Controlling the Abuse of Small Claims Courts

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1. Introduction

One of the greatest problems faced in the operation of small claims courts is the overwhelming predominance of corporate plaintiffs who are attracted to the courts by the cheap, fast, and simple adjudication of their claims. This is to the almost total exclusion of individual claimants.[1] If small claims courts are to prove effective, this problem must be solved.

2. The reasons for the existence of small claims courts

The need for the modern small claims court was recognized in 1913 by Dean Roscoe Pound:

> For ordinary causes our contentious system has great merit as a means of getting at the truth. But it is a denial of justice in small causes to drive litigants to employ lawyers, and it is a shame to drive them to legal aid societies to get as a charity what the state should give as a right.[2]

The legal system exists, then, as an avenue through which every person in society who has a valid claim against another should be able to move to attain satisfaction of that claim. Conversely, it should be a protection to persons against invalid claims from other members of society. The fact that a claim is small or held by a person without the knowledge or capabilities to enforce it should be of no importance whatsoever. If the claim is a valid one it should be capable of enforcement. When a claim cannot be enforced because the relative cost is prohibitive, there is, as Pound has said, a "denial of justice".

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[1] In Manitoba between November 1971 and July 1972 only 31% of small claims were brought by individuals. See J. R. Gerbrandt, T. Hague and A. Hague, "Preliminary Study of the Small Claims Court Procedure in Manitoba", a study conducted under an Opportunities for Youth grant under the supervision of Professor Janet Debicka of the Faculty of Law, University of Manitoba, Winnipeg (1972), 22 (hereinafter referred to as Gerbrandt, Hague and Hague). In J. W. Samuels, "Small Claims Procedure in Alberta", prepared for the Institute of Law Research and Reform, University of Alberta, Edmonton (1969) (hereinafter referred to as Samuels), at 86 it is indicated that in Alberta between June 1967 and December 1968 only 24.5% of claims were brought by individuals.

[2] R. Pound, *The Administration of Justice in the Modern City* (1912-13) 26 Harv.L.Rev. 302, 308.

The administrative cost, complications, and other difficulties are no excuse for these denials of justice. As such, something must be done to enable these claims to be effectively enforced: a very cheap and efficient adjudication process.[3] Prujiner calls this process the "democratisation de la justice".[4] It has been the rationale behind small claims courts.

It is necessary to ask two important questions when formulating proposals for an improved small claims court.[5] Firstly, what groups of people should the small claims court serve, and the corollary, what groups, if any, should be excluded? And secondly, what sort of claims should be included within the court's jurisdiction?

The question involving the type of claim is not really so difficult. There would appear to be a reasonable amount of agreement in Canada that any actions relating to a person's reputation (for example, defamation, malicious prosecution and breach of promise to marry), actions relating to land, or the validity of bequests and wills, are not appropriate for a small claims court. It is the more difficult problem, of who can sue in the court, which will be the subject of this discussion.

3. The objectives of small claims courts

The courts can attempt to deal with all types of small claims, whether held by business interests or individuals, in response to the general criticism that the judicial process is too expensive for the adjudication of small claims. Or, there can be an effort to provide a "people's court" designed as an instrument through which social justice and equity might be achieved in a forum for those unable to pursue their valid claims through the normal channels.

When the Small Claims Court and Conciliation Branch of the Municipal Court of the District of Columbia was established, the

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[3] As was stated in a report of the United Kingdom Consumer Council, *Justice Out of Reach: A Case for Small Claims Courts; A Consumer Council Study* (1970), 5:

> "... it is a prime duty of a civilised society to provide an easily accessible means of settling disputes; not necessarily courts in exactly the same form as they exist today, but some forum where disputes may be brought."

See also R. L. Walker, *Compulsory Arbitration Revisited* (1966) 38 Penn.B.Assoc. Q. 36.

[4] A. Prujiner, *L'ambiguité des "small claims courts" et ses effets sur leur adaptation québecoise* (1971) 12 C.de D. 175.

[5] See B. M. Stoller, *Small Claims Courts in Texas: Paradise Lost* (1968-69) 47 Texas L.Rev. 448, 450.

Committee of the United States Senate responsible for the District stated that the purpose of the court was

> ... to improve the administration of justice in small civil cases and make the service of the municipal court more easily available to all of the people whether of large or small means; to simplify practice and procedure in the commencement, handling, and trial of such cases; to eliminate delay and reduce costs; to provide for installment payment of judgements; and generally to promote the confidence of the public in the courts through the provision of a friendly forum for disputes small in amount but important to the parties.[6]

These have been the objectives behind the formation of most small claims courts. Incidentally, the provision of a forum devoted exclusively to legitimate claims of small value relieves the mounting pressure on the superior courts. However, the extensive use of the courts by business interests has to all intents and purposes defeated most of these objectives and has relegated most small claims courts to the status of debt collection agencies.

This is not thought to be a problem by every commentator.[7] One obvious argument, and one which is difficult to refute, is that if a business plaintiff is able to recover his legitimate claims in the cheapest possible way, then those defendants who are ordered to pay their bills are subjected to minimal costs:

> It is a quick and easy method of clearing up overdue accounts. A small business can collect these sums without ... risking much money in the collection process. The defendant too has advantages. He is given his day in court, and his costs of defending the action are small. He does not have to hire a lawyer and, if he loses, the payments are scaled low to give him every chance to meet them.[8]

Coats, Gantz, and Heathcote view the practice of excluding businesses as inequitable. They say, "[it] does not seem to be substantially fair to exclude an entire class of citizens from a useful adjudicative process for the abuse of a few".[9] It should also be

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[6] Quoted in N. Cayton, *Small Claims and Conciliation Courts* (1939) 205 Annals 57, 60. See also *Small Claims Court: Reform Revisited, infra,* note 9, 48-49.

[7] See *e.g.,* Institute of Judicial Administration, *Small Claims Courts in the United States,* New York, 1959 Supplement 1-2 (Rep. No. 7-US7, March 13, 1959).

[8] Comment, *Small Claims Courts as Collection Agencies* (1951-52) 4 Stan.L.Rev. 237, 421.

[9] D. Coates, C. D. Gantz and B. Heathcote, *Small Claims in Indiana* (1969-70) Ind. Leg.F. 517, 534. See also *Small Claims Court: Reform Revisited* (1969) 5 Colum.J.L.& Soc. Prob. 47, 62:

> "[T]he exclusion of one type of claim may not only be unfairly prejudicial to the group pursuing it, but also inimical to the interests of the

remembered that where debts are owed (either to businesses or individuals) there should be no obstacle to their recovery.[9a]

But the fact of the matter is that since small claims courts are inundated with business claims the real beneficiaries are business interests — not individuals.[10] Where studies have been conducted into the social class of individuals using the court,[11] it has been shown that they are almost all "middle class" and well educated. Moulton concludes that small claims courts are courts of the poor "only in the sense that many poor people are brought in to them by compulsory process".[12]

The now-disbanded United Kingdom Consumer Council suggested a system of small claims courts for England and Wales, which, if set up, would be "genuine people's courts" and therefore that "companies, partnerships, associations, and assignees of debts should not be allowed to sue".[13] The report continued:

> The purpose would be to prevent the court's becoming widely used by firms for debt collecting and its approach thus becoming more geared to businesses than to individuals.
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> This is a real danger, as some American small claims courts have shown. Business representatives are usually easier for the court officers and judges to deal with than are individual litigants: they speak the same language, and are generally more articulate and less emotionally involved in the dispute. If company representatives — particularly representatives of the same companies — became a familiar part of the scene, there would be a danger that individuals would become the "odd" parties, the ones to be dealt with on sufferance, with the implication that they were wasting the court's time.[14]

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judicial system and society. For example, if business interests are excluded their claims will congest the regular civil docket, or perhaps simply go unlitigated, being passed on to the consumer in the form of higher prices."

[9a] See *e.g.*, T. Murphy, *D.C. Small Claims Court — The Forgotten Court* (1967) 34 D.C.B.J. 14.

[10] B. Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California* (1969) 21 Stan.L.Rev. 1657, 1659. The survey Ms. Moulton conducted revealed that "... local tax collectors or business organizations — typically finance companies and those specializing in credit sales of furniture and appliances — have discovered the relative ease and efficiency of the small claims court as a collection device, using it routinely to collect on delinquent accounts ..." (at 1661).

[11] *Ibid.*, 1662. See also Gerbrandt, Hague and Hague, *supra*, note 1.

[12] Moulton, *supra*, note 10, 1662. The transfer option provided by art.983 C.C.P. of the Province of Quebec, clearly provides an answer to such a criticism.

[13] *Supra*, note 3, 30.

[14] *Ibid.*

The grouping of claims is another illustration of the misuse of the court; it further decreases the cost of recovery and illustrates the "collection agency" characteristic of the small claims court. It has been said that mass

> ... filing of claims seems to clearly cut against the equality values which the small claims court was designed to effectuate. A drastic procedural change directly affecting debt collection efforts in small claims court by corporations and other business concerns may be called for. Those organizations which are able to afford the services of a collection agency or more expensive court authorized debt collection should be compelled to employ them.[15]

Limiting the number of times any one person (legal or individual) could sue would deal with this problem to a large extent, but, if the court is not to be a collection agency, mass claims must be removed in some way. If commercial interests were prohibited from suing in small claims court, the court could not be used as a commercial debt collection agency. Unfortunately, a consequence of such a decision would be to increase the incidence of such claims in the higher courts. The commercial interests being barred from the small claims court would have no choice, if they wished to enlist the aid of the judicial system, but to bring their actions in these higher courts.

As the small claims adjudication process is so attractive, many actions are instigated which would not be worth-while in its absence. The individual with a claim, especially an individual of limited means, is not normally aware that a small claims court exists to help him pursue his claim.[16] Neither is an individual likely to feel competent to take on a large corporation or even a local businessman. For many people,

> ... especially the poor, small claims ... courts *are* the legal system; it is their experience in these inferior tribunals that shapes the attitudes of low-income litigants toward the law and society it reflects. Thus an appraisal of small claims courts necessarily poses the question of whether we feel it is important to reduce the alienation of the poor and to increase their sense of participation — and their actual participation — in the legal process. It is not enough to look at the surface efficiency of small claims courts and their apparent saving of judicial resources that results without asking how this efficiency and economy is obtained, and at whose expense.[17]

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[15] Comment, *Small Claims Courts and The Poor* (1968-69) 42 S.C.L.Rev. 493, 497.

[16] For instance, in the study by Gerbrandt, Hagne and Hague, *supra*, note 1, it was found that although 80% of persons with high incomes were aware of the court only 32.6% of those with low incomes knew of its existence.

[17] Moulton, *supra*, note 10, 1668.

Traditionally, matters which are worth adjudicating have been those which it is economically efficient to adjudicate, *i.e.* those claims of such an amount that once the legal and other fees have been deducted, a valuable and worth-while amount remains to the successful party. With small claims this cannot possibly be the justification for going to court; the costs involved in normal court action are staggering. By reducing costs small claims courts attempt to reduce the importance of this criterion.

Small claims *are* important, collectively if not individually. There are many more small claims than large ones.[18] And although the amounts may be small in absolute terms, to the claimant they may form enormous sums in relation to his income. As well, more small claims involve disputes between persons of different social and economic status than do large ones. As Ison says,

> ... it is in the handling of small claims, rather than large ones, that the integrity of justice is tested in the processes of interclass reaction. So to the majority of the population, the handling of small claims is far more significant than the handling of larger ones in contributing to the level of their confidence in the administration of justice.[19]

Small claims courts have been set up primarily in order to make civil justice accessible to the poor. They provide an inexpensive and efficient means of dispute settlement for a potentially large number of claimants, but whether they actually perform this function for the poor is debatable, as already pointed out.[20] Small claims courts have failed to provide "a kind of participatory justice where every citizen would have his say, no matter how small his claim".[21]

4. Solutions to the abuse of small claims courts

Small claims courts are abused by business claimants who have turned them into debt-collection agencies. They have not responded to the needs of the individual with a small claim. Quebec has sought to rectify this imbalance by excluding from small claims court all those pursuing a commercial claim. This restriction on the use of the court by commercial interests is not as effective as it may seem at first sight. Restricting the availability of default judgments, it is submitted, might provide a more satisfactory alternative. It at least

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[18] T. Ison, *Small Claims* (1972) 35 M.L.R. 18, 22. As Pound says, this is where "the administration of justice touches immediately the greatest number of people", *supra*, note 2, 315.

[19] Ison, *ibid.*, 23-24.

[20] See Moulton, *supra*, note 10.

[21] *Ibid.*, 1659.

avoids the argument, raised by business interests, that the exclusion from small claims court of commercial matters discriminates against certain legitimate small claims.

One thing is abundantly clear: unless businesses are prevented from commencing actions in the small claims court, they will continue to predominate.[22] Statistics show that few cases are being brought by individuals.[23] Even with the statutory requirement to prove claims which exists in Alberta,[24] corporate plaintiffs predominate.[25]

Discussions of the use and abuse of small claims courts have centered primarily around the issue of who may be plaintiff. There have been a variety of suggestions:

a) Do not place any restriction on who can sue in small claims courts;[26]

b) Permit anyone to sue, but split the court into two sections — one for business claims and one for individual claims;

c) Limit the number of times in any particular time-period that any person (legal or otherwise) can sue in the court;[27]

[21a] Art.953, C.C.P.

[22] See Comment, *Small Claims Court: Reform Revisited, supra,* note 9, 61, 64-65; U.K. Consumer Council, *supra,* note 3, 26; Murphy, *supra,* note 9a; C.D. Robinson, *A Small Claims Division for Chicago's New Divisiondl Court* (1963) 43 Chic.Bar.Rec. 421, 423; Comment, *Small Claims Courts as Collection Agencies* (1952) 4 Stan.L.Rev. 237; Moulton, *supra,* note 10, 1661; J. Wright, *The Courts Have Failed the Poor,* N.Y. Times, March 9, 1969, s.6, 26, 104, 106; H.J. Fox, *Small Claims Revisions — A Break for the Layman* (1971) 20 De Paul L.Rev. 912; Stoller, *supra,* note 5; Coats, Gantz and Heathcote, *supra,* note 9, 534-535; C. Pagter, R. McCloskey and M. Reinis, *The California Small Claims Court* (1964) 52 Calif.L.Rev. 876.

[23] See U.K. Consumer Council, *supra,* note 3, 14; Pagter, McCloskey and Reinis, *supra,* note 22, 884 *et seq.* and Robinson, *supra,* note 22, 422; Moulton, *supra,* note 10.

[24] R.S.A. 1970, c.343, s.26.

[25] *Supra,* note 1.

[26] This is the position in all Canadian provinces with small claims procedures except Quebec, which as has been stated, limits the availability of its court to "any physical person 'suing' in his own name and on his personal behalf" with very limited exceptions: art. 953(d) C.C.P. In Saskatchewan a corporate plaintiff may not sue for more than $200 in the small claims court of that province, whereas the limit for individuals is $500: S.S. 1973, c.104, s.2(a). By s.4(1)(f) of the Alberta *Small Claims Act, supra,* note 24, municipalities are not permitted to sue for taxes.

[27] See, *e.g.,* Prujiner, *supra,* note 4, 183.

d) Permit only businesses with "clean hands" to sue, but do not restrict individual rights in any way;[28]

e) Bar business plaintiffs from suing in the court altogether;

f) Permit anyone to sue but require proof of the claim before giving judgment; in other words, exclude default judgments.[29]

a) *No Restriction*

Small claims courts are being monopolized by business interests and are not fulfilling the function for which they were specifically designed. In the absence of some other effective measure to control this misuse, there must be some restriction on who may sue in the court.

b) *One Small Claims Court, Two Divisions*

Robinson was the first to put forward the proposal that a small claims court might have two divisions, one for commercial claims and one for individual claims:

> Most statutes deal with this problem in a negative way by barring the corporation, partnership, association, and assignee, or one or more of them, from proceeding in the small claims court. However, the proposed procedure to a large extent is applicable to both classes of cases noted There is no reason why all cases which may appropriately proceed under the simplified practices suggested should not do so. There is then no question of the so-called collection cases being excluded from the positive aspects of this procedure, but because of the special needs of the individual claimant with a small claim, these claims should be heard separately. The purpose of segregating these cases is to provide an atmosphere where the clerks and judge are oriented to the particular problems of the litigant filing and proceeding with his own claim. As we have seen, the bulk of cases, where there is not such a segregation, will be collection cases. This is bound to influence and perhaps determine the flavor of the court. Clerks and judges cannot be expected to pay the same attention to individual litigants as to the claimant who is before the Court day after day with court business. Busy men must be hurried out while the occasional litigant can afford to wait — so will go the thinking.[30]

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[28] *Small Claims Courts as Collection Agencies, supra,* note 22, 242.

[29] See *supra,* note 24.

[30] Robinson, *supra,* note 22, 424; see also Fox, *supra,* note 22, 913. Robinson did not, however, suggest restricting the availability of default judgments in any way. As such, the commercial branch of his suggested court would operate as most present small claims courts do, and there would almost certainly be no let up in the activity of commercial claimants. As a result, it is at least questionable whether such a proposal would be of any advantage. Certainly it might encourage individual claimants to exercise their rights, but it would not help defendants.

Basic to any conception of small claims courts is the recognition that there are different types of claimants requiring different treatment.[30a] Separating the business claimants from the individual claimants, either by hearing the cases on different days or by different branches of the court,[31] may correct some of the inegalities created by herding the sheep with the goats. Business plaintiffs who now sue in the small claims court would, under a dual system, use the business section, and those individuals with claims would use another section. This would be an improvement only if, as suggested by Robinson, the segregation of the cases produced clerks and judges more aware of and receptive to the problems of these individuals. Otherwise there would be little advantage gained by a dual system of small claims courts.

c) *Limiting the Number of Suits*

Another possible solution is placing a limit on the number of suits that could be brought in any given period.[32] This has been done in a number of American jurisdictions,[33] the argument being that it opens the court to everyone but prevents its abuse.[34] Indeed, Moulton considers that such a move "effectively eliminate[s] the most troublesome suits".[35]

In effect, this is merely another, more subtle, means of removing the corporation from the court, although it can be argued that, as the limitation would affect everyone, prospective business plaintiffs and individuals alike, it is not discriminatory. Still, the arguments tendered against the total exclusion of business plaintiffs from small claims courts can, with equal validity, be used against this tactic. However, discriminatory or not, a limitation on the number of times an action may be brought within a given time period, would serve to curb the abuse by businesses of the small claims court.[36]

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[31] *Small Claims Court: Reform Revisted, supra,* note 9, 67.

[32] Prujiner, *supra,* note 4, 183, suggests that the limiting number could be laid by statute or left to the discretion of the judge.

[33] *E.g.,* Minnesota, Ohio, Detroit.

[34] *Supra,* note 8, 242.

[35] Moulton, *supra,* note 10, 1674.

[36] Again, however, it should be mentioned that the problem would not be solved, only "pushed upstairs" to the next court in the judicial hierarchy.

d) *"Clean Hands" Claimants Only*

The proponent[37] of the suggestion that only businesses with "clean hands" should be permitted to sue in the court submits that the small claims court judge should have the discretion to decide whether or not a prospective business plaintiff has "clean hands". Those businesses with "honourable claims" would be permitted to sue, while those with "less honourable claims" would have to discount them to collection agencies or enforce them through the normal court structure.

A procedure involving a differentiation between honourable and less honourable claims is rife with uncertainty, although it is conceivable that legislation could lay down *prima facie* instances of "honourable" and "less honourable" claims. And while "[t]wo practices should be discouraged — overextension of credit, and sales which involve shoddy merchandise, overpricing, and misleading representation",[38] without any guidelines, it would be the judge who would decide which business practices tainted the claim to such an extent as to make it "less honourable".

Apart from the problem of uncertainty, this is an attractive proposition. It would permit the inclusion of businesses as plaintiffs in the small claims court, while preventing claims which resulted from oppressive or shady business practices. Any reticence on the part of judges in holding that shady practices gave rise to less honourable claims, however, would leave the court in the same position which it now occupies — a cheap, fast, efficient, and simple debt-collection procedure with little or no scrutiny of claims before it.

A recent study by the National Institute for Consumer Justice[39] proposed a variation on this theme: a judge should have the power to bar any litigant from appearing for a period of a year if he has "abused or misused" the court. A claimant who had obtained several default judgments based on fraudulent or unfair trade practices or who had filed under a fictitious name to avoid the prohibition on mass filing or who had filed suit without making any effort to resolve the matter with the defendant, would be deemed to have abused or misused the court.

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[37] See *supra*, note 8, 242.

[38] *Ibid.*

[39] National Institute for Consumer Justice, "Redress of Consumer Grievances" in *National Institute for Consumer Justice Staff Studies on Small Claims Courts*, Boston (1972).

e) *Total Exclusion of Business Claimants*

The most sweeping proposal is to exclude businesses from the small claims court, as has been done in Quebec. Article 953(d) of the Code of Civil Procedure includes in its definition of a small claim, for the purpose of the special procedure, a requirement that it be "exigible by any physical person in his own name and on his personal behalf, except for a purchaser of accounts, or by a tutor or curator in his official capacity".

If the small claims court were closed to business interests, much of what Prujiner calls commercial "agressivité juridique"[40] would be "defused". It would, perhaps more correctly, be diverted to other courts or collection methods. Exclusion would merely allow the default judgment to be obtained in a higher court, with the subsequent higher costs being paid by the defendant.

This problem can be solved in two ways. A statutory provision could provide that a judgment could not, under any circumstances, in any court, be awarded in the absence of the defendant without proof being shown by the plaintiff. On such a wide scale, this is impractical. The Province of Quebec has chosen the second alternative and has stipulated that an action brought in a higher court by a business, because of the exclusion of businesses from the small claims court,[41] may, at the option of the defendant, be heard in small claims court.[42] In effect, it means that the small claims court is faced with a claim being pursued by a business. If the small claims procedure is as good as is anticipated, if the individual defendant is informed of his choice, and if the advantages of opting for the small claims court are explained to him, surely in almost every case in which the option is available it will be exercised. Therefore, the situation will be the same as it was prior to the exclusion of business claimants from the court. It is difficult to see the value to the individual in excluding business claimants from instituting an action in the small claims court and providing for this optional transfer of the hearing.

If the option is not exercised by a defendant where this is available, and the plaintiff is successful in his claim, the costs payable by the defendant will be greater than if the case had been transferred to the small claims court. Default judgments being available in the higher courts is an added problem to defendants,

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[40] *Supra,* note 4, 176.
[41] Art.953 C.C.P.
[42] Art.983 C.C.P.

especially if they find it impossible to take time off work to defend the claim against them. The chances of successful defense are no higher and, because of the nature of the court, might even be considered to be lower, than in the small claims court.

Perhaps the only benefit is psychological: the consumer will have chosen to come to the small claims court. It has been suggested that this maintains the integrity and efficacy of the small claims court as a people's court. If the defendant loses, however, he or she will not be any more understanding of the judicial system merely because the defeat took place in a forum chosen, not by the commercial claimant, but by the defendant.

Business or commercial claimants should not be excluded altogether from small claims courts, but, if the transfer-option safeguard is used as in Quebec, the danger remains that the court will be used as a collection agency. In order to prevent this abuse, the procedure must be such as to require more scrutiny before judgment is awarded to recover a debt. This would appear to be most satisfactorily dealt with by restricting or curtailing the availability of default judgments which account for the vast majority of decisions rendered in small claims courts.

f) *Exclusion of Default Judgments*

The harmful effects of default judgments cannot be remedied by measures aimed at the litigants. The small claims procedure of the province of Quebec does little to alter the effect of default judgments. Article 965 of the Civil Code of Procedure, however, does provide for the judge to scrutinize the evidence more closely than in a traditional type of case; he may render judgment when the defendant does not appear after "examining the exhibits in the record, or, if he considers it necessary, after hearing the proof of the [plaintiff]". It is at the discretion of the judge whether he actually requires the plaintiff to prove his case.[43]

Alberta is one jurisdiction which has actually tried to come to terms with the difficult problem of default judgments. Section 26 of *The Small Claims Act*[44] provides, in situations where the defendant

[43] See, however, arts.195 and 196 C.C.P. which indicate that, generally, undefended claims have to be proven. Art.194, however, would indicate that liquidated debts are dealt with in the same way as in common law courts.

[44] R.S.A. 1970, c.343. The pertinent sections read as follows:

"26. (1) Where a defendant fails to appear for trial the magistrate may in his discretion allow the plaintiff to prove his claim in the same manner that a defendant may prove a counterclaim under section 25, subsection

does not appear, for a judgment to be awarded in his absence. The section, however, stipulates that the magistrate "may in his discretion allow the plaintiff to prove his claim" by oral evidence given under oath by the plaintiff and/or his witnesses or by means of affidavit evidence where the magistrate is satisfied that oral evidence cannot for some good reason be presented to the court. The magistrate, then, has the discretion to require the plaintiff to prove his claim whether or not the defendant appears. The exercise of the discretion would, of course, mean that the plaintiff would receive no benefit from the non-appearance of the defendant: his path to a judgment is no easier. Section 26 gives the magistrate a choice; he may allow the claimant to prove his case, adjourn the trial to a later date or award judgment by default on production of such evidence as he considers sufficient. Thus, the magistrate in Alberta has the discretion to preclude default judgments, in the normal sense, from his court.

There emerge four possible ways of dealing with default judgments. The *status quo*, as it exists in most provinces, can be maintained: no proof is required for liquidated debts. Or, as in Alberta, discretion may be given to the judge either to award a default judgment or require the claimant to prove his claim. More radical yet, would be a statutory provision *requiring* the claimant to prove his claim, whether or not the defendant makes an appearance. To preclude default judgments being awarded where the defendant does not appear is clearly unacceptable; no defendant would ever appear under such circumstances.

The present system in most provinces would seem equally unacceptable; claimants recover their debts, legitimate or not, very cheaply and efficiently. The vast majority of cases go by default

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(2), or the magistrate may adjourn the trial to a later date or may sign judgment by default on production of such evidence as the magistrate considers sufficient.

25. (2) If a magistrate dismisses a plaintiff's claim pursuant to subsection (1), he shall not give judgment on any counterclaim asserted by the defendant until the defendant has presented his case in respect of the counterclaim

(a) by the oral evidence given under oath of the defendant and any witnesses he may have, or

(b) by means of affidavit evidence where the magistrate is satisfied that oral evidence cannot for special good reason be presented to the court."

See also R.S.B.C. 1960, c.359, s.29; R.S.S. 1965, c.102, s.19; R.S.M. 1970, c.S-140, s.17.

with virtually no assessment of their merits. Neither is judicial discretion in the awarding of default judgments an ideal solution. It is likely to effect very little change in the existing system.

It is, therefore, recommended that legislation provide that whether the defendant appear or not, the claimant must prove his claim. This would make the award of a judgment to a claimant dependent upon whether he could prove his claim, and would have the result of safeguarding the individual from the commercial plaintiff who at present uses the small claims procedure partly because his claims receive little scrutiny by the judge.

With the requirement that proof be shown, groundless claims or those of doubtful value would either not be brought or would quickly be dispensed with by the judge. Few doubtful claims would result in judgments being awarded against individual defendants. Genuine claims would suffer little or no hindrance; their holders would merely have to prove them. Needless to say, the small claims jurisdiction would have to be exclusive in order for this to be of value. If it were still possible to sue in higher courts the more doubtful claims could be pursued there and so undermine the protection of the individual envisaged by the small claims court.

The use of the adjournment in order to allow the defendant another chance to appear should be more current. The judge should attempt to ascertain why the defendant did not appear and to encourage him to appear at the next hearing. Where an adjournment is decided upon, costs should be awarded to the claimant to compensate him for the results of the defendant's non-appearance and consequent adjournment. The requirements of proof should not be overly rigorous; the judge should require only sufficient proof as to satisfy him as to his decision.

5. Evidence Required To Substantiate A Claim

For the prohibition of default judgments to be successful, satisfactory rules of evidence must be applied. Two considerations especially must be borne in mind: adequate evidence must be presented and it must not vastly increase the adjudication costs.

Those provinces precluding default judgments require evidence to be presented in the form of either oral evidence under oath or by affidavit where the presentation of oral evidence is not possible for some reason.[45] The judge, however, can also grant a judgment

[45] See the legislation referred to *ibid.*

when the defendant is not present on the "production of such evidence as [he] considers sufficient".[46]

This would appear to be the most suitable solution to the problem, the only difficulty being to ensure that evidence is presented upon which the decision is based. For instance, nothing would be achieved if bogus or doubtful claims could be pursued to judgment in the same manner as they can be processed at present, in spite of the proof requirement.

As the evidence provision must not increase the cost of small claims adjudication unduly, requiring witnesses to appear at the hearing would not be advisable. There may well be instances, however, where the judge wants to see a particular witness, in which case he should be summoned. In most instances evidence by affidavit would appear to be sufficient, although there is the danger of perjury.

Any system of small claims adjudication, in order to be successful, must be flexible and allow the judge discretion. The judge must come to a conclusion based upon the facts presented to him; he must ascertain whether or not the witnesses and parties are reliable; he must make an assessment as to the truth; and he must decide accordingly. Even if this is not considered to be a radical departure from the present system of awarding default judgments, it is much preferable. At least the judge will not be deciding a case on the basis of a book entry and non-appearance of the defendant. This should ensure that claims which would otherwise not be scrutinized, and which would be enforced without scrutiny, will be examined and only enforced where they can be proven to the satisfaction of the judge. As long as a practice of standard form affidavits attested to without concern for the truth does not grow up, this provision will be a successful one. The discretion in the judge should prove the means whereby this practice does not arise.

6. Conclusion

There have been two legislative approaches to the problem of the abuse of small claims court. Quebec has precluded business plaintiffs from its small claims courts and has left the rules relating to default judgments unchanged. British Columbia, Alberta, Manitoba, and Saskatchewan have not prevented businesses from suing, but have given the judge the discretion to require claims to be proven, even if they relate to liquidated debts, and the defendant does not

[46] R.S.A. 1970, c.343, s.26(1).

appear at the hearing. The remainder of the provinces with small claims courts have not responded to the problem.

It is felt that nothing constructive can be achieved by precluding business claimants from using small claims courts as it merely encourages those claimants to pursue their claims in higher courts, with the attendant higher costs being payable by the losing defendants. Shifting the adjudication to a higher court may well maintain the integrity of the small claims court as a court for individuals, but it does not solve the problem of the indiscriminate enforcement of small claims against individuals, with little concern for their validity. The requirement that all claims be proven to the satisfaction of the court, whether liquidated debts or not, is designed to prevent small claims adjudication from being abused. In order to prevent business claimants from avoiding the proof requirement by bringing their action in higher courts than the small claims court, the jurisdiction of the court should be exclusive; and so every claim falling within the jurisdictional limits, both monetary and subject, should be required to be pursued in the small claims court. Perhaps, in this way, small claims courts will begin to live up to their early expectations and become a genuine "people's court".