. In the past this practice was reserved for high-stakes commercial litigation in the Superior Court of Justice involving extended multi-week or multimonth trials and a lengthy list of witnesses. The cost of obtaining daily transcripts tends to be prohibitive given the need to order on a rush delivery basis.

Sometimes daily transcripts are obtained in Small Claims Court and then claimed as disbursements at the end of trial. Given the generally short duration and simple nature of trials in this court it is hard to justify such a measure — unless perhaps the ordering party suffers from short-term memory loss. These disbursements are likely to be disallowed.

In *Lahrkamp v. Metropolitan Toronto Condo. Corp. No. 932* (2017), 2017 CarswellOnt 21445, [2017] O.J. No. 7038 (Sm. Cl. Ct.) at para. 45~~.~~; leave to appeal costs denied (2018), 2018 ONSC 1771, 2018 CarswellOnt 4185, [2018] O.J. No. 1413 (Div. Ct.), the successful defendant after a 12-day trial claimed $9,364 as a disbursements for the cost of daily transcripts. That claim was disallowed as "not an ordinary or reasonable disbursement which the Plaintiff could have anticipated paying."

A transcript of day one of a two-day trial was obtained b~~y~~ a self-represented party at a cost of $700. That disbursement was disallowed on the basis that it was an optional preparation tool that should not be visited on the opposing party: *Wallis v. Gallant*, [2018] O.J. No. 1514 (Sm. Cl. Ct.) at para. 52.

An exception occurred in *Lincoln v. Sobeys Capital Inc.*, [2019] O.J. No. 3986 (Sm. Cl. Ct.) at paras. 12-13, where $676 was allowed as a reasonable disbursement where the transcript was legitimately needed to prepare for cross-examination given "lengthy delays in between trial dates" Paragraph 2 of the decision states that the trial took "6+ days" over the course of 12 months.

It should be noted that under a recently-adopted practice, and subject to the trial judge's discretion, a party may order a copy of the recording of a prior days of trial proceedings through Court Services, if that is thought desirable, at a cost of only $25 per day. The ordering party must give certain undertakings and the recording cannot be used to create a transcript for use in court or on appeal.

Harmonized Sales Tax (HST)

By analogy to Item 36 under Part II of Tariff A — Lawyers' Fees and Disbursements Allowable Under Rules 57.01 and 58.05 (under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194), HST on fees and disbursements may itself be treated as a disbursement. On that basis, HST would not be counted in assessing the *prima facie* limit on costs, apart from disbursements, under *Courts of Justice Act* s. 29.

Offers to Settle

Note that where the cost consequences of offers to settle are triggered under rules 14.07(1) or 14.07(2), the double costs which may be awarded are a double representation fee but not double disbursements: *Henderson v. Canada*, 2008 CarswellOnt 2279, 37 C.E.L.R. (3d) 306, 292 D.L.R. (4th) 114, 238 O.A.C. 65 (Ont. Div. Ct.) at para. 31; *Ohler v. Pye* (June 11, 2009), Koprowski D.J., [2009] O.J. No. 3435 (Ont. Sm. Cl. Ct.) at para. 22; *Nerdahl v. Sun Life Financial Distributors (Canada) Inc.* (May 11, 2010), Doc. Kitchener 1421/08; 1421D1/08, [2010] O.J. No. 1954 (Ont. Sm. Cl. Ct.) at para. 9. Doubling disbursements would violate the fundamental nature of costs as indemnity for expenses actually incurred, and would amount to an unjustified windfall. See *West End Tree Service Inc. v. Stabryla*, 2010 ONSC 68, 2010 CarswellOnt 12, 257 O.A.C. 265, [2010] O.J. No. 7 (Ont. Div. Ct.).

Clerk's Role

Disbursements may be assessed by the clerk if the court has awarded costs in terms that leave the reasonable disbursements to be determined by the clerk (for example, an award of a fixed representation fee "plus reasonable disbursements"). Under rule 19.01(2), the clerk's jurisdiction to assess disbursements is preserved. However the current, more common and preferable practice is for the court to fix costs inclusive of disbursements. This avoids the need for further time to be spent by the parties, and by the clerk, and also avoids the potential need for a future review of the clerk's assessment by a judge.

19.02 Limit — Any power under this rule to award costs is subject to section 29 of the *Courts of Justice Act*, which limits the amount of costs that may be awarded.

O. Reg. 78/06, s. 39

Commentary: This rule simply reminds parties and the court that *Courts of Justice Act* s. 29 imposes a general limit on costs. The various costs items under rule 19 are subject to that general limit, namely that an order of costs, apart from disbursements, shall not exceed 15% of the amount claimed in the proceeding unless a penalty costs order is necessary to penalize unreasonable conduct during the proceeding.

19.03 [Repealed O. Reg. 440/10, s. 4.]

19.04 Representation Fee — If a successful party is represented by a lawyer, student-at-law or paralegal, the court may award the party a reasonable representation fee at trial or at an assessment hearing.

O. Reg. 78/06, s. 39; 440/10, s. 5; 230/13, s. 15

Commentary: For successful parties who are represented at trial or an assessment hearing by a lawyer, paralegal or student-at-law, the representation fee under rule 19.04 is usually the largest single costs item available to compensate for the cost of the litigation. The representation fee is an amount designed to compensate for the cost of the successful party's representation at trial or assessment hearing, and can properly include a preparation component.

The amount of the representation fee is a matter of judicial discretion, but cannot exceed the amount actually chargeable by the party's representative for representation at trial or assessment hearing. The amount is also subject to the general limit under *Courts of Justice Act* s. 29, being 15% of the amount claimed in the proceeding, unless a penalty costs award under s. 29 is necessary. In principle the representation fee is treated as "partial indemnity costs" as that concept is used in the *Rules of Civil Procedure* — that is, the representation fee is generally not intended as 100% costs recovery unless that result is warranted in the particular circumstances.

The amount of the representation fee may vary depending on the amount at stake, the duration of trial, the seniority of counsel, the complexity of the evidence or law, and other factors. The court must fix a reasonable representation fee and then verify that amount for compliance with s. 29. Where offers to settle trigger cost consequences under rule 14.07(1) or (2), the representation fee will generally be doubled, but subject to the court's determination whether a penalty costs order under s. 29 is applicable and necessary.

The general format for a costs order at trial consists of a representation fee (inclusive of HST), which may be doubled under rule 14.07 if applicable, plus disbursements, with a stated total costs award inclusive of disbursements and HST. See the commentary and case law under s. 29 and rules 14.07(1) and (2).

There is no tariff or official chart to determine the appropriate amount for representation fees. Prior to an amendment of rule 19.04 effective July 1, 2006, the rule stated that the maximum representation fee was $300. However that limit has been deleted from the rule which now simply provides for a "reasonable representation fee". In addition the monetary jurisdiction of the court has been substantially increased since then, making that figure and caselaw interpreting the former rule irrelevant.

Since 2010, often the representation fee allowed by the court may be in a range from $500 for a half-day trial with a junior lawyer or paralegal representing the successful party, up to $2,000 for a full-day trial with a senior lawyer representing the successful party. Those amounts are of course subject to s. 29: if the amount claimed is too small to support those amounts without applying the penalty costs proviso in s. 29, then awarding those amounts would represent legal error. For example, if the amount of damages claimed in the action was only $1,000, then the representation fee could not exceed $150 unless the court makes a penalty costs order under s. 29.

Like the traditional common law counsel fee, the representation fee under rule 19.04 includes a preparation component and need not be limited to a mathematical calculation based on the duration of trial: *Tanas v. Homestead Land Holdings Ltd.*, [2019] O.J. No. 5125 (Sm. Cl. Ct.) at para. 21; *Lucy v. Kitchener (City)*, 2013 CarswellOnt 381, 6 M.P.L.R. (5th) 285, [2013] O.J. No. 190 (Ont. Sm. Cl. Ct.) at para. 62.

The factors affecting determination of an appropriate representation fee may include the duration, importance and complexity of the hearing, the conduct of a party which tended to shorten or lengthen unnecessarily the duration of trial, whether a party presented unneces-

sary or repetitious evidence or unreasonable positions, the seniority of counsel, and any partial losses or successes on individual issues. The court may refer by analogy to the shopping list of common law factors codified in rule 57.01(1) of the *Rules of Civil Procedure*. See *Tanas v. Homestead Land Holdings Ltd.*, [2019] O.J. No. 5125 (Sm. Cl. Ct.) at para. 21; *De Fresne v. H.O.P.E. Systems Inc.*, [2016] O.J. No. 5061 (Ont. Sm. Cl. Ct.).

Self-Represented Parties

By its terms the representation fee under rule 19.04 is not available for self-represented parties. It is a fee to compensate for the cost of representation by a lawyer, student-at-law or paralegal at trial or assessment. If no such cost has been incurred there is nothing to compensate for.

However see rule 19.05 (reviewed below), which permits the court may award up to $500 to compensate self-represented parties for "inconvenience and expense". Such an award may be viewed as a limited alternative to a representation fee. Rule 14.07(3) contains a similar provision dealing with offers to settle made by self-represented parties. Costs awards for self-represented parties (apart from disbursements) are not routinely made and, like representation fees, are subject to the *prima facie* limit in s. 29: see rule 19.02.

Representation Fee for Multi-Day Trials

One approach to representation fees for multi-day trials is to consider a daily representation fee multiplied by the number of trial days: see *Scott v. Specs Appeal Inc.*, 2014 CarswellOnt 10790, [2014] O.J. No. 3692 (Ont. Sm. Cl. Ct.). Regardless of the length of trial, the amount of any representation fee awarded under rule 19.04 is subject of course to the *prima facie* limit in s. 29. The representation fee may exceed that limit only if the court finds it necessary to apply the penalty costs proviso in s. 29. The representation fee is also limited by the fundamental rule of indemnity and cannot exceed the amount the party is actually liable to pay his or her lawyer or paralegal for representation at trial, inclusive of preparation.

Recently the court made what appears to have been the largest ever costs award to date in Small Claims Court. After a very lengthy trial lasting 12 days, the plaintiff's claim for damages of $1,500 ($500 in each of three actions tried together) was dismissed. The court found it necessary to apply the penalty costs proviso because the proceeding was unnecessary and "a complete waste of time and money" which was unduly prolonged by the self-represented plaintiff. The defendant was awarded a total representation fee of $15,000 plus HST for all three actions combined, plus disbursements: *Lahrkamp v. Metropolitan Toronto Condo. Corp. No. 932* (2017), 2017 CarswellOnt 21445, [2017] O.J. No. 7038 (Sm. Cl. Ct.). A motion for leave to appeal the costs order was denied on the basis that the order reflected no error in principle: (2018), 2018 ONSC 1771, 2018 CarswellOnt 4185, [2018] O.J. No. 1413 (Div. Ct.).

Another award of $15,000 plus HST and disbursements was made after a 9-day trial in *Rooks v. Park'N'Fly*, [2019] O.J. No. 3984 (Sm. Cl. Ct.), supported by a finding that the penalty costs proviso in s. 29 was applicable. In particular, it was found that the trial ought to have taken two days but was unreasonably extended by a further seven days by the plaintiff's unreasonable conduct.

While trials lasting 9 or 12 days are extremely rare in Small Claims Court and costs awards exceeding $15,000 were unheard of until recently, it is important to note that where the court finds proper grounds to apply the penalty costs proviso in s. 29, there is no specific upper limit on the amount which may be awarded. In other words, where the 15% limit is found to be displaced by a party's unreasonable conduct, any amount up to full indemnity costs could be awarded in appropriate cases: see *Lahrkamp*, *supra*, at para. 13; *Rooks v. Park'N'Fly*, *supra*, at para. 27. In both of those cases the amounts actually requested by the successful defendants exceeded $100,000. Costs demands in that range are of course highly uncommon in Small Claims Court.

For multi-day trials, in general the court may be far more willing to apply the penalty costs proviso where the trial time has been extended by a party's unreasonable conduct, than for shorter trials. Parties should not assume that the *prima facie* limit in s. 29 will protect them from the potentially high increased cost of allowing their trial to become unduly or unnecessarily lengthy.

Representation Fee for Plaintiff's Claim and Defendant's Claim

For cases involving both a plaintiff's claim and a defendant's claim, there are by definition two claims and two amounts claimed between the parties. Accordingly both claims are subject to costs orders, which may be addressed either separately or as one combined costs order.

For purposes of the 15% *prima facie* limit in s. 29, the "amount claimed" is the total of both claims: *King v. K-W Homes Ltd* (2006), 2006 CarswellOnt 8358, [2006] O.J. No. 5104 (Sm. Cl. Ct.) at para. 17; *Niedopytalski v. Kuzmenko*, [2011] O.J. No. 1179 (Sm. Cl. Ct.) at para. 17.

It may in some cases be preferable to make separate costs awards for a plaintiff's claim and defendant's claim. This may also permit a better focus on relative success between the parties and the trial time caused by each claim, and could tend to discourage frivolous or unnecessary defendants' claims. It may possible for the court to conclude that a penalty costs award is warranted for one claim but not the other. In the event of appeal, if only one claim is for less than the minimum appealable limit, or if the court's decision on only one claim is appealed, separate costs orders may be preferable from the appeal court's perspective.

For example, in *Spavest Inc. v. Wu* (2015), 2015 CarswellOnt 9807 (Ont. Sm. Cl. Ct.); [2015] O.J. No. 3439 (Sm. Cl. Ct.), the plaintiff's claim was for $25,000 and the defendant's claim was for $12,631. After a five-day trial, the plaintiff's claim was allowed in the amount of $2,566 and the defendant's claim was dismissed. The defendants had produced new documents during the trial and had caused trial time to be extended, while the plaintiff had grossly exaggerated his pleaded position. The court made separate costs awards in favour of the plaintiff: in the plaintiff's claim, a representation fee of $3,000 plus disbursements, and in the defendant's claim a representation fee of $1,700 plus disbursements.

Case Law: *Norma Wexler v. Carleton Condominium Corporation No. 28*, 2017 ONSC 5697, 2017 CarswellOnt 15271 (Ont. Div. Ct.).

Order that the Costs award of the Small Claims Court be set aside. Rule is not intended to give the Small Claims Court a broad and unfettered discretion to make awards of compensation regarding the conduct of a party that is unrelated to the matter over which the Small Claims Court has jurisdiction. Appeal by Plaintiff, Wexler, from Judgment of Deputy Judge in which he awarded costs against Ms. Wexler, in the amount of $20,000.00. A court should only set aside an award of costs on appeal if the trial judge made an error in principle or if the costs award is plainly wrong (*McDowell v. Barker*, 2012 ONCA 827, 2012 CarswellOnt 14919, 82 E.T.R. (3d) 197 (Ont. C.A.) at para. 17 and *Hamilton v. Open Window Bakery Ltd.*, 2004 CSC 9, 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, REJB 2004-54076, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 2004 C.L.L.C. 210-025, 316 N.R. 265, 184 O.A.C. 209, [2003] S.C.J. No. 72 (S.C.C.) at para. 27. It is also important to note the standard of review for decisions in the Small Claims Court is outlined in *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.). Rule 19.02 of the *Rules* states "[a]ny power under this rule to award costs is subject to section 29 of the *Courts of Justice Act*, which limits the amount of costs that may be awarded." Rule 19.06 provides "[i]f the court is satisfied that a party has unduly complicated or prolonged an

action or has otherwise acted unreasonably, the court may order the party to pay an amount as compensation to another party". Appeal allowed, award of costs reduced to 15% of Wexler's claim for $2,525.14 as per s. 29 of the *CJA*.

Garson v. Braithwaite (1994), 5 W.D.C.P. (2d) 424 (Ont. Gen. Div.).

The landlord represented himself and the defendant tenant was represented by an agent who was neither a student-at-law, nor a law clerk operating under the supervision of a solicitor. The defendant was successful and moved for an award of party-and-party costs at the level as if his agent was a solicitor. Should costs be awarded where a party is represented by an agent who is neither a law clerk nor a student-at-law? Costs were not awarded. Under s. 131(1) of the *Courts of Justice Act*, costs could only be awarded in connection with the services of solicitors, students-at-law, or law clerks operating under the supervision of a solicitor.

Skidmore v. Blackmore, 122 D.L.R. (4th) 330, 1995 CarswellBC 23, [1995] B.C.J. No. 305, 2 B.C.L.R. (3d) 201, [1995] 4 W.W.R. 524, 27 C.R.R. (2d) 77, 55 B.C.A.C. 191, 90 W.A.C. 191, 35 C.P.C. (3d) 28 (B.C. C.A.).

An action was successfully conducted by one of the plaintiffs who was a former member of the Law Society, but no longer held a practising certificate. The trial judge held there was a binding precedent that unless a litigant is a practising lawyer, no costs may be awarded, only disbursements may be recovered. Can costs be awarded to a self-represented litigant, who is a non-lawyer? "The view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated. Party-and-party costs serve many functions. They partially indemnify the successful litigant, deter frivolous actions and defences, encourage reasonable offers to settle, and discourage improper or unnecessary steps in the litigation."

Weiss v. Prentice Hall Canada Inc. (1995), 1995 CarswellOnt 729, [1995] O.J. No. 4188, 66 C.P.R. (3d) 417, 7 W.D.C.P. (2d) 99 (Ont. Sm. Cl. Ct.).

There is concurrent jurisdiction of provincial courts and the Federal Court: s. 37 of the *Copyright Act*. That Act of the Federal Parliament makes every provincial court a *curia designata* to enforce civil remedies provided by that Act. The application of Rule 20.03 of the Small Claims Court Rules with its maximum counsel fee $300 is inconsistent with the discretion in s. 25 of the *Courts of Justice Act*. The court referred to s. 29 of the *Courts of Justice Act*. Section 29 is in conflict with Rule 20.03 of the Small Claims Rules. Any conflict must be resolved in favour of the Act.

Fellowes, McNeil v. Kansa General International Insurance Co. (1997), 37 O.R. (3d) 464, 1997 CarswellOnt 5013, 17 C.P.C. (4th) 400 (Ont. Gen. Div.).

Plaintiff law firm was successful in action. Since one of the partners acted in person on plaintiff's behalf, plaintiff asked the court for a direction under Rule 57.02 that partner's bill of costs be treated the same as that of a represented litigant. Partner submitted that such a direction was needed because there was a body of "judge made law" that established the principle that unrepresented litigants did not get full costs. Defendant argued that costs awards were footed on the principle of indemnification, and that no counsel fees were incurred by plaintiff with the result that no counsel fees should be fixed in its favour. Here, a partner should be compensated for his party and party costs because while he did not pay costs to third parties as counsel to the firm in this action, he deprived his partners and himself of income that would otherwise have been available had he been able to serve other clients. The principle of indemnity which footed the old concepts that had been followed by the courts in dealing with the issue (distinguishing between three classes of litigants) was now outdated because costs were to serve many functions.

Martin v. East Coast Lumber Ltd. (1998), 166 Nfld. & P.E.I.R. 295, 511 A.P.R. 295 (P.E.I. T.D.).

Application by defendant for costs. Application dismissed. Given the divided success of the action, and the aim of small claims litigation to keep the procedure simple and to maximize self-representation, it was inappropriate to require the plaintiff to pay costs to the defendant.

Skovberg v. Lampimaki (1998), 227 A.R. 278 (Alta. Q.B.).

Motion by appellant, Lampimaki, for costs of an appeal from a Small Claims Court judgment in action by Skovberg against Lampimaki. The amount of the original claim was only $283 plus $131 in costs. The legal costs of the appeal were considerably higher. Motion allowed and Column One costs ordered. While the small amount of monies involved in the case was definitely a factor, it was not the overriding factor.

Lavigne v. Canada (Human Resources Development) (1998), *(*sub nom. *Lavigne v. Canada (Minister of Human Resources Development))* 229 N.R. 205 (Fed. C.A.).

The motions judge confirmed that lay litigants cannot receive counsel's fees under the Federal Court Rules when they have successfully represented themselves. Under Tariff B of those Rules, a service cannot be rendered by a litigant to himself. The courts, be it the Trial Division or the Court of Appeal, are not at liberty to change what is legislation. Does the Rule breach rights protected by the *Charter*, especially those covered by ss. 7 and 15? Answer is no as found by the Court in *Rubin v. Canada (Attorney General)*, [1990] 3 F.C. 642, (Fed. T.D.).

Insch v. Geary (June 22, 1999), Doc. Winnipeg Centre CI 99-01-12460 (Man. Master).

A lawyer represented a client in a Small Claims Court action arising out of a motor vehicle accident. The lawyer estimated cost at $1,000 to defend action. A fee of $1,500 was charged. The hearing was, at most, one hour longer than anticipated. A fair and reasonable fee should not exceed $1,000 plus actual out-of-pocket disbursements plus GST.

Duca Community Credit Union Ltd. v. Giovannoli (2000), 2000 CarswellOnt 4814 (Ont. S.C.J.).

Unrepresented defendant. No rule denying recovery of costs by self-represented litigants.

Tran v. Financial Debt Recovery Ltd. (2000), 193 D.L.R. (4th) 168, 2 C.C.L.T. (3d) 270, 2000 CarswellOnt 4219 (Ont. S.C.J.).

The defendant collection agency was harassing the plaintiff for loan repayment by repeatedly making abusive telephone calls to workplace, contrary to statute. Unrepresented party. The litigant in person is entitled to compensation for time spent in preparation, but not time in court.

George v. Imagineering Ltd. (2001), 2001 CarswellOnt 3832 (Ont. S.C.J.).

Costs awarded to plaintiff on party-and-party basis. Assessment officer directed to assess reasonable articling student fees in preparation for trial itself.

In Ontario there are only two types of costs: party-and-party and solicitor-and-client. The factors set out in Rule 57 provide sufficient flexibility under either category so that there is no need to create a hybrid scale of "enhanced" party-and-party costs. *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 180 D.L.R. (4th) 748, 48 O.R. (3d) 228, 127 O.A.C. 286, 1999 CarswellOnt 4036 (Ont. C.A.); leave to appeal refused (2000), 193 D.L.R. (4th) vii, 2000 CarswellOnt 4184, 2000 CarswellOnt 4185, 264 N.R. 191 (note), 145 O.A.C. 200 (note) (S.C.C.); reconsideration refused (2001), 2001 CarswellOnt 958, 2001 CarswellOnt 959 (S.C.C.).

Dechant v. Stevens, 2001 CarswellAlta 356, 2001 ABCA 81, [2001] 5 W.W.R. 448, *(*sub nom. *Dechant v. Law Society of Alberta)* 277 A.R. 333, *(*sub nom. *Dechant v. Law Society of Alberta)* 242 W.A.C. 333, 89 Alta. L.R. (3d) 289, *(*sub nom. *Dechant v. Law Society of*

Alberta) 203 D.L.R. (4th) 157, [2001] A.J. No. 373 (Alta. C.A.); leave to appeal refused (2001), 2001 CarswellAlta 1211, 2001 CarswellAlta 1212, 283 N.R. 394 (note), *(*sub nom. *Dechant v. Law Society of Alberta)* 299 A.R. 177 (note), *(*sub nom. *Dechant v. Law Society of Alberta)* 266 W.A.C. 177 (note) (S.C.C.).

Non-practicing lawyer self-represented. Appellant appealed ruling of Chambers Judge awarding costs solely for disbursements. It was appropriate to make award beyond that of disbursements to compensate for lost opportunity.

Metrin Mechanical v. Big H (2001), 10 C.P.C. (5th) 302, 2001 CarswellOnt 605 (Ont. Master).

Court terminated relationship between solicitors and clients on basis of alleged conflict raised by another party to action. Solicitors purported to exercise solicitor's lien in respect of clients' files. Motion granted. Case management master had jurisdiction to hear motion. Rationale behind solicitor's lien is to prevent party from lawyer shopping mid-way through after running up account. Focus should be on whether or not client voluntarily initiated change of counsel. Clients in this case did not initiate that process; accordingly solicitor's lien not available.

Morris Rose Ledgett LLP. v. Crisolago (2001), 2001 CarswellOnt 5065 (Ont. S.C.J.).

In action for recovery of legal fees from client, Court ordered assessment to be carried out. Retainer not disputed as client had paid initial account in amount of $3,194 and was only disputing two subsequent bills. At assessment client could object to specific items not being authorized. No party had applied for assessment pursuant to *Solicitors Act*, R.S.O. 1990, c. S.15, but Court had inherent jurisdiction over solicitors as officers of court to refer matter to assessment. Order for assessment would permit justice between parties to be done as type of inquiry was one in which assessment officer was particularly qualified.

Korhani v. Bank of Montreal (2002), 2002 CarswellOnt 4223, [2002] O.J. No. 4785 (Ont. S.C.J.).

Claim against self-represented defendant dismissed as part of settlement of action by other parties. Defendant not employed and not entitled to compensation for her time spent, or that of husband who assisted her. However, defendant entitled to generous disbursements of $6,990 including fees paid to solicitors who assisted, travel costs for obtaining documents, and child care costs for attendance times, payable jointly by plaintiff and other defendant.

Schaer v. Barrie Yacht Club (2003), 2003 CarswellOnt 5233, 108 O.A.C. 95 (Ont. Div. Ct.); leave to appeal refused (2004), 2004 CarswellOnt 3007 (Ont. C.A.).

Appeal of judgment of Deputy Judge in two Small Claims Court actions. "Vandalism Action." "Lien Action."

Trespass actionable without proof of damage.

Appellants argued trial judge erred pursuant to ss. 96, 97, 106, 107 of The *Courts of Justice Act* to stay the Small Claims Court proceedings until determination in action B2743 in the Superior Court. I disagree. That outstanding action, dealt with equitable relief not unavailable in the Small Claims Court. *Repair and Storage Liens Act* applied.

Respondents represented by counsel, accordingly, Rule 19.04 of The *Small Claims Court Rules* applicable. Section 29 of The *Courts of Justice Act* cannot be used to circumvent the inapplicability of Rule 19.05 to compensate the successful defendant at trial when there was no finding of unreasonable behaviour against the unsuccessful Plaintiff at trial.

Verchere v. Greenpeace Canada, 2003 CarswellBC 2539, 2003 BCSC 1571 (B.C. S.C.).

Plaintiffs having sufficient reason to bring claim in Supreme Court. Appropriate to award Plaintiffs costs notwithstanding fact that judgment not exceeding $10,000.

1467736 Ontario Ltd. v. Galli (2003), 2003 CarswellOnt 4070, 48 C.B.R. (4th) 147 (Ont. Master).

Plaintiff declared bankrupt. Plaintiff's claim vested in trustee. No Order to continue applied for. Defendant argued entire action was stayed not just that of bankrupt Plaintiff. Motion for stay allowed. Wording of Rule 11 of *Rules of Civil Procedure* (Ont.) clear.

Williams v. Babb (July 11, 2003), Doc. St. J. 2541/98, 2542/98 (N.L. T.D.).

Plaintiff argued Babb not entitled to allowance for personal time as self-represented litigant. Self-represented lay-litigant was not entitled to allowance for any amount in nature of counsel fees. Trial judge's discretionary authority did not extend to granting such allowance. Court was bound by doctrine of *stare decisis*.

Belanger v. McGrade Estate (2003), [2003] O.J. No. 2853, 2003 CarswellOnt 2682, *(*sub nom. *McGrade Estate, Re)* 65 O.R. (3d) 829 (Ont. S.C.J.).

Superior Court Judge has jurisdiction to hear appeal of contempt finding and punishment made by another Superior Court Judge. The grammatical and ordinary sense of *Rule 57.07(1)* did not require proof of bad faith on part of lawyer before he was ordered to pay costs personally.

Concrete Restorations Ltd. v. 784169 Alberta Ltd., 2003 CarswellAlta 786, 37 C.P.C. (5th) 225, 345 A.R. 387, 2003 ABPC 99 (Alta. Prov. Ct.).

Registered office of corporation was residential address, having community postal box. Postal service delivered notification of registered mail to box, but corporation failed to claim mail. Default judgment not set aside.

Schaffran v. Alseaidy (2003), 2003 CarswellOnt 1571 (Ont. Div. Ct.).

Claim sent by registered mail, signed for, but later returned to sender as unknown. Business address shared by unrelated corporations. Defendant's evidence that signatory was not employee or known to it was uncontested. Default judgment set aside for lack of proper service.

Bains v. Mattu, 2002 CarswellBC 2397, 2002 BCSC 1437 (B.C. S.C.).

Plaintiff succeeded on claim on loan for $15,000 and defendant succeeded on claim for $6,250 on promissory note. Transactions found to be separate. Two separate judgments should issue, and claim of Plaintiff should be reduced to $10,000 monetary jurisdiction limit *before* set-off of claim of Defendant.

Guindon v. Ontario (Minister of Natural Resources), 2006 CarswellOnt 3173, 212 O.A.C. 207 (Ont. Div. Ct.).

Divisional Court rejected applicant's assertion that no costs be awarded given the public interest nature of the litigation. Applicants had not acted solely as public interest litigants. Nevertheless, the amount fixed should be fair and reasonable and within applicants' reasonable expectations.

Dunbar v. Helicon Properties Ltd., 2006 CarswellOnt 4580, [2006] O.J. No. 2992, 213 O.A.C. 296 (Ont. Div. Ct.).

Appellants argued that because monetary jurisdiction of Small Claims Court is $10,000, trial judge should have deducted the amounts set off in their favour from amount instead of the total damages alleged by respondent, an amount over $15,000. Trial judge awarded the respondent $10,000, which complied with the applicable regulation: see O. Reg. 626/00.

Appellants argued $500 costs award exceeded maximum provided for by way of counsel fee pursuant to R. 19.04 by $200. However, this provision has been interpreted as a daily counsel fee award: see *Bird v. Ireland*, 2005 CarswellOnt 6945, [2005] O.J. No. 5125, 205 O.A.C. 1 (Ont. Div. Ct.).

Pierlot Family Farm Ltd. v. Polstra, 2006 CarswellPEI 27, 2006 PESCAD 13, 271 D.L.R. (4th) 525, 766 A.P.R. 169, 257 Nfld. & P.E.I.R. 169 (P.E.I. C.A.).

Plaintiff, a self-represented litigant, was successful at trial. The defendant appealed unsuccessfully. Plaintiff awarded partial indemnity costs. He submitted a bill of costs in excess of $14,000. Plaintiff entitled to recover costs of $800, plus disbursements.

Costs should only be awarded to self-represented lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation, and that as a result, they incurred an opportunity cost by foregoing remunerative activity. GST and PST were not included. Plaintiff entitled to recover costs of $800, based on 40 hours at a rate of $20 per hour.

Costs are now accepted as payable to a lay litigant (see *Prince Edward Island (Attorney General) v. Ayangma*, 2004 CarswellPEI 85, *(*sub nom. *Ayangma v. Prince Edward Island (Attorney General))* 242 Nfld. & P.E.I.R. 77, *(*sub nom. *Ayangma v. Prince Edward Island (Attorney General))* 719 A.P.R. 77, 4 C.P.C. (6th) 66, 2004 PESCAD 22 (P.E.I. C.A.); *Fong v. Chan* (1999), 46 O.R. (3d) 330, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.)).

Kennedy v. Kiss, [2006] B.C.J. No. 404, 2006 CarswellBC 453, 54 B.C.L.R. (4th) 151, 2006 BCSC 296 (B.C. S.C.).

Plaintiff self-represented lawyer in fast-track personal injury litigation. Plaintiff made offer to settle in amount of $26,000 in July 2005. Plaintiff recovered judgment at trial in October 2005 in amount of $30,007.64. Parties made submissions on costs. Plaintiff awarded double costs capped at $7,200. As self-represented lawyer, plaintiff was entitled to costs. As well, plaintiff did bring counsel to lead his evidence and that was substantial component of evidence. Trial almost one-and-one-half days and should be treated as two-day trial for purpose of assessing costs.

Case law supports contention that self-represented lawyers may be awarded costs: *London Scottish Benefit Society v. Chorley* (1884), 13 Q.B.D. 872, [1881-1885] All E.R. 1111, 53 L.J.Q.B. 551, 51 L.T. 100, *(*sub nom. *London Permanent Building Society v. Thorley)* 32 W.R. 781 (Eng. C.A.). See *Fong v. Chan* (1999), 46 O.R. (3d) 330, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.).

Phillips v. Cedar Springs Motorsports Ltd., 2006 CarswellOnt 8899, [2006] O.J. No. 5505 (Ont. S.C.J.); additional reasons to 2006 CarswellOnt 5609 (Ont. S.C.J.).

Plaintiff awarded costs of $1,500 and A Inc. awarded costs of $500. Rule 19.04(1) of *Small Claims Court Rules* regarding representation fee applied even though trial took place just three weeks after new rules came into force. Section 29 of *Courts of Justice Act* limited amount recoverable in costs to no more than 15 per cent of amount claimed. Trial lengthy by Small Claims Court standards and had legal issues of some complexity which were important to all parties.

King v. K-W Homes Ltd., 2006 CarswellOnt 8358 (Ont. S.C.J.); additional reasons to 2006 CarswellOnt 6834 (Ont. Sm. Cl. Ct.).

Defendant represented by lawyer, C, with 17 years' litigation experience. After three-day trial, plaintiff's claim dismissed and defendant's claim allowed in amount of $4,964.99. Defendant awarded costs of $2,600, legal representation fee of $2,400. $2,400 fair given amounts sought in both claims, relative success of parties, length of trial, C's experience, and fact that C's cross-examination of plaintiff was necessary to bring out all facts. Representation fee not subject to $300 limit under r. 19.04 of *Rules of Small Claims Court* as it existed before amendment. Amendment to r. 19.04 removing $300 limit became effective July 1, 2006, which was after two days of evidence but before last day of trial. New Rules applied

as of July 1, 2006 regardless of whether action was commenced prior to that date. Defendant also awarded $125 for disbursements and $75 for preparation and filing of pleadings.

CT Comm Edmonton Ltd. v. Shaw Communications Inc., 2007 CarswellAlta 937, 2007 ABQB 473, 423 A.R. 338 (Alta. Q.B.); additional reasons at 2007 CarswellAlta 971, 2007 ABQB 482 (Alta. Q.B.).

Defendants to action by self-represented company awarded party and party costs for each of three applications in which defendants largely succeeded. Defendants should not to bear costs of unnecessary applications due to failure of plaintiff to retain counsel. A trial judge have a duty to provide basic information to unrepresented litigants, but must be careful not to allow assistance given to effect its duty to provide both parties equally with fair hearing.

R. v. Moran (2008), 2008 CarswellOnt 3404, 69 M.V.R. (5th) 228 (Ont. S.C.J.).

Defendant appealed his conviction on the basis trial judge erred in law by denying standing to his representative, an articled student-at-law. Furthermore, the defendant asserted that he was effectively denied the opportunity to be heard on the merits of his application which gave rise to a reasonable apprehension of bias. Appeal allowed.

The decision to deny standing to the appellant's representative, an articled student-at-law, was in error as an articled student-at-law had a prima facie right to appear at a summary conviction trial. The inquiry should be limited to whether the defendant was making an informed choice to be represented by a student.

The trial judge's statement that the Crown's factum was correct in law and application would be dismissed subject to anything new being raised considered as denial the natural justice to the defendant. This raised a reasonable apprehension of bias.

Transport Training Centres of Canada v. Wilson, 2010 ONSC 2099, 2010 CarswellOnt 2155, *(*sub nom. *Wilson v. Transport Training Centres of Canada)* 261 O.A.C. 301 (Ont. Div. Ct.); additional reasons at 2010 ONSC 2714, 2010 CarswellOnt 3549, *(*sub nom. *Wilson v. Transport Training Centres of Canada)* 263 O.A.C. 226 (Ont. Div. Ct.).

The trial judge awarded employee $7,000 in general damages for undue mental distress instead of claimed amount of $1,000, amending her statement of claim accordingly, and fixing her costs at $1,500. The employer appealed. Appeal allowed. The trial judge erred in awarding damages to employee. Interaction of r. 19.04(2) of *Small Claims Court Rules* and section 29 of *Courts of Justice Act* meant that award of costs with respect to employee's agent could not exceed half of statutory maximum of 15 per cent of amount claimed. No evidence of unreasonable behaviour by employer, so as to justify under section 29 of *Act* amount exceeding statutory maximum amount. Costs award exceeded trial judge's discretion and was set aside.

Vigna v. Levant, 2011 CarswellOnt 357, 2011 ONSC 629, 2011 CarswellOnt 2592 (Ont. S.C.J.).

Factors to be considered when fixing costs set out in r. 57 of the *Rules of Civil Procedure* and include, in addition to success, the amount claimed and recovered, the complexity and importance of the matter and the principle of proportionality, the conduct of any party which unduly lengthened the proceeding, whether any step was improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution, a party's denial or refusal to admit anything, any offer to settle, the principle of indemnity, scale of costs, hourly rate claimed in relation to the partial indemnity rate set out in the Information to the Profession effective July 1, 2005, the time spent, and the amount that a losing party would reasonably expect to pay.

The plaintiff claims substantial indemnity costs for the law firm of Heenan Blaikie of $26,434.54. The plaintiff claims substantial indemnity fees in the amount of $68,250 for himself as a self-represented lawyer.

Vigna is a lawyer who was called to the Bar of Québec in 1992. Vigna is not engaged in private practice and has no overhead expenses.

In *Fong v. Chan*, 1999 CarswellOnt 3955, [1999] O.J. No. 4600, 46 O.R. (3d) 330, 181 D.L.R. (4th) 614, 128 O.A.C. 2 (Ont. C.A.).

The court held that the issue the right to recover award costs to a self-represented litigant remains within the discretion of the trial judge. The Court of Appeal held that self-represented litigants, whether legally trained or not, are not entitled to costs on the same basis as those of a litigant retaining private counsel. Losing party would reasonably expect to pay the sum of $30,000 plus disbursement in costs.

Ernst v. Royal Mutual Funds Inc., 2011 CarswellOnt 15933, 80 E.T.R. (3d) 39 (Ont. Sm. Cl. Ct.).

The successful defendant's representation fee for this one-day trial was fixed at $1,500. The primary costs rules, apart from rule 14.07, are the items in Rule 19. Once costs are fixed, the result must be measured against the *prima facie* limit under *Courts of Justice Act* s. 29 to determine if the award would exceed that limit and if so, whether a penalty costs order is warranted.

19.05 Compensation for Inconvenience and Expense — The court may order an unsuccessful party to pay to a successful party who is self-represented an amount not exceeding $500 as compensation for inconvenience and expense.

O. Reg. 78/06, s. 39; 440/10, s. 5

Commentary: a costs award under rule 19.05 is available only for self-represented parties and represents a limited form of substitute for a representation fee under rule 19.04.

Traditionally at common law, litigants are not compensated for the time they personally take attending to the litigation, including court attendances, preparation and other steps. Self-represented litigants could recover disbursements only.

Those litigants who retain a lawyer or paralegal may recover costs to compensate for that expense. But whether litigants are represented or self-represented, their own time is not traditionally viewed as a compensable item. There is no out-of-pocket expense to compensate. While litigants may incur opportunity cost such as the loss of income which might otherwise have been earned, not compensating for such cost is consistent with the basic rule of law principle that all litigants are equal before the law. Paying litigants for their own time may also create a disincentive for representation by lawyers and paralegals -imposing a cost on the administration of justice through the additional court time caused by the uninformed or misguided positions and strategies which may be taken by self-represented parties.

That traditional position has been relaxed in recent years.

In *Skidmore v. Blackmore*, 1995 CarswellBC 23, 2 B.C.L.R. (3d) 201, 35 C.P.C. (3d) 28, 122 D.L.R. (4th) 330, [1995] 4 W.W.R. 524, 55 B.C.A.C. 191, 27 C.R.R. (2d) 77, 90 W.A.C. 191, [1995] B.C.J. No. 305 (B.C. C.A.), the court overruled prior authority in British Columbia precluding recovery of costs, other than disbursements, to self-represented parties. This it was held that self-represented parties entitled to costs could recover an amount to compensate for the time spent performing work that would normally be performed by a lawyer.

A few years later in Ontario the same change was adopted in *Fong v. Chan*, 1999 CarswellOnt 3955, 46 O.R. (3d) 330, 181 D.L.R. (4th) 614, 128 O.A.C. 2, [1999] O.J. No. 4600 (Ont. C.A.). The court reviewed in particular the caselaw dealing with self-represented lawyers. That caselaw effectively gave self-represented lawyers preferential treatment over other self-represented parties by allowing recovery of costs based on opportunity cost. The court de-

cided to extend the opportunity cost approach and allow costs recovery to all self-represented litigants.

However the court cautioned that recovery of costs by self-represented parties was not to be treated as an automatic right. The court's discretion was retained, in part to recognize the reality that some self-represented parties may conduct proceedings inappropriately. The court must retain the discretion to make an appropriate costs award, including the denial of costs. The following considerations apply in determining the appropriate award (see para. 28 of Fong v. Chan):

- the costs are not to be calculated on the same basis as for represented litigants
- no costs are awarded for time that any litigant would have devoted to the case regardless whether represented or self-represented
- costs are awarded only for work that would ordinarily be performed by a lawyer and which caused the self-represented litigant a loss of remunerative activity
- the self-represented litigant should receive only a "moderate" or "reasonable" allowance for the loss of time devoted to preparing and presenting their case
- *per diem* allowances for litigants who would be in court anyway are excluded

Those principles were recently reaffirmed in *Benarroch v. Fred Tayar & Associates P.C.*, 2019 ONCA 228, 2019 CarswellOnt 4101, 30 C.P.C. (8th) 221, 433 D.L.R. (4th) 112 (Ont. C.A.). Costs recovery for a self-represented litigant, including a self-represented lawyer litigant, cannot be calculated on the same basis as if the party was represented. It is relevant to take into account the hourly or daily rate of income for employed individuals, or the lost profit of a self-employed businessperson.

After *Fong v. Chan*, *supra*, some courts had allowed costs to self-represented litigants on the basis of a reasonable hourly rate such as $20 or $60, but without finding that the litigant had incurred any opportunity cost. This approach was overruled in *Mustang Investigations Inc. v. Ironside*, 2010 ONSC 3444, 2010 CarswellOnt 5398, 103 O.R. (3d) 633, 98 C.P.C. (6th) 105, 321 D.L.R. (4th) 357, 267 O.A.C. 302, [2010] O.J. No. 3184 (Ont. Div. Ct.), where it was held to be an error to simply assume that time devoted to the case involves an opportunity cost sufficient to support an award of costs to a self-represented litigant. *Mustang Investigations* was cited with approval in *Benarroch*, *supra*, at para. 18.

With those principles in mind, the exercise of considering whether to award such costs to self-represented parties in Small Claims Court is considerably narrowed by rule 19.05. Where such an award is made, it shall not exceed $500. The award is described as "compensation for inconvenience and expense" — which is analogous to opportunity cost: see *Pridham v. Noel*, [2015] O.J. No. 3589 (Sm. Cl. Ct.) at para. 60.

The theoretical possibility remains for additional compensation to be awarded to self-represented litigants under rule 19.06, as compensation where a party has "unduly complicated or prolonged an action or has otherwise acted unreasonably". But such an award would then be subject to the significant limitations established by *Fong v. Chan*, *supra*.

Additional Case Law

In *Henderson v. Canada*, 2008 CarswellOnt 2279, 37 C.E.L.R. (3d) 306, 292 D.L.R. (4th) 114, 236 O.A.C. 65 (Ont. Div. Ct.) at para. 30, on appeal the self-represented plaintiff was awarded $400 under rule 19.05. He had done an extraordinary amount of work on the case including legal research on issues that were far from simple. His exemplary dedication was deserving of recognition under rule 19.05.

In *Clark v. Gahungu*, [2018] O.J. No. 548 (Sm. Cl. Ct.), a self-represented plaintiff succeeded after a two-day trial in obtaining judgment for damages of $5,485. He claimed costs

of $1,558 as compensation for representing himself, for lost time at work, for legal fees and disbursements incurred. The trial judge awarded $500 under rule 19.05 which was described as a comprehensive "self-representation fee", plus disbursements for a total of $770.

In *Miranovich v. Barmas*, [2018] O.J. No. 5710 (Sm. Cl. Ct.) at para. 24, the self-represented plaintiff was awarded $250 for inconvenience and expense under rule 19.05.

In *Wallis v. Gallant*, [2018] O.J. No. 1514 (Sm. Cl. Ct.), the self-represented defendants were successful at the third trial of the matter, after two prior trials at which they were represented by counsel and two prior appeals. Each defendant was awarded $500 for inconvenience and expense under rule 19.05.

In *Gordner v. 2384898 Ontario Ltd.*, [2017] O.J. No. 1366 (Sm. Cl. Ct.) at para. 7, it was held that the self-represented plaintiff was limited to costs of $500 under rule 19.05 regardless of the unusual length and complexity of trial and despite the fact he was a practicing lawyer. However the court went on to make a further award of penalty costs under rule 19.06 in the amount of $5,000. Both awards were then doubled due to an offer to settle, to $11,000, under rule 14.07(1) and s. 29. The trial had required seven days over a 12-month period.

Any and all caselaw decided prior to *Fong v. Chan*, *supra*, must be viewed with caution.

19.06 Penalty — If the court is satisfied that a party has unduly complicated or prolonged an action or has otherwise acted unreasonably, the court may order the party to pay an amount as compensation to another party.

O. Reg. 78/06, s. 39

Commentary: rule 19.06 provides for a penalty costs award described as compensation where a party has "unduly complicated or prolonged an action or has otherwise acted unreasonably".

Such awards are uncommon in practice. The fact that a party is unsuccessful in the litigation is not enough to support a penalty costs award. Unreasonable conduct is required and it must be unreasonable conduct in relation to the court case.

Like all costs awards, as a compensatory remedy it is limited by the concept of indemnity for a financial loss actually incurred due to unreasonable behaviour in the proceeding. A penalty costs award is not to be used like a punitive damages award but must have some rational relationship to the costs caused by the unreasonable conduct: *West End Tree Service Inc. v. Stabryla*, 2010 ONSC 68, 2010 CarswellOnt 12, 257 O.A.C. 265, [2010] O.J. No. 7 (Ont. Div. Ct.) at para. 25.

Obviously rule 19.06 significantly overlaps with the concept of a penalty costs award under s. 29. Arguably it is merely a reminder or restatement of the court's penalty costs power under s. 29, like rule 19.02. In practice however an award could be made under rule 19.06 without exceeding 15% of the amount claimed, under s, 29. In any event, s. 29 as a statutory provision takes precedence. If an award is made under rule 19.06 it cannot exceed 15% of the amount claimed unless the court also makes a finding that the penalty costs proviso in s. 29 applies.

Additional Case Law

In *Rooks v. Park'N'Fly*, [2019] O.J. No. 3984 (Sm. Cl. Ct.), the court made a penalty costs award jointly under s. 29 and rule 19.06, after the plaintiff was found to have acted unreasonably and extended what should have been a two-day trial by seven days. Costs were fixed at $15,000 plus disbursements and HST.

In *Stark v. Lewis*, [2019] O.J. No. 1940 (Sm. Cl. Ct.) at para. 43, the successful defendant was awarded $3,000 as a penalty costs under rule 19.06 and s. 29. The plaintiff had unreasonably failed to accept an offer to settle thereby causing a 4-day trial, and had wasted trial

time by pursuing an unmeritorious issue with a number of witnesses until that position was eventually abandoned midway through trial.

In *Mr. Towing Inc. v. Mercedes-Benz Financial Services Canada Corp.*, [2018] O.J. No. 5486 (Sm. Cl. Ct.); affirmed on other grounds 2020 ONSC 3223 (Div. Ct.), the defendant was granted two awards under rule 19.06: (i) $670 by reason of the plaintiff's unreasonable failure to make admissions before trial; and (ii) $1,470 by reason of the plaintiff's failure to accept a defence offer to pay $5,000 to settle the case. Prior to litigation the plaintiff had already recovered more than its statutory entitlement from an insurance company. Having turned down the $5,000 offer it proceeded to trial where its claim was dismissed. Those awards did not require a penalty costs award under s. 29 since the total costs apart from disbursements did not exceed 15% of the amount claimed.

In *Gordner v. 2384898 Ontario Ltd.*, [2017] O.J. No. 1366 (Sm. Cl. Ct.), the plaintiff was a practicing lawyer. After a seven-day trial over a period of 12 months, he was completely successful in recovering a judgment for $25,000 and was entitled to cost consequences under rule 14.07(1) by virtue of an offer to settle. The trial judge made an award of penalty costs under rule 19.06 in the amount of $5,000, which was then doubled due to an offer to settle, to $10,000.

Rule 20 — Enforcement Of Orders

20.01 Definitions — In rules 20.02 to 20.12,

"creditor" means a person who is entitled to enforce an order for the payment or recovery of money;

"debtor" means a person against whom an order for the payment or recovery of money may be enforced.

O. Reg. 78/06, s. 40

Commentary: The Rules of the *Small Claims Court* provide for a number of enforcement options for parties who are in possession of a judgment or order that has not been complied with.

The enforcement options available to a party with an enforceable order will vary and will likely be determined by a number of factors including:

- the type of order requiring enforcement;
- where the order originated;
- the creditor's knowledge about the whereabouts of the debtor(s); and/or
- the creditor's knowledge about the debtor(s) assets.

IMPORTANT: Section 29 of the *Crown Liability and Proceedings Act* (Federal) and section 21 of the *Proceedings Against the Crown Act* prohibit the issuance of executions against the Crown (Federal or Provincial).

Where a creditor requests the issuance of an execution against "Her Majesty the Queen in Right of Ontario," "Sa Majesté du chef de l'Ontario," or the Attorney General of Canada, they must be advised that the court is expressly prohibited from doing so in accordance with the applicable *Act* (above).

Proceedings against the Federal Crown may also include agencies of the Crown where an Act of Parliament authorizes proceedings to be taken in the name of the agency.

The *Rules of the Small Claims Court* do not limit the time period within which the following methods of enforcement may be issued:

- Certificate of Judgment;
- Writ of Delivery; or
- Notice of Examination.

If more than six years have elapsed since the judgment was made, the clerk shall *not* issue:

- a writ of seizure and sale of land [r. 20.07(2)],
- a writ of seizure and sale of personal property [r. 20.06(1.1)], or
- a Notice of Garnishment [r. 20.08(2.1)].

In these cases, the creditor would be required to obtain leave of the court in order to have the garnishment or writ(s) issued.

Service of Enforcement Documents at a Place of Employment

If a document is to be served personally on an individual pursuant to subrule 8.02(a), the document can be served by leaving a copy with the individual, unless the individual is under a disability. A person can be served with the document at their place of employment.

If a document is to be served by mail, Rule 8.07(1) states:

> 8.07 (1) If a document is to be served by mail under these rules, it shall be sent, by regular lettermail or registered mail, to the last address of the person or of the person's lawyer or agent that is,
>
> a. on file with the court, if the document is to be served by the clerk;
>
> b. know to the sender, if the document is to be served by any other person. O.Reg. 258–98, r. 8.07(1).

If the last address on file with the court or known to the sender is the place of employment, then the document can be served by mail at the place of employment.

If a document is to be served by courier, Rule 8.07.1(1) states:

> 8.07.1 (1) If a document is to be served by courier under these rules, it shall be sent by means of a commercial courier to the last address of the person or of the person's lawyer or agent that is on file with the court or known to the sender. O. Reg. 78/06, s. 15.

If the last address on file with the court or known to the sender is the place of employment, the document can be served by courier at the place of employment.

On occasion, litigants may inquire about the enforcement of multiple judgments that have been awarded on a single claim. For example, it is possible that a creditor may have received a default judgment with respect to an admitted portion of a claim (where the defendant defaulted on their payment terms) and a second judgment with respect to a portion of the claim that was disputed and awarded at trial.

Depending upon how a party obtained judgment, the affidavit for enforcement request may be the first time that the creditor is attending to the process of calculating pre-judgment or post-judgment interest or thinking about the post-judgment costs that they may be entitled to.

When a creditor obtains a judgment, their award may have included costs. These costs form part of the overall judgment and are subject to post-judgment interest.

Post-judgment interest does not accrue on subsequent costs unless they are assessed or fixed by the court. Where costs are assessed or fixed by the court, they may accrue interest from the date they are assessed or fixed.

Some of the fees or expenses that might be claimed by a creditor include:

- fees paid to issue a certificate of judgment, examination, garnishment, or writ;
- fees paid to the enforcement office for the filing of a writ; and
- costs associated with the service of a document.

Examples of costs or expenses that cannot be claimed by a creditor include, but are not limited to:

- costs associated with conducting searches or obtaining certificates (*e.g.*, Used Vehicle Information Packages, PPSA or RSLA searches, etc.);
- costs of obtaining appraisals of debtor property; and

cost of credit bureau searches.

Orders or Judgments for Filing and Enforcement

There are a variety of orders or judgments issued by agencies, boards, tribunals, other levels of court in Ontario, or other jurisdictions that may be filed and subsequently enforced in the Small Claims Court.

Certificate of Judgment from another Small Claims Court location

Where a Certificate of Judgment (Form 20A) is issued by the clerk of the originating court and filed with the clerk of another court, either a garnishment or examination of the debtor can be issued in the receiving court. Only the originating court can issue a certificate of judgment when requested to do so by the creditor.

A creditor may attend the court office and/or make a written inquiry to enforce a judgment by garnishment or through examination of the debtor. Where the debtor lives or carries on business outside of the jurisdiction of the originating court, the creditor *must* obtain a certificate of judgment from the originating court and file it at the court in the jurisdiction where the debtor lives or carries on business.

Restitution Orders under the *Criminal Code* of Canada

Pursuant to the *Criminal Code of Canada*, the Ontario Court of Justice or the Superior Court of Justice may make an order naming a person(s) entitled to recover monetary restitution pursuant to:

- A restitution order under section 738 or 739
- A condition of probation under section 732.1
- A condition of a conditional sentence under section 742.3

Where an amount that is ordered to be paid under sections 732.1, 738, 739 or 742.3 is not paid without delay, the person to whom the amount was ordered to be paid may, by filing the order, enter as a judgment the amount ordered to be paid in any civil court that has jurisdiction to enter a judgment for that amount. That judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings [s. 741(1) *CCC*].

Restitution Order under sections 738 or 739

The offender and the victim are each provided with a copy of the restitution order. The order may be filed at any time *after* the date it is issued by the originating criminal court. The order may be filed for enforcement in any civil court of appropriate monetary jurisdiction, either the Superior Court of Justice or the Small Claims Court. Upon filing, it is entered as a judgment of the court and is then enforceable in the same manner as a civil judgment of the court.

Orders under sections 732.1 or 742.3

When the court makes a restitution order under s. 738 or 739, the court may require the offender to pay the full amount specified in the order by a specific date or set out a schedule for periodic payments.

Where an amount that is ordered to be paid under s. 732.1, 738, 739 or 742.3 is not paid by the day specified in the order or if a periodic payment is missed, the offender is in default of the order and, the person to whom the amount or periodic payment was ordered to be paid may, by filing the order, enter as a judgment any amount ordered to be paid that remains unpaid under the order in any civil court in Canada that has jurisdiction to enter a judgment for that amount. That judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings [s. 741(1) CCC].

Monetary restitution orders will usually be filed in the county/district in which the court ordering the restitution is located.

A restitution order or the probation/conditional sentence order in which a condition provides for restitution may be accepted for filing at any court location provided that it falls within the proper monetary jurisdiction of the court. To issue a notice of garnishment or notice of examination, the order must be filed in the territorial division where the debtor resides or carries on business [r. 20.08(3), 20.10(1)].

The general guideline concerning Small Claims Court territorial divisions where these orders may be filed are:

- "reside" — the offender may be considered to reside, where he/she is incarcerated, or his/her usual residence prior to conviction and to where the offender may return;
- "cause of action" — may be considered to be the location where the offence was committed or where the restitution order was made.

The restitution order or the probation/conditional sentence order in which a condition provides for restitution bears post-judgment interest calculated from the date the order is filed as a judgment in the civil court. The rate is governed by the *Courts of Justice Act* and is the rate in effect on the date the order was made by the criminal court.

Where a restitution order or a probation/conditional sentence order in which a condition provides for restitution is made in a Canadian court outside Ontario, and it is filed with a court in Ontario for the purpose of enforcement, money owing under the order bears post-judgment interest at the rate, if any, applicable to the order given outside Ontario by the law of the place where it was given [s. 129(3) CJA].

No fees are payable for the filing of a restitution order or the issuance of enforcement processes. However, any out-of-pocket expenses incurred as a result of enforcement activity conducted (*e.g.*, costs of towing a seized vehicle) will be required to be paid to the enforcement office in advance of enforcement activity.

Where monetary restitution is ordered pursuant to a restitution order, or as a condition of a probation/conditional sentence order, and the amount is not paid, a victim/creditor may:

1. File three copies of the order of restitution

   It is not necessary for the victim/creditor to file certified copies of the restitution order or the probation/conditional sentence order in which a condition provides for restitution, in the civil court.

The filed order automatically becomes a judgment enforceable in the same manner as if it were rendered in a civil proceeding against the offender. All payments must be made to the civil court where the order was filed. Payments cannot be made to the criminal court where the order was issued after filing in the civil court.

Statutory Powers Procedure Act

Tribunals are, in effect, the adjudicative units that preside over individual cases, and their roles, powers, and responsibilities are referred to in both the *Statutory Powers Procedures Act* (SPPA) and the parent legislation governing a regulatory scheme (*e.g.*, *Residential Tenancies Act* is the parent legislation governing the Landlord and Tenant Board). The SPPA sets out basic procedural rules for most (but not all) of Ontario's tribunals, and also sets out where a Tribunal may itself make rules governing its proceedings.

In addition to the provisions of the SPPA, the "parent" statute of a tribunal (which establishes its existence and function) may establish procedural provisions effecting the tribunal and may also stipulate that some proceedings (usually minor ones) of a tribunal are exempted from the SPPA, either because those proceedings do not involve a statutory power of decision or because the parent statute specifically exempts those proceedings from the SPPA's application.

Neither the SPPA nor any specific administrative law regime has its own separate enforcement procedures. Most decisions and orders of tribunals that are not complied with must be enforced through the civil courts.

The most commonly filed orders authorized to be filed under section 19 of the SPPA are Landlord and Tenant Board orders issued under the *Residential Tenancies Act* and Orders to Pay issued under the *Employment Standards Act*.

Other statutes that provide for the issuance of an order that might be filed with a civil court of competent jurisdiction include, inter alia:

- *Mining Act*;
- *Human Rights Code*;
- Ontario *Works Act, 1997*; and
- Ontario *Disability Support Program Act, 1997*.

In accordance with the *Statutory Powers Procedures Act*, a certified copy of a tribunal's decision or order in a proceeding may be filed in the Superior Court of Justice by the tribunal or by a party, and on filing shall be deemed to be an order of that court and once entered is enforceable as such.

The *Landlord and Tenant Board* (LTB) is a tribunal, created under the *Residential Tenancies Act, 2006* (RTA).

Landlord and Tenant Board Orders (Board Orders) that include awards for monetary compensation may be enforced by filing a Board-certified copy of the Board Order with the Small Claims Court [s. 19(1), SPPA].

The party is not required to file the order where the debtor resides or carries on business, but as a practical matter should try to file the order in the appropriate territorial division to avoid having to obtain a Certificate of Judgment to permit enforcement by way of examination or garnishment in another jurisdiction.

The monetary jurisdiction of the Landlord and Tenant Board (LTB) is limited to the jurisdiction of the Small Claims Court and increased from $10,000.00 to $25,000.00 on January 1, 2010.

Board Orders are usually issued where a tenant is in arrears with respect to rent and/or required to compensate a landlord for damages to a rental unit. The landlord may seek compensation, termination of a tenancy agreement, and eviction of a tenant from premises. A tenant may also make applications to the LTB for compensation.

The Small Claims Court may proceed with processing/managing the filing and enforcement of a Board Order before, during, or after the enforcement office has carried out enforcement of the eviction portion of the Board Order.

If a creditor seeks to issue a Notice of Garnishment, the Landlord and Tenant Board Order would ideally be filed in the Small Claims Court where the debtor resides. Otherwise, the creditor would be required to request the issuance of a certificate of judgment directed to the clerk of the appropriate court location to facilitate issuance of the garnishment.

At the time of filing the Board Order, the creditor must also provide the name, address, and telephone numbers of the creditor, creditor representatives, and the debtor (if known). If the Board Order included per diem values, or multiple awards (rent plus compensation for damages), the creditor must set out the amount owing under the award and to set out the form of calculation used.

The LTB, tenants, or other interested parties may file documents (such as a Notice of Appeal, Notice of Void Order, etc.) with the Small Claims Court and possibly the enforcement office (re: evictions) that may have the effect of suspending or staying further enforcement of an order.

Section 74(4) of the RTA provides that a tenant debtor may avoid enforcement of the eviction portion of a Board Order at any time after the Board Order is issued but before the eviction portion of the Board Order is effective (enforceable), upon payment of amounts specified within the order to the LTB and/or the landlord/agent.

If the tenant debtor pays the amount specified in the order to the LTB, the staff of the LTB will issue a notice to the landlord and tenant acknowledging that the order is void (Notice of Void Order). The tenant or the LTB may submit a copy of this order to the court/enforcement office.

If the tenant debtor pays the amount specified to the landlord or part to the landlord and part to the LTB, the tenant debtor may file a motion with the LTB, without notice to the landlord, asking for the LTB to issue an order determining that the tenant debtor has paid the full amount due and confirming that the order is void. Such an order will be made without holding a hearing (Ex-parte Board Order).

A landlord may seek an order of the LTB to determine that the setting aside/ex parte ceases to apply and enforcement may proceed [s. 74(10), *RTA*].

Stay or Suspension of Order Pending Appeal

Any person affected by a Board Order can appeal the order to the Divisional Court.

An appeal to Divisional Court must be filed within 30 days of the date the order was issued.

When an appeal of an order is filed with the Divisional Court, the order is automatically stayed in accordance with section 25 of the *Statutory Powers Procedure Act* and r. 63.01(3) of the *Rules of Civil Procedure* and cannot be enforced until the disposition of the appeal, unless the Divisional Court lifts (or removes) the stay at the request of a party.

The debtor or their representative may deliver a copy of a Notice of Appeal with the Divisional court file number (to establish proof of filing with the Divisional Court) to the court office at any time [r. 63.01(1) — Ontario *Rules of Civil Procedure*].

Section 21.2 of the *Statutory Powers Procedures Act* authorizes a tribunal (which adopts rules of practice) to review its own orders. The scope of and procedures for such reviews are set out in the LTB Rules of Practice.

A person affected by an order may request a review if they believe the Member (adjudicator) made a serious error, such as an error of procedure or fact or an unreasonable application of discretion. The Board can issue a stay under Rule 28.9 of the LTB Rules of Practice related to a request to amend an order. Once the stay is issued, the landlord cannot enforce the

original order. As soon as the tenant receives the order (staying proceedings) from the Board, they are responsible for taking a copy of the order to the court/enforcement office.

A copy of the Stay of Order Pending Review is sufficient for the court/enforcement office to suspend all enforcement activity.

Ministry of Labour Orders/Notice

The Ministry of Labour (MOL) administers the *Employment Standards Act*, *2000* (ESA) and the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009* (EPFNA) conducts investigations into a variety of complaints made by employees in Ontario including complaints with respect to unpaid wages and other monetary amounts. Orders may be issued by the Ministry of Labour against an employer, director or other party who may have been found to have breached either the ESA or the EPFN. The Ontario Labour Relations Board ("OLRB"") may exercise the powers conferred on an employment standards officer when it is reviewing orders (or reviewing the refusal of an officer to issue an order). In accordance with s. 126(1) of the ESA and s. 40 of the EPFNA, the Director of Employment Standards (Director) may choose to seek enforcement of an order/notice by filing a copy of the order/notice (certified by the Director to be a true copy) with a court of competent jurisdiction. Upon filing, the order/notice may be enforced in the same manner as a judgment or order of the court.

The Order to Pay is an electronically generated document. Employment Standards Officers will sign statements to certify the document as a true copy in accordance with s. 126 of the *Employment Standards Act*.

The certificate of true copy should include information that will enable staff to confirm that it attaches to the Order to Pay, such as reference to:

- Order Number,
- Date Order Issued,
- Amount (Total Amount of Order), and
- Name of Debtor(s), including address details (if any).

Recent developments in the administration of these orders at MOL have resulted in amendments to the Act that permit MOL to authorize a "collector" to exercise the powers of the Director specified in the authorization to collect amounts owing under this Act.

MOL obtains the services of one or more collection agents/agencies to assist them in the collection of monetary awards under the Act. In accordance with OPS procurement policies, MOL must undergo the request for proposal process in order to identify viable collection service providers.

As stated above, in accordance with s. 127(1) of the *Employment Standards Act*, the Director of Employment Standards may authorize a collector to exercise specified powers under sections 125, 126, 130 and 135(3) in the collection of amounts owing under these sections of the Act or under an order made by a reciprocating state.

Reciprocal Enforcement of Judgments Act

An order originating from another Canadian province or territory (*other than Quebec*) may be filed in accordance with the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5., and may then be enforced. Creditors must obtain the permission of the court before the order may be filed in Ontario and accepted as an enforceable judgment.

Creditors may make the request for permission to file the order with the court in Ontario by filing a Notice of Motion and Supporting Affidavit [Form 15A] along with a certified copy of the order that the creditor wishes to file in Ontario at the Small Claims Court office where the creditor wants to have the order filed.

Within motion materials, the creditor must provide an explanation as to why they wish to file the order for enforcement in Ontario. Details about how the matter proceeded through the court in the other province or territory, including how and when the debtor was served with any documentation and if they defended themselves in the original matter, should also be provided by the creditor. The creditor is not required to attend at the motion, but may do so if they wish. In the event that the court grants the creditor the relief requested within their motion, the creditor will be notified by mail.

An order originating from an Ontario court may be filed and enforced in another Canadian province or territory (*other than Quebec*). About half of the provinces in Canada (Alberta, British Columbia, Manitoba, Newfoundland, Prince Edward Island, and Yukon) require the creditor to file a certificate to register an out-of-province order. The certificate is required if the application is being made without notice or ex parte and places the onus on the creditor to prove that the judgment should be registered. In provinces or territories where there is no certificate required, the onus is on the debtor to show to the court that the judgment should not be registered.

The requirements of each province are set out in the applicable legislation:

Alberta — Reciprocal Enforcement of Judgments Act, RSA c. R-6 (s. 2(3));

British Columbia — BC Court Order Enforcement Act, 1996, c. 78 (s. 29(3));

Manitoba — Reciprocal Enforcement of Judgments Act, 1987, CCSM c.J20;

New Brunswick — Reciprocal Enforcement of Judgments Act, c.R-3 (s. 2(3));

Nova Scotia — Reciprocal Enforcement of Judgments Act, 1989, c.338 (s. 3(4));

Newfoundland — Reciprocal Enforcement of Judgments Act, RSNL 1990 C.R-4 (s. 3(3));

Nunavut — Reciprocal Enforcement of Judgments Act, R.S.N.W.T. 1988, R-1 amended by S. Nu. 2002, c. 26, s. 47 and S. Nu. 2006 c.10, s. 6 (s. 2(5));

Northwest Territories — Reciprocal Enforcement of Judgments Act, R.S.N.W.T. 1988, R-1 (s. 2(5));

Prince Edward Island — Reciprocal Enforcement of Judgments Act, R-6 (s. 2(3));

Yukon — Reciprocal Enforcement of Judgments Act, 2002, c. 189. (s. 2(3)); and

Saskatchewan — Reciprocal Enforcement of Judgments Act, 1996. C. R-3.1 (s. 3(5)).

Note: Some provinces may require a certified copy of the court order to accompany the original certificate. Where the creditor wishes to file and enforce an Ontario court order in another Canadian province or territory which requires the creditor to file a certificate to register an out-of-province order, *the creditor will*:

1. Attend the court office and/or make a written request to have a certificate issued.
2. Provide two copies of a completed certificate.
3. Pay the required fee in accordance with the SCC Schedule of Fees.

Noël et Associés, s.e.n.c.r.l. v. Sincennes, 2012 ONSC 3770, 2012 CarswellOnt 9810, *(*sub nom. *Noël et Associés, S.E.N.C.R.L. v. Sincennes)* 112 O.R. (3d) 138, 41 C.P.C. (7th) 175, Kane J. (Ont. S.C.J.)

A holder of foreign judgment from a non-reciprocating state for payment of money should be brought in Small Claims Court rather than in Superior Court of Justice where foreign judgment is for payment of money in an amount within monetary jurisdiction of Small Claims Court.

The Supreme Court in *Morguard Investments Ltd. v. De Savoye* (1990), 1990 CarswellBC 283, 1990 CarswellBC 767, EYB 1990-67027, [1990] 3 S.C.R. 1077, 52 B.C.L.R. (2d) 160,

46 C.P.C. (2d) 1, 76 D.L.R. (4th) 256, 15 R.P.R. (2d) 1, [1991] 2 W.W.R. 217, 122 N.R. 81, [1990] S.C.J. No. 135 (S.C.C.) held that the courts in one province should give full faith and credit to the judgments given in another province or territory as long as that court has appropriately exercised jurisdiction in the action. The Supreme Court rejected the argument that a foreign judgment may not be enforced in another province unless the defendant had attorned to the jurisdiction of the foreign court.

The Court of Appeal in *Lax v. Lax*, 2004 CarswellOnt 1633, 70 O.R. (3d) 520, 50 C.P.C. (5th) 266, 239 D.L.R. (4th) 683, 3 R.F.L. (6th) 387, 186 O.A.C. 20, [2004] O.J. No. 1700 (Ont. C.A.); additional reasons 2004 CarswellOnt 5343, 75 O.R. (3d) 482, 4 C.P.C. (6th) 194, 247 D.L.R. (4th) 1, 12 R.F.L. (6th) 112, [2004] O.J. No. 5146 (Ont. C.A.) dealt with the applicability of a limitation period and the enforcement of a foreign judgment. In considering that issue, the court considered the nature of an action to enforce a judgment debt for the payment of money. I will return to this decision below.

Quebec is not a reciprocating state. A Quebec judgment may not be registered in and enforced here as if obtained in Ontario. The holder of that Quebec judgment must commence an Ontario proceeding.

Proceedings in Ontario for debt owing in the amount of $35,000 or less, based on a foreign judgment from a non- reciprocating state, should be brought by action in the Small Claims Court.

Line Fences Act

The purpose of the *Line Fences Act* is to provide a procedure for the resolution of line fence disputes between the owners of adjoining properties. Line fences are fences that mark the boundary between properties; they are often referred to as boundary or division fences as well. The Act does not deal with disputes about fences that are not on a boundary line.

Owners of properties who are unable to reach agreement about a fence line may apply to their local municipality to have the dispute arbitrated by three fence-viewers who are appointed by municipal council or, in areas where appropriate municipal organization does not exist, the ministry of municipal affairs and housing will provide assistance.

Proceedings Under Section 68 of the *Provincial Offences Act*

Under the provisions of the *Provincial Offences Act*, when an unpaid fine imposed under the Act is in default it may be collected by means of civil enforcement. The Act further provides that enforcement may be carried out in a court of competent jurisdiction.

Multiple fines against the same person can either be issued on separate certificates, or on one certificate with an attached schedule indicating the different fines.

Effective December 15, 2009 section 68(2) of the *Provincial Offences Act* has been repealed. Section 68(2) previously stated: "*A certificate shall not be filed under subsection (1) after two years after the default in respect of which it is issued*." Therefore, the 2 year limitation period for filing POA Certificates of Defaults under section 68(2) of the POA has been repealed.

> 68. (3) Where a certificate has been filed under subsection (1) and the fine is fully paid, the clerk shall file a certificate of payment upon which the certificate of default is discharged and, where a writ of execution has been filed with the sheriff, the clerk shall file a certificate of payment with the sheriff, upon which the writ is cancelled.

Provincial Offences Act above is the clerk of the Ontario Court of Justice (POA court).

Section 70 of the *Provincial Offences Act*

> 70. (1) Where the payment of a fine is in default and the time for payment is not extended or further extended under subsection 66(6), the defendant shall pay the administrative fee prescribed by the regulations.

(2) For the purpose of making and enforcing payment, a fee payable under this section shall be deemed to be part of the fine that is in default.

Section 68 of the *Provincial Offences Act* permits the filing of the certificate "in a court of competent jurisdiction." Provided the amount owing does not exceed the monetary jurisdiction of the Small Claims Court, the certificate would be filed in the territorial division where the defendant resides or carries on business [r 6.01(1)]. The certificate could, however, be filed in the territorial division where the Ontario Court of Justice is situated if the only enforcement process to issue was a writ of seizure and sale of lands.

All funds recovered pursuant to the Certificate are payable to the creditor Municipal Partner and should be paid over to that Municipal Partner (at the address on the Certificate of Default). See sections 165(4) and 165.1(2) and (3) of the *Provincial Offences Act*.

The Certificate of Default does not become a court order until it is filed in the court of competent jurisdiction, therefore, the Affidavit for Enforcement Request should list the Small Claims Court location as the location where the order was made (section 2 on Form 20P).

Jurisdiction

The initial filing of the Certificate of Default must take place in the court having jurisdiction where the land affected by the award is located. Once the initial filing takes place, the creditor may then request the issuance of a Certificate of Judgment and file it in the small claims court location where the debtor resides and carries on business for the purpose of having any Notices of Garnishment or Notices of Examination issued.

The amounts awarded within the Certificate of Default bear post-judgment interest at a rate established according to the provisions of the *Municipal Act* (Section 412). The filing party should have the municipal clerk endorse the applicable rate of interest on the certificate.

Enforcement of Orders

Section 29 of the *Crown Liability and Proceedings Act* (Federal) and section 21 of the *Proceedings Against the Crown Act* prohibit the issuance of executions against the Crown (Federal or Provincial). Proceedings against the Federal Crown may also include agencies of the Crown where an Act of Parliament authorizes proceedings to be taken in the name of the agency.

Issuing a Warrant of Committal — Small Claims Court proceeding

The only time that a warrant of committal will be issued in Small Claims Court proceedings by Superior Court of Justice staff will be when the summoned person attends the contempt hearing heard by a Superior Court judge and the judge orders a warrant of committal. A warrant of committal would then be required immediately to take the person to a correctional institution.

If the judge orders a warrant of committal when the person is not in attendance, the warrant is not immediately required by police services. In this case, the file will be returned to the originating Small Claims Court and the required paperwork will be prepared and distributed from that office.

Issuing a Warrant for Arrest (Contempt) — Small Claims Court proceeding

If a Superior Court judge presiding over a Small Claims Court contempt hearing orders a Warrant for Arrest (Contempt), the Superior Court of Justice courtroom registrar will prepare the Warrant for Arrest and present it to the Superior Court of Justice judge for signature. The original signed warrant, the corresponding endorsement record and the file will then be returned to the originating Small Claims Court office for distribution in accordance with usual practice.

The court where the judgment is made is called the originating court. Sometimes, the debtor lives or carries on business within the area of a court other than the originating court. In this case, before the creditor can get either a notice of garnishment or notice of examination from the court in that jurisdiction, a Certificate of Judgment [Form 20A] is required. The creditor may also request the issuance of a certificate of judgment if they wish to have it for their records or, where required, as proof of judgment (*e.g.*, may be required by sheriff as proof of judgment where sale of land is requested). The certificate of judgment must be requested and issued by the originating court and filed in the court office where the judgment will be enforced. There is a fee for issuing each certificate of judgment.

If you are the creditor, it is your responsibility to contact the court to advise that the debt has been paid in full and to stop or withdraw any enforcement steps. If the debt is paid in full under a notice of garnishment, you must immediately serve a Notice of Termination of Garnishment [Form 20R] on the garnishee and on the clerk.

If you are the debtor, once you have paid all you owe to the creditor under the judgment, you can fill out a Request for Clerk's Order on Consent [Form 11.2A]. Each party must sign the form in the presence of his or her witness.

If the creditor is unavailable or unwilling to complete the notice of termination of garnishment form or sign the Request for Clerk's Order on Consent [Form 11.2A], you can bring a motion for an order stating that payment has been made in full satisfaction of the debt.

A creditor can request an examination hearing if there is a default under an order for the payment or recovery of money.

At the hearing, the debtor or other person should be prepared to answer questions about the debtor's employment, any property the debtor owns such as motor vehicles or land, and about all bank branches where the debtor has an account, including accounts which may be held jointly with another person.

A judge may also make orders at an examination, such as an order as to payment.

The creditor and the person to be examined (usually the debtor) *must* attend the examination. Lawyers or agents may also attend. The examination will be conducted under oath. The public will not be allowed to attend unless the court orders otherwise.

The creditor can begin the examination process by filing a Notice of Examination [Form 20H] indicating the person to be examined (usually the debtor). If the debtor is a company, name the person who has the information you need, an officer or director of the corporation, a partner in the partnership or the sole proprietor.

An Affidavit for Enforcement Request [Form 20P] is necessary in support of a request for a notice of examination.

The notice of examination is served on the debtor or other person to be examined at least 30 days before the hearing. If the debtor to be examined is an individual, you will also need to serve a blank Financial Information Form [Form 20I]. If the debtor is a business, no financial information form is required.

The Affidavit of Service [Form 8A] is necessary to prove service on the debtor or person to be examined. The notice of examination must be served by personal service or an alternative to personal service.

The debtor (or other person) can be examined in relation to:

- the reason for non-payment;
- the debtor's income and property;
- the debts owed to and by the debtor;

- the disposal the debtor has made of any property either before or after the order was made;
- the debtor's present, past and future means to satisfy the order;
- whether the debtor intends to obey the order or has any reason for not doing so; and
- any other matter pertinent to the enforcement of the order.

A debtor who is an individual must fill out the Financial Information Form [Form 20I] and serve it on the creditor before the hearing. A financial information form provides a snapshot of the debtor's income, expenses, debts and assets. The form is *not* filed with the court.

If, at the examination, the court orders a periodic payment schedule, the debtor must make the payments in the amounts and on the dates ordered in the schedule. As long as those periodic payments are made, the creditor cannot do anything else to enforce the judgment, other than issue a writ of seizure and sale of land.

If the debtor fails to make a payment or makes only a partial payment, you can serve on the debtor and file with the court a Notice of Default of Payment [Form 20L] and an Affidavit of Default of Payment [Form 20M]. An order for periodic payment terminates 15 days after you serve the debtor with the notice of default of payment, unless a Consent [Form 13B] in which you waive the default, is filed with the court within the 15-day period.

If the debtor or other person attends the examination but refuses to produce documents or answer questions, the judge may order a contempt hearing before a judge of the Small Claims Court.

The creditor must serve the notice on the debtor or other person who has been ordered to attend the contempt hearing by means of sworn (or affirmed) and filed with the Small Claims Court at least seven days in advance of the hearing date.

The creditor and the debtor (or other person) must attend the contempt hearing.

If the debtor (or other person) does not attend the examination hearing, the judge may order the person to attend a contempt hearing to determine whether he or she is in contempt of court. The contempt hearing will take place before a judge of the Superior Court of Justice.

At the contempt hearing, you will be given an opportunity to explain your actions and any reasons for them. The judge may order you to attend an examination hearing. The judge may also make an order that you are to be jailed for up to 40 days for contempt of court. If you do not attend the contempt hearing, orders may be made against you or a warrant for your arrest may be issued.

If the judge orders the debtor or other person to be jailed for contempt of court, the clerk will issue a Warrant of Committal [Form 20J] directed to the police. The warrant authorizes the police to take the individual named in the warrant to the nearest correctional institution and hold him or her there for the time specified in the warrant.

Limitation Period for Enforcement

The *Rules of the Small Claims Court* do not limit the time period within which the following methods of enforcement may be issued:

- Certificate of Judgment;
- Writ of Delivery; or
- Notice of Examination.

If more than six years have elapsed since the judgment was made, the clerk shall *not* issue:

- a writ of seizure and sale of land [r. 20.07(2)],

- a writ of seizure and sale of personal property [r. 20.06(1.1)], or
- a Notice of Garnishment [r 20.08(2.1)].

The creditor is required to obtain leave of the court in order to have the garnishment or writ(s) issued. The creditor must file a motion to make this request and is required to attend at a motion hearing and advise the court as to why there has been no enforcement within six years of obtaining judgment.

The court will make a determination as to how or if the creditor will be allowed to proceed with enforcement of their judgment or order.

Multiple Judgments

A creditor may have received a default judgment with respect to an admitted portion of a claim (where the defendant defaulted on their payment terms) and a second judgment with respect to a portion of the claim that was disputed and awarded at trial.

The prescribed forms do not contemplate the enforcement of multiple judgments within one form. In the event that multiple judgments are included within an Affidavit for Enforcement Request (Form 20P), the creditor should provide a copy of the affidavit for enforcement and/or attached pages along with the writ of seizure and sale of land or personal property when filing with the enforcement office.

Assignment of Judgments

At any stage of a proceeding the interest or liability of a party may be transferred to another person by assignment, bankruptcy, death, or other means. The court may decide to order that the proceeding be continued by or against the other person.

The Rules of the Small Claims Court do not permit the clerk to assign the judgment (subrule 1.03(2)). The assignee must bring a motion in Small Claims Court seeking an order of the court. If the order is granted, the assignees can then proceed with enforcement. If there is an assignment of judgment under *Motor Vehicle Accident Claims Act*, section 9(2) of the Act indicates that upon filing (lodging) a copy of the assignment of judgment, certified by the Director of the Motor Vehicle Accident Claims Fun to be a true copy, with the clerk of the court in which the judgment was obtained, the Minister of Finance shall be deemed to be the judgment creditor. No motion is required to obtain an assignment of judgment.

Costs, Interest and Calculations

Depending upon how a party obtained judgment, the affidavit for enforcement request must calculate pre-judgment or post-judgment interest or thinking about the post-judgment costs that they may be entitled to.

Costs — Subsequent Costs

When a creditor obtains a judgment, the award may have included costs. These costs form part of the overall judgment and are subject to post-judgment interest.

The post-judgment interest rate is defined within section 127(1) of the *Courts of Justice Act*. Interest may not be awarded in accordance with section 127(1) of the *Courts of Justice Act* where there may be a right to receive post-judgment interest at a different rate.

Calculation of Post-judgment Interest

Unless otherwise directed by the court in its judgment, post-judgment interest must be calculated from the date of the order. This applies where the court makes an order or judgment, but releases reasons on a later date. If the judgment is reserved, the interest is calculated from the date the judgment is released.

"Date of the order" means the date the order is made even if the order is not issued or enforceable on the date [s. 127(1), CJA].

Post-judgment interest is calculated on the total amount of the order including prejudgment interest and costs. Post-judgment interest is payable on prejudgment interest included in the judgment because the prejudgment interest is "money owing under an order."

Interest continues to accrue until the judgment is paid but is to be calculated and recalculated (as the case may be) on the value of the judgment, pre-judgment interest, and costs awarded at the time of judgment as payments are made by the debtor.

Notice of Garnishment

In this process, an affidavit refers to an Affidavit for Enforcement Request (Form 20P).

Where a debtor does not pay a debt pursuant to a judgment, in order to make a demand of money owed to the debtor by someone else (*e.g.*, garnishment of bank accounts, wages or money owed through a contract), a creditor must obtain a notice of garnishment in the jurisdiction where the debtor resides or carries on business. The person or company to whom the notice is sent is the garnishee.

A Notice of Garnishment (Form 20E) remains in force for six years from the date of its issue and for a further six years from each renewal [r. 20.08(5.1)].

The creditor may first have to obtain a certificate of judgment in the originating court and file it in the court in the jurisdiction where the debtor resides or carries on business.

If a creditor is considering the garnishment of wages or amounts owing to a debtor by the Canadian Armed Forces, or the Federal/Provincial Crown, there are special time limits and additional steps that the creditor will be required to take.

The garnishee is liable to pay to the clerk any monies he or she owes to the debtor, up to the amount shown in the notice of garnishment, within 10 days after service of the notice on the garnishee or 10 days after the debt becomes payable, whichever is later [r. 20.08(7)]. A debt the garnishee owes to the debtor includes:

- a debt payable at the time the notice of garnishment is served;
- a debt payable (whether absolutely or on the fulfilment of a condition) within six years after the notice is served and within six years after it is issued [r. 20.08(8)].

A garnishee who admits owing a debt to the debtor shall pay it to the clerk in the manner prescribed by the notice of garnishment, subject to section 7 of the *Wages Act* [r. 20.08(9)]. The amounts paid into court shall not exceed the portion of the debtor's wages that are subject to garnishment under section 7 of the *Wages Act*. Interpretation and compliance with the *Wages Act* is the responsibility of the garnishee.

If more than six years have elapsed since the judgment was made, the clerk shall not issue a notice of garnishment [r. 20.08(2.1)]. The party requires leave of the court in order to have the writ issued.

Where a notice of garnishment is requested following the filing of a certificate of default under the *Provincial Offences Act*, the clerk shall not issue the garnishment if more than six years have elapsed since the date of the earliest date of the default for which the certificate was issued. The party requires leave of the court in order to have the garnishment issued.

Where a notice of garnishment is requested following the filing of a tribunal order under the *Residential Tenancies Act* or the *Employment Standards Act*, the clerk shall not issue the garnishment if more than six years have elapsed since the date tribunal order is effective. The party requires leave of the court in order to have the garnishment issued.

In the event that an order granting leave to issue is made, the notice of garnishment must be issued within one year after the date of the order, otherwise the order granting leave ceases to have effect and the creditor must obtain another order from the court by way of a subsequent motion [r. 20.08(2.2.)].

Garnishing the Wages of Federal/Provincial Employees

There are specific time limits and extra steps that must be taken if a creditor intends to garnish the wages of an employee of the federal government, a member of the Canadian Armed Forces, or an employee of the provincial government.

Garnishing the wages of an employee of the Federal Government:

The federal government requires information in addition to the basic information provided within the notice of garnishment before they will honour a garnishment request.

The creditor must obtain and complete a form called an "Application to Garnishee." The Application to Garnishee form is available online at http://laws.justice.gc.ca/eng/SOR-83-212/page-4.html#anchorsc:1, or by contacting the Garnishment Registry at the address provided below.

The creditor must serve the certified copy of their order or judgment, the issued notice of garnishment, and the completed Application to Garnishee on the federal government at the Garnishment Registry Office, which is located in the Department of Justice Canada — Ontario Regional Office, The Exchange Tower, 130 King St. West, Suite 3400, Box 36, Toronto, Ontario M5X 1K6.

The creditor must serve the aforementioned documents on the federal government within 30 days of the notice of garnishment being issued by the clerk of the Small Claims Court, otherwise the federal government may consider the garnishment invalid in accordance with the *Garnishment, Attachment and Pension Diversion Act*, section 6(2).

In accordance with the *Garnishment, Attachment and Pension Diversion Act*, section 10, the federal government has a minimum of 15 days to respond to the notice of garnishment.

For more information about the process of garnishing the wages of a federal government employee, see http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12138.

Garnishing the wages of a member of the Canadian Armed Forces:

The creditor must give the debtor's commanding officer notice of their intention to issue a garnishment at least 30 days before serving the notice of garnishment. If the creditor does not know the identity of the debtor's commanding officer, the creditor should be advised to contact the Office of the Judge Advocate General — National Defence Headquarters for instructions (613) 992-6420.

A commanding officer has a minimum of 30 days from the date that they are served with the notice of garnishment to respond.

For more information about garnishing the wages of a member of the Canadian Armed Forces, see http://www.admfincs.forces.gc.ca/qro-orf/vol-03/doc/chapter-chapitre-207.pdf.

Garnishing the wages of an employee of the provincial government (Ontario):

The *Proceedings Against the Crown Act*, R.R.O 1990, Reg. 940, requires that a Statement of Particulars must be served along with the issued notice of garnishment.

> 2. The creditor would proceed to have their notice of garnishment issued by the clerk of the court in the usual way.
>
> 3. The creditor must complete a form called a "Statement of Particulars." This regulated form is contained within the *Proceedings Against the Crown Act*, R.R.O 1990, Reg. 940.

In accordance with the *Proceedings Against the Crown Act*, R.R.O 1990, Reg.940, section 2, the province had 30 days from the date that service is effective, in which to respond to the notice of garnishment.

Writ of Seizure and Sale of Personal Property

If the debtor has been ordered by the court to pay the creditor money but he or she has not paid, the creditor can ask the enforcement office to take specific personal possessions belonging to the debtor and sell them at public auction so that the money can be used to pay the judgment debt. The costs of this procedure can be relatively high. The creditor risks paying these costs with no chance of recovery if the debtor does not have any goods worth seizing and selling, and the other enforcement remedies fail.

Under the *Execution Act*, a debtor is entitled to certain exemptions from seizure of personal property such as:

- Clothing (up to a certain amount);
- Household furniture, utensils, equipment, food and fuel (up to a certain amount);
- Tools and instruments used in the debtor's business (other than tillage of the soil or farming)(up to a certain amount);
- Tools, books and instruments used for the tillage of the soil or farming and livestock, fowl, bees and seed (up to a certain amount); and
- One motor vehicle worth less than the specified amount.

The debtor has a right to choose the goods that make up the exemptions.

If the creditor is requesting that a motor vehicle, snowmobile or boat be seized, he or she must also provide the court with proof that the following searches have been made:

> *Personal Property Security Act* search and *Repair and Storage Liens Act* search to show whether there are any liens or other securities registered against the vehicle, the amounts of the liens or securities, and whether there is enough equity in the vehicle for it to be seized and sold.

The writ will expire six years from the date it is issued, unless it is renewed for an additional six-year period.

Writ of Seizure and Sale of Land

A creditor can file a writ of seizure and sale of land against a debtor in any county or district where the debtor may own land (including a house). The writ would encumber any land presently owned or land which may be purchased in the future by the debtor in the county(ies) or district(s) where the writ is filed. If you wish to enforce the writ in more than one location, you must issue a separate writ for each location and file it there.

If another creditor has a writ filed in the same enforcement office against the same debtor and is actively enforcing it, everyone will share, on a pro-rata basis (divided on a proportionate basis depending on the amount of each debt), in any money paid into the enforcement office (sheriff) from any enforcement activity taken against the debtor.

The creditor does not have to wait for the debtor to decide to sell the land. Four months after filing the writ with the enforcement office, someone may direct the enforcement office (sheriff) to seize and sell the land, but the actual sale cannot proceed until the writ has been on file for six months. The enforcement office can only sell the portion of the land that the debtor actually owns. Mortgages, liens, and encumbrances may reduce the value of the property that is available to be seized and sold by the enforcement office. Creditors should determine, before proceeding with this process, that the debtor actually has equity (difference between what a property is worth and what the owner owes against that property) available to be sold. The writ will expire six years from the date it is issued, unless you renew it for an additional six-year period. There is a fee to file and renew a writ.

Writ of Delivery

When a person or business has personal property that does not belong to him or her and refuses to return it to the rightful owner, the owner can request a court order for a writ of delivery. This writ authorizes enforcement staff to take the specific items and return them.

The court requires a full description of the personal property, *i.e.*, serial numbers, make, model, photographs (if available), the exact location where the items can be found and proof of ownership, where applicable.

Once the judge grants the order for a writ of delivery, an Affidavit for Enforcement Request [Form 20P] and Writ of Delivery [Form 20B] must be filled out.

If the personal property referred to in a writ of delivery cannot be found or taken by an enforcement officer, a notice of motion can request an order directing an enforcement officer to seize any other personal property owned by the debtor.

Consolidation Order

This order would combine the judgment debts and set up a schedule of repayments for all creditors named in the order. As long as payments are made as ordered, no other enforcement measures can be taken to collect the debts included in the order, except each creditor could seek issuance of a Writ of Seizure and Sale of Land [Form 20D] and file it with the enforcement office (sheriff).

A Notice of Motion and Supporting Affidavit [Form 15A] listing the judgments, debts, income from all sources and any family support obligations is the process for this order. The notice of motion and affidavit must be served on each creditor at least seven days before the scheduled motion date.

A judge will hear evidence about income and expenses and may make an order combining debts and order payments to be made in installments.

A consolidation order will terminate immediately if:

- an order for payment of money is obtained against you for a debt incurred after the date of the consolidation order; or
- if you are in default under the terms of the order for 21 days.

If the order is terminated, no further consolidation order can be made until a year has passed from the date of the termination.

Enforcement Improvements

If you are the plaintiff and you win the case, the court may order the defendant to pay you money. The defendant (often referred to as the "debtor" after judgment) may pay right away, or you may give the debtor more time to pay. If the debtor does not pay, there are steps the creditor can take to get the money. This is called enforcing the judgment.

Changes to the rules for enforcing a judgment include the following:

1. — Writ of Seizure and Sale of Personal Property — Holding Period

When a debtor has been ordered by the court to pay the creditor money, but fails to do so, the creditor may ask the clerk of the court to issue a writ of seizure and sale of personal property. The creditor can then take the writ to the enforcement office.

The enforcement office may enforce the writ by taking personal possessions belonging to the debtor and selling them at public auction. The money from the sale would be used to pay the judgment debt owed to the creditor and any costs associated with the enforcement steps taken. The process governing the writ of seizure and sale of personal property is set out in rule 20.06.

Before, subrule 20.06(6) required the enforcement office to hold seized personal property for at least 30 days before it could be sold. Now, under the amended subrule 20.06(6), the holding period has been reduced to ten days. This reduces the holding costs charged by the enforcement office.

Order for a Contempt Hearing

Examination Hearing

A creditor can request an examination hearing if there is a default under an order for the payment of recovery of money. See r. 20.10.

An examination of the debtor gives both the court and the creditor information about the debtor's financial situation. It may be that the creditor wants to enforce an order though garnishment and needs to know where the debtor works or banks. The examination may give the creditor the information needed to request a garnishment. The creditor can also examine a person other than the debtor to get information about the debtor's assets.

The creditor and the person to be examined (usually the debtor) *must* attend the examination. Lawyers or agents may also attend. The examination will be conducted under oath. The public will not be allowed to attend unless the court orders otherwise.

The debtor or any other person to be examined should be prepared to answer questions and provide documents in relation to the examination.

A debtor who is an individual (*i.e.*, not a corporation) must fill out the Financial Information Form [Form 20I] and serve it on the creditor before the hearing. The debtor must also bring a copy of the completed form to the hearing and give it to the judge. A financial information form provides a snapshot of the debtor's income, expenses, debts and assets. The form is *not* filed with the court. The debtor must also bring to the hearing documents that support the information given in the form.

If, at the examination, the court orders a periodic payment schedule, the debtor must make the payments in the amounts and on the dates ordered in the schedule. As long as those periodic payments are made, the creditor cannot do anything else to enforce the judgment, other than issue a writ of seizure and sale of land.

What Can a Creditor Do if the Debtor Fails to Make a Payment Under a Periodic Payment Order or Makes a Partial Payment?

If the debtor fails to make a payment or makes only a partial payment, you can serve on the debtor and file with the court a Notice of Default of Payment [Form 20L] and an Affidavit of Default of Payment [Form 20M]. An order for periodic payment terminates 15 days after you serve the debtor with the notice of default of payment, unless a Consent [Form 13B] in which you waive the default, is filed with the court within the 15-day period. You can then proceed with another method of enforcement.

If the debtor or other person attends the examination but refuses to produce documents or answer questions, the judge may order the person to attend a contempt hearing to determine whether the person is in contempt of court.

If the debtor (or other person) does not attend the examination hearing, the judge may order the person to attend a contempt hearing to determine whether the person is in contempt of court.

If the judge orders the debtor or other person to be jailed for contempt of court, the clerk will issue a Warrant of Committal [Form 20J] directed to the police. The warrant authorizes the police to take the individual named in the warrant to the nearest correctional institution and hold him or her there for the time specified in the warrant.

If you are found in contempt of court at the contempt hearing and a warrant of committal is issued, you or your representative may ask the court to set aside the warrant and the finding

of contempt by filing a Notice of Motion and supporting Affidavit [Form 15A] at the Small Claims Court office. In your supporting affidavit and at the motion hearing, explain to the judge the reasons why the contempt order should be set aside.

Contempt Hearings for Wilful Failure to Attend an Examination

Previously, a contempt hearing for wilful failure to attend an examination in Small Claims Court was required to be heard before a judge of the Superior Court of Justice. As of January 1, 2011, these hearings may also be heard by a deputy judge or provincial civil judge.

Also, as of January 1, 2011, where the court finds a person in contempt of court for wilful failure to attend an examination, the maximum penalty has been reduced from 40 days to 5 days in jail.

Execution Act

The *Execution Act* is the primary legislation in Ontario affecting the seizure and sale of assets. Key sections of the *Execution Act* Include:

Categories of Exemption from Seizure	Section 2 sets out six categories of chattels that are exempt from seizure under any writ issued out of any court. Exemptions from seizure generally exist to permit debtors to carry on the basics of daily life and to engage in their business in order to continue to earn income. (See Section 5: Exemptions From Seizure)
Sale and Refund of Amount of Exemption	Section 3 sets out circumstances in which certain chattels against which the debtor claims an exemption may nonetheless be seized. In those cases a refund of the exemption amount will be paid to the debtor from the sale proceeds. (See Section 5.1.3: Tools of Trade and Section 5.1.4: Livestock and Farm Tools)
No Exemption for Corporate Debtor	Section 7(4) provides that the exemptions in the *Execution Act* are not available to a corporate debtor.
Disputes	Section 8(1) provides for debtors or creditors to apply to the Superior Court of Justice to determine whether a chattel is eligible for exemption from seizure, or whether chattels claimed to be exempt exceed the value of the exemption. Section 8(2) provides that a sheriff may apply to the Superior Court of Justice for direction on matters arising from exemptions under the *Execution Act*.
Seizure and Sale of Land	Section 9 allows for the seizure and sale of the lands of the execution debtor, including land held in trust for the debtor, and including any interest of the debtor in lands held in joint tenancy.
Seizure and Sale of Shares or Dividends	Section 14 contains provisions for the seizure and sale of shares or dividends. (See Section 10.26: Seizure Of Specific Goods — Shares and Dividends and Section 20.8: Sale of Shares and Dividends)
Seizure and Sale of Rights in Chattels	Section 18 provides for the seizure and sale of the debtor's interests in chattels. The sale conveys the debtor's interest as of the time the execution was delivered to the sheriff (or for Small Claims court at the time of seizure).

Mortgages	Section 19 provides for the seizure of money and securities. Sections 23 and 24 contain specific procedures for the seizure and sale of mortgages. (See Section 10.19: Seizure — Specific Assets — Mortgages and Section 20.5: Sale of Mortgage)
Reasonable Force	Section 20 sets out the circumstances for using reasonable force during a seizure.

Repair and Storage Liens Act

The *Repair and Storage Liens Act* deals with the resolution of disputed amounts for the repair or storage of tangible articles other than fixtures. The enforcement office is required to seize an article subject to a repair and storage lien in two circumstances:

- After a non-possessory lien claimant registers the claim under the *Personal Property Security Act*, he or she may give the enforcement office a direction to seize the article to which the lien applies; or
- Where the owner of the article or other lawful applicant has paid the disputed amount into court (or posted security) and the lien claimant does not return the article, the applicant may obtain a writ of seizure from the clerk of the court and file it with the enforcement office.

Key sections of the *Repair and Storage Liens Act* include:

Direction to Seize	Section 14(1) provides for a non-possessory registered lien claimant to deliver to the sheriff a direction to seize the article. (See Section 11.5.9: Enforcement of Non-Possessory Liens — Direction to Seize)
Requirement to Seize	Section 14(2) requires the sheriff to seize the article and deliver it to the lien claimant after receiving a copy of the registered claim for lien and a direction to seize.
Costs of Seizure	Section 16(1) provides that where a lien claimant has sold an article, part of the proceeds go to the costs of seizure.
Payment of Sale Proceeds Into Court	Section 16(2) provides for a lien claimant to pay sale proceeds into court where there is a question about the right of any person to share in the proceeds.
Application to Determine Questions	Section 23(1) states that any person may apply to court to determine questions about seizure, sale by the lien claimant, the distribution of proceeds, the amount of the lien, the right to a lien, or other matters. (See Section 11.7.1: Application to Determine Questions)
Application to Resolve Dispute and Return Article	Section 24 provides for the owner or other lawfully entitled person to apply to the court to recover possession of the article, and for the payment of funds into court or posting security. (See Section 11.7.2: Application to Resolve Dispute and Return Article)
Writ of Seizure	Section 24(9) provides for an applicant to obtain a writ of seizure where the respondent does not release an article as required. (See Section 11.7.2: Application for Return of Articles — Writ of Seizure for Non-Return of Article)
Reasonable Force	Section 31(1) sets out the circumstances for using reasonable force in enforcing a direction to seize or a writ of seizure under the *Repair and Storage Liens Act*.

Wages Act

Section 7 of the *Wages Act* puts limits on the amount of a debtor's wages that can be seized from an employer.

Bail Act

Section 1 of the *Bail Act* provides for the Crown Attorney to transmit a certificate of lien to the sheriff in cases where a person has been committed for trial and admitted to bail. The certificate of lien contains information about the surety for bail for the appearance of the individual in court.

Land Titles Act

Section 138 of the *Land Titles Act* states that the seizure of a mortgage or charge or leasehold land registered under the Act does not take effect until the sheriff's certificate is lodged with the land registrar. This section does not apply where the sheriff has provided the land registrar with a notice under Section 23 of the *Execution Act*.

Mining Act

Under section 64 of the *Mining Act*, a copy of a writ of seizure and sale may be filed with the mining recorder and recorded on a mining claim held by the judgment debtor. The sheriff may then treat the judgment debtor's mining interest as if it were goods and chattels subject to a writ of seizure and sale.

Absconding Debtors Act

Section 2 of the *Absconding Debtors Act* provides for the court to make an "order of attachment" to seize the non-exempt real or personal property from an Ontario resident who departs from Ontario to defraud creditors or to avoid being arrested or served with process. The Act sets out specific procedures for the sheriff to follow in enforcing orders of attachment.

Federal Statutes

Bankruptcy and Insolvency Act

Section 69.3(1) of the federal *Bankruptcy and Insolvency Act* states that on the bankruptcy of a debtor, no creditor has any remedy against the debtor or the debtor's property or shall continue execution or proceedings until the trustee has been discharged. Section 69.4 provides for creditors to seek a court declaration in connection with a stay of proceeding.

Bank Act

Schedule I and II of the *Bank Act* list banks from which seizure and sale of shares and dividends can take place.

Indian Act

Section 89 of the *Indian Act* provides that, with few exceptions, the real and personal property of an Indian or band situated on a reserve cannot be seized except at the instance of another Indian or band.

Canada Shipping Act

Under section 629 of the *Canada Shipping Act*, the Admiralty Court may require the arrest of a ship found in Canadian waters in order to enforce an order for money owed for work done in connection with the ship.

Other statutes that provide for the issuance of an order that might be filed with a civil court of competent jurisdiction include, but are not limited to:

- *Mining Act*;
- *Human Rights Code*;
- *Ontario Works Act, 1997*; and

- *Ontario Disability Support Program Act, 1997*.

The Landlord and Tenant Board (LTB) is a tribunal, created under the *Residential Tenancies Act, 2006* (RTA).

The RTA came into effect on January 31, 2007 and sets out the rules for most residential rental housing in Ontario. The previous legislation, known as the *Tenant Protection Act*, is no longer in effect.

Landlord and Tenant Board Orders (Board Orders) that include awards for monetary compensation may be enforced by filing a Board-certified copy of the Board Order with the Small Claims Court [s. 19(1), SPPA].

The Ministry of Labour administers the *Employment Standards Act* (Act) and conducts investigations into a variety of complaints made by employees in Ontario, including complaints with respect to unpaid wages.

As a result of these investigations, an Order to Pay may be issued by the Ministry of Labour against an employer.

In accordance with section 126(1) of the Act, the Director of Employment Standards (Director) may choose to seek enforcement of the Order to Pay by filing a copy of the order (certified by the Director to be a true copy) with a court of competent jurisdiction. Upon filing, the order is deemed to be an order of the court in which it was filed and may be enforced as if it was a judgment or order of the court.

In accordance with s. 127(1) of the *Employment Standards Act*, the Director of Employment Standards may authorize a collector to exercise specified powers under sections 125, 126, 130 and 135(3) in the collection of amounts owing under these sections of the Act or under an order made by a reciprocating state.

Section 127(3) of the Act allows the Director of Employment Standards to authorize the collector to collect a reasonable fee or reasonable disbursements or both from each person from whom the collector seeks to collect amounts owing under this Act. Under section 127(4) of the Act, the Director may also set limitations on the amount that a collector is entitled to collect (such limitations would be required to be explicitly stated, in writing).

Case Law: *McIntosh v. Lalonde* (1998), 165 D.L.R. (4th) 178 (Ont. Div. Ct.).

To what extent is a welfare recipient protected against seizure, by creditors, of funds received under a provincial welfare disability allowance? When a family benefits disability allowance is deposited electronically into a bank account, and the allowance is the sole source of the funds in the account, are the funds in the bank account immune from seizure under s. 5(1)(b) of the *Family Benefits Act*, R.S.O. 1990, c. F.2? Case governed by s. 5(1)(b) of the *Family Benefits Act*. See O'Brien J. in *Metropolitan Toronto (Municipality) v. O'Brien* (1995), 23 O.R. (3d) 543 (Ont. Gen. Div.). Protection from creditors continues after the benefit is paid into a bank account provided that the bank account's purpose is to receive the benefit. Use of bank account and electronic deposits is an administratively convenient and secure way to make welfare payment. Any other interpretation would also undermine the underlying social purpose of welfare legislation like the *Family Benefits Act*.

Ladies' Dress & Sportswear Industry Advisory Committee v. 1265122 Ontario Ltd. (November 9, 1999), Doc. Toronto CP-12682-98 (Ont. Sm. Cl. Ct.).

The corporation was operated by the same individual, as an alter ego, working for the same clients. The plaintiff was entitled to enforce judgment against the second corporation, which was a sham.

R. v. Devgan (1999), 121 O.A.C. 265, 44 O.R. (3d) 161, 136 C.C.C. (3d) 238, 26 C.R. (5th) 307, 1999 CarswellOnt 1534 (Ont. C.A.); leave to appeal refused (2000), 254 N.R. 393 (note), 134 O.A.C. 396 (note), 2000 CarswellOnt 911, 2000 CarswellOnt 912 (S.C.C.).

Civil judgment against the accused not precluding granting of compensation order. Compensation order may not be granted for legal fees, disbursements or interest: *Criminal Code*, R.S.C. 1985, c. C-46, s. 725(1).

Superior Propane Inc. v. Veer Preet Petro Products Canada Inc. (2002), 2002 CarswellOnt 2150, 23 C.P.C. (5th) 303, [2002] O.J. No. 2660 (Ont. Master).

Default judgment against corporate defendant not stayed. No explanation for default given. No genuine issue for trial as against corporate defendant. Default judgment would stand but enforcement of judgment was stayed pending final determination of counterclaim on terms that corporate defendant pay into court portion of judgment as security.

Adekunte v. 1211531 Ontario Ltd. (2002), 2002 CarswellOnt 2166 (Ont. S.C.J.).

Inconclusive as to whether or not claim reached corporate defendant. Default judgment set aside and all future enforcement proceedings stayed on condition that corporate defendant file defence to defendant's claim and counterclaim.

Credit Union Atlantic Ltd. v. McAvoy, 2002 CarswellNS 481, 2002 NSCA 145, 210 N.S.R. (2d) 207, 659 A.P.R. 207 (N.S. C.A.).

Defendant unable to pay for legal advice and unaware that she could defend on own behalf. Later found counsel on affordable terms. Chambers judge erred in refusal to set aside judgment. Test was not whether Defendant had decided not to defend, but whether she had reasonable excuse for failure. Appeal allowed and judgment set aside.

MacKay v. Dauphinee, 2007 CarswellNS 178, 254 N.S.R. (2d) 127, 810 A.P.R. 127, 47 C.P.C. (6th) 380, 2007 NSSM 11 (N.S. Sm. Cl. Ct.); reversed 2008 CarswellNS 312, 2008 NSSC 190, 44 C.B.R. (5th) 205, 61 C.P.C. (6th) 395, 266 N.S.R. (2d) 92, 851 A.P.R. 92 (N.S. S.C.).

Applicant sought to enforce judgment in small claims court and brought an action for order granting leave to sell interests in land of judgment debtor. Application dismissed. The adjudicator determined that the Small Claims Court did not have jurisdiction, due to s. 10(a) of the *Small Claims Court Act* which states that no claim could be made under Act for recovery of land or estate or interest therein.

MacKay v. Dauphinee, 2008 CarswellNS 312, 2008 NSSC 190, 44 C.B.R. (5th) 205, 61 C.P.C. (6th) 395, 266 N.S.R. (2d) 92, 851 A.P.R. 92 (N.S. S.C.).

Plaintiff brought unsuccessful application in the Small Claims Court for order granting leave to sell interests in debtor's land free of prior judgments. The adjudicator determined that the Small Claims Court did not have jurisdiction, due to *s. 10(a)* of the *Small Claims Court Act* which states that no claim could be made under Act for recovery of land or estate or interest therein. The plaintiff appealed. Appeal allowed.

The Supreme Court of Nova Scotia held that an execution order issued to enforce payment of a judgment which has the result of forcing a sale a real property is not a claim for the recovery of land or an interest or an estate in land. An execution order issued by the court is simply a recognition by the court that the claimant is entitled to recover on its judgment. As such, the appellant is entitled to the order sought before the Small Claims Court, granting him leave to sell the judgment debtor's land free of the encumbrances of the prior judgments.

R. v. Castro, [2010] O.J. No. 4573, 261 C.C.C. (3d) 304, 2010 ONCA 718, 2010 CarswellOnt 8120, 270 O.A.C. 140, 102 O.R. (3d) 609 (Ont. C.A.).

The appellant ordered to make restitution pursuant to s. 738(1) of the *Criminal Code*, R.S.C. 1985. The appellant sought to have restitution portion of his sentence set aside or reduced.

Trial judge ordered restitution in the amount of $141,752.

Section 738(1)(a) governs the making of restitution orders when money has been taken. It gives the court discretion to order the offender to make restitution by paying the victim "an

amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned. . . where the amount is readily ascertainable."

Appellate court will only interfere with the sentencing judge's exercise of discretion on the basis of error in principle or if the order is excessive or inadequate. See *R. v. Devgan*, 26 C.R. (5th) 307, 136 C.C.C. (3d) 238, 44 O.R. (3d) 161, [1999] O.J. No. 1825, 121 O.A.C. 265, 1999 CarswellOnt 1534 (Ont. C.A.); leave to appeal refused 254 N.R. 393 (note), 134 O.A.C. 396 (note), 2000 CarswellOnt 912, 2000 CarswellOnt 911, [1999] S.C.C.A. No. 518 (S.C.C.). Discretion in making restitution order found in in *R. v. Zelensky*, [1978] 3 W.W.R. 693, 41 C.C.C. (2d) 97, 21 N.R. 372, 86 D.L.R. (3d) 179, 2 C.R. (3d) 107, [1978] 2 S.C.R. 940, 1978 CarswellMan 121, 1978 CarswellMan 51 (S.C.C.).

See further *R. v. Fitzgibbon*, 1990 CarswellOnt 996, 1990 CarswellOnt 172, 76 C.R. (3d) 378, 55 C.C.C. (3d) 449, 78 C.B.R. (N.S.) 193, 40 O.A.C. 81, 107 N.R. 281, [1990] 1 S.C.R. 1005, EYB 1990-67542 at pp. 1012–14 (S.C.C.); *London Life Insurance Co. v. Zavitz*, 1992 CarswellBC 63, [1992] B.C.J. No. 400, 22 W.A.C. 164, 11 B.C.A.C. 164, 12 C.R. (4th) 267, 65 B.C.L.R. (2d) 140, 5 C.P.C. (3d) 14 (B.C. C.A.), at p. 270 [C.R.]; *R. v. Scherer*, 1984 CarswellOnt 79, 42 C.R. (3d) 376, 5 O.A.C. 297, [1984] O.J. No. 156, 16 C.C.C. (3d) 30 (Ont. C.A.); leave to appeal refused [1984] 2 S.C.R. x (note), [1984] S.C.C.A. No. 29, 58 N.R. 80n, 16 C.C.C. (3d) 30 (note) at pp. 37-38 (S.C.C.) *R. v. Salituro*, 1990 CarswellOnt 101, 56 C.C.C. (3d) 350, 78 C.R. (3d) 68, 38 O.A.C. 241 (Ont. C.A.), at pp. 372-73 [C.C.C.], affirmed 1991 CarswellOnt 124, 1991 CarswellOnt 1031, [1991] S.C.J. No. 97, 68 C.C.C. (3d) 289, 131 N.R. 161, [1991] 3 S.C.R. 654, 50 O.A.C. 125, 8 C.R.R. (2d) 173, 9 C.R. (4th) 324, EYB 1991-67635 (S.C.C.); *R. v. Horne* (1996), 34 O.R. (3d) 142, 1996 CarswellOnt 5479 (Ont. Gen. Div.), at pp. 148-49 [O.R.]; and *R. v. Carter*, 1990 CarswellOnt 1032, [1990] O.J. No. 3140, 9 C.C.L.S. 69 (Ont. Gen. Div.), at pp. 75-76 [C.C.L.S.], varied 1991 CarswellOnt 1080, 9 C.C.L.S. 82 (Ont. C.A.); leave to appeal refused 55 O.A.C. 390 (note), 137 N.R. 400 (note), 9 C.C.L.S. 82n (S.C.C.).

Imposition of restitution order proper exercise of trial judge's discretion. Appeal dismissed and restitution order upheld.

R. v. Popert, 251 C.C.C. (3d) 30, 258 O.A.C. 163, 2010 CarswellOnt 535, 2010 ONCA 89 (Ont. C.A.).

Generally speaking, an insurance company that has paid out a claim on a house that was subject of arson can obtain a compensation order in the course of the sentencing proceedings concerning the person who committed the arson, either on the basis of subrogation or on the basis that it is a person who has suffered "the loss . . . of . . . property . . . as a result of the commission of the offence" within the meaning of s. 738(1)(a) of the *Code*. The fact that the person to whose rights the insurance company is subrogated hired the arsonist does not bar a claim for the order.

The Supreme Court of Canada (SCC) rendered judgment in a case involving the intersection of judgment enforcement and privacy rights. In allowing Royal Bank of Canada's appeal, the SCC provided a process for successful litigants to collect judgments owing.

The SCC confirmed that the *Personal Information Protection and Electronic Documents Act* (PIPEDA) is intended to promote legitimate business concerns in addition to privacy rights.

Creditors are generally entitled to enforce judgments against debtors by having the sheriff seize and sell real property owned by the debtors. In Ontario, the sheriff does not seize and sell property without being satisfied that the debtor has sufficient equity in the property. A judgment cannot be enforced unless the mortgagee provides personal information of the debtor to the creditor.

In *Royal Bank of Canada v. Trang (Trang)*, Justice Côté held that PIPEDA does not preclude a mortgagee from providing a mortgage discharge statement directly to a creditor that has taken the steps necessary to execute a judgment. A creditor seeking enforcement by means of a writ of seizure and sale is entitled to know the current value of the debtor's mortgaged property without the creditor having to spend time and money holding multiple debtor examinations or taking several trips to court. As long as the creditor has obtained and filed a writ against a property, and the mortgage discharge statement it seeks is with regard to that property, the mortgagee can provide the creditor with a statement. *PIPEDA* does not represent an impediment, because it is reasonable to imply the debtor's consent.

If a plaintiff obtains judgment and the defendant refuses to pay, the plaintiff (creditor) can, as always, exercise its enforcement rights under provincial law. Most rights are available whether the award arose as a result of court action, private arbitration, or a non-court process that can yield a judgment enforceable as a court order (e.g. awards under workers' compensation, victim restitution, human rights, employment standards, or landlord-tenant legislation).

A creditor who seeks to enforce an award through a writ of seizure and sale over real property need only obtain a writ, file it with the sheriff, and ask any mortgagee(s) for the mortgage discharge statements that the sheriff requires. *PIPEDA* does not prevent the mortgagee from providing this information.

Alternatively, the creditor can file a motion (on notice) for a court order requiring the mortgagee to provide a mortgage discharge statement. The court should grant the order if it is satisfied the debtor previously failed to consent to provide a discharge statement, or previously failed to attend a judgment debtor examination. Under *PIPEDA*, no consent to disclosure is needed if a court order requires production.

Debtors not allowed to use privacy legislation to defeat or frustrate their creditors enforcement efforts.

20.02 (1) Power of Court — The court may,

(a) stay the enforcement of an order of the court, for such time and on such terms as are just; and

(b) vary the times and proportions in which money payable under an order of the court shall be paid, if it is satisfied that the debtor's circumstances have changed.

Commentary: Where a stay of execution is ordered by the court pursuant to Rule 20.02, all enforcement proceedings, including the necessity for a garnishee to make payments, cease. Where a Notice of Garnishment was previously issued, the garnishee company should be advised by the court of the stay and directed to cease further remittances until the stay has expired or a subsequent order of the court states otherwise. Monies received under a Notice of Garnishment after a stay is issued will be returned to the garnishee, unless the terms of the order direct otherwise.

Stay of Proceedings

Rule 63.01 of the *Rules of Civil Procedure* states that the delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order. If the writ was issued in accordance with the *Rules of Civil Procedure* or the *Rules of the Small Claims Court*, a copy of the filed notice of appeal is sufficient proof of the appeal and would stay any further enforcement proceedings until the appeal is disposed of.

Writs issued under other rules or legislation will likely require the filing of a Certificate of Stay issued by the registrar in accordance with r. 63.02 of the *Rules of Civil Procedure*, which indicates that an interlocutory or final order may be stayed on such terms as are just,

(a) By an order of the court whose decision is to be appealed; or

(b) By an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken. O. Reg. 465/93, s. 8

The Certificate of Stay (Form 63A) is issued by the registrar on request of a party in accordance with r. 63.03(4) of the *Rules of Civil Procedure*.

Where an order is stayed, no steps may be taken under the order or for its enforcement, except by order of a judge of the court to which a motion for leave to appeal has been made or an appeal has been taken. A stay does not prevent the issue of a writ of execution or filing of the writ in the sheriff's office [r. 63.03(3)], *Rules of Civil Procedure*.

Stay Due to Bankruptcy

As a general rule, the commencement of bankruptcy proceedings under the *Bankruptcy and Insolvency Act* gives rise to a stay of proceedings, including enforcement activity, against the debtor.

Written notice of the stay may be received in:

- A Notice of Intention to Make a Proposal
- A proposal
- A consumer proposal
- A receiving order
- An assignment in bankruptcy

If a party to the proceedings wants to take steps against the debtor, the party should apply to Bankruptcy Court for leave to do so, or for an order that the stay does not apply. If there is a dispute about the stay, the party should take the matter to the Bankruptcy Court for resolution.

A stay of proceedings due to bankruptcy must be applied to all writs that exist for the debtor(s) named within the document/notice. The application of notice of a stay of proceedings is applied to all of the debtor's writs in an effort to ensure that no further enforcement activity will occur, until further notice is received from the court or Trustee in Bankruptcy.

Since an order setting aside default judgment is an interlocutory order (as per *Laurentian Plaza v. Martin* (1992), 7 O.R. (3d) 111 (C.A.), no appeal of that interlocutory order is possible). Thus, an interlocutory order of the Small Claims Court directing payment of funds to a party must be obeyed.

Under s. 3(5) of the *Creditors' Relief Act*, where the enforcement office has a writ against a debtor, at the request of a creditor, the enforcement office may provide a demand, in writing, for any garnishment funds being held in Small Claims Court in connection with that same debtor.

The demand procedure under the *CRA* applies where the sheriff's writ names the same debtor as the debtor named in the SCC Notice of Garnishment (Form 20E). The sheriff is entitled to take those garnished funds and distribute them under the *CRA*.

Where a judgment creditor in the Superior Court of Justice wishes to obtain funds held by the Small Claims Court, the creditor should file a Writ of Seizure and Sale and a Direction to enforce with the sheriff. Depending on the origins of the money held by the Small Claims Court, the sheriff will then take the appropriate action. There are three possible types of funds in this scenario: funds received by the Small Claims Court by way of garnishment,

funds held by the Small Claims Court bailiff as a result of a seizure under an execution, and funds paid in to the Small Claims Court pending the outcome of a proceeding. If funds are in the hands of the Small Claims Court as a result of garnishment, the sheriff is authorised to demand and receive them pursuant to subsection 3(5) of the *Creditors' Relief Act*, R.S.O. 1990, c. C.45.

Pursuant to subsection 25(1) of the *Creditors' Relief Act*, funds or other property held by the Small Claims Court bailiff as a result of a seizure under a writ of seizure and sale may be demanded and obtained by the sheriff only if the sheriff has first been unable to find sufficient other property or monies of the judgment debtor to satisfy the writ that is in the sheriff's hands. Thus, funds should not be released unless the Registrar or court clerk is provided with some evidence that the sheriff has taken steps to locate other monies or property of the debtor.

Funds paid into the Small Claims Court pending the outcome of a proceeding cannot be attached or seized until a determination has been made as to entitlement to those funds. Once it has been determined that a person who is a judgment debtor is entitled to the funds, a sheriff or other interested party may make an application to the Small Claims Court for those funds pursuant to s. 23 of the *Creditors' Relief Act*.

It is not possible to garnishee funds held by the Small Claims Court. The funds, in accordance with s. 93 of the *Courts of Justice Act* are held by Her Majesty the Queen and subsection 21(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 reads as follows:

> Subject to subsections (2) and (3), no execution or attachment or process in the nature thereof shall be issued out of any court against the Crown.

Subsection 21(1) clearly prohibits any execution or attachment to be issued against the Crown. Subsection 21(2) states that a garnishment that is otherwise valid may issue against the Crown for the payment of money owing or accruing as remuneration payable by the Crown for goods or services. Thus, subsection 21(1) refers not only to execution or attachment processes in which the Crown is the debtor but also refers to situations where the Crown is the garnishee. Subsection 21(3) states that a garnishment may issue against the Crown for an amount owing or accruing under an order for support or maintenance. Thus, the Crown can only be named as a garnishee when the Crown owes money as remuneration for services or goods to a debtor or when the debtor who is owed money by the Crown owes money for support or maintenance.

The Supreme Court of Canada has ruled on the criteria that should be applied in determining whether an order should be stayed pending appeal. See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] S.C.J. No. 17, 54 C.P.R. (3d) 114, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, *(*sub nom. *RJR-Macdonald Inc. c. Canada (Procureur général))* 171 N.R. 402 (note) (S.C.C.) and *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 176, 1987 CarswellMan 272, [1987] S.C.J. No. 6, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 38 D.L.R. (4th) 321, 73 N.R. 341, 46 Man. R. (2d) 241, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, [1987] D.L.Q. 235, *(*sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1 (S.C.C.). A three-part test is involved. In the case of a motion for a stay, the court must first undertake a preliminary assessment of the merits to ensure that there is a serious question to be determined on the appeal itself. Second, it must be determined whether the appellant who is seeking the stay would suffer irreparable harm (that is, harm not readily compensable in money damages) if the stay were

not granted. Third, a comparison must be made as to which of the parties would suffer the greater harm from the granting or refusing of the stay sought (this is often referred to as the "balance of convenience" or, in the words of Ontario courts from time to time, the "balance of inconvenience" test).

The *Execution Act*, R.S.O. 1990, c. E.24 states in part:

> 10. (1) Subject to the *Land Titles Act* and to section 11, a writ of execution binds the goods and lands against which it is issued from the time it has been received for execution and recorded by the sheriff.
>
> R.S.O. 1990, c. E.24, s. 10(1)
>
> . . . . .
>
> (4) Subsection (1) does not apply to an execution against goods issued out of the Small Claims Court, swhich binds only from the time of the seizure.
>
> R.S.O. 1990, c. E.24, s. 10(4)
>
> 11. (1) Writ not to bind lands unless name of debtor sufficient — Where the name of an execution debtor set out in a writ of execution is not that of a corporation or the firm name of a partnership, the writ does not bind the lands of the execution debtor unless,
>
> (a) the name of the execution debtor set out in the writ includes at least one given name in full; or
>
> (b) a statutory declaration of the execution creditor or execution creditor's solicitor is filed with the sheriff identifying the execution debtor by at least one given name in full.
>
> R.S.O. 1990, c. E.24, s. 11(1)

See the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6 as to the reciprocal recognition and enforcement of judgments in Ontario courts, in particular Part IV, Article VI.

Case Law: *Han v. Re/Max Town & Country Realty Inc.* (1996), 97 O.A.C. 228, 4 C.P.C. (4th) 203 (C.A.); amended (1997), 7 C.P.C. (4th) 187 (Ont. C.A. [In Chambers]).

Appellants sought order lifting automatic stay. Court had ordered accounting. Certain consumers were beneficiaries of statutory trust created by *Real Estate and Business Brokers Act*, R.S.O. 1990, c. R.4, s. 20. There was no basis for continuing stay as it affected consumers and accountant as they were entitled to be paid in priority to all other claimants. Stay not lifted with respect to agents.

Desautels Creative Printing Papers Inc. v. Printcrafters Inc. (1999), 138 Man. R. (2d) 309, 202 W.A.C. 309 (Man. C.A.).

The defendant claimed summary judgment should be stayed pending determination of its counterclaim. The defendant had not shown that it would be manifestly unjust to allow the plaintiff to enforce payment of its judgment. The test pending appeal was stated in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (H.L.). The defendant was not able to demonstrate irreparable harm or that the balance of convenience was in its favour. The trial judged erred in staying summary judgment.

The plaintiff moved for removal of a stay. The stay was not one granted by the *Courts of Justice Act*, but created by s. 69(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1992, c. 27, as amended. The defendant was an undischarged bankrupt. Only a superior court sitting in bankruptcy has authority to lift a stay and grant leave to proceed: *Bankruptcy and Insolvency Act* s. 183. Execution of the default judgment may only proceed with leave of the bankruptcy court: *382231 Ontario Ltd. v. Wilanson Resources Ltd.* (1982), 43 C.B.R. (N.S.) 153 (Ont. S.C.).

Once a defendant is discharged, the plaintiff may seek leave from the Small Claims Court to continue, subject to s. 178(1) of the *Bankruptcy and Insolvency Act*, giving credit for the security: *Re Bouchard* (1939), 21 C.B.R. 8; *Franklin v. Shultz*, [1967] 2 O.R. 149, 10 C.B.R.

(N.S.) 29, 62 D.L.R. (2d) 643 (Ont. C.A.); *Ladanyi v. Malcolm* (1990), 3 C.B.R. (3d) 216; *Associates Financial Services of Canada Ltd. v. Campbell* (1998), 8 C.B.R. (4th) 187, 1998 CarswellOnt 5089 (Ont. Sm. Cl. Ct.).

Chan v. Bernlor Enterprises Inc., 2001 CarswellAlta 1106, 2001 ABCA 210 (Alta. C.A.).

Plaintiffs each got judgment of $2,500 plus costs. Defendants applied for stay of enforcement and also for order including transcript of proceedings before Chambers Judge in appeal book. Presumption with money judgment was that it should be enforced and grave harm would not result to defendants if enforcement levied. Transcript was included as no real harm caused.

Knodell v. Blackburn (2002), 2002 CarswellOnt 1124 (Ont. S.C.J.).

Applicant was landlord who had order to evict tenant from Rental Housing Tribunal. Labour strike prevented enforcement of order. Applicant then sought order of Superior Court. Inherent jurisdiction existed to issue order at Superior Court. Section 85 of *Tenant Protection Act* (Ontario) stated order of Tribunal was to be enforced on same basis as orders from Superior Court. Order issued.

R. v. Bullen, 2001 YKTC 504, 2001 CarswellYukon 91, 48 C.R. (5th) 110 (Y.T. Terr. Ct.).

Interesting and lengthy discussion of compensation and the role of the victim in any joint sentencing submission. Restitution covered by section 738(1) of the *Criminal Code*. 1995 amendments to Code clarified that restitution can be a stand-alone remedy enforceable in civil courts. It also does not affect subsequent civil actions, except, perhaps, as a set-off.

Odhavji Estate v. Woodhouse, 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, [2003] S.C.J. No. 74, 19 C.C.L.T. (3d) 163, [2003] 3 S.C.R. 263, 11 Admin. L.R. (4th) 45, 233 D.L.R. (4th) 193, 312 N.R. 305, 180 O.A.C. 201 (S.C.C.).

Plaintiffs submitting that they are public interest litigants and should not have been required to pay costs. Actions involving public authorities and raising issues of public interest insufficient to alter essential nature of litigation. Plaintiffs not falling within definition of public interest litigants. No clear and compelling reasons to interfere with Court of Appeal's decision to award costs in accordance with usual rule that successful party is entitled to costs.

Wickwire Holm v. Wilkes, [2005] N.S.J. No. 406, 2005 CarswellNS 439, 237 N.S.R. (2d) 197, 754 A.P.R. 197, 28 C.P.C. (6th) 338 (N.S. Sm. Cl. Ct.).

Section 31 of *Small Claims Court Act* of Nova Scotia provides that order of Small Claims Court may be enforced in same manner as order of Supreme Court. Small Claims Court has, within its own statutory limits, jurisdiction concurrent with Supreme Court. Under s. 31 of *Act*, Small Claims Court has jurisdiction to issue order for discovery in aid of execution.

R. v. Popert, 251 C.C.C. (3d) 30, 2010 CarswellOnt 535, 2010 ONCA 89, 258 O.A.C. 163 (Ont. C.A.).

Does the court have the power to make a restitution order in favour of an insurance company under s. 738(1)(a) of the *Criminal Code*? Power to make a restitution order comes from s. 738(1). See *R. v. Fitzgibbon*, 1990 CarswellOnt 996, 1990 CarswellOnt 172, 76 C.R. (3d) 378, 55 C.C.C. (3d) 449, 78 C.B.R. (N.S.) 193, 40 O.A.C. 81, 107 N.R. 281, [1990] 1 S.C.R. 1005, EYB 1990-67542 (S.C.C.), where the Supreme Court of Canada found that the Law Society of Upper Canada was a "person aggrieved" and, therefore, was entitled to a restitution order under s. 653(1) of the *Criminal Code*, despite the fact that the Law Society had made compensation to the victims of the offences.

Restitution orders are not a substitute for civil proceedings nor are they intended to displace the civil remedies necessary to ensure full compensation to victims. *R. v. Zelensky*, [1978] 3 W.W.R. 693, 41 C.C.C. (2d) 97, 21 N.R. 372, 86 D.L.R. (3d) 179, 2 C.R. (3d) 107, [1978] 2 S.C.R. 940, 1978 CarswellMan 121, 1978 CarswellMan 51 (S.C.C.). Rather, restitution or-

ders are one factor to be considered when deciding the total sentence to be imposed on an offender.

Taylor's Towing v. Intact Insurance Company, 2017 ONCA 992, 2017 CarswellOnt 19778, 21 M.V.R. (7th) 186 (Ont. C.A.)

Towing companies located within boundaries of First Nation could not claim protection unders. 89 of *Indian Act*. Vehicles were towed and stored by towing companies owned by First Nation. All towing companies located within boundaries of First Nation. Insurer was not debtor nor creditor and it followed that towing companies could not claim protection of s. 89. Section 89 of *Indian Act* only protected against seizure from creditors or Crown.

(2) Enforcement Limited While Periodic Payment Order in Force — While an order for periodic payment is in force, no step to enforce the judgment may be taken or continued against the debtor by a creditor named in the order, except issuing a writ of seizure and sale of land and filing it with the sheriff.

(3) Service of Notice of Default of Payment — The creditor may serve the debtor with a notice of default of payment (Form 20L) in accordance with subrule 8.01(14) and file a copy of it, together with an affidavit of default of payment (Form 20M), if the debtor fails to make payments under an order for periodic payment.

(4) Termination on Default — An order for periodic payment terminates on the day that is 15 days after the creditor serves the debtor with the notice of default of payment, unless a consent (Form 13B) in which the creditor waives the default is filed within the 15-day period.

O. Reg. 78/06, s. 41

20.03 General — In addition to any other method of enforcement provided by law,

(a) an order for the payment or recovery of money may be enforced by,

(i) a writ of seizure and sale of personal property (Form 20C) under rule 20.06;

(ii) a writ of seizure and sale of land (Form 20D) under rule 20.07; and

(iii) garnishment under rule 20.08; and,

(b) a further order as to payment may be made under subrule 20.10(7).

20.04 (1) Certificate of Judgment — If there is default under an order for the payment or recovery of money, the clerk shall, at the creditor's request, supported by an affidavit for enforcement request (Form 20P) stating the amount still owing, issue a certificate of judgment (Form 20A) to the clerk at the court location specified by the creditor.

Commentary: Where a debtor lives or carries on business outside of the jurisdiction of the court and the creditor wants to enforce the judgment by:

- garnishment; and/or
- holding an examination of the debtor or other person;

the creditor may request that the originating court (where the original judgment was made) to issue Certificate(s) of Judgment (Form 20A), which can be filed in other court location(s) as specified by the creditor [Rule 20.04(1)].

Section 29 of the *Crown Liability and Proceedings Act* (Federal) and section 21 of the *Proceedings Against the Crown Act* prohibit the issuance of executions against the Crown (Federal or Provincial).

Where a creditor requests the issuance of an execution against "Her Majesty the Queen in Right of Ontario", "Sa Majesté du chef de l'Ontario", or the Attorney General of Canada, they must be advised that the court is expressly prohibited from doing so in accordance with the applicable Act (above).

Proceedings against the Federal Crown may also include agencies of the Crown where an Act of Parliament authorizes proceedings to be taken in the name of the agency.

A certificate of judgment may also be issued to a party to an action (creditor) for:

- personal records or to forward a copy to another party.
- filing with the Ministry of Transportation in claims involving motor vehicle damages for the purpose of revoking the debtor's licence.
- proving the filing of an order of a board, tribunal, agency, or other court as a judgment of the court in which it is filed. However, if the order is from another Small Claims Court, the originating court (where the order of the board, tribunal, agency or other court was first filed) must issue the certificate.
- enforcement purposes, such as proof of judgment as required by a sheriff before proceeding with the sale of lands under the *Rules of Civil Procedure*.

If a creditor finds that a debtor has moved or returned to the originating court's jurisdiction, the creditor may return to the originating court to pursue enforcement, or alternatively request the issuance of a certificate of judgment directed to another court location.

Case Law: *1794279 Ontario Limited v. Nissan Canada Finance*, 2017 ONSC 6142, 2017 CarswellOnt 15859 (Ont. Div. Ct.).

Certificate of judgment is a form provided for by Rule 20.04 of the Small Claims Court Rules and applies when a party is seeking to enforce an order that is in default. The Rule provides that an "affidavit for enforcement" stating the amount owing is needed in order to obtain such a certificate. Pursuant to Rule 61.10(1)(d) as copy of the reasons are also to be required. The reasons for decision signed by the Deputy Judge granting the plaintiff judgment and quantifying the amount of that judgment is all that is required given there is no chance of an appeal from costs. That document complies with both requirements of Rule 61.10(1)(c) and (d) in the one document. It is the decision signed and issued by the Small Claims Court and it contains the reasons of the Deputy Judge. Defendant/appellant is permitted to perfect its appeal by filing an appeal book that only contains a copy of the signed reasons for decision as issued by the Small Claims Court. A certificate of judgment is not required to perfect the appeal.

(2) The certificate of judgment shall state,

(a) the date of the order and the amount awarded;

(b) the rate of postjudgment interest payable; and

(c) the amount owing, including postjudgment interest.

O. Reg. 393/09, s. 17

20.05 (1) Delivery of Personal Property — An order for the delivery of personal property may be enforced by a writ of delivery (Form 20B) issued by the clerk to a bailiff, on the request of the person in whose favour the order was made, supported by an affidavit of that person or someone acting on that person's authority stating that the property has not been delivered.

Commentary: The writ of delivery is used to enforce an order for the recovery of possession of personal property. Claims for recovery of possession of personal property can be made in the Small Claims Court under *Courts of Justice Act*, s. 23(1)(b), where the value of

the property does not exceed the prescribed limit of $25,000. The plaintiff's claim must request that relief and if the claim is granted, whether at trial, assessment hearing, or on motion under rule 12.02, the writ of delivery becomes available to enforce the order. Writs of delivery are enforced by the bailiff.

It is essential that the personal property to be recovered be described with as much detail as possible in the underlying order. For example, in the case of a motor vehicle, the make, model, year, colour, licence plate and VIN number should be specified. If the property is a common item (such as a laptop computer or cell phone), and is insufficiently described in the order, it may be difficult or impossible for the bailiff to locate and identify the item.

A writ of delivery is not available by originating notice of motion, but must be supported by a plaintiff's claim and a resulting judgment: *Easy Home v. Rogalski*, 2004 CarswellOnt 475, 46 C.P.C. (5th) 318, [2004] O.T.C. 114, [2004] O.J. No. 533 (Ont. Sm. Cl. Ct.); *Easyhome Ltd. v. Geveart*, 2007 CarswellOnt 3237, [2007] O.J. No. 2025 (Ont. Sm. Cl. Ct.). The writ of delivery is not available to enforce a judgment for damages: *Easyhome Ltd. v. Hookey*, [2016] O.J. No. 4769 (Ont. Sm. Cl. Ct.).

Although *Courts of Justice Act*, s. 104 contemplates an interim order for recovery of possession of personal property, the section does not expressly include or exclude the Small Claims Court from its purview. In the Superior Court of Justice, such a motion is brought under Rule 44 of the *Rules of Civil Procedure*, which does not apply in Small Claims Court. It has been held that motions for interim recovery of personal property are not available in Small Claims Court, although plaintiffs can seek a final order for recovery of possession under Rule 12.02 or an expedited trial may be ordered: *Ever Fresh Direct Foods Inc. v. Schindler* (August 11, 2011), Doc. 315/11, [2011] O.J. No. 3634 (Ont. Sm. Cl. Ct.).

Case Law: *Easy Home v. Rogalski*, 2004 CarswellOnt 475, 46 C.P.C. (5th) 318 (Ont. Sm. Cl. Ct.).

Procedure to be followed in obtaining Writ of Delivery for return of personal property in Small Claims Court. Plaintiff must first commence action by issuing a claim for return of goods in question. Plaintiff must then obtain judgment either by default or otherwise for return of goods. Only when that judgment or order not complied with Plaintiff may file affidavit setting out non-compliance and obtain a Writ of Delivery for the forcible return of the goods. See also S. 104 of the *Courts of Justice Act* and Rule 44 of the *Rules of Civil Procedure*. Motions improperly constituted and dismissed.

Lease Truck Inc. v. Serbinek (2008), 2008 CarswellOnt 6960, 67 C.C.L.I. (4th) 247 (Ont. S.C.J.).

Motion by garnishee for an order determining its liability on the Notice of Garnishment to pay the creditor some or all of the statutory accident benefits accruing to debtor. Section 65(1) of the SABS prohibits "assignment" of benefits due under that Act, whereas r. 60.09(1) provides for enforcement of an order for the payment of money by garnishment of debts payable to the debtor by other persons. Issue complicated by fact that at least part of benefits payable substitute lost wages.

Motion allowed.

Garnishee must pay *Statutory Accident Benefits Schedule* monies payable to debtor until amount claimed is satisfied, but is to pay 80 per cent of any income replacement benefits directly to the debtor. "Assignment" is not defined in the *SABS*. There is no conflict between the prohibition on assigning a benefit under s. 65(1) of the *SABS* and the seizure or attachment of a debt pursuant to rule 60.09(1). Because income replacement benefits are deemed in s. 7(1.1) of the *Wages Act* to be wages for the purposes of s. 7, and 80 per cent of a person's wages are exempted from seizure or garnishment under s. 7(2), the aforementioned amounts should be excluded from garnishment.

(2) Seizure of Other Personal Property — If the property referred to in a writ of delivery cannot be found or taken by the bailiff, the person in whose favour the order was made may make a motion to the court for an order directing the bailiff to seize any other personal property of the person against whom the order was made.

Case Law: *Brydon v. Berrigan* (2003), 2003 CarswellOnt 651 (Ont. S.C.J.).

Garnishment hearing pursuant to *Rule 20.08(15)* of the *Rules of Court*.

Does *inter alia* restitution order made under Section 738 of the *Criminal Code of Canada* and entered as a judgment in the Small Claims Court attract postjudgment interest pursuant to the *Courts of Justice Act*?

Section 741 of *Criminal Code* permits amount awarded in restitution order to be entered as a judgment for enforcement. Unlike prejudgment interest, postjudgment interest attaches by operation of law and does not depend on an Order of Court.

(3) Unless the court orders otherwise the bailiff shall keep personal property seized under subrule (2) until the court makes a further order for its disposition.

(4) Storage Costs — The person in whose favour the order is made shall pay the bailiff's storage costs, in advance and from time to time; if the person fails to do so, the seizure shall be deemed to be abandoned.

O. Reg. 78/06, s. 42; 230/13, s. 16

Commentary: The process of recovery of possession of personal property unlawfully taken from, or unlawfully detained by, another person has been made less complicated and less expensive through the use of a writ of delivery.

Section 104 of the *Courts of Justice Act* authorizes the obtaining of an interim order (prior to judgment) for delivery of possession of personal property upon motion to a judge. The writ of delivery would then be served along with the claim. The *Courts of Justice Act* also provides that a person who improperly obtains a writ of delivery is liable for any loss suffered by a person who is ultimately found to be entitled to possession of the property.

Rule 20.05(1) of the rules of the Small Claims Court deals with enforcement by a writ of delivery and section 20 of the *Execution Act*, R.S.O. 1990, c. E.24 controls the use of force which the bailiff can apply in executing a writ of delivery. Section 20 of the *Execution Act* provides that the bailiff may use reasonable force to effect seizure if the property in in *other than a dwelling*. If the property is located in a dwelling, the bailiff must apply to the court for an order to use reasonable force.

Unlike a writ of seizure and sale of personal property, where goods seized by the bailiff must be stored and sold by public auction, a writ of delivery requires the seizure and delivery of the personal property to the applicant. It is also important to note that a "sheriff" as defined in section 1, includes a bailiff who is acting on a writ of delivery.

If property to be seized is a vehicle, the creditor must provide an up-to-date *Personal Property Security Act* ("PPSA") search at the time of issuing the Writ of Seizure and Sale of Property. The PPSA search is to be no older than 48 hours when filed. To allow a writ to be renewed, a request for renewal must be received before the writ has expired. The writ is renewed six months from the day of issuance or renewal. A writ of seizure and sale of personal property cannot be renewed after it has expired.

Case Law: *Voulgarakis v. 730048 Ontario Ltd.* (1999), 40 C.P.C. (4th) 288, 1999 CarswellOnt 3648 (Ont. Master).

The defendants repossessed a truck, alleging breach of payment provisions in lease agreement allegedly executed by both parties. The defendants were entitled to retain possession on condition of posting bond for twice the amount already invested in truck by plaintiff. The

plaintiff was entitled to regain possession on posting bond for twice the amount of value less amount already invested, and on terms.

20.06 (1) Writ of Seizure and Sale of Personal Property — If there is default under an order for the payment or recovery of money, the clerk shall, at the creditor's request, supported by an affidavit for enforcement request (Form 20P) stating the amount still owing, issue to a bailiff a writ of seizure and sale of personal property (Form 20C), and the bailiff shall enforce the writ for the amount owing, postjudgment interest and the bailiff's fees and expenses.

Commentary: Where a debtor does not pay a debt pursuant to a court order, in order to have the debtor's property seized and sold to satisfy the judgment, the creditor must obtain a writ of seizure and sale of personal property in the court where judgment was rendered (or where a Certificate of Judgment (Form 20A) is filed).

The *Rules of the Small Claims Court* do not limit the time period within which methods of enforcement may be issued.

A creditor may attend the court office and/or in writing make an inquiry to have a Writ of Seizure and Sale of Personal Property (Form 20C) issued.

Rule 20.06(1) provides that the bailiff shall enforce a writ of seizure and sale of personal property, including post judgment interest, the bailiff's fees and the bailiff's expenses. This would include the reasonable costs of a private bailiff or auctioneer used to carry out the sale.

If a debtor does not pay a court order to meet his or her debt, the creditor can act to have the debtor's property seized and sold to satisfy the judgment.

Before the court can issue a writ of seizure and sale of personal property the court must receive written instructions and a completed writ of seizure and sale of personal property from the creditor and a statement of the balance of money owing. The writ can then be enforced and the property of the debtor seized and held for auction.

Before the debtor's property can be seized and/or sold, the following must occur:

- the creditor must give specific instructions to take possession of the property;
- the creditor should ensure that the items to be seized are owned solely by the debtor; and
- the creditor must deposit enough funds with the court office to cover the costs of removing and storing the items to be seized as well as the cost of publishing notice of the seizure. These costs will be added to the amount owing by the debtor.

Goods or property seized have to be sold at public auction, and it is easier to sell items that are free of any other legal claims (liens or security interests). Certain goods cannot be seized. These include clothing, furniture, utensils, tools and home implements.

At any time up to the sale of the seized items, the debtor can prevent the sale by paying the amount of the judgment, plus costs and interest. The debtor can also ask the court to have the seizure postponed or to pay the judgment in installments.

Section 29 of the *Crown Liability and Proceedings Act* (Federal) and section of the *Proceedings Against the Crown Act* prohibit the issuance of executions against the Crown (Federal or Provincial). Proceedings against the Federal Crown may also include agencies of the Crown where an Act of Parliament authorizes proceedings to be taken in the name of the agency. A writ of seizure and sale of personal property cannot be issued in the court where the original judgment was obtained and/or where the certificate of the judgment is filed.

If a party files a terms of settlement (prior to judgment) which include the parties agreeing to have the court issue writ of seizure and sale on consent, the court cannot issue the writ without a judgment in place.

Judgment must be obtained by way of a motion or by proceeding as if there had been no terms of settlement prior to issuing any writs of seizure and sale [r. 14.06].

If more than six years have elapsed since the judgment was made, the court cannot issue a writ of seizure and sale of personal property [r. 20.06]. The party requires leave of the court in order to have the writ issued.

Burns v. Ontario Society for the Prevention of Cruelty to Animals, 2012 ONSC 339, 2012 CarswellOnt 513, 27 C.P.C. (7th) 192 (Ont. S.C.J.)

A motion was brought by the Society to issue a new alias Writ of Seizure and Sale referable to the Order of the Honourable Justice Cosgrove dated February 18, 2002, pursuant to rule 60.07(2) of the *Rules of Civil Procedure*.

The writ expired on July 19, 2010, six years after it was issued. Due to an oversight, the Writ not renewed pursuant to Rule 60.07(6) and (8). The reason for non-renewal was because neither the Society nor the law firm acting for them at the time received notice from the Sheriff that the Writ was expiring. The motion was adjourned at least twice. It was heard on January 5, 2012.

Shmegilsky v. Slobodzian, 1964 CarswellOnt 473, [1964] 1 O.R. 633 (Ont. Master), *McLay v. Molock*, 1993 CarswellOnt 471, 21 C.P.C. (3d) 189 (Ont. Gen. Div.) and *Colombe v. Caughell*, 1985 CarswellOnt 647, 52 O.R. (2d) 767, 6 C.P.C. (2d) 314 (Ont. Dist. Ct.) cited for the proposition that a court can grant leave to issue an alias Writ after the expiration of the original Writ of Seizure and Sale. See also *Canada (Attorney General) v. Palmer-Virgo*, 2002 CarswellOnt 5003, 31 C.P.C. (5th) 143 (Ont. S.C.J.); additional reasons at 2003 CarswellOnt 1409, [2003] O.J. No. 1238 (Ont. S.C.J.) which allowed for leave to issue alias Writs of Seizure and Sale.

It is incongruous that a judgment can remain in effect for 20 years, while a Writ of Seizure and Sale to enforce it cannot be renewed or issued after it has expired even though judgment to be enforced is still in effect. Leave was granted for the Society to issue an alias Writ of Seizure and Sale to take effect the day that it was issued out of the Sheriff's office. The original Writ was not renewed *nunc pro tunc*. This is to protect any intervening rights which may have accrued to the parties from the date of expiry of the original Writ to the date of issuance of the alias Writ. No interest was permitted to accrue from the date of expiry of the original Writ to the date of issuance of the alias Writ. There was no order as to costs.

(1.1) If more than six years have passed since the order was made, a writ of seizure and sale of personal property may be issued only with leave of the court.

(1.2) If a writ of seizure and sale of personal property is not issued within one year after the date on which an order granting leave to issue it is made,

(a) the order granting leave ceases to have effect; and

(b) a writ of seizure and sale of personal property may be issued only with leave of the court on a subsequent motion.

(1.3) A writ of seizure and sale of personal property shall show the creditor's name, address and telephone number and the name, address and telephone number of the creditor's representative, if any.

(2) Duration of Writ — A writ of seizure and sale of personal property remains in force for six years after the date of its issue and for a further six years after each renewal.

Commentary: A writ of seizure and sale of personal property issued by the Small Claims Court will be directed to the bailiff of the Small Claims Court location where the personal property of the debtor is located. Writs remain in force for six years from the date of issue or renewal [Rule 20.06(2), Rule 20.07(3)].

Sale of Personal Property

Personal property seized shall not be sold by the bailiff unless a notice of the time and place of sale has been:

- Mailed to the creditor or the creditor's lawyer and to the debtor at least 14 days before the sale,
- Advertised in a manner that is likely to bring it to the attention of the public [r. 20.06(6)].

(3) Renewal of Writ — A writ of seizure and sale of personal property may be renewed before its expiration by filing a request to renew a writ of seizure and sale (Form 20N) with the bailiff.

(4) Direction to Enforce — The creditor may request enforcement of a writ of seizure and sale of personal property by filing a direction to enforce writ of seizure and sale of personal property (Form 20O) with the bailiff.

(5) Inventory of Property Seized — Within a reasonable time after a request is made by someone acting on the debtor's authority, the bailiff shall deliver an inventory of personal property seized under a writ of seizure and sale of personal property.

(6) Sale of Personal Property — Personal property seized under a writ of seizure and sale of personal property shall not be sold by the bailiff unless notice of the time and place of sale has been,

(a) mailed, at least 10 days before the sale,

(i) to the creditor at the address shown on the writ, or to the creditor's representative, and

(ii) to the debtor at the debtor's last known address; and

(b) advertised in a manner that is likely to bring it to the attention of the public.

O. Reg. 78/06, s. 43; 393/09, s. 18; 230/13, s. 17

Commentary: If a debtor does not pay a debt pursuant to a judgment, in order to place a lien against the debtor's land or have the debtor's land seized and sold to satisfy the judgment, a creditor must obtain a Writ of Seizure and Sale of Land (Form 20D) in the court where judgment was rendered (or the court where a certificate of judgment was filed). If more than six years or more have elapsed since the judgment was made, the clerk shall not issue a writ of seizure and sale of land [r. 20.07(2)]. In that case, the party requires a court order prior to the issue of the writ. Enforcement fees must be paid at the enforcement office where the writ is to be filed.

Subsection 25(1) of the *Creditors' Relief Act*, R.S.O. 1990, c. C.45, provides that a sheriff who has knowledge of funds or property in the hands of a bailiff pursuant to a writ of seizure and sale of personal property, shall demand the funds or property from the bailiff for distribution under that Act. Similarly, subsection 3(5) permits a sheriff to demand and receive from a clerk, monies paid into the Small Claims Court as a result of garnishment proceedings.

The sheriff distributes money pursuant to s. 5(2) of the Act. This basically includes Writs of Seizure and Sale, Writs of Fieri Facias, Certificates issued under this Act or Orders of the Court filed in the sheriff's office. Section 4(6) makes one exception, in the case of Garnish-

ment Proceedings: the *attaching creditor* under whose garnishment funds are collected may also share with the Execution Creditors.

Where a sheriff is aware that a Small Claims Court or Family Court has garnishment funds in court relating to a debtor in respect of whom the sheriff has a writ of execution on file, the sheriff shall, upon written request of the creditor, demand from the clerk/administrator, that the funds be paid over to him/her. [s. 3(5) *Creditors' Relief Act*]

Where monies belonging to a judgment debtor, or to which a judgment debtor is entitled are held in court, a sheriff or any person interested, may make application in writing to have the monies paid over to the sheriff, and it shall be deemed to be monies levied under an execution. [s. 23 *Creditors' Relief Act*]

Where monies are held by a bailiff under an execution or attachment against the debtor, the sheriff shall, on written request of the creditor, demand the funds from the bailiff. [s. 25(1) *Creditors' Relief Act*];

Where monies are paid to a sheriff in whose hands there is no execution against the property of the debtor, a sheriff who has a filed execution (or a creditor of the debtor) may make application for receipt of the funds for distribution, and the court shall fix compensation for the sheriff who received the funds from the garnishee. [s. 3(4) *Creditors' Relief Act*]

As a general rule, funds recovered through garnishment of the seizure and sale of property in the Small Claims Court are not governed by the *Creditors' Relief Act*. However, s. 3(5) provides an exception to this general rule, stating:

> Where money recovered by garnishment is paid into the Small Claims Court, the Ontario Court (Provincial Division) or the Unified Family Court, the sheriff is entitled to demand and receive it from the clerk of the court for the purpose of distributing it under this Act, except in so far as the priority created by subsection 4(1) applies to the money.

In other words, where the sheriff is aware that there are garnishment funds being held by the Small Claims Court with respect to a debtor and the sheriff has an execution on hand against the same debtor, the sheriff may demand that the Small Claims Court funds be handed over for the purpose of distribution under the Act. Subsection 3(6) then provides that the attaching Small Claims Court creditor is entitled to share in the sheriff's distribution.

Subsection 3(8) goes on to provide:

> The clerk of the Small Claims Court, the Ontario Court (Provincial Division) or the Unified Family Court is not liable for making payment to the creditor unless, at the time of the payment, the clerk has notice that there is an execution against the property of the debtor in the sheriff's hands.

"Notice" is not defined in s. 3(8) of the *Execution Act* or elsewhere in the Act, nor is it defined in the *Interpretation Act*, R.S.O. 1990, c. I.11.

"Notice" in s. 3(8) of the *Execution Act* may simply be the equivalent to knowledge.

Personal property seized *shall not be* sold by the bailiff unless a notice of the time and place of sale has been:

- mailed to the creditor or the creditor's lawyer and to the debtor at least 30 days before the sale;

advertised in a manner that is likely to bring it to the attention of the public [r. 20.06(6)].

20.07 (1) Writ of Seizure and Sale of Land — If an order for the payment or recovery of money is unsatisfied, the clerk shall at the creditor's request, supported by an affidavit for enforcement request (Form 20P) stating the amount still owing, issue to the sheriff specified by the creditor a writ of seizure and sale of land (Form 20D).

Commentary: A writ of seizure and sale permits a creditor to instruct a sheriff to seize and sell real property (land) of a debtor, to satisfy a debt. A creditor must obtain a Writ of Seizure and Sale of Land (Form 20D) in the home court where judgment was rendered [r. 20.07(1)]. A writ of seizure and sale of land may be issued/filed and maintained electronically [r. 20.07(1.3)]. Electronic issuance, filing, and maintenance (once available) will be limited to lawyers and paralegals. The software used for this purpose must be authorized by the Ministry of the Attorney General. Currently, the authorized software is offered by Teranet.

Section 29 of the *Crown Liability and Proceedings Act* (Federal) and section 2.1 of the *Proceedings Against the Crown Act* prohibit the issuance of executions against the Crown (Federal or Provincial).

Proceedings against the Federal Crown may also include agencies of the Crown where an Act of Parliament authorizes proceedings to be taken in the name of the agency.

In the event that an order granting leave to issue is made, the writ of seizure and sale of land must be issued within one year after the date of the order, otherwise the order granting leave ceases to have effect and the creditor must obtain another order from the court by way of a subsequent motion [r. 20.07(1.2)]. Once issued, with the exception of rules pertaining to the duration and renewal, the *Rules of Civil Procedure* apply to a writ of seizure and sale of land for all purposes instead of the *Rules of the Small Claims Court*, as if the writ were a writ of seizure and sale filed with the Enforcement Office under rule 60.07 of the *Rules of Civil Procedure* [r. 20.07(2)].

(1.1) If more than six years have passed since the order was made, a writ of seizure and sale of land may be issued only with leave of the court.

(1.2) If a writ of seizure and sale of land is not issued within one year after the date on which an order granting leave to issue it is made,

(a) the order granting leave ceases to have effect; and

(b) a writ of seizure and sale of land may be issued only with leave of the court on a subsequent motion.

(1.3) Electronic Filing, Issuance — The following persons may electronically file a request under subrule (1) for a writ of seizure and sale of land, without the supporting affidavit for enforcement request:

1. A lawyer or a paralegal.

2. A person who has filed a requisition with the clerk to provide for the electronic filing and issuance of documents in relation to the enforcement of an order.

(1.4) If the request is filed electronically, the writ of seizure and sale of land shall be issued electronically.

(1.5) Subrule 1.05.1(6) does not apply to an electronically filed request or an electronically issued writ.

(2) Application of *Rules of Civil Procedure* to Issued Writ — Subject to subrules (3) and (4), the *Rules of Civil Procedure* apply for all purposes instead of these rules to an issued writ of seizure and sale of land, as if the writ were a writ of seizure and sale issued under rule 60.07 of those Rules.

Commentary: In this process, an affidavit refers to an Affidavit for Writ of Seizure and Sale of Land (Form 20O).

If a debtor does not pay a debt pursuant to a judgment, in order to place a lien against the debtor's land or have the debtor's land seized and sold to satisfy the judgment, a creditor

must obtain a Writ of Seizure and Sale of Land (Form 20D) in the court where judgment was rendered.

If more than six years have elapsed since the judgment was made, the clerk shall not issue a writ of seizure and sale of land [r. 20.07(2)]. The party requires leave of the court in order to have the writ issued.

The writ must be filed with the enforcement officer four months before he or she can direct the enforcement office (sheriff) to seize and sell the property. The actual sale cannot proceed until the writ has been on file for six months. The sale of land is a complicated and costly process and is rarely used to enforce a Small Claims Court judgment.

The enforcement office has a general duty to act reasonably and in good faith towards all parties. The enforcement office can refuse to act if the estimated costs of executing the writ of seizure and sale are greater than the debtor's equity in the property to be seized.

A Writ of Seizure and Sale of Land (Form 20D) remains in force for six years from the date of its issue and for a further six years from each renewal [r. 20.07(3)].

- If more than six years have elapsed since the judgment was made, the court shall not issue a writ of seizure and sale of land [r. 20.07(1.1)]. The party requires leave of the court to have the writ issued.
- Where a writ of seizure and sale of land is requested following the filing of a certificate of default under the *Provincial Offences Act*, the court shall not issue the writ if more than six years have elapsed since the date of the earliest date of the default for which the certificate was issued. A party requires leave of the court in order to have the writ issued.
- Where a writ of seizure and sale of land is requested following the filing of a tribunal order under the residential *Tenancies Act* or the *Employment Standards Act*, the court shall not issue the writ if more than six years have elapsed since the date tribunal order is effective. Leave of the court is required in order to have the writ issued.

If an order granting leave to issue is made, the writ of seizure and sale of land must be issued within one year after the date of the order, otherwise the order granting leave ceases to have effect and the creditor must obtain another order from the court by way of a subsequent motion [r. 20.07(1.2)].

A Request to Renew Writ of Seizure and Sale (Form 20N) must be filed with the enforcement office before the expiration of the writ of seizure and sale of land.

(3) Duration of Writ — A writ of seizure and sale of land remains in force for six years after the date of its issue and for a further six years after each renewal.

(4) Alternative Method of Renewal — Instead of being renewed under the *Rules of Civil Procedure* in accordance with subrule (2), a writ of seizure and sale of land may be renewed before its expiration by filing a request to renew a writ of seizure and sale (Form 20N) with the sheriff.

O. Reg. 78/06, s. 44; 393/09, s. 19; 44/14, s. 14

Commentary: The *Rules of the Small Claims Court* do not limit the time period within which the following methods of enforcement may be issued:

- Certificate of Judgment
- Writ of Delivery
- Notice of Garnishment
- Notice of Examination

If more than six years have elapsed since the judgment was made, the clerk shall *not* issue a writ of seizure and sale of land [r. 20.07(2)] or a writ of seizure and sale of personal property [r. 20.06(1.1)]. In both cases, the creditor requires leave of the court in order to have the writ issued.

Failure to Renew Writ of Execution

Kovachis v. Dunn, 2011 ONSC 4174, 2011 CarswellOnt 6738, 38 C.P.C. (7th) 206, 71 E.T.R. (3d) 28 (Ont. S.C.J.) confirms that failure to renew a writ of *fieri facias* (also referred to as a writ of seizure and sale or writ of execution) within the 20-year limitation period under the old *Limitations Act*, R.S.O. 1990, c. L.15 (the old Act) results in a time-bar of the enforcement of the underlying judgment under the transition provisions of the *Limitations Act 2002*, S.O. 2002, c 24. Sch. B, (the new Act). Citing *Lax v. Lax*, 2004 CarswellOnt 1633, 70 O.R. (3d) 520, 50 C.P.C. (5th) 266, 239 D.L.R. (4th) 683, 3 R.F.L. (6th) 387, 186 O.A.C. 20, [2004] O.J. No. 1700 (Ont. C.A.); additional reasons 2004 CarswellOnt 5343, 75 O.R. (3d) 482, 4 C.P.C. (6th) 194, 247 D.L.R. (4th) 1, 12 R.F.L. (6th) 112, [2004] O.J. No. 5146 (Ont. C.A.), Justice Corrick notes that "[w]rits extend limitation periods. A judgment can be enforced indefinitely be renewing a writ of seizure and sale: Failure to renew a writ required an application for leave to issue an execution under rule 60.07(2) of the *Rules of Civil Procedure."* (at para 16). The court was bound by the Ontario Court of Appeal's decision in *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 2008 CarswellOnt 3495, 90 O.R. (3d) 401, 56 C.P.C. (6th) 14, 294 D.L.R. (4th) 141, 241 O.A.C. 29, [2008] O.J. No. 2339 (Ont. C.A.) which held that the doctrine of special circumstances enables a court to amend or add a claim to an existing action, but does not give a "court the power to allow the commencement of an action after the expiry of a limitation period. Ms. Dunn's application for leave to issue an execution must be denied." (at para. 22).

20.08 (1) Garnishment — A creditor may enforce an order for the payment or recovery of money by garnishment of debts payable to the debtor by other persons.

Commentary: If a debtor has not paid a debt pursuant to a court order, the creditor can make demand for money owed to the debtor by someone else by issuing a notice of garnishment, (for example, garnishment of bank accounts, wages, or money owed on some contract). Service on garnishee — by mail, personal service as per Rule 8.02 or by an alternative to personal service as per Rule 8.03. Service on debtor — by mail, personal service as per Rule 8.02 or by an alternative to personal service as per Rule 8.03. A Notice of Garnishment is effective for a term of two years from the date of service on the garnishee (Subrules 20.08 (7), (8)).

Payment obligations made pursuant to orders of the Workplace Safety and Insurance Board may be enforced in the Small Claims Court. Sections 139 and 140 of the *Workplace and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A provide:

> 139. (1) If a person does not pay amounts owing under this Act when they become due, the Board may issue a certificate stating that the person is in default under this Act and setting out the amount owed and the person to whom it is owed.
>
> 1997, c. 16, Sched. A, s. 139(1)
>
> (2) The Board may file the certificate with the Superior Court of Justice or with the Small Claims Court and it shall be entered in the same way as an order of that court and is enforceable as such. Despite any other rule of the court, the Board may file the certificate by mail and personal attendance at the court is not required.
>
> 1997, c. 16, Sched. A, s. 139(2); 2000, c. 26, Sched. I, s. 1(17)
>
> 140. (1) Enforcement through municipal tax rolls — If an employer does not pay amounts owing under this Act within 30 days after they become due, the Board may issue a certificate setting out the employer's status under this Act and the address of the employer's establish-

ment, stating that the employer is more than 30 days in default under this Act and setting out the amount owed.

In accordance with the *Bankruptcy and Insolvency Act* (Canada), where a debtor is bankrupt, the bankruptcy affects a stay of proceedings against the bankrupt/debtor. Written notice of the debtor's bankruptcy must be received from the trustee in bankruptcy. Generally, the garnishment is stayed until the bankruptcy is discharged. The question of whether the stay affects the running of the six-year lifetime of the garnishment is up to the parties to determine or dispute.

For example, should the garnishee believe that the six-year period continues to run during the bankruptcy, and the bankrupt debtor is discharged after the six-year period expires, the garnishee will not send any more money into court. In this case, it is up to the creditor to challenge the garnishee's decision.

Note that the debt that is owed by the bankrupt debtor may or may not be discharged by the bankruptcy. A garnishee may, therefore, send money into court believing that the debt has not been discharged.

Garnishment

Superior Court garnishments do not take precedence over Small Claims Court garnishments. Garnishment funds received in Small Claims Court are distributed equally between all garnishment creditors that may be entitled to share in the distribution of garnishment proceeds within that court.

If the sheriff/enforcement office is instructed by an execution creditor to seize garnishment proceeds held by the Clerk of the Small Claims Court, Clerk of the OCJ-Family Court, or Registrar of the SCJ-Family Court, then the sheriff may make a demand to the court for the proceeds, in accordance with s. 3(4) of the *Creditors' Relief Act, 2010*. Garnishment funds are only to be seized in accordance with the provision if the enforcement office receives clear written instruction from an execution creditor that provide details of specific funds to be seized.

It is not the responsibility of the enforcement office or court to provide legal advice to a garnishee with respect to compliance with a garnishment (*e.g.*: how to deal with multiple garnishments or the amount of wages to be paid to the court).

Garnishment — Rule 20.08

Section 7 of the *Wages Act* restricts the amount of wages that can be garnished. Some exemptions from garnishment are employment insurance, social assistance, and pension payments, even if the funds have been deposited into an account at a financial institution.

Most other kinds of debts owing to the debtor are 100 per cent garnishable

Case Law: *Take-a-Break Coffee Service v. Raymond* (1987), 26 C.P.C. (2d) 184 (Ont. Prov. Ct.).

There was an outstanding debt owed by the Federal Crown to the judgment debtor when the garnishment of the provincial court had been received. Once a competing Quebec garnishment claim had been satisfied payments were required to be remitted and continued during the ensuing six month period or until the government was fully retained.

Frangeskaki v. Director of Support and Custody Enforcement (1990), 31 R.F.L. (3d) 110 (Ont. Gen. Div.).

The debtor unsuccessfully challenged the jurisdiction of the provincially appointed Director to garnish the wages of an employee of a federal corporation. The relevant provincial statute was of general application and it did not attempt to regulate the very nature of the undertaking.

667801 Ontario Ltd. v. Moir (1990), 1 W.D.C.P. (2d) 266 (Ont. Prov. Ct.).

Commission due from the garnishee to the judgment debtor was a debt payable within the meaning of Rule 21.08. The garnishment in favour of the judgment creditor and notice of garnishee took precedence over the advances of loans to the judgment debtor by the garnishee.

Director of Support & Custody Enforcement v. Jones (1992), 3 C.P.C. (3d) 206 (Ont. Div. Ct.).

At common law, a joint bank account could not be garnished to satisfy a debt owing by a garnishee to a judgment debtor. To permit this would oblige a court to ascertain the exact extent of the judgment debtor's ownership of the funds in the joint account, and would implicitly authorize the court to re-write the joint account agreement.

Jantunen v. Ross (1991), 5 O.R. (3d) 433 (Ont. Div. Ct.).

Tips paid to a waiter (by credit card) were not exempt from the protection of s. 7(2) of the *Wages Act*. "Wages" included salary payable by "time or by the job or piece or otherwise" and credit card tips fell under "otherwise".

Canada Mortgage & Housing Corp. v. Apostolou (1995), 22 O.R. (3d) 190 (Gen. Div.).

Issue on motion was question of priority between garnishment issued and served by creditor, and earlier assignment of wages by debtor to other creditor, financing statement for which was registered subsequent to service of notice of garnishment. Serving notice of garnishment placed direct influence and restrictions upon garnishee. Liability of garnishee took effect at that time, and no further steps were required. Notice of garnishment stood in priority to wage assignment. Section 145 of the *Small Claims Court Act*, R.S.O. 1980, c. 476 had been repealed. *Bank of Montreal v. Osborne* (1983), 3 P.P.S.A.C. 227 (Ont. Div. Ct.) no longer applicable.

Dacon Corp. v. Treats Ontario Inc. (1995), 6 W.D.C.P. (2d) 174 (Ont. Gen. Div.).

Rents payable under a sublease were a garnishable debt owing to the sublessor by the sublessee. Sublessee, once served with a notice of garnishment, had to comply and pay rent to the sheriff, not sublessor. See Rule 60.08(19) of *Rules of Civil Procedure*.

Cadillac Fairview Corp. v. Grandma Lee's Ontario Inc. (1995), 6 W.D.C.P. (2d) 432 (Ont. Gen. Div.).

Rent money not attachable (garnishable) because it was owed jointly by both the garnishee/subtenant and the debtor/tenant to the creditor/landlord.

Crich Holdings & Buildings Ltd. and David Hall; Eugene Madore o/a Absolute Office Furniture Services, Garnishee, (December 20, 1994), File # 633/94 Searle, Dep. J., Woodstock (Ont. Sm. Cl. Ct.).

The issue is whether an employer who is served as a garnishee with a notice of garnishment is liable to remit even if the judgment debtor does not become employed by the garnishee until after the notice is served. The creditor sought order against the garnishee for payment/pursuant to the Small Claims Court Rule 21.08, (5), (6). Rule 60.08 of the *Rules of Civil Procedure* referred to. Court held no valid agreement unless employer/employee relationship at time. Notice of garnishment served.

Toronto Dominion Bank v. Cooper, Sandler, West & Skurka (1998), 157 D.L.R. (4th) 515, 37 O.R. (3d) 729 (Ont. Div. Ct.).

Client deposited $15,000 with solicitors, held in trust as retainer for defence on criminal charges of fraud and breach of trust. Relationship not debtor-creditor relationship. Funds held as true retainer were not debt to client and thus not subject to garnishment.

Whalley v. Harris Steel Ltd. (1997), 46 C.C.L.I. (2d) 250 (Ont. C.A.).

Trial judge properly held that annuity policies and payments were exempt by s. 196(2) of *Insurance Act*, R.S.O. 1990, c. I.8, provided that designation of specified persons was in

effect, even if moneys were not payable to designated beneficiary. Exemption does not apply to funds resulting from collapse of plan.

Waldteufel v. Fiducie Desjardins (1995), 95 D.T.C. 5183, 9 C.C.P.B. 78, *(*sub nom. *Ministre du Revenu national v. Waldteufel)* 118 F.T.R. 133 (Fed. T.D.).

Crown sought garnishment of R.R.S.P. owned by debtor and administered by garnishee. Investment non-garnishable under Act respecting trust companies and savings companies (Que.) as it was fixed-term annuity that was exempt from seizure but any annuity ultimately paid to debtor could be garnished.

Baskind v. Lauzen (1998), 43 B.L.R. (2d) 83 (Ont. Gen. Div.).

Defendant organized financial affairs entirely through corporation which he owned. Court found moneys paid to defendant were in form of "salary" and were properly subject to garnishment.

1066232 Ontario Ltd. v. Anbor Corp. (1998), 27 C.P.C. (4th) 279 (Ont. Gen. Div.).

Subrule 68.01(11) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out the limits of the garnishee's obligation to the sheriff and the time within which there must be compliance. Subrule 68.01(12) sets out those debts which are subject to garnishment. Is there a debt owing by the garnishee to the debtor, as contemplated under Rule 68.08 of the Rules of Civil Procedure? Amount of security deposit not a debt within the meaning of Rule 68.08.

Arnot v. Ermine (1999), 33 C.P.C. (4th) 374, 181 Sask. R. 161 (Sask. Q.B.).

A law firm applied for an order appointing the chief of S Band as the proper officer to be examined in aide of execution. The application was granted. The defect in describing the corporate garnishee and, subsequently, the party against whom judgment was obtained represented irregularity and did not nullify proceedings. S Band was not prejudiced by misdescription, as error did not mislead either Band officers or their solicitors as to the identity of the judgment debtor.

Lifescan Canada Ltd. v. Hogg (1999), 174 D.L.R. (4th) 187, 24 R.P.R. (3d) 224, 44 O.R. (3d) 593, 10 C.B.R. (4th) 180 (Ont. S.C.J.).

As result of a motion brought by garnishees pursuant to Rules of Civil Procedure (Ontario), Rule 60.08(16), the court ordered moneys paid under Notices of Garnishment be released to the judgment creditor and that all subsequent moneys should be paid to S.L. Garnishees awarded solicitor-and-client costs fixed at $3,900, as conduct of S.L throughout proceedings was appalling and egregious. The garnishees were forced to bring the motion after being locked out from the property without notice.

Tremblay c. Bourbeau, [1999] R.J.Q. 1601 (C.A.).

The court below erred in finding that garnishment proceedings were not execution proceedings and therefore did not fall within traditional common-law Crown immunity. Garnishment proceedings imposed certain legal obligations upon the garnishee, which were subject to sanction if ignored.

General Motors Acceptance Corp. of Canada Ltd. v. McClintock (2000), 49 C.P.C. (4th) 215, 138 O.A.C. 138, 2000 CarswellOnt 4414, [2000] O.J. No. 3836 (Ont. C.A.).

Appeal from (1999), 37 C.P.C. (4th) 25 dismissed. A partnership bank account was debt payable to the partnership and not to the individual partners. The debtor partner had no independent right to deal with the funds in the account. Share of debtor was not subject to garnishment.

Statute making "cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money" exigible. Registered retirement savings plans are not other security for money. Not exigible: *Memorials and Executions Act*, R.S.N.B. 1973, c. M-9, s. 26(1).

Hayes Debeck Stewart & Little v. Nikka Developments Ltd. (1996), 41 C.P.C. (4th) 364, 1996 CarswellBC 2628 (B.C. Master).

A claim was made by accountants for professional services. The debt was for a definite amount. The claim was for a liquidated amount. Cause of action in debt. Services rendered and payment demanded by way of invoice.

Horne v. Canada (Attorney General) (1996), 149 Nfld. & P.E.I.R. 46, 467 A.P.R. 46, 42 C.P.C. (4th) 325, 1996 CarswellPEI 126 (P.E.I. T.D. [In Chambers]).

A solicitor obtained an order for payment into court. A garnishee against the solicitor was set aside. The solicitor not owing debt; the Crown subject to garnishment. The applicant failed to garnishee Crown, which was the debtor according to the settlement. Garnishee set aside: *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2, s. 3.

Alessandro v. Ontario (Provincial Court Justice of the Peace) (2000), 2000 CarswellOnt 1331 (Ont. S.C.J.).

Effect of s. 5 of Act to make provincial garnishment law applicable to Federal Crown employees: *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2, s. 5.

Ferguson Gifford v. Lax Kw'Alaams Indian Band, 2000 BCSC 273, 72 B.C.L.R. (3d) 363, [2000] 2 C.N.L.R. 30, 2000 CarswellBC 333, [2000] B.C.J. No. 317 (B.C. S.C. [In Chambers]); leave to appeal allowed 2000 BCCA 280, 2000 CarswellBC 907 (B.C. C.A. [In Chambers]).

Indian Act, R.S.C. 1985, c. I-5, s. 89 prohibited moneys belonging to Indian band from seizure. Bank garnished moneys and placed moneys into court. Status Indian who was assignee was not permitted release of moneys.

Royal Bank v. Calonego (1999), 1999 CarswellOnt 4377 (Ont. S.C.J.).

A bank was entitled to proceed against both or either of the husband and wife who were joint debtors on a line of credit. A covenant not to sue the wife after payment of sum did not amount to a release by the husband.

Noble China Inc. v. Lei (1999), 1999 CarswellOnt 4244, [1999] O.J. No. 5030 (Ont. S.C.J.).

None of the money garnished from a joint bank account belonged to the debtor. The only information about the account was received in discovery process in another action and was protected by deemed undertaking not to use for any purposes outside action. Garnishment ordered was set aside.

720659 Ontario Inc. v. Wells (2001), 2001 CarswellOnt 3247 (Ont. S.C.J.).

Judgment debtor had gone bankrupt before garnishee hearing. Garnishment set aside. All proceedings had been stayed under ss. 69(1) and 70 of *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

Davidson & Co. v. MacAdam (2001), 2001 CarswellBC 2285, 2001 BCSC 1393, 95 B.C.L.R. (3d) 320, [2002] 1 W.W.R. 760, C.E.B. & P.G.R. 8392 (note) (B.C. S.C.).

Plaintiff law firm successfully acted for defendant in claim for disability benefits provided by solicitor's lien. Solicitor's lien was charge on benefit and was void by s. 65(1) of *Canada Pension Plan*, R.S.C. 1985, c. C-8.

20 Toronto Street Holdings Ltd. v. Coffee, Tea or Me Bakeries Inc. (2001), 53 O.R. (3d) 360, 2001 CarswellOnt 593, 4 C.P.C. (5th) 393 (Ont. S.C.J.).

Subtenant agreeing to be bound by the terms of the head lease. Subtenant paying its rent directly to the head landlord. Subtenant's payment of rent to head landlord extinguishing subtenant's debt to the tenant. Subtenant's rent not subject to garnishment by creditor of tenant.

Cina v. Ultratech Tool & Gauge Inc. (2001), 2001 CarswellOnt 4023, 56 O.R. (3d) 338, 15 C.P.C. (5th) 71 (Ont. S.C.J.).

Notice of Garnishment served upon garnishee described as TD Canada Trust not invalid. It was name under which five entities carried on retail banking business. Service as effected was effective to constitute service on all five corporations. Order jointly and severally to pay to sheriff amount in question.

Minister of National Revenue v. Hypnat Ltée, 2001 CarswellNat 789, 2001 CarswellNat 2161, 2001 CFPI 285, 2001 D.T.C. 5288 (Fr.), [2001] 4 C.T.C. 201 (Fed. T.D.).

Judgment creditor obtained provisional order of garnishment against account receivable owed to garnishee by judgment debtor. Judgment creditor then obtained final order. Debt not prescribed. Garnishee's financial statements and worksheets indicated that debt existed between garnishee and judgment debtor. Transactions were admission of existence of debt regularly renewed by garnishee, which constituted interruption of prescription by debt recognition.

Schmutz v. Parsons (2003), 2003 CarswellOnt 2832 (Ont. Master).

Plaintiff brought motion to change place of trial from Toronto to Whitby. Defendant brought motion to change place of trial from Toronto to Fort Frances. Plaintiff's medical witnesses were from Toronto. Plaintiff's motion allowed.

Citifinancial Canada Inc. v. Sherven, 2005 CarswellSask 812, 2005 SKQB 485 (Sask. Q.B.).

Ex parte application for payment out of funds to the plaintiff under provisions of the *Attachment of Debts Act*, R.S.S. 1978, c. A-32. Application for payment out includes claim for costs payable to plaintiff in priority to satisfaction of judgment. Counsel seeks order for solicitor-client costs for $1,100 plus disbursements of $470.01. Total draft bill of costs $1,756.91, almost $300 more than the funds paid into court by garnishee. Costs of garnishment proceedings entirely in court's discretion. If plaintiff seeks costs in garnishment proceedings, defendant must be served with Motion.

RCT Sales Ltd. v. Hamilton, 2005 CarswellBC 2280, 2005 BCPC 400 (B.C. Prov. Ct.).

Garnishment. Nature and extent. General principles.

Mullin v. R - M & E Pharmacy, 2005 CarswellOnt 203, 74 O.R. (3d) 378 (Ont. S.C.J.).

Garnishment is an equitable remedy. Court has jurisdiction to declare moneys payable on account of personal injury damages for pain and suffering to be exempt from garnishment. Law of Ontario that damages awarded for pain and suffering exempt from a bankrupt's trustee. See *Holley v. Gifford Smith Ltd.*, 1986 CarswellOnt 178, [1986] O.J. No. 165, 14 O.A.C. 65, *(*sub nom. *Holley, Re)* 54 O.R. (2d) 225, *(*sub nom. *Holley, Re)* 26 D.L.R. (4th) 230, *(*sub nom. *Holley, Re)* 59 C.B.R. (N.S.) 17, 12 C.C.E.L. 161 (Ont. C.A.). Plaintiff in personal injury claim cannot assign his cause of action. If all proceeds were to be scooped up by creditors, plaintiffs would not pursue legitimate claims.

Larry Penner Enterprises Inc. v. Lake St. Martin First Nation, 2006 CarswellMan 53, [2006] 2 C.N.L.R. 93, 202 Man. R. (2d) 213, 2006 MBQB 30 (Man. Master).

Plaintiffs moved *ex parte* on default judgment to garnish moneys allegedly owed by Province to defendants. Claim for continuing garnishing order dismissed. Subject moneys owed by Province were tax rebates from goods sold on reservation. Money payable by Province to defendants subject to Crown immunity.

Trick v. Trick, 2006 CarswellOnt 4139, 271 D.L.R. (4th) 700, 213 O.A.C. 105, 54 C.C.P.B. 242, 31 R.F.L. (6th) 237, 81 O.R. (3d) 241, 83 O.R. (3d) 55 (Ont. C.A.); leave to appeal refused 2007 CarswellOnt 575, 2007 CarswellOnt 576 (S.C.C.).

Payor in receipt of Canada Pension Plan and Old Age Security benefits falling in arrears under support order. Provincial law capping garnishment at 50 per cent where provincial

agency seeking enforcement. Appeal allowed. Court had discretion to set amount of garnishment. Discretion to be exercised in light of legislative policy to preserve one-half of benefits for payor.

The *Pension Benefits Act* ("PBA"), s. 66(1), exempts money payable under a pension plan from "execution, seizure or attachment." There is no authority to increase the 50 per cent exemption. Section 65(3) of the *PBA* cannot provide relief from the s. 65(1) general prohibition against pension assignment.

Univar Canada Ltd. v. PCL Packaging Corp., 2007 CarswellBC 2894, 2007 BCSC 1737, 76 B.C.L.R. (4th) 196 (B.C. S.C. [In Chambers]).

Appeal by plaintiff from dismissal of its application for pre-judgment garnishing order and order for service *ex juris* allowed. B.C. plaintiff sought garnishment of bank account at Ontario branch of TD Canada Trust. Master erred in finding branch was not in jurisdiction of court as TD Canada Trust operated branches in B.C. and was in jurisdiction of court. However, pursuant to *Bank Act*, plaintiff was required to serve branch where funds were located, so plaintiff was required to obtain leave to serve garnishing order *ex juris*.

The Attorney General of Canada v. Tammy James (January 19, 2017), Doc. 134/10, Deputy Judge, Glenn C. Walker (Ont. Sm. Cl. Ct.).

Motion brought by the Plaintiff requesting an order for leave to issue a Notice of Garnishment pursuant to Rule 20.08(2.1). The defendant entered into student loan agreements pursuant to the *Canada Student Loans Act*, R.S.C. 1985, c. S-23 and its Regulations, as amended, and student loans made pursuant to the *Canada Student Financial Assistance Act*, S.C. 1994, c. 12, and its Regulations, as amended.

On April 20, 2010, a Default Judgment was obtained against the defendant in this Court for $15,027.55 plus costs in the amount of $130.00. On May 21, 2010, a Notice of Garnishment was issued by this Court naming Copper Terrance Limited as the Garnishee. On June 16, 2010, the defendant filed an Assignment in Bankruptcy wherein KPMG Inc. was appointed as trustee of the state of the bankrupt. In or about March, 2011, the defendant was discharged from bankruptcy.

See Section 178(1)(g) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3.

In the matter of the bankruptcy of *Charles Wesley Sims*, (2008) A.B.Q.B. 121, the Bankruptcy Registrar came to the conclusion that the interpretation of ceasing to be a full-time student should have the same interpretation under the *Bankruptcy and Insolvency Act* and the *Canada Student Loans Act*. Having found that the defendant ceased to be a full-time student on June 30, 2003, her assignment in bankruptcy made on June 30, 2010, was within seven years after the date on which she ceased to be a full-time student. Consequently, the Judgment debt in this file has not been discharged by her bankruptcy. Leave granted to the Plaintiff to issue Notice of Garnishment.

(2) Joint Debts Garnishable — If a debt is payable to the debtor and to one or more co-owners, one-half of the indebtedness or a greater or lesser amount specified in an order made under subrule (15) may be garnished.

Commentary: As of September 1, 1998 joint debts are garnishable. You will be able to garnish up to 50 per cent of the joint debt. The garnishee is required to identify the co-owners of the debt to the creditor and the court. The creditor must notify the co-owner of the joint debt about the garnishment. The co-owner of the debt can dispute the amount of money payable for the joint debt. To do so, the co-owner of the debt must make a motion to the court. Before a notice of garnishment is issued, you as the creditor first have to file a sworn statement (affidavit re: garnishment) with the court where the debtor lives or carries on business.

Case Law: *Maxine's Ladies Wear v. Veltri* (May 26, 1998), Doc. 1114/97 (Ont. Gen. Div.).

Motion by the Garnishee for return of $664.39 remitted to the Small Claims Court. In *Director of Support & Custody Enforcement (Ontario) v. Jones* (1991), 5 O.R. (3d) 499 (Ont. Div. Ct.), the Divisional Court held that joint bank accounts in the name of a judgment debtor and another person are not garnishable because the bank is indebted to both joint account holders and not solely the judgment debtor. Motion therefore allowed.

A bank was entitled to pursue both or either of husband and wife who were joint debtors on a line of credit. A covenant not to sue the wife after payment of the sum did not amount to the husband's release. Both M.C. and the wife were principal debtors, joint and several and the bank was entitled to proceed against either or both. M.C.'s argument that his rights as guarantor under the mortgage were impaired by material variation in terms between the bank and his wife failed. *Royal Bank of Canada v. Calonego* (December 2, 1999), Doc. 98-0886 (Ont. S.C.J.).

(2.1) Where Leave Required — If more than six years have passed since the order was made, or if its enforcement is subject to a condition, a notice of garnishment may be issued only with leave of the court.

(2.2) If a notice of garnishment is not issued within one year after the date on which an order granting leave to issue it is made,

(a) the order granting leave ceases to have effect; and

(b) a notice of garnishment may be issued only with leave of the court on a subsequent motion.

(2.3) A notice of renewal of garnishment may be issued under subrule (5.3) without leave of the court before the original notice of garnishment or any subsequent notice of renewal of garnishment expires.

(3) Obtaining Notice of Garnishment — A creditor who seeks to enforce an order by garnishment shall file with the clerk of a court in the territorial division in which the debtor resides or carries on business,

(a) an affidavit for enforcement request (Form 20P) naming one debtor and one garnishee and stating,

(i) the date of the order and the amount awarded,

(ii) the territorial division in which the order was made,

(iii) the rate of postjudgment interest payable,

(iv) the total amount of any payments received since the order was granted,

(v) the amount owing, including postjudgment interest,

(vi) the name and address of the named garnishee to whom a notice of garnishment is to be directed,

(vii) the creditor's belief that the named garnishee is or will become indebted to the debtor, and the grounds for the belief, and

(viii) any particulars of the debts that are known to the creditor; and

(b) a certificate of judgment (Form 20A), if the order was made in another territorial division.

Commentary: Where a debtor does not pay a debt pursuant to a judgment, in order to make a demand of money owed to the debtor by someone else (*e.g.*, garnishment of bank accounts, wages or money owed through a contract), a creditor must obtain a notice of gar-

nishment in the jurisdiction where the debtor resides or carries on business. The person or company to whom the notice is sent is the garnishee.

The creditor may first have to obtain a certificate of judgment in the originating court and file it in the court in the jurisdiction where the debtor resides or carries on business.

A Notice of Garnishment (Form 20E) is effective for six years from the date of service on the garnishee. Notices of garnishment, unlike writs, cannot be renewed. Therefore, a new affidavit and a new notice of garnishment must be completed and filed to obtain a new notice of garnishment [r. 20.08(8)].

The garnishee is liable to pay to the clerk any monies he or she owes to the debtor, up to the amount shown in the notice of garnishment, within 10 days after service of the notice on the garnishee or 10 days after the debt becomes payable, whichever is later [r. 20.08(7)]. A debt the garnishee owes to the debtor includes:

- a debt payable at the time the notice of garnishment is served;
- a debt payable (whether absolutely or on the fulfilment of a condition) within six years after the notice is served [r. 20.08(8)].

A garnishee who admits owing a debt to the debtor shall pay it to the clerk in the manner prescribed by the notice of garnishment, subject to s. 7 of the *Wages Act* [r. 20.08(9)]. The amounts paid into court shall not exceed the portion of the debtor's wages that are subject to garnishment under s. 7 of the *Wages Act*. Interpretation and compliance with the *Wages Act* is the responsibility of the garnishee. The *Rules of the Small Claims Court* do not limit the time period within which garnishments may be issued.

According to subrule 8.01(8), a notice of garnishment is to be served by mail, by courier, personally, or by an alternative to personal service.

Within 10 days of being served with a Notice of Garnishment (Form 20E), a garnishee who wishes to dispute the garnishment, or pay to the clerk less than the amount set out in the notice of garnishment, is responsible for filing a Garnishee's Statement (Form 20F).

A creditor may be informed by the garnishee that the debtor has a co-owner of debt.

- Serving a Notice to Co-Owner of Debt (Form 20G) together with a copy of the Garnishee's Statement (Form 20F) to any co-owners of debt.
    - The co-owner of debt has 30 days from the date of service of the notice of co-owner of debt to request a garnishment hearing [r. 2.08(16)].
- If the 30-day time period for requesting a garnishment hearing has expired, within 30 days afterwards the creditor may file with the clerk [r. 20.08(21)]:
    - An Affidavit of Service (Form 8A) of the notice to co-owner of debt [r. 8.06];
    - An affidavit (Form 15B) stating he or she believes that no co-owner of the debt is a person under disability and the grounds for the belief [r. 20.08(21)].

Case Law: *Smith v. Schaffner*, 2007 CarswellNS 306, 2007 NSSC 210, 34 C.B.R. (5th) 316, 43 C.P.C. (6th) 358, 820 A.P.R. 58, 257 N.S.R. (2d) 58 (N.S. S.C.).

Mother brought application for enforcement of execution order against joint account. Application granted. Mother established on balance of probabilities that father's contribution to joint account was at least 45 per cent of amounts deposited. Bank ordered to apply execution order to 45 per cent of any monies in joint account. No reason existed to deny creditor's entitlement to have sheriff attach execution to debtor's interest in joint property if interest of execution debtor in such property was established. See *Penney v. Canadian Imperial Bank of Commerce*, 1996 CarswellNfld 238, 145 Nfld. & P.E.I.R. 355, 453 A.P.R. 355 (Nfld. T.D.).

(4) On the filing of the documents required by subrule (3), the clerk shall issue a notice of garnishment (Form 20E) naming as garnishee the person named in the affidavit.

(5) A notice of garnishment issued under subrule (4) shall name only one debtor and only one garnishee.

(5.1) Duration and Renewal — A notice of garnishment remains in force for six years from the date of its issue and for a further six years from each renewal.

Commentary: Section 29 of the *Crown Liability and Proceedings Act* (Federal) and section 21 of the *Proceedings Against the Crown Act* prohibit the issuance of executions against the Crown (Federal or Provincial).

Where a creditor requests the issuance of an execution against "Her Majesty the Queen in Right of Ontario", "Sa Majesté du chef de l'Ontario", or the Attorney General of Canada, they must be advised that the court is expressly prohibited from doing so in accordance with the applicable Act (above).

Proceedings against the Federal Crown may also include agencies of the Crown where an Act of Parliament authorizes proceedings to be taken in the name of the agency.

The garnishee is liable to pay to the clerk any monies he or she owes to the debtor, up to the amount shown in the notice of garnishment, within 10 days after service of the notice on the garnishee or 10 days after the debt becomes payable, whichever is later [r. 20.08(7)]. A debt the garnishee owes to the debtor includes:

- a debt payable at the time the notice of garnishment is served;
- a debt payable (whether absolutely or on the fulfilment of a condition) within six years after the notice is served and within six years after it is issued [r. 20.08(8)].

A garnishee who admits owing a debt to the debtor shall pay it to the clerk in the manner prescribed by the notice of garnishment, subject to section 7 of the *Wages Act* [r. 20.08(9)]. The amounts paid into court shall not exceed the portion of the debtor's wages that are subject to garnishment under section 7 of the *Wages Act*. Interpretation and compliance with the *Wages Act* is the responsibility of the garnishee. Issues relating to the *Wages Act* are legal matters and the garnishee should seek legal advice.

Garnishing the Wages of Federal/Provincial Employees

There are specific time limits and extra steps that must be taken if a creditor intends to garnish the wages of an employee of the federal government, a member of the Canadian Armed Forces, or an employee of the provincial government.

Garnishing the wages of an employee of the Federal Government:

There are specific time limits and extra steps that must be taken if a creditor intends to garnish the wages of an employee of the federal government, a military member of the Canadian Armed Forces, or an employee of the provincial government.

Garnishing the wages of an employee of the Federal department or department or agency falling under the definition of department as defined in s. 4 of the Garnishment Attachment and Pension Diversion Act:

The federal government requires information in addition to the basic information provided within the notice of garnishment, before they will honour a garnishment request:

1. The creditor would give their notice of garnishment issued by the clerk of the court in the usual way.

2. The creditor must obtain a copy of their order or judgment or a certificate of judgment.

3. The creditor must obtain and complete an "Application for Garnishment under the *Garnishment, Attachment and Pension Diversion Act"* form (Form 339) available on-line at http://www.justice.gc.ca/eng/fl-df/enforce-execution/pwr-pqr.html.

4. The creditor must serve the completed application for garnishment form, the copy of the final order or judgement, the issued notice of garnishment, and the garnishee's statement on the applicable Garnishment Registry.

The Notice of Garnishment must be issued within 30 days of service on the applicable Garnishment Registry Service, and can be effected by regular mail.

Pursuant to s. 4(1)(f) of the *Garnishment and Attachment Regulations*, if the garnishment is issued by one of the following locations:

1. District of Algoma;
2. District of Cochrane;
3. County of Frontenac;
4. District of Kenora;
5. County of Lanark;
6. Counties of Leeds and Grenville;
7. Counties of Lennox and Addington;
8. District of Manitoulin;
9. District of Nipissing;
10. Judicial District of Ottawa-Carleton;
11. District of Parry Sound;
12. Counties of Prescott and Russell;
13. County of Prince Edward;
14. District of Rainy River;
15. County of Renfrew;
16. Counties of Stormont, Dundas, and Glengarry;
17. District of Sudbury;
18. District of Temiskaming; or
19. District of Thunder Bay

service must be effected at the Garnishment Registry in Ottawa at

Garnishment Registry-National Capital Region
284 Wellington Street
Ottawa, ON
K1A 0H8

Pursuant to (s. 4(1)(g)), service must be made at:

Garnishment Registry-Department of Justice Canada
Ontario Regional Office
2 First Canadian Place
Box 36
Toronto ON
M5X 1K6
Attention: Garnishment Registry

If the garnishee summons is for the payment of maintenance, alimony or support and issued in Ontario in the Northwest Region, Northeast Region, East Region or Central East Region prescribed under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, outside Ontario, or by the provincial enforcement service. Service must be made at:

Garnishment Registry
Department of Justice
120 Adelaide Street
West, Suite 400
Toronto, Ontario
M5H 1T1

If the garnishment proceedings are in respect of a debtor who receives salary or remuneration from the Department of Justice, the Public Prosecution Service of Canada or a court, is a judge to whom the *Judges Act* applies or is a person appointed by a Minister under s. 128 of the *Public Service Employment Act*, pursuant to s. 4(2), service of documents must be made at:

Garnishment Registry
Department of Justice
120 Adelaide Street
West, Suite 400
Toronto, Ontario
M5H 1T1

If the garnishment proceedings are in respect of a debtor who receives salary or remuneration from a Crown corporation listed in s. 6, service of documents must be made at the head office of the corporation, pursuant to s. 4(3).

The creditor must serve the documents on the applicable Garnishment Registry within 30 days of the notice of garnishment being issued by the clerk of the Small Claims Court. Otherwise, the application will be rejected. See *Garnishment, Attachment and Pension Diversion Act*, s. 6(2).

In accordance with the *Garnishment, Attachment and Pension Diversion Act*, s. 10, the federal government has a minimum of 15 days to respond after the last day of the second pay period next following the pay period in which Her Majesty is bound by the notice of garnishment (could take up to 6 to 8 weeks after service usually for the first payment).

Doctrine that lower courts must follow decision of higher hours is fundamental to legal system because it provides certainty while permitting orderly development of law in incremental steps. *Stare decisis* is not a straitjacket that condemns law to stasis. Trial courts may reconsider settled rulings of higher courts in 2 situations:

1. where new legal issue is raised; and

2. where there is change in the circumstances or evidence that "fundamentally shifts the parameters of the debate": *Bedford v. Canada (Attorney General)*, 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, (sub nom. *Canada (Attorney General) v. Bedford)* [2013] 3 S.C.R. 1101, 128 O.R. (3d) 385 (note), 303 C.C.C. (3d) 146, 7 C.R. (7th) 1, 366 D.L.R. (4th) 237, (sub nom. *Canada (Attorney General) v. Bedford)* 297 C.R.R. (2d) 334, 452 N.R. 1, 312 O.A.C. 53, [2013] S.C.J. No. 72 (S.C.C.) at para. 42.

Carter v. Canada (Attorney General), 2015 CSC 5, 2015 SCC 5, 2015 CarswellBC 227, 2015 CarswellBC 228, [2015] 1 S.C.R. 331, 66 B.C.L.R. (5th) 215, 320 C.C.C. (3d) 1, 17

C.R. (7th) 1, 384 D.L.R. (4th) 14, [2015] 3 W.W.R. 425, 366 B.C.A.C. 1, 327 C.R.R. (2d) 334, 468 N.R. 1, 629 W.A.C. 1, [2015] A.C.S. No. 5, [2015] S.C.J. No. 5 (S.C.C.)

At the Court of Appeal, the appellant argued that in awarding costs the motion judge had ignored evidence of her impecuniosity and, in this case, the appellant had not met that onus. The Court of Appeal saw no grounds to interfere with the motion judge's ruling.

Baines v. Sigurdson Courtlander Burns and Silverstone Barristers & Solicitors, 2015 ONCA 80, 2015 CarswellOnt 1264 (Ont. C.A.).

An order made without notice is NOT nullity but remains a valid order of the court until set aside. In this case, the trial judge had given judgment in favour of the plaintiff at an undefended trial. On appeal, the defendants sought to have the judgment set aside on the grounds they had not been properly served with a notice of the trial. The Court of Appeal could find no evidence that the defendants lacked knowledge of the proceedings. Evidence showed they were aware of the order striking out their statement of defence and that their request for adjournment had been denied. The trial court had specifically addressed the validity of service by courier in a previous order that the defendants never bothered to appeal. The Court of Appeal dismissed the defendants' request to have the trial judgment set aside.

Agaki v. Synergy Group (2000) Inc., 2015 ONCA 44, 2015 CarswellOnt 658, [2015] O.J. No. 278 (Ont. C.A.)

Law Society has jurisdiction to review and sanction the conduct of counsel in the courtroom. Permitting the Law Society to review the conduct of lawyers in the courtroom does not interfere with judicial independence. While judges have a responsibility to address issues of incivility engaged in by lawyers who appear before them, the obligations of judges and the Law Society differ.

A lawyer's conduct must first be uncivil to invoke the discipline process. Zealous advocacy is not, by itself, sufficient to open the door to professional misconduct. Conduct that engages the incivility concern begins with conduct that is rude, unnecessarily abrasive, sarcastic, demeaning, abusive, or of any like quality. For uncivil conduct to rise to the level that would properly engage the disciplinary process, it must be conduct that, in addition to being uncivil, will also bring the administration of justice into disrepute, or would have the tendency to do so.

Groia v. Law Society of Upper Canada, 2015 ONSC 686, 2015 CarswellOnt 1238, 124 O.R. (3d) 1, 87 Admin. L.R. (5th) 221, 382 D.L.R. (4th) 337, 330 O.A.C. 202, [2015] O.J. No. 444 (Ont. Div. Ct.); additional reasons 2015 ONSC 1680, 2015 CarswellOnt 3644 (Ont. Div. Ct.); affirmed 2016 ONCA 471, 2016 CarswellOnt 9453, 131 O.R. (3d) 1, 1 Admin. L.R. (6th) 175, 358 C.R.R. (2d) 1, 352 O.A.C. 210 (Ont. C.A.); reversed 2018 CSC 27, 2018 SCC 27, 2018 CarswellOnt 8700, 2018 CarswellOnt 8701, [2018] 1 S.C.R. 772, 34 Admin. L.R. (6th) 183, 46 C.R. (7th) 227, 424 D.L.R. (4th) 443, [2018] S.C.J. No. 27 (S.C.C.).

Factors in exercise of discretionary power: the Court of Appeal agreed that the motion judge's decision to strike the husband's pleadings for non-compliance with various disclosure orders was a discretionary matter that deserved the appellate court's deference, absent error in principle or material misapprehension of evidence. The Court of Appeal agreed that the motion judge had correctly identified operative principles in exercise of that discretion:

- whether husband remained in default;
- whether his default was wilful; and
- if so, whether striking pleadings only appropriate remedy available

In this case:

1. Ongoing default: The motion judge found that, even though the husband had addressed many of the alleged deficiencies in his disclosure, he still left many gaping holes in the production of his material.

2. Wilful default: Despite many chances for his compliance, the husband's resistance to disclosure orders continued over almost 2 years and, even when he did respond, he chose to obfuscate the nature and extent of his response, leaving the motion judge unable to ascertain the extent of his compliance with the orders. The Court of Appeal ruled it was open to the motion judge to view his response as part of strategy designed to avoid compliance with outstanding disclosure orders and the strategy was indicative of wilful disobedience.

3. Remedy of last resort: The Court of Appeal conceded that striking the pleadings was a drastic remedy but, in this case, the motion judge mitigated the harshness of the remedy by allowing the husband to reinstate his pleadings on "proper evidence" and elaborated what that "proper evidence" would need to be — the husband chose not to pursue that avenue in a timely fashion.

The Appeal was dismissed.

Glasco v. Bilz, 2015 ONCA 83, 2015 CarswellOnt 1278 (Ont. C.A.).

The motion judge ordered the plaintiff to pay the defendant's costs and refused to allow a set-off for the amount by which the defendant was indebted to the plaintiff. The order determined rights that extended beyond entitlement to and quantum of costs. Leave to appeal not required under s. 133(b) of *Courts of Justice Act*. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 133(b).

Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc., 2014 ONCA 652, 2014 CarswellOnt 13034, 122 O.R. (3d) 177 (Ont. C.A.)

The plaintiff commenced the action in 1989. The plaintiff's delay for the first 14 years was excusable, as the parties were attempting to resolve matters consensually. The plaintiff offered no reasonable explanation for the post-2003 delay. The presumption of prejudice to defendants was very strong. The plaintiff failed to rebut the presumption as it did nothing to preserve the evidence of any witness or potential witness.

Canadian National Railway v. Kitchener (City), 2014 ONSC 4929, 2014 CarswellOnt 11624, *(*sub nom. *Canadian National Railway Co. v. Kitchener (City))* 122 O.R. (3d) 372, 28 M.P.L.R. (5th) 251 (Ont. S.C.J.); affirmed 2015 ONCA 131, 2015 CarswellOnt 2541, 66 C.P.C. (7th) 251, 33 M.P.L.R. (5th) 173 (Ont. C.A.); leave to appeal refused 2015 CarswellOnt 11239, 2015 CarswellOnt 11240 (S.C.C.)

Actions dismissed for delay for second time after plaintiffs' lawyer missed deadline for setting matter down for trial. Test for inadvertence in missing deadline not higher when there has been second breach of set-down date order. Lawyer providing some explanation for failure to meet second deadline. Master not erring in exercise of his discretion in reinstating action. *Cousins v. Roesler*, 2014 ONSC 4530, 2014 CarswellOnt 14821, 122 O.R. (3d) 660 (Ont. S.C.J.).

Garnishing the wages of a member of the Canadian Armed Forces:

The creditor must give the debtor's commanding officer notice of their intention to issue a garnishment at least 30 days before serving the notice of garnishment. If the creditor does not know the identity of the debtor's commanding officer, the creditor should be advised to contact the Office of the Judge Advocate General — National Defence Headquarters for instructions, at (613) 992-6420.

In this process, an affidavit refers to an Affidavit for Enforcement Request (Form 20P).

If there is a default in payment of a debt pursuant to a judgment, the creditor may require the debtor or other person to be examined for the purposes of assessing the debtor's assets which may be available for satisfying the judgment.

Section 29 of the *Crown Liability and Proceedings Act* (Federal) and section 21 of the *Proceedings Against the Crown Act* prohibit the issuance of executions against the Crown (Federal or Provincial).

Where a creditor requests the issuance of an execution against "Her Majesty the Queen in Right of Ontario," "Sa Majesté du chef de l'Ontario," or the Attorney General of Canada, they must be advised that the court is expressly prohibited from doing so in accordance with the applicable *Act* (above).

Proceedings against the Federal Crown may also include agencies of the Crown where an Act of Parliament authorizes proceedings to be taken in the name of the agency.

A Notice of Examination (Form 20H) is issued by the clerk in the jurisdiction where the debtor or other person resides or carries on business. The creditor may first have to obtain a certificate of judgment in the originating court and file it in the court in the jurisdiction where the debtor or other person resides or carries on business.

A separate notice of examination must be completed for each person examined and a fee must be submitted for each notice of examination.

"Examination days" on which examinations are scheduled may be established in each court. A creditor may attend the court office and/or make a written request to obtain a date, time, and place for the hearing of the examination.

Rule 1.07(1.1) grants parties the ability to request that all or part of an examination be conducted by *videoconference only* where facilities exist by filing a Request for Telephone or Video Conference (Form 1B), indicating the reasons for the request. If the request is granted, the court will make the necessary arrangements and notify the parties.

Financial Information Form

In the case of a debtor who is an individual, they will be served with the Financial Information form (Form 20I) along with the notice of examination. In accordance with r. 20.10(4.1)(b), the debtor must complete the financial information form and serve a copy on the creditor, and provide a copy to the judge at the examination hearing. In accordance with r. 20.10(4.2), the debtor must also bring documents to the examination hearing to support the information provided in the financial information form.

(5.2) A notice of garnishment may be renewed before its expiration by filing with the clerk of the court in which the notice of garnishment was issued a notice of renewal of garnishment (Form 20E.1), together with an affidavit for enforcement request (Form 20P).

(5.3) On the filing of the notice and affidavit required by subrule (5.2), the clerk shall issue the notice of renewal of garnishment (Form 20E.1) naming as garnishee the person named in the affidavit.

(5.4) The provisions of these rules that apply with respect to notices of garnishment also apply with respect to notices of renewal of garnishment.

(6) Service of Notice of Garnishment — The notice of garnishment (Form 20E) shall be served by the creditor in accordance with subrule 8.01(8).

Commentary: Where the garnishee is a bank, trust company, loan corporation, credit union, or the Province of Ontario Savings Office, the Notice of Garnishment should be served at the branch where the debt to the payor is payable.

Section 212 of the federal *Bank Act*, R.S.C. 1985, c. B-1, limits the effect of any writ or process to the branch where it was served.

Once issued, the creditor is required in accordance with rule 20.08(6) to serve both the debtor and the garnishee with a copy of the Notice of Garnishment together with a copy of the sworn Affidavit for Enforcement Request.

The debtor must be served with a copy of the garnishment within five days of serving it on the garnishee.

The rule of service that applies with respect to garnishments is rule 8.01(8).

Service on:	Documents Requiring Service:	Acceptable Methods of Service:	Timelines for Service:
Debtor	• Notice of Garnishment, and • Affidavit for Enforcement Request.	• Personally (8.02) • Alternative to Personal Service (8.03) • Mail (8.07) • Courier (8.07.1)	Within 5 days of effecting service on garnishee.
Garnishee	• Notice of Garnishment, and • Garnishee Statement.	• Personally (8.02) • Alternative to Personal Service (8.03) • Mail (8.07) • Courier (8.07.1)	

It is acceptable for a debtor to be served with a Notice of Garnishment at the debtor's place of employment.

(6.1) The creditor shall serve the notice of garnishment on the debtor within five days of serving it on the garnishee.

(6.2) Financial Institution — If the garnishee is a financial institution, the notice of garnishment and all further notices required to be served under this rule shall be served at the branch at which the debt is payable.

(6.3) Proof of Service — Service of the notice of garnishment may be proved by affidavit.

(7) Garnishee Liable From Time of Service — The garnishee is liable to pay to the clerk any debt of the garnishee to the debtor, up to the amount shown in the notice of garnishment, within 10 days after service of the notice on the garnishee or 10 days after the debt becomes payable, whichever is later.

(8) For the purpose of subrule (7), a debt of the garnishee to the debtor includes,

(a) a debt payable at the time the notice of garnishment is served; and

(b) a debt payable (whether absolutely or on the fulfilment of a condition) after the notice is served and within six years after it is issued.

Commentary: A garnishment remains in force for 24 months from the date of service [Rule 20.08(8)]. A debt of the garnishee to the debtor includes a debt payable at the time the

Notice of Garnishment is served and a debt payable within 24 months after the notice is served or payable on the fulfilment of a term or condition with 24 months after the notice is served. Where the full amount of the order has not been paid within the 24 month period, the creditor/agent must file a new affidavit.

(9) Payment by Garnishee — A garnishee who admits owing a debt to the debtor shall pay it to the clerk in the manner prescribed by the notice of garnishment, and the amounts paid into court shall not exceed the portion of the debtor's wages that are subject to seizure or garnishment under section 7 of the *Wages Act*.

Commentary: Effective April 17, 2000, cheques for garnished funds received by Small Claims Court should be issued payable to the creditor, unless there is a letter of direction from the creditor instructing otherwise. They may be mailed either care of the agent/lawyer's address or to the creditor, as directed. The Small Claims Court Form #SCR 20.08-20E "Notice of Garnishment" has been amended to reflect this change with the following note: "*Note: Any garnished funds received by the court will be made payable to the judgment creditor in all instances, unless an irrevocable letter of direction is received from the judgment creditor directing otherwise.*"

(10) Equal Distribution Among Creditors — If the clerk has issued notices of garnishment in respect of a debtor at the request of more than one creditor and receives payment under any of the notices of garnishment, he or she shall distribute the payment equally among the creditors who have filed a request for garnishment and have not been paid in full.

Commentary: Where a judgment creditor requests issuance of a garnishment after the funds have been received even though they may not have been distributed, the creditor is not entitled to a share of the funds standing in court. The judgment creditor will be entitled to a share of any funds received after the request for garnishment has been filed with the court. A judgment creditor who has filed a request for garnishment in another territorial division is *not* entitled to share in any distribution of funds. Only judgment creditors who have filed requests for garnishment in the territorial division where the funds are being received are entitled to share in any distribution.

Suppose creditor "A" issues a Notice of Garnishment against a debtor's bank account, and creditor "B" issues a notice of garnishment against the same debtor's employer. They would each share equally in any moneys paid into court by either garnishee. If additional notices of garnishment are subsequently issued against the same debtor naming the same or other garnishees, those creditors would share equally in any distribution of moneys received from any of the garnishees.

(11) Disputing Garnishment — A garnishee referred to in subrule (12) shall, within 10 days after service of the notice of garnishment, file with the court a statement (Form 20F) setting out the particulars.

(12) Subrule (11) applies to a garnishee who,

(a) wishes to dispute the garnishment for any reason; or

(b) pays to the clerk less than the amount set out in the notice of garnishment as owing by the garnishee to the debtor, because the debt is owed to the debtor and to one or more co-owners of the debt or for any other reason.

Commentary: A garnishee can dispute a garnishment within 10 days after it was served with the Notice of Garnishment by sending a statement to the court setting out the particulars of the dispute [Rule 20.08(11)]. Distribution of garnishment monies received must be made equally among all creditors who filed a garnishment, regardless of the garnishee named. The garnishee is responsible to identify if the debt is owed to the debtor and one or more co-

owners. He/she must serve a copy of the statement on the creditor and the debtor, and file with the court, a copy of the garnishee's statement indicating that the debt is owed to the debtor and one or more co-owners (see Subrules 20.08 (13) and (14)). A garnishment hearing may be requested by a creditor, debtor, garnishee, co-owner of the debt and any other interested person.

Within 10 days of being served with a Notice of Garnishment (Form 20E), a garnishee who wishes to dispute the garnishment, or pay to the clerk less than the amount set out in the notice of garnishment, is responsible for filing a Garnishee's Statement (Form 20F).

A dispute filed under this rule could include any one or more of the following reasons:

1. That, at the time of being served with the Notice of Garnishment the payor owed the recipient no money, either,

   (a) because the amount claimed by the recipient was paid up in full; or

   (b) because the amount claimed by the recipient was calculated for an order that, by its own wording, is no longer effective or that has been suspended or found no longer to be effective by an appropriate court.

2. That, at the time of being served with the Notice of Garnishment declaration for indexed support, the payor owed less than the amount claimed by the recipient, either,

   (a) because some of the amount was paid; or

   (b) because some of the amount was calculated for an order that, by its own wording, is suspended or no longer effective or that has been suspended or found no longer to be effective by an appropriate court.

3. That, at the time of being served with the Notice of Garnishment,the garnishee did not owe the payor any money and that the garnishee does not now owe and does not expect in the future to owe the payor any money.

4. That the garnishee owes or will owe the payor money, but that this money is protected from garnishment by a legal exemption, the details of which must be set out in the dispute.

5. That the garnishee has a right of set-off against the payor, the details of which must be set out in the dispute.

6. That the amount being garnisheed is greater than what is allowed,

   (a) under section 7 of the *Wages Act*;

   (b) in an order made under section 7 of the *Wages Act*;

   (c) in an order made under section 68 of the *Bankruptcy and Insolvency Act* (Canada); or

   (d) under any other law, the details of which must be set out in the dispute.

7. That the money owed by the garnishee to the payor is not a wage under the Wages Act, that the amount being garnisheed is causing a serious financial hardship for the payor and that the payor is asking for a change in the amount being garnished. The case of *Gavitz v. Brock* (1974), 3 O.R. (2d) 58 (C.A.) determined that wages includes a salesperson's commission.

Case Law: *Shaffer v. Greenberg* (1994), 26 C.P.C. (3d) 331 (Man. Q.B.).

The defendant moved to vary or suspend the notice of garnishment because the plaintiff breached an agreement not to take action before February 24 and did not use his best efforts to collect funds from the co-defendant. The notice of garnishment was set aside. The plaintiff by obtaining the notice of garnishment against the co-defendant and attempting to sustain the order against him fulfilled his obligation, therefore, the plaintiff may properly proceed with efforts to collect from the defendant.

Cina v. Ultratech Tool & Gauge Inc. (2001), 2001 CarswellOnt 4023, 56 O.R. (3d) 338, 15 C.P.C. (5th) 71 (Ont. S.C.J.).

Notice of Garnishment served upon garnishee described as TD Canada Trust not invalid. It was name under which five entities carried on retail banking business. Service as effected was effective to constitute service on all five corporations. Order jointly and severally to pay to sheriff amount in question.

Stoneworth Ltd. v. Applegate (Ont. Sm. Cl. Ct.).

Motion to set aside judgment against garnishee.

Garnishee did not file statement of garnishment, was not present at hearing and had not informed either Court or the plaintiff of proper names of the defendant's employer. Court gave judgment against garnishee for wages paid in the period of time between service of garnishment and defendant's consumer proposal.

Judgment against garnishee set aside. Costs payable by the garnishee to the plaintiff.

Garnishee took position in motion that it was under restraint to inform either Court or plaintiff of correct name of the employer of the defendant. The legal employer of the defendant is a management company with different officers and shareholders. It supplies Applegate's services to Robins Appleby. This is a normal configuration for law firms.

Garcia v. Cheng, 2014 ONSC 5520, 2014 CarswellOnt 13483 (Ont. Div. Ct.).

The Respondents issued a Notice of Garnishment. This was done before Cheng pursued the appeal. Money ($1,536.00) was garnished from her account and held by the Enforcement Office at Court. The Registrar dismissed her appeal in May 2013. Cheng obtained an order from the court setting aside the Registrar's dismissal order and giving her thirty days to perfect her appeal. The Enforcement Office of the Small Claims Court released the garnished funds to the respondents. The Respondents consented to setting aside the order of the Small Claims judge dated July 7, 2012 and directing a new trial before a different judge. The Court was not prepared to order the respondents to return the garnished monies to Cheng.

Sangwan v. Marsh (August 6, 2019), Doc. 679/18, Deputy Judge Winny (Ont. Sm. Cl. Ct.).

The plaintiff requests judgment against the garnishee pursuant to rule 20.08(17) of the *Small Claims Court Rules*, O.Reg. 258/98, in the amount of $27,879.83 being judgment dated August 31, 2018 inclusive of interest and costs. Request dismissed.

Garnishee denies owing any money to the judgment-debtor and states that he is her boyfriend. Garnishment is only available where a debt is or will be owed by the garnishee to the judgment-debtor. Plaintiff would have to obtain a judgment in the Superior Court of Justice establishing the judgment-debtor's interest in one or both real properties before enforcement against such an interest would be available. This court has no jurisdiction to make a judgment declaring ownership of real property.

Unlike rule 60.18(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 20.10 of the *Small Claims Court Rules* does not require leave of the court to examine a non-party in aid of execution. Examinations of a judgment-debtor's spouse, or an alleged transferee of a judgment-debtor's property, are not unheard of. See *Advance Magazine Publishers Inc. v. Fleming*, [2002] B.C.J. No. 1527 (Master), and *Patrons Acceptance Ltd. v. Born*, 1983 CarswellOnt 417, 34 C.P.C. 186, [1983] O.J. No. 2189 (Ont. Co. Ct.), respectively.

SCC Certificates of Judgment: A certificate of judgment is issued in the Oshawa SCC, where a garnishment was issued and followed by a garnishment hearing. A judge made an order against the garnishee.

Can a certification of judgment be issued by the receiving court with respect to the judge's order from the garnishee hearing only?

Only the originating/home court office can issue a certificate of judgment. If a creditor finds that a debtor has moved or returned to the originating court's jurisdiction, the creditor may return to the originating court to pursue enforcement, or alternatively request from the originating/home court the issuance of a certificate of judgment directed to another court location. Writs of seizures and sale of personal property and writs of seizure and sale of land must be issued only at the Small Claims Court location where the judgment was originally obtained.

Small Claims Court rule and form changes effective January 1, 2015, according to O. Reg. 170/14.

(13) Service on Creditor and Debtor — The garnishee shall serve a copy of the garnishee's statement on the creditor and the debtor.

(14) Notice to Co-owner of Debt — A creditor who is served with a garnishee's statement under subrule (13) shall forthwith send to any co-owners of the debt, in accordance with subrule 8.01(14), a notice to co-owner of debt (Form 20G) and a copy of the garnishee's statement.

(15) Garnishment Hearing — At the request of a creditor, debtor, garnishee, co-owner of the debt or any other interested person, the clerk shall fix a time and place for a garnishment hearing.

Case Law: *Cotton v. Cotton*, 2004 CarswellOnt 793 (Ont. S.C.J.).

Does plaintiff have status to maintain proceeding given now an undischarged bankrupt? Plaintiff has no status or authority to maintain proceeding, based on a consideration of section 71(2) of *The Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, *Hall-Chem Inc. v. Vulcan Packaging Inc.*, 1994 CarswellOnt 309, 28 C.B.R. (3d) 161, 75 O.A.C. 74, 120 D.L.R. (4th) 552, 21 O.R. (3d) 89, 33 C.P.C. (3d) 361 (Ont. C.A.), *Sier Bath Deck Gear Corp. v. Polymotion Ltd.* (1996), 30 O.R. (3d) 736, 1996 CarswellOnt 3873, 42 C.B.R. (3d) 1, 15 O.T.C. 323 (Ont. Gen. Div.), a decision of the Ontario Court (General Division) on appeal from the Small Claims Court. See also *Rule 11* of the *Ontario Rules of Civil Procedure*. Action stayed.

(15.1) Service of Notice of Garnishment Hearing — After having obtained a hearing date from the clerk, the party requesting the garnishment hearing shall serve the notice of garnishment hearing (Form 20Q) in accordance with subrule 8.01(9).

(15.2) Powers of Court at Hearing — At the garnishment hearing, the court may,

(a) if it is alleged that the garnishee's debt to the debtor has been assigned or encumbered, order the assignee or encumbrancer to appear and state the nature and particulars of the claim;

(b) determine the rights and liabilities of the garnishee, any co-owner of the debt, the debtor and any assignee or encumbrancer;

(c) vary or suspend periodic payments under a notice of garnishment; or

(d) determine any other matter in relation to a notice of garnishment.

(16) Time to Request Hearing — A person who has been served with a notice to co-owner of debt is not entitled to dispute the enforcement of the creditor's order for the payment or recovery of money or a payment made by the clerk unless the person requests a garnishment hearing within 30 days after the notice is sent.

(17) Enforcement Against Garnishee — If the garnishee does not pay to the clerk the amount set out in the notice of garnishment and does not send a garnishee's

statement, the creditor is entitled to an order against the garnishee for payment of the amount set out in the notice, unless the court orders otherwise.

(18) Payment to Person other than Clerk — If, after service of a notice of garnishment, the garnishee pays a debt attached by the notice to a person other than the clerk, the garnishee remains liable to pay the debt in accordance with the notice.

(19) Effect of Payment to Clerk — Payment of a debt by a garnishee in accordance with a notice of garnishment is a valid discharge of the debt as between the garnishee and the debtor and any co-owner of the debt, to the extent of the payment.

(20) Distribution of Payments — When proof is filed that the notice of garnishment was served on the debtor, the clerk shall distribute a payment received under a notice of garnishment to a creditor in accordance with subrule (20.1), unless,

(a) a hearing has been requested under subrule (15);

(b) a notice of motion and supporting affidavit (Form 15A) has been filed under rule 8.10, 11.06 or 17.04; or

(c) a request for clerk's order on consent (Form 11.2A) has been filed seeking the relief described in subparagraph 1 iii of subrule 11.2.01(1).

Commentary: Is the 24-month lifetime of a garnishment suspended where notice is received from a trustee in bankruptcy stating that the debtor is bankrupt?

In accordance with the *Bankruptcy and Insolvency Act* (Canada) where a debtor is bankrupt, the bankruptcy effects a stay of proceedings against the bankrupt/debtor. Generally, the garnishment is stayed until the bankrupt debtor is discharged. Written notice of the debtor's bankruptcy must be received from the trustee in bankruptcy. The question of whether the stay affects the running of the 24-month lifetime of the garnishment is up to the parties to determine or dispute.

For example, should the garnishee believe that the 24-month period continues to run during the bankruptcy, and the bankrupt debtor is discharged after the 24-month period expires, the garnishee will not send any more money into court. In this case, it is up to the creditor to challenge the garnishee's decision.

Should the garnishee believe that the 24-month lifetime of the garnishment is suspended until the bankruptcy is discharged and that the garnishment is revived after the discharge, and the garnishee sends money in to court, court staff should process it as garnishment money and leave it to the debtor to dispute.

Note that the debt that is owed by the bankrupt debtor may or may not be discharged by the bankruptcy. A garnishee may, therefore, send money into court believing that the debt has not been discharged. As is the usual practice where money is received, court staff should process it as garnishment money and leave it to the party/garnishee to dispute.

Under s. 3(5) of the *Creditors' Relief Act*, where the enforcement office has a writ against a debtor, the enforcement office may provide a demand, in writing, for any garnishment funds being held in Small Claims Court in connection with that same debtor.

The demand procedure under the *CRA* applies where the sheriff's writ names the same debtor as the debtor named in the SCC Notice of Garnishment (Form 20E). The sheriff is entitled to take those garnished funds and distribute them under the *CRA*.

Case Law: *Bazar McBean LLP v. 1464294 Ontario Ltd.* (2009), 2009 CarswellOnt 5934, [2009] O.J. No. 4088 (Ont. Div. Ct.).

The plaintiff garnished $2,544 from the individual defendants. All the parties then reached a settlement for $1,000 and paid the monies. The individual defendants then learned monies

had already been garnished from them. To permit the plaintiff to keep the garnished funds and the settlement funds would be inequitable. It was not viable to set aside the settlement instead of the garnishment as it was impossible to believe the plaintiff really thought it was entitled to a windfall.

(20.1) The clerk shall distribute the payment,

(a) in the case of the first payment under the notice of garnishment, 30 days after the date it is received; and

(b) in the case of every subsequent payment under the notice of garnishment, as they are received.

(20.2) Notice Once Order Satisfied — Once the amount owing under an order that is enforced by garnishment is paid, the creditor shall immediately serve a notice of termination of garnishment (Form 20R) on the garnishee and on the clerk.

(21) Payment if Debt Jointly Owned — If a payment of a debt owed to the debtor and one or more co-owners has been made to the clerk, no request for a garnishment hearing is made and the time for doing so under subrule (16) has expired, the creditor may file with the clerk, within 30 days after that expiry,

(a) proof of service of the notice to co-owner; and

(b) an affidavit stating that the creditor believes that no co-owner of the debt is a person under disability, and the grounds for the belief.

(22) The affidavit required by subrule (21) may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

(23) If the creditor does not file the material referred to in subrule (21) the clerk shall return the money to the garnishee.

O. Reg. 461/01, s. 18; 78/06, s. 45; 393/09, s. 20

Commentary: A creditor may be informed by the garnishee that the debtor has a co-owner of debt.

The creditor is responsible for:

1. Serving a Notice to Co-Owner of Debt (Form 20G) together with a copy of the Garnishee's Statement (Form 20F) to any co-owners of debt.

The co-owner of debt has 30 days from the date of service of the notice of co-owner of debt to request a garnishment hearing [r. 2.08(16)].

2. If the 30-day time period for requesting a garnishment hearing has expired, within 30 days afterwards the creditor may file with the clerk [r. 20.08(21)]
   - An Affidavit of Service (Form 8A) of the notice to co-owner of debt [r. 8.06];
   - An affidavit (Form 15B) stating he or she believes that no co-owner of the debt is a person under disability and the grounds for the belief [r. 20.08(21)].

If the creditor does not file proof of service of the notice to co-owner and an affidavit stating that the creditor believes that no co-owner of the debt is a person under disability, and the grounds for the belief, the clerk shall return any received money back to the garnishee [r. 20.08(23)].

20.09 (1) Consolidation Order — A debtor against whom there are two or more unsatisfied orders for the payment of money may make a motion to the court for a consolidation order.

(2) The debtor's notice of motion and supporting affidavit (Form 15A) shall set out, in the affidavit portion,

(a) the names and addresses of the creditors who have obtained an order for the payment of money against the debtor;

(b) the amount owed to each creditor;

(c) the amount of the debtor's income from all sources, identifying them; and

(d) the debtor's current financial obligations and any other relevant facts.

(3) For the purposes of clause 15.01(3)(a), the notice of motion and supporting affidavit shall be served on each of the creditors mentioned in it at least seven days before the hearing date.

Commentary: If a debtor has more than one outstanding Small Claims Court judgment against him or her, the debtor can apply to the Small Claims Court in the jurisdiction where he or she lives or carries on business for a consolidation order. The requested order would combine the judgment debts and set up a schedule of repayments for all creditors named in the order. While the consolidation order is in force, no step to enforce the judgment may be taken or continued against the debtor by a creditor named in the order, except issuing a writ of seizure and sale of land and filing it with the sheriff [r. 20.09(8)].

At the hearing, a judge will hear evidence about the debtor's income and expenses and may make an order combining the debts and order payments to be made in instalments.

"Motion days" are established in each court. A party may obtain a motion date from staff in advance of completing a Notice of Motion (Form 15A). The date must be obtained by a party at least seven days before the date set for the hearing since all documents must be served at least seven days before the hearing.

A motion can be heard or conducted by telephone or video conference if facilities are available and the court grants the request. A party can file a *Request for Telephone or Video Conference* [Form 1B], indicating the reasons for the request. If the request is granted, the court will make the necessary arrangements and notify the parties.

When the debtor has obtained an order of the court for consolidation, a creditor may attend the court office and/or make a written request to be added to a consolidation order (provided that the creditor obtained the order for the payment of money against the debtor after the date of the consolidation order, for debt incurred before the date of the consolidation order). [r. 20.09(7)]

A creditor may attend the court office and/or make a written request to terminate a consolidation order if an order for the payment of money is obtained against the debtor for a debt incurred after the date of the consolidation order.

A consolidation order terminates immediately if:

- an order for payment of money is obtained against the debtor for a debt incurred after the date of the consolidation order; or
- if the debtor is in default under the terms of the order for 21 days [r. 20.09(8), (10)].

If the order is terminated, no further consolidation order can be made until a year has passed from the date of the termination [r. 20.09(9)].

A party may attend the court office and/or make a written request to terminate a consolidation order.

A creditor may attend the court office and/or make a written request to terminate a consolidation order in default.

A consolidation order terminates immediately if:

- an order for payment of money is obtained against the debtor for a debt incurred after the date of the consolidation order; or
- if the debtor is in default under the terms of the order for 21 days.

If the order is terminated, no further consolidation order can be made until a year has passed from the date of the termination.

A party may attend the court office and/or make a written request to terminate a consolidation order.

(4) Contents of Consolidation Order — At the hearing of the motion, the court may make a consolidation order setting out,

(a) a list of unsatisfied orders for the payment of money against the debtor, indicating in each case the date, court and amount and the amount unpaid;

(b) the amounts to be paid into court by the debtor under the consolidation order; and

(c) the times of the payments.

(5) The total of the amounts to be paid into court by the debtor under a consolidation order shall not exceed the portion of the debtor's wages that are subject to seizure or garnishment under section 7 of the *Wages Act*.

(6) Creditor May Make Submissions — At the hearing of the motion, a creditor may make submissions as to the amount and times of payment.

(7) Further Orders Obtained After Consolidation Order — If an order for the payment of money is obtained against the debtor after the date of the consolidation order for a debt incurred before the date of the consolidation order, the creditor may file with the clerk a certified copy of the order; the creditor shall be added to the consolidation order and shall share in the distribution under it from that time.

(8) A consolidation order terminates immediately if an order for the payment of money is obtained against the debtor for a debt incurred after the date of the consolidation order.

(9) Enforcement Limited While Consolidation Order in Force — While the consolidation order is in force, no step to enforce the judgment may be taken or continued against the debtor by a creditor named in the order, except issuing a writ of seizure and sale of land and filing it with the sheriff.

(10) Termination on Default — A consolidation order terminates immediately if the debtor is in default under it for 21 days.

(11) Effect of Termination — If a consolidation order terminates under subrule (8) or (10), the clerk shall notify the creditors named in the consolidation order, and no further consolidation order shall be made in respect of the debtor for one year after the date of termination.

(11.1) Manner of Sending Notice — The notice that the consolidation order is terminated shall be served by mail or email.

(11.2) [Repealed O. Reg. 78/06, s. 46(2).]

(11.3) [Repealed O. Reg. 78/06, s. 46(2).]

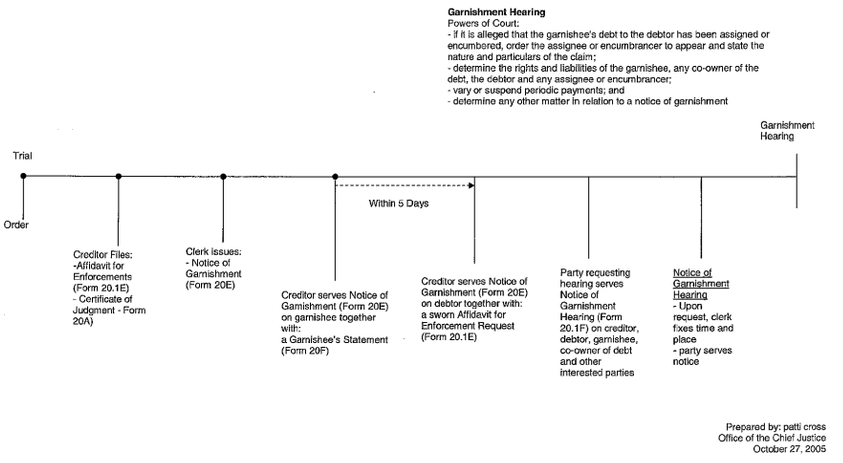
(12) Equal Distribution Among Creditors — All payments into a consolidation account belong to the creditors named in the consolidation order who shall share equally in the distribution of the money.

(13) The clerk shall distribute the money paid into the consolidation account at least once every six months.

O. Reg. 461/01, s. 19 [s. 19(3) revoked O. Reg. 330/02, s. 12(2).]; 330/02, s. 12(1); 440/03, s. 5, item 10; 78/06, s. 46; 393/09, s. 21; 108/21, s. 18

Commentary:

A SMALL CLAIMS COURT CASE - 2005 (Amended Rules)
FROM TRIAL TO ENFORCEMENT (GARNISHMENT HEARING)
A Case Flow Chart



Prepared by: patti cross
Office of the Chief Justice
October 27, 2005

20.10 (1) Examination of Debtor or Other Person — If there is default under an order for the payment or recovery of money, the clerk of a court in the territorial division in which the debtor or other person to be examined resides or carries on business shall, at the creditor's request, issue a notice of examination (Form 20H) directed to the debtor or other person.

Commentary: In this process, an affidavit refers to an Affidavit for Enforcement Request (Form 20P).

If there is a default in payment of a debt pursuant to a judgment, the creditor may require the debtor or other person to be examined for the purposes of assessing the debtor's assets which may be available for satisfying the judgment. A Notice of Examination (Form 20H) is issued by the clerk in the jurisdiction where the debtor or other person resides or carries on business. Thus, the creditor may first have to obtain a certificate of judgment in the originating court and file it in the court in the jurisdiction where the debtor or other person resides or carries on business.

A separate notice of examination must be completed for each person examined and a fee must be submitted for each notice of examination.

"Examination days" on which examinations are scheduled may be established in each court. A creditor may attend the court office and/or make a written request to obtain a date, time and place for the hearing of the examination.

Case Law: *Bank of America National Trust & Savings Assn. v. Shefsky* (1997), 4 C.B.R. (4th) 32, 24 C.P.C. (4th) 135 (Ont. Gen. Div.).

An inability to collect on a judgment because of a lack of funds constituted "difficulty in enforcement," which justified examination of the third party. Information sought was relevant and critical to enforcing the judgment. Questions relating to the debtor's income and to the debtor's present, past and future means of satisfying judgment were to be answered.

Advance Magazine Publishers Inc. v. Fleming, 2002 CarswellBC 1571, 2002 BCSC 995 (B.C. Master).

Spouse of judgment debtor required to attend to answer questions of judgment creditor. Questions confined to debtor's ability to satisfy judgment.

(2) The creditor's request shall be accompanied by,

(a) an affidavit for enforcement request (Form 20P) setting out,

(i) the date of the order and the amount awarded,

(ii) the territorial division in which the order was made,

(iii) the rate of postjudgment interest payable,

(iv) the total amount of any payments received since the order was granted, and

(v) the amount owing, including postjudgment interest; and

(b) a certificate of judgment (Form 20A), if the order was made in another territorial jurisdiction.

(3) Service of Notice of Examination — The notice of examination shall be served in accordance with subrules 8.01(10), (11) and (12).

Commentary: service of a notice of examination is specifically addressed by rule 20.10(3), and must be by personal service or by alternative service under rule 8.01(10). Substituted service of the notice of examination under rule 8.04 is not an option: *Preferred Credit Resources Ltd. v. Weber* (March 12, 2020) (Ont. Sm. Cl. Ct.) [unreported].

(4) The debtor, any other persons to be examined and any witnesses whose evidence the court considers necessary may be examined in relation to,

(a) the reason for nonpayment;

(b) the debtor's income and property;

(c) the debts owed to and by the debtor;

(d) the disposal the debtor has made of any property either before or after the order was made;

(e) the debtor's present, past and future means to satisfy the order;

(f) whether the debtor intends to obey the order or has any reason for not doing so; and

(g) any other matter pertinent to the enforcement of the order.

Commentary: The creditor is responsible for serving the debtor with the Notice of Examination (Form 20H) and, if the debtor is an individual, a blank Financial Information Form (Form 20I).

Once the creditor has effected service, the creditor may attend the court office and/or make a written inquiry to prove service of a notice of examination.

Case Law: *Teskey v. Peraan* (September 29, 1998), Doc. 92-CU-50498 (Ont. Master).

An affidavit sworn in support of a judgment debtor's motion to set aside a default judgment. The plaintiff creditor sought an adjournment to permit cross-examination. The adjournment was refused. The affidavit set out a good defence at law. Cross-examination would serve no useful purpose.

Zeppieri & Associates v. Jabbari, 2014 ONSC 818, 2014 CarswellOnt 1414 (Ont. Div. Ct.).

The applicant sought a judicial review of the decision of a Deputy Judge who refused to allow the applicant to proceed with an examination of the respondent/debtor under rule 20.10. The Deputy Judge advised counsel he could not proceed "because she's on public assistance . . . if she's on welfare, we do not proceed with enforcements." The issue could have been avoided had the debtor completed the financial information form required under rule 20.10(4.1) or had the Deputy Judge acceded to request for an adjournment so the debtor could provide further information to the creditor. Application allowed. The order of the Deputy Judge was set aside and the application was ordered to go for a further examination before a different Deputy Judge.

(4.1) Duties of Person to be Examined — A person who is served with a notice of examination shall,

(a) inform himself or herself about the matters mentioned in subrule (4) and be prepared to answer questions about them; and

(b) in the case of an examination of a debtor who is an individual, complete a financial information form (Form 20I) and,

(i) serve it on the creditor requesting the examination, but not file it with the court, and

(ii) provide a copy of it to the judge presiding at the examination hearing.

(4.2) A debtor required under clause (4.1)(b) to complete a financial information form (Form 20I) shall bring such documents to the examination hearing as are necessary to support the information that he or she provides in the financial information form.

(5) Who May Be Examined — An officer or director of a corporate debtor, or, in the case of a debtor that is a partnership or sole proprietorship, the sole proprietor or

any partner, may be examined on the debtor's behalf in relation to the matters set out in subrule (4).

Commentary: *Zeppieri & Associates v. Jabbari*, 2014 ONSC 818, 2014 CarswellOnt 1414 (Ont. Div. Ct.).

Judicial review of the decision of the deputy judge who refused to allow the applicant to proceed with examination of respondent/debtor under rule 20.10 of Rules. The deputy judge interrupted when the debtor advised she was receiving social assistance. There is nothing in rule 20.10 that would provide any foundation for order. The rule provides that a creditor may examine a debtor if there is a default in payment under an order.

The whole issue would have been avoided had the debtor completed the financial information form required under rule 20.10(4.1) or had the deputy judge acceded to the request for adjournment so that the debtor could provide further information to the creditor. An application was allowed, the order of the deputy judge was set aside, and there was an order to go for further examination before a different deputy judge.

(5.1) Attendance — A person required to attend an examination may attend,

(a) in person; or

(b) by video conference in accordance with rule 1.07.

(6) Examinations Private, Under Oath and Recorded — The examination shall be,

(a) held in the absence of the public, unless the court orders otherwise;

(b) conducted under oath; and

(c) recorded.

(7) Order As To Payment — After the examination or if the debtor's consent is filed, the court may make an order as to payment.

Commentary: A notice of examination must be issued in the territorial division where the debtor resides or carries on business. The debtor, an officer or director of a corporate debtor, a partner or sole proprietor and any witnesses whose evidence the court considers necessary may be examined (see subrules 21.10(4) and 21.10(5)). The examination shall be held in the absence of the public unless the court orders otherwise (subrule 21.10(6)). After the examination or with the debtor's written consent, the court may make an order as to payment (subrule 21.10(7)).

(8) Enforcement Limited while Order as to Payment in Force — While an order as to payment is in force, no step to enforce the judgment may be taken or continued against the debtor by a creditor named in the order, except issuing a writ of seizure and sale of land and filing it with the sheriff.

(9) [Repealed O. Reg. 78/06, s. 47(5).]

Case Law: *Burgoyne Holdings Inc. v. Magda*, 2005 CarswellOnt 537, 74 O.R. (3d) 417 (Ont. S.C.J.).

Contempt of court. Nature of offence. Civil and criminal contempt defined.

(10) [Repealed O. Reg. 78/06, s. 47(5).]

(10.1) [Repealed O. Reg. 78/06, s. 47(5).]

(11) [Repealed O. Reg. 78/06, s. 47(5).]

Case Law: *Canadian Imperial Bank of Commerce v. Teh*, 2003 CarswellAlta 1822, 2003 ABQB 1052 (Alta. Master).

Application by Defendant to open up default judgment against her for $8,462 granted. Defendant failed to respond to Claim when served. Full and complete defence to Plaintiff's claim. No real prejudice to Plaintiff provided they were compensated for their costs.

Benoit v. Akert, 2003 CarswellSask 558, 2003 SKPC 113 (Sask. Prov. Ct.).

Action dismissed. *The Land Contract (Actions) Act* applied to Plaintiff's claim. Action related to an agreement for the sale of land. Plaintiff required consent of Court of Queen's Bench to proceed.

Abegweit Potatoes Ltd. v. J.B. Read Marketing Inc., 2003 CarswellPEI 84, 36 C.P.C. (5th) 203, 2003 PESCAD 24, 227 Nfld. & P.E.I.R. 151, 677 A.P.R. 151 (P.E.I. C.A.).

Respondent suing appellant for unpaid potatoes. Appellant suing shipper for negligence and breach of contract. Actions consolidated as involving common issue.

Martin v. Universal Cleaning Equipment Inc., 2005 CarswellBC 1440, 2005 BCPC 234 (B.C. Prov. Ct.).

Application brought by Martin, the judgment creditor, to have a warrant for the arrest of Mohns, one of the judgment debtors issued, result of Mohns's failure to attend scheduled payment hearing.

Question whether to issue warrant inasmuch as he was served substitutionally. Warrant to issue.

In the case of *Ho v. Porter* (January 21, 1994), Doc. C92-04018 (B.C. Prov. Ct.), decided at Vancouver, jurisdiction for court to make order of substitutional service, but that before doing so, the judge should be satisfied, one, that there is an overwhelming likelihood that the debtor who is avoiding process of the court will receive *de facto* notice of the payment hearing and that such a notice includes advice that should the judgment debtor fail to attend, as required, he may be arrested.

Provisions to Rule 14(1) of the *Small Claims Rules* provide that:

> If a warrant of arrest is issued under Section 12(15) . . .
>
> [And that is the one that I have just dealt with.]
>
> . . . the registrar must serve the person named in the warrant with a notice of arrest.

The warrant of arrest should contain the recommendation that the judgment debtor only be released upon posting security.

Orphan v. Roulston, 2000 CarswellBC 1472, 2000 BCSC 1062 (B.C. S.C.).

Defendant refused to answer questions on examination for discovery. Plaintiff obtained order requiring defendant to answer. Defendant continued to refuse, then gave false answers. Where no outstanding order exists which requires defendant's compliance, court has no power to punish for civil contempt, in absence of some important public purpose. Most appropriate means of addressing defendant's conduct would have been to request special costs at trial.

McDonald v. Lancaster Separate School Board (1916), 35 O.L.R. 614, 29 D.L.R. 731 (Ont. H.C.).

Per Masten J., quoting Oswald on *Contempt of Court*, 3rd ed., p. 1: "Contempt, in the legal acceptance of the term, primarily signified disrespect to that which is entitled to legal regard. . . . In its origin, all legal contempt will be found to consist in an offence more or less direct against the Sovereign himself as the fountain-head of law and justice."

(12) [Repealed O. Reg. 78/06, s. 47(5).]

Commentary: The court may order a debtor or other person on whom a notice of examination has been properly served under rule 20.10 to attend a contempt hearing. There are two possible scenarios which may happen at the examination hearing in the Small Claims Court which may lead to contempt proceedings:

1. If the person attends the examination but refuses to answer questions or to produce documents or records, the contempt hearing will be scheduled before a judge or deputy judge of the Small Claims Court or
2. If the person fails to attend the examination, the contempt hearing will be scheduled before a judge of the Superior Court of Justice.

A person who has been ordered to attend a contempt hearing before a Superior Court Judge may make a motion to a judge of the Small Claims Court to set aside the order, before or after receiving the notice of contempt hearing. This motion must be heard before the date of the contempt hearing.

A warrant remains in force for 12 months after its date of issue, subject to an order of the court [r. 20.11(10)].

Where a contempt hearing has been held, the presiding judge of the Small Claims Court or judge of the Superior Court of Justice may order a warrant of committal to issue stating that the debtor or other person be jailed for a period not exceeding 40 days. A creditor *may* provide a completed Identification Form (Form 20K).

See Flow Chart also.

(13) [Repealed O. Reg. 78/06, s. 47(5).]

Case Law: *Roberts v. R.* (2003), 2003 SCC 45, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2003] S.C.J. No. 50, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 231 D.L.R. (4th) 1, 19 B.C.L.R. (4th) 195, *(*sub nom. *Wewayakum Indian Band v. Canada)* 309 N.R. 201, [2004] 2 W.W.R. 1, *(*sub nom. *Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2004] 1 C.N.L.R. 342 (S.C.C.).

A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias. The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude.

(14) [Repealed O. Reg. 78/06, s. 47(5).]

Commentary: A warrant of committal now remains in force for 12 months from the date of its issue and may be renewed by order of the court. The method of renewal may vary from division to division depending on the requirements of both the local police force and the judiciary. The renewal should take place prior to the expiry date of the warrant. It is the responsibility of the creditor to arrange for the renewal.

Subrule 20.10(1) allows the issue of a notice of examination "directed to the debtor" *only*. Form 20H (notice of examination) can only be used in respect of summoning the debtor. (Rule 20.10(1)).

Subrule 20.10(13) requires delivery to the nearest institution and refers to police officers, not bailiffs. Not all counties or districts have correctional institutions within their boundaries and these courts are directing incarceration in adjoining counties or districts. In addition, not all counties or districts have correctional institutions that will accommodate women.

Subrule 20.10(12) requires the clerk to immediately issue a warrant of committal when an order is made.

Case Law: *Consumers' Gas Co. v. Ferreira* (1990), 1 W.D.C.P. (2d) 259 (Ont. Prov. Ct.).

The claim, notice of default judgment, and notice of examination of the judgment debtor were all served by mail. A notice of show caused was mailed to the debtor who failed to appear. The court was not satisfied that the debtor refused to attend. A renewal should not be granted where the court was not satisfied that the debtor had notice of the claim, the default judgment and the warrant.

Ontario (Attorney General) v. Rae (1984), 44 O.R. (2d) 493 (Ont. H.C.).

A judge can proceed to enforce a maintenance order made by another province, though the creditor is not present and is unrepresented.

(15) [Repealed O. Reg. 78/06, s. 47(5).]

O. Reg. 461/01, s. 20 [s. 20(3) revoked O. Reg. 330/02, s. 13(3).]; 330/02, s. 13(1), (2); 440/03, s. 5, item 11; 78/06, s. 47; 393/09, s. 22; 440/10, s. 6

Commentary: There are two types of warrants in Small Claims Court: a Warrant of Committal (Form 20J) and a Warrant for Arrest of Defaulting Witness (Form 18B).

Rule 20 deals with the enforcement of orders. Note that in Rule 1 "order" is defined to include a judgment. The Small Claims Court has the power to make orders that are not judgments, for example, an order of costs at a pre-trial conference (see Rule 14.01(4)) and an order for the payment of compensation directly to a witness where the power to summon a witness has been abused (see Rule 19.01(7)). These orders can be enforced under Rule 20 in the same manner as a default judgment or a judgment after trial.

Section 28 of the *Courts of Justice Act* provides that the Small Claims Court may order the times and the proportions in which money payable under an order of the court shall be paid. Rule 20.02(1)(b) says that the court may vary the times and proportions in which money payable under an order of the court shall be paid if it is satisfied that the debtor's circumstances have changed. Another general power of the court is Rule 20.02(1)(a), which provides that the court may stay proceedings to enforce an order of the court for such time and on such terms as are just. There is no automatic stay of enforcement proceedings pending an appeal.

There are several ways in which an order or judgment may be enforced. Enforcement is initiated by means of a written request or an affidavit. These forms are available from any court office. No action to enforce an order or judgment will be taken by the court without the creditor's instructions and payment of the required fee. Enforcement proceedings (with the exception of writs of seizure and sale against lands) in Small Claims Courts are normally issued in the territorial division in which the debtor resides or carries on business. It may, therefore, be necessary to transfer the judgment from one court to another before enforcement can take place. All enforcements must be carried out by a Small Claims Court bailiff.

Any request or affidavit required by the Small Claims Court Rules to initiate enforcement action must provide a breakdown of the outstanding amount. It is the responsibility of the creditor or his or her representative to calculate the amount to be recovered and include this in the request or affidavit. If it is not included, the enforcement process will issue only for the amount shown. This may result in further enforcement proceedings having to be taken or the possible loss of these monies.

A certificate of judgment will be completed by the original court and forwarded directly to the receiving court. Once a certificate of judgment has been issued no enforcement proceedings can be commenced in the original court. It is the responsibility of the creditor or the creditor's representative to determine that the certificate has been received before submitting the request for enforcement to the receiving court.

Section 23 of the *Courts of Justice Act* provides that the Small Claims Court has jurisdiction in an action for the recovery of possession of personal property where the value of the pro-

perty does not exceed the prescribed amount, *e.g.*, $10,000. The court may make an order for the recovery of personal property in one of two ways.

The court may make an interim order for the recovery of possession of personal property under s. 104 of the *Courts of Justice Act*. An order for the interim recovery of possession of property can be obtained on motion to the court after an action has been commenced. The court can impose conditions on the granting of the order. In addition, a person who obtains possession of personal property as a result of an interim order is liable for any loss that is suffered by the person who is ultimately found to be entitled to possession of the property. Where no order has been made by a Judge for the issuance of a writ of delivery, anyone who wishes to obtain a unit of delivery is required to commence an action by filing a claim along with the ex parte notice of motion requesting the issuance of a writ of delivery. If the enforcement proceeding is commenced by way of an ex parte notice of motion, the claim will normally be served at the same time as the writ of delivery is executed.

An order for the recovery of property may also be made after trial in the form of a judgment of the court. The default judgment procedure is not available where the claim is for the recovery of personal property, and accordingly, the action must go before a judge.

Where a creditor has obtained a final order of the court requiring a debtor to return personal property, it may be enforced by filing with the clerk a request and an affidavit stating that the property has not been returned. The clerk will issue a writ of delivery and direct it to the bailiff for enforcement. Where the property is recovered, the bailiff will turn it over to the creditor or his or her representative. If the property cannot be found or delivered, the creditor or his or her representative may proceed by way of a notice of motion and supporting affidavit for an order to seize other personal property of the debtor. Any property subsequently recovered will be held by the bailiff pending an order of the court for its release.

It is also possible to obtain an interim order for the return of personal property. The application is commenced by means of a notice of motion and supporting affidavit which is filed with the court at the same time as the statement of claim. The clerk should be consulted to determine if the local practice requires service of a copy of the notice of motion and supporting affidavit on the defendant. After the goods have been recovered, the bailiff will serve a copy of the claim on the defendant. Unless the court has ordered otherwise, the property will be turned over to the plaintiff for his or her representative.

Where the personal property of a debtor is located in the territorial division where judgment was recovered, the creditor may request in writing that a writ of seizure and sale of personal property be issued by the court. If the debtor resides in another territorial division it will be necessary to transfer the judgment before enforcement.

A written request should indicate (a) the style of cause and the action number; (b) the amount remaining unsatisfied; and (c) description of the goods including serial numbers.

With regards to a car, the creditor should also provide to the court a copy of the Ministry of Transportation vehicle search, indicating that the registered owner and the judgment debtor are the same.

Bank Accounts, Guaranteed Investments Certificates, Bonds, Registered Retirement Savings Plans, other financial instruments, contents of safe deposit boxes, and contents of cash registers can also be seized.

In addition to the filing fees, the court may request a deposit against the costs involved in seizing the items requested. With automobiles, this deposit will be applied to towing and storage charges.

Goods seized under a writ of seizure and sale of personal property will not be sold by the bailiff until notice of the time and place of the sale have been advertised in a manner likely to bring the sale to the public's attention and, of course, both the creditor and debtor have

been advised. If the notice is delivered personally, fourteen clear days are required before the sale can take place. If the notice is sent by regular mail then an additional five days notice is required.

Note the exemptions set out in section 2 of the *Execution Act*, R.S.O. 1990, c. E.24.

The *Creditors' Relief Act*, R.S.O. 1990, c. C.45 provides in part:

> 3. (5) Where money recovered by garnishment is paid into the Small Claims Court, the Ontario Court of Justice or the Family Court of the Superior Court of Justice, the sheriff is entitled to demand and receive it from the clerk of the court for the purpose of distributing it under this Act, except insofar as the priority created by subsection 4(1) applies to the money.
>
> R.S.O. 1990, c. C.45, s. 3(5); 2006, c. 19, Sched. C, s. 1(2), (4)
>
> . . . . .
>
> (8) The clerk of the Small Claims Court, the Ontario Court of Justice or the Family Court of the Superior Court of Justice is not liable for making payment to the creditor unless, at the time of payment, the clerk has notice that there is an execution against the property of the debtor in the sheriff's hands.
>
> R.S.O. 1990, c. C.45, s. 3(8); 2006, c. 19, Sched. C, s. 1(2), (4)
>
> . . . . .
>
> 25. (1) If the sheriff does not find property of a debtor leviable under the executions and certificates in his or her hands sufficient to pay the same in full, but finds property or the proceeds thereof in the hands of a bailiff of the Small Claims Court under an execution or attachment against the debtor, the sheriff shall demand and obtain them from the bailiff, who shall forthwith deliver them to the sheriff with a copy of every execution and attachment in his or her hands against the debtor and a memorandum showing the amount to be levied under the execution, including the bailiff's fees, and the date upon which each execution or attachment was received by the bailiff.
>
> (2) Penalty for default — If the bailiff fails to deliver any of such property or the proceeds thereof, the bailiff shall pay double the value of that which is retained, which may be recovered by the sheriff from him or her with costs of suit, and shall be accounted for by the sheriff as part of the estate of the debtor.
>
> (3) Costs — The costs and disbursements of the bailiff are a first charge upon such property or the proceeds thereof and shall be paid by the sheriff to the bailiff upon demand after being assessed by the Small Claims Court clerk.
>
> (4) The sheriff shall distribute the proceeds among the creditors entitled to share in the distribution, and the Small Claims Court execution creditors are entitled without further proof to stand in the same position as creditors whose executions are in the sheriff's hands.
>
> R.S.O. 1990, c. C.45, s. 25

One of the major changes as provided by Rule 20, enforcement of orders, pertains to garnishments: a Notice of Garnishment must be issued where the debtor resides or carries on business; a Notice of Garnishment remains in force for a period of twelve moths, or until such time as the order is paid, or the garnishment is withdrawn; and where there is more than one Notice of Garnishment issued by various plaintiffs against one debtor, each plaintiff shares equally in the proceeds.

A creditor may enforce an order for the payment or recovery of money by garnishment of debts payable to the debtor by other persons.

The creditor must file with the clerk in the territorial division in which the debtor resides or carries on business and affidavit stating the details of the judgment, the name and address of the garnishee and the basis for believing that the garnishee is or will become indebted to the judgment debtor. If the territorial division in which the debtor resides is different from the one in which the judgment was obtained, the creditor must also arrange for a certificate of judgment to be transferred and filed in the territorial division in which the debtor resides or carries on business.

Where an order is obtained in a court against a debtor who resides in the territorial division of another court, the plaintiff must be advised that, if a garnishment is to be issued, it must be transferred to the court in which the debtor resides. For example, a claim (cause of action took place in Metropolitan Toronto) is filed in the Toronto Small Claims Court and the debtor resides in Brampton. After an order is obtained (either by default judgment or after a hearing) in the Toronto Small Claims Court, and the plaintiff or agent wishes to garnish the wages of the debtor who is employed in Toronto, or any other county where the debtor is employed, the claim must be transferred to the Brampton Small Claims Court.

Funds received by the court are normally held for fourteen days prior to their release to the appropriate party. However, the funds will not be disbursed if a garnishment hearing has been requested or if either an appeal or an application to set aside the judgment has been commenced. In these cases, the funds will continue to be held by the court office pending an order for their release.

An administration fee will be deducted by the court office from each payment received from the garnishee with the exception of the initial payment. The remaining funds will be released to the creditor or the creditor's representative unless the court office has issued notices of garnishment at the request of more than one creditor. It is always possible that a garnishment may expire before the full amount is paid. The creditor should always monitor the proceedings to determine if a further garnishment will be required.

If the garnishee fails to comply with the Notice of Garnishment the creditor may apply to a judge for an order for payment against the garnishee. On receipt of a written request for a hearing, the court office will forward a notice of hearing to the creditor or the creditor's representative, the debtor and the garnishee.

Rule 20.10 of the Rules of the Small Claims Court provides that, where there is default under an order for payment of recovery of money, the clerk of the territorial division where the debtor resides or carries on business shall, at the creditor's request, issue a notice of examination directed to the debtor or other person to be examined. The purpose of the examination is to examine the person as to his or her assets and ability to satisfy the judgment. The creditor's request must be accompanied by an affidavit setting out the particulars of the judgment and the outstanding balance, including postjudgment interest. The Notice of Examination is served pursuant to subrule 20.10(3). A notice of the hearing date will be sent to the creditor or the creditor's representative who must be prepared to attend the examination hearing.

A warrant remains in force for 12 months from its date of issue and may be renewed by order of a judge. It is the responsibility of the creditor or the creditor's representative to arrange for the renewal.The court office should be contacted to determine the appropriate renewal procedure.

A judgment creditor who seeks to enforce an order by garnishment shall file, with the clerk in the territorial division in which the debtor resides or carries on business: (1) the appropriate fee; (2) an affidavit stating the date of the order and the amount awarded, the territorial division in which the order was made, the rate of postjudgment interest payable, the date and amount of any payment received since the order was granted, the amount owing (including postjudgment interest), the name and address of each person to whom a notice of garnishment is to be directed and to whom the creditor believes are or will become indebted to the debtor, the grounds for the belief (and such particulars of the debts as are known to the creditor); and (3) a certificate of judgment (Form 20A).

The certificate of judgment issued to a plaintiff and the one issued to another court to transfer a judgment from one division to another are identical. However, if a plaintiff attempts to file a certificate along with an enforcement request in a court other than the one where the judgment was given, it would be refused. The practice has been to have the court issue a

certificate of judgment directed to the forwarding court. The plaintiff would then forward a request for enforcement to the second court.

On the filing of the material required by subrule (2), the clerk shall issue notices of garnishment (Form 20E), naming as garnishee the persons named in the affidavit. On the filing of the request for garnishment, the clerk shall issue notices of garnishment. The garnishments are served on the garnishee by registered mail, on the debtor by regular mail or, if requested, on either party by personal service (see Rules of Services).

Rule 20.08(10) provides that where the clerk has issued notices of garnishment in respect of a debtor at the request of more than one creditor, and the clerk receives payment under any of the notices of garnishment, the clerk shall distribute the payment equally among the creditors who have filed a request for garnishment and have not been paid in full.

A plaintiff must request that a Notice of Garnishment be issued in order to share in the payments received.

A Notice of Garnishment remains in force for twelve months following service on the garnishee and where wages are being attached, will likely result in multiple payments from the garnishee. Creditors should always maintain contact with the court office to ensure that payments are being received regularly.

A debtor against whom there are two or more unsatisfied orders for the payment of money may make a motion to the court for a consolidation order.

In terms of the garnishment of wage, note the *Wages Act*, R.S.O. 1990, c. W.1, in particular sections 1 and 7 in part:

> 1.
>
> "wages" means wages or salary whether the employment in respect of which the same is payable is by time or by the job or piece or otherwise.
>
> R.S.O. 1990, c. W.1, s. 1
>
> . . . . .
>
> 7. (1) For the purposes of this section,
>
> "wages" does not include an amount that an employer is required by law to deduct from wages.
>
> R.S.O. 1990, c. W.1, s. 7(1)
>
> (1.1) For the purposes of this section, payments from an insurance or indemnity scheme that are intended to replace income lost because of disability shall be deemed to be wages, whether the scheme is administered by the employer or another person.
>
> 1999, c. 12, Sched. B, s. 18
>
> (2) Subject to subsection (3), 80 per cent of a person's wages are exempt from seizure or garnishment.
>
> R.S.O. 1990, c. W.1, s. 7(2)
>
> (3) Fifty per cent of a person's wages are exempt from seizure or garnishment in the enforcement of an order for support or maintenance enforceable in Ontario.
>
> R.S.O. 1990, c. W.1, s. 7(3)
>
> (4) A judge of the court in which a writ of execution or notice of garnishment enforceable against a person's wages is issued may, on motion by the creditor on notice to the person, order that the exemption set out in subsection (2) or (3) be decreased, if the judge is satisfied that it is just to do so, having regard to the nature of the debt owed to the creditor, the person's financial circumstances and any other matter the judge considers relevant.
>
> R.S.O. 1990, c. W.1, s. 7(4)
>
> (5) A judge of the court in which a writ of execution or notice of garnishment enforceable against a person's wages is issued may, on motion by the person on notice to the creditor, order that the exemption set out in subsection (2) or (3) be increased, if the judge is satisfied that it is

> just to do so, having regard to the person's financial circumstances and any other matter the judge considers relevant.
>
> R.S.O. 1990, c. W.1, s. 7(5)
>
> (6) Where an employer receives notice of a motion under subsection (4) or (5), the employer may pay into court the part of the person's wages that is not exempt from seizure or garnishment under subsection (2) or (3), as the case may be, and the judge on the hearing of the motion may make such order for payment out of court as is just.
>
> R.S.O. 1990, c. W.1, s. 7(6)
>
> (7) Subject to subsection (8), an assignment of wages or any part of them to secure payment of a debt is invalid.
>
> R.S.O. 1990, c. W.1, s. 7(7)
>
> (8) A person may assign to a credit union to which the *Credit Unions and Caisses Populaires Act* applies the part of the person's wages that does not exceed the part that may be seized or garnished under this section.
>
> R.S.O. 1990, c. W.1, s. 7(8)

The garnishee, the debtor, the creditor or any other interested person may request that the clerk set down a dispute to the garnishment for hearing by a judge. At the hearing, the judge may determine the rights and liabilities of the parties and of any assignee or encumbrancer or may determine nay other matter in relation to the notice of garnishment. The purpose of the examination is to examine the debtor with respect to his or her assets and their ability to pay.

Where more than one creditor has issued a Notice of Garnishment in respect of the same debtor and the clerk receives payment under any of the notices of garnishment, the clerk must distribute the payments he receives equally among all the creditors who have filed a request for garnishment and are not paid in full.

A notice of examination will be issued at the creditor's request in the territorial division where the debtor resides or carries on business (Rule 20.10(1)). The clerk is entitled to deduct an administrative fee from each payment submitted by a garnishee and will remit the balance to the creditor or his or her representative. However, if more than one Notice of Garnishment has been issued against the same defendant, any funds received from a garnishee (after deducting the administrative fee) will be distributed equally among the creditors who have issued notices. The clerk is not required to notify the creditor or its representative of the receipt of monies. If no monies will be forthcoming, the garnishee must advise the clerk and a copy of their response will usually be sent to the creditor or his or her representative. The creditor should also be aware of the expiry date of the Notice of Garnishment as there could still be an outstanding balance. In such cases, a new affidavit should be filed with the court if enforcement is to continue.

Should the garnishee fail to comply with the Notice of Garnishment, the creditor or his or her representative can apply to the court for an order against the garnishee to pay the amount set out in the notice. A written request to place the matter on the court list should be filed with the clerk. In addition, the clerk should be consulted regarding the need to subpoena the books and records of the garnishee as some judges are reluctant to grant an order in the absence of service of a subpoena. The creditor, debtor, garnishee or any other interested party may request a hearing to determine any matter relating to the Notice of Garnishment.

Examinations shall be held in the absence of the public unless the court orders otherwise. Subrule 20.10(4) provides that the debtor may be examined in relation to the following matters: (a) the reason for nonpayment; (b) the debtor's income and property; (c) the debts owed to and by the debtor; (d) the disposal the debtor has made of any property either before or after the making of the order; (e) the debtor's present, past and future means to satisfy the order; (f) whether the debtor intends to obey the order or has reason for not doing so; and (g) any other matter relevant to the enforcement of the order.

Section 28 of the *Courts of Justice Act* allows the court to order that a judgment be paid in instalments. Rule 21.02(b) allows the court to vary the times and amounts of the instalments.

Section 7(5) of the *Wages Act* provides for an increase to the exempt portion of the wages of a judgment debtor that may be attached by garnishment proceedings. A request for an increase in the exempt amount must be made by motion supported by affidavit, by the debtor on notice to the creditor.

Consolidation orders are available to a debtor against whom there are two or more unsatisfied orders of the Small Claims Court. The debtor may apply for a consolidation order by way of a notice of motion to the court. With the notice of motion, the debtor must file an affidavit which sets out his or her creditors, the amount owed to each creditor, details of the debtor's income and a statement of the debtor's current financial obligations.

Where a debtor has two or more unsatisfied orders and wishes to obtain a consolidation order, the clerk shall assist the debtor in the preparation of a notice of motion and affidavit applying for a consolidation order. The affidavit shall contain the information set out in Rule 20.09(2). The debtor is responsible for the services of the notices of motion and affidavits, either by registered mail or by personal service on each creditor or their representative. The clerk shall prepare a consolidation order setting out the information contained in Rule 20.09(4). After the consolidation of order is obtained, a creditor shall file with the clerk a certified copy of judgment from the court in which a judgment has been obtained. Upon filing the certified copy of an order, the creditor shall be added to the consolidation order.

All payments into a consolidation order shall be distributed every six months. The funds in court will be divided equally among the creditors named in the consolidation order.

Where an order (judgment) is obtained against a debtor for a debt incurred after the date on which a consolidation order is obtained and where a debtor is in default for 21 days under the order, the consolidation order will be immediately terminated by the clerk.

The debtor and any witnesses whose evidence the court considers necessary may be examined; see Rule 20.10(4) and Rule 20.10(5) as to who may be examined. The examination shall be held in the absence of the public unless the court orders otherwise (Rule 20.10(6)). After the examination, or with the debtors' written consent, the court may make an order as to payment (Rule 20.10(7)).

A notice of examination must be issued in the territorial division where the debtor resides or carries on business. Where an order has been obtained in another court, the order must be transferred to the proper court. The creditor must request that a notice of examination (Form 20H) be issued, and file an affidavit setting out the information contained in Rule 20.10(2). The clerk shall issue a notice of examination, setting out the date of examination, and deliver the notice to the bailiff for service.

Rule 20.09(5) provides that the total of the amount to be paid into court under a consolidation order shall not exceed the portion of the debtor's income that is subject to seizure or garnishment under s. 7 of the *Wages Act*, namely 20 per cent of net wages. The creditor is entitled to make submissions at the consolidation order hearing.

As long as the consolidation order is in force, no enforcement proceedings, may be taken. The one exception to this stay of proceedings is that a writ of seizure and sale of land may be issued by the clerk and filed with a sheriff.

An order may be enforced by Notice of Garnishment, Writ of Delivery, Writ of Seizure and Sale of Personal Property, Writ of Seizure and Sale of Land, or examination of debtor immediately after an order has been obtained, either upon the signing of default judgment or after a court hearing where judgment is given.

To issue an enforcement process (garnishment, writ of seizure and sale of personal property, examination of a debtor) against a debtor who does not reside in, or has moved out of, the

jurisdiction in which an order has been obtained, it is necessary that the order be transferred to the court in which the debtor resides.

The plaintiff or agent must request in writing that the order be transferred. The plaintiff or agent shall advise the clerk of the amount still owing (principal plus prejudgment interest). The clerk shall prepare and send a certificate of judgment (Form 20A) to the clerk of the court specified by the creditor.

Where an order has been obtained against two or more defendants, a creditor may request that a Notice of Garnishment be issued against one debtor and a writ of seizure and sale of personal property be issued against the other debtor, or one of the other debtors. Proceedings can take place to enforce a judgment indifferent territorial divisions at the same time. Any request to transfer must be directed to the original court only.

Where there are two or more defendants, it is not necessary that an order be transferred as is the process for one defendant. For example, there are two defendants and an order is obtained against both in Court "A." One of the defendants resides in the court where the order was obtained ("A" Court), and the other defendant resides or has personal property in another territorial division ("B" Court). The creditor requests that a Notice of Garnishment be issued against the defendant in Court "A" and a writ of seizure and sale of personal property be issued against the other defendant in Court "B."

Where defences have been received from either or both debtors, the clerk must ensure that only the proper amount of judgment, costs and interest (prejudgment and postjudgment) are remitted to the plaintiff or his agent or solicitor. Any surplus funds should be returned to the proper debtor.

Effective January 1, 1989, amendments to the *Proceedings Against the Crown Act*, S.O. 1988, c. 29 [now R.S.O. 1990, c. P.27], permit a creditor to attach monies owing by the Crown in Right of Ontario through a notice of garnishment. This includes wages owing to a provincial Crown employee as well as monies that may be owing to an independent contractor for goods or services supplied to the Crown.

The *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2, as amended 1992, c. 1, s. 141 and 1997, c. 1, ss. 24–40, in force May 1, 1997.

Part I — Garnishment and Attachment Proceedings

Part II — Diversion of Pension Benefits to Satisfy Financial Support Orders

Part I of the Act relates specifically to the process to issue a garnishment attaching the salary of all persons as defined in Part I — Division 1 — Section 4 (Salary Means) and Section 6, where a judgment or order against the debtor has been obtained.

General Information

1. Under the provisions of the Act and the Regulations thereto, it is now possible to garnish or attach the salary or remuneration of all persons, who are paid out of federal funds, as defined in Part 1 — Division 1 — see section 4.

2. Before the issuance of a garnishment or attachment, a notice of intention to garnishee, together with an affidavit for notice of intention to garnishee must be served on Her Majesty, at a place specified by the Regulations (see item 7 below).

3. Her Majesty has 30 days from the time of service to the notice of intention to garnishee. (Where service is effected by registered mail, the document shall be deemed to be served on the day of it receipt by Her Majesty.) Where no response is received within that period, a creditor or agent is required to issue a garnishee within the next thirty days after the date of service. If a garnishee is not issued within this time frame, it will be necessary to repeat the process described in 2. Please review amendment to Act.

Schedule I — Appendix 1 — Notice Of Intention To Garnishee Her Majesty

(Subsection 3(1))

Under Part 1 of the *Garnishment, Attachment and Pension Diversion Act* (Canada).

This notice must be served at the place specified in the *Garnishment and Attachment Regulations*. See SOR/97-177, April 8, 1997.

Address of place of service:

. . . . . .

. . . . . .

. . . . . .

ATTENTION: Garnishment Registry

TAKE NOTICE that the undersigned intends to serve a garnishee summons on Her Majesty within the next 30 to 60 days after service of this notice to garnishee or attach the salary or remuneration payable by Her Majesty to the debtor.

1. Full name of debtor: . . . . . .

2. Latest known address of debtor: . . . . . .

3. Name of employer (Department or Crown corporation):

. . . . . .

4. Is the debtor a member of the senate? (yes/no) . . . . . .

House of Commons? (yes/no) . . . . . .

5. Is the debtor a judge to whom the *Judge's Act* applies? (yes/no) . . . . . .

If yes, the name of the court to which the debtor is appointed ..... and the location of that court . . . . . .

6. Debtor's place of employment: . . . . . .

7. Is the unpaid debt under the judgment or order attached hereto a maintenance, support or other debt? . . . . . .

8. The amount of the debt remaining unpaid or to be paid periodically is . . . . . .

9. The name and location of the court that has issued or will be issuing the garnishee summons: (name of court) . . . . . and (location of court) .

10. Does the garnishee summons have or will the garnishee summons have continuing effect? (yes/no) . . . . . .

11. The following information may be provided:

(1) Is the money which is payable to the debtor payable as:

(a) salary? (yes/no) . . . . . .

(b) remuneration? (yes/no) . . . . . .

If yes, is the money payable in respect of the performance of service? (yes/no) . . .

(2) Occupation, profession, job classification or title of the debtor: . . . . . .

(3) Telephone number of the debtor at the debtor's place of residence and the debtor's place of employment:

residence . . . . . .

employment . . . . . .

(4) Section, division or branch of department on behalf of which or the Crown corporation by which salary or remuneration is payable to the debtor: . . . . . .

(5) Street address of the debtor's place of employment:

. . . . . .

Date: . . . . . .

Address of undersigned: . . . . . .

. . . . . .

Signature . . . . . .

Schedule II — Appendix 2 — Affidavit For Notice Of Intention To Garnishee

(Subsection 3(3))

IN THE

BETWEEN: Creditor (By Judgment or Order)

— and —

Debtor (by Judgment or Order)

AFFIDAVIT

I, ... the above-named Creditor (or solicitor or agent acting for the above-named Creditor), make oath and say as follows:

1. By a (Judgment or Order) of ..... Court made in this action and dated ....., 19....., it was (adjudged or ordered) that the above-named Creditor should recover against the above-named Debtor the sum of $..... and also interest thereon at the rate of .....% per annum from ....., 20....., and $..... for cost taxed together with interest at the rate of .....% per annum thereon from ....., 20.....

2. The sum of $..... of the said (Judgment or Order) (remains unpaid or is the amount to be paid periodically) on or as of ..... and is justly due and owing to me.

3. Her Majesty, (name of Department or Crown Corporation) ..... located at ..... is indebted to the Debtor in a sum which I am unable to name.

SWORN OR DECLARED before me at the ..... of ..... in the ..... of ....., this ..... day of ..... A.D. 20.....

(A Commissioner, Justice of the Peace, Notary Public etc.) of .....

(i) Where the Notice of Garnishment is issued or will be issued by a court located in

(1) the following counties, districts, or Regional Municipalities of Ontario, namely,

(A) District of Algoma,

(B) District of Cochrane,

(C) County of Frontenac,

(D) District of Kenora,

(E) County of Lanark,

(F) United Counties of Leeds and Grenville,

(G) Counties of Lennox and Addington,

(H) District of Manitoulin,

(I) District of Nipissing,

(J) Regional Municipality of Ottawa-Carleton,

(K) District of Parry Sound,

(L) United Counties of Prescott and Russell,

(M) County of Prince Edward,

(N) District of Rainy River,

(O) County of Renfrew,

(P) Counties of Stormont, Dundas and Glengarry,

(Q) District of Sudbury,

(R) District of Timiskaming, and

(S) District of Thunder Bay, or

(ii) that part of the National Capital Region located in Quebec,

Garnishment Registry
Department of Justice,
Montreal Regional Office,
9th Floor, East Tower,
200 Rene Levesque Blvd. West,
Montreal, Quebec
H2Z 1X4
(514) 283-4934

(iii) Where the Notice of Garnishment is issued or will be issued by a court located in Ontario, other than the counties districts or regional municipality referred to above,

Garnishment Registry
Department of Justice,

Toronto Regional Office,

First Canadian Place, Box 16
Toronto, Ontario

M5X 1K6

(416) 973-3036

The Notice of Garnishment binds only those debts payable to a judgment debtor by the garnishee named in the Notice of Garnishment. Where a creditor has named the wrong Ministry, a new Notice of Garnishment showing the proper Ministry must be issued and the preceding steps must be repeated.

Note section 12(9) of the *Line Fences Act*, R.S.O. 1990, c. L.17, which states in relation to an award by fence-views:

> 12. (9) Levy of amount against goods and chattels — Instead of having the amount certified placed upon the collector's roll, or instead of applying for that amount or a portion thereof under a by-law passed under subsection (6), the owner entitled to receive the amount may file a copy of the certificate and of the award in respect of which the certificate was made, certified by the clerk in accordance with this Act, with the clerk of the Small Claims Court of the division in which any part of the land affected by the award is situate, and upon being so filed, the amount may be levied against the goods and chattels and land of the adjoining owner in the same manner of a judgment of the Small claims Court may be levied.
>
> R.S.O. 1990, c. L.17, s. 12(9)

Note also the *Municipal Statute Law Amendment Act*, 2006, c. 32, Sched. C, s. 30 and Sched. D, s. 6.

It is possible that a debtor to the award may reside or carry on business in the jurisdiction of a Small Claims Court other than where the land affected by the award is situate. If this is the case, the initial filing will still have to take place in the court having jurisdiction where the land is situate. The proceedings will then have to be transferred to the court having jurisdiction where the debtor resides or carries on business.

An Order to Pay unpaid wages issued by an employment standards officer against an employer, which remains wholly or partially unpaid, can been forced under the provisions of the *Employment Standards Act*, S.O. 2000, c. 41 as amended, upon the issuance and filing of a copy of the order certified by the Director in a court of competent jurisdiction. See section 103(4) as to the maximum order of $10,000 for wages, payment in trust, sections 104(3)(4) and section 126.

The certificate bears postjudgment interest from the date of issue at the "postjudgment interest rate" prescribed by section 127 of the *Courts of Justice Act*.

Under the provisions of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended, where a fine imposed by a Provincial Offences Court is in default it may be collected by means of civil enforcement. The Act further provides that enforcement may be carried out in a court of competent jurisdiction. Subsections 68(1) to (5) of the *Provincial Offences Act* state:

> 68 (1) Civil enforcement of fines — When the payment of a fine is in default, the clerk of the court may complete a certificate in the prescribed form as to the imposition of the fine and the amount remaining unpaid and file the certificate in a court of competent jurisdiction and upon filing, the certificate shall be deemed to be an order or judgment of that court for the purposes of enforcement.
>
> (2) Limitation — A certificate shall not be filed under subsection (1) after two years after the default in respect of which it is issued.
>
> (3) Certificate of discharge — Where a certificate has been filed under subsection (1) and the fine is fully paid, the clerk shall file a certificate of payment upon which the certificate of default is discharged and, where a writ of execution has been filed with the sheriff, the clerk shall file a certificate of payment with the sheriff, upon which the writ is cancelled.
>
> (4) Costs of enforcement — Costs incurred in enforcing the deemed court order or judgment shall be added to the order or judgment and form part of it.
>
> (5) More than one fine — The clerk may complete and file one certificate under this section in respect of two or more fines imposed on the same person.

Section 68 permits the filing of the certificate "in a court of competent jurisdiction". Provided the amount owing does not exceed the monetary jurisdiction of the Small Claims Court, the certificate would be filed in the jurisdiction where the defendant resides or carries on business. The certificate could be filed in the jurisdiction where the Ontario Court of Justice [formerly Ontario Court (Provincial Division)] is situated if the only enforcement process to issue was a writ of seizure and sale of lands. In this case, should any other enforcement process be requested, the proceeding would have to be transferred to the jurisdiction where the defendant resides or carries on business.

See also section 161, orders under Statutes, 2000, c. 26, Sched. A, s. 13(b).

A creditor is entitled to post judgment interest from the date that the certificate is filed with the Small Claims Court, at the rate prescribed by the *Courts of Justice Act* in effect on the date of the filing of the certificate.

Sample Debtor Examination — Individuals[35]

Date.....

---

[35] Samples reproduced with the permission of the Ministry of the Attorney General.

Full name..... Date of Birth.....

Address..... Postal Code..... Phone.....

Employment

Employer's name & address.....

.....

How long?..... Type of work.....

Gross income $.....wk/mth/yr. Net income $.....wk/mth/yr.

Income from all other sources (pension, family allowances, rental income, etc.) List below

..... $.....

..... $.....

..... $.....

Marital Status

Married?..... Divorced?..... Separated?..... Single?.....

If married

Name of Spouse..... Earnings $.....wk/mth/yr.

Any dependents?..... How many?..... Ages.....

Home

Own?..... Rent?..... Mortgage/Rent payment $.....wk/mth

Name & address of owner/mortgagee.....

.....

If owned, how registered?..... Value $.....

Amount of Mortgages 1st $..... payments $.....wk/mth

2nd $..... payments $.....wk/mth

Own or have interest in any other property?

Location.....

..... Value $.....

Mortgage?..... Amount $..... payments $.....wk/mth

Motor Vehicles

Own?..... Lease?..... Co-owner?..... if so, with whom?.....

List all vehicles including that of spouse

	year	**make**	**model**	**licence #**	**amount of lien**	**lienholder**
#1						
#2						

List all Bank, Trust or Credit Union Accounts including spouse's

	Name	**Address**	**Type of Account**
#1			
#2			
#3			

Stocks, Bonds, G.I.C.'s, etc. Identify and indicate value and where located. Include those owned by spouse.

.....

.....

Any money owing to debtor or spouse from any source? If so, list.....

.....

Other Debts List

	Creditor	Amount	Payments?
#1		$	
#2		$	
#3		$	
#4		$	
#5		$	

Results:

Sample Debtor Examination — Proprietorships and Partnerships

Date .....

Proper Company Name.....

Address.....

Postal Code..... Phone.....

Is company registered?..... Proprietorship?..... Partnership?.....

Bank Accounts

Name	Address	Status (overdraft, ect.)

Assets List & Value. State if encumbered, and if so, to whom?

For motor vehicles give make, model & licence no.....

.....

.....

.....

.....

.....

Receivables List below. Are they assigned to the bank?

Name	Address		Amount
		$	
		$	
		$	
		$	
		$	
		$	
		$	

List Creditors

Name	Address	Amount	Payments
		$	
		$	
		$	
		$	
		$	
		$	
		$	
		$	

PROPRIETORSHIP Give proper name and address of proprietor

Name..... Phone #.....

Address..... Postal Code.....

PARTNERSHIPS List Names and Addresses of *ALL* Partners

1. Name..... Phone #.....

Address..... Postal Code.....

2. Name..... Phone #.....

Address..... Postal Code.....

3. Name..... Phone #.....

Address..... Postal Code.....

4. Name..... Phone #.....

Address..... Postal Code.....

Proprietors and partners to answer all questions in individual capacity.

If proprietorship or partnership is owned in whole or part by a limited company refer to form respecting limited company examinations.

Sample Debtor Examination — Limited Companies

Date.....

Proper name of company.....

Address.....

Postal Code..... Phone #.....

Name & Position of person examined.....

Does company operate under any other name? If so, list below

.....

.....

Bank Accounts

	Name	Address	position — overdraft, etc.
#1			
#2			

Is company indebted to Bank? If so, explain. Amount $.....

How secured?.....

Receivables List below Are they assigned to the Bank?

Name	**Address**		**Amount**
		$	
		$	
		$	
		$	
		$	
		$	
		$	
		$	
		$	
		$	

Assets Lists & Value State if encumbered and by whom.

For motor vehicles give make, model and licence #.

.....

.....

.....

.....

.....

.....

.....

.....

Any loans to shareholders by the company? If so, list names, addresses & amounts .....

Any outstanding shares? Give details .....

List names and addresses of all officers and directors.

.....

.....

.....

.....

List Creditors

Name	**Address**		**Amount**	**Payments**
		$		
		$		
		$		
		$		
		$		

Personal Property Security Act ("PPSA") Search

Consider also doing a PPSA search. You may also find out which bank the debtor uses, and you may get some indication of what he or she will say on examination when asked about

liabilities. An execution search will tell you if there are any other judgments outstanding against the debtor. If there is a substantial writ already, you will not want to spend the money going after the debtor just so somebody else will get paid. Once a debtor has been located and it is time to conduct an examination, be specific and thorough in questioning. Debtors are not particularly forthcoming with information. Ask what the debtor previously owned, and consider the possibility of conveyances and preferences. If you know the debtor's name, you can search through the rolls to find the legal description of property he may own. You can also do a subsearch of the property to determine who owns it and if there are any encumbrances. Also check court files. Searching these sometimes uncovers judgments and/or cost awards in favour of the debtor that you may be able to garnish. Something else to consider are estate files. The debtor may be the beneficiary of a will that can be garnished.

Case Law: *Pioneer Communications Ltd. v. Broadcast Services Ltd.*, [1979] 1 W.W.R. 8 (Sask. Dist. Ct.).

The plaintiff was awarded judgment in the sum of $500. The defendant did not file any defence or counterclaim. Thereafter the defendant sued the plaintiff and was allowed the $500 as a set-off. This subsequent action was defended by the plaintiff. The defendant was denied a stay of execution of the $500 since its action was not commenced until after the first judgment was granted, and since it had not defended the first action. Also, the sum in question, $500, was not so large as to prejudice the defendant.

MacKinnon v. MacKinnon (1979), 14 C.P.C. 94 (Ont. Div. Ct.).

A *decree nisi* providing for maintenance, issued by the court of another province and registered pursuant to section 15 of the *Divorce Act* (Canada) and Rule 813 of the Rules of Practice, is a judgment which can be filed in a small claims court and upon which a direction to garnishee wages can therefore issue.

Bonus Finance Ltd. v. Smith, [1971] 3 O.R. 732 (Ont. H.C.).

Moneys payable under a registered pension plan are made immune from attachment by s. 24 of the *Pension Benefits Act*, R.S.O. 1970, c. 342.

Avco Financial Services Can. Ltd. v. Bowe (1979), 23 O.R. (2d) 264 (Ont. Div. Ct.).

An employee who is paid regularly in advance is entitled to payment at the beginning of each pay period and, accordingly, the moneys then owing may be the subject of garnishment proceedings.

Trans-Can. Credit Corp. v. Rogers Moving (1977), 26 C.B.R. (N.S.) 187 (Ont. Div. Ct.).

The affidavit filed in support of a direction to garnishee was defective, and the small claims court judge failed to hold a judicial hearing with respect to the garnishee proceedings.

Bain v. Rosen (1984), 45 O.R. (2d) 672 (Ont. Div. Ct.).

What is the debt due or accruing. The employer deducted 30 per cent from the net wage under s. 224(1) of the *Income Tax Act*. You must begin with the gross wage due, and then deduct the statutorily mandated deductions under the *Income Tax Act*, the *Unemployment Insurance Act* and the *Canada Pension Act*.

Re Landry (1973), 1 O.R. (2d) 107 (Ont. Sm. Cl. Ct.).

A judgment of a Superior, County or District Court filed with a small claims court under s. 130(3) of this Act is not a small claims court judgment but remains a judgment of the court in which it was made. Consequently, this section does not apply to a debtor against whom there is one unsatisfied small claims court judgment and a number of District Court judgments.

Re Young (1973), 4 O.R. (2d) 390 (Ont. Sm. Cl. Ct.).

A consolidation order was refused where one of the creditors was a divorced wife who has filed a Supreme Court order for maintenance of the children of the marriage with the small claims court. The order was refused in view of the public interest in the maintenance of the children, and the complexity involved in determining the amount due at any particular time under an order for continuing maintenance.

Dainard v. Dainard (1981), 22 C.P.C. 283 (Ont. Prov. Ct.).

A support order cannot be included in a consolidation order of the small claims court; support order and variation is to be effected only by recourse to s. 37 of the *Family Law Act, 1986* (Ontario), S.O. 1986, c. 4.

Once garnishment is instituted a creditor is required to wait until it is completed before pursuing alternate collection procedures; however, where, as in this case, the garnishment has been completed, the small claims court does not retain exclusive jurisdiction to deal with the arrears merely because the support order remains filed at the small claims court. Accordingly, the Provincial Court (Family Division) (now the Ontario Court (Provincial Division)) could enter in the wife's enforcement proceeding.

Texaco Can. v. Deganais (1983), 40 C.P.C. 64 (Ont. Div. Ct.).

For the purposes of this section, the "sum of dispute" was the amount of the judgment appealed against, where the "sum in dispute" excluded $500. Upon an appeal in garnishee proceedings, the amount was determined by reference to the actual amount of the judgment in the garnishee proceedings, not to the debt itself.

Nunez-do-Cela v. May Co. (1973), 1 O.R. (2d) 217 (Ont. C.A.).

A judgment against a defendant in a trade name may be enforced against the defendant himself without any additional order.

T. Eaton Co. Ltd. v. Higgins (1984), 7 C.P.C. (2d) 277 (Ont. Prov. Ct.).

In a Small Claims Court action, the judgment debtor was a recipient of welfare benefits under s. 7(1) of the *General Welfare Assistance Act*, R.S.O. 1980, c. 188. The sum of $410 was standing to the credit of the judgment debtor in an account with the garnishee bank. Once the welfare assistance was paid to the judgment debtor and he in turn deposited the moneys into his bank account, a debtor-creditor relationship was established between the garnishee bank and the judgment debtor making the account subject to attachment by garnishee.

Bank of Nova Scotia v. Cameron Inco Ltd. (1985), 1 C.P.C (2d) 18 (Ont. Prov. Ct.).

An employer received three notices of garnishment issued out of three different Small Claims Courts and one Notice of Garnishment issued by the District Court purporting to garnishee the wages of its employee. Correspondence with the courts as to the proper procedure for distributing the funds garnished did not produce a satisfactory response. It was held that the effect of the Rules of Civil Procedure and of the Provincial Court Rules, 1985 was to require that the Notice of Garnishment be dealt with in priority of their receipt and not on a *pro rata* basis. When the first creditor had been satisfied, subsequent garnishments should be honoured by the garnishee.

20.11 (1) Contempt Hearing — If a person on whom a notice of examination has been served under rule 20.10 attends the examination but refuses to answer questions or to produce records or documents, the court may order the person to attend before it for a contempt hearing.

(2) Same — If a person on whom a notice of examination has been served under rule 20.10 fails to attend the examination, the court may order the person to attend before it for a contempt hearing under subsection 30(1) of the *Courts of Justice Act*.

(3) If the court makes an order for a contempt hearing,

(a) the clerk shall provide the creditor with a notice of contempt hearing setting out the time, date and place of the hearing; and

(b) the creditor shall serve the notice of contempt hearing on the debtor or other person in accordance with subrule 8.01(13) and file the affidavit of service at least seven days before the hearing.

(4) Setting Aside Order for Contempt Hearing — A person who has been ordered to attend a contempt hearing under subsection 30(1) of the *Courts of Justice Act* may make a motion to set aside the order, before or after receiving the notice of contempt hearing but before the date of the hearing and, on the motion, the court may set aside the order and order that the person attend another examination under rule 20.10.

(5) Finding of Contempt of Court — At a contempt hearing held under subrule (1), the court may find the person to be in contempt of court if the person fails to show cause why the person should not be held in contempt for refusing to answer questions or produce records or documents.

Commentary: When a Deputy Judge presides over a contempt hearing and a debtor fails to appear, the Deputy Judge may refer the matter to a Superior Court Judge for possible issuance of a warrant for arrest. Where a debtor has failed to attend a contempt hearing and a Deputy Judge has referred the matter to a Superior Court judge to consider the issuance Warrant for Arrest (Contempt), the Notice to Debtor form will be mailed to the debtor along with a copy of the endorsement record. The Notice to Debtor provides the debtor with 30 days from the date of the contempt hearing to bring a motion to explain his or her failure to attend the hearing and to convene a judgment debtor examination.

(6) Same — The finding of contempt at a hearing held under subsection 30(1) of the *Courts of Justice Act* is subject to subsection 30(2) of that Act.

Commentary: The court may order a debtor or other person on whom a notice of examination has been properly served under rule 20.10 to attend a contempt hearing.

From July 1, 2006 to December 31, 2010, only a Superior Court Judge could preside over a hearing in Small Claims Court for contempt of court for a debtor's wilful failure to attend an examination hearing. The Rules of the Small Claims Court and the *Courts of Justice Act* have been changed to also give deputy judges and provincial civil judges jurisdiction to preside over these contempt hearings as of January 1, 2011 (r. 20.11(2); new *Courts of Justice Act*, s. 30).

A person who has been ordered to attend a contempt hearing for wilful failure to attend an examination hearing under section 30(1) of the *Courts of Justice Act* may make a motion to a judge of the Small Claims Court to set aside the order, before or after receiving the notice of contempt hearing [r. 20.11(4)].

This motion must be heard before the date of the contempt hearing [r. 20.11(2)].

Where the Small Claims Court presiding judge orders a contempt hearing, the creditor will attend at the Small Claims Court to request that a contempt hearing be scheduled.

Where the Small Claims Court presiding judge orders that a contempt hearing be referred to the Regional Senior Justice for scheduling before a Superior Court Judge, the creditor will attend at the Small Claims Court to request that a contempt hearing be scheduled.

Under the *Rules*, a warrant remains in force for 12 months after its date of issue, subject to an order of the court [r. 20.11(10)].

Where a contempt hearing has been held, the presiding judge of the Small Claims Court or judge of the Superior Court of Justice may order a warrant of committal to issue stating that

the debtor or other person be jailed. Where the presiding judge is a judge of the Small Claims Court, an order may be made ordering a warrant of committal to issue stating that the debtor or other person be jailed for a period *of not more than 5 days*. A creditor *may* provide a completed Identification Form (20K).

The police require the individual's date of birth or age in order to enter the Warrant of Committal on CPIC. A creditor *may* provide a completed Identification Form (20K).

If a Superior Court judge presiding over a contempt hearing orders a Warrant for Arrest (Contempt) the Superior Court courtroom registrar will prepare the Warrant for Arrest and present it to the SCJ judge for signature.

A Warrant of Committal (Form 20J) shall only be renewed by order of the court, on the creditor's motion.

Subject to judicial direction, a warrant of committal that is issued pursuant to an order of a presiding judge of the Small Claims Court can be renewed by a presiding judge of the Small Claims Court.

Subject to judicial direction, a warrant of committal that is issued pursuant to an order of a judge of the Superior Court of Justice may only be renewed by a judge of the Superior Court of Justice.

This Rule provides mechanisms for the enforcement of various types of orders. Enforcement mechanisms include, among others, a writ of seizure of sale, a notice of garnishment, a writ of sequestration, and a writ of possession.

In addition, a monetary tribunal order can be filed at any time following the date set out in the tribunal order for payment of any money. Tribunal monetary orders can be enforced as provided by any of the enforcement processes available in the court where the tribunal order is filed.

Criminal Code of Canada monetary restitution orders may also be filed for enforcement.

The tribunal order or monetary restitution is treated in the same manner as an order or judgment originating in the court where the tribunal order is filed. Unless ordered by the tribunal or the Criminal Court, the order does not expire. The creditor may choose the court in which to file the order. There is no minimum that can be claimed and there are no restrictions as to the territorial jurisdiction in the Superior Court of Justice.

A tribunal order that orders both an eviction and a monetary award can be taken to both the sheriff and also filed with the court of appropriate monetary jurisdiction for enforcement of the monetary portion. The creditor will file a certified copy the order in each location.

The only time that a warrant of committal will be issued in Small Claims Court proceedings by Superior Court of Justice staff will be when the summoned person attends the contempt hearing heard by a Superior Court judge and the judge orders a warrant of committal. A warrant of committal would then be required immediately to take the person to a correctional institution.

If a Superior Court judge presiding over a Small Claims Court contempt hearing orders a Warrant for Arrest (Contempt), the Superior Court of Justice courtroom registrar will prepare the Warrant for Arrest and present it to the Superior Court of Justice judge for signature. The original signed warrant, the corresponding endorsement record, and the file will then be returned to the originating Small Claims Court office for distribution in accordance with usual practice.

Enforcement of a Divisional Court order, which arises as a result of an appeal from a lower court order, is issued by the originating/lower court where the proceeding was commenced; see Rule 60.04(1), Rule 60.07(1), and Rule 60.08(4). An order of the Divisional Court shall also be entered in the originating/lower court, in accordance with Rule 59.05(3).

Pursuant to the *Criminal Code of Canada*, the Ontario Court of Justice or the Superior Court of Justice may make an order naming a person(s) entitled to recover monetary restitution pursuant to:

- A restitution order under section 738 or 739;
- A condition of probation under section 732.1; and
- A condition of a conditional sentence under section 742.3.

Where an amount that is ordered to be paid under sections 732.1, 738, 739, or 742.3 is not paid without delay, the person to whom the amount was ordered to be paid may, by filing the order, enter as a judgment the amount ordered to be paid in any civil court in Canada that has jurisdiction to enter a judgment for that amount. That judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings [s. 741(1), CCC].

The offender and the victim are each provided with a copy of the restitution order. The order may be filed at any time after the date it is issued by the originating criminal court. The order may be filed for enforcement in any civil court of appropriate monetary jurisdiction of the Superior Court of Justice. Upon filing, it is entered as a judgment of the court and it then becomes enforceable in the same manner as a civil judgment of the court.

Where an amount that is ordered to be paid as a condition of a probation or conditional sentence order under sections 732.1 or 742.3 is not paid within the time given by the criminal court judge, only then may the order be filed for enforcement. Criminal court staff do not routinely provide a victim with a copy of the probation or conditional sentence order. If the victim wishes to enforce an order for restitution that is a condition of a probation/conditional sentence order that remains unpaid on the expiry of the time allowed for payment, he/she would be required to attend at the criminal court office where the original probation/conditional sentence order was issued to obtain a copy of the relevant order.

Monetary restitution orders will usually be filed in the county/district in which the court ordering the restitution is located.

In the Superior Court of Justice (SCJ), the restitution order or the probation/conditional sentence order in which a condition provides for restitution may be enforced in the same manner as any other judgment of the court for the payment or recovery of money. The rules applicable to the enforcement method requested, such as the issuance of a writ of seizure and sale and/or notice of garnishment, apply. The enforcement process must be issued from the court location where the restitution order was filed.

The Nature of Contempt

Contempt involves a breach or arguably a disobedience of a lawful order of a court of competent jurisdiction. Disobedience of a prohibitory order is civil contempt: See *Canadian Transport (U.K.) Ltd. v. Alsbury*, 1953 CarswellBC 3, *(*sub nom. *Poje v. British Columbia (Attorney General))* 17 C.R. 176, *(*sub nom. *Poje v. British Columbia (Attorney General))* [1953] 1 S.C.R. 516, 105 C.C.C. 311, [1953] 2 D.L.R. 785, 53 C.L.L.C. 15,055 (S.C.C.). Disobedience of a prohibitory order may also constitute criminal contempt: See *Poje*, *supra*, at p. 519 [S.C.R.], and *U.N.A. v. Alberta (Attorney General)*, EYB 1992-66869, 1992 CarswellAlta 10, 1992 CarswellAlta 465, [1992] S.C.J. No. 37, [1992] 3 W.W.R. 481, 89 D.L.R. (4th) 609, 71 C.C.C. (3d) 225, 135 N.R. 321, 92 C.L.L.C. 14,023, 1 Alta. L.R. (3d) 129, 13 C.R. (4th) 1, 125 A.R. 241, 14 W.A.C. 241, [1992] 1 S.C.R. 901, 9 C.R.R. (2d) 29, [1992] Alta. L.R.B.R. 137 (S.C.C.), at pp. 931-32 S.C.R.

The principal distinguishing feature between civil and criminal contempt is the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts: *United Nurses*, *supra*, at pp. 931-32 [S.C.R]; *Poje*, at p. 527 [S.C.R.].

Contempt, whether civil or criminal, requires proof that the alleged contemnor had actual knowledge of the order that was the subject of the contempt proceedings: see *Bhatnager v. Canada (Minister of Employment & Immigration)*, 43 C.P.C. (2d) 213, 12 Imm. L.R. (2d) 81, 111 N.R. 185, [1990] 2 S.C.R. 217, 71 D.L.R. (4th) 84, 44 Admin. L.R. 1, 1990 CarswellNat 737, 36 F.T.R. 91 (note), 1990 CarswellNat 73, EYB 1990-67238 at para. 17 (S.C.C.). The standard of proof required in contempt proceedings, again regardless of whether the contempt is civil or criminal, is proof beyond a reasonable doubt.

A director, for example, may also be found liable for the conduct of a corporate contemnor. See O'Leary J. in *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 1974 CarswellOnt 894, 19 C.C.C. (2d) 218, 48 D.L.R. (3d) 641, 4 O.R. (2d) 585 (Ont. H.C.); varied (1975), 1975 CarswellOnt 921, 8 O.R. (2d) 375, 59 D.L.R. (3d) 430, 23 C.C.C. (2d) 445 (Ont. C.A.); affirmed (1975), 1975 CarswellOnt 810, 65 D.L.R. (3d) 231, 29 C.C.C. (2d) 325, 11 O.R. (2d) 167 (Ont. C.A.).

The failure of the judge to expressly articulate the precise standard of proof applied does not vitiate the finding, so long as the evidence proves contempt beyond a reasonable doubt. See *Kopyto v. Clarfield* (1999), 30 C.P.C. (4th) 241, [1999] O.J. No. 672, 118 O.A.C. 130, 43 O.R. (3d) 435, 1999 CarswellOnt 644 at para. 19 (Ont. C.A.), and *Ali v. Triple 3 Holdings Inc.* (2002), [2002] O.J. No. 4405, 2002 CarswellOnt 3986 at paras. 4-5 (Ont. C.A.).

Pintea v. Johns, 2017 CSC 23, 2017 SCC 23, 2017 CarswellAlta 680, 2017 CarswellAlta 681, [2017] 1 S.C.R. 470, [2017] S.C.J. No. 23 (S.C.C.).

"The common law of civil contempt requires that the respondents prove beyond a reasonable doubt that Pintea had actual knowledge of the Orders for the case management meetings he failed to attend. The case management judge failed to consider whether Pintea had actual knowledge of two of the three Orders upon which she based her decision. Finding of contempt cannot stand. We endorse the Statement of Principles on Self-represent Litigants and Accused Persons (2006) established by the Canadian Judicial Council. Appeal allowed, action restored and costs award vacated."

Notice of Contempt Hearing before a judge of the Superior Court of Justice

From July 1, 2006 to December 31, 2010, only a Superior Court Judge could preside over a hearing in Small Claims Court for contempt of court for a debtor's wilful failure to attend an examination hearing. The Rules of the Small Claims Court and the *Courts of Justice Act* were changed to also give deputy judges and provincial civil judges jurisdiction to preside over these contempt hearings as of January 1, 2011 (r. 20.11(2); new *Courts of Justice Act*, section 30).

A person who has been ordered to attend a contempt hearing for wilful failure to attend an examination hearing under section 30(1) of the *Courts of Justice Act* may make a motion to a judge of the Small Claims Court to set aside the order, before or after receiving the notice of contempt hearing [r. 20.11(4)]. This motion must be heard before the date of the contempt hearing [rule 20.11(2)]. If not, the person must attend the contempt hearing.

Where the Small Claims Court presiding judge orders that a contempt hearing be referred to the Regional Senior Justice for scheduling before a Superior Court Judge, the creditor will attend at the Small Claims Court to request that a contempt hearing be scheduled.

A person who has been ordered to attend a contempt hearing for wilful failure to attend an examination hearing under section 30(1) of the *Courts of Justice Act* to be scheduled before a Superior Court Judge may make a motion to a judge of the Small Claims Court to set aside the order, before or after receiving the notice of contempt hearing.

This motion must be heard before the date of the contempt hearing [r. 20.11(4)]. If not, the person must attend the contempt hearing.

Case Law: *Mercedes-Benz Financial v. Kovacevic* (2009), 2009 CarswellOnt 1142, [2009] O.J. No. 888, 308 D.L.R. (4th) 562, 74 C.P.C. (6th) 326 (Ont. S.C.J.).

Six months after obtaining court order requiring K to deliver up car, dealership brought motion for civil contempt. Motion granted. K found guilty of contempt, sentenced to five days' imprisonment. Filings under *Personal Property Security Act* demonstrated that K's refusal to return car was result of deliberate plan to avoid obligations to dealership by splitting persons. K's defiance of Canadian law was palpable, unrepentant and unremitting. See also *777829 Ontario Ltd. v. McNally* (1991), 1991 CarswellOnt 476, [1991] O.J. No. 3458, 9 C.P.C. (3d) 257 (Ont. Gen. Div.), *Niagara Regional Police Services Board v. Curran* (2002), [2002] O.J. No. 179, *(*sub nom. *Niagara (Municipality) (Police Services Board) v. Curran)* 57 O.R. (3d) 631, 16 C.P.C. (5th) 139, 2002 CarswellOnt 137 (Ont. S.C.J.), *Sussex Group Ltd. v. Sylvester* (2002), 62 O.R. (3d) 123, [2002] O.J. No. 4350, 32 C.P.C. (5th) 308, 2002 CarswellOnt 3893 (Ont. S.C.J. [Commercial List]), *Sussex Group Ltd. v. 3933938 Canada Inc.*, [2003] O.J. No. 2952, 2003 CarswellOnt 2908, [2003] O.T.C. 683 (Ont. S.C.J. [Commercial List]), and *Milligan v. Lech* (2006), 2006 CarswellOnt 7415, [2006] O.J. No. 4700 (Ont. C.A.).

Telehop Communications Inc. v. Chamberlain (2009), 2009 CarswellOnt 4780 (Ont. S.C.J.).

Defendant found in contempt for failing to attend examination as a judgment debtor and for failing to attend the within contempt proceeding. In 2005, the plaintiff obtained a small claims default judgment against the defendant. The defendant subsequently ignored several Notices of Examination and the Notice of Contempt Hearing requiring his attendance. Court found defendant in contempt and issued a warrant for his committal to jail for up to seven days or until payment of the judgment plus outstanding costs was made.

Korea Data Systems Co. v. Chiang, 2009 ONCA 3, 2009 CarswellOnt 28, [2009] O.J. No. 41, *(*sub nom. *Chiang (Trustee of) v. Chiang)* 93 O.R. (3d) 483, 49 C.B.R. (5th) 1, *(*sub nom. *Chiang (Trustee of) v. Chiang)* 305 D.L.R. (4th) 655, *(*sub nom. *Mendlowitz & Associates Inc. v. Chiang)* 257 O.A.C. 64, 78 C.P.C. (6th) 110 (Ont. C.A.); additional reasons at 2009 ONCA 153, 2009 CarswellOnt 769, 50 C.B.R. (5th) 13, 68 C.P.C. (6th) 32 (Ont. C.A.); additional reasons at 2010 ONCA 67, 2010 CarswellOnt 345, 63 C.B.R. (5th) 201 (Ont. C.A.).

The defendants frustrated plaintiffs' efforts to collect debt for 15 years. In 2003, the defendants consented to finding they were in contempt of court orders and were given opportunity to purge their contempt. The trial judge found that the defendants failed to fully comply with undertakings. The defendants sentenced to imprisonment. Defendants appealed. The appeal should be heard, and was allowed in part. The sentence varied to substitute sentence of seven days' imprisonment for each defendant. The consent order addressed court's sanctions if defendants failed to fulfil undertakings.

The Ontario Court of Appeal reviewed the law of contempt. "Our law has distinguished between civil and criminal contempt of court. A person who breaches a court order, other than an order for payment of money, commits civil contempt of court . . . Where breach accompanied by element of public defiance or public depreciation of the court's authority, contempt becomes criminal . . . The distinction between civil and criminal contempt is not always clear-cut. Civil contempt must be made out to the criminal standard of proof beyond a reasonable doubt. A person found in civil contempt of court may be committed to jail or face any other sanction available for a criminal offence, such as a fine or community service."

Maple Villa Long Term Care Centre v. Bourgoin Estate, 2010 ONSC 5095, 2010 CarswellOnt 6946, 62 E.T.R. (3d) 110 (Ont. S.C.J. [In Chambers]).

A nursing home obtained judgment against an estate in Small Claims Court for unpaid care fees. The applicant estate trustee had not complied with numerous Small Claims Court orders and faced contempt hearing. The estate trustee brought application for advice and direc-

tions pursuant to section 60 of *Trustee Act* regarding legitimacy of Small Claims Court orders. Application dismissed. Application brought without notice and in improper form. Public guardian and trustee was appointed as estate trustee's litigation guardian. Estate trustee had disability. Estate trustee faced jail time for failing to comply with court orders. Estate trustee had need for assistance of litigation guardian to prosecute and defend matters on her behalf.

Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.), 2010 ABCA 240, 2010 CarswellAlta 1487, 482 A.R. 273, 490 W.A.C. 273, 8 Admin. L.R. (5th) 1, 30 Alta. L.R. (5th) 42, 86 R.F.L. (6th) 1, [2010] 12 W.W.R. 232, 323 D.L.R. (4th) 745, 259 C.C.C. (3d) 154 (Alta. C.A.); and *Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.)*, 246 C.C.C. (3d) 170, 460 A.R. 188, 94 Admin. L.R. (4th) 295, 462 W.A.C. 188, 9 Alta. L.R. (5th) 225, 70 R.F.L. (6th) 32, [2009] 11 W.W.R. 450, 2009 CarswellAlta 1103, 2009 ABCA 258, [2009] A.J. No. 773 (Alta. C.A.); reversed 2010 ABCA 240, 2010 CarswellAlta 1487, 259 C.C.C. (3d) 154, 323 D.L.R. (4th) 745, [2010] 12 W.W.R. 232, 86 R.F.L. (6th) 1, 30 Alta. L.R. (5th) 42, 8 Admin. L.R. (5th) 1, 482 A.R. 273, 490 W.A.C. 273 (Alta. C.A.).

In appropriate circumstances, a government official can be held personally liable in civil contempt proceedings that arise from the failure of his or her department to comply with a court order.

Uyj Air Inc. v. Barnes; *Ogilvy Renault v. Barnes*.

A custodial term was imposed on an order for contempt because of "utter disregard and contempt" for the court's authority. "It is necessary in the circumstances of this case to bring home to the gravity of misconduct."

The Ontario Court of Appeal upheld a 14-month sentence against Barry Landen in *Langston v. Landen* for not complying with numerous court orders in an alleged multi-million-dollar estates fraud. It concluded in the contempt case of *Chiang (Re)* in 2009 that sentences of eight and 12 months for a couple who breached numerous orders requiring them to disclose assets were not excessive.

In *Chiang*, the Court of Appeal described civil contempt as a necessary "coercive" power to try to obtain compliance with court orders. People serving sentences for contempt are not eligible for parole, and the release date is within the jurisdiction of the court, not correction officials.

Lymer v. Jonsson, 2017 ABQB 110, 2017 CarswellAlta 216 (Alta. Q.B.); affirmed 2018 ABCA 36, 2018 CarswellAlta 130 (Alta. C.A.); leave to appeal refused *Neil Alan Lymer v. Diane Jonsson, et al.*, 2018 CarswellAlta 2118, 2018 CarswellAlta 2119 (S.C.C.), L.A. Smart, Registrar in Bankruptcy.

Lymer was found in civil contempt of court for swearing false affidavits of records and for repeatedly failing to abide by court orders requiring him to disclose relevant and material records in his possession. He applied for a declaration he had purged his contempt.

Contempt orders may be set aside where "the contemnor subsequently complies with the order or otherwise purges his or her contempt": *Carey v. Laiken*, 2015 CSC 17, 2015 SCC 17, 2015 CarswellOnt 5237, 2015 CarswellOnt 5238, [2015] 2 S.C.R. 79, 133 O.R. (3d) 80 (note), 66 C.P.C. (7th) 1, 382 D.L.R. (4th) 577, *(*sub nom. *Sabourin and Sun Group of Companies v. Laiken)* 470 N.R. 89, *(*sub nom. *Sabourin and Sun Group of Companies v. Laiken)* 332 O.A.C. 142, [2015] A.C.S. No. 17, [2015] S.C.J. No. 17 (S.C.C.) at para. 66 [*Carey*]. The Alberta Rules of Court, r. 10.53(2) provides that "[i]f a person declared to be in civil contempt of Court purges the person's contempt, the Court may waive or suspend any penalty or sanction." The party found to have been in contempt of court bears the onus, on a balance of probabilities, to demonstrate that they have purged their contempt: *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 2009 CarswellOnt 28, *(*sub nom. *Chiang (Trustee of)*

v. Chiang) 93 O.R. (3d) 483, 49 C.B.R. (5th) 1, 78 C.P.C. (6th) 110, *(*sub nom. *Chiang (Trustee of) v. Chiang)* 305 D.L.R. (4th) 655, *(*sub nom. *Mendlowitz & Associates Inc. v. Chiang)* 257 O.A.C. 64, [2009] O.J. No. 41 (Ont. C.A.) at paras. 50 and 52; additional reasons 2009 ONCA 153, 2009 CarswellOnt 769, 50 C.B.R. (5th) 13, 68 C.P.C. (6th) 32 (Ont. C.A.); additional reasons 2010 ONCA 67, 2010 CarswellOnt 345, 63 C.B.R. (5th) 201, [2010] O.J. No. 285 (Ont. C.A.). To aid the contemnor, the Court may issue specific directions on what the contemnor must do to purge his or her contempt: *Alberta v. AUPE*, 2014 ABCA 197, 2014 CarswellAlta 950, *(*sub nom. *Alberta v. Alberta Union of Provincial Employees)* 575 A.R. 338, 100 Alta. L.R. (5th) 255, 374 D.L.R. (4th) 336, [2015] 4 W.W.R. 98, 2014 C.L.L.C. 220-043, 312 C.R.R. (2d) 199, *(*sub nom. *Alberta v. Alberta Union of Provincial Employees)* 612 W.A.C. 338, [2014] A.J. No. 618 (Alta. C.A.) at para. 66~~.~~; additional reasons 2014 ABCA 326, 2014 CarswellAlta 1760, *(*sub nom. *Alberta v. Alberta Union of Provincial Employees)* 584 A.R. 135, 11 Alta. L.R. (6th) 84, 69 C.P.C. (7th) 230, [2015] 4 W.W.R. 124, *(*sub nom. *Alberta v. Alberta Union of Provincial Employees)* 623 W.A.C. 135 (Alta. C.A.); leave to appeal refused 2015 CarswellAlta 135, 2015 CarswellAlta 136 (S.C.C.).

In *Cotroni c. Québec (Police Commission)*, 1977 CarswellQue 60, 1977 CarswellQue 60F, [1978] 1 S.C.R. 1048, 38 C.C.C. (2d) 56, 80 D.L.R. (3d) 490, 18 N.R. 541 (S.C.C.) at p. 1058 [S.C.R.] [*Cotroni*], the Supreme Court found that where a person is allegedly in contempt of court for failing to provide adequate answers to questions or undertakings, the pleadings should specifically note which responses are being characterized as inadequate or evasive. However, if a court does find a person to be in contempt for failing to answer undertakings adequately, it is unnecessary for the court to itemize which answers are unsatisfactory if the record shows the contemnor is otherwise aware of what he or she must do to purge his or her contempt: *Doobay v. Diamond*, 2012 ONCA 580, 2012 CarswellOnt 11032, 297 O.A.C. 190, [2012] O.J. No. 4144 (Ont. C.A.) at paras. 28–30; leave to appeal refused 2013 CarswellOnt 4051, 2013 CarswellOnt 4052, 453 N.R. 396 (note), 320 O.A.C. 395 (note) (S.C.C.).

In order to find that a litigant is in civil contempt of court, the Court must be satisfied beyond a reasonable doubt that:

> 1) The order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Carey* at para. 33, citing *G. (N.) c. Services aux enfants & adultes de Prescott-Russell*, 2006 CarswellOnt 3772, 2006 CarswellOnt 10335, 82 O.R. (3d) 669, *(*sub nom. *Prescott-Russell Services for Children & Adults v. G. (N.))* 82 O.R. (3d) 686, *(*sub nom. *G. (N.) v. Services aux enfants & adultes de Prescott-Russell)* 271 D.L.R. (4th) 750, 29 R.F.L. (6th) 92, 214 O.A.C. 146, [2006] O.J. No. 2488 (Ont. C.A.) at para. 27.
>
> 2) The party must have had actual knowledge of the order: *Carey* at para. 34.
>
> 3) The party must have intentionally contravened the order by doing what was expressly prohibited, or not doing what was expressly compelled: *Carey* at para. 35.

Lymer continued to be in contempt of court for failing to file compliant Affidavits of Records for himself and the Lymer Companies in accordance with my October 2, 2013 and March 7, 2014 orders. Lymer and the Lymer Companies (on a company-by-company basis) shall file and serve further and better Affidavits of Records disclosing relevant and material documents limited, however, to the types of documents specifically identified.

Town of Aurora v. Lepp, 2019 ONSC 5430, 2019 CarswellOnt 14991 (Ont. S.C.J.), Justice J. Di Luca.

Oral Reasons found Lepp guilty of civil contempt in relation to a violation of the Order of de Sa J. dated March 28, 2019. Penalty phase of the proceedings to allow Lepp time to consider purging his contempt.

The *Rules of Civil Procedure* expressly provide for a wide range of penalty options for dealing with civil contempt. See rule 60.11(5) of the *Rules of Civil Procedure*. The role of a civil contempt finding is twofold; first, it seeks to enforce compliance with a court order and second, it seeks to foster societal respect for the court process. See *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, 2017 CarswellOnt 12846, 416 D.L.R. (4th) 269, [2017] O.J. No. 4367 (Ont. C.A.) per Weiler J.A. at para. 77~~.~~; leave to appeal refused *Robyrt Regan v. Business Development Bank of Canada*, 2018 CarswellOnt 13162, 2018 CarswellOnt 13163 (S.C.C.) and see also *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 574, 2014 CarswellOnt 10591, 121 O.R. (3d) 670, 376 D.L.R. (4th) 60, *(*sub nom. *Boily v. Carleton Condominium Corp. No. 145)* 322 O.A.C. 261, [2014] O.J. No. 3625 (Ont. C.A.) at para. 79~~.~~; additional reasons 2014 ONCA 735, 2014 CarswellOnt 19244, 407 D.L.R. (4th) 239, [2014] O.J. No. 4951 (Ont. C.A.).

Rule 60.11(5) permits the inclusion of costs as a component of a penalty package. Indeed, the general presumptive rule in a civil contempt matter is that costs are payable on a substantial indemnity basis. See *Astley v. Verdun*, 2013 ONSC 6734, 2013 CarswellOnt 15108, 118 O.R. (3d) 43, [2013] O.J. No. 4942 (Ont. S.C.J.); affirmed 2014 ONCA 668, 2014 CarswellOnt 13412, [2014] O.J. No. 4571 (Ont. C.A.).

(7) Other Powers of Court at Contempt Hearing — At a contempt hearing, the court may order that the person,

(a) attend an examination under rule 20.10;

(b) be jailed for a period of not more than five days.

(c) attend an additional contempt hearing under subrule (1) or subsection 30(1) of the *Courts of Justice Act*, as the case may be; or

(d) comply with any other order that the judge considers necessary or just.

Commentary: If a Superior Court judge presiding over a contempt hearing orders a Warrant for Arrest (Contempt), the Superior Court courtroom registrar will prepare the Warrant for Arrest and present it to the SCJ judge for signature. The original Warrant, the endorsement record and the file will then be returned to the originating SCC office.

A Warrant of Committal (Form 20J) shall only be renewed by order of the court, on the creditor's motion.

A warrant of committal that is issued pursuant to an order of a judge of the Superior Court of Justice shall only be renewed by a judge of the Superior Court of Justice.

If the motion is to be scheduled before a judge of the Superior Court of Justice, Small Claims Court staff will advise the person that he/she must attend before a judge of the Superior Court of Justice and will contact the Superior Court of Justice on his/her behalf to obtain a motion date.

(8) Warrant of Committal — If a committal is ordered under clause (7)(b),

(a) the creditor may complete and file with the clerk an identification form (Form 20K) to assist the police in apprehending the person named in the warrant of committal; and

(b) the clerk shall issue a warrant of committal (Form 20J), accompanied by the identification form, if any, directed to all police officers in Ontario to apprehend the person named in the warrant anywhere in Ontario and promptly bring the person to the nearest correctional institution.

Warrant of Committal

Under the *Rules*, a warrant remains in force for 12 months after its date of issue, subject to an order of the court [r. 20.11(10)].

Where a contempt hearing has been held, the presiding judge of the Small Claims Court or judge of the Superior Court of Justice may order a warrant of committal to issue stating that the debtor or other person be jailed. Where the presiding judge is a judge of the Small Claims Court, an order may be made ordering a warrant of committal to issue stating that the debtor or other person be jailed for a period *of not more than 5 days*.

(9) Discharge — A person in custody under a warrant issued under this rule shall be discharged from custody on the order of the court or when the time prescribed in the warrant expires, whichever is earlier.

(10) Duration and Renewal of Warrant of Committal — A warrant issued under this rule remains in force for 12 months after the date of issue and may be renewed by order of the court on a motion made by the creditor for 12 months at each renewal, unless the court orders otherwise.

(11) [Repealed O. Reg. 440/10, s. 7(11).]

O. Reg. 78/06, s. 48; 440/10, s. 7

Commentary: The court may order a debtor or other person on whom a notice of examination has been properly served under rule 20.10 to attend a contempt hearing. There are two possible scenarios which may happen at the examination hearing in the Small Claims Court which may lead to contempt proceedings:

1. If the person attends the examination but refuses to answer questions or to produce documents or records, the contempt hearing will be scheduled before a judge or deputy judge of the Small Claims Court. This process is set out in section 20.20 below; or
2. If the person fails to attend the examination, the contempt hearing will be scheduled before a judge of the Superior Court of Justice. This process is set out in section 20.21.

A person who has been ordered to attend a contempt hearing before a Superior Court judge may make a motion to a judge of the Small Claims Court to set aside the order, before or after receiving the notice of contempt hearing. This motion must be heard before the date of the contempt hearing [rule 20.11(2)]. If not, the person must attend the contempt hearing.

Small Claims Court forms and fees apply to any process under the contempt process except for the Warrant for Arrest (Contempt) Form 60K.

Where the Small Claims Court presiding judge orders a contempt hearing, the creditor will attend at the Small Claims Court to request that a contempt hearing be scheduled.

The creditor is responsible for ensuring that there are sufficient true copies of the notice of contempt hearing for service on the person named in the notice. The notice of contempt must be served personally [r. 8.01(13), 20.11(3)(b)].

The creditor must file the affidavit of service of the notice of contempt hearing at least seven days before the hearing date.

If the notice was served but was filed late and the judge refused to allow the matter to proceed, the creditor must contact the debtor to indicate that the matter will not proceed on the original date.

A new Notice of Contempt Hearing can be issued or the date on the original Notice of Contempt Hearing can be changed by putting a line through the original date and inserting the new date.

Where the Small Claims Court presiding judge orders a contempt hearing before a Superior Court judge, the creditor will attend at the Small Claims Court to request that a contempt hearing be scheduled.

A person who has been ordered to attend a contempt hearing before a Superior Court judge may make a motion to a judge of the Small Claims Court to set aside the order, before or after receiving the notice of contempt hearing. This motion must be heard before the date of the contempt hearing [rule 20.11(2)]. If not, the person must attend the contempt hearing.

Renewing a Warrant of Committal

A Warrant of Committal (Form 20J) shall only be renewed by order of the court, on the creditor's motion.

Subject to judicial direction, a warrant of committal that is issued pursuant to an order of a presiding judge of the Small Claims Court can be renewed by a presiding judge of the Small Claims Court.

Subject to judicial direction, a warrant of committal that is issued pursuant to an order of a judge of the Superior Court of Justice may only be renewed by a judge of the Superior Court of Justice.

Failure to notify police services of the court-ordered renewal means that the warrant will be removed from the police information system after 12 months. The warrant will be treated as expired and returned to the clerk of the issuing Small Claims Court.

A warrant shall only be rescinded by order of the court, on motion. A warrant issued pursuant to an order of a presiding judge of the Small Claims Court can be rescinded by a presiding judge of the Small Claims Court. Subject to judicial direction, a warrant that is issued pursuant to an order of a judge of the Superior Court of Justice may only be rescinded by a judge of the Superior Court of Justice.

Case Law: *Intrans-Corp v. Environmental Cleaning Systems Inc.*, 2006 CarswellOnt 4335, 23 C.B.R. (5th) 227 (Ont. Sm. Cl. Ct.).

Creditor served notice of examination on debtor. Debtor did not show up for examination. In similar situations, other justices had exercised discretion to send matter immediately back for second examination. Hearing held to determine whether to proceed to contempt hearing or send matter back for second examination. Matter would proceed directly to contempt hearing and notice to be served personally on debtor. Court disagreed with discretion exercised by other judges. Second examination was appropriate only in exceptional circumstances. An innocent creditor who had properly served and paid for notice of examination should not have to expend further time and expense mandated by second examination. Second notice would be in same form as first and therefore would wastefully repeat initial service. Proceeding to contempt hearing put onus on debtor to move or not move with respect to setting aside contempt hearing and restoring matter to judgment debtor list.

Rules 20.10(2), 20.11(3)–(7) as amended referred to.

Boyle, Re, 2006 CarswellAlta 1004, 2006 ABQB 585, 24 C.B.R. (5th) 252 (Alta. Q.B.).

Judge presided over bankruptcy proceedings and contempt hearings. Debtor brought application for removal of judge for bias. Application dismissed. Reasonable observer would not find likelihood of bias. *Roberts v. R.* (2003), 2003 SCC 45, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2003] S.C.J. No. 50, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 231 D.L.R. (4th) 1, 19 B.C.L.R. (4th) 195, *(*sub nom. *Wewayakum Indian Band v. Canada)* 309 N.R. 201, [2004] 2 W.W.R. 1, *(*sub nom. *Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2004] 1 C.N.L.R. 342 (S.C.C.) followed.

Milligan v. Lech, 2006 CarswellOnt 7415 (Ont. C.A.).

Throughout case, defendant had repeatedly broken his promises to court and showed deliberate and flagrant disregard for court orders. He was imprisoned for 12 months for contempt in failing to disclose documents, to answer questions on discovery and to attend in court. Nine

months later, he was incarcerated for another 15 months on second contempt order made for same reasons. Two years later when he still refused to comply, third contempt order yielded him further 15 months in prison, which he appealed. Appeal court found that this was not case of punishing him for same refusal but rather for fresh, discrete and wilful refusal to comply with existing obligation. No error in motion judge's decision to commit defendant for third contempt.

Dickie v. Dickie, 2007 CarswellOnt 606, 2007 CarswellOnt 607, [2007] S.C.J. No. 8, 221 O.A.C. 394, 43 C.P.C. (6th) 1, 84 O.R. (3d) 799 (note), 2007 SCC 8, 357 N.R. 196, [2007] 1 S.C.R. 346, 279 D.L.R. (4th) 625, 39 R.F.L. (6th) 30 (S.C.C.).

Payor appealed to Ontario Court of Appeal where he was confronted by motion made by mother that challenged his right to be heard until he first purged his contempt. Majority exercised discretion in favour of allowing payor to present argument because his appeal concerned the legality of contempt proceeding itself and not the validity of underlying support orders. Finding of contempt set aside on appeal.

Mother appealed to Supreme Court of Canada. The full court chose not to interfere with discretionary conclusion of majority in Court of Appeal whereby payor allowed right of audience without first having to purge his contempt (although it said that it could find no fault with the discretionary disposition of the dissenting Appeals Justice John I. Laskin, who would have adjourned the payor's appeal until he complied with the securing orders).

Supreme Court agreed with dissenting judgment that securing orders did not create a fixed debt obligation requiring payor to make payments to mother. Securing orders not orders for the payment of money within meaning of subrule 60.11(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

Baumung v. 8 & 10 Cattle Co-operative Ltd., [2005] S.J. No. 530, 2005 CarswellSask 574, 2005 SKCA 108, 259 D.L.R. (4th) 292, 269 Sask. R. 190, 357 W.A.C. 190 (Sask. C.A.).

To be found in contempt of court, the alleged contemnor must intentionally act contrary to the order in question. While it had to be shown only that the act contravening the order was itself done intentionally, the contemnor had to have notice of the terms of the order. In order to ground a contempt finding, a court order must be clear.

No proof that order formally served on the plaintiff.

Anthes v. Wilson Estate, 2005 CarswellOnt 1742, 197 O.A.C. 110, 25 C.P.C. (6th) 216 (Ont. C.A.).

Court's own motion for contempt poses particular procedural problems. Contempt process, even civil contempt process, is criminal in nature and requires proof of contemptuous conduct beyond reasonable doubt. Conduct must be wilful, deliberate and of contumacious and egregious nature. Trial judge did not address issue of burden of proof. Nothing on record that could justify finding of contempt.

Johnson v. Schwalm, 2006 CarswellOnt 2620 (Ont. S.C.J.).

Respondent found in contempt. On return of motion, submissions made regarding penalty and costs. Respondent ordered to pay fine of $750. Impossible to tell whether contempt had been purged. Respondent's assertion that he was unable to understand terms of court order preposterous. Respondent ordered to pay costs related to previous and current contempt proceedings in amount of $16,750. Respondent ordered imprisoned for period of seven days, to be permanently stayed if fine and costs paid within 45 days.

Brian Mallard Insurance Services Ltd. v. Shirley, 2005 CarswellAlta 1750, 2005 ABQB 858, 20 C.P.C. (6th) 1, 385 A.R. 249 (Alta. Q.B.).

K wrote to trial judge in other action in which he was defendant that judge who granted Anton Piller Order participated in felony. Plaintiffs brought motion to find K in contempt.

Motion granted on other grounds. K's actions not in face of court not calculated to scandalize court. Law of contempt designed to protect dignity and authority of court. Personal abuse of judge not contempt.

Directv Inc. v. Boudreau, 2005 CarswellOnt 6630, 42 C.P.R. (4th) 388 (Ont. C.A. [In Chambers]).

Defendant committed for civil contempt and sentenced to imprisonment for nine months. Defendant appealed sentence. Defendant's motion to stay sentence pending disposition of appeal allowed. Defendant's arguments raised serious question. Defendant would suffer irreparable harm. Balance of convenience favoured defendant.

Taylor v. Taylor, [2005] O.J. No. 4593, 2005 CarswellOnt 5264, 21 R.F.L. (6th) 449 (Ont. S.C.J.).

Disobedience of court order. Husband flagrantly breached court orders in family law proceeding and caused his former wife untold stress. Resentful spouse not above the law. Breaches serious and warranted sanction beyond declaration. Husband offered no reasonable explanation for his misconduct. In view of his apparent means, systematic and ongoing contempt for his wife's interests, fine must be substantial. Husband ordered to pay fine of $25,000 to wife.

Dickie v. Dickie, 2007 CarswellOnt 606, 2007 CarswellOnt 607, [2007] S.C.J. No. 8, 221 O.A.C. 394, 43 C.P.C. (6th) 1, 84 O.R. (3d) 799 (note), 2007 SCC 8, 357 N.R. 196, [2007] 1 S.C.R. 346, 279 D.L.R. (4th) 625, 39 R.F.L. (6th) 30 (S.C.C.).

The Court of Appeal dismissed the ex-wife's preliminary motion. In dissent, Justice Laskin reasoned that court should exercise its discretion not to entertain ex-husband's appeal because he had wilfully and continuously refused to obey court orders. Justice Laskin also found that the purpose of exception in rule 60.11(1) was to ensure that a person could not be imprisoned for failure to pay an ordinary civil debt and that the security orders did not create fixed debts. Appeal allowed. Mrs. Dickie should be awarded her costs before the Supreme Court of Canada on a solicitor and client basis and in the Court of Appeal on a substantial indemnity basis.

Blais v. Belanger, 2007 CarswellOnt 2421, 54 R.P.R. (4th) 9, 2007 ONCA 310, 282 D.L.R. (4th) 98, 224 O.A.C. 1, [2007] O.J. No. 1512 (Ont. C.A.).

The applicants brought motion for contempt. Gordon J. ordered that access be restored and the parties agreed to adjourn the contempt matter until after the trial respecting the declaration. The Court of Appeal held that Belanger's disregard of the court's authority was properly found to be contemptuous. He was not entitled to disregard their orders because he believed the court would ultimately decide the issue in his favour.

Point on the Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd., 2006 CarswellAlta 1396, 68 Alta. L.R. (4th) 308, [2007] 3 W.W.R. 731, 405 A.R. 1, 2006 ABQB 775 (Alta. Q.B.).

Breach of court order, plus delay and lack of cooperation, more than sufficient to establish finding of contempt. Proceeding in disregard or ignorance of order is, *prima facie*, contempt. While merely civil, act or failure to act must be intentional and accidental, and contempt must be proved beyond reasonable doubt. Contempt is a very serious matter and ought to be invoked in only most extreme circumstances. Contempt is affront to whole administration of justice and aggrieved party should seek remedy in timely fashion and not accumulate grievances for later application. Contempt is not contempt inter parties, but contempt of court.

Wickwire Holm v. Nova Scotia (Attorney General), 2007 CarswellNS 428, 2007 NSSC 287, 285 D.L.R. (4th) 439, 824 A.P.R. 259, 258 N.S.R. (2d) 259, 56 C.P.C. (6th) 324 (N.S. S.C.).

The text of the original decision corrected on October 12, 2007.

The applicant seeks "(a) a declaratory order that any order issued by an Adjudicator of the Nova Scotia Small Claims Court shall be enforced according to the terms of the order, (b) another order to be issued by Adjudicator Casey requiring the Sheriff of Halifax County to cause Peter Wilkes to appear before the Small Claims Court on specified dates to show cause why he should not be held in contempt, and (c) costs." The respondent states that the first issue to be decided is whether the Small Claims Court has *ex facie* civil contempt jurisdiction.

The inherent common law jurisdiction of superior courts continues to be available to those statutory courts and tribunals which are intended to have the protection of contempt proceedings to enforce the orders of those statutory courts and tribunals. The nature of proceedings in the Small Claims Court are judicial, not administrative, and are therefore of the type for which *ex facie* civil contempt is intended to be available.

The jurisdiction of the Supreme Court to deal with *ex facie* civil contempt of the Small Claims Court continues to exist. No provision of the Act attempts to oust the inherent jurisdiction of the Supreme Court to deal with contempt of inferior tribunals or statutory courts.

The fact that the Supreme Court retains jurisdiction to enforce orders and proceedings in the Small Claims Court by civil contempt does not, by itself, mean that the Small Claims Court does not have *ex facie* civil contempt jurisdiction.

The Small Claims Court of Nova Scotia does not have *ex facie* civil contempt jurisdiction, based on the Supreme Court of Canada's decisions in *Canadian Broadcasting Corp. v. Quebec (Police Commission)*, 1979 CarswellQue 98, 1979 CarswellQue 163, [1979] 2 S.C.R. 618, 28 N.R. 541, 14 C.P.C. 60, 48 C.C.C. (2d) 289, *(*sub nom. *Canadian Broadcasting Corp. v. Cordeau)* 101 D.L.R. (3d) 24 (S.C.C.), and *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, EYB 1992-67219, 1992 CarswellNat 4, 1992 CarswellNat 657, 42 C.P.R. (3d) 353, 138 N.R. 321, 92 D.L.R. (4th) 609, [1992] 2 S.C.R. 394, 7 B.L.R. (2d) 1, 12 Admin. L.R. (2d) 1 (S.C.C.).

Some jurisdictions have legislatively set out the enforcement jurisdiction and procedures of Small Claims Courts; for example, Rule 20 of the *Rules of the Small Claims Court*, being Ontario Regulation 258/98, made pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides for examination of debtors (Rule 20.10), and for contempt hearings before a judge of the Superior Court of Justice if the debtor fails to attend (Rule 20.11), and section 13 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, sets out the jurisdiction and procedure for the Divisional Court to hear contempt in respect of tribunals.

Kassay v. Kassay (2000), 2000 CarswellOnt 3262, [2000] O.J. No. 3373, 11 R.F.L. (5th) 308 (Ont. S.C.J.).

Motion by the husband for a finding of contempt against the wife regarding a denial of access to child. Motion allowed. The court held that there are two types of civil contempt: contempt in the face of the court (*in facie*) and contempt not in the face of the court (*ex facie*). An order requiring a person to do an act other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order. However, it must be established that he or she deliberately or willfully or knowingly did some act which was designed to result in the breach of a court order. The wife willfully breached an access order and thus, was found in contempt.

Pro Swing Inc. v. ELTA Golf Inc., [2006] S.C.J. No. 52, 2006 CarswellOnt 7203, 2006 CarswellOnt 7204, 52 C.P.R. (4th) 321, [2006] 2 S.C.R. 612, 2006 SCC 52, 354 N.R. 201, 218 O.A.C. 339, 273 D.L.R. (4th) 663, 41 C.P.C. (6th) 1 (S.C.C.).

Successful foreign plaintiff brought a motion to the Ontario Superior Court of Justice for recognition and enforcement of the contempt order against the Ontario based defendant. The

motions judge held that non-money foreign judgments can be enforced in Ontario. The Court of Appeal set aside the motions judge's decision. The plaintiff appealed.

Supreme Court of Canada dismissed the appeal. The contempt order is quasi-criminal in nature, and a Canadian court will not enforce a foreign penal order, either directly or indirectly. Receiving courts should use their discretion to refrain from enforcing orders that subject Canadian litigants to unforeseen obligations.

Wickwire Holm v. Nova Scotia (Attorney General), 2007 CarswellNS 428, 2007 NSSC 287, 285 D.L.R. (4th) 439, 824 A.P.R. 259, 258 N.S.R. (2d) 259, 56 C.P.C. (6th) 324 (N.S. S.C.).

Adjudicator issued order that Sheriff cause debtor to appear at show cause hearing after debtor failed to appear. Provincial department advised adjudicator that sheriff could not enforce the order because of departmental directive. Application brought by creditor for declaration that order of the Small Claims Court requiring Sheriff to cause debtor to appear at show cause hearing shall be enforced and for order directing Small Claims adjudicator to reissue order Application granted in part.

Although respondent obligated to obey court order or have it stayed or overturned, Small Claims Court had no ex facie civil contempt jurisdiction. Respondent had no authority to direct a Sheriff not to enforce a court order and Sheriff had no authority to refuse to enforce a court order.

College of Optometrists (Ontario) v. SHS Optical Ltd., [2008] O.J. No. 3933, 2008 CarswellOnt 6073, 300 D.L.R. (4th) 548, 241 O.A.C. 225, 2008 ONCA 685, 93 O.R. (3d) 139 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 3393, 2009 CarswellOnt 3394 (S.C.C.).

Appeal by the appellant from a decision finding the appellants in contempt of an order of the Superior Court of Justice. The appellant claimed that the Notice of Application submitted by the respondents when they brought contempt proceedings against the appellant was inadequately particular. Appeal dismissed. Appellants did not apply for particulars or complain of any insufficiency of detail in the notice. No basis for finding of unfair hearing as the application judge assisted the applicant whenever he asked for help; applicant was self-represented by choice, had no language difficulties and was experienced business person.

St. Elizabeth Home Society v. Hamilton (City), 2008 CarswellOnt 1381, 52 C.P.C. (6th) 48, 237 O.A.C. 25, 230 C.C.C. (3d) 199, 2008 ONCA 182, 89 O.R. (3d) 81, 291 D.L.R. (4th) 338, [2008] O.J. No. 983 (Ont. C.A.).

Appellant, a newspaper reporter, appealed a decision finding him in contempt of court. Appellant was subpoenaed to testify at trial but refused to disclose identity of one source claiming that to do so would lead to the identification of a confidential source. The source eventually revealed himself before conclusion of trial. Appeal allowed.

Citations for contempt should be used as a last resort and this is particularly apt where journalist-informant confidentiality was at stake. Even if appellant's claim of privilege had failed the court should have first explored other means of proceeding that would be less intrusive to journalist-informant relationship of confidentiality.

York (Regional Municipality) v. Schmidt (October 20, 2008), Doc. CV-07083917 (Ont. S.C.J.).

Applicant made an application for a finding that the defendant was in contempt of a court order. Application allowed. The applicant satisfied the court beyond a reasonable doubt that Schmidt was in contempt of the order. The order was clear and it was breached. The evidence showed that the breach was deliberate.

Dickie v. Dickie, 39 R.F.L. (6th) 30, 279 D.L.R. (4th) 625, [2007] 1 S.C.R. 346, 357 N.R. 196, 2007 SCC 8, 84 O.R. (3d) 799 (note), [2007] S.C.J. No. 8, 2007 CarswellOnt 607, 2007 CarswellOnt 606, 43 C.P.C. (6th) 1, 221 O.A.C. 394 (S.C.C.).

Ex-husband did not comply with new orders. *Rules of Civil Procedure* precluding contempt proceedings to enforce orders require "payment of money." Contempt proceedings available. Orders not within exception and did not create fixed debts. See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 60.11(1).

The motion judge found ex-husband in contempt. Husband sought to appeal contempt order while in non-compliance with underlying orders. Appellate court had discretion to refuse to entertain appeal; see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 140(5).

In dissent, Laskin J. reasoned that court should exercise its discretion not to entertain the ex-husband's appeal because he had wilfully and continuously refused to obey court orders. He would have adjourned proceedings until the ex-husband complied with security orders. He also found ex-husband's appeal failed on merits. Purpose of exception in r. 60.11(1) was to ensure that a person could not be imprisoned for failure to pay an ordinary, civil debt, and that the security orders did not create fixed debts. Rather, they required provision of security and so did not fall within exception. Finally, he found that ex-husband had received a fair hearing.

Held, on ex-wife's appeal, appeal should be allowed.

Wickwire Holm v. Nova Scotia (Attorney General), 56 C.P.C. (6th) 324, 258 N.S.R. (2d) 259, 824 A.P.R. 259, 285 D.L.R. (4th) 439, 2007 NSSC 287, 2007 CarswellNS 428 (N.S. S.C.).

The applicant law firm obtained default judgment and execution order in Small Claims against client debtor. The debtor failed to appear for discovery in aid of execution. Small Claims Court of Nova Scotia did not have *ex facie* civil contempt jurisdiction.

Applicant sought order requiring sheriff to cause debtor to appear before Small Claims Court to show cause why he should not be held in contempt. Application granted. Department of Justice had no authority, statutorily or constitutionally, to direct sheriff *not* to enforce court order. Sheriff had no authority to refuse to enforce court order. Department of Justice and sheriff were required to carry out orders of Small Claims Court unless court of competent jurisdiction stayed order or otherwise released them from obligation to enforce it.

Supreme Court jurisdiction to deal with *ex facie* civil contempt of the Small Claims Court continued to exist. Supreme Court had inherent jurisdiction to deal with *ex facie* contempt of orders and proceedings in the Small Claims Court. Common law presumption was against statutory courts and inferior tribunals having *ex facie* civil contempt jurisdiction unless granted by statute and in clear and unambiguous language.

Granting of declaratory judgment discretionary. Small Claims Court entitled to have its orders respected in same manner as other courts and tribunals unless its orders stayed, reversed by appeal, judicial review, prerogative writ or by an equally effective order to the effect that its order need not be obeyed.

Cellupica v. Di Giulio, 2010 ONSC 5839, 2010 CarswellOnt 8573, [2010] O.J. No. 4844, 5 C.P.C. (7th) 371 (Ont. S.C.J.).

The plaintiffs brought a motion for an order of contempt. The motion was granted. Two missed examination dates and unfulfilled undertaking were not properly specified in the notice, and so could not be relied on for contempt. The defendant raised reasonable doubt about the first missed court hearing, and was given a move to a different courtroom. The defendant failed to explain the non-attendance at the ordered examination, or the failure to obtain bank records. The defendant deliberately and wilfully failed to perform the obligations imposed on him by the court order, and was in contempt of court. The defendant would not be given any further time to purge contempt, as he had repeatedly toyed with plaintiffs and breached court orders.

Elements required to find a person in contempt of court are referred to in *Hobbs v. Hobbs*, 2008 ONCA 598, 2008 CarswellOnt 5037, [2008] O.J. No. 3312, 240 O.A.C. 202, 54 R.F.L. (6th) 1 at para. 26 (Ont. C.A.).

On a motion seeking to find a defendant in contempt of a court order, the moving party must prove that the defendant was aware of the terms of the order: *College of Optometrists (Ontario) v. SHS Optical Ltd.*, 2008 ONCA 685, 2008 CarswellOnt 6073, [2008] O.J. No. 3933, 93 O.R. (3d) 139, 300 D.L.R. (4th) 548, 241 O.A.C. 225 at para. 71 (Ont. C.A.); leave to appeal refused 2009 CarswellOnt 3393, 2009 CarswellOnt 3394, 262 O.A.C. 396 (note), 398 N.R. 400 (note) (S.C.C.). Generally, a copy of the order must be served on the person affected by it in sufficient time to enable the defendant to perform the ordered act: See Donald Ferguson, *Ontario Courtroom Procedure*, 2009, pp. 540-541.

Where an alleged contemnor testifies at a contempt hearing, a court should assess the evidence in accordance with the principles laid down by the Supreme Court of Canada in *R. v. W. (D.)*, 1991 CarswellOnt 1015, 1991 CarswellOnt 80, EYB 1991-67602, [1991] S.C.J. No. 26, [1991] 1 S.C.R. 742, 3 C.R. (4th) 302, 63 C.C.C. (3d) 397, 122 N.R. 277, 46 O.A.C. 352 (S.C.C.).

Once a person is found in civil contempt of court, the court will usually afford a contemnor an opportunity to purge his contempt before the penalty or punishment phase of the proceeding begins: *College of Optometrists (Ontario)*, *supra*, para. 73. If, after being found in contempt of court, a party purges his contempt by subsequently complying with the court order, compliance may be taken into account as a mitigating factor on the sentence. See *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 2009 CarswellOnt 28, [2009] O.J. No. 41, *(*sub nom. *Chiang (Trustee of) v. Chiang)* 93 O.R. (3d) 483, 49 C.B.R. (5th) 1, *(*sub nom. *Chiang (Trustee of) v. Chiang)* 305 D.L.R. (4th) 655, *(*sub nom. *Mendlowitz & Associates Inc. v. Chiang)* 257 O.A.C. 64, 78 C.P.C. (6th) 110 at paras. 50 to 52 (Ont. C.A.); additional reasons at 2009 ONCA 153, 2009 CarswellOnt 769, 50 C.B.R. (5th) 13, 68 C.P.C. (6th) 32 (Ont. C.A.); additional reasons at 2010 ONCA 67, 2010 CarswellOnt 345, 63 C.B.R. (5th) 201 (Ont. C.A.).

2076280 Ontario Inc. v. TransCanada Inc., 2011 ONSC 799, 2011 CarswellOnt 691 (Ont. S.C.J.).

Surinderjit Singh Gill, owner of TransCanada Inc., failed to attend a judgment debtor exam on October 19, 2010. He was personally served with a Notice of Contempt Hearing and did attend in the Superior Court of Justice on November 23, 2010. At that time he was ordered to attend an examination in Small Claims Court on January 28, 2011, and the contempt motion was adjourned to February 1, 2011.

He did not attend January 28, 2011. He also did not attend on February 1, 2011 although paged three times. Form 60K warrant was signed to issue for his arrest. A Copy of Endorsement was mailed to him. An arrest warrant was issued immediately.

World Assurances Inc. v. Al Imam, 2011 QCCS 5792, 2011 CarswellQue 12070, EYB 2011-197842 (Que. S.C.).

Jurisprudence has developed sentencing objectives for civil contempt as well as factors to be considered. These factors are: (a) extenuating and aggravating circumstances; (b) the particular situation of the defendant; and (c) harmonization of sanctions. The Court of Appeal has confirmed the objectives of sentencing (See *Bellemare c. Abaziou*, 2009 QCCA 210, 2009 CarswellQue 570, EYB 2009-153875, [2009] R.J.Q. 276 at para. 22 (Que. C.A.)) in civil contempt, which were originally established in the Superior Court case of *Syndicat des travailleurs(euses) des épiciers unis Métro-Richelieu (CSN) v. E. Chèvrefils & Fils Inc.*, [1998] R.J.Q. 2838, 227 N.R. 280 (note) (S.C.C.).

The defendant did not have the right to opt out of the system when he decided the court order did not suit him. He did not have the right to destroy data that an impartial tribunal was entitled to analyze — and decide whether relevant or not — in the main civil dispute between he and the plaintiff.

A fundamental precept of our Canadian justice system is that once a judgment has become final, it must be respected by all parties, including the losing party. This provides certainty and finality. It allows the parties, for better or worse, to move on.

There is a procedure to follow for a losing party who disagrees with a judgment: they can seek to appeal to a higher court. What they cannot do is take justice into their own hands and ignore a judgment, fairly and independently given, by acting intentionally in contravention of that judgment. If this were to be allowed there would be no rule of law, and there would be no fair and free system of justice.

Punishment for civil contempt of court has an objective to ensure respect for our entire system of justice, which includes respect for the judges and their role in ensuring respect for the rule of law.

The appropriate fine should be $10,500. The fine must have sufficient consequence that it cannot simply be dismissed as a "licence fee" and part of "the costs of doing business."

Nashid v. Michael, 2012 ONSC 675, 2012 CarswellOnt 1001, 18 R.F.L. (7th) 417, [2012] O.J. No. 459 (Ont. S.C.J.).

The applicant, Dr. Nashid, was found in contempt. Nashid was provided with the opportunity to purge her contempt.

Michael submitted Nashid's pleadings should be struck for her failure to comply with court orders, her failure to purge her contempt, and her failure to pay four outstanding cost orders.

The authority to strike a pleading for non-compliance with orders is provided for in *Family Law Rules* 1(8) and 14(23). In addition, Rule 13(17) provides that the court may dismiss the party's case if the party does not obey an order to serve and file a financial statement, including an updated financial statement.

See *Purcaru v. Purcaru*, 2010 ONCA 92, 2010 CarswellOnt 563, [2010] O.J. No. 427, 265 O.A.C. 121, 75 R.F.L. (6th) 33 (Ont. C.A.), where Lang J.A. noted, at para. 50, that the decision to strike pleadings and to determine the parameters of trial participation was a discretionary one. She cited *Sleiman v. Sleiman*, 2002 CarswellOnt 1595, [2002] O.J. No. 1887, 28 R.F.L. (5th) 447 (Ont. C.A.), a case involving a refusal of financial disclosure in which the motion judge determined that the party had demonstrated a "blatant disregard for the process and the orders of the court."

She also cited the decision of the Divisional Court in *Vacca v. Banks*, 2005 CarswellOnt 146, [2005] O.J. No. 147, 6 C.P.C. (6th) 22 (Ont. Div. Ct.) in which the plaintiff had repeatedly failed to comply with orders related to the discovery and the progress of litigation. In that case, Ferrier J. noted that the master's remedy of the dismissal of the action may be an appropriate sanction to recognize the court's "responsibility for the administration of justice."

In *Horzempa v. Ablett*, 2011 ONCA 633, 2011 CarswellOnt 11184, [2011] O.J. No. 4391 (Ont. C.A.), the Court of Appeal heard an appeal from an order striking the appellant's pleadings and dismissing the appellant's motion to change a final order for spousal support. The court indicated, at paragraph 7, that striking a pleading and denying a party the right to be heard on a motion is a "drastic remedy of last resort." The Court of Appeal dismissed the appeal, noting, "The record demonstrates a consistent and unyielding pattern of noncompliance with court orders and a total disregard for the process of the court" and that, by his refusal to follow rules or obey orders, the appellant had chosen not to avail himself of "the numerous opportunities for meaningful participation that the ordinary process provides."

The pleadings of Nashid were therefore struck. Michael has leave to proceed with an undefended trial after March 31, 2012.

It is appropriate that Michael receive full recovery for the contempt motion.

If a party seeks a postponement of the payment of costs on the basis of an inability to pay, the onus is on that party to provide evidence. There was no such evidence in this case.

Culligan Canada Ltd. v. Fettes, 2010 SKCA 151, 2010 CarswellSask 802, [2011] 7 W.W.R. 726, 2 C.P.C. (7th) 79, 326 D.L.R. (4th) 463, 506 W.A.C. 24, 366 Sask. R. 24 (Sask. C.A.).

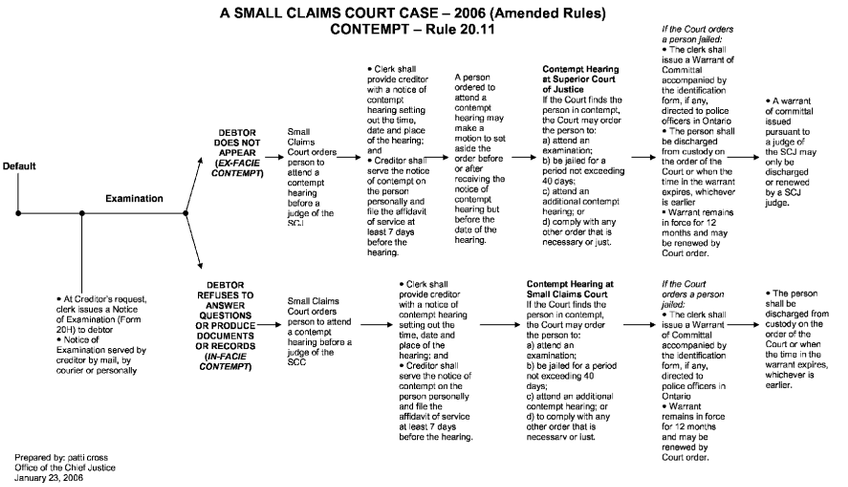
Disobedience of court. A court order sought to be enforced by contempt applications incorporated overly broad and unclear language. External circumstances exacerbated the order's lack of clarity. The order was sufficiently ambiguous to preclude a finding of contempt. The ambiguity of the order made the application of order to facts problematic for the reviewing court. There was no distinct legal issue, regarding the use of mass mailing devices, which could be decided without considering what it meant to "serve." A lack of clarity was fatal to the application.

On June 24, 2016, Francis Mella was imprisoned for a term of three months as punishment for his contempt of court. The imprisonment resulted from the order of Justice Shelley in *336239 Alberta Ltd. v. Mella*. Justice Shelley ordered that, if significant fines were not paid in relation to a previous contempt order (first contempt order), plus an additional fine for the ongoing contempt, Mr. Mella would have to return and show cause why he should not be imprisoned (second contempt order). The contempt was not purged, and Mr. Mella therefore found himself in jail. On July 27, 2016, the Court of Appeal refused a stay of the second contempt order and declined to release Mr. Mella pending the hearing of this appeal.

The decisions in this case lend support to future plaintiffs seeking to enforce their judgments against a devious defendant determined not to pay.

Commentary

A Small Claims Court Case — 2006 (Amended Rules) Contempt — Rule 20.11



20.12 Satisfaction of Order — If payment is made in full satisfaction of an order,

(a) where all parties consent, a party may file a request for clerk's order on consent (Form 11.2A) indicating that payment has been made in full satisfaction of the order or terms of settlement; or

(b) the debtor may make a motion for an order confirming that payment has been made in full satisfaction of the order or terms of settlement.

O. Reg. 78/06, s. 48; 393/09, s. 23

Commentary

Satisfaction of Orders

The creditor who proceeds with enforcement of a judgment/order under the Rules of the Small Claims Court must ensure that the court and the enforcement office (where applicable) is advised that the judgment or order has been satisfied in full and to stop or withdraw any enforcement steps.

If a debt is paid in full under a notice of garnishment, the creditor must immediately serve a Notice of Termination of Garnishment [Form 20R] on the garnishee and on the clerk in accordance with r. 20.08920.2.

Where all the parties consent, a party may file a Request for Clerk's Order on consent [Form 11.2A], in accordance with r. 11.2.01(1).

If the creditor is unavailable or unwilling to complete the notice of termination of garnishment form or sign the Request for Clerk's Order on Consent [Form 11.2A], the debtor may bring a motion before the court seeking an order of the court stating that payment has been made in full satisfaction of the debt.

Rule 21 — Referee

21.01 (1) A person assigned the powers and duties of a referee under subsection 73(2) of the *Courts of Justice Act* may, if directed by the regional senior judge or his or her designate,

(a) hear disputes of proposals of terms of payment under rule 9.03;

(b) conduct settlement conferences under rule 13;

(c) hear motions for consolidation orders under rule 20.09; and

(d) assess receipted disbursements for fees paid to the court, an authorized court transcriptionist or a sheriff under the regulations made under the *Administration of Justice Act*.

Commentary: Pursuant to Rule 21.01(1), a referee designated under subsection RSO1990cC43 77(2) of the *Courts of Justice Act* may, if directed by the regional senior justice or his or her designate:

- hear disputes of proposals of terms of payment under rule 9.03
- conduct settlement conferences under rule 13
- hear motions for consolidation orders under rule 20.09
- assess receipted disbursements for fees paid to the court, a court reporter, or a sheriff under the regulations under the *Administration of Justice Act*.

The Rules do not provide for assessment officers presiding in Small Claims Courts matters.

(2) Except under subrule 9.03(5) (order as to terms of payment), a referee shall not make a final decision in any matter referred to him or her but shall report his or her findings and recommendations to the court.

(3) [Repealed O. Reg. 78/06, s. 49.]

O. Reg. 78/06, s. 49; 393/09, s. 24; 171/14, s. 1; 108/21, s. 19

Commentary: A referee is someone designated under section 77(2) of the *Courts of Justice Act* and is directed by the Regional Senior Justice or the local Administrative Justice to hear matters under the *Small Claims Court Rules*. Referees hear terms of payment disputes under subrule 9.03, conduct settlement conferences under rule 13, make consolidation orders under subrule 20.09, and can assist the clerk in assessing disbursements. The latter authority is new as of July 1, 2006.

Case Law: *Bussineau v. Roberts* (1982), 15 A.C.W.S. (2d) 367 (Ont. Sm. Cl. Ct.).

The duties of a pre-trial referee in Small Claims Court (see R.R.O. 1980, Reg. 917, ss. 68(1) and (2)) do *not* include conducting a trial by hearing evidence from the parties and their witnesses. The referee cannot dismiss the claim for failure of the plaintiff to attend or to give judgment of the plaintiff for failure to the defendant to attend a hearing.

Lagadin v. King (1985), 2 W.D.C.P. 259 (Ont. Prov. Ct.).

At a resolution hearing, with the plaintiffs appearing, the defendant absent and no defence entered, the referee exceeded the jurisdiction by recommending judgment with respect of an unliquidated claim. This cannot be done without the written consent to same by all parties.

Rule 22 — Payment Into and Out of Court

[Heading amended O. Reg. 400/12, s. 2.]

22. [Repealed O. Reg. 400/12, s. 2.]

Payment Into and Out of Court

Rules of the Small Claims Court

The Rules of the Small Claims Court will include a new Rule 22 (Payment into and out of court).

A party can obtain a payment out from funds that are held by the Accountant with a court order by filing required documentation with the Accountant. A new Form 4B has been made for use in motions to seek payment out of court for persons under disability under Rule 4.08 of the Rules of the Small Claims Court.

A Ministry form has been posted on the Ontario Court Forms website entitled "Request to pay money into or out of court" for use by parties seeking to pay money into or out of court.

The new rule applies to money paid into court after January 1, 2013. Transition rules have been made for money that was paid into local courts before January 1, 2013. Money that will continue to be held locally will continue to be handled in accordance with local practice.

A party may be required to pay money into court for the following reasons:

- A judge has ordered the party to pay money into court,
- A statute or court rule may require a party to pay money into court (for example, in applications under the *Repair and Storage Liens Act*),
- Where a party is "under disability" (*e.g.*, a minor or a mentally incapable person), Rule 4.08 requires that any money to be paid to that party must be paid into court.

Rule 22 does not apply to money paid or to be paid into court,

- Under an order or proposal for payment made under [r. 9.03];
- Under an offer to settle a claim in return for the payment of money; or

- For the enforcement of an order for the payment or recovery of money under Rule 20 including enforcement by garnishment.

As of October 1, 2012, court staff will;

- Print the information sheet double-sided to ensure both the French and the English versions are printed on a single page.
- Mail the information sheet to all parties, or their representatives, in a Small Claims Court action together with the Notice of Settlement Conference.
- Post the information sheet in a conspicuous location such as small claims court public waiting areas, with both languages prominently displayed.

22.01 Definitions — In this Rule,

"Accountant" means the Accountant of the Superior Court of Justice;

"clerk" means the clerk in the location where the proceeding was commenced.

O. Reg. 400/12, s. 2

22.02 Non-Application of Rule — This Rule does not apply to money paid or to be paid into court,

(a) under an order or proposal for payment made under rule 9.03;

(b) under an offer to settle a claim in return for the payment of money; or

(c) for the enforcement of an order for the payment or recovery of money under Rule 20, including enforcement by garnishment.

O. Reg. 400/12, s. 2

22.03 (1) Payment into Court — Subject to subrule (7), a party who is required to pay money into court shall do so in accordance with subrules (2) to (6).

(2) Filing with Clerk or Accountant — The party shall file the following documents with the clerk or the Accountant:

1. If the payment into court is under a statutory provision or rule, a written request for payment into court that refers to that provision or rule.

2. If the payment into court is under an order, a written request for payment into court and a copy of the order that bears the court's seal.

(3) Direction — On receiving the documents required to be filed under subrule (2), the clerk or Accountant shall give the party a direction to receive the money, addressed to a bank listed in Schedule I or II to the *Bank Act* (Canada) and specifying the account in the Accountant's name into which the money is to be paid.

(4) Clerk to Forward Documents — If the documents are filed with the clerk, the clerk shall forward the documents to the Accountant.

(5) Payment — On receiving the direction referred to in subrule (3), the party shall pay the money into the specified bank account in accordance with the direction.

(6) Bank's Duties — On receiving the money, the bank shall give a receipt to the party paying the money and immediately send a copy of the receipt to the Accountant.

(7) Payment to Accountant by Mail — A party may pay money into court by mailing to the Accountant the applicable documents referred to in subrule (2), together

with the money that is payable; the written request for payment into court referred to in that subrule shall include the party's name and mailing address.

(8) Accountant to Provide Receipt — On receiving money under subrule (7), the Accountant shall send a receipt to the party paying the money.

(9) Proof of Payment — A party who pays money into court shall, immediately after receiving a receipt from the bank under subrule (6) or from the Accountant under subrule (8), as the case may be, send to every other party a copy of the receipt and file a copy of the receipt with the court.

O. Reg. 400/12, s. 2

22.04 (1) Payment Out of Court — Money may only be paid out of court under an order.

(2) Documents to be Filed — A person who seeks payment of money out of court shall file with the Accountant,

(a) a written request for payment out and supporting affidavit, in the form provided by the Ministry; and

(b) a copy of the order for payment out that bears the court's seal.

(3) Payment Out, Children's Lawyer or Public Guardian and Trustee — If the person seeking payment out is the Children's Lawyer or the Public Guardian and Trustee,

(a) the written request need not be in the form provided by the Ministry and a supporting affidavit is not required; and

(b) a single written request that deals with more than one proceeding may be filed.

(4) Payment Out, Minor Attaining Age of Majority — Despite subrule (2), money in court to which a party is entitled under an order once the party attains the age of majority may be paid out to the party on filing with the Accountant, in the forms provided by the Accountant,

(a) a written request for payment out; and

(b) an affidavit proving the identity of the party and that the party has attained the age of majority.

(5) Accountant's Duties — If the requirements of subrule (2) or (4), as the case may be, are met, the Accountant shall pay the money to the person named in the order for payment out, and the payment shall include any accrued interest, unless a court orders otherwise.

O. Reg. 400/12, s. 2

22.05 Transition — This Rule applies to the payment into and out of court of money paid into court on and after the day on which Ontario Regulation 400/12 comes into force.

O. Reg. 400/12, s. 2

Rule 23

23. This Regulation comes into force on September 1, 1998.

Below is a list of forms set out in the Table of Forms in the Rules of the Small Claims Court. Forms are often amended after this book is published. For the most up to date version of the forms please go to www.ontariocourtforms.on.ca.

CHAPTER 5 — COURT FORMS, COURT FEES AND JUDGES

Schedule 1 — Court Forms in Small Claims Court

Forms

~~The Forms prescribed for the Small Claims Court are reproduced on the CD-ROM that accompanies this publication. The Forms may also be viewed and downloaded at www.ontariocourtforms.on.ca.~~

Table of Forms

~~(See rule 1.06 and http://www.ontariocourtforms.on.ca/)~~

Form Number	Form Title	Date of Form
1A	Additional Parties	January 1, 2021
1A.1	Additional Debtors	January 23, 2014
1B	Request for Telephone or Video Conference	January 23, 2014
4A	Consent to Act as Litigation Guardian	January 1, 2021
4B	Affidavit (Motion for Payment Out of Court)	January 1, 2021
5A	Notice to Alleged Partner	January 23, 2014
7A	Plaintiff's Claim	January 1, 2021
8A	Affidavit of Service	January 1, 2021
9A	Defence	January 1, 2021
9B	Request to Clerk	January 23, 2014
10A	Defendant's Claim	January 1, 2021
11A	Affidavit for Jurisdiction	January 1, 2021
11B	Default Judgment	January 1, 2021
11.2A	Request for Clerk's Order on Consent	January 1, 2021
11.3A	Notice of Discontinued Claim	January 23, 2014
13A	List of Proposed Witnesses	January 1, 2021
13B	Consent	January 23, 2014
14A	Offer to Settle	January 23, 2014
14B	Acceptance of Offer to Settle	January 23, 2014
14C	Notice of Withdrawal of Offer to Settle	January 23, 2014
14D	Terms of Settlement	January 23, 2014
15A	Notice of Motion and Supporting Affidavit	January 1, 2021
15B	Affidavit	January 1, 2021
18A	Summons to Witness	January 23, 2014
18B	Warrant for Arrest of Defaulting Witness	January 23, 2014

Form Number	Form Title	Date of Form
20A	Certificate of Judgment	January 23, 2014
20B	Writ of Delivery	January 1, 2021
20C	Writ of Seizure and Sale of Personal Property	January 1, 2021
20D	Writ of Seizure and Sale of Land	January 1, 2021
20E	Notice of Garnishment	January 1, 2021
20E.1	Notice of Renewal of Garnishment	January 1, 2021
20F	Garnishee's Statement	May 1, 2019
20G	Notice to Co-owner of Debt	January 1, 2021
20H	Notice of Examination	January 23, 2014
20I	Financial Information Form	January 23, 2014
20J	Warrant of Committal	January 1, 2021
20K	Identification Form	January 23, 2014
20L	Notice of Default of Payment	January 23, 2014
20M	Affidavit of Default of Payment	January 1, 2021
20N	Request to Renew Writ of Seizure and Sale	January 23, 2014
20O	Direction to Enforce Writ of Seizure and Sale of Personal Property	January 23, 2014
20P	Affidavit for Enforcement Request	January 1, 2021
20Q	Notice of Garnishment Hearing	January 1, 2021
20R	Notice of Termination of Garnishment	May 1, 2019

O. Reg. 78/06, s. 50; 56/08, s. 4; 393/09, s. 25; 505/09, s. 1; 440/10, s. 8; 56/12, s. 5; 400/12, s. 3; 230/13, s. 18; 144/14, s. 1; 194/15, s. 4; 38/16, s. 9; 488/16, s. 2; 345/19, s. 1; 108/21, s. 20

ONT. REG. 332/16 — SMALL CLAIMS COURT — FEES AND ALLOWANCES

made under the *Administration of Justice Act*

O. Reg. 332/16, as am. O. Reg. 41/19.

Commentary: You must pay a fee to file a claim in Small Claims Court and for most steps in a proceeding such as filing a motion, requesting a trial date and taking steps to enforce a judgment.

Court fees are set out in regulations made under the *Administration of Justice Act*. If you need to take steps to enforce your judgment, you may need to pay some of the fees listed in the *Sheriffs — Fees* regulation. If you wish to appeal the judge's decision at trial, you will need to pay fees listed in the *Court Reporter's and Court Monitor's Fees* regulation for preparing the transcript of your case, as well as a fee for filing your appeal. Remember, you should always refer to the actual regulations. The current regulations are available at the

Ontario government's e-laws website at *www.e-laws.gov.on.ca*. All fees are subject to potential recovery from the unsuccessful party.

Because access to the courts is a constitutional imperative, court fees cannot be unreasonably high and must be subject to waiver in the case of impoverished litigants who can not afford to pay such fees: *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 CSC 59, 2014 SCC 59, 2014 CarswellBC 2873, 2014 CarswellBC 2874, *(*sub nom. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* [2014] 3 S.C.R. 31, 74 Admin. L.R. (5th) 181, 62 B.C.L.R. (5th) 1, 59 C.P.C. (7th) 1, 375 D.L.R. (4th) 599, 51 R.F.L. (7th) 1, [2014] 11 W.W.R. 213, 361 B.C.A.C. 1, *(*sub nom. *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General))* 320 C.R.R. (2d) 239, 463 N.R. 336, 619 W.A.C. 1 (S.C.C.). The fee waiver regulation in Ontario is O.Reg. 2/05 (reproduced below), which sets out the criteria and process for applications for fee waivers.

Recognizing that in some cases fee waivers may facilitate the bringing of frivolous proceedings, the court has an inherent jurisdiction to revoke a fee waiver: *Ellis v. Wernick*, [2017] O.J. No. 1070 (Ont. S.C.J.).

Certain fees cannot be waived, including the fee for transcripts required for appeals. The court has no jurisdiction to waive the transcript fee: *Begman v. Mejery*, [2014] O.J. No. 1376 (Div. Ct.); leave to appeal denied (June 6, 2014), unreported (Ont. C.A.)~~,~~; leave to appeal denied [2014] S.C.C.A. No. 332.

Segura Mosquera v. Ottawa Catholic School Board, 2018 ONSC 2397, 2018 CarswellOnt 5861 (Ont. Div. Ct.). Mr. Justice Calum Macleod.

Appellant Mosquera appealed a decision of deputy judge who dismissed her Small Claims Court action against the Ottawa Catholic School Board (OCSB). She believed requirement to order and pay for a transcript in order to perfect her appeal was unfair because it imposed a financial barrier to access to justice. Even with a fee waiver, litigants will have to incur expenses associated with their litigation. That cost is regulated but it is paid to a certified court reporter and not to the government. It is not covered by a fee waiver. The audio recording of the trial is however available for a nominal fee. Appellant did not provide evidence that it is in the interests of justice to dispense with the filing of a transcript. Appellant qualified for a fee waiver. She did not demonstrate impecuniosity by evidence that she could not raise the money for the portion of the transcript she might require. By analogy with cases on security for costs, it would require financial evidence and evidence that there is no one else who might be in a position to assist her. Motion dismissed.

O'Brien v. Blue Heron, 2018 ONSC 5501, 2018 CarswellOnt 15412 (Ont. Div. Ct.).

Dwoskin D.J. struck parts of the statement of claim and dismissed all but one claim against the respondents. O'Brien appealed that decision. The respondents brought a motion for security for costs. The motion was heard by Smith J. He granted the relief sought, ordering Mr. O'Brien to pay $5,000 as security for costs for the "Blue Heron Respondents" and another $5,000 for the "Sector Respondents". The matter came for a review of that order pursuant to s. 21(5) of the *Courts of Justice Act* and Rule 61.16(6) of the *Rules of Civil Procedure*. A decision regarding security for costs is discretionary in nature and is to be afforded deference See *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 2017 CarswellOnt 16763, 138 O.R. (3d) 1, 75 B.L.R. (5th) 173, 418 D.L.R. (4th) 679 (Ont. C.A.) at para. 20; and *Susin v. Susin*, 2018 ONCA 220, 2018 CarswellOnt 3287 (Ont. C.A.) at para. 10~~,~~; affirmed 2018 ONCA 549, 2018 CarswellOnt 9573 (Ont. C.A.). Section 31(a) of the *Court of Justice Act* does not afford jurisdiction for an appeal when the amount claimed against a defendant does not exceed $2500. S. 31(a) of the *Courts of Justice Act* establishes the appeal is frivolous and vexatious as against those respondents. Smith J. referenced two leading authorities on the legal test. At para. 25 of *Pickard v. London Police Services Board* The Court stated: "To

deny meritless claims is not to curtail access to justice, rather to facilitate access to justice by making room for legitimate claims", *Pickard v. London Police Services Board*, 2010 ONCA 643, 2010 CarswellOnt 7357, 268 O.A.C. 153, [2010] O.J. No. 4169 (Ont. C.A. [In Chambers]); and *Lukezic v. Royal Bank*, 2011 ONSC 5263, 2011 CarswellOnt 9257 (Ont. S.C.J.); additional reasons 2012 ONSC 431, 2012 CarswellOnt 1148 (Ont. S.C.J.); reversed in part 2012 ONCA 350, 2012 CarswellOnt 6464, 350 D.L.R. (4th) 111, [2012] O.J. No. 2344 (Ont. C.A.). Motion dismissed.

Segura Mosquera v. Ottawa (City), 2019 ONCA 760, 2019 CarswellOnt 15223, David Brown J.A. (Ont. C.A.)

Self-represented litigants. Affording a lawyer is not the only problem some SRLs face: affording copying costs for filing requirements can also be a problem. In *Segura Mosquera v. Ottawa (City)*, the Court of Appeal noted that the costs for Mosquera to copy materials, which she estimated to be $250, represented 25 per cent of her monthly income. Therefore, given the above, the court granted her relief from the requirement to file hard copies. Opposing counsel can assist in limiting costs by agreeing to accept service of documents electronically

1. Fees payable to clerk — (1) In this section,

"claim" does not include a defendant's claim;

"claimant" includes an individual, a sole proprietorship, a partnership, an unincorporated organization and a corporation;

"frequent claimant" means a claimant who files a claim in a Small Claims Court office on or after January 1 in any calendar year and who has already filed 10 or more claims in the same office in that calendar year;

"infrequent claimant" means a claimant who is not a frequent claimant.

(2) The following fees are payable to clerks of the Small Claims Court in respect of proceedings in that Court:

1. On the filing of a claim by an infrequent claimant, $102.

2. On the filing of a claim by a frequent claimant, $215.

3. On the filing of a defendant's claim, $102.

4. On the filing of a notice of motion served on another party, a notice of motion without notice or a notice of motion for a consent order (except a notice of motion under the *Wages Act*), $120.

5. On the filing of a defence, $73.

6. For the fixing of a date for a trial or an assessment hearing by an infrequent claimant, $290.

7. For the fixing of a date for a trial or an assessment hearing by a frequent claimant, $380.

8. For the filing of a request for default judgment by an infrequent claimant, $89.

9. For the filing of a request for default judgment by a frequent claimant, $121.

10. On the issue of a summons to a witness, $31.

11. On receipt for enforcement of a process from the Ontario Court of Justice or an order or judgment as provided by statute, $42.

12. On the issue of a certificate of judgment, $28.

13. On the issue of a writ of delivery, a writ of seizure and sale or a notice of examination, $64.

14. On the issue or renewal of a notice of garnishment, $136.

15. For preparing and filing a consolidation order, $120.

16. For forwarding a court file to Divisional Court for appeal, $99.

17. For making up and forwarding of papers, documents and exhibits, $99 and the transportation costs.

18. For transmitting a document other than by mail, the cost of transmission.

19. For making copies of documents,

i. not requiring certification, $1 per page,

ii. requiring certification, $3.50 per page.

20. For the inspection of a court file by,

i. a person who has entered into an agreement with the Ministry of the Attorney General for the bulk inspection of court files, $1 per file,

ii. any other person, other than a solicitor or party in the proceeding, $10 per file.

21. For the retrieval from storage of a court file, $78.

22. For a copy on compact disc (CD) of a digital recording of a court hearing in respect of a case, if such a recording exists and a copy is available,

i. $22 for a single day's recording, and

ii. $10.50 for each additional day's recording, if the request is made at the same time as a request under subparagraph i.

(3) The following fees are payable to clerks of the Small Claims Court, in addition to those payable under subsection (2), in an application under the *Repair and Storage Liens Act*:

1. On the filing of an application, $190.

2. On the filing of a notice of objection, $106.

3. On the issue of an initial or final certificate, $93.

4. On the issue of a writ of seizure, $64.

(4) If the applicable filing fee is paid on the filing of a document electronically in accordance with the rules of court, the fee is not payable again on the subsequent filing of a paper copy of the document.

O. Reg. 41/19, s. 1

2. Fees and allowances payable to bailiff — (1) The following fees and allowances are payable to bailiffs of the Small Claims Court:

1. For each attempt to enforce a writ of delivery, $36.

2. For each attempt to enforce a writ of seizure and sale of personal property,

i. where no sale is necessary, $36, or

ii. where a sale is necessary, $60.

3. For each attempt to enforce a writ of seizure under the *Repair and Storage Liens Act*, $36.

4. For enforcing a writ of delivery or a writ of seizure and sale of personal property, removing property seized, advertising the sale of personal property, includ-

ing obtaining assistance in seizing, securing or retaining property, those reasonable disbursements that are necessarily incurred, including appraisers' fees.

(2) A fee under subsection (1) for attempted enforcement by a bailiff is payable whether or not the attempt was successful.

3. Fees and allowances payable to witnesses — The following fees and allowances are payable to witnesses appearing before the Small Claims Court:

1. For attendance in court, $10 per day, subject to paragraph 2.

2. For attendance in court by a barrister, solicitor, physician, surgeon, engineer, veterinary surgeon or other professional who is not a party to the action, to give evidence of a professional service rendered or to give a professional opinion, $25 per day.

3. For travel to court, those reasonable travelling expenses actually incurred, but not exceeding the kilometre allowance set out in Regulation 11 of the Revised Regulations of Ontario, 1990 (*Kilometre Allowances*) made under the Act.

4. Automatic fee increases — (1) Beginning on January 1, 2023, and on every third January 1 that follows, the fees payable under this Regulation shall be adjusted in accordance with the following, subject to subsection (3):

1. The fees payable immediately before the applicable January 1 date shall be increased by the percentage change between the Ontario Consumer Price Index for the calendar year that is two years before the year in which the adjustment is being made, and the Ontario Consumer Price Index for the calendar year that is five years before the year in which the adjustment is being made.

2. If the percentage change in the Ontario Consumer Price Index between the two applicable calendar years, as set out in paragraph 1, results in a negative amount, the fees shall not be increased.

3. Any fee that, once increased in accordance with paragraph 1, results in an amount that is not a whole number shall be rounded to the nearest dollar.

(2) For the purposes of subsection (1), the Ontario Consumer Price Index is the Consumer Price Index for Ontario (All-Items) as published by Statistics Canada.

(3) A fee shall not be adjusted under subsection (1) if, before the date on which the adjustment would otherwise take effect, the Minister responsible for the administration of the Act,

(a) determines that the fee as adjusted would exceed full cost recovery; and

(b) publishes notice of the determination, confirming the amount of the fee, on a Government of Ontario website.

O. Reg. 41/19, s. 2

5. Revocation — Ontario Regulation 432/93 is revoked.

6. Commencement — This Regulation comes into force on the later of November 6, 2016 and the day it is filed.

ONT. REG. 293/92 — SUPERIOR COURT OF JUSTICE AND COURT OF APPEAL — FEES

made under the *Administration of Justice Act*
O. Reg. 293/92, as am. O. Reg. 136/94 (Fr.); 272/94; 359/94; 802/94; 212/97; 248/97 (Fr.); 403/98; 329/99; 14/00; 136/04; 10/05; 272/05; 169/07; 247/12; 335/16; 344/18; 42/19; 29/21

SCJCAF 1 — Commentary

Most of this regulation has no relevance to Small Claims Court proceedings. The relevant provisions may be summarized as follows:

In the event of an appeal from Small Claims Court to Divisional Court, the fee to file a notice of appeal or cross-appeal to an appellate court of a final order of the Small Claims Court is $130. The fee to perfect an appeal is $608.

In the event of a motion in Divisional Court, for example a motion for an extension of the time to appeal, the fee to file the notice of motion is $320.

In the event of an application for judicial review of an order of the Small Claims Court, the fee to issue the notice of application is $229 and the fee to perfect the application is $608.

In the event of a motion for leave to appeal from an order of the Divisional Court to the Court of Appeal for Ontario, the fee to file the notice of motion for leave to appeal is $320. If leave is granted, the fee to file the notice of appeal is $229 and the fee to perfect the appeal is $608.

ONT. REG. 294/92 — SHERIFFS — FEES

made under the *Administration of Justice Act*

O. Reg. 294/92, as am. O. Reg. 431/93; 137/94 (Fr.); 358/94; 213/97; 404/98; 4/99; 330/99; 217/00; 508/10; 12/11 (Fr.); 333/16.

1. (1) The following fees are payable to a sheriff:

1. For up to three attempts, whether or not successful, to serve a document, $100 for each person to be served.

2. For filing or renewing a writ of execution or order that a sheriff is liable or required to enforce and for delivering a copy of the writ or order or a renewal of it to the land registrar of a land titles division, $100.

3. For filing or renewing a writ of execution or order that a sheriff is liable or required to enforce and that is not required to be delivered to a land registrar of a land titles division, $75.

4. For filing a writ of seizure or a direction to seize under the *Repair and Storage Liens Act*, $115.

5. For each attempt, whether or not successful, to enforce a writ of delivery, a writ of sequestration, an order for interim recovery of personal property, an order for interim preservation of personal property, or a writ of seizure or direction to seize under the *Repair and Storage Liens Act*, $400.

6. For each attempt, whether or not successful, to enforce a writ of seizure and sale or an order directing a sale, $240.

7. For each attempt, whether or not successful, to enforce any other writ of execution or order, $240.

8. For a search for writs, per name searched, $11 before November 2, 2015, and the amount determined under subsection (4) on and after that date.

9. For each report showing the details of a writ, lien or order or for a copy of a writ, lien or order,

i. before November 2, 2015, $6, up to a maximum fee of $60 for each name searched, and

ii. on and after that date, the amount determined under subsection (4), up to a maximum fee for each name searched of the amount determined under subsection (5).

10. For preparing a schedule of distribution under the *Creditors' Relief Act*, $45 per writ or notice of garnishment listed on the schedule, up to a maximum fee of an amount equal to 20 per cent of the money received.

11. For a calculation for satisfaction of writs and garnishments, $45 per writ or notice of garnishment.

12. For any service or act ordered by a court for which no fee is provided, $55 for each hour (or part of an hour) spent performing the service or doing the act.

13. For making copies of documents, other than writs of execution, orders and certificates of lien,

i. not requiring certification, $1 per page,

ii. requiring certification, $3.50 per page.

(2) In addition to the fees set out in paragraphs 5, 6, 7 and 12 of subsection (1), the person who requests the service shall pay the sheriff his or her reasonable and necessary disbursements in carrying out the services described in those paragraphs.

(3) In subsections (4) to (8),

"actual fee" means, for a specified year, the fee that is payable on the annual effective date in the specified year;

"actual maximum fee" means, for a specified year, the maximum fee that is payable on the annual effective date in the specified year;

"annual effective date" means the first Monday in November;

"Consumer Price Index" means the Consumer Price Index for Canada, all-items, not seasonally adjusted (2002=100), as published by Statistics Canada in Table 5 of *The Consumer Price Index* (Catalogue no. 62-001-X).

(4) For the purposes of paragraphs 8 and 9 of subsection (1), the following is the amount of the fee that is payable on and after November 2, 2015:

1. The fee payable on and after November 2, 2015 and before the annual effective date in 2016 is the amount determined in accordance with the following rules:

i. Calculate the notional fee for 2015 using the formula,

$$(A \times B \times 0.5) + A$$

in which,

"A" is the actual fee payable for 2014, and

"B" is the indexation factor for 2015, as determined in accordance with subsection (6).

ii. Choose the amount that is the higher of the notional fee for 2015 and the actual fee for 2014.

iii. The amount chosen, as rounded to the nearest multiple of five cents, is the amount of the fee payable on and after November 2, 2015 and before the annual effective date in 2016.

2. The fee payable on and after the annual effective date in a specified year after 2015 and before the annual effective date in the following year is the amount determined in accordance with the following rules:

i. Calculate the notional fee for the year using the formula,

$$(C \times D \times 0.5) + C$$

in which,

"C" is the notional fee for the preceding year, and

"D" is the indexation factor for the specified year, as determined in accordance with subsection (7).

ii. Choose the amount that is the higher of the notional fee for the year and the actual fee for the preceding year.

iii. The amount chosen, as rounded to the nearest multiple of five cents, is the amount of the fee payable on and after the annual effective date in the specified year and before the annual effective date in the following year.

(5) For the purposes of paragraph 9 of subsection (1), the applicable maximum fee payable on and after November 2, 2015 is determined in accordance with the rules set out in subsection (4), with necessary modifications, to be read as if each reference to "fee", "notional fee" or "actual fee" in that subsection were a reference to "maximum fee", "notional maximum fee" or "actual maximum fee", respectively.

(6) The indexation factor for 2015 is the percentage, rounded to the nearest one-thousandth, that is calculated using the formula,

$$[(1 + E) \times (1 + F) \times (1 + G) \times (1 + H) \times (1 + J)] - 1$$

in which,

"E" is the Consumer Price Index percentage change, for June 2011, from the corresponding month of the previous year,

"F" is the Consumer Price Index percentage change, for June 2012, from the corresponding month of the previous year,

"G" is the Consumer Price Index percentage change, for June 2013, from the corresponding month of the previous year,

"H" is the Consumer Price Index percentage change, for June 2014, from the corresponding month of the previous year, and

"J" is the Consumer Price Index percentage change, for June 2015, from the corresponding month of the previous year.

(7) The indexation factor for a specified year after 2015 is the Consumer Price Index percentage change, for June of the specified year, from the corresponding month of the previous year.

(8) A reference in subsection (6) or (7) to the Consumer Price Index percentage change, for a month, from the corresponding month of the previous year is a reference to the percentage change published by Statistics Canada in Table 5 of *The Consumer Price Index* (Catalogue no. 62-001-X).

O. Reg. 213/97, s. 1; 404/98, s. 1; 4/99, s. 1; 330/99, s. 1; 217/00, s. 1; 508/10, s. 1; 333/16, s. 1

2. In addition to the fees and disbursements set out in section 1, the person who requests the service shall pay the sheriff a travel allowance as set out in Regulation 11 of the Revised Regulations of Ontario, 1990 (*Kilometre Allowances*) made under the Act for the distance he or she necessarily travels, both ways, between the court house and the place where the sheriff,

(a) [Repealed O. Reg. 431/93, s. 2.]

(b) enforces or attempts to enforce a writ or order; or

(c) performs or attempts to perform any other service directed by a court.

O. Reg. 431/93, s. 2; 333/16, s. 2

3. Ontario Regulation 392/90 is revoked.

ONT. REG. 2/05 — FEE WAIVER

made under the *Administration of Justice Act*

O. Reg. 2/05, as am. O. Reg. 671/05; 95/14; 336/16; 44/19.

1. Definitions — (1) In this Regulation,

"child" includes a person whom a person has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody;

"dependent child" means a child who,

(a) is a minor or is enrolled in a full time program of education, and

(b) if 16 years of age or more, has not withdrawn from parental control;

"gross annual household income", when used with respect to a person, means the gross amount of all regular payments of any kind received by the members of the person's household during a year;

"gross monthly household income" [Repealed O. Reg. 336/16, s. 1(1).]

"household" means a person and his or her spouse and dependent children;

"household liquid assets", when used with respect to a person, means all assets owned by the members of the person's household that are money or can readily be converted into money;

"household net worth", when used with respect to a person, means the difference between,

(a) the value of all assets owned by the members of the person's household, and

(b) the value of all debts and other financial liabilities of the members of the person's household;

"spouse" means spouse as defined in Part III of the *Family Law Act*.

(2) Two persons are not spouses for the purpose of this section if they are living separate and apart as a result of a breakdown of their relationship.

O. Reg. 671/05, s. 1; 336/16, s. 1

2. Prescribed conditions — (1) A person meets the prescribed conditions referred to in subsections 4.3(4) and 4.5(2) of the Act if,

(a) the primary source of the person's gross annual household income is one or more of,

(i) income assistance under the *Ontario Works Act, 1997*, income support under the *Ontario Disability Support Program Act, 1997* or an allowance under the *Family Benefits Act*,

(ii) a pension, together with a guaranteed income supplement, under the *Old Age Security Act* (Canada),

(iii) a benefit paid under the *Canada Pension Plan*, or

(iv) an allowance paid under the *War Veterans Allowance Act* (Canada);

(b) the person has applied to receive legal aid services in respect of the proceeding to which any waiver of fees would apply, and Legal Aid Ontario has approved the application; or

(c) the person meets the financial criteria set out in subsection (2).

(2) The following financial criteria apply for the purposes of clause (1)(c):

1. The person's gross annual household income is less than,

i. $31,200, if he or she is the only person in his or her household,

ii. $46,800, if there are two people in his or her household,

iii. $54,000, if there are three people in his or her household,

iv. $64,800, if there are four people in his or her household, and

v. $75,600, if there are five or more people in his or her household.

2. The value of the person's household liquid assets is less than $2,600.

3. The person's household net worth is less than $10,500.

(3) Beginning on January 1, 2023, and on every third January 1 that follows, the financial threshold amounts set out in subsection (2) shall be adjusted in accordance with the following:

1. The threshold amounts that apply immediately before the applicable January 1 date shall be increased by the percentage change between the Ontario Consumer Price Index for the calendar year that is two years before the year in which the adjustment is being made, and the Ontario Consumer Price Index for the calendar year that is five years before the year in which the adjustment is being made.

2. If the percentage change in the Ontario Consumer Price Index between the two applicable calendar years, as set out in paragraph 1, results in a negative amount, the threshold amounts shall not be increased.

3. Any threshold amount that, once increased in accordance with paragraph 1, results in an amount that is not a multiple of one hundred shall be rounded to the nearest hundred dollars.

(4) For the purposes of subsection (3), the Ontario Consumer Price Index is the Consumer Price Index for Ontario (All-Items) as published by Statistics Canada.

O. Reg. 336/16, s. 2; 44/19, s. 1

2.1 Supporting financial information — (1) A person requesting a fee waiver under section 4.3 or 4.5 of the Act shall provide together with the fee waiver request form the supporting financial information required by this section.

(2) The person shall provide one of the following, as appropriate, as proof of his or her income:

1. An income tax return or notice of assessment for the most recent taxation year.

2. The most recent statement of earnings from his or her employer showing the total earnings paid in the year to date including overtime, or, if such a statement is not available, his or her three most recent pay stubs.

3. The most recent statement of income showing income he or she received from employment insurance, social assistance, a pension, workers compensation or disability payments.

4. If no document referred to in paragraph 1, 2 or 3 is readily available, an itemization, in the portion of the fee waiver request form provided for the purpose, of his or her income sources and amounts.

(3) If the person's household includes a spouse, the person shall also provide proof of the spouse's income in accordance with subsection (2).

(4) The requirements of this section to provide supporting financial information do not apply to a person who meets the condition for fee waiver eligibility set out in clause 2(1)(b).

O. Reg. 336/16, s. 2

3. Exempted fees — Sections 4.3 to 4.9 of the Act do not apply to the following fees:

1. Fees under Ontario Regulation 94/14 (*Fees for Court Transcripts*) made under the Act.

2. Fees and travelling allowances under section 5 of Ontario Regulation 293/92 (*Superior Court of Justice and Court of Appeal — Fees*) made under the Act.

3. Fees under the regulation described in paragraph 2 with respect to proceedings relating to offences under Acts of the Parliament of Canada.

4. Fees under the regulation described in paragraph 2 with respect to appeals under the *Provincial Offences Act*.

5. Disbursements under subsection 1(2) and travel allowances under section 2 of Ontario Regulation 294/92 (*Sheriffs — Fees*) made under the Act, except in relation to the enforcement of an order made under subsection 31(3) of the *Residential Tenancies Act, 2006*.

6. Disbursements payable to a bailiff under paragraph 4 of subsection 2(1) of Ontario Regulation 332/16 (*Small Claims Court — Fees and Allowances*) made under the Act.

7. Fees and travel allowances payable to a witness under section 3 of the regulation described in paragraph 6.

8. Fees under Ontario Regulation 451/98 (*Mediators' Fees (Rule 24.1, Rules of Civil Procedure)*) made under the Act.

8.1 Fees under Ontario Regulation 43/05 (*Mediators' Fees (Rule 75.1, Rules of Civil Procedure)*) made under the Act.

9. Fees under Ontario Regulation 210/07 (*Ontario Court of Justice — Fees*) made under the Act, except with respect to proceedings that are governed by Ontario Regulation 114/99 (*Family Law Rules*) made under the *Courts of Justice Act*.

O. Reg. 671/05, s. 2; 95/14, s. 1; 336/16, s. 3; 44/19, s. 2

4. Exempted persons — Sections 4.3 to 4.9 of the Act do not apply to a person if, in connection with the proceeding in respect of which the fee is payable,

(a) [Repealed O. Reg. 336/16, s. 4.]

(b) the person has been appointed a representative party under the *Class Proceedings Act, 1992* and has entered into an agreement providing for payment of disbursements only in the event of success, as described in section 33 of that Act; or

(c) the person is a party to a contingency fee agreement made under the *Solicitors Act* under which the person's lawyer is responsible for the payment of disbursements during the course of the proceeding.

O. Reg. 336/16, s. 4

5. Requests under ss. 4.3 and 4.4 of Act — A request for a fee waiver that is made under section 4.3 or 4.4 of the Act shall be submitted,

(a) in the case of a request to the Registrar of the Court of Appeal or to a judge of that court, to the office of the Registrar;

(b) in any other case, to the office of the court in the county, municipality or territorial division, as the case may be,

(i) where the proceeding is or would be commenced, or

(ii) to which the proceeding has been transferred.

6. Requests under s. 4.7 of Act — A request for a fee waiver that is made under section 4.7 of the Act shall be submitted to the office of the court in the county, municipality or territorial division, as the case may be, where the tribunal order is to be enforced.

7. Litigation guardian or representative — (1) This section applies to a person who is,

(a) under a "disability" as defined in subrule 1.03(1) of Regulation 194 of the Revised Regulations of Ontario, 1990 (*Rules of Civil Procedure*) made under the *Courts of Justice Act*;

(b) under a "disability" as defined in subrule 1.02(1) of Ontario Regulation 258/98 (*Rules of the Small Claims Court*) made under that Act;

(c) a "special party" as defined in subrule 2(1) of Ontario Regulation 114/99 (*Family Law Rules*) made under that Act.

(2) Where a person to whom this section applies seeks to obtain a fee waiver certificate, and the proceeding in respect of which the fee waiver is sought is one in which the person has or will have a,

(a) litigation guardian under Rule 7 of Regulation 194 of the Revised Regulations of Ontario, 1990 (*Rules of Civil Procedure*) made under the *Courts of Justice Act*;

(b) litigation guardian under Rule 4 of Ontario Regulation 258/98 (*Rules of the Small Claims Court*) made under that Act; or

(c) special party representative under Rule 4 of Ontario Regulation 114/99 (*Family Law Rules*) made under that Act,

any fee waiver request made under the *Administration of Justice Act* shall be completed by the litigation guardian or representative, or by the person who intends to become the litigation guardian or representative.

O. Reg. 671/05, s. 3

Commentary: The process to request a fee waiver may be reviewed on the website of the Attorney General of Ontario at www.attorneygeneral.jus.gov.on.ca/english/courts/feewaiver. The required forms can be viewed and downloaded from that website or may be obtained from the court office.

Fees for civil, small claims and family court cases, appeals, and for enforcement of a court or tribunal order are prescribed by regulation under the *Administration of Justice Act*.

A fee waiver request may only be made by an individual, not a business or organization. A person must be:

- a party in a case;
- a person who intends to party in a case; or

- a party who will enforce or is enforcing a court or tribunal order.

If the fee waiver requestor has or will have:

- a litigation guardian under the Rules of Civil Procedure or the Rules of the Small Claims Court, or
- a special party representative under the Family Law Rules,

for the proceeding or the case for which he or she is seeking free waiver, his or her request must be completed by that person. If the requestor does not yet have a litigation guardian or special party representative, his or her request must be completed by a person who intends to act as a litigation guardian/special party representative.

Court Fee Waiver Forms

Fee waiver request forms are also available on request at any court or enforcement office.

Form Number	Form Title	Version Date	Effective Date
3	Fee Waiver Request to Registrar, Clerk or Sheriff	Oct. 1, 2016	Nov. 7, 2016
4	Fee Waiver Request to Court	Oct. 1, 2016	Nov. 7, 2016
6	Fee Waiver Request to Registrar, Clerk or Sheriff By a Litigation Guardian For a Person Under Disability Or a Person Representing a Special Party	Oct. 1, 2016	Nov. 7, 2016
7	Fee Waiver Request to Court By a Litigation Guardian For a Person Under Disability Or a Person Representing a Special Party	Oct. 1, 2016	Nov. 7, 2016

Court Fee Waiver[36]

Having your court fees waived

What to do if you can't afford to pay your court fees.

If you're going to court in Ontario, you may have to pay fees to start a proceeding, file documents, schedule a hearing or enforce a judgment or order.

If you can't afford to pay the fees in your case, you can ask the court to waive your fees so that you don't have to pay. If you request a fee waiver, the court will look at your financial situation and decide whether you're eligible. If your request is accepted, you will be given a certificate which you must show to court staff when you go to pay a fee.

You can use your fee waiver certificate only in the case or proceeding for which it was given to you, plus any enforcement related to that case. If you have multiple cases at once, or if your case is appealed, you will need to request a new fee waiver for each case.

Eligibility

You can request to have your court fees waived if:

- you are involved, or will be involved, in a proceeding or case in family, civil or small claims court

[36] https://www.attorneygeneral.jus.gov.on.ca/english/courts/feewaiver/

- you are not acting on behalf of a business or organization
- your fees are not being paid by a lawyer under a contingency fee agreement

There are three primary ways to qualify for a fee waiver.

1. Your gross annual household income and assets are less than:

Criteria		**Maximum amount**
Gross annual household income:	1 person in your household	$ 31,200
Gross annual household income is the	2 people in your household	$ 46,800
total amount of money that all of the	3 people in your household	$ 54,000
members of your household earn in a	4 people in your household	$ 64,800
year, before taxes or deductions	5 or more people in your household	$ 75,600
Household liquid assets: Household liquid assets are any assets owned by the members of your household that are money or can readily be converted into money, such as stocks, bonds, RRSPs or GICs that are not locked in.		$ 2,600
Household net worth: Household net worth is the value of all assets owned by the members of your household, minus the amount of all their debts and other financial liabilities.		$ 10,500

OR

2. Your main source of household income is one or more of the following:

- income assistance from Ontario Works
- income support from the Ontario Disability Support Program
- Old Age Security Pension and the Guaranteed Income Supplement
- War Veterans Allowance
- Canada Pension Plan benefits

OR

3. You are receiving services from *Legal Aid Ontario* for this case.

If you don't meet any of these requirements, but you don't believe that you can afford to pay court fees, you can make a request to the court to have your financial situation evaluated by a judge.

If your financial situation changes, you can request a fee waiver again. There is never a charge to request a fee waiver.

When to request a fee waiver

Although you can request a fee waiver before, during or at the enforcement stage of your case, a fee waiver certificate can't be used to refund court or enforcement fees that you've already paid.

To have any fee waived, you have to receive your fee waiver certificate beforehand and show it when you go to pay that fee.

Which fees cannot be waived

The fee waiver applies to fees that the court charges in civil, family and small claims matters, except for:

- fees you pay to an individual who is independent of the court (e.g. lawyers, authorized court transcriptionists, official examiners, witnesses and mediators)
- fees relating to criminal matters
- fees paid to the sheriff or small claims court bailiff to enforce an order (unless the order was made under subsection 35(3) of the *Tenant Protection Act, 1997*)
- the federal Central Registry of Divorce Proceedings fee
- fees for serving documents
- fees for bankruptcy proceedings under the *Bankruptcy and Insolvency Act*
- costs that you are ordered to pay to another party

How to request a fee waiver

Step 1: — Pick up the form

Depending on your situation, you will have to fill out one of several different forms. These forms can be picked up at your local courthouse, or printed at home using the links below.

If you think you meet the financial requirements, fill out form *FW-A 3 — Fee Waiver Request to Registrar, Clerk or Sheriff*.

If you don't think you meet the financial requirements but think your fees should be waived, fill out form *FW-A 4 — Fee Waiver Request to Court*.

If you're a litigation guardian or special party representative, fill out one of the following:

If the person you're representing meets the financial requirements: *FW-A 6 — Fee Waiver Request to Registrar, Clerk or Sheriff by a Litigation Guardian for a Person Under Disability or a Person Representing a Special Party*

If the person you're representing doesn't meet the financial requirements but you feel that their fees should be waived: *FW-A 7 — Fee Waiver Request to Court by a Litigation Guardian for a Person Under Disability or a Person Representing a Special Party*

Step 2: — Fill out the form

Here are some tips to help you when filling out your request form:

Make sure that all the personal information you give is complete and current. If your contact information changes, it's your responsibility to update the court in writing.

If you already have a court file, include your file/claim number and the title of the proceeding or name of the case on the form.

Financial information

You will have to provide proof of your gross annual household income. This includes proof of income for your spouse, if you have one.

- If you're filling out form *FW-A 3 — Fee Waiver Request to Registrar, Clerk or Sheriff* or *FW-A-6 — Fee Waiver Request to Registrar, Clerk or Sheriff by a Litigation Guardian for a Person Under Disability or a Person Representing a Special Party*, you can submit any one of these three documents for each of you and your spouse:
    - an income tax return or notice of assessment for the most recent taxation year from the Canada Revenue Agency
    - the most recent statement of earnings from your employer showing total earnings paid this year including overtime or your three most recent pay stubs
    - the most recent statement of income showing income from employment insurance, social assistance, a pension, workers compensation or disability payments

Indicate on the form which documents you have included. If you can't provide any of these documents, explain why and continue to fill out the rest of the form, where you will write down your household's income information instead.

You don't need to provide proof of income for any working members of your household aside from your spouse, but you must include their income when you calculate your gross annual household income on the request form.

- If you're filling out form FW-A 4 — Fee Waiver Request to Court or FW-A-7 — Fee Waiver Request to Court by a Litigation Guardian for a Person Under Disability or a Person Representing a Special, you have to fill out Exhibit A, where you will list the members of your household, give estimated income amounts, expenses and assets. For each piece of information you provide, make sure to attach a recent financial document (e.g. a tax return, pay stubs, T-4 slips, benefit statements), or receipt to support it.

If there is any other information about your financial situation that you would like to give the court that wasn't included in your request so far, use the space in question 5 of Exhibit A to write it down. Make sure to also attach financial documents that support any information you give in this part.

With Exhibit B, you will also have to provide one of the following:

- the first document you filed or will file in your case, which sets out your position in the case (e.g. statement of claim or application, statement of defence, answer)
- a copy of the order you wish to enforce or continue enforcing, as appropriate

Step 3: — Swear your affidavit

Once you've completed your fee waiver form, you have to swear or affirm that the information you've provided is accurate and true to the best of your knowledge. You can get your form sworn or affirmed at the court or enforcement office at no cost.

You can also have your form sworn or affirmed by a lawyer, notary public or someone else who is authorized to commission documents, although they may charge a fee for their service.

While your lawyer can commission your affidavit, you still have to be the one to swear or affirm that the information provided is true — they can't do this on your behalf.

It is important to remember that it is a criminal offence to knowingly swear or affirm a false affidavit.

Step 4: — Submit the form

You have to submit your form and all of the required documents either in person or by mail, to the court or the enforcement office where you will be paying a fee related to your court

case or enforcement of order. The form can be submitted on its own or along with any court document that you wish to file. Your lawyer or agent can also submit your form for you. If necessary, you can also contact the court or enforcement office about other options available to submit your form.

Don't forget that you must sign and swear or affirm the form before you submit your request.

Finding out if you qualified for a request to staff:

If you submit a request to staff in person at a court or enforcement office, staff will review and determine whether or not you are eligible on the spot. If you submit your request by mail, you will also receive your response by mail.

Finding out if you qualified for a request to court:

After you submit a request to court, your request will first be reviewed by staff to determine whether or not you are eligible. If you are not eligible, your request will then be presented to a judge. You will receive your order from a judge by mail.

Requesting a court interpreter

Once you've received a fee waiver certificate, if you or any of your witnesses need a court interpreter in a language other than English or French, you will also have to fill out form *FW-A 5 — Request For Court Interpreter*. You can fill out this form at any time during the court process.

This form is available to pick up at your local courthouse, or it can be printed at home from *Ontario Court Forms*.

To complete the form, you'll need to give your name, contact information and court file number. If you need an interpreter for yourself, list the language you need interpretation to and from. If you need an interpreter for one or more of your witnesses, list the names of these witnesses, what language they need interpretation in, and when they are appearing in court.

This form can be submitted in person or by mail to the court office where you filed your fee waiver. If you need an interpreter for any witnesses, you must submit this form as soon as you find out your date and time of the court appearance when the interpreter will be required.

After you have submitted this request for an interpreter, if you become aware that an interpreter is not required for a court appearance, notify the court immediately to cancel the interpreter.

You will not need to pay for a court interpreter once you submit this form to the court. However, refunds cannot be given for any fees you paid for private court interpreter services before you filed this form with the court.

Fee Waiver Request to Registrar, Clerk or Sheriff — By a Litigation Guardian For a Person Under Disability — Or a Person Representing a Special Party

(PLEASE PRINT CLEARLY)

[Please read the definitions in "A Guide to Fee Waiver Requests" before completing this form.]

1. My name is *(full legal name)* .....

2. I live in *(municipality and province)* ..... and I swear/affirm that the following is true:

3. Title of proceeding/Name of case: .....

4. Court file/Claim number *(if applicable)*: .....

5. I am/intend to be *(check one)*

❑ a litigation guardian for a party under disability, **or**

❑ a person representing a special party under the *Family Law Rules*.

6. My current mailing address, and fax number and e-mail address, if applicable, are: .....

My current telephone number is: .....

7. Request made at *(check one)*:

❑	Court of Appeal	❑	Divisional Court	❑	Superior Court of Justice
❑	Family Court	❑	Small Claims Court	❑	Ontario Court of Justice
❑	Enforcement Office				

8. Court/Office location: .....

NOTE:	**The party under disability or the special party under the *Family Law Rules* is the "requestor" for the purposes of paragraphs 9 to 15 below. You should complete paragraphs 9 to 15 with information about the requestor.**

9. The requestor requires a court interpreter for a language other than English or French:

❑ for the requestor

❑ for witness(es)

❑ no

Fee waiver is only available to a party, or a person who intends to become a party, in a proceeding or case.

10. The requestor's court/enforcement fees are being paid by Legal Aid Ontario or by a lawyer under a contingency fee agreement:

(a) ❑ Yes

(b) ❑ Yes, but the requestor's Legal Aid certificate does not cover his/her divorce court fees.

(c) ❑ No

If your answer to paragraph 10 is "(a) Yes", do not complete paragraphs 11 to 15

11. The *primary* source of the requestor's household income is from one or more of the following sources:

- income assistance from Ontario Works,
- income support from Ontario Disability Support Program,
- *Family Benefits Act* allowance,
- Old Age Security Pension together with the Guaranteed Income Supplement,
- War Veterans Allowance, and
- Canada Pension Plan benefits:

❑ Yes ❑ No

If your answer to paragraph 11 is "Yes", do not complete paragraphs 12 to 15

12. The number of people in the requestor's household, including the requestor, the requestor's spouse and dependent children is:

❑ 1 ❑ 2 ❑ 3 ❑ 4 ❑ 5+

13. The gross monthly income of the requestor's household, from *all* sources, is:

❑ Under $1,500 ❑ $1,500–$2,249 ❑ $2,250–$2,582

❑ $2,583–$3,082 ❑ $3,083–$3,582 ❑ $3,583 or more

14. The total amount of the requestor's household's liquid assets is less than $1,500: ❑ Yes ❑ No

15. The requestor's household's net worth is less than $6,000: ❑ Yes ❑ No

This information is accurate to the best of my knowledge and belief. I agree to provide financial information and records, if requested, to confirm the information in this Request form.

SWORN (*OR* AFFIRMED) BEFORE
ME AT the (City,

Town, etc.) of .....

on *(date)* ....

(Signature of litigation guardian or person representing a special party)

.....
COMMISSIONER FOR TAKING AFFIDAVITS
(or as may be)

WARNING:	**IT IS AN OFFENCE UNDER THE *CRIMINAL CODE* TO KNOWINGLY SWEAR OR AFFIRM A FALSE AFFIDAVIT**

NOTE: For more information on **fee waiver**, please contact your local court or enforcement office. A listing of court addresses can be found on the Ministry of the Attorney General website at: www.attorneygeneral.jus.gov.on.ca. Please remember that court and enforcement staff cannot complete the forms for you or give you legal advice about your case.

Personal information contained on this form is collected under the authority of ss. 4.3, 4.5 and 4.6 of the *Administration of Justice Act*, R.S.O. 1990, c. A.6. This information will be used to determine fee waiver eligibility. By signing this form, you agree to provide supporting financial documentation and records if requested to do so by the Ministry of the Attorney General, which would be used to confirm the information you provide in this form. If you have any questions regarding the **collection of personal information** for fee waiver requests, please contact the Manager of Administrative Services, Civil/Family Policy and Programs Branch, Ministry of the Attorney General, 720 Bay Street, 2nd floor, Toronto, ON M5G 2K1, (416) 326-1028.

(For Office Use Only)

Requestor is eligible for fee waiver under the *Administration of Justice Act*, R.S.O. 1990, c. A.6:

❑ Yes ❑ No

....

(Date of signature) *(Signature of registrar, clerk of the court or sheriff)*

Fee Waiver Request to Court — By a Litigation Guardian For a Person Under Disability — Or a Person Representing a Special Party

(PLEASE PRINT CLEARLY)

[Please read the definitions in "A Guide to Fee Waiver Requests" before completing this form.]

(a) This is a request for waiver of court and/or enforcement fees with respect to: *(Select one.)*

❑ a proceeding before the *(specify court)* .....

❑ the enforcement of an order of the *(specify court or administrative tribunal)* .....

(b) Title of proceeding/Name of case: .....

(c) Court file/Claim number *(if applicable)*: .....

(d) In support of this request, I, *(full legal name of litigation guardian or person representing special party)* ....., submit the following affidavit, sworn/affirmed the ..... day of ....., 20.....

.....

(Signature of litigation guardian or person representing special party)

(To be completed by registrar or clerk if the requestor is eligible for fee waiver under s. 4.4(4) Administration of Justice Act, R.S.O. 1990, c. A.6)

Requestor is eligible for fee waiver under s. 4.4(4) *Administration of Justice Act*, R.S.O. 1990, c. A.6:

❑ Yes ❑ No

....

(Date of signature) *(Signature of registrar or clerk of the court)*

(To be completed by the Court if the requestor is not eligible for fee waiver under s. 4.4(4) Administration of Justice Act, R.S.O. 1990, c. A.6)

This Court orders that

❑ a fee waiver certificate shall be given.

❑ a fee waiver certificate shall not be given.

Reasons, if applicable:

.....

....
(Date of signature) *(Signature of judge, deputy judge or case management master)*

Affidavit in Support of Fee Waiver Request — By a Litigation Guardian For a Person Under Disability — Or a Person Representing a Special Party

(PLEASE PRINT CLEARLY)

1. I, *(full legal name)* ....., of the (City, Town, etc.) of ....., MAKE OATH AND SAY (*or* AFFIRM): I make this affidavit in support of this request for waiver of court and/or enforcement fees.

2. *[Select and complete one.]*

❑ In this proceeding or case, I am or intend to act as

(a) ❑ the litigation guardian of a party under disability who is the *(appellant/respondent/plaintiff/applicant/defendant)* ....., or intends to become a party, **or**

(b) ❑ a person representing a special party under the *Family Law Rules*.

OR

❑ I am or intend to act as

(c) ❑ the litigation guardian of a party under disability, **or**

(d) ❑ a person representing a special party under the *Family Law Rules*,

seeking enforcement of an order of the *(specify court or administrative tribunal)* .....

made in the proceeding or case of *(title of proceeding/name of case)* .....

3. My current mailing address, and fax number and e-mail address, if applicable, are:

.....

My current telephone number is: (.....) .....

NOTE:	**The party under disability or the special party under the *Family Law Rules* is the "requestor" for the purposes of paragraphs 4 to 12 and the exhibits. You should complete paragraphs 4 to 12 and the exhibits with information about the requestor.**

4. The requestor requires a court interpreter for a language other than English or French:

❑ for the requestor

❑ for witness(es)

❑ no

Fee waiver is only available to a party, or person who intends to become a party, in a proceeding or case.

5. The requestor's court/enforcement fees are being paid by Legal Aid Ontario or by a lawyer under a contingency fee agreement:

(a) ❑ Yes

(b) ❑ Yes, but the requestor's Legal Aid certificate does not cover his/her divorce court fees.

(c) ❑ No

If your answer to paragraph 5 is "(a) Yes", do not complete paragraphs 6 to 10 or the Exhibits

6. The *primary* source of the requestor's household income is from one or more of the following sources:

- income assistance from Ontario Works,
- income support from Ontario Disability Support Program,
- *Family Benefits Act* allowance,
- Old Age Security Pension together with the Guaranteed Income Supplement,
- War Veterans Allowance, and
- Canada Pension Plan benefits:

❑ Yes ❑ No

If your answer to paragraph 6 is "Yes", do not complete paragraphs 7 to 10 or the Exhibits

7. The number of people in the requestor's household, including the requestor, the requestor's spouse and dependent children is:

❑ 1 ❑ 2 ❑ 3 ❑ 4 ❑ 5+

8. The gross monthly income of the requestor's household, from *all* sources, is:

❑ Under $1,500 ❑ $1,500–$2,249 ❑ $2,250–$2,582

❑ $2,583-$3,082 ❑ $3,083–$3,582 ❑ $3,583 or more

9. The total amount of the requestor's household's liquid assets is less than $1,500: ❑ Yes ❑ No

10. The requestor's household's net worth is less than $6,000: ❑ Yes ❑ No

If your answer to paragraph 5 is "(a) Yes" or your answer to paragraph 6 is "Yes", cross out paragraphs 11 and 12 and do not complete the Exhibits.

11. Attached as Exhibit "A" is a financial statement that accurately sets out the requestor's household's estimated monthly income, expenses and assets.

12. Attached as Exhibit "B" is a copy of *(select one)*:

❑ the first document I filed or wish to file in this proceeding that sets out the requestor's position in the case (for example, statement of claim or application; statement of defence, answer).

OR

❑ the order the requestor wishes to enforce or continue enforcing.

This information is accurate to the best of my knowledge and belief. I agree to provide financial information and records, if requested, to confirm the information in this Request Form.

SWORN (*OR* AFFIRMED) BEFORE ME AT the (City, Town, etc.) of .....

on *(date)* .....

.....
(Signature of litigation guardian or person representing a special party)

.....
COMMISSIONER FOR TAKING AFFIDAVITS
(or as may be)

WARNING:	**IT IS AN OFFENCE UNDER THE *CRIMINAL CODE* TO KNOWINGLY SWEAR OR AFFIRM A FALSE AFFIDAVIT**

NOTE: For more information on **fee waiver**, please contact your local court or enforcement office. A listing of court addresses can be found on the Ministry of the Attorney General website at: www.attorneygeneral.jus.gov.on.ca. Please remember that court and enforcement staff cannot complete the forms for you or give you legal advice about your case.

Personal information contained on this form is collected under the authority of ss. 4.3, 4.5 and 4.6 of the *Administration of Justice Act*, R.S.O. 1990, c. A.6. This information will be used to determine fee waiver eligibility. By signing this form, you agree to provide supporting financial documentation and records if requested to do so by the Ministry of the Attorney General, which would be used to confirm the information you provide in this form. If you have any questions regarding the **collection of personal information** for fee waiver requests, please contact the Manager of Administrative Services, Civil/Family Policy and Programs Branch, Ministry of the Attorney General, 720 Bay Street, 2nd floor, Toronto, ON M5G 2K1, (416) 326-1028.

Exhibit "A"

[Please read the definitions in "A Guide to Fee Waiver Requests" before completing this form.]

Exhibit "A" to the affidavit of ....., sworn/affirmed this ..... day of ....., 20 .....

.....
COMMISSIONER FOR TAKING AFFIDAVITS
(or as may be)

Financial Statement

1. — Household

Besides the requestor, the following individuals make up the requestor's household:

Name of individual	Relationship	Age

2. — Estimated Net Monthly Household Income

[Attach copies of documents proving the requestor's income — for example, most recent pay stubs, income tax returns and T-4 slips, benefit statements.]

Estimated net monthly household income from all sources (i.e., the income remaining after non-voluntary deductions such as income tax and union dues):

Employment	$
Pension	$
Dividends	$
Interest	$
Support received (child and spousal)	$
Other *(please specify)*	
TOTAL (Estimated net monthly household income)	**$**

3. — Estimated Monthly Household Expenses

[Attach copies of receipts for the following:]

Monthly expenses related to housing (e.g., rent, mortgage payments)	$
Monthly expenses related to transportation (e.g., train passes, automotive maintenance)	$
Monthly expenses related to household (e.g., utilities, maintenance)	$
Monthly expenses related to medical and dental	$
Other personal monthly expenses (e.g., food, clothing)	$
Other monthly expenses, not included in above, related to dependant children *(please specify)*	
Monthly debt payments *(please specify)*	
TOTAL	**$**

(Estimated monthly household expenses)	

4. — Household Assets

[Specify all assets, including liquid assets (e.g., bank accounts, RRSPs) and non-liquid assets (an asset that cannot readily be converted to cash, e.g., real property) and set out their estimated value.]

Asset	Value
	$
	$
	$
	$
	$
	$
	$
	$

5. — Additional Financial Information

NOTE: This section is **optional**. Complete it only if you would like to provide relevant information about the requestor's financial circumstances that has not already been set out in this affidavit.

[Attach copies of any documents you have that prove the financial information you provide below.]

I feel that the following information about the requestor's financial situation, which has not already been mentioned in this affidavit, is important to this request for fee waiver:

.....

Exhibit "B"

Exhibit "B" to the affidavit of ....., sworn/affirmed this ..... day of ....., 20 .....

.....
COMMISSIONER FOR TAKING AFFIDAVITS
(or as may be)

[Attach either a copy of the first document you filed or wish to file in this proceeding that sets out the requestor's position in the case (for example, statement of claim or application; statement of defence, answer), or a copy of the order the requestor wishes to enforce or continue enforcing, as appropriate.]

TABLE [1] [Repealed O. Reg. 336/16, s. 5.]

The number in square brackets has been editorially added by Carswell.

[Repealed O. Reg. 336/16, s. 5.]

ONT. REG. 94/14 — FEES FOR COURT TRANSCRIPTS

made under the *Administration of Justice Act*

O. Reg. 94/14

1. Definitions — In this Regulation,

"authorized court transcriptionist" means a member of a class of persons authorized by the Attorney General to transcribe recordings;

"recording" means a recording made under subsection 5(1) of the *Evidence Act* of a court proceeding or of evidence in a court proceeding.

2. Fees for court transcripts — The following fees are payable to an authorized court transcriptionist:

TABLE

Item	Service	Fee
1.	To transcribe all or part of a recording and produce a first certified copy of a transcript	$4.30 per page or $20.00, whichever is greater
2.	To transcribe all or part of a recording and produce a first certified copy of a transcript, to be provided within five business days	$6.00 per page or $20.00, whichever is greater
3.	To transcribe all or part of a recording and produce a first certified copy of a transcript, to be provided within 24 hours	$8.00 per page or $20.00, whichever is greater
4.	For any additional certified copy of the transcript, in printed format	$.55 per page or $20.00, whichever is greater
5.	For an electronic copy of the transcript, requested at the same time as a request for item 1, 2, 3 or 4	No charge
6.	For an electronic copy of the transcript, requested at any other time	$20.00

3. Transcripts for judges — Fees payable under section 2 for transcripts requested by a judge for the judge's own use shall be paid by the Province of Ontario.

4. Revocation — Ontario Regulation 587/91 is revoked.

5. Commencement — This Regulation comes into force on the later of May 1, 2014 and the day it is filed.

Judges of the Small Claims Court

The Small Claims Court has one full-time Small Claims Court Administrative Judge appointed pursuant to section 87.2 of the *Courts of Justice Act*: the Honourable Justice Laura Ntoukas.

The majority of Small Claims Court cases are presided over by the approximately 420 deputy judges appointed pursuant to section 32 of the *Courts of Justice Act* by the Regional Senior Justices of each of the eight judicial regions of the Superior Court of Justice. The deputy judges are appointed for renewable three-year terms. A current list of all deputy judges is published by the Superior Court of Justice on its website: www.ontariocourts.ca/scj/judges/current/provincial-deputy/.

Pursuant to section 22(3) of the *Courts of Justice Act*, every judge of the Superior Court of Justice is also a judge of the Small Claims Court. Although rarely necessary in practice, the Small Claims Court can be presided over by a judge of the Superior Court of Justice.

In each of the eight judicial regions, the Small Claims Court is supervised by the Regional Senior Justices. Each Regional Senior Justice appoints one judge of the Superior Court of Justice to be the region's Administrative Judge for the Small Claims Court. The Administrative Judges in each region perform certain supervisory functions on behalf of the Regional Senior Justices. Those functions include reviewing complaints alleging misconduct by a deputy judge under section 33.1 of the *Courts of Justice Act* and may include reviewing applications for appointment or renewal of appointments by deputy judges and making recommendations to the Regional Senior Justices.

The Chief Justice of the Superior Court of Justice is the president of the Small Claims Court under section 22(2) of the *Courts of Justice Act*.

The Regional Senior Justices for each region, and the Administrative Judges for Small Claims Court, are as follows:

Superior Court of Justice (Judicial Regions)

REGIONAL SENIOR JUSTICES OF THE SUPERIOR COURT OF JUSTICE	
CHIEF JUSTICE GEOFFREY B. MORAWETZ Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5	
Associate Chief Justice Faye E. McWatt Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5	
(Northeast Region) Mr. Justice M. Gregory Ellies Regional Senior Justice Superior Court of Justice Court House, 360 Plouffe St. North Bay, Ontario Tel: (705) 495-8360 Ext 307 Fax: (705) 495-8364 Justice Alain Perron Administrative Judge	(Southwest Region) Mr. Justice Bruce G. Thomas Regional Senior Justice Superior Court of Justice Court House, 15th Floor, Unit G 80 Dundas Street London, ON N6A 6B3 Tel: (519) 660-2291 Fax: (519) 660-2294 Justice M. McArthur Administrative Judge
(Central West Region) Mr. Justice Leonard Ricchetti Regional Senior Justice Superior Court of Justice Court House, 7755 Hurontario Street Brampton, ON L6W 4T6 Tel: (905) 456-4835 Fax: (905) 456-4834 Justice Lucille Shaw Administrative Judge	(Toronto Region) Mr. Justice Stephen E. Firestone Regional Senior Justice Superior Court of Justice Court House, 361 University Avenue, Toronto, ON M5G 1T3 Tel: (416) 327-5284 Fax: (416) 327-5417 Justice Benjamin Glustein Administrative Judge
(East Region) Mr. Justice Calum U. MacLeod Regional Senior Justice Superior Court of Justice Court House, 161 Elgin Street, Ottawa, ON K2P 2K1 Tel: (613) 239-1399 Fax: (613) 239-1507 Justice Mark Smith Administrative Judge	(Central East Region) Mr. Justice Mark L. Edwards Regional Senior Justice Superior Court of Justice Court House, 4th Floor, 50 Eagle Street West Newmarket, ON L3Y 6B1 Tel: (905) 853-4810 Fax: (905) 853-4824 Justice Laura Bird Administrative Judge
(Central South Region) Mr. Justice Paul R. Sweeny Regional Senior Justice Superior Court of Justice John Sopinka Courthouse, 626-45 Main St. E. Hamilton, ON L8N 2B7	(Northwest Region) Madame Justice Bonnie R. Warkentin Regional Senior Justice Superior Court of Justice Court House, 6th Flr., 125 Brodie St. N. Thunder Bay, ON P7C 0A3 Tel: (807) 626-7083 Fax: (807) 626-7090

REGIONAL SENIOR JUSTICES OF THE SUPERIOR COURT OF JUSTICE	
Tel: (905) 645-5289 Fax: (905) 645-5379	
Justice Elizabeth C. Sheard Administrative Judge	Justice F. Bruce Fitzpatrick Administrative Judge

Small Claims Court Offices

Because it is a branch of the Superior Court of Justice, most Small Claims Court offices are located in each county's courthouse for the Superior Court of Justice. In some cases including Toronto, the Small Claims Court has its own separate courthouse. A complete listing of all of the Small Claims Court offices and other court offices in Ontario can be found on the website of the Attorney General of Ontario at www.attorneygeneral.jus.gov.on.ca.

	How to obtain a Bilingual Proceeding: Former Regulation 185	**How to obtain a Bilingual Proceeding: O. Reg. 53/01, as am. O. Reg. 121/17**	**New Provisions**
Civil, *Family* & *Small Claims Court Proceedings*	- File a Requisition Form	1. File a Requisition Form [Form 1]	Unless the court, on motion, orders otherwise, the requisition or statement:
		2. File a written statement with the registrar where the proceeding has begun	• Must be filed or made not later than 7 days before the date of the first hearing indicated in the requisition or statement [ss. 5(1)(a)(b); (3) and (7)]
		3. Make an oral statement to the court during an appearance in the proceeding	• Shall specify one or more future hearings shall be heard before a bilingual judge or officer, *and* may specify that all future hearings in the proceeding shall be heard by a bilingual judge or officer [ss. 5(2) and 7]
*Ontario Court of Justice *Superior Court of Justice			• Where the proceeding is a trial of an action to be heard by a bilingual judge, the requisition or statement must be filed or made before the action is placed on the trial list [ss. 5(1)(a)(b); (4)(a) and (7)]
			• The requisition or written statement must be served on every other party in accordance with the rules of court [s. 5(8)]
		4. File or issue the first document in French	Unless the court, on motion, orders otherwise, the first document:

	How to obtain a Bilingual Proceeding: Former Regulation 185	How to obtain a Bilingual Proceeding: O. Reg. 53/01, as am. O. Reg. 121/17	New Provisions
			• Must be filed or issued no later than 7 days before the hearing; party deemed to have exercised the right to a bilingual proceeding under s. 126(1) of the *CJA,* and to have specified that all future hearings in the proceeding are to be heard by a bilingual judge or officer [ss. 3(1)(a)(b); (2); and (3)] • *Applies only to the areas listed in Schedule 2 to s. 126 of the Courts of Justice Act; or elsewhere in Ontario if the other parties consent* [s. 3(4)] [paras. 6 and 7 of s. 126(2) CJA]
		How to withdraw a request for bilingual hearing: • File consents of all other parties, or on motion, with leave of the court	• Party must file consents or to make motion for leave, at the earliest possible opportunity [s. 6(1) and (2)]
Appeals •All Courts Sitting as an Appeal Court	• File a Requisition Form	• File a requisition form [Form 2] with registrar or clerk	Appellant to file at the time the notice of appeal is filed: Respondent to file within 10 days after the notice of appeal served; unless the court, on motion, allows otherwise [ss. 8(1)(a) and (b); and (2)] Requisition to be served on every other party to the appeal as provided in the applicable rules of court [s. 8(3)]
		• The first document that is filed by a party to the appeal is written in French	Document to be filed no later than 7 days before the appeal hearing, unless the court on motion, allows otherwise [ss. 7(1), (2) and (3)]

How to obtain a Bilingual Proceeding: Former Regulation 185	How to obtain a Bilingual Proceeding: O. Reg. 53/01, as am. O. Reg. 121/17	New Provisions
	How to withdraw a Request for an appeal heard by bilingual judge or judges: • File written consent of all other parties,	*Applies only to appeal documents filed in a Schedule 2 area* or elsewhere in Ontario if the other parties consent* [Section 126(4)] and paras. 6 & 7 of section 126(2) *Courts of Justice Act* [ss. 7(1) and (4)] Party must file consents or make the motion at the earliest possible opportunity [ss. 9(1) and (2)] * The areas named in Schedule 2 are Essex; Chatham-Kent; Middlesex, Prescott and Russell; Renfrew; Simcoe; Stormont Dundas and Glengarry; Algoma; Cochrane; Kenora; Nipissing; Sudbury (formerly the Territorial District now included as the City of Greater Sudbury); Thunder Bay and Timiskaming; the area of the County of Welland as it existed on December 31, 1969 (otherwise referred to as Niagara South); the City of Hamilton; the City of Ottawa; the City of Toronto; the Regional Municipality of Peel

MONETARY LIMITS — COMPARATIVE CHART

Small Claims in Canada

The following chart summarizes the current monetary limits and adjudication in the small claims courts in Canada.

Jurisdiction	Monetary Limit
British Columbia	$35,000
Alberta	$50,000
Saskatchewan[1]	$30,000
Manitoba	$10,000
Ontario[2]	$35,000 with a $3,500 appeal minimum
Quebec[3]	$15,000
New Brunswick[4]	$12,500
Nova Scotia	$25,000
Prince Edward Island	$16,000
Newfoundland and Labrador	$25,000
Northwest Territories	$35,000
Yukon Territories	$25,000
Nunavut	$20,000

Notes:

1 *Small Claims Regulations, 1998*, R.R.S. c. S-50.11 Reg. 1. Saskatchewan continues to increase the monetary limit of cases heard in small claims court to the desired maximum of $30,000.

2 O. Reg. 626/00, *Small Claims Court Jurisdiction and Appeal Limit*. Effective January 1, 2010.

3 *Code of Civil Procedure*, Art. 953(a).

4 Rule 80 of the *Rules of Court of New Brunswick*. In force July 15, 2010. Repealed 2012, c. 15, c. 47(2), in force January 1, 2013.

Small Claims Courts in Alberta

The Provincial Court of Alberta has concurrent civil jurisdiction with the Queen's Bench in civil matters involving debt or damages (including damages for breach of contract) to a maximum of $50,000 effective November 1, 2002 as a result of the *Justice Statutes Amendment Act*, R.S.A. 2000, c. 16 (Supp.). The court also has concurrent jurisdiction in landlord and tenant matters under the *Residential Tenancies Act* (R.S.A. 2000, c. R-17) and the *Mobile Home Sites Tenancies Act* (R.S.A. 2000, c. M-20).

In 1996 the court established a system of pre-trial conferences in Edmonton and Calgary. It has established a program of court ordered mediation in both cities in 1998, with a success

rate of approximately 70 per cent in resolving disputes. This was expanded to Red Deer and Lethbridge in 2002.

Small Claims Courts in British Columbia

Effective June 1, 2017, most civil claims for up to $5,000 are subject to the *Civil Resolution Tribunal Act*, SBC 2012, c. 25, and must proceed through the Civil Resolution Tribunal before the matter may proceed in Provincial Court. The Act calls for a negotiation-facilitation-adjudication process which is intended to finally resolve most cases channelled through the Act. The $5,000 limit is anticipated to increase in future.

B.C. passed legislation in 2012 establishing the Civil Resolution Tribunal (CRT) Canada's first online dispute resolution tribunal — aimed at creating an affordable option to resolve legal disputes. It started hearing strata property disputes in 2016 and small claims disputes under $5,000 in 2017. Recent amendments added three areas of jurisdiction: motor vehicle disputes over liability and damages under $50,000, minor injury determinations and entitlement to accident benefits, and unlimited claims under the *Societies Act* and the *Cooperative Associations Act*.

It is fully online and it has no physical location and participants never come together, even by phone or videoconference (with some exceptions).

The Supreme Court of British Columbia may judicially review the CRT's decisions, but deference is paid to the tribunal's "specialist" knowledge.

The legislation establishing the tribunal specifically excludes lawyers without special permission from the CRT. There has been an exception made to permit lawyers to represent those in the motor vehicle dispute since the government-run insurer has a lawyer.

Manitoba Courts

The Small Claims Court is under the jurisdiction of the Manitoba Court of Queen's Bench regarding monetary disputes that do not exceed $10,000.

Nova Scotia Small Claims Court

The Small Claims Court provides a quick, informal and cost-effective method for deciding claims up to $25,000 (not including interest). It is not necessary for the person making the claim (claimant) and the person whom the claim is against (defendant) to have lawyers.

Small Claims Court of New Brunswick

New Brunswick has reinstated its Small Claims Court, under the *Small Claims Act*, SNB 2012, c. 15. As of January 1, 2013, claims up to $12,500 in debt, damages, or for recovery of possession of personal property valued at not more than that amount proceed in Small Claims Court. Procedure in that court is established by N.B. Reg. 2012-103.

The Supreme Court of P.E.I.

The Trial Division deals with pre-trial matters and hears trials in general civil matters including small claims.

Provincial Courts of Saskatchewan

Small Claims Court is within the Civil Division of the Saskatchewan Provincial Court. Claims cannot exceed $30,000 in value. Dispute involving title to land, slander, libel, bankruptcy, false imprisonment or malicious prosecution must be handled at Queen's Bench.

Small Claims Courts in Newfoundland and Labrador

The Small Claims Court of Newfoundland is part of the Provincial Court and all the Provincial Court judges have Small Claims jurisdiction.

The first Small Claims Act (*Small Claims Act, 1979*, R.S.N. 1979, c. 34) for Newfoundland was enacted in 1979 and was proclaimed in force that same year. The upper claim limit has been increased to $25,000 in 2010.

The court has been held to be confined to award money damages only. In the case of *Popular Shoe Stores Ltd. v. Simoni* (1998), 163 Nfld. & P.E.I.R. 100, 503 A.P.R. 100 (Nfld. C.A.) the Newfoundland Court of Appeal held that a Small Claims Court judge did not have the authority to order the return of items (in that particular case, shoes). There is no limitation requiring that a party claim only liquidated damages and general damage claims up to $3,000 as held in *Collins v. Aylward's (1975) Ltd.* (1995), 134 Nfld. & P.E.I.R. 195, 417 A.P.R. 195 (Nfld. Prov. Ct.).

Small Claims Courts in Quebec

Quebec is the only province in Canada to have a provincial court with vast jurisdiction in civil matters, a jurisdiction up to $85,800, except claims for alimony, class actions and those reserved for the Federal Court of Canada. The Small Claims Division deals with all claims for $15,000 or less. Judgments are final and without appeal.

The interpretation of the Quebec *Code of Civil Procedure*, CQLR c. C-25.01 (CCP) relating to provisions for the small claims division, specifically article 542 CCP, stipulates that (i) individuals must self-represent and (ii) corporations, partnerships and associations can only be represented by an officer or employee in their sole service who is not a lawyer. See *Respecs inc. c. Marchés Pépin inc.*, 2020 QCCQ 148, *Lachapelle c. Ville de Granby*, 2019 QCCQ 4373, *Bardell c. Ndayishimiye*, 2019 QCCQ 849, and *Lavigne c. 6040993 Canada inc.*, 2016 QCCA 1755, 2016 CarswellQue 10254, EYB 2016-272123 (C.A. Que.)

Territorial Court of the Northwest Territories

The Territorial Court of the Northwest Territories has pursuant to legislation, jurisdiction in civil matters where the amount in dispute is $35,000 or less, supported by Rules of Court and procedures designed by the Territorial Court.

Small Claims Courts in Saskatchewan

Saskatchewan law governing small claims matters is found in the *Small Claims Act, 1997*, S.S. 1997, c. S-50.11. Among the changes were provisions broadening the jurisdiction, modernizing service, empowering mediation and allowing by regulation changes in the monetary limit. The monetary limit in Saskatchewan is $30,000. See Sask. Reg. S-50.11, Reg. 1. Although there has been discussion about the advantages of creating small claims court rules, at the moment no such rules exist. The Provincial Court hears all claims under *The Small Claims Act*.

Yukon Courts

The Small Claims Court hears civil cases in which the amount of money or the value of personal property being claimed is $25,000 or less. It does not have jurisdiction over actions concerning land, actions against a personal representative of a deceased person, or actions for libel or slander. The Small Claims Court sits in the same locations as the Territorial Court and can hear cases as part of court circuits to the communities. Every judge of the Territorial Court is a judge of the Small Claims Court.

Litigation in Canada — The Pleadings

• Litigating in Alberta

A civil action for an amount in excess of $50,000 is commenced in the Court of Queen's Bench by way of Statement of Claim within 2 years of a date of loss.

A civil action is commenced in the Provincial Court Civil Division by way of Civil Claim in the prescribed form within 2 years of a date of loss. The Provincial court hears claims with a monetary value under $50,000. Certain types of claims must be filed in the Court of Queen's Bench as the Provincial Court does not have jurisdiction over certain types of claims including, but not limited, claims for title to land, defamation, malicious prosecution, validity of a bequest, and false imprisonment.

• Litigating in British Columbia

Actions in the BC Supreme Court commencing by way of a Notice of Civil Claim. Other actions can be commenced by way of petitions and requisition or in Small Claims court.

In the absence of more specific legislation, the *Limitation Act* governs limitation periods for commencing an action in British Columbia. In most cases, an individual has until the second anniversary from the date a cause of action is discovered to commence legal proceedings. Different discovery rules and limitations period apply depending on the type of action and the proposed parties subject to the action.

• Litigating in Manitoba

There are three levels of civil actions; small claims (claims up to $15,000), expedited actions (liquidated claims up to $100,000) and regular civil actions (claims over $100,000).

A small claim action is commenced by filing a Small Claim. A defendant must respond by filing a Defence.

• Litigating in New Brunswick

There are three divisions of Civil Court in New Brunswick; i) Trial division, which hears cases involving unlimited damage claims; ii) Simplified Procedure actions, (otherwise known as Rules of Court — Rule 79 actions), which involve consideration of claims up to $75,000 on an expedited timeline basis; and iii) Small Claims Court, which will consider claims up to $20,00.00.

The pleadings process in New Brunswick is almost identical to the process in Ontario.

• Litigating in Newfoundland and Labrador

There are two courts in NL where civil actions may be commenced:

1. Supreme Court Trial Division — hears unlimited damage claims, family cases, estate cases, criminal cases and appeals from the Small Claims Court; and
2. Small Claims Court (Provincial Court) — hears claims up to $25,000.00.

• Litigating in Nova Scotia

Small Claims Court — The Small Claims Court has jurisdiction over claims up to $25,000, but only allows general damages up to $100.

• Litigating in Ontario

A plaintiff will have a statement of claim issued by the Superior Court of Ontario by issuing the claim with the court. There are three levels of civil court; small claims court (claims up

to $35,000), simplified procedure (claims up to $200,000) and ordinary rules (claims over $200,000).

• Litigating in Prince Edward Island

A plaintiff will have a statement of claim issued by the registrar of the Supreme Court of Prince Edward Island. There are three sets of procedures available: small claims court (claims up to $16,000); simplified procedure (claims up to $25,000 subject to exclusions); and ordinary procedure (claims over $25,000 and those excluded from simplified procedure).

• Litigating in Quebec

In Quebec, there are two levels of civil court: The Court of Quebec (claims up to $85,000), which contains the small claims division (claims up to $15,000), and the Superior Court, which is the general jurisdiction (claims over $85,000). In a contentious case, a judicial application is conducted according to the procedure set out in the *Code of Civil Procedure*.

• Litigating in Saskatchewan

There are two levels of civil court. The first level is Small Claims Court, which is considered a part of the Provincial Court of Saskatchewan. In Small Claims Court your claim cannot exceed $30,000.00.

CHAPTER 6 — APPEALS

Appeals

What is an Appeal?

An appeal is totally different than a trial. It is not a means to obtain a second opinion about a case. Rather, it is a review for specific types of error on the part of the trial judge.

Going into a trial, the trial judge makes no presumption about who is likely to win. All parties are entitled to the same right to a full and fair hearing. At the conclusion of a trial, the result is a judgment which usually means victory for one side and defeat for the other. Appeals aren't intended to change the reality that litigation produces successful and unsuccessful parties. Rather, appeals provide a means for quality control, to ensure that trial judges apply legal rules correctly and make findings of fact that are reasonably supported by the evidence.

Appeal courts apply a presumption that the trial judge made no reversible errors. Unless that presumption is rebutted, the appeal will be dismissed. An appellant bears the onus to satisfy the appeal court that some significant error was committed which affected the outcome. An unsuccessful litigant may be dissatisfied with the judgment at trial and may be convinced it is wrong, but may have no meaningful chance of winning an appeal from that judgment.

A trial involves a presentation of evidence and argument, after which the trial judge determines the necessary factual and legal issues and delivers a judgment. Civil trial judges find what facts are true based on the balance of probabilities standard, which requires only that a given fact be found to be more than 50 per cent probable. Trial judges often face several possible choices in finding what the facts are, and several alternative findings may be reasonable based on the evidence. That is a significant reason why it is often said that going to trial is risky, while settlement is certain. Litigants, and particularly self-represented litigants, sometimes fail to appreciate the reality that however clear their own view of the truth may be, from the objective and impartial standpoint of a judge, it is unusual that only one specific outcome will be reasonable based on the evidence. The trial judge has the power to select just one outcome among as many outcomes as are reasonably supported by the evidence. In most cases, the unsuccessful litigant will be unable to successfully appeal from a trial judge's findings of fact.

There are three basic elements in assessing the prospects for successful appeal. First, is there a right of appeal? Second, what is the applicable standard of appellate review? Third, is the proposed appeal financially viable?

Is There a Right of Appeal?

An appeal is solely a creature of statute. For there to be a right of appeal, there must be a statute which says so.

There is a right of appeal from final orders of the Small Claims Court, subject to the minimum appealable limit prescribed under section 31 of the *Courts of Justice Act*. The right of appeal applies to a final order in an action for the payment of money in excess of $3,500, exclusive of costs, or in an action for the recovery of personal property, where the value of the property exceeds $3,500.

There is no appeal from interlocutory orders of the Small Claims Court. For examples of interlocutory orders which cannot be appealed, see the cases annotated under section 31 of the *Courts of Justice Act*. Examples of interlocutory orders are an order setting aside default

judgment and an order adjourning a trial. Recent confirmation that there is no appeal from interlocutory orders of the Small Claims Court is found in *Grainger v. Windsor-Essex Children's Aid Society*, 2009 CarswellOnt 4000, 96 O.R. (3d) 711 (Ont. Div. Ct.).

The distinction between final and interlocutory orders has a history; the leading case is *Hendrickson v. Kallio*, 1932 CarswellOnt 148, [1932] O.R. 675, [1932] 4 D.L.R. 580 (Ont. C.A.). A final order is an order which finally determines who wins or loses the case or an issue in the case. An interlocutory order is merely an order made along the way towards a final order, but which leaves the issues in dispute between the parties for later determination. Final orders include a judgment at trial, an order striking out a pleading without leave to amend, and an order dismissing a motion to set aside default judgment.

Based on the language of *Courts of Justice Act* section 31, the amount of the minimum appealable limit in actions for damages includes the total of both the amount of damages the amount of prejudgment interest claimed: see *Medis Health & Pharmaceutical Services Inc. v. Belrose*, 1994 CarswellOnt 486, 17 O.R. (3d) 265, 23 C.P.C. (3d) 273, 72 O.A.C. 161 (Ont. C.A.); *Watson v. Boundy*, 2000 CarswellOnt 905, 49 O.R. (3d) 134, 130 O.A.C. 328 (Ont. C.A.). Therefore in some cases, it will be necessary to calculate the amount of prejudgment interest to determine whether the action (damages plus prejudgment interest) is for an amount which exceeds the minimum appealable limit and is subject to appeal.

If there is otherwise a right of appeal under section 31, then if the proposed appeal is from a consent order or a costs order, the proposed appeal requires leave to appeal: *Courts of Justice Act* section 133.

Standard of Appellate Review

The basic reality of appellate litigation is that most appeals are dismissed. Why? Because an appeal is an entirely different creature than a trial.

An appeal is not a mere request for a second opinion as to some theoretical single correct outcome, but a search for significant error which affected the outcome at trial. Based on a review of the documentary evidence and the transcript of the oral evidence given at trial, if the appeal judge can find no reversible error — if the outcome was reasonably supported by the evidence and untainted by legal error affecting the outcome — the appeal must be dismissed. Many appeals are dismissed even though the appeal judge might have decided the case differently if he or she had presided at trial. That is because an appeal is not a second trial before an appeal judge, but a focused review for specific types of error on the trial judge's part.

Before hearing the appeal, an appeal judge starts with the presumption that the trial judge made no errors of fact or law. The appellant must convince the appeal court that, in this particular case, that usual assumption is wrong and the trial judge did commit one or more reversible errors.

The standard of appellate review is the same for appeals from the Small Claims Court as for appeals from other courts: *Allison v. Street Imports Ltd.* (May 14, 2009), Doc. 03 DV 000953, [2009] O.J. No. 1979 (Ont. Div. Ct.); *Tang v. Jarrett*, 2009 CarswellOnt 1656, 251 O.A.C. 123, [2009] O.J. No. 1282 (Ont. Div. Ct.). See also *Zeitoun v. Economical Insurance Group*, 2008 CarswellOnt 2576, [2008] O.J. No. 1771, 91 O.R. (3d) 131, 236 O.A.C. 76, 64 C.C.L.I. (4th) 52, 53 C.P.C. (6th) 308, 292 D.L.R. (4th) 313 (Ont. Div. Ct.); additional reasons at 2008 CarswellOnt 3734, 56 C.P.C. (6th) 191, 64 C.C.L.I. (4th) 68 (Ont. Div. Ct.); affirmed 2009 ONCA 415, 2009 CarswellOnt 2665, [2009] O.J. No. 2003, 96 O.R. (3d) 639, 73 C.C.L.I. (4th) 255, 257 O.A.C. 29, 73 C.P.C. (6th) 8, 307 D.L.R. (4th) 218 (Ont. C.A.), where it was held that there was no principled reason to apply a different standard of appellate review to decisions by masters than applies to decisions by judges. The same reasoning applies to appeals from the Small Claims Court.

Factual findings are reviewed on a deferential standard and will not be interfered with on appeal unless they are the product of palpable and overriding error, are unreasonable or unsupported by the evidence, or are clearly wrong. Findings of pure law are reviewed for correctness: *Housen v. Nikolaisen*, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] S.C.J. No. 31, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1 (S.C.C.); *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, REJB 2005-89538, EYB 2005-89538, [2005] S.C.J. No. 24, [2005] 1 S.C.R. 401, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604 (S.C.C.). Particularly for fact-driven appeals, the appellant faces a difficult burden. Appeal courts show deference to the factual findings made by trial courts because the trial court had the benefit of seeing and hearing the evidence in person. This causes appellate courts to reject arguments that a trial judge ought to have weighed the evidence differently, or ought to have made different findings of fact merely because the appellant would have preferred a different outcome.

The Supreme Court of Canada in 2019 addressed the issue as to how appeal courts should approach the review of findings of fact and whether the concept of a "distorting lens" is inconsistent with the long standing standard of palpable and overriding error. See *Salomon v. Matte-Thompson*, 2019 CSC 14, 2019 SCC 14, 2019 CarswellQue 764, 2019 CarswellQue 765, [2019] 1 S.C.R. 729, 52 C.C.L.T. (4th) 175, 432 D.L.R. (4th) 1, [2019] S.C.J. No. 14 (S.C.C.). The metaphor cannot be used to hide errors that do not follow the standard set out in *Housen v. Nikolaisen*, 2002 CSC 33, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, REJB 2002-29758, [2002] 2 S.C.R. 235, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 30 M.P.L.R. (3d) 1, [2002] 7 W.W.R. 1, 286 N.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] S.C.J. No. 31 (S.C.C.), or as a means to literally weigh again the evidence. Processing errors occur where the trial judge or trial does not appreciate, disregards or misapprehends the evidence relevant to the facts. In any event to permit appellate intervention, they must taint the reasoning process on that issue and rise to the level of palpable and overriding error.

See *K. (K.) v. G. (K.W.)*, 2008 ONCA 489, 2008 CarswellOnt 3651, 90 O.R. (3d) 481, 56 C.C.L.T. (3d) 165, 294 D.L.R. (4th) 202, 41 E.T.R. (3d) 21, 238 O.A.C. 282, [2008] O.J. No. 2436 (Ont. C.A.) at paras. 88-89. In other words, a thorough analysis of the trial judge's reasons against the record.

The powers of an appeal court are set out in *Courts of Justice Act* section 134. Generally, where appellate interference is warranted, an appeal court can make any order which the trial judge should have made: section 134(1)(a). A new trial shall not be ordered unless some substantial wrong or miscarriage of justice has occurred: section 134(6). That means that in some cases, the appellate court may find an error to have been committed by the trial judge, but may find it to be a "harmless error" which does not warrant appellate interference with the result.

The bottom line is that generally speaking, an appeal is an uphill battle for the appellant. According to the statistics found in the 2009 Annual Report of the Court of Appeal for Ontario, for example, the percentage of civil appeals (excluding family law) that were allowed during the years 2004 through 2009 varied from a high of 37 per cent to a low of 27 per cent: see www.ontariocourts.on.ca/coa/en/ps/annualreport/2009. While those statistics do no relate specifically to appeals from the Small Claims Court, they illustrate the simple fact that most appeals are dismissed.

Is the Proposed Appeal Financially Viable?

Most trial judgments are not appealed. Appeals from the Small Claims Court are launched less frequently than appeals from other courts, simply because the monetary value of disputes in the Small Claims Court is comparatively low and the cost of appeal is therefore comparatively high.

A party considering an appeal faces two costs which must be assessed to determine whether the appeal is financially viable.

The first cost which a potential appellant must be prepared to incur is that party's own cost of the appeal. That cost consists of the legal fees and disbursements which the potential appellant must pay to proceed with the appeal.

The largest cost on appeal is the cost of legal representation, which will depend on what particular lawyers may charge for appellate cases. Legal fees could involve $5,000 and up. In the appeal court, corporations must be represented by a lawyer (subject to leave under rule 15.01(2) of the *Rules of Civil Procedure*) and paralegals are not permitted to appear.

The disbursements required to appeal include a court fee of $229 to file the notice of appeal, and a court fee of $608 to perfect the appeal once the transcripts and all other court documents required to be filed by the appellant are completed. The cost of transcripts will vary with the length of trial. If desired, an estimate of the actual cost for the transcript may be obtained from the court reporter. The transcript cost is usually the largest disbursement for an appeal and varies depending on the length of the trial.

In the event an appeal is successful, the appellant will usually recover partial indemnity costs payable by the other side. Partial indemnity costs are usually fixed in an amount determined by the appeal judge and can vary depending on the particular judge's subjective opinion of what amount of disbursements and legal fees are "fair and reasonable and within the reasonable expectations of the unsuccessful party". Often partial indemnity costs will consist of 100% of the disbursements (consisting mostly of the court fees and transcript cost) but only about 65% of the legal fees incurred by the appellant for the appeal. Therefore, if the appellant spent $3,000 in disbursements and $10,000 (including HST) in legal fees, and wins the appeal, an award of partial indemnity costs might be fixed at $3,000 plus $6,500 for an all-inclusive total of $9,500. The successful appellant, despite winning the appeal, has incurred a net loss of $3,500. But if the appeal judge awards a smaller amount for costs or disbursements, or if the legal fees incurred were higher, the net loss increases accordingly. If the responding who is ordered to pay partial indemnity costs is unlikely to have the money, then the risk of an unenforceable costs order only increases the potential net loss.

Costs are notoriously difficult to predict accurately but the concept of an unrecoverable costs component for the successful party is for practical purposes a certainty. The only question is how much. The point is that a party considering appeal needs to accept the risk of losing thousands of dollars even if the appeal is successful. The value of the dispute needs to be sufficient to justify the costs risk of successful appeal. But that assumes the appeal is successful.

Based on those rough estimates, the potential appellant will in many cases have to commit at least $6,000 to pursue an appeal.

The second cost which a potential appellant faces is the potential costs liability to the respondent if the appeal is unsuccessful. The unsuccessful party on appeal is usually ordered to compensate the successful party for appeal costs on a partial indemnity scale. The amount of such costs is determined by the appeal judge, and is subject to significant potential variance. Awards of Small Claims Court appeal costs are most often in a range from $2,500 to $10,000, depending on the time required for the appeal, the complexity of the issues, the amount in dispute, and other factors including any offers to settle the appeal. For recent

examples of appeal costs awards, see the annotations under section 31 of the *Courts of Justice Act*.

The financial reality is that many potential appeals are not financially viable, even if the appellant has an arguable appeal. The potential appellant must be prepared to accept the risk of not only the loss of that party's own cost of the appeal, but also liability for the other party's appeal costs.

On the other hand, if an appeal is successful, there are cost consequences for the respondent as well. That party will have paid the cost of its own participation in the appeal, and also faces liability for the appellant's appeal costs, in addition to the cost of reversal or variation of the trial judgment or possibly a new trial.

Where an appeal is launched, the parties are just as free to settle while the appeal is pending as they were while the trial was pending. However appeals tend to settle less frequently than trials.

Procedure on Appeal

An appeal from the Small Claims Court is to the Divisional Court, which is a branch of the Superior Court of Justice. Such appeals are heard by a single judge of the Divisional Court: *Courts of Justice Act* section 21(2)(b). The appeal proceeds in the county in which the Small Claims Court heard the case. Other Divisional Court appeals which are heard by three judges proceed in the designated regional center for each judicial region, but that practice does not apply to single-judge appeals, which are heard by the judges of the local Superior Court of Justice, sitting as Divisional Court judges.

The procedure for appeals is set out in Rule 61 of the *Rules of Civil Procedure*.

The time to initiate an appeal is within 30 days of the order appealed from. Within that time, the appellant must serve a notice of appeal (Form 61A) and appellant's certificate (Form 61C): rule 61.04(1). The notice of appeal must be filed with proof of service within 10 days after service: rule 61.04(4). The appeal is filed in the office of the Superior Court of Justice that is in the same court house, or the same county, as that where the Small Claims Court heard the case.

A respondent may serve the respondent's certificate respecting evidence (Form 61D), within 15 days after service of the appellant's certificate: rule 61.05(2). The parties may make an agreement respecting the evidence that is necessary for the appeal: rule 61.05(4).

A respondent may launch a cross-appeal within 15 days after service of the notice of appeal, by serving a notice of cross-appeal (Form 61E): rule 61.07(1). That notice must be filed within 10 days after service: rule 61.07(2).

The court fee for an appeal from a final order of the Small Claims Court is currently $125. That fee must be paid by the appellant to file the notice of appeal. A respondent who wishes to file a notice of cross-appeal must pay that same fee.

The appellant must order the transcripts of all oral evidence that the parties have not agreed to omit, and file proof of ordering: rule 61.05(5). The court reporters' office will produce a certificate of ordering transcript once the order is in place. The transcript preparation time will depend on a variety of factors, but should generally involve up to three months. The appellant must pay for the transcript (original and one copy for each set of parties). That cost varies with the length of transcript but may be estimated at $500 per day of trial, for one original and two copies of the transcript.

Once the transcript is completed, the appeal must be perfected — which means that the appellant has filed all of the material required by rule 61.09, and paid the court fee to perfect the appeal (currently $608). The materials required to perfect the appeal are as follows:

- appeal book and compendium (see rule 61.10)
- exhibit book (see rule 61.10.1)
- transcript (printed version, with electronic version if provided)
- appellant's factum (printed version, with electronic version) (see rule 61.11)
- book of authorities (may be filed after appeal is perfected)
- certificate of perfection (see rule 61.09(3)(c))

A respondent must serve and file, within 60 days after service of the appellant's materials, a respondent's factum and a respondent's compendium: rule 61.12.

Depending how long the court reporter needs to prepare the transcript, appeals can be expected to take 6 to 12 months from the date of the order appealed from.

Procedure affected by COVID-19

Note that despite the procedural rules under the *Rules of Civil Procedure* which are summarized above, the Divisional Court has a practice direction in effect as at February 18, 2021 entitled Notice to the Profession — Divisional Court, which supplements and in some respects displaces the normal rules for appellate procedure on appeal from the Small Claims Court. For example, the first step to initiate an appeal is to contact the Divisional Court by email as directed in section D.2 of that Notice.

Readers should ensure they have consulted the current version of that Notice on the court's official website, as the various practice directions resulting from the suspension of normal court operations tend to be amended on an ongoing basis. The Notice as it read on February 18, 2021 is as follows:

> **Notice to Profession — Divisional Court**
>
> ***For Court Hearings During COVID-19 Pandemic***
>
> February 18, 2021
>
> The Divisional Court will hear matters in accordance with this Notice to the Profession until further notice. This Notice to the Profession is an update to and replaces the June 29, 2020 Notice to the Profession — Divisional Court. It is supplemented by and does not replace the Notice to Profession for Appeals from the Landlord and Tenant Board in the Divisional Court (Effective August 24, 2020).
>
> *D.1. — Provincewide Protocol applies to all Divisional Court matters*
>
> Set out below is the practice to be observed to commence or continue and to schedule any step in a matter in the Divisional Court **anywhere in Ontario**. Please note that this direction applies to **all** matters in the Divisional Court, including matters commenced prior to the suspension of regular court operations in March 2020 and all matters commenced after that date. This direction also applies to all Divisional Court matters, including panel matters, in-writing motions for leave to appeal and matters ordinarily heard by a single judge, including Small Claims Court appeals and motions.
>
> *D.2. — Commencing Proceedings and Scheduling Divisional Court Matters*
>
> 1. Any party wishing to commence a new Divisional Court proceeding or to schedule a step in an existing Divisional Court proceeding shall contact the court through the following email address (with a copy sent to all other parties): Other parties should not respond to the email. They will have an opportunity to respond after the Court responds to the request as detailed below.
>
> scj-csj.divcourtmail@ontario.ca.

2. Requests should contain the following information:

a. Title of Proceedings, file number (if one already exists), and jurisdiction (judicial region) from which the case originates.

b. The names and email addresses of representatives of the parties (counsel or self-represented persons).

c. The nature of the matter to be scheduled (motion, application or appeal) and brief particulars (for example, "appeal from the final order of Doe J. of the Superior Court of Justice (2020 ONSC 123456) granting judgment of $25,000 in a defamation action" or "judicial review from the Ontario Labour Board decision granting / denying certification"). The explanation should not be more than a sentence or two in length. Where the decision below has been reported on CanLII, a citation to that decision should be included. Where the decision below has not been reported on CanLII, a copy of the decision should be attached.

d. The estimated time required for the hearing.

e. A brief explanation of any urgency, time sensitivity, or other factors the party wishes the court to take into account in scheduling.

f. Whether some or all parties consent to scheduling the matter (**consent is not required**).

g. Whether the matter was commenced before the suspension of regular court operations in March 2020 or whether this is a new proceeding.

h. Where the proceeding is new, the request should include the originating document (for example, Notice of Application for Judicial Review, Notice of Appeal or Notice of Motion for Leave to Appeal).

i. Where parties have agreed on a timetable for the exchange of materials in advance of the hearing request, the proposed agreed timetable should be included.

3. Where a party submits a request to commence a new matter, the Court will confirm by email that the originating document is deemed to have been filed on the date it was received and provide a Divisional Court File Number. The Court will also provide directions for payment of the filing fee.

4. In all cases where a party submits a request for a hearing, the Court will respond with a request that the parties agree on a schedule for the exchange of documents or will schedule a case conference with a Divisional Court Administrative Judge or a designate. The case management process is addressed in more detail at D.7 below.

5. Matters will be scheduled at the direction and in the discretion of a Divisional Court Administrative Judge or a designate. Urgent matters will be given priority, but the Divisional Court is currently scheduling all matters, including non-urgent matters, based on availability of court dates.

6. Where a party wishes to commence a proceeding to preserve the party's rights, but does not wish to proceed immediately or to give notice of it to other parties, the party need not send a copy to all other parties [or provide addresses and email addresses for opposing parties], but should clearly indicate, instead, that the party wishes to commence but not yet move forward with the application.

D.3. — Electronic hearings

1. All hearings are currently conducted electronically, either by teleconference or by videoconference. Teleconferences are conducted on court teleconference lines. Videoconferences are conducted using the application ZOOM. The court will send parties a conference call number or a link to the videoconference in advance of the hearing.

2. In the case of videoconference hearings, counsel are not required to gown for the hearing. Instead, business attire is required for anyone with a speaking role in the hearing. All parties must ensure that they participate in the video conference from appropriate surroundings.

3. Counsel are permitted to share conference call numbers or Zoom links with their clients and other members of their firm. In the case of videoconference hearings, if the parties anticipate

that there will be broad media interest and/or public interest in the hearing, the parties should advise the court ahead of time so that appropriate arrangements can be made. For hearings not expected to generate media interest, any member of the media or the public who wishes to observe the remote proceeding may email their request to the local courthouse staff in advance of the hearing in accordance with Part C, paragraph 5 of the *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media*.

D.4. — Submitting Electronic Documents for Hearings

1. All documents required for a hearing must be available to the court electronically. **The requirement of electronic documents applies to all matters, including cases where parties filed paper documents prior to the suspension of regular court operations**.

2. Once a schedule is set for the exchange of materials, parties are to comply with the directions below for making electronic documents available for the hearing. If necessary, a teleconference may be arranged with an Administrative Judge or designate for directions respecting what materials are required and how they are to be provided to the Court.

3. In general, hearing materials are to be uploaded to CaseLines or provided to the court through a document sharing platform provided by the parties. Unless a Divisional Court Administrative Judge or Divisional Court staff provide different directions, materials are to be uploaded as follows and in accordance with the following deadlines:

i. Unless the Court approves an expedited or modified schedule, all materials are to be uploaded at least four weeks before the hearing date. (This does not apply to deadlines for the compendium for oral argument, counsel sheet or costs outline, which are addressed below.)

ii. All documents are to be uploaded in PDF format. The indexes to all records should include bookmarks. Factums should contain hyperlinks to authorities and to the records.

iii. Factums are also to be uploaded in Word format.

iv. In accordance with Rule 4.05.3(6), document names must set out (a) the document type, (b) the type of party submitting the document, (c) the name of the party submitting the document, and (d) the date on which the document was created or signed, in the format DD-MMM-YYYY (e.g. 12-JAN-2021). Examples of documents typically filed in the Divisional Court labelled in accordance with this direction are set out in Appendix A. Document names must not include firm specific naming conventions, abbreviations or file numbers.

v. Pages should be numbered sequentially within each PDF document.

vi. Parties are not required to upload Books of Authorities containing the full text of authorities. However, citations to cases in the factums are to provide, if possible, hyperlinks to CanLII. The only exceptions are authorities not available on CanLII, such as excerpts from textbooks, foreign law, or Canadian decisions not reported on CanLII: these should be collected in a brief of unreported authorities and uploaded electronically.

vii. Parties are also encouraged to upload a compendium for oral argument in advance of the hearing, containing excerpts of evidence and authorities to which counsel will refer in oral argument. The compendium for oral argument is to be uploaded to CaseLines or other document sharing platform no later than 5 business days before the hearing date. Where portions of cases are included in a compendium, the title of proceedings and headnote should be included as well. Where portions of the record are included in a compendium, the first page of the document and identification of where it may be found in the record, by reference to CaseLines page number, should also be provided.

viii. At least one day before the hearing, the parties are to upload a counsel sheet setting out the name(s) of counsel and the estimated time for counsel's submissions.

ix. Unless the court has directed an earlier deadline, at least one day before the hearing, the parties are to advise that they have reached agreement on costs or are to upload bills of costs and costs outlines.

x. To assist the panel, each party's documents should be uploaded so that they are displayed in CaseLines in the following sequence:

a. Factum

b. Application Record/Appeal Book and Compendium/Motion Record

c. Oral hearing compendium, if any

d. Book of Authorities, if any

e. Transcripts, if any

f. Exhibit Books, if any

g. Bill of Costs and Costs Outline

h. Counsel Sheet

i. Other documents if any

4. The deadlines set out above take precedence over the deadlines set out in Rule 4.05.3 of the Rules of Civil Procedure.

5. At the hearing of a case where documents have been uploaded to CaseLines, the parties should be prepared to use the Direct Others to Page function or to advise the court of the CaseLines page number when referring to documents.

6. It is the responsibility of the parties to ensure that all materials they upload for the matter comply with the Rules of Civil Procedure. For example: (a) the maximum length of a factum is 30 pages, plus permitted appendices; and (b) reply factums are not permitted, except on motions for leave to appeal in writing and only, in accordance with Rule 61.03.1(11) of the Rules of Civil Procedure, where the responding party's factum raises an issue on which the moving party has not taken a position in the moving party's factum. Parties may depart from the Rules of Civil Procedure only if a judge grants them leave to do so. If a party uploads a document that does not comply with the Rules, the court may strike out the document, with or without leave to upload a new document that complies with the Rules of Civil Procedure, and may order costs against the party that uploaded the non-compliant document.

7. It is the responsibility of the parties to ensure that all materials they provide to the court for a matter contain only materials properly put before the court. Appeals and applications for judicial review are generally conducted solely on the record that was before the court or tribunal whose decision is under appeal or review in Divisional Court. Generally, parties are not permitted to add to the record below in Divisional Court unless they obtain an order from the Divisional Court permitting them to adduce fresh evidence. If a party uploads documents that are not properly before the Divisional Court, the court may strike out the documents, with or without leave to bring a motion to adduce fresh evidence, and may order costs against the party that uploaded materials.

8. A party who is unsure about the application of these principles in their case may raise that issue with the court during the case management process, either by email or at a case management conference.

D.5. — Filing Documents with the Court and Payment of Fees

1. Uploading documents to CaseLines in accordance with this Notice to Profession or a case management direction or order does not constitute "filing" of documents. Documents uploaded to CaseLines are also to be filed with the Divisional Court on the day they are uploaded to CaseLines by sending them by email to the Court. Documents are to be sent to the following email address:

scj-csj.divcourtmail@ontario.ca

The re line in the email is to include the following: "FOR FILING — Case name — File No. — Date of hearing".

2. Parties are required to pay ordinary court fees payable for proceedings in the Divisional Court, which shall be paid in accordance with a direction made by or on behalf of the Registrar or a Local Registrar of the Divisional Court.

D.6. — Self-Represented Litigants

1. This direction applies to all matters in Divisional Court, whether parties are represented by counsel or are self-represented. If a self-represented litigant is unable to conduct a case in accordance with any of the requirements set out in this Notice to the Profession, then the self-represented litigant shall advise the court of the difficulty and request variation in the requirements to enable that litigant to provide documents to the Court and participate in the hearing by some alternative means. These requests can be submitted by email at scj-csj.divcourtmail@ontario.ca or by telephone at (416) 327-5100.

2. In preparing materials for an appeal or application for judicial review, self-represented litigants are encouraged to refer to the following guides:

> Guide to Appeals in Divisional Court at: https://www.ontariocourts.ca/scj/files/pubs/guide-div-ct-judicial-appeals-EN.pdf
>
> Guide to Judicial Review in Divisional Court at: https://www.ontariocourts.ca/scj/files/pubs/guide-div-ct-judicial-review-EN.pdf

D.7. — Case Management

1. All matters in Divisional Court, and all steps in all matters in Divisional Court, are subject to case management by an Administrative Judge of the Divisional Court or a designate. The purpose of case management is to facilitate the timely adjudication of all matters in Divisional Court in a cost-effective and proportional manner.

2. When the court is contacted by a party pursuant to this Notice to the Profession, the party's request is subject to triage by an Administrative Judge of the Divisional Court or a designate. At that stage, the triage judge may give directions on matters such as (a) jurisdiction, (b) timeliness of the matter, (c) prematurity (d) identification of proper parties to the matter, and (e) any other issue that, in the opinion of the triage judge, ought to be addressed with the parties prior to making a scheduling direction. This part of the triage process does not preclude any party from raising preliminary issues with the court after the triage judge has given an initial direction.

3. Where no preliminary issues are identified by the court, the triage judge will give scheduling directions. Parties should raise any preliminary issues they have at the time they address the court's request for an agreed schedule from the parties.

4. Where the triage judge is of the opinion that a case management conference is required to address any issue, the triage judge may direct that such a conference be scheduled by staff. Case management conferences are held by telephone unless the triage judge directs otherwise. The triage judge is not seized of case management unless the triage judge directs otherwise.

5. Any timetable or deadline set through case management supersedes the deadlines set in the Rules of Civil Procedure.

D.8. — Motions for a Stay or Lifting a Stay Pending Appeal or Judicial Review

1. Except in a case of urgency, the court will not schedule or grant a stay or a motion to lift a stay prior to conducting triage and making an initial case management direction/order in accordance with this Notice to Profession. A party seeking a stay of all or part of an order should raise this issue with the court at the earliest opportunity, generally when first contacting the court to request a hearing.

2. Where a party is seeking a stay, that party is expected to agree to serve its materials and to participate in the hearing of the case as quickly as reasonably possible, to minimize the prejudice of any stay that may be granted. Where a party is responding to and opposing a motion for a stay, that party is expected to agree to prepare its responding materials and to participate in the hearing of the case as quickly as reasonably possible, to either obviate the need for a stay or to minimize the prejudice of granting or refusing a stay.

3. An Administrative Judge of the Divisional Court or a case management judge may grant or decline a motion for stay or to lift a stay by case management direction/order or may direct that a motion be brought for a stay or to lift a stay, on such schedule and terms as the judge considers just, and may take into account the parties' positions on scheduling the underlying case in

deciding what process to follow and whether to grant or lift a stay and, if a stay is granted or lifted, on what terms.

D.9. — Costs of Triage and Case Management

1. Unless the presiding judge orders otherwise, there shall be no costs associated with triage or case management in the Divisional Court. This principle is without prejudice to a party claiming costs in respect of the preparation of materials for use at the hearing of the underlying proceeding or step in the proceeding. For example, (a) an initial request to bring a case in Divisional Court will not ordinarily give rise to an award of costs, but the preparation of the Notice of Appeal or the Notice of Application provided to the court in support of the request is subject to a claim for costs in the underlying case; and (b) a request to bring a motion and/or a case management teleconference to consider and give directions in respect of the request to bring a motion will not ordinarily give rise to an award of costs, but the preparation of the Notice of Motion and/or other motion materials provided to the court in support of the request to bring the motion is subject to a claim for costs in the underlying motion.

D.10. — Release of Digital Court Recordings or Transcripts

1. Digital court recordings or transcripts of case management teleconferences are generally not available, and where they may be available, cannot be obtained except with permission from the court in accordance with Part VI, C, of the *Consolidated Provincial Practice Direction*.

D.11. — Recording of Proceedings Not Permitted Without Leave

1. Under section 136 of the *Courts of Justice Act*, it is an offence for anyone to copy, record, publish, broadcast or disseminate a court hearing or any portion of it, including a hearing conducted over videoconference or teleconference, without leave of the Court. This prohibition includes screenshots.

D.L. Corbett and Favreau JJ.

Divisional Court Administrative Judges

February 18, 2021

Appendix A — Divisional Court CaseLines Naming Convention

Applicant

Factum — Applicant ABC Inc. — 01-JAN-2021

Application Record — Applicant ABC Inc. — 01-JAN-2021

Supplementary Application Record — Applicant ABC Inc. — 01-JAN-2021

Oral Argument Compendium — Applicant ABC Inc. — 01-JAN-2021

Book of Authorities — Applicant ABC Inc. — 01-JAN-2021

Transcript Brief — Applicant ABC Inc. — 01-JAN-2021

Exhibit Book — Applicant ABC Inc. — 01-JAN-2021

Counsel Slip — Applicant ABC Inc. — 01-JAN-2021

Cost Outline — Applicant ABC Inc. — 01-JAN-2021

Appellant

Factum — Appellant ABC Inc. — 01-JAN-2021

Appeal Book and Compendium — Appellant ABC Inc. — 01-JAN-2021

Oral Argument Compendium — Appellant ABC Inc. — 01-JAN-2021

Book of Authorities — Appellant ABC Inc. — 01-JAN-2021

Transcript Brief — Appellant ABC Inc. — 01-JAN-2021

Exhibit Book — Appellant ABC Inc. — 01-JAN-2021

Counsel Slip — Appellant ABC Inc. — 01-JAN-2021

Appellant's Cost Outline — Appellant ABC Inc. — 01-JAN-2021

Moving party

Factum — Moving Party ABC Inc. — 01-JAN-2021

Motion record — Moving Party ABC Inc. — 01-JAN-2021

Oral Argument Compendium — Moving Party ABC Inc. — 01-JAN-2021

Book of Authorities — Moving Party ABC Inc. — 01-JAN-2021

Counsel Slip — Moving Party ABC Inc. — 01-JAN-2021

Cost Outlines — Moving Party ABC Inc. — 01-JAN-2021

Tribunal

Record of Proceedings — ABC Board — 01-JAN-2021

Respondent

Factum — Respondent Smith — 01-JAN-2021

Responding Record — Respondent Smith — 01-JAN-2021

Supplementary Respondent Record — Respondent Smith — 01-JAN-2021

Responding Appeal Book and Compendium — Respondent Smith — 01-JAN-2021

Oral Argument Compendium — Respondent Smith — 01-JAN-2021

Book of Authorities — Respondent Smith — 01-JAN-2021

Transcript Brief — Respondent Smith — 01-JAN-2021

Exhibit Book — Respondent Smith — 01-JAN-2021

Counsel Slip — Respondent Smith — 01-JAN-2021

Cost Outline — Respondent Smith — 01-JAN-2021

Additional documents not specifically identified in this Appendix are to be named by analogy.

Ordering Transcripts

The process to order transcripts has been centralized and no longer involves communicating directly with the specific court reporter who was in court during the hearing in question. Instead, any party wishing to order a transcript may select any Authorized Court Transcriptionist (ACT) from the government's online register of ACTs and place the order with that individual. He or she then obtains a digital recording of the hearing in question and uses that to prepare the transcript. The ACT need not be located at or near the specific courthouse.

The same process can be used to ask a reporter for an estimate of the transcript cost.

The government website can be found at www.courttranscriptontario.ca.

The general rule is that the full transcript of the trial is required for appeal. By convention, opening and closing submissions and submissions on any mid-trial objections are not included unless specifically requested by the ordering party, although that convention is no longer consistently followed. Any doubt concerning what is or is not needed for appeal can be resolved by consulting the other parties and using the process for the Appellant's Certificate and Respondent's Certificate, or the Agreement Respecting Evidence, mandated by rule 61.05 of the *Rules of Civil Procedure*.

The cost of transcripts is fixed by regulation: see O.Reg. 94/14 under the *Administration of Justice Act*, R.S.O. 1990, c. A.6, reproduced above in Chapter 5 in the section on court fees.

Second Potential Appeal

A party who wishes to appeal further after the Divisional Court decides the appeal faces a limited prospect for further recourse. The only further appeal is for questions that are not questions of fact alone, and first requires that leave to appeal to the Court of Appeal be

sought and granted, on motion: *Courts of Justice Act* section 6(1)(a). Such a motion for leave to appeal must be launched within 15 days after the date of the Divisional Court's decision: *Rules of Civil Procedure*, rule 61.03.1(3).

Leave for a second appeal is rarely granted. The strong general rule is that where there is a right of appeal, there is only one appeal. In practical terms, it is very rare for a Small Claims Court case to go to the Court of Appeal.

Note that the Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario was amended effective March 1, 2017. The amended practice direction may be viewed on the court's website at <http://www.ontariocourts.on.ca>.

A decision by the Court of Appeal is usually the last word in any civil case. A potential further appeal to the Supreme Court of Canada requires that leave to appeal to that court first be granted, and such leave is granted in fewer than 1 in 20 civil cases in which leave is sought.

Judicial Review of Small Claims Court Decisions?

Judicial review under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, is generally used to review the decisions of administrative tribunals. Under that Act, the concept of what may be judicially reviewed is described as a "statutory power of decision." Section 1 defines that concept as including "the powers of an inferior court." Does judicial review lie from decisions of the Small Claims Court?

Recently it was held that interlocutory orders of the Small Claims Court could be the subject of judicial review, but only as to jurisdictional error or breach of natural justice.

In *Peck v. Residential Property Management Inc.*, 2009 CarswellOnt 4330, [2009] O.J. No. 3064 (Ont. Div. Ct.), it was held that orders of the Small Claims Court, including interlocutory orders of the court, could be the subject of judicial review under the *Judicial Review Procedure Act*. However, the court expressed its reluctance to interfere with an order of the Small Claims Court "unless it is an order made without jurisdiction or in breach of principles of natural justice." The court will decline to interfere with interlocutory orders where the application is in essence an appeal by a different name. In that case the application, which was to review a decision setting aside a default judgment, was dismissed. That decision was recently applied by a differently-constituted panel in *Pardar v. McKoy*, 2011 ONSC 2549, 2011 CarswellOnt 3059, [2011] O.J. No. 2092 (Ont. Div. Ct.).

The correctness of *Peck*, *supra*, may have been questionable in light of authorities holding that the Divisional Court cannot judicially review other branches or officers of the Superior Court of Justice: see *Connie Steel Products Ltd. v. Greater National Building Corp.*, 1977 CarswellOnt 231, 3 C.P.C. 327, [1977] O.J. No. 668 (Ont. Div. Ct.); *Canada Building Materials Co. v. London (City)*, 1978 CarswellOnt 365, 22 O.R. (2d) 98, 13 C.P.C. 184, 92 D.L.R. (3d) 249 (Ont. Div. Ct.); *Butcher v. Sun Media Corp.* (November 21, 2001), Doc. 01-DV-000608, [2001] O.J. No. 4702 (Ont. Div. Ct.); *Schorr v. Selkirk*, 1977 CarswellOnt 190, 15 O.R. (2d) 37, 13 C.P.C. 184, 2 C.P.C. 249 (Ont. Div. Ct.). None of those authorities appears to have been considered in *Peck*, *supra*, or *Pardar*, *supra*.

Those authorities were however addressed by Nordheimer J. writing for the panel in *Thyssenkrupp Elevator (Canada) Ltd. v. 1147335 Ontario Inc.*, 2012 ONSC 4139, 2012 CarswellOnt 9698, 43 Admin. L.R. (5th) 61, 18 C.L.R. (4th) 82, 295 O.A.C. 71, [2012] O.J. No. 3674 (Ont. Div. Ct.). The court's conclusion was that it did have jurisdiction to judicially review the interlocutory decision of a master, despite the absence of a statutory right of appeal, on the narrow grounds of jurisdictional error or natural justice. There appears to be no principled basis to hold that result inapplicable to the Small Claims Court context. While it will be rare for any Small Claims Court litigant to be willing to undertake judicial review

proceedings, that remedy may be available based on jurisdictional error or natural justice grounds.

A separate but related question is whether orders of the Small Claims Court may be challenged by originating application to the Superior Court of Justice. There appear to be two cases in which such applications have been entertained.

In *Mayo v. Veenstra*, 2003 CarswellOnt 9, 63 O.R. (3d) 194 (Ont. S.C.J.), the applicant alleged jurisdictional error. A deputy judge hearing a motion to set aside a default judgment had ordered that the defendant submit to cross-examination on her motion affidavit, failing which her motion would be dismissed. The applications judge held that the deputy judge had no jurisdiction to order cross-examination, which is not part of the court's motion procedures. In *Gulati v. Husain*, 2011 ONSC 706, 2011 CarswellOnt 407, [2011] O.J. No. 384 (Ont. S.C.J.), the applicant alleged a breach of natural justice. A deputy judge had refused an adjournment of a motion to set aside default judgment, gave no reasons for refusing the adjournment, and granted the motion to set aside the default judgment without hearing submissions. The applications judge set aside the deputy judge's order and remitted the matter for hearing by a different deputy judge. The applications judge acknowledged but did not answer the question whether the matter ought to be heard by the Divisional Court.

The effect of the above-noted cases is that in exceptional circumstances involving jurisdictional error or breach of natural justice, decisions of the Small Claims Court, including interlocutory decisions, may be judicially reviewed by the Divisional Court. Recent cases confirm that the Divisional Court is unreceptive to judicial review applications that do not fall within the narrow grounds of alleged jurisdictional error or breach of natural justice. In *Stamm Investments Ltd. v. Ryan*, [2016] O.J. No. 5275 (Ont. Div. Ct.), the plaintiff's claim was for less than the minimum appealable limit. After the claim was dismissed the plaintiff brought an application for judicial review of that decision. The Divisional Court dismissed the application as frivolous, finding that it was an indirect attempt to appeal where no right of appeal existed. See also *1439957 Ontario Inc. v. Benkoe*, [2017] O.J. No. 4369 (Ont. Div. Ct.); *Goodman v. Florin*, [2017] O.J. No. 3464 (Ont. Div. Ct.).

CHAPTER 7 — GLOSSARY AND TABLE OF CASES

Glossary of Legal Terms

Glossary

absentee — A person who has disappeared or whose whereabouts are unknown.

accountant of the Superior Court of Justice — The person who has the authority to accept monies that are paid into the Superior Court, except for proceedings under the *Landlord and Tenant Act* or the *Repair and Storage Lien Act* or actions in Small Claims Court.

action — A legal proceeding in a civil case.

act of bankruptcy — An act committed by a debtor as defined under the *Bankruptcy and Insolvency Act*, *e.g.*, a debtor ceases to meet his liabilities as they generally become due. A creditor with a provable claim of $1,000 and over may file a petition for a receiving order if the debtor has committed such an act within the six months preceding the filing of the petition.

actus reus — Proof that a criminal act has occurred, the requirement of a guilty mind.

ad hoc — For this (special) purpose.

ad idem — At one.

adjournment — court approved postponement of a hearing to a future date.

adjudication — Giving or pronouncing a judgment.

admissible — Evidence which can be legally and properly introduced at a trial.

adversary proceeding — One having opposing, contested parties.

adversary system — The trial method used based on the belief that truth can best be determined by giving opposing parties full opportunity to present and establish their evidence, and to test the evidence presented by cross-examination.

advocates — A lawyer, appearing in a court of law.

affidavit — A written statement or declaration of facts that are sworn or affirmed to be true.

affidavit for jurisdiction — a plaintiff's sworn or affirmed written statement that he or she filed the claim:

- In the territorial division where the cause of action arose (*i.e.*, where the event took place or problem occurred);
- At the court in the territorial division in which the defendant lives or carries on business (if there are several defendants, then it can be the court in the territorial division in which any one of them lives or carries on business); or
- At the court's place of sitting that is nearest to the place where the defendant lives or carries on business (if there are several defendants, then it can be the court nearest to the place in which any one of them lives or carries on business).

(Court addresses and phone numbers can be found online at www.ontario.ca/attorneygeneral.)

affidavit of service — An affidavit certifying that a document has been served on a party.

affirmation — A solemn declaration made by a person to tell the truth. Lying in an affirmation is perjury, a criminal offence.

alternative dispute resolution — Resolving conflict through means other than going to court. Examples of alternative dispute resolution include: arbitration, mediation, and collaborative family law.

arbitration — A process where a neutral third party, selected by the disputing parties, makes a decision on the issue in dispute.

collaborative family law — A process where the parties and lawyers formally agree to negotiate a resolution of the issues in dispute through a series of meetings, without going to court.

mediation — A process where a neutral third party (mediator), selected by the disputing parties, assists parties to reach agreement on issues in dispute.

amicus curiae — Latin for "friend of the court." A lawyer who assists the court during the course of a hearing, to represent a position of interest, usually at the court's request.

answer — A response to an allegation or an application.

appeal — A request by the losing party in a legal action that the order or judgment be reviewed by a higher court.

appeal period — The time limit within which one can appeal.

appellant — A person who brings an appeal. The word "appellant" may refer to either party from a "lower" proceeding (*e.g.*, plaintiff or defendant, applicant, or respondent), depending on who appealed the decision.

application —

1. The commencement of a proceeding in a court by way of filing the appropriate court form.
2. A request made to the court.

arrears — Money that is owed to a party under a court order or agreement, but has not been paid.

assessment —

1. The determination of the rate or amount of something. For example, damages or a fine imposed.
2. In civil cases, a determination of the capacity of an individual to manage property, to make personal care decisions, or to properly retain and instruct counsel.

solicitor-client assessment — A hearing where an assessment officer reviews the amount of a lawyer's bill.

capacity assessment — A determination by a capacity assessor, or the court, as to a person's ability to manage property, make personal care decisions, or to properly retain and instruct counsel.

assignment in bankruptcy — A voluntary assignment by an insolvent person of all of his property to a trustee for the general benefit of creditors.

bench — The seat occupied by the judge or, more broadly, the court itself.

bona fide — In good faith.

burden of proof — In the law of evidence, the necessity or duty of proving facts in dispute raised between the parties in an action. The responsibility of proving a point. For example, in a civil case the burden of proof rests with the plaintiff, who establish his or her case by such standards of proof as on the balance of probabilities.

case law — Law based on previous decisions.

causa causans — Causing, cause.

cause of action — The fact or facts which give a person the legal right to begin a lawsuit.

certiorari — A means of getting an appellate court to review a lower court's decision. An order requiring the lower court to convey the record of the case to the appellate court and to certify it as accurate and complete. If an appellate court grants a writ of certiorari, it agrees to take the appeal.

citation — A reference to a source of legal authority.

civil action — Non-criminal cases in which one private individual or business sues another for redress of private or civil rights.

claim — Demand for money or personal property owing to the plaintiff by the defendant.

claim form — The form used by the party who is suing or making the claim to start the action. Form 7A.

claimant or plaintiff — Party who is suing or making the claim.

clerk — The court official to whom certain powers and duties are given by law. These powers and duties may be exercised or performed by one or more staff in the court office.

common law — Law arising from tradition and judicial decisions rather than from laws passed by legislatures. Also called case law.

compensation — A sum of money paid to provide for loss, breakage, hardship, inconvenience, or personal injury.

consensus (ad idem) — Agreement (in the same terms).

consolidation order — A process permitting a debtor against whom there is more than one Small Claims Court judgment to combine the judgments under one order which can be paid by installments.

contempt of court — An "offence" that can lead to a fine and even imprisonment because of a lack of respect or obedience by an individual in a court of law.

contra — Against.

contra proferentum — Against the proferror (*i.e.*, one who prepared a document).

contributory negligence — A legal doctrine that says that if the plaintiff in a civil action for negligence is also negligent, he or she cannot recover damages from the defendant for the defendant's negligence depending, of course, on degree.

corroborating evidence — Supplementary evidence that tends to strengthen or confirm the initial evidence.

court costs — The expenses of bringing or defending a lawsuit other than lawyer's fees. An amount of money may be awarded to the successful party (and recoverable from the losing party) as reimbursement for court costs.

creditor — One to whom a debt is owed, or in insolvency matters, a person having a claim provable under the *Bankruptcy and Insolvency Act*.

damages — Money awarded by a court to a person injured by the unlawful act or negligence of another.

debtor — Party against whom a judgment for the payment or recovery of money may be enforced.

decision — The judgment reached or given by a court of law.

de facto — In fact, that is, actually occurring although not officially sanctioned.

default — A failure to respond to a lawsuit within a specified time.

default judgment — A document signed by a Clerk for relief claimed against a defendant who has not (1) replied to a claim, (2) disputed a claim, or (3) failed to maintain offered payments.

defence — A dispute or reply to the claim (in Small Claims Court, it may also mean a request for time to pay the debt).

defence form — The form used by the party who is being sued to dispute or reply to a claim. Form 9A.

defendant — Party who is being sued (the one against whom the claim is made).

defendant's claim — The process by which a defendant initiates a claim against a plaintiff or against any other person related to or arising from the plaintiff's claim. This claim is brought in the same file as the plaintiff's claim. Form 10A.

de jure — In law, that is, occurring as a result of official action.

de novo — Hearing or trying a matter anew, as if it had not been heard or tried previously.

deponent — A person making a statement under oath.

discovery — The pre-trial process by which one party discovers the evidence that will be relied upon in a trial by the opposing party.

dismissal — The termination of a lawsuit.

dissent — An appellate court's opinion of reasons setting forth the minority view and outlining the disagreement of one or more judges with the majority decision.

docket — A list of cases to be heard by a court.

due process — The right of all persons to receive the guarantees and safeguards of the law and the judicial process. Includes such requirements as adequate notice, the right to counsel, the right to remain silent, to a speedy and public trial, to an impartial jury, and to confront and secure witnesses.

eiusdem generis — Of the same class.

en banc All judges of a court sitting together. Often appellate courts hear cases in panels of three judges. If a case is heard by the full court, it is heard en banc.

endorsement record — a document on which a judge makes a written judgment or court order.

enforcement — The process available to the creditor to help in the collection of money or property owed to the creditor. For example, Writ of Seizure and Sale of Land or Personal Property, Garnishment, Notice of Examination.

equity — Generally, justice or fairness. Historically, equity refers to a separate body of law developed in England in reaction to the inability of the common-law courts, in their strict adherence to rigid writs and forms of action, to consider or provide a remedy for every injury. The principle of this jurisprudence is that equity will find a way to achieve a lawful result when legal procedure is inadequate.

et al — And others.

ex parte — On behalf only of one party without notice to any other party.

ex post facto — After the fact.

exhibit — A document or other article introduced as evidence during a trial or hearing.

factum — A bound document containing a concise summary of facts, the law, and the arguments made in support of, or in response to, an appeal.

garnishee — Party, named in the notice of garnishment, who the creditor believes owes a debt to the debtor, for example, a bank, employer or company who owes the debtor money.

garnishment — A legal process whereby a creditor requires a third party to turn over to the creditor a debtor's property such as wages or bank account.

gavel — A small mallet used to signal for attention. One of the most famous symbols of the judiciary, but ironically, not actually used in courtrooms.

grounds — The reasons or basis upon which the appellant claims the appeal should be allowed.

hearsay — A statement or document made by someone who is not in court.

hearing — Proceedings before a court.

ibid. — In the same place.

idem (or id.) — The same.

in camera — In chambers, or in private. A hearing in camera may take place in the judge's office outside of the presence of the jury and the public.

in loco parentis — In place of a parent, someone charged with the same rights, duties, and responsibilities.

in re — In the matter (of).

infra — Below, signifying a cross reference to a subsequent part of the document or chapter.

inter alia — Among other things.

inter alios — Among other persons.

inter vires — Within the powers.

injunction — An order of the court requiring a party to refrain or cease from doing a particular act or taking certain actions. A preliminary injunction may be granted provisionally, until a full hearing can be held to determine if it should be made permanent.

issue — The clerk dates and signs completed documents.

joint and several liability — The liability of more than one individual that may be enforced against them all by a joint action or against any one of them by an individual action.

judgment — A formal decision issued by a court on a matter under its consideration.

judicial review — Authority of a court to review the official actions of a court.

jurisdiction — The power of the court to hear a particular matter. The *Courts of Justice Act* provides for the appellate jurisdiction of the Divisional Court. However, provisions of other statutes governing particular litigation may modify the general provisions of the *Courts of Justice Act*.

justiciable — Issues and claims properly examined in court.

leading question — A question which suggests the answer desired of the witness. May be asked on cross-examination.

liable — Legally responsible for.

limitations — Statutes setting out times within which actions must be brought.

liquidated claim — a "liquidated" claim is a claim for a sum of money due under an express agreement where the amount is fixed and does not depend on an assessment by the court.

litigant — A party to a lawsuit.

litigation — A case, controversy, or lawsuit between two or more parties for the purpose of enforcing an alleged right or recovering money damages for a breach of duty.

litigation guardian — A person who acts on behalf of a minor or a mentally incompetent person in a lawsuit. Where the plaintiff or defendant is a minor, the litigation guardian will

normally be a parent. However, the litigation guardian must have no interest in the lawsuit that conflicts with the interest of the person he or she represents.

mala fides — Bad faith.

mandamus — A writ issued by a court ordering or commending a public official to perform an act.

mediation — Process taking place outside a court to resolve a dispute.

mens rea — Guilty mind.

motion — A process used to make a request to a judge for an order.

mutatis mutandis — With necessary changes.

negligence — Failure to exercise that degree of care that a reasonable person would exercise under the same circumstances.

notice — Formal notification of a legal proceeding to the party that has been sued in a civil case.

notice of motion — Written notice by one party to the other party in a lawsuit about an intention to argue a particular issue before a judge.

notice of trial — A formal notice issued by the court to all parties in a claim stating the date, time and place at which trial or pre-trial is to take place.

novus actus interveniens — New act intervening (*i.e.*, to break a chain of causation).

nunc pro tunc — Now for then (*i.e.*, retroactively).

obiter — By the way.

obiter dictum — (plural dicta) Thing said by the way.

onus — Burden.

open court — The vast majority of hearings are held in open court, with members of the public free to enter the courtroom and observe proceedings. Some cases may be held "in camera," which means "in the chamber" or in private.

order — a written decision made by a judge during the course of a proceeding. An order made by a judge resolving the dispute is also called a judgment. Generally, the decision is documented on an endorsement record. You can ask for a copy of an endorsement record at the court office.

parens patriae — Father of the country.

pari passu — In equal step (*i.e.*, equally).

party — Any person, corporation, unincorporated organization, sole proprietorship or partnership named as a plaintiff or a defendant in a Small Claims Court action.

pendente lite — The lawsuit pending.

per — By.

per se — By itself.

person — Includes a natural person (human being), a partnership, and a corporation that is recognized by law as having the same rights and duties as a natural person.

plaintiff — The person who brings a claim against another person, company or organization.

plaintiff's claim — The process by which a plaintiff/claimant starts a suit against one or more defendants. Started by completing and filing Form 7A.

precedent — A previously decided case which may guide the decision of future cases.

pre-trial conference — An informal hearing held before a judge or designated court official, to attempt to settle the dispute before the actual trial.

pre-trial hearing — A meeting between the judge and parties or their lawyers involved in a lawsuit to narrow the issues, agree on what will be presented at the trial, and to make a further effort to settle the case without a trial.

prima facie — At first sight, fact presumed to be true unless disproved by evidence to the contrary.

privilege — The right of a party to refuse to disclose a document or produce a document or to refuse to answer questions on the ground of some special interest recognized by law.

proximate cause — The act which caused an event to occur. A person generally is liable only if an injury was proximately caused by his or her action or his or her failure to act when he or she had a duty to act.

ratio decidendi — Reason for deciding.

reasonable man — A phrase used to denote a hypothetical person who exercises qualities of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interest and the interests of others. Thus, the test of negligence is based on either a failure to do something that a reasonable person, guided by considerations that ordinarily regulate conduct, would do, or on the doing of something that a reasonable and prudent person would not do.

referee — Court official who may hear pre-trial hearings. In many cases, he/she assists in working out a scheme of debtor's payments to the creditor and may assist in the obtaining of consolidation orders.

Regina — Queen.

relief — What you are asking the court to do.

remedy — Legal or judicial means by which a right or privilege is enforced or the violation of a right or privilege is prevented,redressed, or compensated.

replevin — An action for the recovery of a possession that has been wrongfully taken.

res — Thing, matter, substance.

res gestae — Things done, facts surrounding an incident.

res judicata — Matter adjudicated.

respondent — A person who *responds* to an appeal. In an appeal, the word "respondent" may refer to either party from the lower proceeding (*e.g.*, plaintiff of defendant, applicant or respondent), depending on who appealed the decision.

respondent superior — Theory whereby a master is held liable for the wrongful acts of his or her servant or employee if the servant or employee is acting within the scope of his or her employment.

Rex — King.

self defence — Claim that an act otherwise criminal was legally justifiable.

service/serving — Getting a document to another person in the way the rules of court require or allow.

set off — A debt the plaintiff owes the defendant which may be deducted from the amount the court finds the plaintiff is owed.

settlement — An agreement between the parties disposing of a lawsuit.

sine die — Without a day (*i.e.*, indefinitely).

sine qua non — Without which not (*i.e.*, essential).

stare decisis — The doctrine that courts will follow principles of law laid down in previous cases. To observe precedent.

status quo (ante) — The original state.

statutory law — Law enacted by legislatures as distinguished from case law or common law.

stay — An order of the court halting a judicial proceeding.

sub judice — Before the courts.

summons to witness — A legal document from the court requiring a witness to appear in court at a specific time.

supra — Above, signifying cross reference to an earlier part of the document or chapter.

tort — A theory of negligence involving an injury or wrong committed on the person or property of another. A tort is an infringement of the rights of an individual, not founded on contract.There must be a legal duty to the person harmed. There must be a breach of that duty and there must be damage to the person wronged as the proximate result of the breach.

uberrimae fidei — The utmost good faith.

ultra vires — Beyond the powers.

unliquidated..... — A nonspecific dollar amount which requires some form of proof to permit a judge to come to a decision, *e.g.*, repair of a motor vehicle.

verbatim — Word for word.

versus — Against.

viva voce — With living voice (*i.e.*, orally).

volenti non fit injuria — Voluntary assumption of risk of unjury.

writ — Written instructions to a court officer to enforce a court order.

Note to Production: The entries on pages 931-933 have been numbered as [inserts], and then noted within the Table of Cases.

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