

## The Court of Appeal Weighs in on Representation Orders in Small Claims Court: *Kelava v. Spadacini*

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The Court of Appeal recently considered whether the Small Claims Court has jurisdiction to make a representation order and appoint a representative defendant for an unincorporated association.

The [Rights of Labour Act, R.S.O. 1990, c. R. 33](#) precludes a trade union from being named as a party to an action and requires that an action brought in violation of the Act be struck or dismissed. The proper way to sue a trade union in the Superior Court of Justice is to obtain a representation order pursuant to Rule 12.07 of the *Rules of Civil Procedure*, which states:

### PROCEEDING AGAINST REPRESENTATIVE DEFENDANT

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

[Kelava v. Spadacini \(2021 ONCA 428\)](#) considered whether the Small Claims Court had jurisdiction to make such an order, and, accordingly, whether it was even proper to sue an unincorporated association in Small Claims Court.

### Background

Dante Spadacini brought a wrongful termination claim in Small Claims Court against David Kelava and The United Brotherhood of Retail, Food, Industrial and Service Trades International Union (the “Union”), an unincorporated association. The monetary amount of Mr. Spadacini’s claim was within the jurisdiction of the Small Claims Court. The issue that ultimately took the parties to the Court of Appeal was whether the Small Claims Court had jurisdiction to appoint a representative defendant for an unincorporated association.

As a preliminary step in *Kelava*, a deputy judge of the Small Claims Court made an order in 2018 that the defendants to the action be amended to “David Kelava on his own behalf and on behalf of all members of the United Brotherhood of Retail, Food, Industrial Services Trades International Union” (the “Representation Order”).

Mr. Kelava and the Union brought an application for judicial review.

### Application for Judicial Review (Divisional Court)

Mr. Kelava and the Union took the position that the Small Claims Court had exceeded its jurisdiction in making the Representation Order. In the application, they sought an order quashing the Representation Order, a declaration that the Small Claims Court did not have jurisdiction to decide the action, and an order dismissing the action entirely.

The Divisional Court determined that the Deputy Judge of the Small Claims Court did not err in making the Representation Order because:

The Deputy Judge referenced Rule 1.03(2) of the *Rules of the Small Claims Court* (the “*Rules*”), which states:

#### Matters Not Covered in Rules

(2) 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.

The Deputy Judge relied on Rule 12.07 of the *Rules of Civil Procedure* and granted the Representation Order, noting that Mr. Kelava had already been named as a defendant.

The Divisional Court took the position that the *Rules* contain a “gap” and that the Small Claims Court has jurisdiction to fill the “gap” under Rule 1.03(2) by reference to the *Rules of Civil Procedure*.

#### Upheld on Appeal (Court of Appeal)

The Union was granted leave to appeal the Divisional Court’s decision.

#### *The Positions of the Parties*

The Union argued that the Divisional Court erroneously expanded the jurisdiction of the Small Claims Court. It argued that Rule 1.03(2) of the *Rules* can only be applied in order to refer to the *Rules of Civil Procedure* if there is a “gap” as opposed to an “omission” in the *Rules*. Here, the Union argued that there was an omission (something that is not addressed in the *Rules* at all) and not a gap (something that is covered inadequately by the *Rules*). In situations where there is an omission, the Union argued that there was no ability for the Small Claims Court to make reference to Rule 1.03(2) or to the *Rules of Civil Procedure*.

Mr. Spadacini argued that the *Rules* are clear and unambiguous in that the court may make directions and make orders when the *Rules* do not cover a matter adequately, which is what the Deputy Judge did.

#### *The Court of Appeal’s Analysis*

The Court of Appeal upheld the Deputy Judge and the decision of the Divisional Court, but did so for slightly different reasons than those articulated by the Divisional Court. The Court of Appeal determined that the Deputy Judge had the authority under the *Rules* to make the order without reference to the *Rules of Civil Procedure*, as the authority to make the Representation Order is found within the *Rules*.

The Court referred to Rule 1.03(1), which states:

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*.

The Court reiterated that the Small Claims Court embodies the foundations of access to justice – informality, affordability, timely resolution, accessibility for self-represented people and active judicial engagement.

In looking at Rule 1.03(2) again, the Court established that the *Rules* give broad discretion to the Small Claims Court:

- If the *Rules* do not directly address a matter, the court may give directions and make "any order that is just";
- In order to implement the order, the practice is to be decided "by analogy" to the *Rules*; and
- Then, "if the court considers it appropriate" the Small Claims Court *may* refer to the *Rules of Civil Procedure*.

The Court determined that the *Rules* provide the authority to make the Representation Order even without reference to the *Rules of Civil Procedure* for several reasons:

1. A plain reading of Rule 1.03(2) states that the Small Claims Court may give directions and make any order that is just.
2. With respect to pleadings, a liberal, non-technical approach should be taken to the pleadings in the Small Claims Court. The Small Claims Court has the power to grant necessary amendments to secure the just determination of the real matters in dispute.
3. If a matter is not adequately covered, the Small Claims Court is to decide the matter "by analogy" to other Small Claims Court rules. The objective is to emphasize the:

... just, most expeditious and least expensive process. It is inconsistent with this objective to require a litigant to endure the time, expense and delay of an application to the Superior Court only to obtain a representation order when the matter is within the monetary jurisdiction of the Small Claims Court.<sup>[1]</sup>

The Court also found that, though reference to the *Rules of Civil Procedure* was not necessary in this case, the Deputy Judge did not err in doing so as the *Rules* provided the Deputy Judge with authority to make the Representation Order.

The Court also considered whether the Small Claims Court had jurisdiction with respect to unincorporated associations. The Court found that there was no language in a statute that "marks a clear intent to exclude representative defendants from the court's jurisdiction. On the contrary, there is extensive language regarding the ability of the court to manage its process in a cost-effective way."<sup>[2]</sup>

### Something to Note

The focus of the Court of Appeal's decision was on the important role that Small Claims Court continues to play in the administration of justice by providing access to justice for self-represented parties in a timely and cost-effective manner. That said, is it interesting to note that the Representation Order introduced a three-year delay in *Kelava*. (The Representation Order was made on June 21, 2018 and the appeal decision was not released until June 17, 2021.) Further, cost awards totaling \$7,600 were made against the Union for the application for judicial review, motion for leave to appeal and the appeal. This amount is significant when you consider that the maximum amount claimed in the original Small Claims Court action cannot exceed \$35,000. Perhaps this precedent will at least assist with timely and cost-effective access to justice for future litigants.

<sup>[1]</sup> See para 23.

<sup>[2]</sup> See para 36.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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