



Bob Aaron bob@aaron.ca

December 12, 2009

## Will cheaper access to justice mean more litigation?

With less than a month to go, the Ontario court system is in for one of its biggest shake-ups in recent memory.

Effective Jan. 1, 2010, the monetary jurisdiction of the Ontario Small Claims Court jumps from \$10,000 to \$25,000, and new streamlined rules will apply in Superior Court to all claims over that amount. The changes were recommended in 2007 by Justice Coulter Osborne, who was asked by the Ontario government to suggest improvements to the civil justice system.

The net result will be to provide wider and cheaper access to justice for all Ontarians. In the real estate field, I anticipate that unhappy parties to a transaction will be less hesitant to sue for damages. Lawyers will not be necessary for claims under \$25,000, and the cost of litigation for damages exceeding that amount should be much less expensive in future.

Whether the changes will result in a litigation explosion remains to be seen.

Some time ago, a *Toronto Star* series reported that the average three-day civil trial in Ontario Superior Court costs approximately \$60,000. Figuring in preparation, discoveries, and time in court, legal fees can easily reach \$10,000 per day of trial for each side. For most Ontarians, those costs are prohibitive and represent a significant incentive to refrain from suing.

In fact, lawsuits have become so expensive that one of my colleagues in the litigation bar once told me, "At my rates, I couldn't afford to hire myself."

In Small Claims Court, lawyers are not required, the costs to launch a lawsuit are cheaper than in the higher courts, and the procedure is much simpler.

With its new limit of \$25,000, plaintiffs with mid-level claims will be able to pursue their lawsuits without facing expensive legal fees. In addition, the losing party will not be exposed to the significant risk of having to pay much of the winner's legal costs for cases up to the new limit.

Plaintiffs with claims exceeding \$25,000 will have the option of suing in Small Claims Court, abandoning that portion of the claim that is over the limit, and proceeding to trial faster and at less cost and risk than in Superior Court.

The biggest change in court procedure, and the one most likely to affect real estate litigation, is the introduction of mandatory Simplified Procedure rules to all Superior Court claims between \$25,000 and \$100,000, and a streamlined process for claims exceeding \$100,000.

In a typical court case under the current rules, each party has to disclose to the other all documents "relating to" any matter in dispute. This often results in delivery of reams of material, much of it irrelevant. Starting in January, parties to the court case will only be required to disclose those documents actually "relevant to" any matter in issue, a much narrower definition. This should result in court cases with significantly fewer documents to review.

Next to the trial, the most expensive part of litigation is often the examination for discovery, where pre-trial examinations under oath sometimes drag on for days or weeks. The costs for the lawyers to conduct these examinations and the charge for transcripts can be prohibitive.

Under the new procedure, for all cases where the claim is for \$100,000 or less, each side in a court case will only be able to examine the other for a maximum of two hours. Where the amount involved exceeds \$100,000, each party will only be able to examine the other for a maximum of seven hours. For most cases, the end result is expected to be a significant savings in legal costs for both winners and losers, since the losing party has to make a significant even huge contribution to the winner's legal costs.

The new rules are being introduced with the intention of simplifying the litigation process and increasing access to justice by reducing the legal costs and time involved.

Only time will tell whether they will actually achieve those goals, or instead stimulate more litigation by those who were previously priced out of the market.