Civil Litigation

Small Claims rule changes create uneven playing field

Amendments to the Small Claims Court rules have created different standards for self-represented litigants and for parties represented by counsel, Toronto civil litigator Sarah O'Connor writes in *Lawyers Weekly*.

"The Small Claims Court can be a frustrating venue for a party represented by counsel," O'Connor writes in the legal publication.

She details two experiences in the article, one in which she received an order from the Small Claims Court that her client's defence would be struck if a "proper defence" was not filed. She notes the original defence had stated that the plaintiff corporation didn't exist — with NUANS searches attached — and the action could not be sustained.

"This court order was the result of amended Small Claims rules that came into effect July 1 last year. Under the new rules, the court may make an order on its own initiative or if any party to the action files a request asking the court to make such an order to stay or dismiss an action," writes the principal of O'Connor Richardson Professional Corporation.

"However, the court in this action also added the four other corporations in the NUANS search as plaintiffs to the claim. Under either the original or amended rules, there is no authority for the court to add parties to a claim without notice," O'Connor writes in the legal publication.

"Our client incurred additional costs because we then had to inquire why those new plaintiffs were suing our client."

O'Connor writes that the amendments to the Small Claims rules — such as rule 12.02 (3), the general power of the court to stay or dismiss actions and also that defendants are now responsible for serving their defence, instead of the court forwarding a copy to the plaintiff — are meant to lessen the burden on the court and reduce the backlog of cases.

"The initiative behind these rule changes of reducing wait times and congestion in the court and shortening and simplifying proceedings is commendable," she writes. "But it appears in practice that the burden rests mainly with parties who are represented by counsel, who are being held to a higher standard than self-represented litigants, or even litigants represented by paralegals."

She writes that the case backlog at Small Claims Court started when the monetary jurisdiction was raised from $10,000 to $25,000, which led to more people seeking out the assistance of lawyers.

"With the amendments in the rules, the court has attempted to save valuable court time for matters with merit. However, it seems that parties represented by counsel are held to a higher standard than the average person in proving the merit and validity of their claim. While not unreasonable, the rules should be applied consistently."

One possible solution, O'Connor writes, would be to split Small Claims into two courts: a simplified version and a regular court similar to Superior Court. The simplified court could deal with claims of $15,000 or less, with the parties self-represented in court.

"The rules would be applied as previously, where they are suggestions and the parties have indulgences from the court if not properly followed. This wouldn't stop them from seeking out either a paralegal or a lawyer to draft the pleadings or give advice," she writes in *Lawyers Weekly*.

"The regular Small Claims Court would deal with matters between $15,000 and $25,000 (or even bump it up to $30,000) and have corporate parties requiring a representative — as in Superior Court, this could either be counsel or a paralegal. At this level the rules would be applied consistently, with minor indulgences if they aren't followed."

Under the current system, O'Connor writes, it may be best for parties to pay lawyers on an ad hoc basis — using a lawyer to draft the pleadings, research case law and prepare the arguments for trial — but remain a self-represented litigant.