

# In Defence of Small Claims Court



On April 1, 2006 the financial limit for the Small Claims Court increased from \$15,000 to \$25,000. The increase brought concerns that the new limits would enable “deep pocketed” corporations and their lawyers to oppress “the little guy”, who could not afford legal representation.<sup>1</sup> Coupled with these concerns is a tendency on the part of members of the Bar as well as the Supreme Court to want to impose more formal procedures on the Small Claims Court, perhaps on the reasoning that a financial limit that approaches the industrial average wage requires adoption of more formal procedures.<sup>2</sup> Finally, there have been suggestions that the Legislature ought to fund the recording of hearings so that judges on appeal could evaluate the fairness of what took place at a hearing.

I suggest here that these concerns are misplaced. Increases in the financial jurisdiction of the Small Claims Court, in fact, help right the balance between “deep pocketed” corporations and “the little guy”. Attempts to introduce more procedure would only *decrease* access to justice (both substantive and procedural). And finally, money spent on recording hearings would be better spent on other changes to the Small Claims Court that would better improve the public’s access to justice.

What characterizes the procedure and practice of dispute resolution in the Small Claims Court? There is a brief description of the claim, and then the Court assigns a date for the hearing at the time the claim is issued – a date that is usually only a few months (at most) away. There is no pre-hearing disclosure or discovery. There are no default judgments. The rules of evidence at the hearing are relaxed.<sup>3</sup> There are no formal rules of procedure, other than the overarching requirement that claims “are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.”<sup>4</sup> And finally, there are no party and party costs.

This system – which resembles that of labour arbitrations – provides

better access to justice for the poor, the working class,

and indeed for larger segments of the middle class than the complex formality of the Supreme Court. Why? Because it dispenses with much that is unnecessary, employs a “procedure” that minimizes the cost of legal representation (if it is chosen), encourages its most productive use (when it is employed), and finally, levels the playing field between represented and unrepresented parties in court.

One of the most obvious differences between the Small Claims Court and the Supreme Court is the former’s lack of disclosure and discovery. The criticism that is sometimes leveled against such a system is that it constitutes “trial by ambush”. This analogy is misleading.

In a true ambush one side is taken totally by surprise by the other. In the scenario beloved by “B” movie directors, soldiers marching through a narrow defile are suddenly fired upon by attackers whose existence is revealed only with the first bullet. The presence of the attackers (and the fact that a battle is about to occur) comes as a complete surprise to the hapless victims.

Such a scenario hardly characterizes what happens when a dispute ends up in the Small Claims Court. Most lay litigants know what the other side will say and produce by way of documentation. They have been living the “case” (and fighting with the other side about it) as active participants, and have been phoning and meeting and writing letters and emails back and forth to each other for weeks if not months before they decided to sue. The documents they arrive in court with are the documents they have been exchanging from the start. They may be outraged at what the other side says, but they are not surprised.

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In short, pleadings, disclosure, and discovery are not necessary to enable adequate preparation for a hearing. Doing away with them enables the parties to have their hearing more quickly. It also means that the cost of legal representation, if it is chosen, is substantially less than would otherwise be the case. If delay and the expense of legal representation are barriers to justice, then the Small Claims Court's approach clearly lowers both for the lay public.

The way in which default proceedings are handled is another example of how the Small Claims Court protects "the poor" against "the rich." Default judgments in the Supreme Court are granted without any review of the claim to determine whether it has any merit. The process assumes that failure to appear or to file a defence represents an admission of liability. The assumption may be appropriate in theory, but in practice it fails to acknowledge that some defendants fail to defend because they lack the knowledge to know they have a defence, or the financial resources to mount one.

This is not the approach in the Small Claims Court. There is no "default" judgment. Adjudicators must be satisfied that a claim has merit before granting judgment, even if the defendant fails to file a defence, or to appear for the hearing.<sup>5</sup> The system thereby provides some procedural protection to those too poor or too ignorant to advance a meritorious defence – a protection that is not available in the Supreme Court.

Then there is the issue of party and party costs. Imagine a lay litigant in the Small Claims Court confronting a large corporation and its legal team, either as a claimant or as a defendant. They feel they have a good claim or defence. They cannot afford a lawyer, but believe that if they are heard by a neutral decision maker they will win. The only downside associated with loss in the Small Claims Court is either the filing fee (if they are a claimant), or having to pay a claim that in many cases they had at one point budgeted to pay.<sup>6</sup> In such a case the litigant presses forward to have his or her day in court.

The risks are different (and far more oppressive) in the Supreme Court. There the same lay litigant in the same case is told that he or she may have to pay a portion of the corporation's legal costs if they lose. Now the corporation's ability to pit a lawyer against an unrepresented litigant truly becomes oppressive. Now the fear of having to pay party and party costs can cow a litigant into giving up a meritorious claim or defence.

Finally, there is the fact that the Small Claims Court is the only forum that lay litigants have to enforce their rights under such pieces of consumer protection legislation as the *Consumer Protection Act* and the *Residential Tenancies Act*. Such legislation is rarely, if ever, considered in the Supreme Court. But the rights designed to be protected by them remain valueless if they cannot be enforced because enforcement would cost too much and take too long.

To conclude, extending the financial jurisdiction of the Small Claims Court in fact increases the lay public's access to justice. It makes it possible for ordinary people to get to court to enforce or protect their rights. It also enables them to "do it themselves", or to employ lawyers without bankrupting themselves in the process.

The suggestion that hearings ought to be transcribed is misguided. First, appeals from decisions in the Small Claims Court are based on questions of law or denials of natural justice, not on fact. Having transcripts would add nothing to the appeal. Second, there is the question of the cost of obtaining the transcript. For many people who find themselves in the Small Claims Court \$500 is "a lot of money". Expecting them to come up with the cost of a preparing and then copying a transcript would only erect a barrier to the appeal process. A far better use of Legislative time and money would be to improve the enforcement mechanisms of the Small Claims Court or make legal advice available to lay litigants.

Regarding the first point, lay litigants often experience difficulty enforcing their judgments. There is confusion and uncertainty over the extent of the Small Claims Court's ability to enforce its orders (for example, through a judgment debtor examination). To give lay people the right to sue in court but then deny them the ability to enforce their judgments is to deny them access to justice. Such confusion and uncertainty ought to be rectified.

Regarding the second point, for all the laudable informality of the Small Claims Court process, adjudicators are still required to make decisions based on "established principles of law". Those principles are not always understood by lay litigants. Providing a way to obtain legal advice on those principles, and the evidence necessary to satisfy them, would be a far more useful expenditure of public funds than the recording of proceedings. It would also reduce the barriers otherwise created by the lay public's ignorance of those "established principles". (I am not suggesting here that the public purse be used to fund legal *representation*; only that it fund the provision, say, of an hour's "free" advice.) ~~44~~

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#### FOOTNOTES:

- 1 See for example the comments in the Legislature of Kevin Deveaux and Graham Steele: *Hansard*, 20 Oct 2005; and of Michel Samson: *Hansard*, 31 Oct 2005.
- 2 My discussions with members of the bar; and see *Kemp v. Presceskey* 2006 NSSC 122; *Surette Battery Co. Ltd. v. McNutt* 2003 NSSC 6.
- 3 Section 28(1) of the *Small Claims Court Act* (the "Act").
- 4 Section 2 of the *Act*.
- 5 See sections 23(1)(b) and 23(3) of the *Act*.
- 6 I am thinking here of contract disputes, where the defendant had initially agreed to pay a contract price (and so had notionally budgeted for that expense) but only later disputed liability to pay because of a perceived breach of contract.