MANITOBA LAW REFORM COMMISSION

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CHAPTER 1

INTRODUCTION

A. BACKGROUND

In 1983, the Commission issued a Report titled *The Structure of the Courts, Part II: The Adjudication of Smaller Claims*.[1] That Report formed the second part of the Commission's response to a request by the then Minister of Justice to enquire into certain matters pertaining to the structure and organization of trial courts in Manitoba.[2] It made a number of recommendations with respect to the system of adjudicating small claims in the Province. Some of those recommendations were implemented, but others were not.

In the fifteen years since the issuance of the Commission's Report, much has happened to change the landscape of civil litigation in general, and small claims adjudication in particular, in Manitoba. In accordance with the Commission's recommendations, the jurisdiction of the Small Claims Court was increased from $1,000 to $3,000, and later to $5,000; its jurisdiction was restricted by excluding certain types of actions; the rules of evidence were expressly relaxed; and costs awards were strictly limited.

At the same time, the cost of litigation in general has continued to rise; the value of claims brought in general has also continued to rise, in line with inflation;[3] there has been a movement across North America to extra-judicial means of settling disputes, such as mediation and arbitration; and significant overhauls of the small claims system have occurred in Ontario and British Columbia, among others.

The changes mentioned have spurred a number of initiatives to reform civil justice systems in Manitoba and elsewhere in Canada. In 1996, the Court of Queen's Bench, at the prompting of the Manitoba Bar Association, introduced Rule 20A, intended to streamline the procedure for smaller claims brought in that court, defined as disputes involving less than $50,000. Also in 1996, the Ontario Law Reform Commission undertook a comprehensive study of that province's judicial system, one component of which was a review of the province's system of small claims

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[1]Manitoba Law Reform Commission, *The Structure of the Courts; Part II: The Adjudication of Smaller Claims* (Report #55, 1983).

[2]The Commission's response to the first part of the request was a recommendation to amalgamate the Court of Queen's Bench and the County Courts of Manitoba; this recommendation was implemented by the Government of Manitoba shortly thereafter: Manitoba Law Reform Commission, *The Structure of the Courts; Part I: Amalgamation of the Court of Queen's Bench and the County Courts of Manitoba* (Report #52, 1982).

[3]Between 1986 and 1996, the CPI increased by 35.6%: Statistics Canada, CANSIM, Matrix 7463.

adjudication.[4] The Province of Manitoba commissioned a task force to review the system of civil justice in the province, and that task force's Report was received in October of 1996.[5] Finally, in February 1997, the Canadian Bar Association passed a resolution calling for substantial changes to the Canadian system of justice, many of which are directly relevant to the small claims system.[6]

In light of all these developments, the Commission decided that it was timely to revisit the small claims system in Manitoba with a view to determining whether further changes to the system were necessary or advisable, and whether some of the changes, recommended in 1983 but not implemented, were still desirable.

B. SMALL CLAIMS SYSTEMS

The system of small claims courts presently in place across North America originated in response to the perception that the existing civil litigation system was too complex, technical and expensive to afford ready access to wage earners and small businessmen.[7] In the 1960s and 1970s, the emphasis shifted somewhat, to allowing consumers redress for grievances against powerful commercial entities: the Small Claims Court was intended to be "characterized by speed, low cost, informality, self-representation, and an activist adjudicator".[8]

In its 1983 Report, the Commission identified the hallmarks of a small claims system as simplicity, accessibility and effectiveness.[9] *The Court of Queen's Bench Small Claims Practices Act*, which implemented that Report, states:

> The object and purpose of this Act is to provide for the determination of claims in a simple manner as expeditious, informal and inexpensive as possible commensurate with the matters at issue in each claim.[10]

The various objectives of the small claims court system can at times, however, be contradictory. The dilemma was well captured in a study paper prepared for the Ontario Law Reform Commission:

> No doubt providing better financing for legal services would address the public's

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[4]I. Ramsay, "Small Claims Courts: A Review", in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for The Civil Justice Review*, vol. 2 (1996) 489.

[5]*Manitoba Civil Justice Review Task Force Report* (1996).

[6]Canadian Bar Association, "Resolution 97-15-M: Systems of Civil Justice" (1997 Mid-Winter Meeting).

[7]M.A. Zuker, *Ontario Small Claims Court Practice* (7th ed., 1997) 3.

[8]S.C. McGuire and R.A. Macdonald, "Small Claims Court Cant" (1996), 34 Osgoode Hall L.J. 509 at 511.

[9]Manitoba Law Reform Commission, *supra* n. 1, at 5-6.

[10]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 1(3).

> concern with cost. Yet expanding the range of models for financing the cost of legal services will increase the amount of civil litigation undertaken. Unless the number of courtrooms and judges is augmented, one can predict that the judicial process will then be less, not more expeditious. By contrast, changing the relative cost to litigants of a lawsuit may enhance efficiency by reducing the demand for judicial dispute resolution and may also reduce the overall cost of maintaining a civil justice system, but it achieves these goals at the cost of access to the judicial process. As long [as] recourse to the courts is seen as the preferred mechanism for resolving civil disputes there are likely to be few improvements to the civil justice system that do not involve trading off cost as against expediency, or trading off cost to individual litigants as against cost to the public.[11]

The Commission, therefore, in undertaking this study, has borne in mind at all times the various factors that must be considered, and the various goals that the small claims system is intended to achieve. As stated in the original 1983 Report:

> This need to be mindful of the costs in administering small claims must be balanced against the objective of providing an accessible and effective court that is procedurally fair and governed by the rule of law. The ultimate goal in forming a small claims court therefore is to find the "point of equilibrium" between these somewhat countervailing factors.[12]

C. OUTLINE OF REPORT

This then establishes the framework within which this Report is set. Chapter 2 of the Report describes the existing small claims system in Manitoba in some detail, while Chapter 3 provides brief descriptions of the small claims systems in place in other Canadian jurisdictions. Chapter 4 discusses the various possible areas of reform that the Commission considered, along with the Commission's recommendations in each area. Finally, Chapter 5 contains a list of the Commission's recommendations for reform.

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[11] R.A. Macdonald, *Prospects for Civil Justice* (Executive Summary of Study Paper, Ontario Law Reform Commission, 1995) 6.

[12] Manitoba Law Reform Commission, *supra* n. 1, at 6.

D. ACKNOWLEDGEMENTS

The Commission wishes to thank Mr. Jonathan G. Penner, an independent researcher, who was retained to review the small claims systems in Manitoba and other jurisdictions and to assist in the preparation of this Report. We also wish to thank Mr. R. Wayne Cheale, Manager, Small Claims Court, who provided valuable information and statistics on the operations of the court.

CHAPTER 2

THE CURRENT SYSTEM IN MANITOBA

Before considering what changes, if any, ought to be made to Manitoba's small claims system, it is necessary to first understand the nature of the existing system. This Chapter will describe in some detail the current small claims system in Manitoba and how it has been working in practice.

A. JURISDICTION

The Court of Queen's Bench Small Claims Practices Act[1] establishes the small claims procedure for Manitoba and Rule 76 of the *Queen's Bench Rules*[2] establishes certain applicable rules. Essentially, the Small Claims Court is an adjunct of the Court of Queen's Bench, staffed by specialized registry personnel. The Rules, other than Rule 76, do not apply to proceedings under the Act.[3]

The Court has jurisdiction over all claims:

> (a) for an amount of money not exceeding $5,000, which may include general damages in an amount not exceeding $1,000.; [and]
> (b) for an assessment of liability arising from a motor vehicle accident in which the vehicle of the claimant is not damaged.[4]

A claimant may abandon any portion of a claim that is in excess of $5,000 in order to bring it within the court's jurisdiction. Statistics show that in 1996-97 53% of claims filed in the Winnipeg Small Claims Court involved amounts of $1,000 or less, and fully 85% involved amounts of $3,000 or less.[5]

The Court does not have jurisdiction over matters that fall within the exclusive authority of the Director of Residential Tenancies or the Residential Tenancies Commission under *The*

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[1]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285.

[2]*Queen's Bench Rules*, Man. Reg. 553/88, as amended.

[3]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 1(4).

[4]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 3(1).

[5]Memorandum from R.W. Cheale, Manager - Small Claims Court (October 14, 1997) at 3.

Residential Tenancies Act.[6] The Court is also not allowed to hear proceedings that involve, or are likely to require determination of questions relating to:

(a) the ownership of real property or an interest in real property;
(b) the interpretation or enforcement of a testamentary disposition;
(c) the administration of a trust or an estate;
(d) a matter appropriate to a family proceeding as defined in section 41 of The Court of Queen's Bench Act;[7]
(e) an allegation of malicious prosecution, false imprisonment or defamation; or
(f) an allegation of wrongdoing by a judge, magistrate or justice.[8]

B. PROCEDURE

A claimant begins a small claims action by filing with the Court Registry a simple statement setting out the particulars of the claim, including the amount of the claim and the identity of the defendant(s).[9] The registrar will set a date for the hearing of the claim, which must be within the next 60 days.[10] The claimant must then serve each defendant with a copy of the claim within 30 days[11] and file proof of service with the court. [12] Over the past five years, the average number of claims filed monthly in the Winnipeg Small Claims Court has varied between 452 and 563, or between 5,424 and 6,756 annually.[13]

A defendant may, but is not required to, respond to a claim by filing with the court a Notice of Intention to Appear, by which he or she can either dispute the claim or request time to

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[6] *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 3(2).

[7] [A] civil proceeding for the determination or variation of
(a) the family status of the parties,
(b) the custody, access or guardianship of infants,
(c) the obligation to provide support or the entitlement to division of property, as between spouses, former spouses or persons who are living or have lived together as husband and wife in the relationship commonly referred to as a common law marriage, or
(d) the obligation to provide support as between a parent and a child of the parent,
or a similar proceeding, whether based on statute law, common law or the inherent jurisdiction of the court, other than a proceeding by way of summary conviction, and includes a proceeding under or in respect of . . . [one of 17 enumerated statutes].

[8] *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 3(4).

[9] *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 6(1).

[10] *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 8.

[11] *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 6(1) and (3).

[12] *Queen's Bench Rules*, R. 76.03(2).

[13] Cheale, *supra* n. 5, at 2.

pay it.[14]

A defendant may also make a counterclaim against the claimant, by filing with the court and serving on the claimant the appropriate form.[15] If the counterclaim is for an amount not exceeding $5,000 and is not joined with a claim for any other relief, the counterclaim will be dealt with at the same time as the main claim.[16] If the counterclaim is for an amount exceeding $5,000, however, or is joined with a claim for another remedy, the hearing officer must adjourn the hearing of the claims and order the party making the counterclaim to initiate an action in the Court of Queen's Bench within 30 days.[17] Once the action is commenced in the Court of Queen's Bench, the small claims action is deemed to be discontinued.[18] If the hearing officer is persuaded that a defendant is entitled to claim contribution or indemnity from a person who is not already a party to the claim, he or she may permit the defendant to initiate third party proceedings against that person.[19] This procedure is rarely used; on average, only a single third party claim is filed in the Winnipeg Small Claims Court each month.[20]

There are no interlocutory proceedings in the court.[21]

It is not necessary for a claim to proceed to a hearing if the parties are able to settle it in advance. The Act provides that if the defendant consents to judgment, the claimant is entitled to costs in accordance with the Act,[22] while if the claim is withdrawn, the defendant is entitled to the disbursements he or she has incurred in defending the claim.[23] In practice, it would appear that somewhat fewer than half of all small claims are settled prior to the hearing.[24]

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[14]*Queen's Bench Rules,* R. 76.03(4) and (5).

[15]*Queen's Bench Rules*, R. 76.03(6).

[16]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 4.

[17]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 5(1).

[18]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 5(2).

[19]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 9(2).

[20]Cheale, *supra* n. 5, at 2.

[21]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 6(4).

[22]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 19(3).

[23]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 19(1).

[24]Cheale, *supra* n. 5, at 2. In the first 8 months of 1997, for example, an average of 452 small claims were filed, but only 247 Certificates of Decision were issued monthly; in 1996, the comparable figures were 520 and 340.

C. THE HEARING

Claims brought under the Act are heard by deputy registrars of the Court of Queen's Bench, who are known as "hearing officers". Some of the hearing officers in the court do not have legal training, but have experience in the Registry of either the court itself or the Court of Queen's Bench.

The Act provides that a claim may be dealt with in a summary manner, and the hearing officer may conduct the hearing in such manner as he or she deems appropriate in the circumstances of the case to effect an expeditious and inexpensive determination of the claim.[25]

Witnesses in a hearing are to give their evidence under oath or affirmation, but no decision can be set aside solely because the rules of evidence have not been followed.[26]

Unlike the statutes of many other jurisdictions, the Act does not specify to what extent claimants may or may not be represented by counsel or agents. The Court of Appeal recently held that a corporation was not entitled to be represented by a non-lawyer, other than a duly authorized officer, on a small claims appeal to that court,[27] but otherwise the only applicable rules are those found in *The Law Society Act*.[28] That Act makes it an offence for any person to "act as a barrister or solicitor in any superior or inferior court of civil or criminal jurisdiction" unless he or she has been licensed to practise by the Law Society[29] or is an articling or otherwise properly supervised student-at-law.[30] Thus litigants, unless they represent themselves, are only entitled to be represented at a small claims hearing by a lawyer or properly supervised law student. Corporations are also entitled to be represented by a duly authorized officer.[31]

Uncontested matters are dealt with by the hearing officer presiding over the small claims docket court. Contested matters are sent to be heard by hearing officers in other courtrooms. The practice of the court is to have matters in which parties are represented by counsel heard before other matters. The average hearing lasts approximately an hour,[32] and is almost always followed immediately by a decision by the hearing officer. Only in about three per cent of cases does the

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[25]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 1(4).

[26]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 10(3). See, *e.g., Osprey Vitesse Courier Services Inc.* v. *Martel* (1996), 110 Man. R. (2d) 318 (C.A.).

[27]*2272539 Manitoba Ltd.* v. *Manitoba (Liquor Control Commission)* (1996), 139 D.L.R. (4th) 9 (C.A.).

[28]*The Law Society Act*, C.C.S.M. c. L100.

[29]*The Law Society Act*, C.C.S.M. c. L100, s. 56(1).

[30]*The Law Society Act*, C.C.S.M. c. L100, s. 57; *Rules of the Law Society of Manitoba*, R. 104.1(g)(iv).

[31]*54129 Manitoba Ltd.* v. *MacGillivray*, [1989] 5 W.W.R. 365 (Q.B.); leave to appeal dismissed, [1990] 1 W.W.R. 575 (C.A.).

[32]Cheale, s*upra* n. 5, at 16.

hearing officer reserve his or her judgment and deliver it at a later date.[33]

If a defendant (or his or her representative) does not appear at a hearing, the hearing officer may award the claimant default judgment against that defendant.[34] Where the claimant fails to appear, the hearing officer may either dismiss the claim or adjourn the hearing.[35] If a defendant who has brought a counterclaim appears, but the claimant does not, the hearing officer may give default judgment on the counterclaim.[36] In practice, the majority of small claims that proceed to a hearing are disposed of by default: since 1992, an average of 201 certificates of decision have been obtained by default per month, out of a total average of 334 certificates of decision issued.[37]

The hearing officer may award costs against an unsuccessful party, which are not to exceed $100 plus reasonable disbursements except in "exceptional circumstances".[38] What constitutes such circumstances has been left very much up to the individual hearing officer.

Following a hearing, the court will issue a Certificate of Decision to all parties setting out the court's decision.[39] This is enforceable as a decision of the Court of Queen's Bench once it has been filed.[40]

D. APPEALS

A decision of the hearing officer may be appealed to a judge of the Court of Queen's Bench within 30 days of the decision.[41] Leave is required if the appellant failed to appear at the original hearing,[42] and he or she must also pay $150 into court as security for costs.[43] An appeal

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[33]Cheale, *supra* n. 5 at 16.

[34]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 11(1).

[35]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 20(1).

[36]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 20(2).

[37]Cheale, *supra* n. 5, at 2.

[38]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 14(1).

[39]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 23(1); *Queen's Bench Rules*, R. 76.05.

[40]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 12(1).

[41]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 12.

[42]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 12(3).

[43]*Queen's Bench Rules*, R. 76.09(2).

acts as a stay of execution of the original judgment.[44] Approximately 26 decisions are appealed in the Winnipeg small claims system each month,[45] the equivalent of some 20% of the non-default decisions.

An appeal is by way of a new trial, which means that the result may be less favourable to the appellant than the original judgment.[46] The Rules of the Court of Queen's Bench do not apply, unless the judge orders otherwise at the request of one of the parties.[47] Costs on an appeal may be awarded in such amount as the judge may allow;[48] such costs are generally "modest," but on occasion can be quite significant relative to the amount of the claim.[49]

A party may further appeal to the Court of Appeal, with leave of a judge of that court, on a question of law only.[50] Leave will only be granted where the point of law is of "sufficient merit".[51]

E. COLLECTING ON A JUDGMENT

As stated earlier, once a claimant has obtained a judgment in small claims court, that judgment is enforceable in the same manner as a judgment of the Court of Queen's Bench. Such judgments are enforceable primarily in the following ways:

1. garnishment;[52]
2. writ of seizure and sale;[53] and
3. registration of judgment against real property, followed by judgment sale.[54]

The Commission was advised that the most common form of execution is the garnishing

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[44]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 12(6)

[45]Cheale, *supra* n. 5, at 1.

[46]*Kushnir* v. *Aleem* (1993), 85 Man. R. (2d) 257 (C.A.).

[47]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 12(5).

[48]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 14(2).

[49]See, *e.g.*, *Birchwood Pontiac Buick Ltd.* v. *Hasid* (7 April 1997), No. CI96-01-9811 (Man. Q.B.), where Hanssen, J. awarded costs of $1,000 plus disbursements, although the actual damages award was only $2,700, as a result of the defendant's fraudulent conduct.

[50]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 15.

[51]*Nagler* v. *Chabidon* (19 June 1996), No. AI96-30-02789 (Man. C.A.).

[52]*Queen's Bench Rules,* R. 60.08.

[53]*Queen's Bench Rules,* R. 60.07.

[54]*The Judgments Act*, C.C.S.M. c. J10.

order, and that in 1996 approximately $700,000 was collected in this manner. The Writ of Seizure and Sale is less widely used, as the procedure can be quite costly.[55] The Commission has no information regarding how frequently judgments are registered against real property.

As well, the judgment creditor (the successful claimant) is entitled to examine the judgment debtor (the unsuccessful defendant) in aid of execution before a court reporter.[56] If the judgment debtor fails to attend, or refuses to answer proper questions, he or she can be punished by a judge of the Court of Queen's Bench for contempt of court.[57]

Ultimately, however, it is up to the judgment creditor, and not the court, to enforce the judgment. Many individual claimants fail to realize this fact before filing their claim, and are subsequently disappointed.[58]

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[55]Telephone conversation with R.W. Cheale, Manager - Small Claims Court.

[56]*Queen's Bench Rules,* R. 60.17.

[57]*Queen's Bench Rules*, R. 60.17(5).

[58]I. Ramsay, "Small Claims Courts: A Review", in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for The Civil Justice Review*, vol. 2 (1996) 489 at 513.

CHAPTER 3

CANADIAN SMALL CLAIMS SYSTEMS

It is useful, in considering what reforms to the Manitoba small claims system might be appropriate, to compare the existing Manitoba system to the various systems in place in other Canadian jurisdictions. This Chapter contains brief descriptions of the small claims systems in place in the nine other Canadian provinces and two Territories, for comparative purposes.

A. BRITISH COLUMBIA

In British Columbia, the Small Claims Court is a branch of the Provincial Court, established by sections 2 and 3 of the *Small Claims Act*,[1] which came into force on 25 February 1991.

The Small Claims Court has jurisdiction in claims for debt or damages, recovery of personal property, specific performance of agreements relating to personal property or services, and relief from opposing claims to personal property, where the amounts involved are $10,000 or less, exclusive of interest and costs. The plaintiff may abandon amounts in excess of $10,000 in order to bring the matter within the court's jurisdiction. The court does not have jurisdiction in a claim for libel, slander or malicious prosecution.

Once pleadings are closed, the Registry schedules a settlement conference before a judge. Attendance is mandatory in most circumstances, and the parties must bring with them all relevant documents. The judge has wide powers to deal with both substantive and procedural aspects of the claim, in order to effect an early resolution of the claim. No trial date will be set unless and until the parties are unable to reach a settlement at the settlement conference.

A party is entitled to be represented by a lawyer or articled student, a director, officer, or employee if a company, a partner or employee if a partnership, or owner or employee if a sole proprietorship.

The Small Claims Rules specifically empower the judge hearing a small claim to dispense with formal rules of procedure and evidence and to receive evidence in any way the judge thinks is appropriate, except that privileged material is not admissible. Expert evidence may also be filed without the necessity of the expert being called to testify, if the evidence is served on the other parties at least 30 days before trial. An opposing party may require the expert to attend for cross-examination, at the risk of paying his or her expenses if such attendance is found to be unnecessary. Repair estimates and estimates of the value of property must be served on other

[1] *Small Claims Act*, S.B.C. 1989, c. 38.

parties at least 14 days prior to trial.

Lawyers' fees are not recoverable in Small Claims Court, but certain disbursements are payable unless the judge or registrar orders otherwise. The judge may also order an unsuccessful party to pay up to 10% of the successful party's claim if the party proceeded through trial with no reasonable basis for success.

If a person refuses: to be sworn or affirmed; to answer a question; to produce records or other evidence; to obey a direction of the judge; or repeatedly to attend court when summoned or ordered to do so without adequate reasons, the judge may order him or her imprisoned for up to three days, and may take other appropriate steps.

Following a monetary judgment, the court must make a payment order. If the unsuccessful party does not require time to pay, the judgment must be paid immediately. If time is required, the court may order a payment schedule or order a payment hearing, at which the debtor must provide evidence under oath as to his or her assets and financial status. Following a payment hearing, the court may order a payment schedule. As long as the debtor makes payments in accordance with the payment schedule, the creditor can take no further steps to collect on the judgment. On default, the balance becomes payable immediately.

If the debtor fails to obey a payment schedule, the creditor may request a default hearing. At the hearing, the judge may confirm or change the terms of the payment schedule, and may order the imprisonment of the debtor for up to 20 days if the judge considers the debtor's actions to amount to contempt of court. The merits of a claim may be appealed to the Supreme Court within 40 days of a decision. The appeal consists of a trial *de novo*. In order to appeal, the appellant must deposit with the court $200 plus the amount of any judgment awarded against him or her. Filing the notice of appeal and depositing the required amounts acts as a stay of the original order.

There is no appeal from a decision of the Supreme Court.[2]

B. ALBERTA

In Alberta, the Civil Division of the Provincial Court has jurisdiction to try small claims, under the *Provincial Court Act*.[3] The applicable Rules are found in the *Provincial Court Civil Division Regulation*.[4]

The court has jurisdiction over claims for debt or damages where the amount claimed does not exceed $4,000; note that it is possible for a plaintiff to claim both in debt and in damages, such

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[2] *Hunyadi v. Mohammed* (1995), 65 B.C.A.C. 230.

[3] *Provincial Court Act*, R.S.A. 1980, c. P-20, s. 36.

[4] Alta. Reg. 329/89.

that the total resulting claim could be for a maximum of $8,000.[5]

The court has no jurisdiction to hear claims: in which the title to land is brought into question; in which the validity of any devise, bequest or limitation is disputed; for malicious prosecution, false imprisonment, defamation, criminal conversation or breach of promise of marriage; in replevin; against a judge, justice of the peace or peace officer for anything done by him or her while executing his or her duties of office; or by a local authority or school board for recovery of taxes other than taxes imposed in respect of an occupancy of or an interest in land that is itself exempt from taxation.

At a hearing, the parties are confined to the particulars set out in their respective claims and/or dispute notes. The court is not bound by the laws of evidence applicable to judicial proceedings, except that nothing privileged or rendered inadmissible by statute is admissible in evidence. A transcript must be taken of all evidence given in a hearing.

The court is required to include in any judgment an order for costs and any prejudgment interest payable on the judgment. A party may be represented by a lawyer or by an agent in court.

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 into the Court of Queen's Bench.

Any party may appeal a decision of the Small Claims Court to the Court of Queen's Bench within 30 days after judgment is given by filing a notice of appeal in that court, and upon filing proof of service such an appeal operates as a stay of the original judgment. The appellant must file a transcript of the original hearing with the Court of Queen's Bench within 6 months of filing the notice of appeal. The court will set down the appeal for a hearing once this has been complied with, and once any money paid into the Provincial Court has been forwarded to Queen's Bench. The appeal is an appeal on the record, unless, on the application of a party, the court directs that it be heard as a trial *de novo*.

There is no appeal from a decision of the Queen's Bench.

C. SASKATCHEWAN

The Provincial Court of Saskatchewan is established as the Small Claims Court in that province by section 2 of the *Small Claims Act*.[6] The relevant Rules are found in *The Small Claims Regulations*.[7]

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[5] *Parris* v. *Reber* (1994), 22 Alta. L.R. (3d) 78 (Prov. Ct.).

[6] *The Small Claims Act*, S.S. 1988-89, c. S-50.1.

[7] Sask. Reg. 881/88.

The court has jurisdiction, whether or not the Crown is a party, in all claims and demands for money where the amount or balance claimed does not exceed $5,000 (unless the excess has been abandoned), and in all claims for the recovery of goods or for damages where the amount or value does not exceed $5,000, all amounts exclusive of interest and costs. The Act does not apply to an action in which title to land is brought into question; in which the validity of a devise, bequest or limitation is disputed; for malicious prosecution, malicious arrest, false imprisonment, libel, slander or breach of promise to marry; against the assignees of an insolvent debtor; or against a judge, justice of the peace or other peace officer for anything done by him or her in the execution of his or her office. Nor does the Act apply to an action against the personal representative of a deceased person, other than an action for damages or recovery of debt where the amount claimed does not exceed $5,000.

In order to initiate a claim, a plaintiff must apply to the clerk for a summons. The clerk assists the plaintiff in preparing a concise written summary of his or her claim, and then presents it to a judge for approval. If the judge is satisfied that the plaintiff has made out a cause of action, he or she issues a summons returnable at a fixed time and place. The judge has discretion not to issue a summons if it is not in the interest of one or more of the parties to have the claim adjudicated under the Act. The plaintiff must then serve the summons on the defendant at least 10 days prior to its returnable date.

A party may be represented at trial by a lawyer or by an agent.

The court may decide a matter on the basis of written material filed with the court, without requiring the attendance of the parties. Where oral evidence is given at trial, it is to be given under oath and recorded. Where necessary, or where the parties consent, the court may hear evidence by telephone.

The court is authorized to award the following by way of costs: fees paid for issuing a summons or counterclaim; the costs of service or substituted service; fees paid to a witness; and telephone charges incurred to enable a witness to testify by telephone.

No proceedings pursuant to the Act are invalid if there has been substantial compliance with the Act. This does not, however, permit a judge to decide a claim on “no evidence”.[8]

Once the time for appeal has lapsed without an appeal being filed, a certificate of judgment may be filed in the Court of Queen’s Bench, and may thereafter be enforced as a judgment of that court.

A party may appeal to the Court of Queen’s Bench within 30 days after the date of certification of the judgment by the clerk. Filing the notice of appeal automatically stays execution of the judgment, unless the court orders otherwise. The appellant must file a transcript of the trial with the registrar within six months of filing the notice of appeal, unless the court has extended the time limit. Once the transcript is filed, the registrar will set a date for the appeal to be heard.

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[8] *St. Mary's Credit Union Ltd.* v. *General Doors Inc.* (1990), 85 Sask. R. 78 (Q.B.).

The appeal is an appeal on the record. The Court of Queen's Bench has jurisdiction under the Act to give any order that the trial judge should have given, but this seemingly broad discretion has been circumscribed by case law; it will not retry the case, but will confine itself to correcting errors of law and reversing unreasonable findings of fact.[9]

If there is no appeal, either party may move before a Queen's Bench judge within six months of the date of the judgment to set aside the trial judgment on the grounds that: the subject matter of the action was in excess of the small claims jurisdiction; the party was not properly served, and default judgment was obtained as a result; or the judgment was otherwise bad in law.

With leave of a judge of the Court of Appeal, a Queen's Bench appeal judgment may be appealed to that court on a question of law.

D. ONTARIO

The Ontario *Courts of Justice Act*[10] establishes the Small Claims Court as a branch of the General Division. Prior to 1990, small claims were dealt with by the Provincial Court (Civil Division).

The court has jurisdiction in any action for the payment of any amount of money up to $6,000, exclusive of interest and costs, as well as any action for the recovery of possession of personal property up to that value. The court is staffed by judges of the General Division and judges of the Provincial Court (Civil Division) who held that position on 1 September 1990. As well, regional senior judges of the General Division may appoint lawyers to act as deputy judges of the court for three-year terms. The standards of conduct for, and continuing education of, deputy judges are set by a Deputy Judges Council appointed by the Chief Justice and the Attorney General. A mechanism is established to review the conduct of deputy judges and to impose sanctions for cases of inappropriate behaviour.

A pre-trial conference is held, on the request of either party or by order of the court, either before a judge or before another person designated by the court. The purposes of the pre-trial conference are to resolve or narrow the issues, to expedite the disposition of the action or facilitate its settlement, to assist the parties to prepare for trial, and to provide full disclosure. All discussions carried on at the pre-trial conference are confidential and may only be revealed with the parties' consent. The person presiding over the conference may make recommendations to the parties and, if a judge, may make any order relating to the conduct of the action that the court could make (if not a judge, he or she may make recommendations to a judge, who may make such orders). He or she may also prepare a pre-trial memorandum to be placed on the court's file. If the action has not been disposed of within 15 days of the date fixed for the pre-trial conference, the clerk will set a trial date and inform the parties.

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[9] *Estevan Motors Ltd.* v. *Anderson* (1995), 129 Sask. R. 70 (Q.B.).

[10] *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 22-33.

A party may be represented by a lawyer or an agent, but the court may exclude from a hearing anyone other than a lawyer whom it finds is either not competent or not behaving appropriately.

The court may admit anything into evidence that is relevant, other than privileged material or material rendered inadmissible by statute, but may exclude anything unduly repetitious. Where a claim is undefended, it may be proven by affidavit evidence. Any document served on all parties at least 14 days prior to the trial, including witness statements and experts' reports, is admissible to the same extent *viva voce* evidence would be admissible, unless the court orders otherwise. The author of any such document may be compelled to attend as a witness by any party for purposes of cross-examination.

Where a party is represented by counsel and the amount in issue exceeds $500, the court may award costs of up to $300. Where the party is represented by a student-at-law, the amount may not exceed $150. Where the party is unrepresented, and the court feels the proceeding was unduly complicated or prolonged by an unsuccessful party, the court may award up to $300 as compensation. A successful party is also entitled to his or her disbursements, as assessed by the clerk. Costs awarded may not exceed 15% of the amount claimed or the value of the property in issue, unless the court considers it necessary to penalize a party, counsel, or agent for unreasonable behaviour in the proceeding.

Orders may be enforced by a writ of seizure and sale of personal property or of land, and by garnishment, as well as by "any other method of enforcement provided by law". Where the debtor defaults on payment, the judgment creditor may also examine him or her under oath with respect to income, assets, and so on. If the debtor refuses to attend, or attends and refuses to answer questions, the court may commit him or her to a correctional institution for up to 40 days.

Within 30 days after a trial, any party may make a motion to the court seeking a new trial. On the hearing of the motion, the court may grant a new trial, pronounce the judgment that ought to have been given at trial, or dismiss the motion.

An appeal lies to the Divisional Court where the amount in issue exceeds $500, excluding costs. There is no appeal from the Divisional Court.

E. QUÉBEC

The *Courts of Justice Act*[11] stipulates that the Court of Québec deals with civil, criminal and penal cases, and legal matters pertaining to young people. The Court is made up of the Civil Division, the Criminal and Penal Division, and the Youth Division.

The Civil Division of the Court of Québec hears cases in which the amount in dispute is

[11]*Courts of Justice Act*, R.S.Q. c. T-16.

under $30,000, except requests for spousal support and requests reserved for the Federal Court of Canada. The Small Claims Division is a part of the Civil Division, and hears claims from individuals or legal entities residing in Québec for amounts up to $3,000 in litigation pertaining to contracts, quasi contracts, offences or quasi offences.

Individuals may also lodge appeals in respect of tax questions in the Small Claims Division, notably to obtain a reduction of not more than $15,000 in the calculation of income or taxable income. The court may also hear disputes concerning consumption taxes, provided that the amount in dispute does not exceed $4,000, and with regard to the penalties and interest prescribed by taxation legislation, when the amount in question does not exceed $1,500. The Small Claims Division also hears challenges to ministerial decisions under section 65 of the *Act respecting the Québec Pension Plan* and challenges to an assessment issued under section 66 of the Act when the amount of the fees does not exceed $4,000.

Lawyers are prohibited from appearing in the Small Claims Division in a representative capacity, with two minor exceptions. The more significant exception applies where a case raises a complex question on a point of law; in such a case the judge may, on his or her own motion or on motion by a party (with the agreement of the Chief Judge of the Court of Québec), allow the parties to be represented by legal counsel, whose fees are borne by the provincial Crown on the legal aid tariff.

Before 1993, corporations were absolutely prohibited from bringing claims in small claims court; since that time, corporations with fewer than five full-time employees have been permitted to do so. Registered partnerships are still prohibited, although unregistered or nominal partnerships and unincorporated businesses are eligible.

Where a debtor who would be permitted to use the small claims court procedure if he or she were a creditor is sued by someone who cannot use it, the debtor may, upon paying the prescribed fee, have the matter transferred to the Small Claims Division.

Upon the filing of a claim by a plaintiff, the clerk of the court serves it on the defendant(s). If no reply is filed within 10 days of service, the plaintiff is entitled to default judgment. If a reply is filed, and the defendant intends to contest the claim, the clerk will set a date for the hearing.

The court is theoretically devoid of formality, except that the judge must follow the rules of evidence. The Code provides that the judge "proceeds according to the procedure which seems best to him," and that the judge examines and cross-examines the witnesses. The judge is also instructed by the Code to attempt a reconciliation of the parties "wherever possible". It appears that, despite the provisions of the Code, the presiding judges feel themselves constrained to impose a certain degree of formality on the proceedings.[12]

The judge may visit a place or order that any fact relating to a case be investigated by

[12]S.C. McGuire and R.A. Macdonald, "Judicial Scripts in the Dramaturgy of the Small Claims Court" (1996), 11 Can. J. Law & Soc. 63.

experts appointed by the court and paid by either the losing party or the Minister of Justice.

Under section 982 of the Code, a judgment is executory 20 days after it has been pronounced.

If a party has had default judgment pronounced against him or her, he or she may move within 10 days of becoming aware of the default judgment to have it set aside.

Judgments of the Small Claims Division may not be appealed. They are only determinative of the issues as between the parties to the suit, and cannot be used as proof of any fact in any subsequent judicial proceedings whatsoever.

F. NEW BRUNSWICK

A new *Small Claims Act*[13] was assented to on 28 February 1997 but has not yet been proclaimed; nor have new regulations yet been drawn up under it. The following description will refer exclusively to the existing small claims system in that province.

Under section 73.2 of the *Judicature Act,*[14] the Lieutenant-Governor in Council is authorized to make rules with respect to claims not exceeding $3,000; those Rules are found within Rule 75 of the *Rules of Court*, the most recent version of which came into effect on 1 October 1992.[15]

The small claims procedure is mandatory for any action for debt or damages not exceeding $3,000, unless ordered or agreed otherwise.

Once a claim has been filed, the clerk mails a copy to each defendant. If no reply has been filed within 35 days, the plaintiff is entitled to default judgment by filing a requisition with the clerk for any liquidated claim. If the claim is for damages in whole or in part, the clerk must set a hearing date. If a reply is filed, the clerk sets a hearing date at that time and notifies all parties.

The defendant may bring a counterclaim for any debt or other claim within the court's jurisdiction, regardless of the amount, and unless the court rules that it cannot be conveniently tried and disposed of in the action, it will be dealt with at the same time as the plaintiff's claim.

Parties can be represented by a lawyer, an articling student, or, with leave of the court, an unpaid agent. If a corporation, the party may be represented by an officer or employee, and if a partnership by a partner or employee.

The judge is instructed to conduct hearings "as informally as possible while maintaining the decorum of the court". He or she may receive evidence in affidavit form, is not bound by the rules of evidence, may call witnesses and ask questions as he or she thinks fit, and may inform himself or herself in any other manner as to the matters in dispute. The judge may appoint someone to inquire into and report on any question of fact. All proceedings are to be recorded.

An appeal as of right, on the record, lies to the Court of Appeal on a question of law alone. Parties may submit written arguments to the court.

No costs are to be awarded, except that a successful party is entitled to his or her filing fees, attendance money, and the costs of ordering a transcript if an appeal was involved. A judge may also award costs against a party who has brought or defended an action unreasonably, and the Court of Appeal may award costs against a party who has brought or defended an appeal

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[13]*Small Claims Act*, S.N.B. 1997, c. S-9.1.

[14]*Judicature Act*, R.S.N.B. 1973, c. J-2.

[15]N.B. Reg. 92-107.

unreasonably.

Judgments are enforceable in the same manner as other judgments of the court.

G. NOVA SCOTIA

The *Small Claims Court Act*[16] establishes the Small Claims Court of Nova Scotia. The court is presided over by adjudicators, practising lawyers appointed by the Attorney General, and staffed by the prothonotaries of the Supreme Court.

The court has jurisdiction over claims: in respect of a matter or thing arising under a contract or a tort; for municipal rates and taxes; or requesting delivery of personal property, where the amount claimed does not exceed $5,000, excluding interest. It has no jurisdiction over claims: involving the recovery of land or an estate therein; in respect of a dispute concerning entitlement under a will, a settlement, or an intestacy; for defamation or malicious prosecution; involving a dispute between a landlord and a tenant; or for general damages in excess of $100. The Act prohibits ouster of the court's jurisdiction by agreement.

It has been suggested that the court is not a court of competent jurisdiction to support the defence of *res judicata*,[17] although a decision of the court has also been found sufficient to found a defence of issue estoppel.[18]

Parties may be represented by counsel or by agent. Default judgment may be given without a hearing where the defendant fails to file a defence within the allotted time.

The adjudicator may allow as evidence any oral testimony and any document or other thing relevant to the subject matter of the proceedings, except that nothing is admissible that is privileged or inadmissible by any statute.

The adjudicator has only limited authority to award costs, primarily disbursements. Counsel or agent fees are expressly prohibited.

An appeal lies to the Supreme Court within 30 days of the decision being filed on the grounds of: jurisdictional error; error of law; or failure to follow the requirements of natural justice. If both parties to the appeal file briefs of law, the hearing may be dispensed with. On the appeal, barrister's fees of up to $50 may be awarded as costs. There is no appeal from a decision of the Supreme Court.

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[16] *Small Claims Court Act*, R.S.N.S. 1989, c. 430.

[17] *Gough* v. *Whyte* (1983), 56 N.S.R. (2d) (S.C., T.D.).

[18] *Big Wheels Transport and Leasing Ltd.* v. *Hansen* (1990), 102 N.S.R. (2d) 371 (S.C., T.D.).

H. PRINCE EDWARD ISLAND

The *Supreme Court Act*[19] establishes the Small Claims Section as a section of the Trial Division of the Supreme Court.

The Section has exclusive jurisdiction over all actions for debt or damages up to $5,000.

The defendant must file a dispute note within 20 days of service (40 days if served outside Prince Edward Island), or risk having default judgment entered against him or her. At any time after all defendants have been served and/or filed dispute notes, any party may request a hearing date from the registrar.

Before a trial is set, the parties must attend a settlement conference before a judge or prothonotary. Parties must attend in person or, in the case of a party that is not an individual, must send a representative who has authority to settle the claim. They must bring with them all documents and reports on which they will rely at trial. The presiding judge or prothonotary has wide powers at the settlement conference to mediate the dispute and to make appropriate orders to expedite the hearing of the action.

Parties may be represented by a lawyer, an articled student, an unpaid agent (with leave of the court), an officer, partner, or employee.

The hearing is to be as expeditious and informal as is just. The judge may receive affidavit evidence and may call witnesses and ask questions as he or she thinks fit. The judge may also appoint someone to inquire into and report on any question of fact. That person may subsequently be required by any party to appear to submit to cross-examination.

The court stenographer is to keep a record of all proceedings.

If judgment is granted against a defendant who did not appear at the hearing, the defendant may subsequently move to have the judgment set aside on the ground that he did not receive notice of the hearing or was unable to attend for good reason.

The unsuccessful party must pay costs to the successful party unless the court orders otherwise, including: filing fees, reasonable amounts for service, other reasonable charges, and party and party or solicitor and client costs at 50% of the normal taxed amount. Expenses of collection may also be ordered to be paid.

An appeal is available to the Court of Appeal within 30 days of judgment, with leave, on a question of law or where the conduct of the proceeding was so unfair as to constitute a miscarriage of justice. Written arguments may be filed on the appeal. An appeal does not act as a stay of proceedings except by order of the judge who gave the order or a judge of the Appeal Division.

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[19] *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10.

I. NEWFOUNDLAND AND LABRADOR

Jurisdiction to deal with small claims is vested in the Provincial Court by the *Small Claims Act*.[20]

The court has jurisdiction to try and adjudicate on claims for debt or damages, including damages for breach of contract, where the amount claimed does not exceed $3,000. It is specifically permitted to hear claims, within that limit, for the recovery of taxes or charges by a municipality. The court does *not* have jurisdiction to hear a claim: in which title to land is brought into question; in which the validity of a devise, bequest, or limitation is disputed; for malicious prosecution, false imprisonment, defamation, criminal conversation, seduction, or breach of promise of marriage; or against a judge of a court, justice, or public officer for anything done by him or her while executing the duties of his or her office.

Parties may be represented by a solicitor, an articled clerk, or an agent.

An originating summons is valid for 12 months, renewable for a further 12 months. If no response has been filed within 10 days of service, the plaintiff may proceed to obtain default judgment by affidavit. The defendant may apply within one year of receipt of notice of default judgment to have the judgment set aside. In appropriate cases, summary judgment is also available.

A settlement conference at a time and date set by the court is mandatory, unless otherwise ordered. All parties must attend in person, and bring any documents they will rely on at trial. The settlement conference is held either before a judge or a person designated by the Chief Judge as a mediator.

Where a counter claim is brought that exceeds the claims limit, either party can apply to have the entire proceeding moved to the Trial Division, but a judge of the Trial Division may order that the proceedings be heard and determined by a judge of the court as though there were no jurisdictional limit.

Parties are required to file with the court, and exchange, a list of relevant documents, with copies thereof, prior to the settlement conference. Expert opinions must be served on other parties at least 14 days prior to trial; unless another party requires the expert to testify, the report is then admissible in evidence without further proof of its contents.

A transcript must be made of all hearings. Costs awarded to a party cannot exceed 10% of the amount of the claim or $300, whichever is less, and are limited to the amounts set out in a schedule to the Rules.

Judgments of the court may be enforced by execution upon the money, and distress and sale of the goods and effects, of the judgment debtor. Examination of the judgment debtor can

[20]*Small Claims Act*, R.S.N. 1990, c. S-16. s. 3.

also be ordered, and failure to attend can be punished by imprisonment for up to six weeks. Enforcement must be co-ordinated through the province's enforcement registry.

An aggrieved party may appeal to the Trial Division within 30 days of the judgment. The rules of procedure relating to an appeal to the Supreme Court apply to such an appeal *mutatis mutandis*.

The Rules also contain provisions dealing with offers to settle, applications to the court, and contempt proceedings.

J. NORTHWEST TERRITORIES

The Territorial Court, which is vested with the powers of a Provincial Court, is established as the small claims court for the Northwest Territories by the *Territorial Court Act*.[21]

The court has jurisdiction in: actions based on contract, debt, or tort where the amount claimed does not exceed $5,000; actions for the recovery of personal property where the value of the property claimed does not exceed $5,000; interpleader proceedings involving $5,000 or less; and garnishment or attachment proceedings involving $5,000 or less, in certain circumstances. The court does not have jurisdiction in actions: in which the title to land or an interest in land is brought into question; in which the validity of any devise, bequest, or limitation is disputed; for malicious prosecution, false imprisonment, libel, slander, criminal conversation, or breach of promise of marriage; or against a justice of the peace for anything done by a justice of the peace in the execution of his or her office.

The plaintiff must file copies of any document that forms the basis of his or her claim along with the claim itself. The defendant has 25 days following service of the claim to file a defence, after which the clerk sets a date for a hearing. If no defence is filed, the clerk can issue a default judgment on the plaintiff's filing proof of service of the claim, if the claim is in respect of a debt or liquidated demand or for the recovery of goods. In all other cases the plaintiff must proceed to trial and prove the amount claimed.

A judge may order discovery, in appropriate circumstances, where the amount claimed exceeds $1,000, and may limit the scope of any examination.

The rules contain extensive provisions relating to offers to settle and payment into court, permitting parties to avoid a hearing by settling the claim in advance, and permitting costs to be awarded against parties who do not accept reasonable settlement offers.

A party may be represented by a lawyer or any other person not prohibited by the judge.

The judge is to hear and determine matters in a summary way, and may make such order

[21] *Territorial Court Act*, R.S.N.W.T. 1988, c. T-2.

or judgment as appears to be just and equitable. Procedural defects are deemed to be merely irregularities. Matters involving more than $500 are heard last on the court's docket, and the evidence in such matters must be taken down in writing. In an undefended action, the plaintiff may give his or her evidence by way of affidavit, unless otherwise ordered. In addition, documents and written statements may be received into evidence without formal proof if they have been served on the opposing party at least 20 days prior to trial, unless otherwise ordered. There are no limits on the court's jurisdiction to award costs.

An appeal lies from a decision of the Territorial Court to a judge of the Supreme Court within 30 days of the decision, unless the amount in issue is $500 or less, exclusive of costs. Such an appeal does not operate as a stay of the order being appealed. Any decision on appeal is further appealable in the same manner as any decision of the Supreme Court.

A judgment debtor may be summonsed to attend an examination. Wilful failure to attend without sufficient reason is grounds for detention for up to 40 days. Judgments may be enforced by garnishment proceedings.

K. YUKON TERRITORY

The Small Claims Court is established by the *Small Claims Court Act*.[22]

The court has jurisdiction in any action for the payment of money where the amount claimed does not exceed $5,000, exclusive of interest and costs, or for the recovery of possession of personal property where the value of the property does not exceed $5,000. The monetary limit was increased from $3,000 in 1995. The court does not have jurisdiction in any action: for the recovery of land or in which an interest in land comes into question; against the personal representatives of a deceased person or in which the validity of a devise, bequest or limitation under a will or settlement is disputed; or for libel or slander.

The plaintiff must attach to his or her claim copies of any document on which the claim is based. The claim must be served within one year of its being filed, although this time limit may be extended by the court at any time. The defendant must file a reply within 20 days (30 if served outside the Yukon). If no reply is filed within the prescribed time, the plaintiff may obtain default judgment from the clerk with respect to any debt or liquidated amount; with respect to other claims, the clerk must set a hearing date at which the plaintiff need only prove the quantum of his or her claim.

In special circumstances, the court can order discovery between the parties on such terms as are just, and may give directions as to the scope of the discovery.

The parties may elect to have their issues mediated rather than tried. The clerk is to appoint a mediator and set a date and time for the mediation. If the mediation is successful, the agreement reached may be filed as a consent order. If it is unsuccessful, the matter proceeds to a pre-trial conference.

At a pre-trial conference, which is held where a reply has been filed and mediation either has not been chosen as an option or has been unsuccessful, a trial date is set. If one party does not attend, default judgment may be granted against him or her. Pre-trial hearings may be presided over by justices of the peace or the clerk of the court.

A party may be represented by a lawyer or an agent, but the court may exclude any non-lawyer agent who it finds is not competent or does not understand and comply with the duties and responsibilities of an advocate. The Rules also include extensive provisions relating to persons under a disability, partnerships, interlocutory motions, third party claims, and service.

The court is to hear and determine questions of law and fact in a summary way. The court may admit as evidence any oral testimony and any document or other thing relevant to the subject matter of the proceedings whether or not given or proven under oath or affirmation, except that nothing is admissible that is privileged or inadmissible by any statute. Experts reports and other

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[22]*Small Claims Court Act*, R.S.Y. 1986, c. 160.

documents are *prima facie* admissible if they have been served on all other parties at least 14 days prior to trial. The court may also inspect any place of property concerning which a question arises in the action.

At the trial of an undefended action, the plaintiff's case may be proved by affidavit or by telephone or teleconference, unless the trial judge orders otherwise.

The court may make orders directing the times and proportions in which orders shall be paid. If the debtor's circumstances change, he or she may apply to the court to stay or vary enforcement proceedings. In addition to any other method of enforcement permitted by law, the judgment creditor may enforce a judgment by means of a writ of seizure and sale of personal property, a writ of seizure and sale of land, and/or garnishment. The judgment creditor may also examine the debtor as to his or her income, property, and the like. A debtor who refuses to attend, or who attends and refuses to answer questions, may be committed to a correctional institution for up to 40 days.

A successful party may be awarded costs of up to $100 for preparation and filing of pleadings, plus, if the claim exceeds $1,500, up to $150 if represented by counsel, or up to $75 if represented by an articling student. If self-represented, up to $150 may be awarded only if the claims exceeded $1,500 and the proceeding was unduly complicated or prolonged by an unsuccessful party. A successful party is also entitled to his or her disbursements unless the court orders otherwise.

A decision may be appealed to the Supreme Court, where the appeal is heard as a trial *de novo*. There is no appeal beyond the Supreme Court.[23]

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[23]*Burchill* v. *Yukon Travel,* [1996] C.R.Y. 50 (C.A.).

CHAPTER 4

PROPOSED REFORM

While reviewing and considering amendments to the whole of the small claims system in Manitoba, there were four primary areas in which the Commission considered possible reforms. Broadly speaking, those areas were:

4. the appointment and powers of the court's adjudicators;
5. the court's jurisdiction;
6. the hearing process; and
7. the enforcement of judgments.

This Chapter discusses the various issues raised within those four areas, and the recommendations made in each area by the Commission.

A. APPOINTMENT OF ADJUDICATORS

The following chart summarizes the current monetary limits and the type of adjudicators in the small claims systems in all Canadian jurisdictions:

Jurisdiction	Monetary Limit	Adjudicators
British Columbia	$10,000	Provincial Court Judges
Alberta	$4,000	Provincial Court Judges
Saskatchewan	$5,000	Provincial Court Judges
Manitoba	$5,000	Hearing Officers
Ontario	$6,000	General Division Judges/ Deputy Judges
Québec	$3,000	Québec Court Judges
New Brunswick	$3,000	Queen's Bench Judges
Nova Scotia	$5,000	Adjudicators
Prince Edward Island	$5,000	Supreme Court Judges
Newfoundland	$3,000	Provincial Court Judges
Northwest Territories	$5,000	Territorial Court Judges/ Deputy Territorial Judges

Jurisdiction	Monetary Limit	Adjudicators
Yukon Territory	$5,000	Territorial Court Judges/ Deputy Territorial Judges

As the chart shows, most Canadian small claims courts are staffed in whole or in part by full-time judges. In those jurisdictions that rely solely on provincial court judges to staff their small claims courts, the judges are rotated through the civil and criminal sides of the court. In Québec, judges of the Québec Court sit in Small Claims Court on a rotational basis. In Prince Edward Island, judges of the Trial Division of the Supreme Court are assigned to preside over the Small Claims Section of the Trial Division.

In Ontario, Nova Scotia, and the Territories, legally-trained individuals are appointed for terms of varying length to serve as "deputy judges" or "adjudicators". In Ontario and Newfoundland, legally trained individuals are also appointed as "referees" or "mediators" for the purpose of hearing certain types of pre-trials.

The system of appointment of part-time or term adjudicators, and Manitoba's current system of having some small claims heard by non-legally-trained hearing officers, have drawn criticism from some commentators.[1]

Certainly such an arrangement fits with a small claims model that values expeditious and low-cost handling of small claims. It can also happen that judges seconded from a higher court may bring with them an undesirable level of "legalism," subverting the small claims court's emphasis on accessibility. Nevertheless, having non-legally trained hearing officers deciding small claims may create problems.

Iain Ramsay suggests that, in Ontario at least, there is no apparent consistency in the selection of deputy judges for the small claims courts.[2] This is clearly undesirable if the small claims system is not to be seen as a form of "second-class" justice and inferior to the superior courts.

It is important that the initial decision in a small claim be made as fairly and as justly as possible. Almost all Canadian jurisdictions limit the litigants' right of appeal from a small claims adjudicator, in one way or another. In some places, as in Québec, there is no appeal at all. In others, appeals are limited to questions of law or natural justice, and often leave is required. In Manitoba, there is no restriction *per se* on appeals to the Court of Queen's Bench; nevertheless, as set out in Chapter 2, approximately 80% of the hearing officers' decisions are not appealed, meaning that the hearing officer's decision is final in the vast majority of cases.

The Manitoba Civil Justice Review Task Force found that there was "a general consensus

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[1] See, *e.g.,* D.J. Martinson, "The Civil Jurisdiction of the Provincial Court: A Perspective of a Criminal Court Judge" (1994), 18:1 Prov. Judges J. 22 at 23-24.

[2] I. Ramsay, "Small Claims Courts: A Review", in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for The Civil Justice Review,* vol. 2 (1996) 489 at 510.

that the hearing officers do a good job."[3] Nevertheless, the Task Force recommended that raising the limit of the court's monetary jurisdiction would result in a need for hearing officers with legal training. It recommended that:

> as hearing officer vacancies occur they be filled with lawyers, provided the appointees have demonstrable qualities to perform this kind of dispute resolution effectively.[4]

The Commission recommended in its 1983 Report that legally-trained adjudicators who are full-time judges would be likely to improve the quality of justice in small claims court, and would enhance the image of that court in the eyes of the public.[5] The Commission recommended that the Small Claims Court be associated with the Provincial Court, and that the adjudicators be judges of that court.[6] In the present fiscal climate, however, the Commission is of the opinion that such a recommendation is no longer feasible. Nevertheless, it is also of the opinion that it is important that small claims adjudicators be legally trained.

In a vast majority of cases, neither party in a small claims action is represented by legal counsel. In those cases, legally trained adjudicators would be better able to assist self-represented litigants during the course of a hearing: contentious issues could be more clearly defined; the manner of introducing oral evidence would be better controlled and supervised; and decisions would be governed by principles of law, promoting greater consistency between judgments. Primarily, however, as noted in the Commission's 1983 Report, "legal training is essential because of the importance of the concept of equality before the law and the fact that the court system must not be seen to be administering a different form of justice for claims of lower sums."[7]

The Commission therefore is of the opinion that small claims should be dealt with by full-time, legally trained hearing officers, as in Ontario, Nova Scotia, and the Territories. This is particularly important given the Commission's recommendation that the monetary jurisdiction of the court be raised.

RECOMMENDATION 1

Small claims hearing officers should be appointed from the ranks of practising lawyers with at least five years experience in practice.

B. POWERS OF ADJUDICATORS

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[3] *Manitoba Civil Justice Review Task Force Report* (1996) at 26.

[4] *Id.*

[5] Manitoba Law Reform Commission, *The Structure of the Courts; Part II; The Adjudication of Smaller Claims* (Report #55, 1983) at 17-18.

[6] *Id.*, at 18-20.

[7] Manitoba Law Reform Commission, *supra* n. 5, at 17.

Most Canadian jurisdictions grant their small claims adjudicators the power to make whatever orders are necessary to determine whatever claim is properly before them. In British Columbia, for example, the court is empowered to "make any order or give any direction it thinks necessary to achieve the purpose of this Act and the rules",[8] and in Ontario the court may "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."[9] Manitoba has no such express provision.

There is nothing inherent in the nature of small claims courts that restricts them to hearing simple or non-complicated matters,[10] so long as the matters fall within their monetary jurisdiction.[11] Given ample statutory scope for granting necessary remedies, a small claims court need not be restricted in the nature of remedy it may grant either. This can also include the jurisdiction to invoke equitable remedies,[12] such as injunctions, relief against penalties, declaration of constructive trusts, and others.

It is at least arguable that in Manitoba the Small Claims Court's jurisdiction is insufficiently broad, as there is in fact no statutory or other description of what remedies it is entitled to grant. Certainly there have been instances where it has been held not to have the power to grant orders that would have been available from the Court of Queen's Bench.[13] Of course, any grant of powers would have to avoid conflict with the strictures of section 96 of the *Constitution Act, 1867*.[14]

The Commission is of the opinion that the Manitoba Small Claims Court should be granted express jurisdiction to make any order necessary to decide the issues before it, as has been done in British Columbia and Ontario. This will minimize the possibility of dispute over the limits of the court's jurisdiction.

RECOMMENDATION 2

Subject to section 96 of the Constitution Act, 1867, hearing officers in the Small Claims Court should expressly be granted the jurisdiction to make any order consistent with the law necessary to achieve the purpose of the Act.

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[8]*Small Claims Act*, R.S.B.C. 1996, c. 430, s. 2(2).

[9]*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 25.

[10]*Royal Insurance Co. of Canada* v. *Legge* (1996), 36 C.C.L.I. (2d) 210 (N.S.S.C.).

[11]*Stockey* v. *Peel Condominium Corp. No. 174* (1996), 30 O.R. (3d) 464 (Gen. Div. Ct.).

[12] L.A. Taylor and D.M. Wood, "Equitable Jurisdiction of the Provincial Court of Alberta (Civil Division)" (1997), 35 Alta. L. Rev. 592.

[13]See, *e.g., McLean* v. *Compton Agro Inc.* (1993), 90 Man. R. (2d) 59 (Q.B.).

[14]See discussion *infra,* at 35.

C. MONETARY JURISDICTION

There are two primary aspects to the jurisdiction of a small claims court: monetary and substantive. The monetary jurisdiction is relatively straightforward, and will be determined by the governing legislation.

Most Canadian small claims courts, as set out in the chart at pages 28-29, have a monetary jurisdiction of between $3,000 and $5,000; Ontario recently raised the limit to $6,000, and British Columbia raised it to $10,000 in 1991. In Prince Edward Island, the court also has jurisdiction where the claim comes within its monetary limit after deducting any admitted set-off of a debt or demand claimed by the defendant. Newfoundland has made provision for the court to deal with matters in excess of its monetary jurisdiction where so ordered by a justice of the Supreme Court.

All jurisdictions allow a claimant to waive or abandon a portion of his or her claim to bring it within the small claims limit, and all (other than Manitoba) make it express that, upon waiving any part of the claim, the claimant is then prohibited from ever claiming the waived portion in any subsequent proceeding.

The Canadian Bar Association has recently recommended that all Canadian jurisdictions ought to consider raising the monetary limit in Small Claims Court to $10,000.[15] So high a monetary limit raises a concern as to the court's procedure. To the extent that the Small Claims Court's processes parallel those of the superior courts, there is little reason to believe that litigants may be "shortchanged" by granting the Small Claims Court jurisdiction over larger claims. To the extent that the procedure in Small Claims Court dispenses with safeguards available to litigants in the higher courts, however, (such as full discovery, representation by counsel, and adjudication by legally-trained professional judges), there is reason to fear that a form of "second-class justice" might be imposed on those without the resources to make use of the existing court system. The higher the claims limit in Small Claims Court becomes, the more indefensible this differentiation becomes.

As noted above, British Columbia increased the monetary jurisdiction of the Small Claims Court from $3,000 to $10,000 in February of 1991. One year after that change was implemented, a study was carried out to determine what effect the change had had on the use of the court. The study's authors concluded:

> The program has answered a need or provided *access* to significantly more people in the province than was true under the former version of Small Claims Court. The increase in Small Claims volumes [of 42.2%] is thought to be entirely in claims within the $3,000 to $10,000 range.
>
> Little of the increased volume of claims in Small Claims Court since the start of the new program was observed to have transferred from the Supreme Court. The cases that have

[15]Canadian Bar Association, "Resolution 97-15-M: Systems of Civil Justice" (1997 Mid-Winter Meeting), Schedule 1, recommendation 13.

"*come out of the woodwork*" are cases that were not previously served by either court.[16]

This suggests that in British Columbia, at least, there were a significant number of potential claims that were ineligible to be brought in Small Claims Court, but were not worth pursuing in the superior courts because of the cost of litigation in those courts. Once the limit in Small Claims Court was increased, those claims were brought in that court: access to justice had been increased at least to that extent for those claimants.

It is also the case that the "real" limit in the court has been reduced simply by inflation; as noted in Chapter 1, the Consumer Price Index increased by 35.6% between 1986 and 1996.[17] This in itself is cause to consider increasing the monetary limit of the court's jurisdiction.

The Manitoba Civil Justice Review Task Force recommended that the jurisdiction of the court should be increased to $7,500, which it noted is "slightly in excess of the current limit, taking into account inflation since the limitation was enacted."[18] It also recommended that the limit of $1,000 on general damages claims should be reviewed for appropriateness and amount.[19]

Given that only a small minority of claims in the current system are between $3,000 and $5,000,[20] one might question the need to raise the limit of the court's monetary jurisdiction in Manitoba. The argument that there are a large number of "homeless" claims between $5,000 and $10,000 does seem to be weakened by the preponderance of "low value" claims in the current system. Nevertheless, no investigation has been undertaken, by the Commission or by anyone else, as to the number of potential claims. In the face of the Canadian Bar Association's recommendation, the Task Force's recommendation, and the experience of British Columbia, the Commission believes that an increase in the court's monetary jurisdiction must be seriously considered.

The Commission, after considering the advantages and disadvantages of raising the monetary jurisdiction of the court, has decided that on balance an increase is advisable. It is likely that there are a number of potential claimants whose claims exceed the current small claims limit, but for whom litigation in the Court of Queen's Bench is not cost-effective. The Commission is not persuaded, however, that an increase to the full $10,000 suggested by the Canadian Bar Association is appropriate at this time. The Commission is also persuaded that, if the limit of the court's jurisdiction is to be increased, it would also be desirable to increase the limit on general damages claims. There is no reason why that limit should remain the same if the overall limit is increased.

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[16]P. Adams, C. Getz, J. Valley and S. Jani, *Evaluation of the Small Claims Program*, vol. 1 (British Columbia, Ministry of Attorney General, 1992) ii.

[17]Between 1986 and 1996, the CPI increased by 35.6%: Statistics Canada, CANSIM, Matrix 7463.

[18]*Manitoba Civil Justice Review Task Force Report*, *supra* n. 3, at 26.

[19]*Manitoba Civil Justice Review Task Force Report*, *supra* n. 3, at 27.

[20]Memorandum from R.W. Cheale, Manager - Small Claims Court (October 14, 1997) at 5.

RECOMMENDATION 3

The monetary limit of the Small Claims Court's jurisdiction should be increased from $5,000 to $7,500, and the limit on claims for general damages should be increased from $1,000 to $3,000.

D. SUBSTANTIVE JURISDICTION

The substantive jurisdiction of a Small Claims Court depends on its enabling legislation. It also depends in part on the form of court chosen to handle small claims, in that a provincially-created court has only the jurisdiction conferred on it by statute,[21] as opposed to the general jurisdiction of a superior court.[22] The Supreme Court of Canada has determined, however, that because provincial superior courts derive their jurisdiction from section 92(14) of the *Constitution Act, 1867*, not solely from their particular nature as superior courts or because Canada's court system is essentially unitary, it follows that provinces may invest their inferior courts with a type of general jurisdiction.[23]

Thus, a Small Claims Court's jurisdiction need not be limited other than by the terms of the statute establishing it, and by the constitutional prohibition on clothing provincially-created courts with "section 96" powers. That is, if small claims matters are adjudicated otherwise than by a judge of a superior, district, or county court, the province is prohibited by section 96 of the *Constitution Act, 1867* from investing the Small Claims Court with powers that were historically exercised solely by those courts.[24]

In most Canadian jurisdictions, the Small Claims Court has a fairly specific and therefore limited jurisdiction. Typically, the court is granted jurisdiction over all claims for debt, damages, or recovery of goods where the amount in issue is less than the court's monetary jurisdiction. This jurisdiction is then restricted by exempting from it certain types of claims. Manitoba's general list of exemptions is fairly typical:

> **3(4)** This Act does not apply to a proceeding that involves or is likely to require determination of questions relating to
> (a) the ownership of real property or an interest in real property;
> (b) the interpretation or enforcement of a testamentary disposition;
> (c) the administration of a trust or an estate;
> (d) a matter appropriate to a family proceeding as defined in section

[21]See, *e.g.*, *Duguay* v. *Duguay* (1994), 146 N.B.R. (2d) 238 (C.A.).

[22]See, *e.g.*, *Applewood Lane West Ltd.* v. *Fraser* (1989), 61 Man. R. (2d) 261 (Q.B.).

[23]*The Attorney General for Ontario* v. *Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206 at 220.

[24]*Reference re Authority to Perform Functions vested by the Adoption Act, The Children's Protection Act, The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act, of Ontario*, [1938] S.C.R. 398.

41 of The Court of Queen's Bench Act;

(e) an allegation of malicious prosecution, false imprisonment or defamation; or

(f) an allegation of wrongdoing by a judge, magistrate or justice.[25]

Some provinces have bestowed a more restricted jurisdiction on their Small Claims Courts: Alberta and Saskatchewan, for example, both have more precisely worded granting clauses, and more numerous exemptions (although the Alberta granting clause has been interpreted very broadly).[26] Others have granted wider jurisdiction: British Columbia has a wider granting clause and only one exemption, while Ontario's Small Claims Court is granted the following jurisdiction, with no exemptions:

23(1) 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.[27]

The British Columbia Provincial Court and the Territorial Court in the Northwest Territories are also given jurisdiction to deal with interpleader applications of up to $5,000.

Manitoba's current substantive jurisdiction is not dissimilar from that of many other Canadian Small Claims Courts, although it is less broad than that of the Small Claims Courts in British Columbia and Ontario, and those of other provinces or territories in specific respects. The Commission considered whether the court's substantive jurisdiction should be broadened in any way, so as to increase accessibility to justice for cases which did not currently fall within the court's limited jurisdiction.

With respect to the restrictions in section 3(4)(a), (b) and (c) of the Act – those excluding jurisdiction over questions relating to "the ownership of real property or an interest in real property," "the interpretation or enforcement of a testamentary disposition" and "the administration of a trust or an estate" – the Commission is of the opinion that the exclusions in question are justified. Many claims that fall into those categories are in truth not for "money judgments," which are essentially what the court was established to deal with, but rather involve the assertion of rights *in rem*, which the court is ill-equipped to value. To remove or amend these exclusions would likely cause problems.

The restriction in section 3(4)(d) on matters appropriate to a family proceeding is, in the Commission's opinion, entirely appropriate. Such matters involve disputes the importance of

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[25]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 3(4).

[26]*Knight* v. *Calgary Suzuki Inc*. (1996), 180 A.R. 214 (Prov. Ct.).

[27]*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 23(1).

which far transcends any monetary consideration, and may profoundly affect the lives not only of the litigants, but of children and other persons with whom their lives intersect. Such questions must be dealt with by specialized judicial personnel, assisted by knowledgeable and experienced counsel, in accordance with carefully modulated procedures. The Small Claims Court would be an entirely inappropriate venue in which to deal with such matters.

Section 3(4)(e) excludes from the court's jurisdiction questions relating to "an allegation of malicious prosecution, false imprisonment or defamation." All three of those categories of tort are ordinarily tried with a civil jury in Manitoba. Such a procedure would be entirely too cumbersome and inapt for the Small Claims Court. In addition, basic civil liberties are in issue in such actions, and they should be settled in proceedings governed by the full disciplines of the law of evidence, not in the relaxed milieu of the Small Claims Court.

Section 3(4)(f), finally, deals with "allegations of wrongdoing by a judge, magistrate or justice." The law has for sound and obvious reasons long been reluctant to allow any actions at all against such persons for alleged misfeasance in office. To allow them to be pursued in the Small Claims Court would, in the Commission's opinion, be an impolitic inversion of authority.

In one respect, that of interpleader applications, the Commission was persuaded that the court's substantive jurisdiction should be expanded. If the hearing officers who staff the court are to be legally trained, there is no longer any reason to deprive the court of jurisdiction to deal with interpleader issues that would otherwise come within its monetary jurisdiction.

In all other respects, however, the Commission concluded that the present jurisdiction was satisfactory, and that no increase in the court's substantive jurisdiction was desirable at this time.

RECOMMENDATION 4

The court's substantive jurisdiction should be amended to allow the court to hear and determine interpleader applications that fall within its monetary jurisdiction.

E. COMPLEX MATTERS

Some small claims adjudicators have been given the option of not hearing complex claims, which they will take advantage of to avoid having to deal with matters that ought properly be dealt with by a superior court.[28] Such a power must be expressly granted by legislation.[29] Additionally, in many jurisdictions there exist means whereby a party can apply to the superior court to have a matter transferred to that court if appropriate. In the Northwest Territories, as an example, the Rules provide, in part:

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[28]See, *e.g., Sabine* v. *University of New Brunswick* (1996), 174 N.B.R. (2d) 65 (Q.B., T.D.).

[29]*The Owners of Condominium Plan N. 82-S18929* v. *Norman* (1990), 84 Sask. R. 9 (Q.B.).

> **5.** If it appears to a judge of the Supreme Court that an action is one that ought to be tried in the Supreme Court, he or she may order that it be transferred to the Supreme Court on such terms as to payment of costs or otherwise as the judge thinks fit.[30]

There is nothing inherently simple about a claim merely because it involves a limited amount of money. Depending on the nature of the process and the training of the small claims adjudicator, the availability of such a mechanism may be extremely desirable.

Manitoba does not currently have a mechanism whereby a complex matter may be removed from the small claims system, once it has been properly initiated there, despite the lack of legal training of the small claims adjudicators. The Commission considered whether such a mechanism should be implemented. In light of Recommendation 1, however, the Commission felt that no such mechanism would be necessary.

RECOMMENDATION 5

Provided that hearing officers are to be legally-trained, it is not necessary at this time to implement a mechanism to transfer complex matters to the Court of Queen's Bench.

F. EXCLUSIVE JURISDICTION

Manitoba's Small Claims Court does not currently have exclusive jurisdiction over claims that come within its purview. That is, a plaintiff has the option of pursuing his or her claim either in Small Claims Court or in the Court of Queen's Bench. Although it has been suggested that exclusive jurisdiction can have the effect of improving access to justice for impecunious defendants,[31] Prince Edward Island and New Brunswick are the only jurisdictions in Canada that currently have such a system. In both of those provinces, however, the Small Claims Court is a branch of the superior court, and small claims are heard by section 96 judges, so their exclusive jurisdiction is perhaps not surprising.

The Commission recommended in 1983 that the court's jurisdiction be exclusive.[32] The Commission also recommended at that time, however, that small claims matters be heard by a newly-constituted civil division of the Provincial Court. In light of the fact that the Commission is now recommending that the present system continue largely intact, it no longer believes it appropriate to grant exclusive jurisdiction to the Small Claims Court. There are litigants for whom the Queen's Bench procedure is preferable, and it is felt that they ought not to be deprived of that

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[30]*Territorial Court Civil Claims Rules*, R-034-92.

[31]G. Dunlop and J. Casey, "Exclusive Jurisdiction for Small Claims Court: A Study Paper and Recommendations" (1986-87), 25 Alta. L. Rev. 278.

[32]Manitoba Law Reform Commission, *supra* n. 5, at 20-24.

procedure without good reason.

RECOMMENDATION 6

It is not necessary at this time that the Small Claims Court be granted exclusive jurisdiction over claims that fall within its jurisdiction.

G. PRE-TRIAL MEDIATION

Several Canadian jurisdictions (British Columbia, Ontario, Prince Edward Island, Newfoundland and the Yukon Territory) now provide for some sort of "pre-trial" conference before a judge or other court official before a trial date can be set in a small claims matter. One purpose of this process is to encourage the settlement of disputes before they actually go to trial; for this reason, the person presiding over the pre-trial is generally expressly empowered to "mediate any issues being disputed".[33] In British Columbia, Prince Edward Island and Newfoundland, the pre-trial is actually called a "settlement conference". In the Yukon, mediation is provided for separately from the pre-trial conference.

The content of the pre-trial conference in a small claims system is wide-ranging. The British Columbia Rules, which are representative, provide as follows:

> **7(14)** At a settlement conference, a judge may do one or more of the following:
> (a) mediate any issues being disputed;
> (b) decide on any issues that do not require evidence;
> (c) make a payment order or other appropriate order in the terms agreed to by the parties;
> (d) set a trial date, if a trial is necessary;
> (e) discuss any evidence that will be required and the procedure that will be followed if a trial is necessary;
> (f) order a party to produce any information at the settlement conference or anything as evidence at trial;
> (g) order a party to,
> (i) give another party copies of documents and records by a set date, or
> (ii) allow another party to inspect and copy documents and records by a set date;
> (h) if damage to property is involved in the dispute, order a party to permit a person chosen by another party to examine the property damage;
> (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;

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[33]British Columbia, *Small Claims Rules,* r. 7(14)(a).

(j) before dismissing a claim, counterclaim, reply or third party notice, order a party to file an affidavit setting out further information; ....
(k) make any other order for the just, speedy and inexpensive resolution of the claim.

Presumably providing litigants with the opportunity to have their dispute heard by a neutral third party, particularly one associated with the prestige of the court system, will reduce the number of cases that actually have to proceed to trial, thereby saving on costs for the system as well as the litigants. There are other perceived advantages as well, however. Ramsay notes:

> The rationale for the growth of mediation in Small Claims Courts in the USA is attributed to three factors: a possible reduction in costs and delays, since many programs use volunteer mediators; a belief that the more informal atmosphere of mediation would offset the advantages of the repeat player user and lead to a higher quality outcome than adjudication, and the possibility of achieving greater compliance with any agreement reached between the parties.[34]

Ramsay concludes that the value of mediation in the context of the small claims system is "controversial", but there is evidence from those involved in the system in British Columbia and Ontario that their systems of pre-trial conferences, at least, have been successful. Judge Martinson writes:

> The experience in British Columbia during the three years of operation of the *Small Claims Act* is that the mandatory conference does facilitate settlements and helps organize cases for trial. It organizes the case by creating a "one-stop shopping" forum which substitutes for the extensive disclosure provisions of superior court rules that can lead to numerous pre-trial steps.[35]

In Ontario, Judge Bromstein states:

> There are now far fewer adjournments and most cases are disposed of without a trial. Litigants and counsel are better prepared for trials. . . . The last few years show a reported settlement rate, at or after the pre-trial, of between 72 per cent and 82 per cent. The actual rate is probably higher because the figures show that less than 14 per cent of the cases sent to pre-trial are eventually tried.
>
> A retired judge who was a highly regarded counsel and who sat in the higher court has heard pre-trials in . . .[small claims] court for many years. He found that while the amounts are different, the facts and legal issues are similar to higher court problems, and feels strongly that the process is a marked improvement over other existing procedures.
>
> There are two ingredients which appear to be the key to success. Firstly, more direct and early involvement of the judge in the process and secondly, the pre-trial and its

[34]Ramsay, *supra* n. 2, at 510-11.

[35]Martinson, *supra* n. 1, at 24.

early use.[36]

The Canadian Bar Association Systems of Civil Justice Task Force made numerous recommendations for fundamental reform of the Canadian civil justice system. Among the recommendations were the following:

> 1. Every jurisdiction
> (a) Make available as part of the civil justice system opportunities for litigants to use non-binding dispute resolution processes as early as possible in the litigation process and, at a minimum, at or shortly after the close of pleadings and again following completion of examinations for discovery. . . .
>
> 13. Every jurisdiction that has not already done so give serious consideration to providing for Small Claims Courts with a monetary jurisdiction of up to $10,000. Procedures should include options for use of non-binding dispute resolution processes.[37]

In 1983, the Commission recommended that a mediation programme be established in Winnipeg or another urban centre, on a pilot basis, for the purpose of resolving claims commenced in the Small Claims Court.[38] The intention was that, if the pilot programme was successful, a mediation programme would be implemented across the small claims system. Events since 1983[39] have only accentuated the need for, and desirability of, such a mediation programme, and the Canadian Bar Association recommendations reflect this fact.

As in 1983, however, it is the Commission's opinion that the mediation programme

should not to be mandatory, but rather available for the parties to make use of if they wish to. If the parties agree to attempt mediation, a mediation conference would be scheduled before a hearing officer, who will attempt to bring the two sides together to resolve the claim.

RECOMMENDATION 7

A mediation programme should be instituted for the purposes of resolving claims filed in Small Claims Court; mediation should not be mandatory but be available if all parties agree.

H. DEFAULT JUDGMENT

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[36]R. Bromstein, "Speedier Justice in Civil Disputes: Proactive Judges – A Toronto Experience" (1995), 19:1 Prov. Judges J. 3 at 6.

[37]Canadian Bar Association Resolution, *supra* n. 15, Schedule 1.

[38]Manitoba Law Reform Commission, *supra* n. 5, at 32.

[39]Summarized in the Chapter 1 at 1.

All the Atlantic provinces, Alberta, British Columbia, Ontario and the Territories allow a claimant to obtain default judgment if the defendant does not file a response to the claim within a prescribed period after being served. Manitoba's requirement that the claimant attend a hearing to prove his or her claim whether or not the defendant has indicated that he or she intends to contest the claim is almost unique in Canada and can lead to unnecessary inconvenience to claimants whose claim is not contested.

The Manitoba Civil Justice Review Task Force found that the lack of provision for the signing of default judgment against a defendant was a shortcoming in the present system. Its Report stated:

> The issue of default judgment is an important one for those who use the court routinely as they have to appear in court even though the defendant may not appear to defend the claim. These users recommend that the defendant be required to file a Notice of Intention to Appear. If the defendant does not file the document, it was suggested that the court should automatically issue a default judgment without the need for the plaintiff to appear.[40]

The Task Force went on to recommend that a default judgment procedure be implemented to enable a claimant to obtain judgment without having to appear in court, once the defendant has failed to file an answer to the claim within the prescribed period.

It is reasonable to expect that the implementation of such a procedure would assist in expediting the hearing of contested claims, since fewer matters would appear on each docket. It is also reasonable to expect that some claims that are now filed in the Court of Queen's Bench, in order to take advantage of the default judgment procedure in that court, would be filed in Small Claims Court once a default judgment procedure was in place in that court, although there is no way of knowing how significant that shift would be.

In the jurisdictions that do have a default judgment procedure, default judgment is typically available only for claims for debts or liquidated amounts; other claims must proceed to trial where the claimant need only prove the amount of the claim, not liability. Typically interest is also awarded, if claimed in the claim, and often a prescribed amount for costs as well.

RECOMMENDATION 8

Defendants should be required to file a Notice of Intention to Appear within a prescribed period after being served with a claim. If no Notice of Intention to Appear is filed within that period, the claimant should be entitled, on filing a requisition and proof of service, to obtain default judgment on any claim for a debt or liquidated demand, plus interest and a prescribed amount for costs.

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[40] *Manitoba Civil Justice Review Task Force Report*, *supra* n. 3, at 25.

I. ACTIVIST ADJUDICATORS

Judges in Small Claims Courts have historically played a more active role in the hearing than other judges. Judge Zuker describes the background to the creation of the small claims system in part as follows:

> While the adversary process was retained, in the sense that each side to a dispute was responsible for presenting the arguments and facts in its favour, it was envisioned that the judge in a small claims proceeding would play an active role at trial – assisting litigants in bringing out relevant facts and clarifying the legal issues involved. Trial procedures and rules of evidence were to be "informal" and were left largely to the discretion of the trial judge. Generally, a small claims judgment was still required to accord to the rules of substantive law, although in some jurisdictions the small claims judge was directed, in addition, to do "substantial justice" between the parties.[41]

Ramsay also states: "One of the assumptions of much small claims literature has been that there should be an activist judge and this is sometimes recognized in statutory provisions."[42]

One example of a statutory provision urging judges to be activist is Rule 75.11(2) in New Brunswick, which permits the judge to call witnesses and ask questions as he or she thinks fit, and to inform himself or herself in any other manner as to the matters in dispute. In New Brunswick, and also in Québec and Prince Edward Island, the judge is empowered to appoint a third party to investigate and report back on any question of fact.

However, even in Québec, where statutory recognition of the judges' activist role exists, it appears that some judges are reluctant to exercise it.[43] It may be, however, that this is a function of the nature of the Canadian legal system, as suggested in one article:

> Activist judges, willing to probe to the roots of disputes in order to achieve voluntary settlement, are theoretically possible, though they are unlikely to emerge from the current Canadian legal culture.[44]

Judicial activism is not always viewed in a positive light, either, as in one Saskatchewan case in which a new trial was ordered because of the "interference" of the trial judge.[45]

In light of the foregoing, the Commission considered whether it might be desirable to

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[41]M.A. Zuker, *Ontario Small Claims Court Practice* (7th ed., 1997) 3-4.

[42]Ramsay, *supra* n. 2, at 508.

[43]S.C. McGuire and R.A. Macdonald, "Judicial Scripts in the Dramaturgy of the Small Claims Court" (1996), 11 Can. J. Law & Soc. 63.

[44]P. Finkle and D. Cohen, "Consumer Redress Through Alternative Dispute Resolution and Small Claims Court: Theory and Practice" (1993), 13 Windsor Y.B. Access. Just. 81 at 104.

[45]*GMG Watch Shoppe Ltd.* v. *Bilodeau* (1990), 85 Sask. R. 208 (Q.B.).

recommend the adoption of specific provisions empowering hearing officers to be more activist in their hearing of claims. The Act currently provides in section 1(4) as follows:

> A claim may be dealt with in a summary manner and the rules of the court, other than rules specifically applicable to claims under this Act, do not apply and the judge or court officer hearing the claim may conduct the hearing in such manner as the judge or court officer considers appropriate in the circumstances of the case to effect an expeditious and inexpensive determination of the claim.

This provision, while not expressly authorizing the type of judicial activism referred to in the New Brunswick or Québec legislation, does give the hearing officer a great deal of leeway in determining how a case is to be heard and dealt with. In light of that fact, the Commission is of the opinion that it is not necessary to amend the legislation to encourage further activism on the part of the hearing officers.

RECOMMENDATION 9

It is not necessary at this time to amend the Act to allow expressly for activist intervention by hearing officers or judges.

J. RULES OF EVIDENCE

All Canadian jurisdictions, like Manitoba, permit the adjudicator to waive some or all of the rules of evidence when hearing a small claim,[46] although the onus on a plaintiff to prove his or her claim and the kind of evidence required to satisfy that onus is the same as in any other action. British Columbia, Alberta, Ontario, Nova Scotia, and the Yukon, however, specifically exempt from disclosure anything that is privileged, and all of those jurisdictions other than British Columbia also expressly exempt anything that is made inadmissible by statute.

In Manitoba, the only relevant provision is section 1(4), cited above. The absence of more explicit wording may create the possibility of confusion, and potential litigation, over whether privileged material or statutorily inadmissible material might be admissible in Small Claims Court. For that reason, and because there are no contrary policy reasons, it is the Commission's belief that express recognition of excluded evidence should be included in the Act.

RECOMMENDATION 10

The Act should expressly provide that nothing that is privileged, and nothing rendered inadmissible by statute, is admissible in evidence in a small claims hearing.

Several jurisdictions (British Columbia, Saskatchewan, Ontario, Newfoundland and the

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[46] *Saunders* v. *Allied Auto Parts Ltd.* (1990), 66 Man. R. (2d) 281 (C.A.).

Northwest Territories) permit a party to avoid the necessity of actually calling an expert witness if the party serves the expert's written report on the opposing party a certain number of days prior to the hearing. The rules make the report admissible in evidence without the expert's actually testifying, unless the opposing party requires the expert to attend for purposes of cross-examination (with attendant costs consequences). Most of these jurisdictions allow the same procedure to be used for any other document or witness statement as well as experts' reports. In Ontario, for example, the rule provides as follows:

> 19.02(1) A written statement or document described in subrule (2) that has been served on all parties at least fourteen days before the trial date shall be received in evidence, unless the trial judge orders otherwise.
>
> 19.02(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 bill, documentary evidence of loss of income or property damage, and a repair estimate.
>
> 19.02(3) 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 that is served the name and address for service of the witness or author.
>
> 19.02(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 the witness or author as a witness under subrule 19.03 (1).[47]

The Manitoba Act does not currently include any comparable provision. Such a procedure could speed up hearings, simplify and clarify evidentiary issues, and lower costs for participants in small claims hearings. Specifically, if a litigant is not required to call an expert witness to testify in court, he or she will not incur the associated costs. Other costs in wasted witness time could also be avoided and hearings would be able to proceed more expeditiously if fewer witnesses needed to actually testify.

The Commission did have some concerns about adding new rules to the small claims process, given that many participants in that process have little or no knowledge of legal proceedings. On balance, however, it considered that the potential savings in time and expense to all litigants were sufficient to make such a procedure desirable. It is the Commission's intent that the new procedures will include clear instructions to litigants as to their meaning and import.

RECOMMENDATION 11

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[47] R.R.O. 1990, Reg. 201.

> ***A procedure should be implemented whereby an expert's report, or other written witness statement, can be rendered admissible in evidence without the author having to appear in court, if the party wishing to tender it has served it on all other parties a fixed number of days prior to the hearing and no other party has required, in writing, that the expert or witness appear at the hearing to be cross-examined.***

K. APPEALS

The Manitoba Civil Justice Review Task Force recommended the elimination of small claims appeals to the Court of Appeal "once the goal of having legally trained hearing officers is achieved,"[48] but it gave no reasons for or discussion of this recommendation. Presumably the recommendation flowed from the Task Force's view that the court

> must be a "people's court" where citizens can, at their option, have the opportunity to present their cases personally with a minimum of procedural requirements.[49]

Among other Canadian jurisdictions, only Saskatchewan, New Brunswick, Newfoundland and the Northwest Territories permit appeals of small claims decisions to their highest appellate court. In Ontario, appeals are permitted to the Divisional Court, but not to the Court of Appeal. Ramsay discussed this issue as follows:

> An assumption of many reforms was that there should be restricted appeals in Small Claims Courts. An extensive appeal system would raise costs unnecessarily, and advantage wealthier litigants, particularly given the rule of costs following the ultimate result. Moreover, if the Small Claims Court was established partly as a forum which might differ in its approach from the higher courts, then an extensive appeal system might have the cumulative effect of shaping the procedure of the Small Claims Court in the image of the higher courts. On the other hand, where cases raise important points of law or of general interest, an appeal may provide the opportunity for developing applicable law and exposing the higher courts to areas such as consumer law.[50]

He suggested that there are three possible options for reform in Ontario: to ban appeals but permit the possibility of judicial review; to ban appeals except where a point of law of importance arises; and to permit appeals only where the amount in issue exceeds a prescribed dollar amount.

As described above, the present system in Manitoba applies essentially to the second of these options. Notwithstanding the Task Force's recommendation, the Commission is unaware of any dissatisfaction with the present system, or of any pressing reason to change it. Although

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[48]*Manitoba Civil Justice Review Task Force Report*, *supra* n. 3, at 27.

[49]*Manitoba Civil Justice Review Task Force Report,* supra n. 3, at 26.

[50]Ramsay, *supra* n. 2, at 514-515.

unrestricted appeals as of right to the Court of Appeal might well create unnecessary delay and complication that would detract from the operation of the court as a "people's court," the Commission is not persuaded that such is the present situation. Further, the presence or absence of legal training on the part of the hearing officers will have no effect on the number or type of appeals to the Court of Appeal, since such appeals are only from decisions of judges of the Court of Queen's Bench.

RECOMMENDATION 12

The present system of permitting appeals to the Court of Appeal should be maintained.

L. ENFORCEMENT OF JUDGMENTS

The Commission noted in its 1983 Report that the enforcement of judgments has historically been a sore point for litigants in Small Claims Court:

> The inability of judgment creditors to enforce small claims judgments has been a common complaint here and in other jurisdictions. Individuals are often unaware that the onus is on them to realize on their judgments, and the procedures can be complicated and frustrating to self-represented litigants.[51]

This was also apparent to the Manitoba Civil Justice Review Task Force, which stated:

> It became apparent that many users of the Small Claims Court thought the process was over when they obtained judgment but found that that was only half the process. Collecting on the judgment was as difficult if not more difficult than obtaining the judgment.[52]

This concern has been echoed repeatedly. The British Columbia Justice Reform Committee wrote in 1988:

> It comes as a sad surprise to many litigants who pursue their claim to trial, succeed in getting judgment in their favour, and then find that it will be up to them to try to collect the money from the defendant. The cost of enforcing the judgment can amount to more than the judgment itself. It can also take a long time and several more court appearances.
>
> . . . .
>
> Enforcement proceedings must be simplified. A successful plaintiff should have the option of having a . . . [hearing to determine how and when the judgment will be paid] immediately after the judge has given the decision.[53]

Consequently, when British Columbia reformed its small claims system beginning in 1991, one of the four objectives of the reforms was to "obtain better compliance with Small Claim

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[51]Manitoba Law Reform Commission, *supra* n. 5, at 43.

[52]*Manitoba Civil Justice Review Task Force Report,* supra n. 3, at 26.

[53]Justice Reform Commission (British Columbia), *Access to Justice* (1988) 175, cited in Adams, *supra* n. 16, at 37.

Judgments by providing payment hearings and payment schedules."[54] That particular attempt, however, appears to have met with mixed success. The 1992 review of the reformed small claims system in British Columbia found as follows:

> While service providers suggest that there is greater compliance in those cases settling at a settlement conference, payment hearings and payment schedules do not appear to have improved the rate of compliance significantly. However, they do seem to produce "*more satisfied customers*" – there is a perceived fairness in these features of the program and greater understanding of the payment conditions which affect both claimant and defendant.[55]

The British Columbia system of payment hearings and payment orders is set out at page 13 above. In addition, a judgment creditor is permitted to enforce a judgment by obtaining an order for seizure or sale, obtaining a garnishing order, or "by any other means permitted by law".

It is typical for Small Claims Court judgments to be enforceable in the same manner as judgments of the superior courts. This can include garnishment of wages and other debts and seizure of personal and/or real property.

In Manitoba, section 12(1) of the Act provides that a decision under the small claims rules is enforceable as a decision of the Court of Queen's Bench. In provinces where small claims matters are heard in the Provincial Court (British Columbia, Alberta, Saskatchewan and Newfoundland), there is typically a provision in the relevant statute enabling the judgment creditor to file his or her judgment in the superior court and thereby obtain access to the usual enforcement mechanisms. In Saskatchewan, for example, section 35 of the *Small Claims Act* provides that the successful party in a small claim may file his or her certificate of judgment in the judicial centre nearest where the hearing was held, upon which the clerk of the court is to enter the certificate as a judgment of the Court of Queen's Bench.

In Ontario, New Brunswick, and Prince Edward Island – those provinces where the Small Claims Court is a branch of the superior court – judgments are enforceable in the same manner as any other judgment of the court. Judgments of the Court of Québec Small Claims Division are also enforced in the same manner as other judgments of that court.

As pointed out above, no province appears to have managed to provide an enforcement mechanism that successfully simplifies and improves the enforcement mechanism for a judgment creditor so as to relieve the frustration and aggravation experienced by so many small claims judgment creditors. To the extent that enforcement mechanisms are the same as those employed by the superior courts, the system must await an overhaul of the superior courts' enforcement mechanisms, a daunting challenge in itself and well beyond the scope of this Report.

Manitoba's former County Courts had a system whereby judgment creditors who were not

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[54]Adams, *supra* n. 16, at v.

[55]Adams, *supra* n. 16, at 40.

being paid could have the judgment debtor summonsed before the court for an inquiry into the reasons for non-payment, following which the court could set a payment schedule. Failure to comply with the payment schedule could result in an order of incarceration. It is the Commission's opinion that such a system could be effective in increasing compliance with the court's orders, while requiring fewer judicial resources than the system currently in place in British Columbia.

RECOMMENDATION 13

A system of payment hearings should be established to enable judgment creditors to bring non-paying judgment debtors before the court to have a payment schedule set, wilful breach of which would subject the debtor to proceedings for contempt of court.

CHAPTER 5

LIST OF RECOMMENDATIONS

The following is a list of the recommendations contained in this Report.

1. Small claims hearing officers should be appointed from the ranks of practising lawyers with at least five years experience in practice. (p. 31)

2. Subject to section 96 of the *Constitution Act, 1867*, hearing officers in the Small Claims Court should expressly be granted the jurisdiction to make any order consistent with the law necessary to achieve the purpose of the Act. (p. 32)

3. The monetary limit of the Small Claims Court's jurisdiction should be increased from $5,000 to $7,500, and the limit on claims for general damages should be increased from $1,000 to $3,000. (p. 34)

4. The court's substantive jurisdiction should be amended to allow the court to hear and determine interpleader applications that fall within its monetary jurisdiction. (p. 37)

5. Provided that hearing officers are to be legally-trained, it is not necessary at this time to implement a mechanism to transfer complex matters to the Court of Queen's Bench. (p. 38)

6. It is not necessary at this time that the Small Claims Court be granted exclusive jurisdiction over claims that fall within its jurisdiction. (p. 39)

7. A mediation programme should be instituted for the purposes of resolving claims filed in Small Claims Court; mediation should not be mandatory but be available if all parties agree. (p. 42)

8. Defendants should be required to file a Notice of Intention to Appear within a prescribed period after being served with a claim. If no Notice of Intention to Appear is filed within that period, the claimant should be entitled, on filing a requisition and proof of service, to obtain default judgment on any claim for a debt or liquidated demand, plus interest and a prescribed amount for costs. (p. 43)

9. It is not necessary at this time to amend the Act to allow expressly for activist intervention by hearing officers or judges. (p. 44)

10. The Act should expressly provide that nothing that is privileged, and nothing rendered inadmissible by statute, is admissible in evidence in a small claims hearing. (p. 45)

11. A procedure should be implemented whereby an expert's report, or other written witness statement, can be rendered admissible in evidence without the author having to appear in court, if the party wishing to tender it has served it on all other parties a fixed number of days prior to the hearing and no other party has required, in writing, that the expert or witness appear at the hearing to be cross-examined. (p. 46)

12. The present system of permitting appeals to the Court of Appeal should be maintained. (p. 48)

13. A system of payment hearings should be established to enable judgment creditors to bring non-paying judgment debtors before the court to have a payment schedule set, wilful breach of which would subject the debtor to proceedings for contempt of court. (p. 50)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 17th day of March 1998.

Clifford H.C. Edwards, Q.C., President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

REPORT ON

REVIEW OF THE SMALL CLAIMS COURT

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

INTRODUCTION

The landscape of civil litigation and small claims adjudication has experienced significant changes since the Manitoba Law Reform Commission issued a Report titled *The Structure of the Courts, Part II: The Adjudication of Smaller Claims* in 1983. These changes have spurred a number of initiatives to reform civil justice systems in Manitoba and elsewhere in Canada. In light of these developments, the Commission decided that it was timely to revisit the small claims system in Manitoba.

The hallmarks of a small claims system have been identified as simplicity, accessibility and effectiveness. The various objectives of the Small Claims Court system can at times, however, be contradictory. In undertaking this study, therefore, the Commission has borne in mind at all times the various factors that must be considered and the various goals that the small claims system is intended to achieve.

THE CURRENT SYSTEM

The Small Claims Court of Manitoba (the "court") has at its essence an informal and uncomplicated process. The court is an adjunct of the Court of Queen's Bench, staffed by specialized registry personnel. It has jurisdiction over all claims for an amount of money not exceeding $5,000, which may include general damages in an amount not exceeding $1,000, and all claims for an assessment of liability arising from a motor vehicle accident in which the vehicle of the claimant is not damaged. There are exceptions to the court's jurisdiction: it does not, for example, have jurisdiction over matters that fall within the exclusive authority of the Director of Residential Tenancies or the Residential Tenancies Commission, and it is not allowed to hear proceedings that involve a number of specific types of more complex claims.

A claimant begins a small claims action by filing a simple statement setting out the particulars of the claim. The registrar sets a date for the hearing of the claim, which must be within the next 60 days, and the claimant must then serve each defendant with a copy of the claim. A defendant may, but need not, respond to a claim by filing a Notice of Intention to Appear. A defendant may also make a counterclaim against the claimant; if for $5,000 or less, and not joined with a claim for any other relief, the counterclaim will be dealt with at the same time as the main claim; otherwise an action must be commenced in the Court of Queen's Bench. If a defendant is entitled to claim contribution or indemnity from a person not already a party to the claim, the defendant may be permitted to initiate third party proceedings against that person. There are no interlocutory proceedings in the court.

Claims are heard and adjudicated by deputy registrars of the Court of Queen's Bench, known as "hearing officers", some of whom do not have legal training. Claims are dealt with in a summary manner, and the hearing officer may conduct the hearing in such manner as he

or she deems appropriate to effect an expeditious and inexpensive determination of the claim. No decision of a hearing officer can be set aside solely because the rules of evidence have not been followed.

Parties may represent themselves at a small claims hearing or may be represented by a lawyer or properly supervised law student.

If a defendant fails to appear at a hearing, the hearing officer may award the claimant default judgment against that defendant; if the claimant fails to appear, the hearing officer may either dismiss the claim or adjourn the hearing.

The hearing officer may award costs against an unsuccessful party, which are not to exceed $100 plus reasonable disbursements except in "exceptional circumstances".

A decision of the hearing officer may be appealed to a judge of the Court of Queen's Bench. An appeal is by way of a new trial, following which costs may be awarded in such amount as the judge may allow. A party may further appeal to the Court of Appeal, with leave of a judge of that court, only on a question of law.

Following a hearing, the court issues a Certificate of Decision to all parties, which is enforceable as a decision of the Court of Queen's Bench -- primarily by garnishment, writ of seizure and sale, or registration of the judgment against real property, followed by judgment sale. As well, the judgment creditor (the successful claimant) is entitled to examine the judgment debtor (the unsuccessful defendant) in aid of execution before a court reporter. If the judgment debtor does not cooperate, he or she can be punished for contempt of court. Ultimately, however, it is up to the judgment creditor, and not the court, to enforce the judgment. Many individual claimants fail to realize this fact before filing their claims and are subsequently disappointed.

CANADIAN SMALL CLAIMS SYSTEMS

The Report also reviews the small claims systems in place in the nine other Canadian provinces and two territories, for comparative purposes. Some of these systems differ quite significantly from the Manitoba system, while others are broadly similar. British Columbia and Ontario have both overhauled their small claims systems in recent years, and other provinces and territories have attempted innovation to varying degrees and of varying nature in response to pressures brought to bear by users of the system. The Commission gleaned several useful ideas from this overview of other systems and has attempted to adopt those ideas that are useful while discarding those it considers have not worked or are inappropriate to the Manitoba situation.

PROPOSED REFORM

The Commission considered a number of different areas in which reform of the current small claims system might be beneficial. Broadly speaking, the final list of recommendations can be divided into four areas: the appointment and powers of the court's adjudicators; the court's jurisdiction; the hearing process; and the enforcement of judgments.

With respect to the court's adjudicators, all Canadian Small Claims Courts are staffed in whole or in part by judges or legally trained individuals with the exception of Manitoba's court which is staffed in part by non-legally trained officers. While there appears to be a general consensus that the hearing officers are doing a good job and that the system fits the small claims model which values expeditious and low-cost handling of claims, it may also create problems. Given the Commission's recommendations with respect to the monetary and substantive jurisdiction of the court, the Commission recommends that hearing officers should be legally trained. The Commission has also recommended that the hearing officers be granted express jurisdiction to make whatever orders are necessary to determine the claims before them which would bring Manitoba in line with most other Canadian jurisdictions and would avoid possible disputes over the extent of their powers.

There are two primary aspects to the jurisdiction of the Small Claims Court: monetary and substantive. In most respects, the Commission is of the view that the jurisdiction of Manitoba's Small Claims Court is satisfactory. There are, however, areas in which the Commission believes some improvements can be made. From a monetary perspective, it recommends that the limit be increased from $5,000 to $7,5000 and that the limit on claims for general damages be increased from $1,000 to $3,000. As well, in the substantive area, it recommends that the court should be permitted to hear and deal with interpleader applications, given its recommendation that hearing officers should be legally trained.

It is in the area of the court's hearing process that several of the Commission's most significant recommendations appear. Many of these recommendations are intended to streamline the court's procedures and reduce the required amount of time and resources. The first is that a (voluntary) mediation programme be implemented, so that parties are encouraged to settle their disputes without the necessity of appearing in court. The second such recommendation is that the court establish a new default judgment procedure, requiring defendants to respond to claims and enabling claimants to obtain judgment against defendants who do not respond, again without requiring an appearance in court. Thirdly, the Commission has recommended that a process be introduced to enable parties to introduce written evidence without having to call the author to testify in court.

Finally, as noted earlier, the enforcement of judgments has historically been a sore point for litigants in Small Claims Court. No province appears to have managed to provide an enforcement mechanism that successfully simplifies and improves the enforcement mechanism so as to relieve the frustration and aggravation experienced by so many small claims judgment

creditors. Manitoba's former County Courts did, however, allow judgment creditors to have a judgment debtor summonsed before the court for an inquiry into the reasons for non-payment, following which the court could set a payment schedule. The Commission has recommended that such a procedure be reintroduced into the small claims system, in the expectation that it will alleviate, at least to some extent, the problems caused by recalcitrant judgment debtors.

RAPPORT SUR

L'EXAMEN DE LA COUR DES PETITES CRÉANCES

RÉSUMÉ

RÉSUMÉ

INTRODUCTION

En ce qui concerne les procès civils et les causes entendues par les Cours des petites créances, on a assisté à des changements importants depuis la parution en 1983 du rapport de la Commission de réforme du droit du Manitoba intitulé « *The Structure of the Courts, Part II: The Adjudication of Smaller Claims* ». Ces changements ont entraîné un certain nombre de projets de réforme du système de justice civile au Manitoba et ailleurs au Canada. À la lumière de ces développements, la Commission a décidé qu'il était pertinent de réexaminer la Cour des petites créances au Manitoba.

Les caractéristiques distinctives de la Cour des petites créances sont la simplicité, l'accessibilité et l'efficacité. Cependant, ces différents objectifs peuvent parfois être contradictoires. En effectuant cette étude, la Commission a donc gardé à l'esprit les différents facteurs qui doivent être pris en considération et les divers objectifs que ce tribunal est supposé atteindre.

LE SYSTÈME ACTUEL

La Cour des petites créances du Manitoba (la « Cour ») repose sur un processus non officiel et sans complexité. La Cour, tribunal auxiliaire de la Cour du Banc de la Reine, est doté de personnel spécialisé en gestion de dossiers. Elle a compétence sur toutes les demandes concernant un montant de 5 000 $ ou moins, et les causes entendues peuvent notamment concerner des dommages-intérêts généraux de 1 000 $ ou moins ainsi que des demandes d'évaluation de la responsabilité découlant d'un accident automobile dans lequel le véhicule du demandeur n'a pas été endommagé. Il existe certaines exceptions à la compétence du tribunal, par exemple, il n'a pas compétence sur les instances qui relèvent de la compétence exclusive du directeur de la Location à usage d'habitation ou de la Commission de la location à usage d'habitation, et il n'a pas le droit d'entendre les instances qui comprennent certains types précis de demandes plus complexes.

Un demandeur introduit une action à la Cour des petites créances en déposant une simple déclaration décrivant les détails de la demande. Le registraire fixe une date dans les 60 jours qui suivent pour l'audition de la demande, et le demandeur doit alors signifier une copie de la demande à chacun des défendeurs. Un défendeur peut, mais n'y est pas obligé, répondre à une demande en déposant un Avis d'intention de comparaître. Il peut également déposer une demande reconventionnelle contre le demandeur. Si celle-ci porte sur un montant de 5 000 $ ou moins et n'est pas liée à une demande pour toute autre mesure de redressement, elle peut être entendue en même temps que la demande principale. Dans le cas contraire, une action doit être introduite à la Cour du Banc de la Reine. Si un défendeur a le droit de demander une contribution ou une indemnisation d'une personne qui n'est pas une partie à la demande, il peut avoir le droit d'introduire une procédure de mise en cause contre cette personne. Il n'y a pas de procédure interlocutoire à la Cour des petites créances.

Les demandes sont entendues et jugées par les registraires adjoints de la Cour du Banc de la Reine, appelés « agents chargés de l'audience », dont certains n'ont pas de formation juridique. Les demandes sont traitées de façon sommaire, et l'agent peut tenir l'audience de la façon qu'il juge appropriée pour obtenir une résolution rapide et peu coûteuse de la demande. Les décisions des agents chargés des audiences ne peuvent pas être annulées uniquement en raison de l'inobservation des règles de la preuve.

À la Cour des petites créances, les parties peuvent se représenter elles-mêmes ou être représentées par un avocat ou un étudiant en droit supervisé de façon appropriée.

Si un défendeur ne comparaît pas à l'audience, l'agent chargé de l'audience peut rendre un jugement par défaut contre le défendeur. Si le demandeur ne comparaît pas à l'audience, l'agent peut soit rejeter la demande soit ajourner l'audience.

L'agent chargé de l'audience peut enjoindre la partie n'ayant pas gain de cause de payer le montant des dépens, qui ne doit pas dépasser 100 $, plus les débours appropriés, sauf dans des circonstances exceptionnelles.

On peut interjeter appel de la décision de l'agent chargé de l'audience devant un juge de la Cour du Banc de la Reine. L'appel prend la forme d'un nouveau procès, à la suite duquel des dépens peuvent être accordés, dépens dont le juge fixe le montant. Une partie peut interjeter appel de cette décision à la Cour d'appel, si elle obtient l'autorisation d'un juge de cette Cour, uniquement sur une question de droit.

À la suite d'une audience, la Cour délivre un Certificat de décision à toutes les parties, lequel est exécutable de la même façon qu'une décision de la Cour du Banc de la Reine, principalement par saisie-arrêt, bref de saisie et de vente ou hypothèque judiciaire, suivie d'une vente par jugement. De même, le créancier en vertu d'un jugement (le demandeur ayant obtenu gain de cause) a le droit d'interroger le débiteur en vertu d'un jugement en présence d'un sténographe judiciaire en vue de l'exécution de la décision. Si le débiteur en vertu d'un jugement ne coopère pas, il peut être punissable pour outrage au tribunal. En dernier lieu, cependant, c'est le créancier en vertu d'un jugement, et non la Cour, qui est responsable de l'exécution du jugement. De nombreux demandeurs ignorent ce fait avant de déposer leur demande et sont ensuite désappointés.

LES COURS DES PETITES CRÉANCES AU CANADA

Le rapport examine également les Cours des petites créances en place dans les neuf autres provinces canadiennes et les deux territoires, aux fins de comparaison. Certains de ces tribunaux diffèrent grandement du système manitobain alors que d'autres sont très similaires. La Colombie-Britannique et l'Ontario ont remanié leur Cour des petites créances pendant les dernières années, et d'autres provinces et territoires ont essayé d'innover à différents degrés et de diverses façons en réponse aux pressions exercées par les usagers du système. La Commission a recueilli plusieurs idées utiles lors de cet examen des autres systèmes et elle a

essayé d'adopter les idées qui sont utiles tout en éliminant celles qui, selon elle, n'auraient pas fonctionné ou n'étaient pas appropriées au Manitoba.

RÉFORME PROPOSÉE

La Commission a pris en considération nombre de différents domaines dans lesquels la réforme de la Cour des petites créances pourrait être bénéfique. On peut globalement diviser la liste finale des recommandations en quatre catégories : la nomination et les pouvoirs des personnes qui rendent les décisions, la compétence de la Cour, le processus d'audition des causes, et l'exécution des jugements.

En ce qui a trait aux personnes qui entendent les causes, toutes les Cours des petites créances au Canada emploient en tout ou en partie des juges ou des personnes possédant une formation juridique à l'exception de la Cour des petites créances du Manitoba dont le personnel est composé en partie d'agents n'ayant aucune formation juridique. Même s'il semble y avoir consensus sur le fait que les agents chargés des audiences accomplissent bien leur tâche et que le système correspond au modèle de la Cour des petites créances qui favorise le traitement rapide et peu coûteux des demandes, cela peut également être source de problèmes. Étant donné les recommandations de la Commission en ce qui concerne la compétence monétaire ou d'attribution de la Cour, la Commission recommande que les agents chargés des audiences possèdent une formation juridique. La Commission recommande également que ces agents reçoivent la compétence expresse pour rendre les jugements nécessaires dans le cas des demandes qui leur sont présentées afin que le système manitobain soit semblable à celui de la plupart des autres provinces et territoires et afin d'éviter tout litige possible concernant l'étendue de leur pouvoir.

Il y a deux aspects primaires à la compétence de la Cour des petites créances : la compétence monétaire et la compétence d'attribution. Dans la plupart des cas, la Commission est d'avis que la compétence de la Cour des petites créances du Manitoba est satisfaisante. Il y a, cependant, des domaines où la Commission croit que certaines améliorations peuvent être effectuées. D'un point de vue monétaire, elle recommande que la limite des demandes passe de 5 000 $ à 7 500 $, et que la limite pour les dommages-intérêts généraux passe de 1 000 $ à 3 000 $. De même, pour ce qui est de la compétence d'attribution, la Commission recommande que la Cour puisse entendre les demandes d'interplaiderie puisqu'elle recommande que les agents chargés des audiences possèdent une formation juridique.

La plupart des recommandations les plus importantes de la Commission portent sur le processus d'audience de la Cour. Nombre de ces recommandations visent à rationaliser les procédures de la Cour et à réduire les délais et l'utilisation des ressources. La première recommandation consiste en l'instauration d'un programme de médiation facultatif afin que les parties soient encouragées à régler leur conflit sans qu'il soit nécessaire de comparaître en cour. La deuxième recommandation est que la Cour mette sur pied une nouvelle procédure de jugement par défaut, qui exigerait que les défendeurs répondent aux demandes et qui permettrait ainsi aux demandeurs d'obtenir un jugement contre les défendeurs qui ne

répondraient pas, sans qu'il soit nécessaire de comparaître en cour. La troisième recommandation porte sur la mise sur pied d'un processus permettant aux parties de présenter des preuves écrites sans devoir appeler l'auteur à témoigner en cour.

Finalement, comme nous l'avons mentionné plus tôt, l'exécution des jugements a toujours été un point délicat pour les parties en litige à la Cour des petites créances. Aucune province ne semble avoir réussi à instaurer un mécanisme qui parvienne à simplifier et à améliorer l'exécution afin de diminuer la frustration et l'exaspération ressenties par un si grand nombre de créditeurs en vertu d'un jugement rendu à la Cour des petites créances. Cependant, l'ancienne Cour de comté du Manitoba permettait aux créditeurs en vertu d'un jugement d'assigner à comparaître un débiteur en vertu d'un jugement pour enquête sur les raisons du non-paiement, à la suite de quoi la cour pouvait fixer un calendrier de paiement. La Commission a recommandé qu'une telle procédure soit remise sur pied à la Cour des petites créances dans l'espoir que cela diminue, du moins jusqu'à un certain degré, les problèmes causés par les débiteurs en vertu d'un jugement qui sont récalcitrants.