# consumer redress mechanisms

by Pamela A. Sigurdson
and
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## CONSUMER RESEARCH COUNCIL CANADA

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# CONSUMER RESEARCH COUNCIL CANADA

## MESSAGE FROM THE CHAIRMAN

The Consumer Research Council was instituted in 1974 as part of a reorganization of the functions of the Canadian Consumer Council. Funded by Consumer and Corporate Affairs Canada as an independent research body, the Consumer Research Council was operated under the following terms of reference:

1. to advise the Minister and Consumer and Corporate Affairs on consumer research activities which are being carried on in Canadian universities and elsewhere, and on the available sources of research on particular consumer problems;
2. to review research proposals in the field of consumer affairs; and
3. to commission research on consumer affairs, to provide assessments of completed research projects, and decide on their publication and distribution to the public and presentation to the Minister.

During the first year of the Council's operations, a stock-taking was made of research on consumer issues currently being undertaken in Canada. Outlook papers were commissioned and seminars held to assist in the development of future research priorities. In 1975, with a budget of $145,000, a series of research studies was commissioned in the following areas:



The professions

Redress mechanisms

Federal-provincial relations in the field of consumer protection

Product information preferences of consumers

Consumer interest in Canadian food policy

Access to government information

Business as an interest group in Canada: the case of competition policy, 1971-1975

The administration and enforcement of the Combines Investigation Act, 1960-1975

Consumer credit billing practices

Comparative advertising in Canada

Methodologies for measuring the effectiveness of consumer protection programs

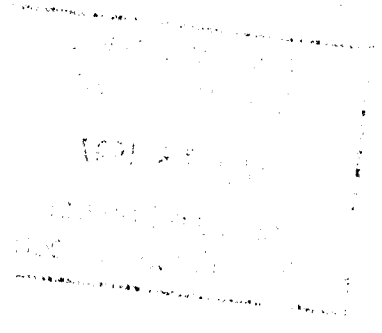
Consumer co-operatives in the Maritimes

These studies are now being reviewed for publication by the Council.

Future activities of the Council were suspended in March, 1976, as part of current policies to reduce government spending.

March 1977.

Michael J. Trebilcock
Chairman



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# FOREWORD

In the last decade or so, more consumer protection legislation has been enacted in Canada than in the previous 50 years. However, the persistence of many consumer problems in the marketplace suggests that simply passing laws is not good enough. A disorderly collection of problems render well-intentioned laws less than fully effective on a day-to-day operational basis: weak government commitment to vigorous public law enforcement; inadequate information to consumers about rights conferred on them by these laws and about the existence and functions of agencies designed to assist them in the enforcement of such rights; and often daunting barriers to individual and collective private enforcement initiatives through the present court system, given the small-scale nature of many consumer grievances.

The two papers in this volume examine the possibilities for reducing the barriers faced by individual consumers in enforcing small-scale consumer grievances. Ms. Sigurdson focuses her attention on ways of streamlining our present Small Claims Court system, with a view to improving consumer access. Mr. Roine's paper, which explores the alternatives or complements to a court-based system, examines the case for an expanded role for mediation and arbitration mechanisms as informal methods of dispute resolution. Both papers offer constructive and imaginative proposals for improving consumer access to justice, and both justify close study.

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# SMALL CLAIMS COURTS AND CONSUMER ACCESS TO JUSTICE

by

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# INTRODUCTION

The "consumer movement" is merely a name for mass citizen concern. Competition is lessening, government supervision is increasing and the marketplace is becoming more complicated. There is more supervision of the business community by government. But in many areas there is still a lot to be done in the areas of product and service quality and safety.

A major problem is the concept of "self-help". As we become aware of our rights and obligations we must use the structures available to redress our grievances. Consumer organizations, government consumer bureaux, consumer action columns are for the articulation of grievances on both a policy level and an individual level. But sometimes these extra-legal mechanisms do not, or cannot, solve the problem. It is in this context that the concept of the small claims court becomes of paramount importance. The burgeoning list of consumer protection Acts has begun to formulate principles which must be reflected by the courts.

It is the purpose of this study to examine the problems of consumer dispute resolution mechanisms and to suggest how the small claims court can best be adapted and improved to reflect the changing nature of society, the growing emphasis on consumer problems and the concern for the individual in the marketplace.

# SMALL CLAIMS AND THE CONSUMER

Consumer exploitation is one of the basic causes of urban and social disorder. There is a conflict between society's interest in efficient management of itself and the summary adjudication of individual claims. This study will attempt to balance this conflict. From a system predicated on the maxim "caveat emptor", we are slowly moving towards a society operating on the principle of "caveat venditor". The courts are not a particularly effective mechanism for serving most of the needs of consumers. The courts are, for all practical purposes, barred to the individual citizen with a grievance involving relatively minor amounts. The formalities and costs of litigation make recourse to the law either unpalatable or infeasible. The problem of adequate consumer access to an impartial arbiter remains. If manufacturers or retailers refuse to accept responsibility, then society must assume an active role in enforcing consumer rights.
Consumers with sound legal claims are not having them adjudicated: they are not welcomed by lawyers and are not encouraged to go to court. Nor do consumers defend, usually because they are ignorant of their rights. Fear of the court no doubt plays a large part in discouraging people, but the overriding discouragement is expense.

Why do consumers not use the small claims system? A dispute with a customer will be handled as normal business routine by commercial interests, but for the customer it is a disturbing experience aggravated by the psychological impediments of the legal system. Court forms are usually drafted in legal jargon which is strange to a layman. The socio-economic milieu of the court is closer to that of business. Claims by businesses usually involve debt, whereas claims by consumers more often involve damages. Moreover, a business can amortize its use of the small claims court over a large number of claims; for a consumer the small claims court is usually her only experience of litigation. A frequent user of the small claims court gains other advantages apart from economic, such as familiarity with the court officials and the procedure. For the consumer a main stumbling block is the unavailability of competent and inexpensive legal advice. It goes without saying that many consumers never become aware that they have any rights against a seller or any defence against a claim. Consumers are often unaware of the problems of evidence and do not come properly prepared. Courts operate at hours covenient to the business community. The court's role in adapting the legal framework to social change cannot be over-estimated. To some extent the doctrines of fundamental breach and unconscionability are judicial attempts to counter unequal bargaining power.

The legislatures of Canada have taken some action in regard to consumer problems but only the surface has been scratched in the areas of advertisements, built-in obsolescence, pricing and credit. The inability of the substantive legal framework to deal with the consumer-oriented society cannot be eradicated by procedural changes alone but must be concurrent with effective changes in the consumer protection area.

It is apparent that existing judicial and administrative procedures, as well as the current state of the law, often restrict the effective assertion of rights in the consumer field. Psychologically, consumers are not predisposed to assert or defend their rights in a litigative framework. Many cannot afford the time to do so, and others are uncertain whether or not their dissatisfaction has merit.

In the long run consumer grievances and frustrations will never be adequately dealt with unless new grievance handling mechanisms can be created to supplement more traditional and formal channels. The needs are twofold: to develop effective techniques for handling complaints and to establish easily accessible bodies for solving grievances.

## THE CONCEPT OF SMALL CLAIMS COURTS

The history of the small claims courts has been summarized in another study published by the Consumer Research Council.[1]

The goal of the small claims court has been enunciated in many ways: to dispose of litigation quickly, inexpensively, simply, and justly; to render a decision which is effective and easily enforced.

The small claims movement intended to create a court which would reach a binding judgment by means of a speedy, informal and inexpensive procedure. This original concept is still valid although it must be expanded and perhaps reconceived as a middle class court, as well as a court for the poor. However, it is in the context of the consumer being at a disadvantage in relation to large corporations and organized bureaucracies that the small claims courts are being developed.

Without a special forum for her small claim the individual faces a costly, protracted suit in the regular civil courts. It is ironic that many claims courts, where they do exist, have fallen into neglect; witness their ineffectiveness in the Maritimes.

The principal criticism levelled at the small claims court system is that its main activity has become that of a collection agency. This does not seem to be solely an urban phenomenon: in Newfoundland the magistrate's court has become simply a mechanism for collecting taxes. Perhaps the essential problem is that its original goal of having a judge who acts as advocate for both sides has not provided a completely workable system.

Another problem with the system is that an individual is intimidated by the very fact that it is a court. It is clear from empirical studies that the small claims courts are truly the courts of business and rarely the courts of the individual. One of the problems this study seeks to overcome is the attitudinal one: how people think of the small claims court must be changed by the actions of government, assisted by aggressive consumer organizations.

I believe that the small claims court system is a good idea gone bad rather than being inherently unworkable. There is tremendous potential for a revitalized system to serve the needs of individuals effectively. Despite the appearance of the small claims system as a collection agency, what we are actually seeing is a plaintiff's court which could easily be used to the advantage of an individual litigant. The public must be convinced that going to the local small claims court is well worth the effort. This has been accomplished in the province of Quebec by publicizing the court and educating the public.

It is also important that the small claims court be accessible and convenient, as well as attractive and comfortable. Going to court should not be unpleasant. This means that the small claims court should be local even if that means it is only available at certain times of the day or month. It must be accessible by public transportation and provide covenient parking facilities.

There must be a forum where a claim for $25 or $500 can receive redress, according to an understandable procedure. One of the most important aspects is that the litigant should understand exactly what is happening so that she has a feeling of control.

The small claims process serves as a catharsis for many litigants; there is often a psychological value in confronting another party over a matter which is as much one of principle as of money. The cathartic value will be lost if the procedures are not comprehensible and worthy of respect. Although the system must be speedy, efficient and comprehensible, it must still maintain a certain order so that respect for the system is not compromised.

It would be a waste of resources to use the small claims court as an initial contact. I note in the responses to the consumer questionnaire that very often the first communication between the parties is a small claims writ. The small claims court should only be utilized once informal methods have failed.

Anyone using or investigating the small claims system often has difficulty in obtaining accurate information about the courts. Handbooks and guides are generally lacking and clerks often do not have information or knowledge. In legal affairs, more than in most other activities, information is power. When one litigant has more information than another about the court's operation or about the law in general, he has an advantage. Unfortunately, information usually has a price – usually a lawyer's fee. The attitude that the law is the property of lawyers, where no amateur dare go, is antithetical to the concept of these courts.

What we are concerned with is petty exploitation, the dollar value of which can be measured no more exactly than its psychological and social cost. Weiss paints a picture of the kind of problems encountered: "landlords who refuse to return two months' rent they accepted in trust as damage deposits knowing that most of the tenants they have singled out for this treatment are too young, too poor, too transient or too weak to take them to court; taxi companies that refuse to pay when their drivers smash into someone's car; towing companies that drag away cars with a snap and a crunch; merchants who sell with full knowledge thay they will soon repossess, pocketing the payments made up to the one that was missed (this is being corrected in consumer protection statutes), car dealers out to minimize service while maximizing income; cleaning establishments for which carelessness seems to be some kind of virtue; insurance companies that prey on low-income persons, glorying in their simplified accounting; professionals who charge far more than would be justified by the actual services performed".[2]

The small claims mechanism epitomizes the psychological problems existing in society: big business versus small consumer; the articulate versus the inarticulate; a well-documented case versus an intimidated and unprepared consumer.

In contrast to the normal adversary system of jurisprudence, which involves complicated procedures, juries, appeals, and lawyers, small claims courts employ simplified procedures, no juries, discretionary rules of evidence, limited appeals, the circumscription of lawyers, and judges who must follow the concepts of justice and equity.

## METHODOLOGY

The object of this paper was to assess the operation of the small claims court in Canada and elsewhere. All the available research from Canada and the United States was gathered. The author sent out questionnaires to 75% of all judges and clerks involved in Canadian small claims courts, and to litigants who had had a hearing before one. Not all the results have been reproduced here but they are available together with the actual questionnaires and correspondence for the information of interested persons. Respondents' names are confidential and are not available. Many of the matters covered in the questionnaires have not been analysed but it is hoped they will be analysed at another time.

## CANADIAN LAW

### British Columbia[3]

The Small Claims Division of the Provincial Court of British Columbia has a jurisdiction of $1,000 in actions relating to debt or damages, replevin, mortgages, and certain relief under the Consumer Protection Act namely, specific performance, cancellation of an agreement relating to goods or services and actions for fraud and mistake. There are no territorial limits to the jurisdiction.

The case must be brought where the defendant resides or carries on business or where the cause of action arose. In the place where the cause of action arose and the defendant resides are in the same jurisdiction, the action is taken in that court; if there are no courts in either of those areas then it must be in the closest court. There are no specific provisions regarding change of venue, costs, minors or the use of lawyers, and reference must be made to the County Court rules. The court has power to transfer a matter to the County Court if the amount involved in the claim or counter-claim is over $1,000, or where the judge is of the opinion that the County Court should deal with the matter and the amount is over $300.

Service may be made by anyone other than the party, either personally, "residentially", or by registered mail or substitutionally. It is provided that the sheriff must be used where possible. Service to out-of-province defendants may be made with leave.

The plaintiff will be confined to the particulars in the summons. The defendant has 10 days to file a Notice of Intention to Dispute. The Act states that proceedings will not be invalid because they lack technical form. If a Dispute is not filed, the plaintiff in a debt action may sign default judgment upon proof of service. In all other cases the plaintiff must prove his case to the satisfaction of the judge either orally or by affidavit. If the matter concerns a conditional sale contract, chattel mortgage or bill of exchange, the plaintiff can obtain interlocutory judgment. The defendant can move to set aside a default judgment within a "reasonable time", if she has a good reason for not having appeared, and upon paying costs. The provisions relating to counter-claims and set-offs are very detailed and specific. There is provision for joining a third party upon motion. Trial date is set by the Court within 10 days' notice. There is provision for pre-hearing garnishment with restrictions.

The court must render its decision at the time of the hearing. The judge can conduct an examination of the debtor as if it were a judgment summons proceeding. Once judgment has been rendered the plaintiff registers it in County Court and garnishment, judgment summons or execution can issue. The court has the power to commit if a witness does not appear, if there has been fraud on the court or if there has been a refusal to pay a judgment.

An appeal can be made within 14 days to the Country Court upon any question of fact or law, after filing security for costs. The matter is set down for hearing as soon as possible but at least 15 days after Notice of Appeal. The appeal is a trial *de novo* and the decision becomes one of the Small Claims Division.

The fee for all processes is $2.00, except execution which is $6.00. No solicitors' fees are recoverable. A judgment debtor in an automobile accident case will have her licence suspended if the judgment is not paid within 30 days.

Although the B.C. Act is generally one of the best, some of its provisions are unduly cumbersome, for example, there must be a formal motion and affidavit to amend a pleading, the sheriff must serve, there can be no error in the identification of the defendant, and the judgment-summons procedure is extremely complicated. The rules of evidence relating to hearsay and documents and the provisions concerning counter-claim and set-off are unnecessarily restrictive.

**Alberta**[4]

Under the provisions of the Small Claims Act, Alberta magistrates have power to adjudicate on claims for debt under $500 and on claims for damages under $200. The plaintiff must abandon the excess in writing. It is a court of record with special territorial limits. There are no provisions concerning corporate plaintiffs, use of lawyers, or transfer. There are no provisions regarding the court's power to amend technical defects, to commit for contempt, or to allow third party procedure.

A plaintiff fills out the summons, including the particulars, and pays a deposit of $4.00. The magistrate has discretion whether to issue the summons or not; he may refuse if he considers that it is not a matter for the Small Claims Act or if there is a problem of distance. In addition to the $4.00 deposit, the plaintiff may be requested to deposit a certain amount to cover mileage costs of the defendant. The date of hearing is set by the magistrate at the time of the issuing of the summons – it must be at least 10 but not more than 60 days after service.

There is no provision for the filing of a defence and the defendant must appear at the date set for hearing in order to prevent default judgment being signed based on oral or affidavit service. There is provision for signing consent judgment on application to the clerk. Judgment must be given in open court, at which time costs are in the judge's discretion. It is a court of record and evidence is transcribed in all cases. There is specific provision allowing a party to have a lawyer or another person, if permitted by the magistrate, appear on her behalf.

The court may at any time set aside or vary default judgment. There is provision for a judgment summons as well as complicated garnishment procedure. The offices of the Sheriff may be used to seize goods and chattels. There is no provision for execution against land.

Any party can appeal within 30 days of the judgment, upon filing security for costs, to a Judge of the District Court, who conducts a trial *de novo* but has before him the transcript of the original trial. There is no appeal from the District Court. There is provision for the payment of a solicitor's fee on appeal which varies from 10% (undefended actions) to 25% (damage actions) with a minimum of $5.00.

**Saskatchewan**[5]

Under the Small Claims Enforcement Act the judges of the Magistrates' Court have jurisdiction in matters brought by an individual plaintiff up to $500, and in matters brought by business plaintiffs, whether incorporated or not, up to $200 in debt, damages and recovery of goods. It is not a court of record and there are no provisions relating to minors, out-of-province defendants, transfer of venue or third party procedure.

The Magistrate must issue a summons if there is a *prima facie* case unless the parties live too far apart, when it is left to his discretion. He is specifically allowed to assist the party in preparing the summons while the plaintiff is obliged to provide all particulars and any relevant documents at

the time of issuing. There is a most interesting provision for the sort of "instant justice" that some of the American authors support: Section 33(1) states that "notwithstanding anything in this act the parties ..... may appear voluntarily before a Magistrate and upon their joint request he shall hear the parties and the witnesses, if any, and adjudicate upon the claim for demand without the formality of issuing a summons or requiring a statement of claim."

After the summons is issued, the plaintiff files a Statement of Claim which is served on the defendant. The summons contains the return date and must be served at least 6 clear days before the date set for trial. The provisions relating to counter-claims and set-off are extremely simple and easy to follow.

Here, as in Alberta, there is no necessity for a formal defence or counter-claim. Consent judgment can be signed by the clerk of the court and there is provision for payment into court by the defendant prior to judgment. If the defendant does not appear, default judgment can be given based on an affidavit or oral evidence.

A defendant can appeal to the District Court to set aside a default judgment within 6 months if there has been defect in service, an excess of jurisdiction or if the judgment is bad in law. An appeal must be filed within 30 days and the District Court hears it upon trial *de novo*. The judgment of the District Court can be appealed to the Court of Appeal with leave if the amount is over $50.

The fee is $3.00 for a claim under $100 and $5.00 above that. There can be no costs awarded except disbursements. The Magistrate must render his decision in writing. The procedures for taking execution are according to the practice of the District Court.

**Manitoba**[6]

The County Court Act has a special and simplified procedure for claims under $500. Not only judges but designated clerks and deputy clerks may deal with claims in contract, tort, replevin, trespass, partnership and inter-pleader. Minors may bring actions involving wages only and may settle other matters with the approval of the Official Guardian.

The Statement of Claim may be initiated by the plaintiff or someone on her behalf. The trial date is set by the clerk at the time the Statement of Claim is issued – between 21 and 60 days from the time of the issuing. The Statement of Claim may be served personally by the plaintiff or by mail within 30 days of the issuance. There is provision for residential or substitutional service with leave.

The defendant may file a Notice of Objection within 7 days, which must be personally served on the plaintiff. There is no necessity to file a Dispute if summary disposition is not objected to, and the defendant may simply appear at the hearing. If she does object to summary disposition she may file security for costs and the matter is then proceeded with according to the stricter rules of the County Court. If there is no Dispute or if the defendant does not appear the plaintiff may sign judgment *ex parte* upon proving the case before the clerk. It is interesting to note that if the plaintiff fails to appear the case may be adjourned. This is in contrast to most statutes, where the claim is automatically dismissed.

There are provisions for payment into Court, counter-claims and set-offs. If the amount is more than $500 the excess must be abandoned in writing. There is also provision for a third party procedure.

The Act specifically states that the rules of evidence do not apply for matters under $500, although there is provision for examinations for discovery. Costs are in the discretion of the court and may be allowed up to 10% of the amount of judgment.

An appeal from the clerk's judgment goes to the County Court within 10 days. The hearing is by way of trial *de novo*. An appeal on a question of law alone lies to the Court of Appeal from the judge. There is provision for execution against land and goods and for judgment summons.

**Ontario**[7]

The Small Claims Court Act provides for hearings by judges and by lawyers appointed *ad hoc*. The limit is $400 and an action cannot be divided so as to bring it within the jurisdiction of the court. The jurisdiction is very broad in that it refers to any action under $400 including replevin and statutory claims. In certain outlying districts the jurisdiction is increased to $800, with a provision that lawyers must appear for claims over $400. It is a court of record with very definite territorial limits. The rules on venue are complicated: the action can be brought in the court where the cause of action arose, where payment is due, where the defendant resides, or any other court with the leave of the judge. The venue can be changed with leave of the judge but will be changed automatically if the claim has been brought in the wrong court.

Minors can bring claims under $100 for wages. Lawyers are allowed but their costs cannot be more than $50. The court can transfer a matter to the County Court if it feels it should be heard by a higher court or if it does not have jurisdiction. The court has specific rules and forms. Service must be by the bailiff of the Court for a fee and must be personal if the amount if over $100. If the amount is under $100 service can be residential and there is provision for substitutional service at the initiative of the court. Defence must be filed within 10 days. If defence is not filed, default judgment can be signed within 6 months if it is a pure money demand. If the matter involves damages, the damages must be proven before the court without the necessity of proving liability. There is an alternative procedure similar to that of a Specially Endorsed Writ upon motion to the court. As in Manitoba there are no provisions for setting aside default judgment. Consent judgment may be signed at least 6 days before the date set for hearing. There are provisions for payment into court on notice. Both parties are bound by their particulars. Trial date is set by the clerk after pleadings have been finished. There is provision for pre-hearing seizure.

Execution must be levied within 50 days although there is a 15 day holding period after judgment has been rendered. There are lengthy procedures for judgment and show cause summonses and for garnishment within the territorial limit of the court. There is only execution on land over $40.

The court is exhorted to render judgments which are both "just and agreeable to equity and good conscience". Although the court is one of record the proceedings are not recorded unless the matter is over $200. Even then it may be dispensed with on agreement of the parties not to appeal.

A party can apply within 14 days for a new hearing to the judge who can direct a new hearing or render judgment. Appeals are allowed if the matter is over $200 or if both parties consent or if an

insurance company is involved. The matter is heard by trial *de novo* by the Divisional Court within 14 days. If the appeal concerns transfer of the matter it is heard by a Supreme Court Judge in Chambers.

The judge can allow amendments "necessary for the advancement of justice, determining the real question raised by or depending on the proceedings and best calculated securely to giving of judgments according to the very right and justice of the case". It is interesting to note that the clerk cannot practice as a barrister and solicitor which severely limits the assistance he can render to claimants. There is provision for service out of the jurisdiction of the court, provided the judge approves the person by whom it is served and provided service is effected at least 15 days before the return date.

There is no right to counter-claim or set-off without notice. Subpoenas are purchased from the court and served by the party. There are provisions for a consolidation order where there are two or more unsatisfied judgments.

**Quebec**[8]

Quebec passed an Act to Promote Access to Justice in 1971 creating the Small Claims Court as a division of the Provincial Court. The jurisdiction includes debt, contract, quasi-contract, tort and quasi-tort up to $500. It does not include alimony, slander, landlord and tenant or any issue which affects the "future rights" of one of the parties. Each court has jurisdiction with a 25 mile radius. The claim is issued on a form by the plaintiff or his representative and is served by mail by the clerk. The case is brought in the court where the debtor is resident or carries on business or where the cause of action arose.

Minors and corporate plaintiffs are not allowed, nor are lawyers. There is specific provision for weekend and night sittings. The defendant can request that the matter be transferred to the court where he resides if it has been brought where the cause of action arose. The defendant can apply to the judge for an order that the case be heard in the regular Provincial Court, and a defendant who is sued by a corporation in the Provincial Court for an amount under $500 may apply to have the matter transferred to the small claims court.

Defence must be filed within 10 days or else there can be a default judgment based on the proceedings filed or on a hearing. The defendants can move to set aside a default judgment in 10 days. There are interesting provisions for consent judgment. Instead of counter-claims and set-off the defendant must file for a separate action which is joined with the first action. The clerk will initiate third party procedure if requested by the defendant within 10 days of service. The clerk sets the date of hearing and must not disrupt the regular occupation of the parties.

The court is specifically exhorted to attempt reconciliation, to cross-examine, to render equitable and impartial assistance, to take views, to request expert testimony, to issue judgment on terms and otherwise to act as it deems just and equitable. There are provisions for examination of the judgment debtor and garnishment but there can be no execution against land. Costs on execution against goods are limited to $10 unless it is done personally by the judgment creditor. The clerk issues execution against goods.

Instead of a fee there is security for costs which is $5.00 for $100 and $10 for over $100. If the matter is settled before the hearing the parties must notify the court. There is no appeal from a decision of the Small Claims Division and the prerogative remedies are the only avenue of redress.

The clerk can refuse to issue an action and his decision can be appealed to a judge. The parties may be represented by an agent if there is written authorization. The judge must follow rules of evidence and instruct the parties thereon. He then follows "the procedure which seems best to him". It is specifically provided that the judgment is only *res judicata* for those parties and for the amount claimed.

### New Brunswick[9]

The New Brunswick County Court has jurisdiction in matters under $250 relating to debt and tort except for matters involving land and wills. It is a court of record with extremely formal practice and procedure. There is provision for a jury. The claim with its particulars is attached to a summons and served by mail or personally. The defendant has 20 days to file a Dispute with the clerk and if there is a counter-claim it may be over $250. There is provision for consent judgment.The clerk can sign default judgment if the matter is one of debt or liquidated damages. If it is a matter of damages the clerk signs interlocutory judgment and the plaintiff must appear before a judge for assessment of those damages. There is no provision for setting aside the default judgment. There is a procedure whereby local magistrates can deal with claims under $80, as in Nova Scotia.

The trial is held in a summary way. The court can allow amendments. Leave must be obtained to transfer to another court or to another venue. The clerk sends notice of trial which must be between 20 and 45 days after service. Costs are discretionary but automatic with a default judgment. The defendant gets costs if the plaintiff fails to appear. There is provision for pre-hearing seizure but no provision for collections, which are done in the manner of the Supreme Court.

An appeal may be launched to the Court of Appeal on a question of law alone, with leave. The extraordinary remedies are not available but there is a "show cause" procedure which is a type of mandamus.

### P.E.I.[10]

P.E.I. does not have a small claims procedure and all actions must be brought in the County Court. The jurisdiction is under $1,000 in debt, tort, replevin, adoption, landlord and tenant, except for matters involving land and wills. Action may be brought in the place of residence of the plaintiff if the cause of action also arose there, otherwise it must be brought where the defendant resides or carries on business. Particulars must be filed but there are no formal pleadings. The Supreme Court practice and procedure usually apply. Counsel fee is set at a maximum of $10 a day.

An appeal lies to a single judge of the Supreme Court and from there to the whole Supreme Court. The appellant is limited to the evidence before the County Court unless there is a new evidence. Matters of discretion may not be appealed.

### Nova Scotia[11]

Nova Scotia has two courts dealing with small claims which, we are led to understand, are little used – the Municipal Court and the Justices' Court presided over by magistrates and stipendiary magistrates or Justices' of the Peace. The Municipal Court's jurisdiction is up to $500 whereas the Justices' Court is $20 for one justice and $80 for two. In general the courts' jurisdictions are wide; however, Municipal Courts do not have jurisdiction over land, and stipendiary magistrates in the Justices' Court are not allowed to hear actions for defamation and criminal conversation. The Municipal Court has tax jurisdiction without limit. Particulars must be filed and the court is limited to these particulars.

Cases can be brought where the defendant resides or the cause of action arose but leave can be given to bring it anywhere else convenient. Assignees and executors are specifically allowed to sue. The Municipal Court can make its own rules of procedure.

Service is effected by a member of the police in person at least 5 days before the hearing. Defence must be filed at least 48 hours before the hearing. Costs are allowed if the matter is over $10. There is provision for execution against land as well as against goods.

An appeal may be filed within 10 days to the County Court, if the appellant is "dissatisfied" with the judgment.

**Newfoundland**[12]

The Newfoundland Provincial Court has a summary jurisdiction for taxes up to $1,000 (except in the 4 major cities where the maximum is $500) for debt, damages and wages up to $500. There is no jurisdiction in defamation, false imprisonment, wrongful dismissal over $50 and land claims. The court is a court of record and the judge is directed to take notes. If the counter-claim is higher than the jurisdictional limit, the matter must be referred to the Supreme Court which can refer it back either to the District Court or the Provincial Court. The court even has injunctive powers. The court does not have jurisdiction outside the province and service is by mail.

There are no pleadings but the plaintiff must file particulars with his complaint. The defendant does not have to file a formal defence. There are very detailed provisions on collection.

Appeal must be filed within 30 days on a question of law or jurisdiction. There are two kinds of appeal, one an *ex parte* procedure to the District Court in chambers, the other a further appeal to the Court of Appeal with leave of the County Court obtained *ex parte*. The fees range from 50¢ to $3.00 plus 25¢ a mile. The Provincial Court also has jurisdiction in criminal matters and investigations into fires and sudden deaths.

**The Territories**[13]

Under the Magistrate's Courts Acts of the Territories, Small Debt Officials have power in matters under $500 relating to contract, debt, tort, replevin, detenue, garnishment and attachment except for land, wills and defamation. The defendant must reside in the Territories. The judge can order execution of the judgment either in cash or in kind.

The process may be served by mail or personally by the defendant. The Small Debt Official has great discretion regarding the proof to be presented if there is no appearance at the hearing and no Dispute Notice is filed, and regarding time for defence, setting aside default judgments, and the fees and costs to be collected. The claim is started by a Notice of Claim with a summary of particulars. There is provision for a pre-hearing seizure. There is execution against goods, whereby anyone, in the discretion of the Small Debt Official, can seize and sell. There is provision for an appeal to the Territorial Court upon filing security for costs.

## SMALL CLAIMS COURTS IN OTHER COUNTRIES

### Britain

The small claims court division of the County Court[14] is presided over by a Registrar or an Arbitrator and covers actions in contract and tort under £100. No corporations, unincorporated businesses, or assignees may institute actions and lawyers are not allowed. The Registrar or Arbitrator has extreme latitude in determining the admissibility of evidence as well as far-reaching powers to negotiate a settlement. The court, like Quebec, may of its own volition seek out expert testimony or other evidence, if it thinks it necessary, at its own expense although it can order recovery of these expenses from the losing party.

There is provision for appeal on a question of law only, with leave, to the High Court. There are no costs payable except for fees paid to institute the action and expenses relating to bringing evidence. The procedure for pleadings and hearings is unduly cumbersome and very much like an ordinary court, unless the Registrar or Arbitrator can settle the matter at a preliminary stage on an informal basis with or without a hearing. Collection is done under the aegis of the County Court.

The Court and the Lord Chancellor's Office as well as the Consumers' Association have attempted to create a sort of "do-it-yourself" litigation, but once the matter is past the informal stage legal advice is necessary. The plaintiff writes her own complaint and serves it herself, or the court will serve it by bailiff or by mail for a small fee. There are two types of summonses and if it is a default summons (similar to a specially endorsed writ) the defence must be filed in 14 days. Otherwise (e.g. damage actions) there is a hearing. Unfortunately the advance pre-trial review by the Arbitrator is becoming less and less informal, partly because the Arbitrator is a lawyer.

The Court may refer a matter to arbitration on terms, and can order an arbitration if the amount involved is under £75, or with the parties' agreement if the amount is over £75. The Lord Chancellor has issued the following suggestions as a guide to arbitrators:

1. The strict rules of evidence shall not apply in relation to the arbitration.
2. With the consent of the parties the arbitrator may decide the case on the basis of the statements and documents submitted by the parties. Otherwise he should fix a date for hearing.
3. Any hearing shall be informal and may be held in private.
4. At the hearing the arbitrator may adopt any method of procedure which he considers convenient and affords a fair and equal opportunity for each party to present his case.
5. If any party does not appear at the arbitration, the arbitrator may not make an award on hearing any other party to the proceedings who may be present.
6. With the consent of the parties and at any time before giving his decision, either before or after the hearing, the arbitrator may consult any expert, call for an expert report on any matter in dispute, or invite an expert to attend the hearing.
7. The costs of the action, up to and including the entry of judgment, are in the discretion of the arbitrator.

### France[15]

There does not seem to be, at this time, any procedure for the settlement of consumer disputes apart from regular court procedures. There is a procedure called "injonction de paver" which is very similar to the specially endorsed writ in that one can request an order to pay where the amount is specified and results from a contract or arises from a bill of exchange or invoice.

### Australia

The Province of Victoria[16] has Small Claims Tribunals which are presided over by a Referee, who is a lawyer. Only individuals can bring actions before the Tribunal against traders who supply goods or services. The Referee tries first to get the parties to settle. If he is not successful he makes an Order. There is no appeal and costs cannot be awarded. A Referee's Order is enforced by filing it, free of charge, in the Magistrate's Court. There is a specific provision that the registrar and clerk must assist the claimant in completing the forms. Service is carried out by certified mail and the initial hearing is set to be convenient to the claimant. The parties must appear personally although a paid agent may be allowed if all parties agree and the Referee is satisfied it will be to no one's disadvantage. The proceedings are held in private and evidence can be given orally or in writing. The Tribunal is not bound by rules of procedure or practice and may obtain advice on any matter which it deems advisable. The default decision of the Referee can be set aside within 7 days and a re-hearing held. The financial jurisdiction of the court is $500 Australian. There are no rules as to venue and courts can be set up anywhere provided that a Referee has been appointed in that area.

There are similar provisions for Small Claims Tribunals in Queensland and New South Wales. Jurisdiction in Queensland is $450. It is important to note that in all states the decision of the Referee is final and binding and without appeal. The parties in all instances have the option of taking the case before a court of concurrent jurisdiction if they wish to keep their appeal options open. There is an important provision in the Queensland Act that a consumer cannot contract out of his rights under the Act.

### Israel

The Consumers' Council gives free legal advice and will pay up to 80% of the cost of filing a claim in an administratively organized Consumers' Court similar to that set up in Sweden. The procedure is voluntary and the decision is not binding.

### Russia

In all cases, except for those between two individuals, there is a statutory requirement forcing prior laying of a claim which is an extra-judicial procedure aimed at settlement out of court. Disputes between an individual and a juridical person are settled by a Tribunal consisting of one judge and two "people's assessors". There is a minimum state duty payable by the claimant upon initiation of his claim which he can recover from the defendant if he wins. Hearings are held in open court in the presence of the parties. The defendant receives notice by registered mail. In instituting the claim the claimant must send a statement of the particulars and the original documents. Although there is no maximum jurisdiction, the rate of state duty increases as the amount claimed gets higher.

Decisions of the court may be referred within 10 days to an appeal court consisting of three judges on the payment of a small fee. Execution of the judgment is done by a bailiff of the court.

When the dispute is between two individuals there is no necessity to lay a claim prior to bringing the dispute before the court. The venue is at a defendant's "whereabouts". Again the court consists of a judge and two people's assessors and there is provision for appeal. The initial court is similar to an arbitration procedure in that the formalities, although governed by the civil procedure legislation, are not as strict as in regular courts.

In addition to the above, there are Comrades' Courts[17] with a maximum jurisdiction of 50 rubles (about $70) which are only concerned with disputes between individuals on the voluntary submission of the individuals to the court. As in the more formal court proceedings the trial is held at the place of the defendant's work or at his residence. The Comrades' Court can consider a matter at the recommendation of a committee, of a state agency, at the petition of a citizen or on its own initiative. The concept of *amicus curiae* is incorporated into this procedure. The "judges" of the Comrades' Court are elected and their judgment is based on a majority decision. The powers of the Comrades' Court include forcing an apology; warning, censoring or reprimanding the wrongdoer; assigning work or compensation; or even ordering demotion or recommending how work can be improved. The decision of the tribunal is final although the Commune Committee or the Soviet can suggest that the court reconsider its decision. The Comrades' Courts are not an ideal form for the settlement of disputes because the judges are from the community and are therefore subject to pressure and personal bias. There are no lawyers involved and there are no "judicial safeguards", so that the standards of justice and the concept of legality are seriously brought into question.

### Sweden

Sweden has an alternative arbitration procedure which is voluntary. The Complaints Board is supervised by the Swedish Consumer Council and is divided into sections (Travelling, Motor Vehicle, Textile, Electrical Appliance, Boat and General). Consumers complain to the secretariat of the Board and most complaints are mediated at that level. If a matter goes before the Board, a decision is made based on written submissions and on the Board's own investigations without a hearing. Because it is a voluntary non-judicial system there are, of course, no appeals and the recommendation of the Board is not enforceable at law. The whole procedure is carried on by written or telephone communication.

### United States[18]

### (i) New York[19]

There are three Acts covering New York City, 61 other cities and two counties. Two of the three Acts preclude corporations, partnerships, associations, assignees and insurers while the third allows partnerships and associations. Parties who bring actions solely for the purpose of harassing or oppressing defendants are precluded from using the small claims court in the discretion of the Clerk. In New York City, the municipal corporations and school districts may use the small claims court as a collection mechanism.

The claim is written by the clerk on a form and the defendant is served at his residence, business or place of employment. Notice of trial is mailed after service.

Some courts require the defendant to file an Answer but most do not. If a counter-claim is over $500 the matter is transferred to a higher court on the defendant paying a set fee. The defendant can also request a jury on the payment of a fee of $12.50. The court has jurisdiction over defendants who reside or have an office in the area. The clerk serves the claim by registered mail.

The judgment is only *res judicata* for the amount in controversy and not for the issues raised by the parties. The court is authorized to conduct the proceedings in such a way as to insure "substantial justice". The courts are not bound by statutory provisions, or by rules of practice, procedure, or evidence except for statutory provisions relating to privilege, although a party will be bound by the particulars filed. The courts are not designed for the active participation of lawyers and the statutes are drafted in such a way as to encourage the judges to take an active role.

Some urban courts provide for a system of compulsory conciliation whereby the report of a conciliator must be filed before the claim is issued. In New York City there is a system of night courts.

Appeal is allowed on the grounds of substantial justice not having been done between the parties according to the rules and principles of substantive law. The Harlem Court has a system of arbitration on a voluntary basis. This court employs para-professionals called Community Advocates who have special training in consumer affairs, law and strategy. They help prepare cases and may actively assist in arbitration and at court. The Harlem Court is a true neighbourhood court, it travels around and has hearings in community centres throughout the area. It has been a most successful experiment which is expanding into other areas of New York City.

**(ii) California**[20]

Corporations are allowed to use the small claims court but assignees are not. Lawyers are barred and the limit is $200. The trial date is set at the time the claim is issued for the fee of $1.00, and must be within 30 days of service which is by mail or in person. The defendant does not have to file a defence but can simply appear. The parties are not bound by the technical rules of evidence. Only the defendant can appeal for a trial *de novo* at which time an attorney is entitled to $15 fee.

**(iii) Pennsylvania**[21]

In Philadelphia corporations, but not assignees, are allowed to use the court. Precedence is given to parties who have attorneys; corporations must be represented by a lawyer. The date is set at the time the claim is issued and sworn by the clerk and the claim must be personally served through the court. The defendant does not have to file an Answer and can request an adjournment in writing without appearing. Hearings are from 3.45 p.m. to 7.30 p.m. Default judgment can be based on affidavit evidence. A party can appeal on posting a $500 bond. An appeal for an amount under $10,000 must first of all go to compulsory arbitration.

In Pittsburgh, there is a system of compulsory arbitration to deal with small claims.

**(iv) Illinois**[22]

There are no rules of procedure in the Illinois Small Claims Court where the jurisdiction is $200. In Chicago, the defendant is not allowed to file any defence and must appear at the hearing. If either party has a lawyer the matter is transferred to the Conciliation Court where the simplified procedures no longer apply.

**(v) Massachusetts**

There is a specific Act to Simplify the Resolution of Consumer Claims which establishes an administrative court within the office of Consumer Affairs. Businesses register with the Consumers' Council and pay a fee. Consumers' Claims Officers hear and determine the claims. There is provision for simple forms and convenient places of operation. The claim can only be filed in the

district of the consumer's residence, for a flat fee of $5.00. Claims under $100 are paid from the Council funds; claims between $100 and $1,000 must be paid by the merchant. The costs are in the discretion of the Claims Officer although if the merchant has violated the Consumer Protection Act he must pay all costs involved. Although there is no appeal a Petition to Review may be brought before the District Court and from there an appeal may be made only on a question of law. A defendant in the regular civil court system can request a hearing before a Consumer Claims Officer at the discretion of the Consumer Council.

**(vi) Wisconsin[23]**

The summons is issued by the Clerk with a notice of hearing. The defendant has the right to transfer from a higher court, as in Quebec. A party can have trial by jury on payment of a high jury fee. The defendant has the right to one 7-day adjournment but the Court may extend it further. The Court is specifically empowered to order installment payments. There is provision for the use of an advisor similar to an *amicus curiae*.

**(vii) Miscellaneous**

In Washington D.C.[24] the judge has specific powers to attempts settlement either through arbitration or conciliation and no lawyers are allowed without permission. Evening sittings are held, where the procedure is particularly informal. In North Carolina[25] the judge is only allowed to reserve judgement for 10 days and can, in addition to the usual remedies, order specific performance concerning the return of personal property, or in landlord and tenant matters. The Nebraska small claims court[26] can grant declaratory relief relating to fraud, minority contracts and breach of warranty. There is a maximum limit of $11 placed on costs as well as limits on the number of cases heard – 2 a week and 10 a year. In Texas there can be no appeal if the amount is under $200 and above that only if the defendant wishes to appeal. The financial limits in Connecticut are $750 in Hartford and $200 in Hackensack. The Colorado courts bar lawyers, have a provision for an extremely informal procedure and provide for night sittings.

Lawyers are barred in Kansas[27], Michigan, and Minnesota and are only allowed in Oregon with the persmission of the judge. Arbitration procedures are available on a voluntary basis in Arizona[28], Oregon, Nevada and Delaware. Only the defendant can appeal a decision in Rhode Island and Washington. There are no small claims procedures available in Florida or Indiana.[29]

## SUMMARY OF RESPONDENTS' OPINIONS

Questionnaires were sent to 450 clerks and 400 judges attached to small claims courts across Canada. The response rate was 20%. Questionnaires were sent to 225 consumers and the response rate was 12%. I wish to extend to all those who replied sincere thanks for their time and effort.

**Judges**

Canadian judges have very distinct views of the small claims mechanism. Some judges, particularly those who are assigned to other civil or criminal courts, are very conscious that they are running a court and not an informal dispute-solving mechanism. These judges tend to be more strict in their application of the rules of evidence and of practice and procedure and also to be more reluctant to see the system changes. Other judges, the vast majority, are very conscious of their role within the community and attempt to act as equitably as possible.

Generally the judges are in favour of having lawyers because they do not like filling the roles of judge, counsel and arbitrator. They are unanimous in believing that lawyers should be consulted prior to trial by all parties in order to facilitate the process. Most are also against barring corporations because they realize that this discriminates against small local businesses.

Generally they are against allowing appeals because it is uneconomic. They are concerned that the appellate court will impose more stringent standards on what is a less formal forum. The existence of appeal, as well as the presence of lawyers, also seems to influence the degree of strictness with which judges will allow evidence or abide by the rules of procedure.

Almost all the judges were conscious of their educative role and attempted to fulfil this by giving instructions at the beginning of the day on practice, evidence, availability of adjournments, and so forth. Although most were in favour of increasing the jurisdiction to somewhere under $1,000, they were concerned that this might increase their workload. Consequently there was a very strong feeling that some sort of pre-hearing consultation should be held so that the lists would be screened. Where the statute requires an *ex parte* hearing on default of the defendant to appear, the judges felt that their time was not well spent, and that these procedures could be carried on by a well-trained clerk.

Opinions varied as as to whether, and to what degree, judges should be involved in encouraging settlement. Quite a few judges said they would suggest a compromise settlement in the middle of the hearing if they felt that the parties were amenable.

There was general reluctance to assume any sort of investigatory role or to become more akin to an arbitrator. They felt that these functions should be carried on by court personnel as an adjunct to the trial mechanism. There was a universal opinion that technicalities were unimportant and never determinative, but whether technical arguments should be used depended to a large extent, in their opinion, on whether lawyers were involved. This same feeling was apparent about the admission of copies of documents, documents without supporting testimony, estimates in automobile accidents, or even hearsay.

Perhaps the most common concern of the judges was the mechanisms available for collection. There was a general consensus that these were inadequate and uneconomic. Most also thought that the forms available were too complicated.

Judges were unanimously against evening sittings and most were not in favour of sitting on Saturdays, although they realized the convenience and saving for the parties: "That is a time for research, reflection, and rest". They were concerned about the demand on their time and energy as well as the cost.

All desired to conduct hearings with dignity and to render judgments that were fair and just. They were concerned about having to deal with complicated legal or factual issues because of the time factor, their lack of training in some areas and the effect that the lack of formality would have on adequate consideration. As one Quebec judge put it: they must dispense equity without excessive formality and with a large measure of paternalism.

**Clerks**

Most clerks saw their role as that of a procedural advisor and general assistant to the parties, particularly plaintiffs. Most clerks in Quebec and some in the other provinces also felt that their role included helping the parties prepare for court. Some clerks felt that they would like to help the parties more but did not have time, mainly because they also had other functions to fulfil outside the small claims system. Several felt that they would like to be involved in assisting the parties to settle, or in determining the method of collection, but again they have neither the training nor the time. In addition to being advisors, the clerks saw themselves as public relations persons. They do not like having to split functions or to share facilities with other courts. One clerk in Nova Scotia said: "in 11 years not one claim has gone to court. Supposedly the local magistrate will act as the municipal court judge but I have never met him or been informed as to when he would bother to hear cases".

Where the clerks were operating on a fee basis they were unanimous in their desire to become civil servants. Most felt that they should be given the authority to grant default judgments.

The main complaint of the clerks, apart from the lack of remuneration, was lack of training in the rudiments of law, in the overall procedure of processing a claim, and in the presentation of a matter at trial. Most felt they culd fulfil a greater role with proper training and staff, but also suggested that if this could not be accomplished, then at the very least the court should provide some facility for the parties to obtain competent advice on the settling or preparing of a case.

All the clerks were conscious of the fact that parties were at a disadvantage because of their ignorance of the procedures available and how to use them. Even clerks in the courts where the parties are given information on procedures felt it was not adequate and that there should be a wide publicity programme.

**Litigants**

Plaintiffs and defendants who had both won and lost replied. Everyone was much in favour of the small claims concept and of the availability of an inexpensive mechanism for collecting debts or resolving disputes. A surprising number of answers were concerned with defective goods and services, either as the reason for the claim or as the cause of non-payment of a claim until suit was filed.

As with the judges, the main concern of litigants seemed to be collection: not only the inability to collect but also the cost. As a rule, judgments were paid within 20 or 30 days or not at all. One man spent $199 in lawyer's and sheriff's fees to collect a judgment of $104; another paid $200 to a lawyer to issue a $400 claim.

There was a general feeling that the presence of lawyers was unfair. One man, who had a lawyer in court, thought that having a lawyer was unjust if the other party did not also have one. Several thought legal aid should be available to assist unrepresented parties.

Although going to court posed no problem for most respondents, more often than not they had to take time off work both to process the claim and to appear at court. Almost everybody suggested that there should be evening sittings. There was some concern about the fact that serving the claim took a long time and that the period between the claim being issued and the hearing was

unduly lengthy. The majority of cases surveyed took between 30 and 60 days from beginning to end, although there was one case in Ontario that took over 6 months. Most people had to wait 45 to 90 minutes before their case was heard, and the majority of cases only lasted between 5 and 15 minutes.

Apart from the problem of collection, the greatest single theme was the lack of information and assistance available. Most people were intimidated or confused by the whole process. A surprisingly large number of people referred to the defendant as the "accused" – particularly in the provinces where the small claims procedure is held in the same building or the same court-room as criminal matters. Several people commented that they felt their lack of knowledge of procedure damaged their case. Many defendants had not heard of the small claims court until they were served.

The main complaints of unhappy parties – and there were relatively few – were that they felt the judge was either biased or inattentive, usually because the judge had not accepted their version of the facts.

## TERRITORIAL JURISDICTION

The territorial limits must balance two interests: the ability of the court to be administratively efficient, and availability and convenience for the parties. The majority of provinces limit the court to a particular county or community. Alberta, Newfoundland and B.C. courts have province-wide jurisdiction.

The problem of putting specific geographical limits on the court is that a claimant or judgment creditor can be at a severe disadvantage if the court is not the right one.

The disadvantages of strict and limited territorial jurisdiction are two-fold: the problem of service and the greater problem of collection. The way to solve these problems is to eliminate the rather artificial concept of territoriality. The rules on venue should be sufficient to control access to a court.

The simplest answer is for each court to have jurisdiction across the province, together with very strict and clear venue rules. Counties are too broad but the 25-mile radius principle, although excellent, is expensive. Courts should be set up where necessary but subject to certain minimum distances (which would vary from province to province and from major city to small town).

Jurisdiction also needs the flexibility to serve outside its limits and to allow *ex juris* plaintiffs to sue.

I suggest that the ideal situation would be for the court to have jurisdiction to hear and adjudicate on any matter within the province.

## SUBJECT MATTER JURISDICTION

All matters of tort and quasi-tort and of contract and quasi-contract should definitely be within the court's jurisdiction; criminal matters and matters dealing with wills, land, trusts and estates should be excluded. The court should have no jurisdiction over issues related to the exercise of a power by any judge or official, or any matters concerning the Crown.

Both the Nova Scotia and Newfoundland courts allow taxes to be collected through the small claims court. These courts have consequently become tax collection agencies without any real social impact. Tax collection should not be in the jurisdiction of the small claims court.

Newfoundland magistrates do not have jurisdiction over cases of false imprisonment or wrongful dismissal where the amount in issue is over $50. The British Columbia Act excludes seduction and breach of promise, and defamation and malicious prosecution are almost universally excluded across the country. All these causes of action are torts of one kind or another. It is true that at times the law can be relatively complicated but it is also true that the measure of damages is quite often small. There is no reason why these types of actions should be completely excluded from the jurisdiction of small claims courts. It would be better to allow such actions and grant the judge power to transfer to a higher court where the matter is too complex.

The actions of replevin and detinue are excluded in some provinces and included in others. On the basis that it is the amount of money which is important and not the complexity of legal issues or the rarity of the matter, I feel that these actions should be within the jurisdiction of the court provided that the judge retains discretion to transfer the matter to the regular civil courts if he feels that the issues raised are too complicated for summary disposition.

Traditionally, actions concerning matrimonial matters, such as maintenance or alimony, do not come within the purview of the small claims court. This area of the law is changing rapidly and it is possible that marriage and separation contracts will become of greater social significance. As statutes are passed, the small claims court could be given greater jurisdiction.

The Quebec Law specifically excludes actions which affect "future rights". This is a logical extension of the concept that because of the summary nature of the proceedings, the cases are only *res judicata* for the parties concerned and do not create jurisprudence. The problem with this clause has been that corporations have, particularly where a consumer is exercising her legal rights, frustrated the purpose of the Act by consistently taking the position that "future rights" are affected. The judge should have much broader powers to transfer complex matters without restricting the types of cases where this prerogative may be exercised.

Perhaps the most contentious issue concerns the relationships between landlord and tenant. Because landlord and tenant laws are changing so rapidly, these matters should be excluded, particularly if there are specific provisions for administrative review.

At present no small claims court has equity powers. This should be changed in order to allow the court the broadest possible powers. The prerogative remedies *per se* should be excluded, but the court should have the broadest of powers in order to preserve its integrity.

The court should be allowed to order recision, reformation, repairs, replacements and that certain acts be done or not done. Of course this power should be purely discretionary, the judge at all times retaining the power to transfer.

The creation of consumer courts would be an expensive and inefficient proposition. All members of the public are consumers and aggressive consumers should not be entitled to any more special treatment than business interests. Consumer courts would lead to judges specializing in particular types of cases (e.g. vacuum cleaners, cars, large appliances) and would deny individual litigants the broader experience of a judge versed in objective justice. Generally, citizens should have only one place to go for judicial redress. In places where a substantial number of consumer cases are brought before the small claims court, the obvious recourse is to appoint judges who are interested and capable in consumer law.

The most important part of the small claims jurisdiction for the future should be under the various consumer protection Acts. The British Columbia Act provides that causes of action arising from and under the Consumer Protection Act may be litigated in the small claims court if within its fiscal jurisdiction. This jurisdiction relates not only to damage actions based on contract, but also to damage actions relating to fraud. Consumer Acts should be extended, as in B.C., so that the court has equitable powers in this area.

Sections similar to those in the British Columbia and Ontario Acts are very desirable: "in actions for specific performance of or for the reforming or delivering up or cancelling of any agreement relating to chattels or service or both including proceedings for relief pursuant to the Consumer Protection Act . . . .", and in "actions for relief against fraud or mistake in respect of any transaction relating to chattels or services . . . ."[30] The Ontario court has the power to grant relief, redress or remedy or a combination of remedies, whether absolute or conditional, including the power to relieve against penalties and forfeitures in as full and ample a manner as might be done by the Supreme Court.

Most courts in Canada have the power to commit for contempt of court. I feel that these very serious and far-reaching powers should be severely limited. The court can protect its integrity and enforce its orders by means of fines and broader collection powers.

## TYPES OF CLAIM[31]

The main "business" of the small claims courts of Canada is collection of debt based on consumer purchases, bank loans, bills of exchange and personal loans. The next two largest categories are automobile accidents and collection of professional fees. Studies done in the United States show a similar picture.

The table which follows broadly summarizes the types of claims brought in small claims courts.

The statistics for 1975 gathered from the questionnaires should be read with the following observations. Some of the headings in the questionnaire were insufficiently precise so that the results do not accurately reflect what occurred. Most of the actions under the categories of "Repairs", "Defective Goods", "Personal Services", and "Door-to-Door Sales" are probably actions brought both by individuals and businesses. Since it is known that approximately 16.5% of all actions are brought by individuals, the figures have been adjusted accordingly.

There were no claims relating to the "Laundry and Dry-Cleaning" category, and Ontario was the only one to report any actions relating to "Door-to-Door Sales" (1.2%). There were no actions for professional fees in Saskatchewan, but 29% of the actions in the Territories were for such fees. The percentage of actions relating to debt was highest in the Territories and lowest in Quebec (30%). There were no claims for wages in the Territories or Manitoba. Automobile accidents accounted for over 20% of the actions in Quebec, Saskatchewan and Manitoba, but there were no actions in the Territories. It is important to note that there were no figures for the four Atlantic provinces.

**TYPES OF CLAIM – ESTIMATES**

| | Auto Damages | Professional Fees | Simple Debt | Wages | Landlord & Tenant | Consumer Complaints |
|---|---|---|---|---|---|---|
| Canada 1975 | 13.2 | 12.8 | 57.9 | 1.6 | 11.2 | 4.7 |
| Vancouver 1975[32] | 10.0 | – | 7.0 | – | 11.0 | – |
| B.C. 1972[33] | 7.0 | – | 68.0 | – | 6.0 | – |
| Regina 1970 – 71[34] | 29.4 | – | 32.0 | .9 | 13.4 | .2 |
| Edmonton 1969[35] | 5.7 | – | 76.8 | – | 6.1 | .7 |
| Winnipeg 1971 – 72[36] | 3.0 | – | 67.0 | – | 19.0 | 5.0 (?) |
| Toronto 1972 - 73[37] | – | 22.0 | 49.5 | .5 | – | – |
| Montreal 1972 - 73 | 21.0 | 9.0 | 57.0 | – | 5.0 | 8.0 (?) |
| Montreal 1974[38] | 36.0 | – | 37.0 | – | 9.0 | – |
| Average Canada | 15.6 | 14.6 | 57.4 | 1.0 | 10.1 | 4.3 |

## FISCAL JURISDICTION[39]

Society seems to judge the importance of a claim by its amount. But a claim may be extremely important to an individual or small business because of the issues rather than because of the amount of money involved. The difficulty is to balance these values when looking at the upper limits of jurisdiction.

The purposes of the court, the current economic situation, the type and extent of the population, as well as the availability of other forums, all play a role. The amount should be large enough to include most minor claims, and yet small enough to exclude the more complicated issues that may be involved in a lawsuit for a large amount of money. The question is, for how much must a claim be before it pays to hire a lawyer? The problem is to have the amount high enough to cover most common non-vehicular consumer purchases, while still discouraging lawyers. If the amount is too high, then people who have very small claims will feel that their case has only received cursory examination.

Moreover, the higher the jurisdictional limit, the greater are the chances that there will be an appeal. Litigants and judges will by nature be more formal and circumspect when considering a large claim.

The limits in Canada range from $200 to $1,000. Six provinces have a maximum jurisdiction of $500. In the United States the fiscal limits range from $100 to $5,000. Limits between $1,000 and $10,000 have been proposed. One study suggests that the limit should be no lower than $500 and no higher than $1,000 except in certain consumer transaction cases filed by individuals, where the amount should be $3,000 to help those who cannot afford lawyers, with complaints involving automobiles.

Most Canadian judges were in favour of a maximum between $700 and $1,000, the majority of them preferring $1,000. The judges of Manitoba and some in Quebec and Saskatchewan were not in favour of increasing the jurisdiction of their court. The main concern was increased work-load. All judges recognized that the monetary amount did not necessarily reflect the importance of the matter to the parties.

In Canada the average case was around $200. The majority of cases filed in the small claims court, regardless of monetary jurisdiction, were between $50 and $250 with a very small percentage over $400, regardless of the limit.

In the Territories, the average claim was about $250, but ranged anywhere from $50 to $450. In Nova Scotia most claims were between $100 and $300, but ranged all the way from $25 up to $5,000.

In 1974, most claims in British Columbia were between $100 and $200, with the next largest group being between $700 and $1,000 (the maximum). In 1975, 25.8% of the cases surveyed were over $400, with 14.8% being under $50. The Ellis Survey[40] in British Columbia showed 73% of the cases between $101 and $250, with 36% under $100 and 8% between $400 and $499. The Justice Development Commission Study[41] showed 52% of all cases between $101 and $500.

In Alberta cases were evenly split between the ranges of $1.00 and $50, and $100 and $200. The average claim in the Province of Quebec was $125 in 1974, and was $154.92 in the City of Montreal. There was a significantly large number of claims between $25 and $50. In 1975, approximately one-third of Quebec's cases were between $201 and $300.

In 1974, the majority of cases in Manitoba were between $150 and $300. In 1975, 72% of cases surveyed were under $200 with 12.6% between $401 and $500. In 1975, 27% of the cases were under $50. The Gerbrant Study[42] in Manitoba showed that most claims issued by small businesses were between $26 and $60, while finance companies never claimed under $100, with the average being $350. The average claim for an individual was approximately $100.

In Saskatchewan, claims averaged $200 in 1974. In 1975, a surprising 41.3% of the cases were between $101 and $200, with only 10% between $300 and $500. The Campbell Study[43] showed that 55.9% of the claims filed were under $100.

The average case in Ontario was between $75 and $200 with a significantly large portion of cases being between $1.00 and $25. In 1975, 24.2% of cases were under $50, with 25% of the cases being between $101 and $200. In 1975, 28.6% of the cases were between $301 and $400.

Based on a sample of 1213 cases across Canada, 66% of all claims brought were for amounts under $200 with only 10% of claims over $400. This may lead one to believe that a jurisdiction of approximately $800 might be the optimum. There does not seem to be any correlation between the cost of living in an area and the limits of the small claims court.

A jurisdictional limit of between $600 and $1,000 would allow action based on large consumer purchases to come within the small claims jurisdiction. It may be advisable to allow the limit to be increased to $3,000 in consumer-initiated matters on consent of both parties.

The small claims court should have exclusive rather than concurrent jurisdiction over matters within its fiscal limits. This would clear regular civil court dockets and would force creditors to use the simpler procedures, thus creating an inflexible advantage for an individual litigant. There are two important qualifications. There must be power within the court to transfer where the issues are complicated or will have wide-ranging effects. If it is decided that the jurisdiction of the small claims court shall be concurrent with the regular civil courts, then there must be an option for an individual defendant to transfer the matter down. Concurrent jurisdiction would then avoid the problem of denying the option to proceed within the regular civil court. My impression is that there should not be that option available in order to enhance the powers of the small claims courts, particularly in consumer matters.

The monetary limit must be tied to the cost of living and be modified yearly according to changes in the Consumer Price Index.

## VENUE

The rules relating to venue are drafted in unnecessarily confusing terms. All Canadian Acts state generally that the case may be brought where the defendant resides or carries on business, or where the cause of action arose. However, they go on to state that notwithstanding the above, if the defendant resides and the cause of action arose in the same jurisdiction, the action must be brought there. Most of the statutes provide that the parties cannot contract where the action will be brought in order to allow the greatest flexibility.

In the Moulton Study[44] nearly 50% of defendants sued by corporations were residents outside the county where the action was filed. This reflects the practice of most Californian corporations to specify that the money due is to be paid at their home office. Consequently, the default judgment rate was substantially higher than average where corporations were plaintiffs.

Once it is decided that the territorial jurisdiction of each court is province-wide, then the issue becomes one of deciding the venue. It must not be forgotten that consumers may be both plaintiffs and defendants so that any rules relating to venue must treat both equally, although there may be a difference of treatment between an individual and a business.

There are two broad options, the first of which is to treat individuals and businesses similarly; the second is to have separate rules for individuals and businesses. There are several alternatives.

(A) Sue where the defendant resides, works or carries on business at the time the claim is filed. This would allow a defendant to escape after the cause of action arose and would encourage unscrupulous businesses to engage in unfair trade practices and then leave the jurisdiction. This is the most advantageous to consumer defendants and the least advantageous to commercial plaintiffs.

(B) Sue where either the plaintiff or the defendant resides, works or carries on business. This is advantageous for consumer plaintiffs but not for consumer defendants because business plaintiffs can then sue where they carry on business.

(C) Sue where the defendant resides, works or carries on business or where the cause of action arose. The California Act stipulates that a plaintiff must sue where the defendant resides except that a suit can be brought where the cause of action arose in actions concerning personal injury and contracts to perform personal obligations. Wisconsin provides that the suit can be issued where the cause of action arose in contract matters only if the defendant is served personally. This is advantageous to consumer defendants and is only partially disadvantageous to individual plaintiffs.

(D) Sue where either the defendant or the plaintiff resides, works or carries on business if the claim arose in that same locality. This is most advantageous for individual plaintiffs and least advantageous to small businesses. I favour this alternative[45].

An unlimited venue requirement which allows a consumer plaintiff to sue wherever it is most convenient would also benefit a business unless there is some differentiation. It must be realized that if there is any substantial distance involved it is going to be inconvenient for one party or the other. It is the bias of this paper that it should be inconvenient for businesses rather than for individuals. If this is not accepted then it should be made clear that costs should include mileage, travelling time and lost wages.

Quebec allows the defendant to request a change of jurisdiction. If the matter is brought where the cause of action arose the defendant can request transfer to the court nearest his residence. If there is no provision allowing a party to have a transfer there should be some discretion in the court clerk to allow venue changes in cases of extreme hardship. Perhaps the judge should have discretion to transfer to a court half way between the two. If a case has been brought in the locality of the plaintiff and the defendant resides a good distance away, there might be a court in between which may be inconvenient to both, but not impossible for either.

If there is discretion in the court to allow a transfer from one venue to another, the request for the venue could be made by mail or telephone. To allow such an informal method would be consonant with the general principles of the court. The judge should also have power to transfer in order to clear court lists.

If the differentiation between individuals and businesses is not acceptable, then the venue should be where the defendant resides, or where the plaintiff resides if the cause of action arose therein.

## PHYSICAL SURROUNDINGS OF THE COURT AND CLERK'S OFFICE

In British Columbia most courts were in a building housing other court or government offices, except in some of the rural areas. A little over 50% of the courts and clerk's offices were air-conditioned in modern buildings. Significantly, no courtroom had a coatroom or a public telephone and only two clerk's offices of 10 had a public telephone. The seating capacity in the courtroom was mostly between 20 and 50. All the courts had the traditional layout with raised dais, witness boxes and counsel table. About 30% of the courts had soft chairs, the rest having wooden or metal chairs or benches. In Alberta most courts were housed with others and were in modern buildings with air-conditioning, although a significant number of the courts were housed in old buildings away from any other government or court office. Most courts and clerk's offices had telephones and coatrooms and every clerk's office could seat 20. Half the courts seated between 21 and 50 people, and half seated between 51 and 100 . In all cases the court was set up in a traditional manner, and the majority had wooden benches. Only a very small portion had comfortable seating arrangements. Often the court was used for other community functions.

All the courts in Manitoba were in modern air-conditioned buildings. Both the court and the clerk's office had coatrooms but no court had a public telephone. All courts had wooden or metal chairs with the traditional courtroom layout. In Saskatchewan, N.W.T., Newfoundland and P.E.I. all the courts reporting were housed in old buildings with no conveniences at all.

In Nova Scotia, half the courts were in old and half in modern buildings. The courtrooms had no facilities, were large and had varying seating arrangements.

In New Brunswick the age of buildings, the facilities, the seating and size varied.

In Quebec the majority of courts were in modern buildings, although most did not have air-conditioning. The Quebec courts were the only one that had waiting rooms, coatrooms and public telephones universally available. The seating arrangements varied from court to court, which at all times were set up traditionally. Most of the courts were used for other community functions. In Ontario the majority were housed with other courts and were evenly split between old and modern buildings. Most had coatrooms, telephones and waiting rooms. Most had benches and were always traditionally set up. A few were used for community activities.

There should be some attempt to make all courts attractive, particularly in urban areas where the courts very often tend to be dingy because of the use of older buildings. The need is to avoid an atmosphere of intimidation. Courts are often scenes of mass confusion, with consumers complaining that they are treated like cattle. At the same time there is a need to engender respect, legitimacy and a sense of authority to the small claims court. If the surrroundings or procedures are too casual, people will feel that justice, too, is casual.

The court and clerk's office should be in one place which is readily identifiable, preferably in a building where there are other courts. The primary function should be that of a court, which could perhaps be used for other community functions. It should not be the other way around, i.e. not a community centre used as a court.

The "dais" concept should be dispensed with, but there should be some regalia such as the Canadian insignia and flag. The dress of the court personnel should not distinguish them from the public. If the judge is not on a dais he should wear robes, otherwise he should not. Small rooms should be used for the actual trials, away from the main courtroom where adjournments, the daily list and simple procedural instructions take place.

## ACCESSIBILITY

The courts should be easily accessible or at least have free parking. Most courts reporting had only 1 or 2 phone lines which would make them difficult to contact. However, the Montreal Court had 10 phone lines and 1 other large urban court had five. The general difficulty of contacting a court should be rectified, particularly in view of the growing importance of the telephone with respect to various procedures such as adjournments and change of venue. In urban areas it would also be useful if a recorded message outlined the purpose of the court and how it operates.

The vast majority of litigants responding drove to court; few used public transport or walked. On average it took most litigants 10 to 30 minutes to get to the court. Some litigants travelled over 200 miles. Most attended during working hours, although few arranged to go to the clerk's office on their day off. Some had to arrange baby-sitting services.

Most courts reporting were accessible by public transportation except in British Columbia, the Territories, P.E.I., and New Brunswick. Most courts in B.C., Quebec and Ontario had convenient parking which was either free or under 50¢. About half the courts in Alberta, Manitoba, Saskatchewan, Nova Scotia and Newfoundland had a similar arrangement. Where the parking was attached to the courthouse it was free.

The location of small claims courts should be related to the availability of public transportation and inexpensive or free parking. Accessibility also implies the need for courts to be open outside working hours.

## SERVICE

Service must be rapid, effective and inexpensive. The only provinces which do not allow service by mail at all are Nova Scotia, P.E.I., and Ontario if the amount is over $100. The other provinces permit mailing as well as personal or residential service and substitutional service.

The key difference is by whom service is made. In Ontario the service must be by a bailiff, in Nova Scotia by a "constable" and in P.E.I. by an officer of the court. British Columbia has an interesting proviso that the sheriff must be given preference in the service of process. Such limitations are not consonant with the principles already discussed relating to procedure. Some provinces also stipulate that service must be proved by affidavit and not by oral evidence.

The American experience is instructive; in New York registered mail is returned between 25% and 33% of the time, but when combined with personal service, service is effected in about 90% of claims issued.[46] In Wisconsin the rules for revocation of a default judgment are linked to the type of service.

A problem in the U.S., particularly in New York, has been "sewer service" by which the summons is discarded by the bailiff; as a result, default judgment is entered unfairly. The simple licensing of process servers does not seem to be the answer.

Personal service is time consuming and costly, and is risky because of hostile defendants, inaccessibility or evasion. However, it has a strong psychological effect and makes a defendant more likely to appear.

Mail service is inexpensive, although the letter carrier is put in the position of a process server. Refusal to accept a registered summons in New York is tantamount to service and can lead to default judgment.

The ideal is to have alternative methods of service. The primary method should be double registered mail by the court on payment of a fee. If this method is ineffective the alternative can be personal service by the plaintiff or someone on the plaintiff's behalf, who could be either a friend or on the court staff. It is unrealistic to use ordinary mail because it would allow defendants to allege non-receipt of a summons. If the service is by double registered mail by the court there should be no necessity to file a cumbersome affidavit or hear oral evidence, it would be sufficient to file the "pink card". Personal service, however, should be provable by either affidavit or oral evidence.

Personal service should be defined as service on the party personally or by leaving it with an adult person present on the business or residential premises of the party.

There should be provision for substitutional service if both mail and personal or "residential" service have been attempted. The clerk or deputy clerk should have discretion to allow substitutinal service, and procedure should be informal. The party should be able to present the case orally in person or over the telephone. If the telephone is used the party should confirm the conversation in writing, and of course the clerk should take detailed notes. The limits for substitutional service should be clearly set out. If there is provision for service *ex juris* then in such cases the judge ought to be the only one to grant leave to serve substitutionally.

Disputes should be filed with the clerk by mail. Although it ought to be the primary responsibility of the defendant to notify the plaintiff of the dispute, the clerk should always mail a copy to the plaintiff. There should be no personal substitutional service.

The rules for service *ex juris* are related to those on territorial jurisdiction and venue. I believe that "*ex juris*" should refer to out-of-province parties only. The rules must apply to both plaintiffs and defendants. The practice across Canada is uneven. The two Nova Scotia Acts state that there is no *ex juris* jurisdiction, while B.C. and P.E.I. require leave.

Allowing service *ex juris* leads to complexities in procedure, conditional appearances and jurisdiction. It also presents problems in collection. Any person or organization residing in or doing business in the province at the time the claim arose, or at the time of the issuance of the suit, should be subject to the jurisdiction of the court.

There should be a broad definition of what "resident or carrying on business" means so that any agent, representative or officer, office or place of business within the jurisdiction would be sufficient; a dealership or a retailer for a manufacturer would be sufficient for "residential" purposes. In these instances service by mail to the head office in addition to the local representative should be allowed without leave. A suit may be brought by an *ex juris* plaintiff on filing for security for costs.

The most efficient procedure would be to take jurisdiction when both parties and the cause of action are all within the province. The rules of venue would then operate to narrow the jurisdiction of each court. The alternative is that an out-of-province party would only be allowed if both the cause of action and the other party were within the province.

Locating corporate defendants is a frequent problem. Each court should have a directory similar to Moody's Directory of the City of Toronto. Bell Telephone records which are brought up to date daily should be available. The clerk should be able to direct the party to the appropriate government department where the information is accessible. The clerk should also share any information gleaned by experience about the names under which a company may operate (e.g. in California, General Motors does business under "C.T. Corporation System"! ). There should be information contained in the manual available to litigants regarding the steps to be taken to ensure that the defendant's address and name are correct.

## PRACTICE[47]

There has been a suggestion that the Rules of Practice and Procedure not be merely simplified but entirely abolished. This has been done in some of the American states but seems to have caused relative chaos. The rules of practice and procedure before the small claims court should be simple and minimal.

The first thing noticeable about the procedure across Canada is the difference in names of forms. Some courts have forms while others do not, some require formal pleadings and some affidavits. In some jurisdictions the defendant is not allowed to appear at trial if no dispute has been filed, whereas in others there is no provision for filing a dispute and in still others there is a choice. Ontario's section on amending is wide and allows the judge at any time to amend any defect or error in proceedings that he considers necessary for the advancement of justice, for determining the real question raised, or is best calculated to secure justice.

It is important to allow the party to be named in such a way that clear identification is established without the necessity of suing or being sued according to strict legal name. Leaving the word "limited" off, or naming a firm by the business name should be acceptable. The terms Mr., Mrs., Ms., and Miss with the initials, together with the correct address also should be sufficient. Nomenclature should be adequate for the purposes of obtaining judgment as well as collection.

The magistrate in Alberta has discretion to refuse the issuing of a summons if by reason of the distance between the parties, or for any other reason, he considers it is not in the interest of any party that the claim be adjudicated within the small claims system. In Saskatchewan the magistrate must be satisfied that the plaintiff has a *prima facie* case. I suggest that this discretion be given universially to the clerk of the court subject to reversal by a judge. This "appeal" should be done without any formality and at any time. Such discretion would help weed out frivolous claims which waste the court's and the parties' time and money. This discretion would not be so essential if there is a pre-hearing negotiation mechanism where the matters can be segregated and settled even if they are not proper cases for the small claims court. Discretion should include distance between the parties, abuse of the process and the raising of complex legal issues.

Some statutes provide for third-party procedure. I recommend that third-party procedure be extremely informal and able to be initiated either by the parties or by the clerk and the mediation personnel involved. There should be no pleadings involved unless desired by the joined party and it should merely be a matter of notice. If complicated questions of law and fact arise, the clerk or judge should be able to transfer it to the regular courts.

The use of affidavit evidence should be extended. Affidavits should not be the sole manner of gettting default judgments, but at a hearing the use of the affidavit would encourage efficiency. The cost of witnesses attending court is high, particularly if there are no evening or weekend sittings. The concept of medical reports which exists in most Evidence Acts should be extended to cover other professionals such as mechanics, repair personnel and engineers. Affidavits of the parties should not, of course, be allowed. Affidavits should be allowed in arbitration proceedings, creating another advantage for arbitrating rather than a hearing.

Fees in the small claims court range from $1.25 to $10 for initiating a claim. A flat fee of $5.00 should be universal for commencement of suit and for collection. The cost of service should be

the cost of mailing or $2.00 whichever method is used. Mileage allowances should be increased. Minors should be allowed to sue or be used if over the age of 14, without formality, particularly for wages.

The document which commences the actions should be entitled a Claim and should be in simple terms. The province of Quebec requires that an affidavit accompany the Claim which contains the particulars necessary if default judgment is to be granted. Whatever the contents of the Claim, a party should not be bound by the particulars.

The Claim should merely contain the essence of the dispute. Any more is not necessary in view of the suggestion elsewhere that judgment be *ex parte* or after a hearing. The Claim should also state the plaintiff's telephone number. If there are documents available, copies of them should be attached to the Claim to be kept at the court.

The Claim should be the primary responsibility of the clerk, as in Quebec. A person other than the party may commence the action in the plaintiff's name. The Swedes have a procedure of "trial by letter", where the complaint and the dispute are exchanged by mail and then placed before a committee of experts. If there is insufficient information then the party is telephoned. This could be adapted to the Canadian system by allowing claims to be issued over the telephone.

Along with the Claim, a Notice should be served in the language predominant in a community and should not be called a "summons" because of the criminal connotations.

The Notice is the most essential document. It should contain the following information: the telephone numbers of local community law offices; the address and telephone number of the court clerk and of any conciliation office; instructions on what the defendant must do if she wants to defend the action and the consequences of not so doing; time limits; how to get assistance from the court; the right to arrange instalment payments; the counter-claim procedure; the necessity to advise the court if an adjournment is required or if the party intends to be represented by a lawyer; the consequences of default; the options concerning change of venue and of applying for transfer to a higher court. Quebec sends out with each Notice a pamphlet explaining the small claims procedure. I feel that this is an essential element of a properly organized small claims court. It would be in this pamphlet that the options of going to arbitration or going to a full court hearing would be explained and analysed.

The Notice must contain a trial date. In Alberta the hearing must be within 60 days of the issuing of the claim with 10 days' notice. In Manitoba the hearing must be held between 21 and 60 days after the summons is issued. A Quebec clerk sets a date "without duly disrupting the occupation of the parties". The British Columbia Act states that the hearing shall not be deferred beyond the shortest reasonable time necessary in the interest of all parties concerned therein; but where the defendant resides outside the territory the return date shall not be less than 15 clear days from the date of service.

The trial date should be mandatory subject to consent adjournments being arranged between the parties and communicated by telephone to the clerk at least 5 days before trial. A second adjournment should only be allowed on consent and with leave of the judge. Each Act should provide that the initial trial date must be set in a period of 40 days but not earlier than 21 days after issuance. This will allow time for the parties to negotiate a settlement and yet provide speedy

justice. In 1975, 39% of the cases issued went to trial. Of these, 58.4% were heard within 40 days of issuance and 5.5% were heard more than 150 days after commencement. These figures accord with the estimates given by the clerks for 1974.

Requiring an Answer or Dispute minimizes the element of surprise, avoids unnecessary appearance by the plaintiff, and clarifies the issues for the court. Filing a Defence, on the other hand, makes the procedure more complex, gives the court more paperwork and generally causes confusion. It usually leads to a higher rate of default because once the defendant fails to answer, appearance in court is unlikely.

Defences were filed in an average of 14% of the cases surveyed in 1975. The courts reporting in Saskatchewan showed that no Defences were filed, but one court in Ontario had Defences filed in 96% of the actions. A significant number of courts had approximately one-quarter of the cases defended. All the provinces have some time limit for filing the Defence, ranging from 10 to 30 days. In Nova Scotia the Defence must be filed within 48 hours of the hearing.

The Manitoba Act provides that the defendant shall only file a Notice of Objection if she does not agree to have the matter disposed of summarily. There is no requirement for filing a Defence in Saskatchewan. I suggest that a Dispute be required where the defendant does not want to have the matter disposed of summarily, or if she intends to use a professional advocate or if she is questioning jurisdiction, otherwise a defendant should not be required to file a Defence.

Following on this recommendation of no required Defence, there should be no provisions allowing examination for discovery, cross-examination or reply.

The rules in Canada for counter-claims and set-off are extremely complicated and do not contribute to a simplified procedure. Many jurisdictions provide that if the counter-claim exceeds the jurisdiction of the court then the excess must be abandoned. Newfoundland has a provision that if a counter-claim is over the fiscal limit of the court then the case is automatically transferred to the higher court which can refer it back. Quebec does not allow counter-claims or set-offs but the defendant must issue a separate suit which is joined. Saskatchewan allows counter-claims and set-offs to be raised without notice.

Approximately 10% of cases issued involved counter-claims or set-off. There were none in the courts reporting in Manitoba, but one court in Ontario reported 66% of its cases had counter-claims.

No more than the fiscal jurisdiction of the court should be put in issue. Providing for automatic transfer if the counter-claim is above the jurisdiction of the small claims court would simply defeat the purpose of the court and frustrate the plaintiff.

I suggest one of two options: adoption of either the provision in Saskatchewan, as long as there is an automatic right to an adjournment at the request of the plaintiff-defendant-by-counter-claim, or the Quebec concept of separate matters, which avoids the element of surprise.

Despite the reluctance of Canadian judges to sit in the evening or on weekends, such arrangements should be instituted, particularly in the urban areas. One urban court in British Columbia, one rural court in Ontario and some Quebec courts have arrangements for evening sittings. Evening

and Saturday hearings should be treated as a matter of routine and not looked on as a privilege. The timing of the hearing should be at the option of the plaintiff, subject to the discretion of the clerk. Night sessions would also facilitate the availability of witnesses, duty counsel and competent arbitrators. At the very least, arbitrations should be held in the evening – adding yet another advantage to this alternative procedure.

I see no reason why two parties involved in a dispute cannot attend the court for an adjudication without the necessity of going through all the formalities, as in Saskatchewan. Particularly in areas where there is a large transient population such a concept would greatly enhance the effectiveness of the small claims court. This suggestion has been made, not only by learned authors, but also by several court clerks and some judges in Canada. I recommend the adoption of a procedure similar to that of Saskatchewan, subject to the proviso that the parties must first attempt a settlement through the court's consultation procedures. Of course, if the parties want "instant justice" there should be some provision for "instant collection".

## ADJOURNMENTS[48]

Only about 10.6% of the cases inititated in Canada in 1975 had at least one adjournment. No cases were adjourned in Quebec, which speaks eloquently for the procedure adopted there whereby the date is set at the convenience of the parties and the matter is changed to another date through the mail. The percentage of adjournments ranged from 6.1% (Manitoba) to a high of 28.5% (Alberta). Of the provinces where adjournments were recorded, the average was slightly higher at 14.1%.

In 1974 the estimates are similar, with Quebec adjournments estimated at about 10%, 20% for Saskatchewan and the Territories. The B.C. Justice Commission study showed that 86% had no adjournments, 11% had one and 1% between 3 and 6.[49]

In California either party can obtain an automatic adjournment as long as it is requested in writing at least 10 days before trail. In New York second adjournments are only granted in "dire circumstances". Adjournments are not a major problem, but they are a nuisance. Parties should be encouraged to inform the court as early as possible of an intention to request an adjournment. The clerk should be able to grant adjournments up to 48 hours before trial and should then notify the other party by telephone or by letter. First adjournments should be granted freely and easily; second adjournments only on consent or in "dire circumstances".

There should be a limit of no more than 15 days on the time for an adjournment. The party not seeking the adjournment should choose the new date unless justice or feasibility dictate otherwise. Applications for adjournments should be made to the clerk by telephone with confirmation to the other party by the clerk. Adjournments requested at trial should be in the discretion of the judge and for good reason.

## RULES OF EVIDENCE AND OF PROCEDURE

Strict adherence to rules of evidence would severely inhibit both speed and informality. The high degree of informality in small claims cases enables a judge to get to basic issues. When formal rules are used, the trial becomes slower, the dockets become clogged and the procedure becomes unintelligible, necessitating lawyers.

Strict rules of evidence work to the disadvantage of consumers because most consumer transactions are relatively informal and consumers rarely get or keep the documents or notations necessary to prove their case. Many evidentiary rules are designed to prevent the jury from hearing unreliable or prejudicial evidence or from weighting evidence incorrectly. A competent judge need not be protected in the same manner as a jury.

As seen in the preceding section, Canadian judges are content with the present state of informality and are generally in favour of liberal interpretation and application of the rules. However, it is clear that they are uneasy about their dual role and would prefer their functions to be more specifically defined. Part of this unease also comes from the fact that judges who have been legally trained, or who act within the regular civil system, are not at ease with a loose structure.

In the Maritimes most judges apply the rules loosely, although the one Newfoundland judge we heard from applies them strictly. All conform to the principles of *stare decisis* and reported case law, but also apply the rules of equity. Most judges will allow hearsay evidence and it then becomes a question of weight rather than admissibility. Photocopies of documents or of testimony relating to unproduced documents are frequently allowed. Some judges even allow affidavit evidence if the party presenting the case can show why that person cannot attend. Most judges do not attach a great deal of importance to the technicalities and seem to be more interested in gathering the facts than on how they are presented.

In Quebec the judges are almost evenly split about the strict application of the rules and the advisability of referring to the principles of equity. The Code Article 976 directs the judge to cross-examine and to give equitable and impartial assistance to each party while ensuring respect for law and equity. Most judges take an active role, although some refuse to get involved in independent investigation. Many of the judges will attempt to reconcile the parties and to assist in negotiating a settlement, but within this context the judge is also bound to follow the rules of evidence and to instruct the parties on these rules as the case proceeds, although he is given some discretion to follow the procedure which seems best. Most judges do not allow hearsay and abide by the "best evidence" rule, except in the case of secondary and collateral matters. Some judges will accept affidavits, documents, photocopies, and testimony unsupported by documents but usually only if both parties agree. In general, the rules are a little more flexible and the judges will tend to interpret them more broadly than in the regular Provincial Court; technicalities will be overlooked if they do not cause prejudice to the parties. One judge seemed to be concerned about the fact that very often technical error is due to the inexperience of the clerk in legal matters.

Most judges in Ontario are very flexible about the rules, and all apply the principles of equity. Most judges apply the principle of *stare decisis* and feel themselves bound by reported case law. Ontario judges only take an activist role where a party has no lawyer. The degree of involvement will depend to a great extent on the time available and on the ability of the parties to speak. Most

judges refuse to do any independent investigation, some because they feel it is improper, but most because they feel they have no facilities or time. On the other hand there was at least one judge who will take views. Most judges will encourage the parties to negotiate a settlement but will not become actively involved. Some judges will initiate settlement only where there are two lawyers present or two parties without representation. The degree of involvement of the judge in settlement is individual: one judge says that if the matter seems to be a clear one he will demand that "the parties smarten up and settle", whereas another may make suggestions at the beginning of the day to those present to try and settle while they are waiting. The looseness with which the rules of evidence are applied seems to depend a great deal on whether the parties are represented or not, on the circumstances of the case and the length of the list. One judge referred to this flexibility as being a "benign blend of law and equity". The judges seem to be more strict about evidence where the matter is appealable than they are in non-appealable matters, where they are really acting more as arbitrator than judge. The judge will play the technicalities of the rules of practice and procedure if one of the parties insists.

In Saskatchewan the judges are almost evenly split in applying the rules of evidence, but when it comes to the rules of practice and procedure they unanimously prefer flexibility. Most judges in Saskatchewan who answered the questionnaire applied the principles of equity, although one did not. Their comments were similar to those of their colleagues in Ontario. Judges often adjourn in order to have the parties settle their case. "All these rules must be tempered with patience and good sense".

Alberta judges unanimously support the loose application of the rules as well as a broad application of the principles of equity. The technical view of the procedure depends on the presence of counsel. Generally technicalities are ignored but are always available within the law.

The Manitoba Act provides that the rules of evidence do not apply and the proceedings shall not be deemed invalid because of their informality.

In British Columbia there is a striking degree of involvement: most of the judges will question the parties and will try to get them to settle, although independent investigation is rarely undertaken. They also unanimously approve the "elasticity of the rules of evidence" although affidavits are never allowed. The rules of practice and procedures seem to be more strictly enforced in British Columbia, although there is some flexibility in that amendments are freely allowed. There seems to be a strong tendency to allow adjournments if it appears that a technical defence is going to defeat the justice of the matter.

A typical direction could be as follows: The judge shall conduct the trial in such a manner as to do substantial justice between the parties according to the rules of substantive law and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except such provisions relating to privileged communications.

Such things as hearsay and documentary evidence should be admissible, but the question of weight is one which is for the judge alone to decide. Judges should not have discretion as to whether or not to adhere strictly to the rules of evidence, but rather their discretion should be as to how informal they think they can be without perverting justice.

If the role of the court is to be investigative and not purely adjudicative, because of the absence of pre-hearing consultation, the responsibility for reaching a just conclusion rests on the court,

not on the litigant, particularly in the case of non-business parties. It should encourage telephone contact through the court before a matter is issued, e.g. buyers who come to the court and speak with the retailer through the clerk. If the matter cannot be clarified in this way, then the clerk would issue the summons. There should be no onus of proof: it should be up to the judge to decide whether he has enough facts on which he can make judgment.

## ROLE OF THE JUDGE

Whether the judge is a true adjudicator or an inquisitor depends on the philosophy on which the small claims courts are based. The basic premise of this paper is that the court should retain its adjudicative role, and that the investigative role should be carried out by court personnel prior to a hearing. If this procedure is adopted, then the judge should maintain a passive role. The parties would have already gone through the mediation process and would be well apprised of the evidence and argument necessary. In addition, any party not having counsel would have duty counsel available if the opposing party is represented by a professional advocate.

If the pre-hearing mechanisms suggested are not adopted then the judge must take on the role envisioned by Ison:[50] he must become an active investigator, acting as counsel, jury and arbiter. Mixing adjudicative and investigative functions is not ideal. People except a judge to act like a judge and are confused and unsettled by a dual role. The role played by the judge in the court-room often determines people's impression of justice being done or not done, regardless of how much prior information and expectations an individual has concerning court procedures.

In practical terms, these two different roles would mainly affect the use of consultants and outside experts at the initiative of the arbiter, the involvement of the arbiter in the actual court proceedings by examining and cross-examining, the power to induce a settlement and the adherence to the rules of evidence practice and procedure.

In most courts the judge not only plays his own role but also that of counsel, and in this way he guards against abuses and ensures that the trial is fair. In some provinces the judge has the power to take a view, to take testimony out of court, to seek expert opinions, to disregard the technical rules and is often specifically directed to apply the rules of equity.

This activist role of a judge seems to run counter to the traditional attitude toward the adversary system in which the judge is the pinnacle. The concept of an activist judge allows justice to vary from court to court depending on personality, training and inclination.

The litigant's view of the judge can vary from being extremely helpful to being interested only in finishing the matter. It is extremely difficult for an activist judge to treat both the defendant and plaintiff equally, particularly if one of them has counsel.

Plaintiffs who frequently appear before the court become familiar to the judge and there will be a natural inclination on his part to overlook the manner of presentation of the case and to be lulled into believing that justice is being done. However, the defendant may not be adequately protected, because the judge in such a case does not get actively involved in order to balance the scales. Very often judges do not want to get involved in complex questions of fact or law and will encourage settlement, thus becoming, in effect, arbitrators. They do not try to play an active role because of the trivial nature, in their eyes, of the matter and will often try to reach a compromise, either by putting pressure on the parties or by making a "saw-off" decision.

It is important to remember that small claims courts, together with traffic courts, are very often the only contact that citizens have with the judicial process and if they are given short shrift by the process, it has an important sociologicial impact on attitudes in the community in general. If the litigants feel that they have not been given a fair hearing or if they do not understand the decision, the appeal procedure will be come over-used, particularly where there is an avenue of appeal by trial *de novo*.

Most judges replying to the questionnaire do not seem to be in favour of having broader investigatory or settlement power. Some are in favour of investigatory powers within the court system, but feel that it should be handled either by duty counsel or by the clerk of the court.

The feeling in Ontario about investigatory powers is similar to that in Saskatchewan. The court should have the power to retain consultants and experts if the matter is unfamiliar to the judge. This is particularly true in consumer matters.

The judge must have an extremely strong character, as well as, humour, patience and an excellent legal background. In communities over 50,000 it would be advisable to have full-time small claims judges with legal backgrounds. The appointment of lay judges is inadvisable, particularly in the light of my recommendation concerning arbitration. With the increasing importance of small claims courts, the fact that highly paid judges either full-time or from other regular civil courts are used in the small claims should not be a drawback. The best system would be for judges to rotate, spending limited periods in small claims courts. Small claims judges should not be justices of the peace or local magistrates, but should have the stature of county court or district court judges.

## DEFAULT JUDGMENTS[51]

There should be more formality in signing default judgments as these are notoriously easy for creditors to obtain. There should not be *pro forma* default judgment. Most defaulters are individuals. High income people are more likely to appear and defend, even without the aid of a lawyer. One study[52] showed that 40% of those making credit purchases were dissatisfied with the merchandise, which indicates that there is often a defence which the defendant does not know about, is afraid to put forward, or does not know how to put forward.

There should be *ex parte* judgments. The minimum requirement should be that the plaintiff must prove an attempt to contact the defendant. This would cut down on the use of the courts as simple collection agencies as well as protecting the defendant who misunderstood her obligations.

In Saskatchewan the plaintiff may prove her claim by means of an affidavit or by oral evidence. The use of affidavits is only allowed in Alberta where oral evidence cannot, for good reason, be presented. In British Columbia, where the action is for damages, the plaintiff or another person must appear to give evidence; judgment in debt matters is *pro forma* except "where the cause of action or relief sought is a conditional sales agreement, bill of sale, chattel mortgage or bill of exchange given to secure a contract where interlocutory judgment is signed and the matter must go before a judge as to the order of proceeding thereafter."

Some clerks feel they ought to have the power to issue default judgment. This should be allowed after extensive training.

All cases should undergo an inquisitorial process and the court should probe beyond the *prima facie* semblance of regularity to get at the facts surrounding the underlying obligation.

It may take court personnel time to inquire into default judgments but in the long run the court will actually save time because creditors will be less tempted to burden the court with collection cases that are dubious or that could be settled out of court.

Statistics of five provinces show that approximately 50.4% of all small claims cases filed in 1975 ended in defalut judgment. Manitoba, Saskatchewan and Alberta do not have a default judgment as such because the matter must be heard in order for judgment to be entered. The range of default varied from a low of 15% in Sept-Îles, Quebec, to a high of 88.9% in Burns Lake B.C. Estimates for 1974 are also revealing. In B.C., default judgment was awarded to the plaintiff on an average of 25% to 40% of the time. In Alberta default judgment was awarded between 55% and 70% of the time. Manitoba and Saskatchewan recorded default judgments in 25% to 40% of the cases. One N.W.T. clerk estimated that default judgment was awarded in approximately 75% of the cases. In the urban court in Newfoundland default judgment is awarded between 55% and 75% of the time, whereas in the rural court it is only 10% to 25%. The Nova Scotia courts report defaults in 40% to 55% of the cases filed. In two New Brunswick courts the default rate was between 10% and 25% and in two others between 55% and 70%. The majority of Quebec courts report default judgment between 25% and 40%. The majority of Ontario courts report the default judgment rate between 55% and 70%.

The most common percentage throughout the Canadian studies is in the high twenties. The Segal[53] study showed that the default rate was between 27% and 35% provincially with Montreal averaging 29%. In British Columbia the Justice Development Commission and Ellis considered the average default judgment rate to be 27% and 29% respectively.[54] The average for British Columbia according to the statistics gathered for this study was 36.2%, excluding the Vancouver courts.

The re-opening of default judgment should not be *pro forma*. The time span for revocation should be approximately two months. The clerk should make the initial decision on whether there is cause shown, taking into consideration the facts of the particular case as well as how knowledgeable and how powerful the party is who is trying to obtain the default judgment; there should be less excuse for a business to default than an individual. The court should be able to open or vacate default judgment on its own motion where, for instance, it is discovered that the plaintiff has been engaging in illegal or unfair practices. Defaults would be less likely if the court is convenient and friendly and if the procedures are simple and understandable.

Elsewhere I discuss the importance of involving neutral parties in the dispute at the earliest possible moment. If this procedure is adopted, then the rate of default judgments will be considerably lowered and this will be even more true for the probability of having default judgments revoked. The Quebec practice of having an accompanying affidavit to the claim would, in the absence of the mediation procedures suggested, assist the clerk in evaluating the matter when application is made for default judgment.

## JUDGMENTS[55]

Some of the courts in Canada have a specific provision requiring the judge to give the decision in open court; others provide that judgment may be reserved and given in writing or given in court at another time. The requirement that judgment be given immediately in open court ought to be encouraged and should be universal.

Reserving judgment allows the parties to cool off and often gives them an opportunity to settle amicably without the necessity of a formal order. It is less embarrassing to a litigant to lose by letter than in front of people. Reserving allows the judge to make fuller evaluation of the facts and issues. However, rendering a decision immediately makes it more understandable because the judge will be more likely to give reasons. It saves time, creates less tension for the litigants, and allows the winner to go immediately for advice on appeal and collection procedures and to arrange for collection.

If judgment is to be reserved there should be a provision that the parties are entitled to judgment with written reasons within a three-week period after the hearing, but this should be in addition to a specific provision encouraging oral judgment at the time of trial.

Sometimes judges will take time to explain their reasoning and at other times the judges refrain from playing this educative role or attempting to justify their actions to the litigant because they do not feel it is of importance. This last aspect is extremely important in the small claims context because a great deal of the attractiveness of the small claims court is the cathartic and psychological role played by the court, and if judges do not participate and share with the litigants the reasoning behind the decision, the psychological satisfaction of going to small claims court is often lacking and the litigants go away unsatisfied.

In Canada in 1975 and 1974 approximately 2% of all judgments were reserved. About 60% of the litigants responding to the questionnaire reported that the judge explained the decision and these respondents rarely complained about the justice of the decision – win or lose. About one-quarter of the respondents had to wait for a decision and none of them was completely satisfied with the result, particularly in view of the fact that they did not receive reasons with the decision.

Judgments of the court ought to be final only with respect to the parties to the suit and for the amount claimed, as in Quebec. They should not be used as precedent for other issues or other parties but kept to the narrowest of confines. In addition, the judgment should be effective throughout the province and have the same effect as a judgment of the next higher court. There should be no necessity for having to file the judgment in a higher court for the purposes of execution.

## COSTS [56]

Some Canadian statutes leave the question of costs up to the discretion of the judge. The British Columbia Act states that no counsel fee of any kind whatsoever shall be charged against either party. Alberta only allows solicitors fees on appeal, to a maximum of 25% of the damages claimed, and in Quebec the amount of fees cannot be over $5.00. In Saskatchewan the only costs allowed is the fee for issuing the summons; in Manitoba costs can be allowed to a maximum of 10% of the amount involved. The fee collectable in Ontario for an action over $200 ranges between $5.00 and $40 according to the difficulty and importance of the case.

Circumstances vary so greatly from case to case that the judge should be given discretion in deciding whether to award costs or not. The dilemma is that having a general rule allowing costs may discourage a litigant from defending, and if costs are not allowed it will probably discourage plaintiffs from prosecuting. The dilemma can be lessened by keeping the fees for filing and processing low.

As a rule a successful plaintiff should be reimbursed for his filing fee and the costs of service. A successful defendant should be reimbursed for any out of pocket expenses, subject to the discretion of the court.

The discretion of the judge should be related to the "closeness" of the case, the ability of the party to pay and the attempts to settle before coming to court, in addition to the success of the litigation.

Consumers were concerned about the expenses of going to court, such as for baby-sitters, time off work and transportation. Such costs should be within the discretion of the judge, but a practice of awarding them is not recommended. The same discretion should be related to costs incurred by the court for such things as expert evidence, telephone calls and the copying of documents.

The general rule for collection costs should be that the party is reimbursed for the fees charged by the court. A judge should be able to require a judgment debtor to pay the costs of collecting where the finds that the collection processes were necessitated by avoidance of payment. I further recommend that no counsel fees be awarded in any instance.

## COLLECTION[57]

It is difficult to obtain accurate data on how successful parties are in collecting. Court records rarely have the results of the collection. The evidence available indicates that collection is a severe problem. A study in Philadelphia showed that although 38% of the cases resulted in default judgment only 14% of the cases were successfully collected. Most respondents to the questionnaire reported difficulty in collecting.

Neither the Saskatchewan Act nor the statutes in the Territories deal with collection or the manner of executing judgments. The other provinces provide for judgment summons, and execution against goods and chattels. Judgments of the Quebec Small Claims Court cannot be executed against land, but most other provinces provide for registering the judgment against land. A Yukon Small Debt Official can issue a writ of execution to any person he thinks will be fit and proper to execute. Execution is issued in British Columbia and Ontario by the clerk. In Ontario the bailiff is limited to the county where he is situated and is paid on a fee basis. A section in the Ontario Act encourages the bailiff to issue execution promptly and effectively by providing that if he does not he can be ordered to pay damages because of delay or neglect.

No statistics or information for the year 1975 were available from the detailed analyses of the cases reported by the court clerks. The clerks did provide estimates based on their personal court experience of collection in 1974. Under 40% of the judgment creditors found it necessary to issue execution in British Columbia, Alberta, Manitoba, Ontario and in New Brunswick. The figure was closer to 60% in Quebec. The greater use of the collection mechanism in Quebec is probably explained by the fact that it is efficient and inexpensive. The success rate of judgment creditors in collecting their judgments varied from around 75% in British Columbia, Ontario and Quebec, to 45% in Alberta, and 25% in Manitoba. The estimates were even more discouraging in the Maritime provinces where the procedures of the higher court are in force.

Comments of respondents suggest that once there is a problem in collecting the chances of successful collection drop dramatically. Many times the problem is just finding the defendant and organizing a schedule of payment. In the main, it is up to the judgment creditor to get the information necessary for collecting.

The easiest way to collect is to act informally. The time a party is most amenable to collection is when she is in court. When the adjudicator has rendered judgment he should immediately request the defendant's address, details of this property and so on, and a method of payment should be worked out at that time. A judgment debtor should be required to pay an immediate partial payment.

Debtors should be given some incentive to pay. For instance, if a debt is paid within two weeks the court clerk could expunge the outstanding judgment from the court record so that the adverse judgment will not affect the defendant's credit rating. This may be worth little in view of the rapid dissemination of credit information. The court could also bar anyone from using the court who has judgments outstanding; this would only be effective if plaintiffs were required to keep the court informed of their collection efforts or defendants were required to report payment.

Court personnel should be encouraged to assist individual judgment creditors by sending a letter on court letterhead or making a phone call. A creditor should have to attempt collection on her own first but if she has difficulty she should be able to resort to the court.

Another way collection can be facilitated is by making a party post a bond. This would probably turn into a very complicated procedure but is worthy of consideration in areas where there is a large transient population. This is certainly more attractive than the rather arbitrary pre-hearing seizure provisions that exist in most Canadian Acts.

When informal collection methods have failed the creditor should be able to resort to more formal methods like writs of execution, attachment and garnishment. The problem is that these are usually executed on a small fee basis or on commission. The officers of the court who are involved in collection should be on a salary so that their incentive is inherent in the job rather than in servicing high volume clients. In Philadelphia there are process-servers whose sole job is to assist claimants in collecting.

One might give consideration to the concept that if a party is unsuccessful in collection within a month she would be entitled to reimbursement of the fees paid to the court.

The purpose is not to harass people who genuinely cannot afford to pay. Any collection procedures should includes provisions to assist a debtor to ameliorate her financial circumstances. In Ontario there is the excellent and largely unrecognized system of the Small Claims Referee who assists debtors in rearranging their finances and consolidating their debts. The British Columbia Justice Development Commission has been seriously looking at such a mechanism and I join with them in recommending the universal adoption of a "credit counselling" arm of the court system.

The collection fees charged should be geared to the size of claim. Generally the fee should be about 10% of the claim to be collected but not less than $2.00 and no more than $10. In order to facilitate collection, territorial restrictions should be abolished and process should be able to be issued throughout the province. Extensive formalities to prove non-payment should not be necessary, although there must be some assurance from the creditor that she has attempted informal methods. Judgment creditors should be encouraged to notify the court of payment. This could be done by having a tear-off portion attached to the notice of judgment which should be sent to each judgment creditor.

No matter what the vagaries of collection, in the context of small claims the pre-hearing seizure concept should be uniformly abolished. It is an arbitrary procedure which is antithetical to the concept of the court as one of justice.

Most courts have show cause and judgment summonses. The most effective procedure would be to examine the defendant at trial when there is a hearing. Where there is *ex parte* judgment or an unfulfilled consent judgment or settlement these procedures should be available in the evening at low cost. The clerk should be able to deal with the matter.

The garnishment procedure in Canada is most unsatisfactory. The main problem is that new garnishee procedures must be issued for each pay. There should be some way of having one garnishment procedure with an order which is effective form pay-day to pay-day until the judgment is satisfied. The employer should be required to pay the money to the court and not to the judgment creditor so that the court has control of its own order. The court should have available a system similar to Quebec's Lacombe Law, where a judgment debtor can voluntarily pay instalments to the court clerk. There is no reason why garnishment cannot be done by mail so that it does not become an imposition on the employer. The clerk should be able to issue an order based on a

written request and telephone conservations with the employer as well as the employee. It would only be in case of non-communication with the employer that a presence in court would be required.

Execution against goods and chattels should be issued by the clerk on application by mail. An employee of the court should be available to execute distress and to follow through with the procedure of seize and sell. The judgment creditor should be given the option of taking the goods rather than forcing the court to sell them. A close look should be given to the amount of the exemptions to ensure that they accurately reflect the current cost of "necessities".

There should be a time limit of 60 days within which the formal collection procedures must be instituted. Writs of execution, once issued, should be valid for 6 years. In addition, the creditor should be able to apply for garnishment after the 60 day period if he can show that a garnishment procedure would have been ineffective within the limit.

Most courts have the power to commit for refusal to pay for non-attendance at a judgment summons or garnishment hearing. I reluctantly admit that such authority is necessary in order to enforce respect for the process of the court. In fact the power to commit is very sparingly exercised – and many defendants are aware of this. There has been a suggestion that in matters involving automobile accidents, if the judgment debtor does not pay within 60 days his driving licence should be suspended on application to the court. Although I realize that this necessitates coordination with another government department I suggest that this concept be seriously considered, not only for tort actions but for all non-payments.

The small claims court of the appellate court should have power to stay the execution of judgment on written application of a party and on payment of security to cover the costs owing.

In cases of mediated settlement there again should be immediate partial payment and the court should assist in collecting delinquent payments. Once the settlement has been put into writing it should have the stature of a judgment of the court for the purposes of issuing execution.

## APPEAL[57]

A system must be designed which recognizes that, in the area of small claims, appeals are not allowed primarily to review the justice of the decision in an individual case. The primary purpose is to use the case as a means by which appelate courts will review and develop applicable law, particularly in the area of consumer law. The only group of people who should be barred from the appeal procedures are those in default.

Most provinces provide for an appeal by way of trial *de novo* to the court immediately above. There are no appeals in Quebec and the only method of "appealing" is to use the prerogative remedies.

The time limit for appeals ranges from 10 to 30 days. Some provinces limit the grounds for appeal to questions of law or jurisdiction; most do not deal with the grounds at all. Only Alberta specifies that the grounds of appeal must be stated in the Notice of Appeal. A Nova Scotian appellant can appeal if there is dissatisfaction with the judgment. In Saskatchewan a party can appeal if she feels aggrieved. Most provinces provide that there is no appeal from the trial *de novo*.

Ontario provides that a non-appealable case under $200 can be appealed if both parties consent. The Act also provides that there can be no appeal if before the trial the parties have filed with the Clerk an agreement in writing not to appeal. Ontario parties also have the right to apply for a new trial within 14 days, at which time the small claims judge may pronounce the correct judgment or may order a new trial. In Saskatchewan either party can apply to set aside a judgment within 6 months on the basis that there has been an excess of jurisdiction, improper service or that the judgment is otherwise bad in law. This right is separate from appeal. Newfoundland has an interesting provision for an *ex parte* appeal to the Supreme Court which is similar to an application by way of stated case.

In 1975 2.2% of the judgments surveyed were appealed. This is lower than the 5% figure shown in the Campbell study in Regina.[58] The clerks estimated that approximately 3% of cases were appealed. In some provinces it was under 1% and in Alberta there was one court with an estimate of 9%.

A too liberal right of appeal would make the system uneconomic. A right to trial *de novo* would give unfair advantages to parties with superior financial resources. An appeal by trial *de novo* is unnecessarily duplicative and wastes both court's and ligitant's time. But to allow no appeals would mean that higher courts would never become exposed to the legal system of small transactions, and certain areas of the law would become isolated.

New York, New Mexico and New Hampshire restrict appeals to questions of law. Michigan and Oregon deny the right of appeal altogether; Texas allows an appeal over $20 but the judgment of the County Court is final without further appeal. In Washington there is no appeal for amounts under $100 and the party who requests the exercise of small claims jurisdiction is not allowed to appeal. In California only the defendant is allowed to appeal. Several states discourage the use of appeal procedures by requiring a bond to be posted.

The appeal right should not apply to cases submitted to voluntary arbitration. There is really no conflict in allowing appeals from a judge's decision but not from an arbitrator's. An appeal is allowed to dispell any appearance of disparate treatment between the parties and to make the court more attractive to plaintiffs. Arbitration may be more attractive because its judgment is final.

In fact appeals are few and far between, consequently no real purpose would be served in not allowing them. The main concern of this study is to avoid having appeal rights abused by commercial litigants or wealthy individuals to the disadvantage of the poor and middle class person. Such protection would not exist if there were an absolute right to trial *de novo* on the question of law and/or fact.

The greatest advantage in allowing trial *de novo* is that it allows more experimentation and informality at the small claims level.

The scheme outlined in this study has suggested that the jurisdiction of the small claims court be exclusive and not concurrent, so that a small claim would be heard in the regular court system only on transfer by the judge. This, plus the fact that there is no record or transcript, leads to the conclusion that the right to an appeal by trial *de novo* is necessary.

Several authors have suggested that the appeal, where there is a novel question of law, be by way of stated case to the Supreme Court of the province. There is also a proposal that questions relating to procedure be appealed to a senior judge of the small claims court. In both instances it is suggested that the appeal court only be allowed to order a new hearing.

Opinions of Canadian judges vary but there is a general feeling that the rights of appeal as they now exist should not be increased in view of the expense both to the parties and to society, and also because the concept of the small claims court as being one of justice and equity might be undermined by the higher courts, where principles of law and rules of evidence and procedure are tenaciously applied. Others, particularly in Quebec, felt that there should be appeal only on a question of law with leave.

It has been suggested that appeal rights should be limited to the defendant – this suggestion is based on the premise that the plaintiff has chosen the small claims procedure over a concurrent civil procedure. To allow plaintiffs to appeal in such circumstances would encourage them to choose that less expensive system. It is fairer if both parties have the same rights. There should be some financial support for appeals when a non-business litigant who was successful becomes a respondent. The concept of *amicus curiae* in consumer matters would allow interested consumer organizations to become involved at the appeal level.

The right to appeal by trial *de novo* should be retained, but it should be coupled with the alternative of appeal by way of stated case in matters where a small claims judge agrees that a question of law ought to be decided by the higher court. The time for lodging an appeal should be short so that the status of the parties is clarified. The grounds for appeal should be specified in the statute. Appeals should be limited to questions of law or mixed fact and law. There should be no appeal on a question of fact, and to allow appeals simply because one party is unhappy is clearly opening the door to the imposition by the higher courts of their stricter codes on the small claims system.

In order that the number of appeals does not increase unduly, it is imperative that some sort of security be filed with an appeal. The aim of restricting the appeal right is to keep the rate of appeal low and to ensure that the judgments of the small claims court remain, in most instances, final and binding. Either party should be allowed to appeal on paying the costs of the small claims proceedings as well as filing a security for costs, the total not to exceed 50% of the amount in controversy. There might be a limit placed on the amount of costs recoverable in the appeal, including a maximum lawyer's fee of $100. In no case should there be a right of appeal beyond the county or district court.

## JURIES

Only New Brunswick's County Court and Nova Scotia's Justices' Court consider allowing juries. The use of juries has been declining because of administrative costs. The right to a jury trial is not consonant with the concept of the small claims court as being both efficient and inexpensive. The smalls claims procedures, either judicial or arbitration, are antithetical to the concept of jury trials (necessitating the use of lawyers).

Because of the rule of law that the findings of fact by a jury cannot be attached, the functions of a judge and any appellate court become more limited. Jury trials increase formality; it would be difficult to have a jury and still have relaxed rules of evidence and procedure. If there is some concern about denying the right to a jury because of the principles on which Canadian law is based then several options can be considered: first, a defendant could have the right to transfer to the regular courts on payment of a rather high fee, or second, there could be concurrent jurisdiction, so that if the plaintiff wanted a jury trial she would simply not sue in the small claims court.

The problem with "removal rights" is that it is an easy way for defendants with money to harass plaintiffs with less. Consequently these options are not attractive and should be ignored.

A third option is to allow an appellant to have the right to choose a jury trial as part of her right to appeal by trial *de novo*, but to curtail the frequent use of this right by use of a jury fee.

## RECORDS OF THE COURT

Most of the small claims courts in Canada are courts of record either specifically or by implication. In Newfoundland the judge is directed to take notes on the proceedings and in Alberta all hearings are transcribed, but the Saskatchewan Act specifically says that the court is not one of record. The problem with creating a court of record is that there are, of necessity, certain formalities. Once a court is deemed one of record the prerogative remedies are available. Although the law, particularly of Ontario, seems to be leaning more and more towards ensuring that a fair hearing takes place whenever a tribunal exercises a statutory power of decision, transcripts and court reporters seem unnecessary paraphernalia in the small claims court.

But just because the court is not one of record and does not necessarily have the formal trappings of a court does not mean that records should not be assiduously kept on all matters. I found that one of the main obstacles to discovering how the small claims courts operate across the country was the poor state of records kept by the various clerks. This is not a reflection on the clerks but on the system.

The greatest gap in record keeping was that of follow-up; nowhere is there an obligation on the parties to inform the court that the matter has been settled or the monies collected. Even the provisions relating to consent judgments are much too lax. Part of the problem of keeping records would be solved by having a single form incorporating all the information necessary to keep a record of the matter, thereby giving the defendant and plaintiff clear notice of their rights and obligations.

Each file should be complete in itself without the need to refer to any other documents. There should also be a record book containing all the proceedings of the court over a particular period. The activity in the small claims court can be a source of warning to the community at large of the types of problems that are of concern to the average person. For instance, if a particular business is continually suing or being sued, this may suggest that an investigation into that business's manner of operation is advisable. If a particular article becomes the subject of many law suits, this may be a warning signal that the safety standards relating to that item need to be reviewed. The records can also give an indication of how the current systems of credit are working.

In the absence of a uniform small claims system throughout the country, accurate records can assist researchers when looking at innovations which might be introduced into other provinces.

## LAWYERS AND PARA-LEGAL PERSONNEL[59]

The essence of the problem in deciding whether or not to allow lawyers or professional advocates, and at what stage, is essentially one of philosophy. One school of thought suggests that the ideal small claims system incorporates the concept of investigation and is really inquisitorial in nature. Another sees the small claims court as a true court, retaining the trappings of the adversary system, on the basis that civil justice cannot be obtained by incorporating into it concepts of "khadi justice".[60]

If the inquisitorial approach is used, the calibre of arbiter must be high, and lawyers are not necessary. The adversary system, on the other hand, necessitates the use of lawyers, or at the very least, para-legals. The adversary nature of the court can be retained if all litigants are well prepared and well versed in what is occurring.

The two problems which arise in allowing lawyers are the cost and the creation of a more formal and time-consuming procedure. However, it is the conclusion of this study that lawyers should not be barred from small claims courts. In any case, the number of times that lawyers are actually used is relatively insignificant in Canada. Their use should be actively discouraged through provisions relating to costs, availability of arbitration, and pre-hearing consultation. In addition, it must be provided that lawyers may be used only if both parties are represented. Simply to bar lawyers would not preserve a balance because other types of professional advocates would quickly fill the void.

In Canada lawyers are allowed to appear in all provinces except Quebec, where only lawyers who are employees of corporate defendants may appear. The states of California, Colorado, Kansas, Michigan, Idaho and Nebraska do not allow lawyers before their small claims courts. Oregon and Washington only allow lawyers with the permission of the trial judge. In Ohio, if a corporation is represented by an attorney and the other party does not have representation, then the attorney is not allowed to engage in cross-examination or argument.

Neither Norway nor Russia provide for the availability of legal counsel. In Australia lawyers are not allowed unless all parties agree and the judge approves. In Britain, neither lawyers nor professional advocates acting for remuneration are allowed. In the City of Westminster Experiment, lawyers were only permitted in special circumstances with the consent of the adjudicator.

Various studies done in the United States are instructive in the use of lawyers in small claims courts. In Chicago, plaintiffs who are individuals almost always had a lawyer, while between 50% and 60% of all defendants had no lawyer. In Washington, 90% of all plaintiffs, but under 4% of the defendants had lawyers.

A study of the Philadelphia small claims court showed that over one-half of all consumer plaintiffs used lawyers to negotiate, appear, advise or collect. Of all parties appearing for trial, 60% had no lawyer; both parties had lawyers in 4% of all cases. Of the plaintiffs who were represented by a lawyer, 91% obtained judgment or settled. No plaintiff with a lawyer lost after trial; on the other hand, 70% of plaintiffs without lawyers also won. A New York study showed that, on the average, plaintiffs recover the same amount of money whether they have a lawyer or not, but that they collect less from a defendant who has a lawyer if the statistics on default judgments are included. Caplovitz[62] discovered that litigants with the service of a lawyer are twice as likely to go to trial as those without.

The Centre for Auto Safety[63] study of the courts in Cambridge, Massachussetts, indicated that businesses used lawyers in 64% of the cases in which they were suing individuals and in 20% of the cases in which they were being sued. Individuals used lawyers in 16% of the cases in which they were suing a business but in only 3% when they were defending. Parties without lawyers won 55% of their cases; parties with lawyers won 72% of theirs. The average claim when a lawyer appeared for a plaintiff was $5.00 higher than the average for plaintiffs without a lawyer. Plaintiffs without lawyers won or settled 82% of the cases brought against a business, compared with 98% if they used a lawyer.

A 1975 study[64] in Vancouver showed that lawyers initiated approximately 31% of the claims and that at least one party was represented in 48% of the cases. Their statistics, like those of Caplovitz, showed that actions initiated by laywers were more likely to go to trial. About 40% of the parties going to trial were unrepresented, while 31% had lawyers and another 29% were represented by a collection agency or a professional advocate. Another study of the Vancouver court[65] showed lawyers or professional advocates appearing for 47% of plaintiffs, but only 4% of defendants. Both parties were represented by lawyers or advocates in only 2% of the cases, but in 51% of the cases neither party was represented. About 73% of the individuals who appeared had no lawyer, but 68% of the corporations did employ one.

In a Toronto study,[66] 88% of the plaintiffs and 5% of the defendants had representation. Of the plaintiffs who were represented, 50% used agents other than lawyers, such as professional advocates, collection agents and law students. In a Manitoba study,[67] no case was heard where both parties were represented by counsel, and 84.3% of the cases had no counsel at all. In 14.6% of the cases only the plaintiff had a lawyer, and in 1.1% of the cases, only the defendant was represented. In a Regina paper,[68] no corporation appeared without an agent, while on the other hand 62% of the individuals appeared without counsel.

About 80% of the judges responding to the questionnaire favoured the use of lawyers in small claims court and 66% were strongly against barring them from court. There was a diversity of opinion on whether lawyers save time or not, and whether they assist in achieving justice, but there was unanimity that the use of lawyers eases the judges' task because the issues are better defined and cases are better prepared.

Generally, the judges in Quebec lamented the absence of lawyers and felt it put an unnecessary burden on them. Several Quebec judges suggested that the concept of a government-appointed duty counsel or para-legal would ease the pressure on them to act as both counsel and arbiter. Others suggested that if the issues were too complicated, the case should be referred to the regular provincial court where lawyers would be able to assist.

Some of the western judges with experience of experimental pre-trial arbitration felt that it works to everyone's advantage, but that if cases were brought before them rather than before an arbitrator, lawyers ought to be allowed in the interests of preserving the adversary system.

Some judges readily admitted that if a party attended with a lawyer, they were more likely to succeed because of the judge's natural bias toward someone who has more clarity of thought. Two judges were concerned about the lack of competence of the lawyers and law students who appeared and said they would rather have no-one than an inexperienced lawyer. Some based their opinion on the monetary jurisdiction of the court; others considered the complication of

the case. One or two judges admitted that if lawyers were not present, they would tend to be more arbitrary and tyrannical.

All were concerned that where only one party is represented, there is no appearance of justice and the other party is at a disadvantage. Many judges realized that it was common for parties to have a lawyer prepare their case before the trial, which they then presented on their own. Judges expressed approval of this method of proceeding. The general consensus was that if lawyers are to be allowed, then both parties should be represented, and that this is preferable to having no lawyers at all. In general, judges did not approve of only one party being represented, but were divided on whether this is preferable to neither being represented. There are a great many arguments raised by Canadian judges both for and against allowing privately-retained advocates to appear in court.[69]

The percentage of parties represented by lawyers in 1975 was extremely small in Canada. Throughout the country only 4.7% of the defendants and 19.1% of the plaintiffs had counsel. The representation of plaintiffs ranged from 1.5% in Manitoba to 66.7% in the Northwest Territories. No defendants had lawyers in Manitoba, and only 8% of defendants in the Yukon were represented.

According to the clerks who gave estimates for 1974, it seems that the vast majority of parties did not use lawyers or professional advocates. At the very most, under 10% of the plaintiffs were represented by lawyers. It is interesting to note that in Nova Scotia between 55% and 75% of plaintiffs, but under 10% of defendants, had lawyers. About 50% of businesses used lawyers, compared to 4% or 5% of individuals.

Perhaps concern over the presence of lawyers is more academic than real, when it is realized how small a percentage are represented in court. The main reason that lawyers or advocates are not used is, simply, financial; it does not pay the lawyer to appear in small claims court and yet it is expensive for the party to hire a professional advocate.

One experienced small claims judge commented that he could not imagine a properly tried lawsuit in any court where a person would be better off without counsel. He, too, was in favour of a rule whereby either both or neither would be represented.

Of course no-one can force a party a hire a lawyer; therefore, as a result of this study, I have to suggest that duty counsel should be assigned to the small claims court. Simply making legal aid available to litigants is not satisfactory because the middle class often does not fall within the range of legal aid requirements. Duty counsel preferably should be a lawyer, but in major urban areas it would also be satisfactory to use articling students. Such a suggestion carries with it a necesary prerequisite: individuals and unincorporated businesses who intend to make use of a professional advocate (whether lawyer, law student, collection agent or other para-professional) must advise the court of that intention. Once this notice has been received, the clerk will advise the duty counsel office so that the case can be prepared. The clerk would also advise the unrepresented party to contact duty counsel.

I am against leaving it up to the judge to decide who may or may not be represented. From a realistic point of view, barring lawyers necessitates a substantial improvement in the quality of judges.

The presence of professional advocates and the availability of duty counsel only relate to matters that go to trial before a judge in the small claims court itself. This study also envisions a parallel alternative arbitration procedure. If an individual or unincorporated business chooses to proceed without representaion and does not want a formal trial I recommend that a representative of the opposite party be allowed only as an advisor. In this way the control of the proceedings is with the arbitrator and the balance is fairly equal. In other words, where both parties are represented by agents, the case will proceed before the court; otherwise the arbitration procedure would lose its most attractive element, namely that it saves time.

Perhaps a more attractive, even if more expensive, method would be to adopt George Adams'[70] concept of having plaintiffs' officers and defendants' officers within the court structure. These would be para-legal personnel and would be available to the unrepresented party. This is the optimum situation within the structure. It would mean that no party would be unrepresented, particularly with reference to arbitration, and, in the situation outlined above, an unrepresented party faced with a business or represented party would avail herself of the services of these para-legals. The plaintiffs' or defendants' representatives would act as advisor to the unrepresented party.

The concept of having institutionalized para-legal assistance available to the community is particularly appropriate, if not imperative, in the urban setting. These offices could be used to give advice before a claim or dispute is filed as well as assistance in preparing for the hearing. I envision the creation of a sort of small claims specialist whose function would be not only to assist the parties but to educate the community as well. Admittedly, these small claims advisors might catch the "disease" of professional paternalism, and contribute to more formal procedures than some consumer advocates consider ideal. It would be essential that these advisors be available during non-working hours. Fees could contribute to the financing of these offices. The advisors would not be available to corporations unless they were in a local proprietorship.

If the concepts of conciliation and mediation envisioned in this study are not adopted then the plaintiffs' and defendants' officers could assume this role.

The use of lay advocates or para-legal personnel is attractive. It would, in the long run, make the court much more efficient and the cost to the taxpayer should be minimal. The nature of the small claims court demands it, the public needs it, and no lawyer will be losing a fee. Any lawyer-like tasks performed would be only a minor part of the para-legals' job, which would consist mainly of assisting the parties procedurally. They could act merely as advisors and not as advocates, simply guiding the case without controlling it. Another role for such advisors or advocates would be to make the community aware of any incompetence or malfunctioning, either within the court or within the community.

The B.C. Justice Development Commission[71] carried out a pilot project which examined the use of mediators, procedural assistants, and a legal advice clinic during the summer of 1975. The project was under the supervision of a lawyer but used para-legal personnel to provide personal and telephone assistance to litigants on procedural issues. These para-legal assistants stated clearly that they were not there to give legal advice, but merely to give direction on the method of proceeding, particularly with respect to drafting documents. Two law students were hired specifically to give legal advice to small claims litigants. Their case load averaged 16 for the first 6 weeks and was growing.

## CORPORATE PLAINTIFFS[72]

This is an area of broad contention. This study recommends that corporations be allowed to use the small claims court, although perhaps there should be different methods of treatment for corporations and for individuals. When analysing the questionnaires, a surprising number of corporate plaintiffs were small community or local businesses. To deny these businesses, which are in reality the backbone of the middle class, access to an inexpensive procedure would be unfair.

Defendants were individuals in more than 80% of the cases. Figures ranged from a low of 80% in the Yukon to a high of 89% in Saskatchewan. The number of plaintiffs who were not individuals was calculated and an arbitrary division was made to separate large corporate plaintiffs from small local commercial interests. Corporate interests included large provincial, national and international companies and their collection agents; the small commercial interests were lumped together whether incorporated or not. Generally, commercial interests accounted for 65% (Saskatchewan) to 91% (Manitoba) of all plaintiffs. But when the large corporate interests are eliminated the statistics are most revealing. In British Columbia, Alberta, Ontario, and Quebec over 50% of all plaintiffs were small businesses. The figure is closer to 35% in Saskatchewan and Manitoba and reaches a high of 80% in the Yukon. These statistics for 1975 agree with the estimates of the court clerks for 1974.

Canadian judges were almost unanimously against barring corporate plaintiffs, because they felt that the individual defendant would be put to greater cost by having to defend in the regular system. This opinion seems also to be based on a premise that the court takes an active role in maintaining the balance between the corporate plaintiff and the individual defendant. Only in Quebec, where corporations are already barred, did judges feel that their exclusion from the small claims court was desirable despite the discrimination involved.

One justice felt that if there was going to be such discriminatory provision it should be limited to large corporations and that the size of the corporation should be decisive. In general, judges were divided; the convenience of having no corporate defendants was balanced by the discriminatory aspect.

A 1970 study[73] of the Vancouver Court showed that 74.5% of the actions were brought by corporations, professionals or assignees. In 1975, 40% of the actions were started by corporations.

It is also instructive to note in how few cases the defendant is a corporation. More often than not the commercial defendant is a small local company or a professional. I was struck by the number of professional firms who took advantage of the small claims court to collect insignificant sums.

The majority of claims instituted by individuals related to automobile accidents or landlord and tenant matters. Landlord and tenant disputes also accounted for many of the small business claims and were considered in that category, rather than as individual claims, in an attempt to define the small business as any sort of proprietorship or business. On the whole, though, most small business claims were issued by retailers.

There have been many studies in the United States analysing the use of the courts by corporations, proprietorships, individuals and government agencies. There, as here, the major users are finance

companies, banks, retailers and collection agents. The use of the court by government agencies in Canada seems to be confined to Newfoundland and British Columbia. One of the conclusions of the American studies is that commercial interests are more successful than individuals in gaining judgments, particularly default judgment, and are also more successful at collecting. There did not seem to be any correlation between the use of lawyers or professional advocates and the rate of success. The Nader[74] study indicates that the size of the business was not relevant in assessing the chances of success if the matter went to a hearing. It was rather in the problems of venue and default judgment that size was a relevant factor. Approximately half of the states do not allow corporations in the small claims court. There is some indication that where corporations are allowed they tend to dominate the court.

Many arguments are put forth both for and against barring corporate plaintiffs from the courts. Barring corporations is advocated on the grounds that the courts would become collection agencies, subsidized by one group of taxpayers to the detriment of another, and that individuals would be intimidated in courts having a business-dominated image. Moreover, as a cheap and easy way of obtaining default judgments, the use of the courts by corporations would clog the docket and encourage the use of high pressure – even fraudulent – sales techniques.

The arguments against barring corporate plaintiffs include the probability that corporations would be obliged to tighten credit, thereby forcing many consumers into the hands of loan-sharks, and to rely increasingly on collection agencies. Corporations would necessarily have to use the higher courts to obtain default judgments, imposing hardships on the individual defendant by way of cost, time and the greater complexity of the legal procedures involved. In any case, it is suggested, corporate plaintiffs are no more likely to abuse the small claims procedure than are individuals.

Corporations should be allowed to sue subject to strict procedures concerning venue and default judgments, and to broad powers being granted to offset technical defences.

In addition to special rules on venue the courts should develop some rule relating to mass filing for corporations. It might also be advisable to have specific days for plaintiffs with commercial interests. Parties who abuse the court procedure could be dealt with by withdrawing their right to use the court for a specific period, up to a year. These abuses would include obtaining default judgment where fraudulent or unfair trade practices were involved, harassing consumers or lack of prior communication before suing. The suspension would be subject to appeal.

One method of avoiding the court appearing to be a collection agency is to bar assignees. It is intimidating enough for an individual to be defending or claiming against a commercial interest without having that fear increased by removing the original parties to the action. Particularly with respect to collateral financial arrangements, it is imperative that the court should have all the issues before it and that the individual should be able to defend against the original plaintiff. If the mediation concepts suggested in this study are adopted it would be essential that assignees not be allowed, otherwise the negotiating process would be unduly impeded.

## LIMITS ON USE

The courts of Saskatchewan, Manitoba, the Territories, Nova Scotia, Newfoundland and Ontario reported that they do not accommodate frequent users of the court. The two urban courts in British Columbia reported that they do, although the other courts reported they were not willing to do so. This same division of attitudes was apparent in Alberta and New Brunswick. All courts in Quebec reported that they attempt to accommodate plaintiffs who bring large numbers of claims. But of course in Quebec there are no corporate plaintiffs.

The urban courts of Alberta and Newfoundland that answered the questionnaire stated that they place a limit on the number of claims that can be filed by a plaintiff in one day.

I suggest that clerks be empowered to set aside specific days for plaintiffs who are continually before the court. This may increase the efficiency of the court and may benefit consumers if consumer organizations become involved in assisting individuals. But any accommodation of plaintiffs who are frequently in the court must be done with great circumspection so that defendants do not become caught up in a machine-type justice.

The suggestion that corporations should not be barred from the system must be read subject to a proviso that some limit be imposed to avoid mass filing. Such a provision would go a long way towards preventing the small claims system from becoming a simple collection agency. The number of claims can be controlled either by limiting the number of cases that can be filed during a specific period or by adding a fee for each case filed above a certain number. Corporations could not avoid these limits by assigning their claims if assignees are barred as proposed.

In Ohio a plaintiff may file 6 claims within any 30 day period, but in Detroit a party may initiate only 4 cases a year. Another method of control would be to give the clerk discretion to limit the number of cases filed.

I suggest that a plaintiff be limited to filing 3 cases in any month except in courts which service a population of over 300,000, when I suggest the limit should be 6 claims a month. If there is no rule about the number of cases than can be filed in any month, the clerk can exercise his discretion, previously suggested, in regard to the withdrawal of the right to use the court.

## CLASS ACTIONS

A great deal has been said about the class action and its advisability and availability. When the basic concepts of a small claims mechanism are considered it becomes clear that class actions ought not to be allowed. The problems involved in class actions are not compatible with these concepts since they usually involve complicated procedural and substantive issues. If the use of lawyers is restricted, the class action becomes ever more anomalous.

The judges who replied to the questionnaire seemed to be, on the whole, against allowing class actions. They felt that these actions would lead to disorder and to more formal hearings, that people would abuse the system, and that it would be essential to use lawyers. One judge referred to it as "the lowest form of blackmail against a defendant".

Many thought that small claims courts would be an excellent forum for experimentation with class actions, but all felt that if they were allowed, lawyers should definitely be present. On the other hand, some judges felt that class actions raise points of law that are relatively important and that should be heard by a higher court. They all seemed to be very concerned with the concept of class actions that is developing in the United States.

There was also an interesting suggestion by one judge that one plaintiff should be allowed an action against a group of businessmen where an important principle of consumer law is raised which affects the community as a whole.

Most judges thought that class actions should only be allowed if the small claims court becomes a court of record but they did not feel that this should become a necessity. All the judges emphasized that joinder should continue to be allowed, where applicable, under the usual rules of practice.

I recommend that class actions be allowed as long as the total claimed is within the monetary limits of the court. The judge should be able to transfer such actions if the issues are complex or of wide consequence.

## TRIAL LISTS

Most Ontario courts had a trial list of 20 to 30 cases although some had less than 10 and the large urban courts had over 50. In Quebec the average trial list had 10 to 20 cases with only one court reporting between 20 and 30. The trial list in Montreal is substantially larger than that. New Brunswick, P.E.I., Saskatchewan and Nova Scotia reported average trial lists of between 1 and 10. In Newfoundland one court had a trial list of between 10 and 20; the other had over 50. In Manitoba, Alberta and B.C. the majority of courts had trial lists of between 1 and 10 although in the larger urban areas the lists were more often between 20 and 30.

It is clear that some mechanism must be found to lessen the trial load and shorten daily lists, even when taking into account the settled (21%) and abandoned (10%) cases. The alternative is more judges. To demand that a judge deal with more than 5 or 6 cases a day is to encourage haste and superficiality.

## EXPERTS AND CONSULTANTS

Very often, the issue to be decided in a small claims case involves a matter of objective evidence, such as whether a part was faulty or a service performed correctly. It is likely that instead of hearing evidence a judge will decide the issue on the basis of credibility. Although procedure should remain as simple as possible, there will be cases where expert testimony will be desirable. Each court should maintain a roster of volunteer consultants who can become involved either during the conciliation stage, or at the request of the judge or arbitrator.

Consultants should be used sparingly, but in many cases involving consumer issues their use must be seen as an essential element of the decision-making process. If a technical issue is raised, experts could be simply consulted over the telephone by the arbitrator or judge. Rarely should experts be required to be present at a hearing, and any costs involved should be partially borne by the losing party.

## PERSONNEL

Generally, friendly and helpful personnel will do as much to make the court attractive and efficient as understandable procedures. Conversely, incompetent, bureaucratic or antagonistic personnel can destroy the impact of any beneficial procedures.

If one court does not have a big enough caseload to warrant full-time staff, staff could also work for another court, but should stay entirely within the small claims system, otherwise their work with other courts would assume greater importance. Care should be taken to hire and retain only those people who show enthusiasm and efficiency for the job, and who have a genuine desire to help people.

Most consumers who responded to the questionnaire commented that personnel were generally polite, but I was concerned that this opinion was not unanimous.

All the clerks surveyed regarded their role as that of procedural adviser, as well as administrator. Some clerks in Quebec, Alberta and New Brunswick considered part of their role to be that of legal adviser. The clerks saw the role of the staff as both administrative and procedural. Some clerks thought that on occasion the staff did become involved as mediators or conciliators.

The main concern of the clerks was to clarify their role, and in some instances a desire to become more involved in the negotiation process. The greatest plea was that clerks be made civil servants. The McRuer Commission[75] called the practice of having clerks and bailiffs on a fee system an "archaic relic". The staff of the small claims courts fulfil an important function and should be given the status of public servants.

Usually the public's first impression of the small claims system is made by contact with the clerk. The clerk should realize that he is a public relations man for the court, and at no time should he assume a totally business-like attitude. One of his primary tasks is to assist the party in any way possible. This may include writing out the claim, referring to other court personnel for assistance, answering questions about the makeup of the court, scheduling the trial, mailing the claim, helping the litigants locate pertinent information for the purpose of filing or collecting, and arranging adjournments and transfers.

One of the clerks' roles is to dispense information, and my feeling from their response is that they are inadequately trained for this function.

A major task of the personnel is to protect the integrity of court procedures. They must ensure that parties do not misuse the court.

The lack of training of court personnel could be partially alleviated by having available manuals on court procedure and on the laws relating to commonly litigated problems. But most important of all, the clerks must be given a sense of importance so that they see their role as one of assisting the community.

## ALTERNATIVE MECHANISMS

Before adequate procedures for the solution of small claims can be agreed on there must be initial discussion and resolution of a basic philosophical dichotomy. There are two classes of procedural framework: the adversary process and the inquisitorial process. This dichotomy has been discussed and formulated by George Adams in a recent article[76]. He assesses the qualities of each of these processes and stresses that the two concepts ought not, as they are now, to be intermingled.

This paper is based on the precepts that the small claims court must remain as a court, with the consequent adjudicative function; and that its adversary process must be maintained.

The concept of the judge as an inquisitor, fulfilling the roles of counsel, jury and judge should be specifically eliminated, but only if there are complementary procedures within the court structure where the inquisitorial function can be carried out. This can be done to some extent within the framework of arbitration. The one comment that runs throughout the completed questionnaires is that the fulfilling of more than one role by the judge causes the court to lose credibility.

A consumer grievance mechanism must have certain basic requirements: it must be readily accessible; the membership must be drawn from unimpeachable sources; the procedures must remain simple and informal; attorneys must be permitted within certain limitations; a financing method must be established that will spread the cost throughout the consuming public and business community; and the availability of the grievance machinery must be fully and continually publicized.

**Pre-Hearing Negotiation**

Prof. Adams proposes separate plaintiff and defendant offices for each small claims court where, for a modest fee, individuals could avail themselves of a mechanism similar to a community grievance system. The plaintiffs' office would assess the nature of a plaintiff's claim, advise him of the merit and formulate the most feasible course of action, and contact the defendants' office, which would then assist the defendant in replying and negotiating a settlement. The aim is to eliminate most claims going to a formal hearing. This plan would establish a dispute-resolving climate, the essence of which is communication.

Conciliation before trial has been utilised in other nations as a major tool in settling small civil disputes quickly and fairly. Perhaps it is in character that the Scandinavian system prefers attempts at conciliation before formal court procedures are resorted to.[77] In 1797 Norway officially adopted a system of community conciliation tribunals having no complex procedures. Characterized as a forum of common sense, unfettered by technicality, the system accomplishes inexpensive and speedy resolution of small disputes. Denmark established a nation-wide system of conciliation courts in 1975 composed of three appointed mediators. Neither statute admits evidence of unsuccessful conciliation attempts at any later trial. German law developed a small claims procedure that affords opportunity for conciliation through a simplified and informal trial. The judge suggests a solution directly to the parties and conducts examinations of witnesses.

Many cases that end in the small claims court need a referee rather than an adjudicator. Many litigants will willingly settle a case once a neutral figure imbued with some authority steps in. Many cases are not settled because one or both of the parties is ignorant of the other party's argument, or even of the strength of her own argument.

A mediator's job should be to remove all the cases that can be settled without the use of an adjudicator. Parties should have to go to the mediator before they see an adjudicator, but they should also be able to see him privately at any time after the claim is filed in order to help settle their dispute. If this course is followed, the adjudicators will only have to deal with controversies that are mostly incapable of being settled. Even if the mediator cannot settle the matter, he can at least bring out the most important disputed facts, so that the parties will be better prepared to engage in a hearing. Any results of consultation with experts should be available to the arbiter.

The mediator should do his best to achieve a settlement which is fair and equitable to both parties, but if one party is willing to take a bad settlement and the mediator believes that the party fully understands his choice, the mediator should accept that settlement. Where the parties are clearly at an impasse, the mediator should not waste time trying to force a settlement.

A mediator should be someone who not only is neutral but gives an impression of being so. Mediators should have some knowledge of the law, so that they can apprise the party of the strong points of the case. Business men and litigants might suspect a settlement suggested by a person who is not an official member of the court staff. Therefore lay advocates should not be used. A mediator could also be someone with a degree in social work, psychology or some other appropriate field. The problem in small claims court today is that the adjudicator in a case is also the mediator, and this is inherently coercive and confusing.

The Justice Development Commission of British Columbia carried out an experimental small claims mediation project in the summer of 1975. The project was directed by a lawyer, with law students acting as the experimental mediators. The primary function was to help the parties arrive at a voluntary settlement prior to trial. A secondary function was to explain the general trial procedure, assist the parties in clarifying the issues and in preparing for trial. The mediators did not provide legal advice and did not attempt to act as adjudicators.

The parties made an appointment on a purely voluntary basis and were encouraged to agree that the proceedings were carried on "without prejudice". They were advised that the mediator had no power to make a decision and that the only thing she could do was to encourage a settlement.

It was found that most litigants without representation were quite willing to participate. If a settlement was concluded a consent to judgment was prepared and the parties returned to the court with their minutes of settlement for processing by the judge. The Interim Report of the project contains some interesting statistics: 76.9% of the parties involved in mediation were not represented by lawyers; 58.1% of the mediations resulted in settlement.

Although some clerks expressed interest in becoming involved more actively in the small claims procedure, either as a procedural and legal advisor or as a type of conciliator, the majority felt that this should be the function of a civil servant attached to the court. Their main concern was their lack of training and also the problem of time, particularly when the clerk also fulfils other functions such as Town Clerk, or even Mayor's secretary. If such a separate mechanism is not created, then clerks should be adequately trained.

Judges in Canada are divided on the issue of pre-trial consultation. They show some unease about this concept, which is understandable in view of their legal and judicial training. In British Columbia most judges are in favour of the idea and are aware of the Justice Development Commission's

experiment in Vancouver. Most Quebec judges are against such a concept because they feel that they fulfil a cathartic role as part of the court hearing process. Saskatchewan and Alberta judges are equally divided, but it must be remembered that in Saskatchewan the magistrate has to decide whether a claimant has a *prima facie* case before a summons is issued. Generally there was a feeling that anyone who would later be involved in the adjudicative process should not participate in any pre-trial conciliation. The judges' main concern was with the level of training of mediators and they recognized that the concept would have to be developed gradually.

Various provincial Labour Relations Boards and Human Rights Tribunals have adopted the concepts of investigation and conciliation. Employees are specifically assigned to investigate the facts and issues involved and to attempt to negotiate or mediate a settlement. This is the single most important element of a revitalized small claims procedure.

If the economies of a particular situation dictate that no personnel of the court be involved in mediation or conciliation – and in small urban areas the clerk should be trained – then the government should make available to the small claims system the expertise which is developing in the various Consumer Protection Bureaux at both the federal and provincial level. The largest single expense in implementing a mediation-type procedure will be the increase in telephone bills because of the necessity for larger switchboards.

Another important role of the mediation officer would be to educate, to go beyond the immediate issues raised.

There should be no final report of the conciliator unless settlement is reached and payments are made because this would be unnecessarily burdensome, but the conciliator should keep a detailed log as the case proceeds through negotiation. If experts have been consulted their reports, or a record of their conversations, should be forwarded to the adjudicator. Once settlement is reached – ideally over the telephone – the responsibility for supervising the settlement becomes that of the clerk's office. The minutes of settlement should be prepared by the mediator and signed by the parties.

**Arbitration**[78]

"Mediation" refers solely to mechanisms designed to resolve disputes, through the intervention of a neutral third party by means of negotiation, compromise and agreement between the primary parties. "Arbitration" is a system for adjudicating disputes on their merits, through a process of fact-finding and adjudication.

It is often said that arbitration is a better system for resolving disputes than litigation because arbitrators are not bound to apply the substantive law unless the parties so stipulate; as a result, arbitrators are able to dispense justice and apply their expertise free from technical restrictions. The best method of avoiding the problem of substantive or procedural constraints is to keep arbitration and mediation or conciliation as informal and expeditious as possible and to provide for a court hearing in the event of dissatisfaction with the pre-hearing process or with the tenets of arbitration.

Although the use of shopping-centre arbitrators, specialized arbitrators and local generalized arbitrators has been suggested, these concepts are outside the small claims process. There are significant differences between a true arbitration alternative and even a very informal courtroom procedure, not the least of which is that arbitration is non-appealable.

The ideal situation is to have arbitration as an alternative to the traditional courtroom process. Particularly in urban areas, the traditional process combined with arbitration can provide the best of both systems.

Care should be taken that the system is truly voluntary. There is a great temptation to speed things up by subtly coercing litigants to choose arbitration. Litigants should be told that arbitration will settle their problems faster, and will give them a private hearing, and that the arbitrator's decision is non-appealable. It is important that the judge should not give the impression that he will look with disfavour on a litigant who decides to have a case tried before him. I am opposed to the use of experts; technical information can be supplied in pamphlets or by expert witnesses. Specialist arbitrators tend not to be competent outside their field and there will be instances where general legal rather than technical knowledge is required. The best type of arbitrator would be a lawyer or law professor. A lawyer has an aura of authority and is more likely to be able to elicit pertinent information. The fact that the rules of evidence do not have to be strictly adhered to makes it very important that the adjudicator have knowledge of them. Where possible the arbitrator should be from the community where the court is located.

The role of an arbitrator should not be markedly different from that of a judge. Arbitrators should be given regular briefings and detailed guidelines. A fear that is often expressed relates specifically to arbitrators having a tendency to "split the difference" somewhat in the manner of Solomon. This is a common complaint of small court judges but is the way they now operate. This study tends to support the thesis that it is usually the individual litigant, not the businessmen, who receives the "golden mean" treatment. Some of the disparity might be accounted for by the fact that judges subconsciously believe businessmen more than consumers, but a great deal of it is probably accounted for by the fact that businessmen's claims are usually liquidated, whereas consumers' are not.

A different model for small claims courts is the system in New York City, which offers arbitration as an alternative to the traditional process. The parties voluntarily waive their right to appeal or to move for a new trial. The arbitrators are appointed and sit without pay one day a month. Consent to submit to arbitration cannot be withdrawn. There is also a system of "community advocates" staffed by para-legal professionals.

Rochester, N.Y., has a pilot project involving compulsory arbitration of all claims between $500 and $3,000 which is dealt with by the regular court system.

Pennsylvania has instituted a system of compulsory arbitration in its two major cities which also works through the regular court system. In Pittsburgh, arbitration covers issues relating to amounts between $500 and $10,000. The date is set with the agreement of the parties and the hearing is held in the office of the Chairman. The award is issued within 20 days and has the effect of a judgment of the court. There is an appeal by trial *de novo* after paying security for costs of up to 50% of the amount in controversy. The rules of each local court establish the procedure to be followed.

Two studies were done in the lates 1950's regarding the operation of the Pennsylvania courts[79]. The predominant view was that arbitrated cases are disposed of more quickly and more easily. The main defect seems to be in setting hearing dates, in view of the fact that the three arbitrators are lawyers and both parties usually have lawyers. Nonetheless the convenience, speed, lack of

waiting time and the informality have been universally praised. It was estimated that in the first 22 months of the operation of the Philadelphia Arbitration Commissioner's Office, the new procedure spared the court almost 2,000 full trials and an additional 1,000 partial trials.

Both the Pennsylvania and New York State systems differ from the New York City arbitration system in that the former are compulsory and the latter is voluntary. There are advantages that the New York City system shares with all the arbitration projects mentioned; the most attractive is that it is very speedy and keeps the docket unclogged. In Philadelphia the average delay between filing and the trial dropped in 2 years from about 27 months to four months. In New York City the arbitrated cases proceed more quickly because there are several arbitrators, but only one judge, in each Borough.

The City of Westminster, England, has been conducting a private experiment in conjunction with the local Law Society and various consumer organizations. Lawyers are allowed, although litigants are encouraged to consult a lawyer prior to coming before the court. The Administrator of the Court (who is a lawyer) will assist the parties in preparing the claims and preparing for trial. The decisions are made by an adjudicator who is a lawyer in private practice working for regular arbitrator's fees. The adjudication is held as informally as possible, without the adversary atmosphere.

It has been the experience of the Westminster experiment that the parties are much more open with the court, and the atmosphere leads to greater satisfaction both financially and psychologically. The aim is arbitration and not mediation, with a "judicial" decision as its object if the parties cannot agree. The court can arrange for legal research and use of experts. Fees run between £5 and £10 and are recouped from the other party at the discretion of the adjudicator. The adjudicator can make a decision without a hearing, based on the statements filed and any other information he deems necessary. Most disputes so far have related to faulty goods or unsatisfactory services.

There has also been an experiment in Manchester, England, which is now supported by the municipal government. The Manchester arbitration experiment only has jurisdiction in contractual matters concerning goods and services. The fees are between £2.50 and £5 and disputes are arbitrated on a voluntary basis by the arbitrator, who is a lawyer. Hearings are private, extremely informal and no lawyers are allowed. The jurisdictional limit of the court is £150 and no businesses are allowed to appear as plaintiffs.

Arbitration should not be made compulsory. There are many litigants who want to go before a judge because that is a "real" court to them – anything else smacks of second-class justice, and consequently people should have the opportunity to use the traditional process. Another important reason that arbitration should not be compulsory, and therefore the sole method of settling consumer disputes, is that it only works so well precisely because it is an adjunct to the traditional courtroom process. In the New York City courts it is clear that the presence of the judge in a traditional courtroom gives a stamp of legitimacy to the arbitration process. Another advantage of arbitration is its flexibility. Arbitrators do not represent a fixed cost. Their numers can vary, depending on the court load. In addition, each one requires only a small room to try a case.

It is to be hoped that mediation or conciliation preceding adjudication will reduce the tendency to "split the difference". Although an adjudicator should avoid making a compromise award, such

decisions will often leave both parties happy and will conform more closely to the equities of the situation.

The role of the arbitrator is three-fold: umpire, adjudicator and investigator. The parties must be willing to participate and abide by her terms. Unlike the judge who, in reaching a decision, must give consideration to such factors as consistency in the application of legal principles or certainty for the sake of guiding future conduct, the arbitrator is not bound by rules of law and considers only the personal equities of the parties before her.

A party should be relieved of the responsibility of finding experts. Arbitration must be available to the consumer at little or no cost. Various methods may be used to shift the burden of costs away from the individual consumer, such as requiring the merchant to pay all costs regardless of how the merits are decided, or providing the service without charge (subsidized by government funds), or having it partially financed through contributions and membership dues. Costs should be awarded at the discretion of the arbitrator.

Canadian judges were very concerned about the availability of some sort of arbitration procedure.

The majority of judges in Quebec were in favour of such a concept but there is already a mechanism for arbitration of disputes provided for in the Code of Civil Procedure[80]. The judges were unanimous in feeling that they should not become arbitrators.

The presence of professional advocates is a problem. The ideal would be to adopt Adams' concept of plaintiffs' and defendants' advisors who would take over when mediation or conciliation had been unsuccessful.

I do not suggest that advocates become actively involved in arbitration. I do not recommend that they be barred but that they only be allowed to act as advisors and not as advocates. The arbitrator should become more actively involved in order to protect the interests of non-business litigants. In such instances it is absolutely essential for the non-business litigant to have advice from some structure within the court framework. In an arbitration framework the litigants do not expect strict judicial formality.

Business interests would be able to frustrate the options of a litigant by simple refusing to go to arbitration, as a harassment tactic. Consequently I recommend that arbitration can be allowed whenever an individual litigant, plaintiff or defendant, requests it and the other party is a business.

The differences betwen arbitration and trial must be explained to litigants both in written pamphlets as well as by the personnel of the court. They should be told that the matter will proceed much more quickly, that the rules of evidence, procedure and substantive law are much more liberally interpreted, that there is no appeal, that the costs are less, that the arbitrator is able to consult with experts on a much more flexible basis and that if they use lawyers there may be a penalty in costs.

A typical suit might go as follows: the plaintiff comes in and discusses her case with the clerk who has discretion to refuse to issue the claim if it would be unfair to either party, or if there clearly is no jurisdiction or if it is obvious that there is no right of action. The date of trial is set at the time of issue. Immediately on issuing the claim the plaintiff (or her agent or friend) proceeds to

the conciliation or mediation officer to explain her case and what she wants and why. The conciliator then contacts the defendant by telephone and discusses the matter with him or his agent, giving the defendant the option of coming in to discuss it in person, but emphasizing that this is not necessary. If the mediation is unsuccessful the matter goes to a hearing.

The file would then be transferred to the plaintiffs' and defendants' officers who would contact an unrepresented individual to assist her prepare for trial. These officers would attend as advisors at an arbitration or would forward the case to duty counsel if a court trial was likely.

## AVAILABILITY OF INFORMATION

There are three areas where the lack of information is actively handicapping the effectiveness of the system: people do not know it exists, or do not know how to use it, and the court staff is inadequately trained. Apart from the suggestions contained in this study relating to the implementation of a system of advising and mediating, the single most important concern is, in my opinion, the availability of information.

The number of individuals using small claims courts is very low, the number of consumers even less. One of the main reasons is that many people just do not know the court exists. The low visibility of the small claims court has allowed businesses to make it their preserve and has helped prevent individuals from using it as an effective tool. There is no systematic education or promotion concerning the court's existence; the courts have not tried to sell themselves to the community and no outside group, apart from the A.P.A. in Quebec, has done much to promote it.

It is clear that the availability of a small claims mechanism must be extensively advertised. In Quebec there was a concentrated effort to inform the public of the existence of the court when it was first brought into operation. Simple and colourful pamphlets explaining the small claims procedure are available through various employee associations and at most banks and Caisses Populaires as well as at all court offices.

Most people find out about the court either by word of mouth or from lawyers. Only one respondent learned about the court through a community organization, and another was told about it by the insurance company.

Consumer groups, tenants' organizations and unions should be enlisted to help promote and publicize the small claims courts. Government must do more to promote and publicize the system. The media must be encouraged to write about its existence and operation and to give free space and time to advertise and promote the small claims court's existence and procedure. One radio station in Columbus, Ohio, started making spot announcements about small claims court and the caseload of the court doubled in two weeks. In areas where there are "action line" columns, the number of cases is usually higher.

The small claims court should distribute information pamphlets through various organizations: banks, department stores, even grocery stores. Mass mailings through the various credit card companies would be socially responsible as well as broadly based. If necessary the government should pay for spot announcements and regular newspaper advertisements and should support local community education groups.

It may also be useful to have available in the various court offices more detailed manuals with precise instructions on procedure. These manuals should be mailed out with each claim served as well as given to plaintiffs on issuing a claim.

New Brunswick, Saskatchewan, Newfoundland and the NorthWest Territories have no information available on the operation of their court systems. Material is available only on request in Ontario and the Yukon. Manitoba has done some newspaper promotion of their court as well as having pamphlets available in various court offices.

Both British Columbia and Alberta provide the parties with a pamphlet which explains how to use the court. One court clerk in British Columbia has even developed his own Information Sheet which he gives out to all parties.

The more effective the small claims court becomes, the more its success will generate promotion and publicity, which will in turn generate further success. If the small claims courts do begin to emerge as significant tools for the redress of consumer grievances, citizens, politicians, and consumer groups will have a stake in making sure the system works. The hardest and most important step is to get this "snowball effect" started. It would be counter-productive to publicize a defective court before improvements have been made.

## LEGAL AID

Although legal aid is based on helping the indigent protect his rights, I cannot foresee legal aid supporting individual lawyers appearing for individual litigants. Ontario Legal Aid may pay for counsel during an appeal from a small claims decision. I would expect the decision to grant legal aid to be made not only on the basis of financial resources, but also on whether important issues of law have been raised. Moreover, the small claims court is becoming the court of the middle class who, more often than not, are not entitled to legal aid.

The role of legal aid, though, must become more dominant. I recommend that the concept of duty counsel be implemented. This will not be inordinately expensive and certainly far less than the cost of a privately-retained lawyer. In the larger urban areas it may be necessary to have a duty counsel roster on full-time call, but in the smaller areas the time required from duty counsel can be minimized by careful organization of the trial lists. I do not envisage any problem with attracting good and competent counsel to appear, particularly if there are evening or Saturday sittings.

Whether duty counsel will be needed at any particular sitting will be known ahead of time because the party who has a privately retained lawyer must notify the court before trial. Contrary to most situations where duty counsel are involved there would be an opportunity to prepare ahead of time. The recognition by the administrators of justice of the necessity for duty counsel would go a long way to indicate to the community that the small claims court has the requisite "stamp of approval".

## FINANCING

Most areas in Canada already have small claims mechanisms, so that the major costs would be those of making all clerks civil servants, creating pre-trial consultation, setting up a system of arbitration and providing duty counsel. I do not foresee a necessity to increase the number of judges because in areas where the case load is small the District, County and Provincial Court judges can fill the role.

Making clerks and their staff members civil servants may sound expensive, but in view of the suggestion that these roles be filled by clerks from other courts or that one clerk might serve more than one small claims court, the actual cost should not be significant. There will be ongoing costs relating to the training of these civil servants but this is a capital investment well worth the money.

The para-legal personnel could serve more than one court in low population areas; in the urban areas there should be more than one mediator for each court. If there was approximately one para-legal person for every one and a half courts, the total number would be under 500. If the figure of 500 is multiplied by a cost figure of $15,000 a year, the costs of creating the pre-hearing consultation mechanism would be roughly $7,500,000. The major cost in addition to staffing would be that of additional telephone lines.

If the arbitration procedure is made available, the necessity for judges to act on a full-time basis would be lessened. It is expected that arbitrators would be available for minimal fees if not on a volunteer basis. The cost would be about half that of providing duty counsel on a day-to-day basis.

If the Ontario Legal Aid tariff is used as a guide, the cost for providing duty counsel in Ontario can be estimated in the following way: if it is assumed that 40% of the courts run five days a week, the cost, at $175.00 a day, would be $1,225,000.00 a year. If the cost of providing duty counsel in the other 60% is $775,000 the total annual cost for providing duty counsel in Ontario would be $2,000,000.

A rough estimate for providing duty counsel throughout Canada would probably be $10,000,000 a year. This is substantially less than the cost to society and to the tax payers for the retention of privately-retained advocates. The cost, then, of providing duty counsel, arbitrators and para-legal personnel would be about $20,000,000 with a maximum cost, including administrative and incidental costs, of $30,000,000 a year for all Canada. Compared to the budgets for provincial and higher courts I do not feel that this cost is out of proportion. However, I look on these figures as maxima and would not be at all surprised if they were substantially less.

## GENERAL OBSERVATIONS

The western and central portions of Canada are, in general, well served by the small claims system. The greatest single problem is collection. Mechanisms must be found to ensure efficient and effective collection. Two more weak areas are training of court personnel and availability of information. On the whole the fees are minimal and fair.

The British Columbia courts have a jurisdiction, which all small claims courts should have, relating to consumer matters and to damages resulting from unfair trade practices. I like the prohibition against lawyers being awarded fees and the ability to suspend a driver's licence if a judgment relating to an automobile accident is not paid. Alberta, Manitoba, and Newfoundland do not require the filing of a defence, which cuts down on paperwork and lessens formality. The powers given to Alberta and Ontario judges to vary judgments without appeal is attractive. I also approve of the one level of appeal in Alberta. I note that in Newfoundland the primary method of service is mail.

The best provision in Canadian law is that of Saskatchewan where two people can come off the street and present their problem for instant resolution. An equally appealing provision is that in Manitoba which states that the rules of evidence do not apply.

There are several attractive provisions in Quebec. No counter-claims are allowed and separate action must be brought. An action brought in a higher court can be transferred down by an individual defendant. The Small Debt Official concept, operational in the Territories, should be looked at for application in rural areas, particularly the ability to order payment in cash or kind.

The British system of arbitration is particularly attractive because of the powers given to the arbitrator. Australia, Sweden and Israel have forums set up specifically for consumer plaintiffs. Such mechanisms should be encouraged to expand on a voluntary basis.

The holding of night courts in the U.S.A. highly recommends itself. The concept of informality is well developed in New York and California. I like the fact that the Nebraska court can issue declarations and place limits on plaintiffs. The Massachusetts Consumer Court, financed by business, can perhaps serve as a model for responsible commercial interests. These ideas are attractive but I feel that the mechanisms already existent can be adapted to serve consumer interests well.

## SUMMARY OF RECOMMENDATIONS

1. A mechanism for pre-hearing mediation must be set up within the court structure.

2. The public must be informed of both the existence of the small claims courts and how to use them. There must be an intensive on-going educational campaign.

3. Arbitration as an alternative to a courtroom trial should be instituted. Arbitration within the court structure is preferable and should be compatible with the mediation/conciliation structure.

4. The territorial jurisdiction of each court should be province-wide.

5. The small claims court should have jurisdiction in all matters of tort and quasi-tort, of contract and quasi-contract, including false imprisonment, wrongful dismissal, defamation, seduction, breach of promise, malicious prosecution, replevin and detenue. There should be no jurisdiction to hear criminal or quasi-criminal matters, nor matters dealing with taxes, landlord and tenant, wills, land, trusts and estates. Matters arising from rights created in consumer protection statutes should be assigned to the small claims court for enforcement.

6. Although the court should not have power to grant the prerogative remedies *per se*, it should have a broad equitable jurisdiction to order anything that is necessary to be done or not to be done to bring the matter to a satisfactory conclusion, including payment "in kind".

7. The power to commit for contempt should be abolished leaving only the power to fine.

8. The fiscal jurisdiction of the court should be between $600 and $1,000 with an $800 optimum. The monetary limit should be adjusted yearly according to the change in the Consumer Price Index.

9. The rules for venue should be different for individuals and businesses, giving the widest range of possible courts to the individual and limiting businesses to the convenience of the individual litigant. The court should have power to transfer venue on informal request.

10. Buildings should be modern and comfortable with adequate seating and telephone facilities. The traditional layout of a courtroom should be modified.

11. The courts should be accessible by telephone as well as by public transportation, and the parking facilities should be adequate and inexpensive.

12. The clerk's office and the court should be open on some evenings and occasional Saturdays.

13. Service of process should be by double registered mail sent by the clerk, with personal or residential service as a secondary method. The definition of "resident" must be broadened.

14. The clerk should assist in locating a party and in providing information for that purpose. Inaccurate nomenclature should be tolerated provided identity is unmistakable.

15. Service *ex juris* should be allowed only when one party and the cause of action are within the province and only where the other party was resident in the province at the time the claim arose or at the time of the issuance of the action.

16. The provinces must adopt uniform practices for claiming and defending.

17. The Claim should be simple but also very detailed about the rights of the defendant and the consequences of following or not following each option. Parties should not be bound by particulars and the clerk should play an active role in filling out the Claim. Forms should be available in a number of languages as should be the information pamphlets accompanying the Claim.

18. The clerk should have a discretion to refuse to issue a Claim which is *prima facie* bad, subject to appeal.

19. Third party procedure should be informal and without pleadings.

20. Affidavit evidence should be accepted in a broader set of circumstances.

21. A flat fee of $5.00 for commencement of suit and a minimal fee for service should be instituted.

22. Minors should be allowed to sue without formality.

23. The trial date should be set at the time of the issuance of the Claim. It should be between 21 and 40 days from issuance.

24. Adjournments should be allowed only once for a period of no more than 15 days. They should be arranged over the telephone or by mail.

25. There should be no requirement to file a defence or dispute; appearance at trial is sufficient.

26. Any excess over the monetary jurisdiction of the court must be abandoned and cannot be the cause of transfer to another court.

27. There should be available a system of "instant justice" whereby the parties may appear at the court for immediate adjudication without formality.

28. The application of the rules of evidence should be extremely liberal and should relate to weight rather than admissibility.

29. The rules of practice and procedure should be almost non-existent and only used for the purpose of maintaining order and not for determining the issues.

30. The judge should not take an active role in the proceedings, given a pre-hearing mechanism.

31. The court should be allowed to take views or to seek expert opinions in matters of fact.

32. Judges should be appointed on a permanent basis.

33. The judge should not become involved in attempting to negotiate settlement unless there is no pre-hearing form of consultation.

34. There should be no default judgments *per se*. Judgments by default should be granted *ex parte* either by the judge or by the clerk on the basis of affidavit or oral evidence. There should be a concerted effort to ensure that they are not granted *pro forma*.

35. The time for re-opening of *ex parte* judgments should be short and the grounds limited. Default judgments could be revoked by the clerk.

36. The court should be encouraged to render judgment at trial and to give full explanation.

37. Judgments should be final only with respect to the parties and for the amount claimed and should be effective throughout the province.

38. Costs should be in the discretion of the judge and should not include costs for the presence of counsel.

39. The parties should be encouraged to attempt informal collection with the assistance of the court.

40. A party present in court should be required to make partial payment immediately on judgment being rendered.

41. The court should have facilities available for collecting judgments and dispersing money to judgment creditors for a minimal fee.

42. A procedure similar to that on judgment summons should be routinely invoked at trial immediately after judgment.

43. Pre-hearing seizure should be abolished.

44. Garnishment should cover several pay periods.

45. Appeal should be by way of trail *de novo* provided that security for costs not to exceed 50% of the amount in controversy be filed. There should be only one level of appeal.

46. The grounds for appeal should be a question of law or mixed fact and law. There should be an alternative appeal by way of stated case on the agreement of the small claims judge.

47. There should be no jury trials. On appeal by trial *de novo* a jury might be available on payment of a high jury fee.

48. Clerks should be encouraged to keep detailed records. Litigants should be directed to keep the court informed of settlement or payment.

49. Lawyers should be allowed to appear at a trial before a judge. Lawyers may only act as counsel in arbitration and may not take an active role.

50. Duty counsel should be made available for unrepresented parties before a trial judge when a professional advocate is acting on the other side.

51. Para-legal personnel should be made a part of the court structure to negotiate settlements and to assist unrepresented parties in preparation for trial. They may assist an unrepresented party in an arbitration but may not take an active role.

52. Legal aid, in addition to supplying permanent duty counsel, should support appeals where the interests of justice necessitate it.

53. Corporations should be allowed to appear and to issue claims in the small claims court. They could be discouraged by instituting stricter rules of venue, the concept of duty counsel, the inability of a professional advocate to take an active part in arbitration, a requirement that active attempts must have been made to collect outside the court system, and having a limit placed on the number of claims that can be brought.

54. Assignees of claims should not be allowed to bring action.

55. Parties who abuse of misuse the system should be subject to having their rights suspended.

56. Class actions should not be allowed.

57. Interpreters must be available according to the custom and langugae of the local community.

58. There should be panels of experts and consultants available to the court for advice. They may be used by the prehearing consultation personnel as well as by arbitrators and judges without having to appear.

59. The government must finance the small claims court in order to give it the prestige and respect which is necessary for it to acquire status within society.

60. Court personnel should be appointed as civil servants on a full-time basis in most areas. They must be extensively trained and selectively hired.

# APPENDIX A
## ANALYSIS OF SMALL CLAIMS IN CANADIAN COURTS 1975[a]

| | 1. Types of Claims (%) | | | | | | | 2. Amount of Claims in Dollars (%) | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Consumer Complaints[b] | Professional Services | Debt | Employer – Employee | Landlord & Tenant | Auto Accident | Insurance | 1 – 50 | 51 – 200 | 201 – 300 | 301 – 400 | 401 – 500+ | |
| Territories (39)[c] | 4.0 | 14.0 | 68.1 | – | 9.0 | 4.9 | – | 8.0 | 17.9 | 14.7 | 11.6 | 29.8 | (39) |
| B.C. (207) | 7.2 | 17.4 | 60.8 | 3.4 | 7.7 | 3.4 | – | 14.8 | 36.4 | 13.4 | 9.6 | 25.8 | (209) |
| Alta. (348) | 5.8 | 4.6 | 72.5 | 1.7 | 7.8 | 4.6 | 3.2 | 20.7 | 52.2 | 11.6 | 7.7 | 7.7 | (362) |
| Sask. (91) | 4.4 | – | 49.5 | 1.1 | 13.2 | 21.7 | 9.9 | 18.8 | 55.1 | 15.0[d] | 2.5[d] | 8.8[d] | (80) |
| Man. (93) | 2.2 | 2.2 | 80.7 | – | 10.8 | 3.2 | 1.1 | 27.4 | 45.3 | 8.4 | 6.3 | 12.6 | (95) |
| Ont. (288) | 2.8 | 10.1 | 67.7 | 0.8 | 4.8 | 5.9 | 4.4 | 18.0 | 38.7 | 11.5 | 8.7 | 23.0[e] | (294) |
| P.Q. (176) | 2.8 | 18.8 | 40.9 | 4.0 | 9.1 | 24.4 | – | 18.2 | 48.8 | 33.0 | – | – | (176) |
| Canada | 4.1 | 9.6 | 63.5 | 1.5 | 8.9 | 9.7 | 2.7 | 17.9 | 42.1 | 15.4 | 9.9 | 17.9 | |

[a] *Courts Reporting: Yellowknife & Whitehorse; Grand Forks, Sechelt, Kamloops, Penticton, Kitimat, Oliver, Burns Lake & North Vancouver: Wetaskiwin, Lethbridge, St. Paul, High Prairie, Edmonton, Vegreville, Red Deer, Hanna, Camrose & Fort MacLeod; Regina, Prince Albert & Wynward; Virden, Flin Flon & Selkirk; St. Thomas, Kingston, Kenora, Dufferin, Dunville, Temiskaming, Timmins, Picton, Oshawa, Exeter & Burlington; Sherbrooke, Cowansville, Rouyn, Percé; Granby; Sept-Îles & Pointe Claire.*

[b] *This includes an arbitrary analysis of categories A to E, G & L in questionnaire.*

[c] *Number of cases is shown in parentheses.*

[d] *Only individuals can claim over $200.*

[e] *Limit is $800 in Northern districts.*

**Appendix A (contd.)**

| | 3. Types of Parties (%) | | | | | | 4. Defences & Counter-claims Filed[a] | | 5. Adjournments & Transfers[b] | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Plaintifs | | | Defendants | | | | | | |
| | Large Business[c] | Local Business[d] | Individuals | Large Business | Local Business | Individual | Defences | Counter-claims | Adjourn-ments | Transfers |
| Territories | 28 | 66 | 6 | 5 | 20 | 75 | 11.5 | 0 | 16.0 | 0 |
| B.C. | 23[e] | 58 | 19[h] | 1[i] | 18 | 81 | 17.6 | 5.2 | 12.8 | 2.1 |
| Alta. | 19 | 58 | 23[h] | 1 | 14 | 85 | 3.9 | 0.8 | 28.5 | .4 |
| Sask. | 35 | 30[f] | 35 | 1[i] | 10 | 89 | 0 | 2.4 | 8.2 | 1.2 |
| Man. | 56[e] | 35 | 9 | 1 | 12 | 87 | 3.0 | 0 | 6.1 | 0 |
| Ont. | 34[e] | 52[g] | 14 | 1 | 12 | 87 | 18.6 | 3.3 | 13.1 | 4.8 |
| P.Q. | n/a | 44[f,g] | 56 | 2 | 10 | 88 | 29.6 | 0[j] | 0 | 0 |
| Canada | 32 | 49 | 23 | 1 | 14 | 85 | 12.0 | 2.0 | 12.1 | 1.2 |

[a] *as Percent of Total Cases Filed (1255)*

[b] *as Percent of Total Cases*

[c] *includes collection agencies, finance companies, large retailers, oil companies*

[d] *includes small local corporations*

[e] *mostly collection agencies*

[f] *mostly rent suits*

[g] *a large portion is for legal or medical fees*

[h] *mostly car accidents*

[i] *large company sued by an individual*

[j] *not permitted*

| | 6. Use of Advocate[a] | | 7. Cases Heard or Defaulted, Settled or abandoned | | | 8. Dismissals | | 9. Costs |
|---|---|---|---|---|---|---|---|---|
| | Plaintiff | Defendant | Heard | Defaulted | Settled or Abandoned | Dismissals as % of Total Cases | Dismissals as % of Cases Heard | Costs[c] |
| Territories | 66.7 | 8.0 | 6.0 | 65.6 | 28.3 | – | – | 68.4 |
| B.C. | 19.1 | 4.3 | 22.7 | 36.2 | 41.1 | 3.5 | 16.1 | 38.5 |
| Alta. | 4.2 | 1.4 | 51.4 | 0[e] | 48.6 | 10.2 | 19.9 | 42.7 |
| Sask. | 4.7 | 2.4 | 69.3 | 0[e] | 30.7 | 18.8 | 27.6 | 48.8 |
| Man. | 1.5 | 0 | 54.5 | 0[e] | 45.5 | 4.5 | 8.3 | 36.2 |
| Ont. | 18.2 | 7.5 | 25.3 | 54.6 | 20.1 | 5.3 | 22.2 | 54.3 |
| P.Q. | 0[d] | 0[d] | 31.7 | 32.9 | 35.4 | 6.5 | 21.2 | 87.9 |
| Canada | 19.1 | 4.7 | 37.8 | 47.4 | 35.6 | 8.1 | 19.2 | 53.8 |

[a] *as Percent of Total Cases*

[b] *as Percent of Total Cases*

[c] *as Percent of Cases Heard, Defaulted or Settled (819)*

[d] *not allowed in Quebec*

[e] *default judgments are heard*

| | 10. Judgments | | | | 11. Judgment Reserved & Amounts Awarded After Trial[a] | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | For Plaintiff % of Cases Heard | For Plaintiff % of Total Cases | For Defendant % of Cases Heard | For Defendant % of Total Cases | Judgment Reserved | $1 – 50 | $51 – 200 | $201 – 300 | $301 – 400 | $401 – 500 | $501 – 1,000 |
| Territories | 100.0 | 77.6 | 0 | 0 | 0 | 33.3 | 0 | 0 | 66.7 | n/a | – |
| B.C. | 67.7 | 41.8 | 3.2 | 0.7 | 9.7 | 9.5 | 42.8 | 4.8 | 23.8 | 0 | 19.0 |
| Alta. | 75.3 | 39.5 | 0 | 0 | 0 | 26.3 | 51.1 | 8.8 | 7.3 | 5.8 | 0.7[b] |
| Sask. | 62.1 | 43.5 | 1.7 | 1.2 | 0 | 18.9 | 59.4 | 16.2 | 0 | 5.4 | n/a |
| Man. | 58.3 | 33.3 | 2.8 | 1.5 | 0 | 31.8 | 45.4 | 13.6 | 4.5 | 4.5 | n/a |
| Ont. | 60.0 | 45.5 | 0 | 0.5 | 4.4 | 14.8 | 48.1 | 22.2 | 11.1 | – | 3.7 |
| P.Q. | 76.9 | 66.3 | n/a | n/a | 0 | 10.0 | 50.0 | 35.0 | 5.0[b] | n/a | – |
| Canada | 71.5 | 49.6 | 1.2 | 0.6 | 2.0 | 20.6 | 42.4 | 14.4 | 16.9 | – | – |

[a] *As percent of cases heard (407).*
[b] *Exceeds jursisdiction.*

| | 12. Appeals & Collection | | | 13. Time[a] | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Time to Resolution[b] | | | | | | Time to Hearing[c] | | | | | |
| | Appeals % of Total Cases | Appeals % of Cases Heard | Collection Commenced[d] | 1 – 20 | 21 – 40 | 41 – 60 | 61 – 90 | 91 – 150 | 151 + | 1 – 20 | 21 – 40 | 41 – 60 | 61 – 90 | 91 – 150 | 151 + |
| Territories | 0 | 0 | | 24.0 | 20.3 | 18.6 | 8.3 | 19.1 | 12.0 | 0 | 0 | 33.3 | 0 | 66.6 | 0 |
| B.C. | .7 | 3.2 | 29.0 | 33.6 | 28.8 | 12.1 | 6.4 | 4.8 | 10.0 | 9.6 | 25.8 | 19.3 | 12.9 | 16.1 | 16.2 |
| Alta. | .4 | .8 | 4.0 | 14.4 | 44.6 | 20.9 | 16.7 | 2.3 | 1.1 | 4.3 | 43.9 | 23.6 | 22.5 | 3.2 | 2.2 |
| Sask. | 0 | 0 | | 19.0 | 36.9 | 27.4 | 10.7 | 2.4 | 3.6 | 13.7 | 46.5 | 27.5 | 8.6 | 3.4 | 0 |
| Man. | 1.5 | 2.8 | 11.1 | 19.7 | 62.1 | 12.1 | 3.0 | 1.5 | 1.5 | 0 | 80.5 | 11.1 | 5.5 | 2.7 | 0 |
| Ont. | 0 | 0 | 26.7 | 32.5 | 27.2 | 8.9 | 8.3 | 10.1 | 13.0 | 1.9 | 5.8 | 19.6 | 21.5 | 23.5 | 27.4 |
| P.Q. | n/a | n/a | 28.3 | 30.5 | 43.3 | 12.8 | 3.0 | 4.2 | 6.1 | 7.6 | 46.1 | 25.0 | 9.6 | 9.6 | 1.9 |
| Canada | .4 | 1.1 | 19.8 | 24.8 | 37.7 | 16.1 | 8.1 | 6.3 | 5.8 | 5.3 | 35.5 | 22.7 | 11.5 | 17.8 | 6.8 |

[a] *In numbers of days.*

[b] *Percent of total cases from issuance date.*
*Resolution– abandoned, settled, defaulted, heard.*

[c] *Percent of cases heard.*

[d] *As percent of cases.*

## APPENDIX B
### Analysis of Judges' Questionnaires[a]

| | Use of Lawyers | | Application of Principles of Equity | | Application of Rules | | | | Greater Investigatory or Settlement Powers? | | Evening or Saturday Sittings? | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | Evidence | | Practice & Procedure | | | | | |
| | Pro | Con | Yes | No | Strict | Liberal | Strict | Liberal | Yes | No | Yes | No |
| B.C. (10)[b] | 9 | 1 | 7 | 2 | 0 | 8 | 2 | 6 | 4 | 5 | 1 | 7 |
| Alta. (7) | 5 | 2 | 6 | 1 | 0 | 7 | 1 | 6 | 0 | 6 | 1 | 5 |
| Sask. (8) | 7 | 1 | 7 | 1 | 3 | 5 | 0 | 8 | 1 | 7 | 2 | 6 |
| Man. (2) | – | – | 2 | 0 | 1 | 0 | 0 | 1 | | | | |
| Ont. (20) | 15 | 5 | 15 | 0 | 8 | 12 | 5 | 15 | 3 | 12 | 9 | 8 |
| P.Q. (15) | 5 | 3 | 8 | 4 | 7 | 6 | 6 | 8 | 2 | 7 | 2 | 11 |
| N.B. (2) | 1 | 1 | 1 | 1 | 0 | 2 | 0 | 2 | 0 | 1 | 0 | 1 |
| N.S. (1) | 1 | 0 | 1 | 0 | 0 | 1 | 0 | 1 | 1 | 0 | 0 | 1 |
| Nfld. (1) | – | – | 1 | 0 | 1 | 0 | – | – | | | | |

[a] *Numbers where these vary, the balance of Judges were "indifferent" or had no positive opinion.*
[b] *Number of replies in parentheses.*

**Appendix B** (Contd.)

| | Bar Corporate Plaintiffs? | | Bar Lawyers? | | Greater Monetary Jurisdiction? | | Pre-Trial Consultation? | | Simplified Procedures? | | Less Formality? | | Class Action? | | Broader Rights of Appeal? | | Arbitration? | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Yes | No | Yes | No | Yes | No | Yes | No | Yes | No | Yes | No | Yes | No | Yes | No | Yes | No |
| B.C. | 0 | 8 | 0 | 9 | 5 | 2 | 7 | 2 | 2 | 7 | 0 | 9 | 3 | 6 | 4 | 3 | 3 | 6 |
| Alta. | 1 | 5 | 2 | 4 | 5 | 1 | 3 | 2 | 2 | 3 | 2 | 3 | 3 | 2 | 3 | 2 | 1 | 4 |
| Sask. | 0 | 8 | 0 | 8 | 3 | 3 | 4 | 4 | 7 | 1 | 4 | 4 | 4 | 3 | 2 | 2 | 1 | 5 |
| Ont. | 1 | 16 | 2 | 15 | 10 | 6 | 7 | 10 | 12 | 5 | 4 | 11 | 7 | 3 | 5 | 9 | 7 | 9 |
| P.Q. | 2 | 7 | 3 | 3 | 5 | 5 | 3 | 6 | 0 | 9 | 1 | 8 | 2 | 8 | 0 | 6 | 6 | 2 |
| N.B. | 0 | 1 | 2 | 0 | 1 | 0 | 0 | 1 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 1 | 2 | 0 |
| N.S. | 0 | 1 | 0 | 1 | 1 | 0 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 1 | 1 | 0 | 1 | 0 |

## APPENDIX C
## ANALYSIS OF CLERKS' QUESTIONNAIRES

| | Number of Replies | Number of Claims in 1974 | | | | | | | | Physical Criteria Types of Facilities Available or Present | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 1 – 50 | 50 – 200 | 200 – 500 | 500 – 1000 | 1 – 2000 | 2 – 4000 | 10,000 | 10,000+ | Modern | Signs | Central | Public Telephone | Visiting Rooms | Accessible by public Transit | Convenient Inexpensive Parking |
| N.W.T. | 1 | – | – | 1 | – | – | – | – | – | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| Yukon | 2 | – | – | 2 | – | – | – | – | – | 0 | 2 | 2 | 2 | 2 | 0 | 2 |
| B.C. | 12 | – | 1 | 5 | 2 | 1 | – | – | – | 6 | 3 | 9 | 2 | 4 | 3 | 9 |
| Alta. | 13 | 1 | 5 | 3 | 1 | 1 | | 1 | – | 8 | 4 | 13 | 2 | 8 | 12 | 3 |
| Sask. | 3 | – | 1 | 2 | – | – | – | – | – | 1 | 1 | 2 | – | – | 1 | 2 |
| Man. | 3 | 1 | 2 | – | – | – | – | – | – | 2 | 2 | 3 | 1 | 1 | 3 | 3 |
| Ont. | 19 | – | 2 | 2 | 4 | 6 | 1 | 1 | – | 8 | 9 | 18 | 6 | 2 | 12 | 14 |
| P.Q. | 13 | – | 1 | 1 | 1 | 3 | 1 | 1 | 2 | 8 | 4 | 9 | 2 | 7 | 11 | 12 |
| N.B. | 4 | – | 1 | 2 | – | – | – | – | – | 4 | 1 | 4 | 2 | 3 | 3 | 1 |
| N.S. | 2 | 2 | – | – | – | – | – | – | – | 1 | 1 | 2 | 0 | 0 | 1 | 1 |
| P.E.I. | 1 | – | – | – | – | – | – | – | – | 0 | 0 | 1 | 0 | 0 | 0 | 1 |
| Nfld. | 2 | – | – | 1 | 1 | – | – | – | – | 0 | 2 | 2 | 0 | – | 1 | 1 |

**Appendix C** (contd.)

| | Administrative | | | | | | | | | | Role of Clerk | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Clerk Fulltime | Staff 1–5 | Staff 5–10 | Staff 10+ | Phone Lines 1–2 | Phone Lines 3–5 | Phone Lines 5+ | Interpreters Available | Accommodation of Frequent Users | Limits on Filing | Legal Advisor | Procedural Advisor | Conciliator | Administrative Purely |
| N.W.T. | 1 | – | 1 | – | – | 1 | – | 1 | 0 | 0 | 0 | 1 | 0 | 1 |
| Yukon | 2 | 2 | – | – | 2 | – | – | 2 | 0 | 0 | 0 | 2 | 0 | 2 |
| B.C. | 9 | 9 | 2 | – | 8 | 2 | – | 7 | 2 | 0 | 1 | 9 | 2 | 4 |
| Alta. | 13 | 11 | 2 | – | 2 | 10 | 1 | 7 | 6 | 1 | 3 | 13 | 4 | 4 |
| Sask. | 1 | 2 | – | – | 3 | – | – | 2 | 0 | 0 | 1 | 2 | 1 | 3 |
| Man. | 3 | 3 | – | – | 3 | – | – | 1 | 0 | – | 0 | 2 | 1 | 3 |
| Ont. | 14 | 15 | – | – | 15 | – | – | 7 | – | – | 1 | 19 | 6 | 3 |
| P.Q. | 12 | 9 | 1 | 2 | 7 | 2 | 3 | 2 | 5 | 0 | 2 | 12 | 6 | 2 |
| N.B. | 2 | 4 | – | – | 4 | – | – | 3 | 1 | 0 | 2 | 2 | 0 | 3 |
| N.S. | 1 | 2 | – | – | 2 | – | – | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| P.E.I. | 1 | 1 | – | – | 1 | – | – | 1 | – | – | 0 | 1 | 1 | 0 |
| Nfld. | 1 | 2 | – | – | 2 | – | – | 1 | 1 | 1 | 1 | 0 | 0 | 1 |

**Appendix C** (contd.)

| | Role of Staff | | | | Clerk's Office Open | | Court Sits | | Daily Trial Lists | | | Availability of Printed Information | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Legal Advisor | Procedural Advisor | Conciliator | Administrative | 1 – 15 days | 15+ days | 1 – 15 days | 15+days | 1 – 10 cases | 10 – 20 cases | 20+ cases | Existence of Court | How to Proceed |
| N.W.T. | 0 | 1 | 0 | 1 | 1 | – | – | 1 | – | 1 | – | 0 | 0 |
| Yukon | 0 | 2 | 0 | 2 | – | 2 | 2 | – | 2 | – | – | 2[a] | 2[a] |
| B.C. | 0 | 10 | 1 | 5 | – | 11 | 10 | 2 | 9 | 2 | – | 0 | 4[b] |
| Alta. | 3 | 13 | 2 | 4 | 2 | 11 | 11 | 2 | 6 | 3 | 3 | 3 | 10[b] |
| Sask. | 1 | 2 | 1 | 3 | 1 | 2 | 1 | 2 | 3 | – | – | – | – |
| Man. | 1 | 2 | 1 | 3 | – | 3 | 3 | – | 2 | 1 | – | 1 | 1 |
| Ont. | 0 | 18 | 5 | 5 | – | 19 | 12 | 2 | 2 | 4 | 13 | 3 | 7 |
| P.Q. | 0 | 6 | 3 | 9 | – | 13 | 7 | 2 | 3 | 7 | 1 | 13 | 13[b] |
| N.B. | 0 | 0 | 0 | 4 | – | 4 | 4 | – | 4 | – | – | 0 | 0 |
| N.S. | 0 | 0 | 0 | 2 | – | 2 | 2 | – | 2 | – | – | 0 | 0 |
| P.E.I. | 0 | 0 | 0 | 1 | – | 1 | 1 | – | 1 | – | – | 0 | 0 |
| Nfld. | 0 | 1 | 0 | 1 | – | 2 | 1 | 1 | – | 1 | 1 | 0 | 0 |

[a] *Available from the government.*
[b] *Available from the court.*

## FOOTNOTES

[1] *Small Claims Procedures in Canada*, Canadian Consumer Research Council Report No. 8, Aug. 1974.

[2] J. Weiss, *Little Injustices*, (1972).

[3] *Small Claims Act*, 1960 R.S.B.C. c.359, amended 1969, 1975.

[4] *Small Claims Act*, 1970 R.S.A. c.343.

[5] *Small Claims Enforcement Act*, 1965 R.S.S. c.102, amended 1973.

[6] *County Courts Act*, 1970 R.S.M. c.260, amended 1972, 1974.

[7] *Small Claims Court Act*, 1970 R.S.O. c.439.

[8] *Cour d'Accès à la Justice*, C.C.P., Articles 953–996.

[9] *County Courts Act*, R.S.N.B. 1973 c. C–30.

[10] *County Court Act*, 1975 S.P.E.I. c.27.

[11] *Municipal Courts Act*, R.S.N.S. c.197 and *Justices Courts Act*, R.S.N.S. c.158.

[12] *Provincial Court Act*, 1974.

[13] *Magistrates' Court Ordinance*, C.M– 1 and *Judicature Ordinance* C. J–1 (Yukon) and *Magistrates' Court Ordinance*, C M–1 (N.W.T.).

[14] *Small Claims Courts Act*, 1973; Foster K., *Small Claims* (1975) 2 Br. J. of Law & Soc. 1, Turner J.N. *Small Claims in England* (1974) 48 Aust. L.J.345.

[15] Décret No. 72–790, Aug. 28, 1972.

[16] *Small Claims Tribunals Act*, 1973.

[17] H.J. Berman, *Soviet Comrades' Court*, (1963) 38 Wash. L. Rev. 842; G. Smith, *Comrades Court* (1974) 49 Ind. L.J. 238.

[18] See generally: Weiss, *supra* footnote 2 and A.S. Gould, *Staff Report on Small Claims Courts* (1972) National Institute for Consumer Justice; F. Forbes, *What the Legal Community Needs to know about the Small Claims Court*, (1972) 6 Creighton L. Rev. 317, Skoler D., *Monetary Limitations on Civil Jurisdictions* (1962–3) 36 1 Southern Cal. L. Rev.55.

[19] R.W. Atwood, *An Evaluation of the Operations of the Small Claims Court in New York City*, 1971 (mimeo); B.G. Driscoll, *Small Claims Court in N.Y.C.* (1974), 2 Fordham U.L.J. 479; S.L. Kasc., *Toward the Informal Resolution of Consumer Grievances*, (1972) 27, Record of the N.Y.C.B. 419; J.J. Markwardt, *Nature & Operation of the New York Small Claims Court* (1974) 38 Albany L. Rev. 196; E. Siegal, *Evaluation of Small Claims Courts in N.Y.C.* (1971) N.Y.C. Digest of Consumer Affairs; S.L. Dreyfuss, *Due Process Denied* (1974) 10 Colum, J.L. & Soc'y., p. 370.

[20] B. Moulton, *Small Claims Court in California*, (1969) 21 Stanford L. Rev. 1657, Pagter et al, *The California Small Claims Court*, (1964) 52 Cal. L. Rev. 876, *Small Claims Courts & the Poor*, (1969) S. Cal. L. Rev. 493.

[21] Steadman & Rosenstein, *Small Claims Consumer Plaintiffs in Philadelphia Municipal Court* (1973), U. of Penna L. Rev. 1309; M. Rosenberg, *Trial by Lawyer*, (1961) 74 Harv. L. Rev. 448 *Translating Sympathy for Deceived Consumers*, (1966) U. of Penna. L. Rev. 35; *Arbitration: The Philadelphia Story* (1964) 4 J. of Am. Insurance 45.

[22] H. J. Fox, *Small Claims Revision* (1971) 20 De Paul L. Rev. 912; C.D. Robinson *Small Claims Division* (1963) 44 Chicago Bar Record 421.

[23] R.F. Boden, *Wisconsin Small Claims Procedure*, (1963) 47 Marquette L. Rev. 38.

[24] F. Myers, *Small Claims Court* (1953) 287 Annals 21.

[25] W.G. Haemmel, *N. Carolina Small Claims Court*, (1973) 9 Wake Forest L. Rev. 503

[26] S.G. Olsen, *The Establishment of Small Claims Courts in Neb.* (1967) 46 Neb. L. Rev. 152.

[27] R.J. Fowko, *Small Claims Courts* (1968) 37 J. of Bar Association of Kansas 167.

[28] H.R. Hink, *Judicial Reform in Arizona*, (1964) 6 Arizona L. Rev. 13.

[29] D. Coats, *Small Claims in Indiana*, (1970) 3 Ind. Legal Forum 517.

[30] *Supra,* footnote 3, Section 4.

[31] See Appendix A, Table 1.

[32] British Columbia Justice Development Commission *Small Claims Project*, Final & Interim Reports, 1976.

[33] G.H. Ellis, *Role of Small Claims Court*, 1974, unpublished.

[34] W.J. Campbell, *The Use of Small Claims Courts*, 1972, unpublished.

[35] J. Samuels, *Small Claims Procedure in Alberta*, (1969) Institute of Law Research & Reform, Project No.4.

[36] Gerbrandt *et al.*, *Preliminary Study of Small Claims Procedure in Manitoba*, 1972, unpublished.

[37] Moldaver & Herlichy, *Consumer Litigation in Toronto*, 1974, unpublished.

[38] R. Cliche, *Les Petite Créances*, (1973) 14 Cours de Droit 291.

[39] See Appendix A, Table 2.

[40] *Supra*, footnote 33.

[41] *Supra*, footnote 32.

[42] *Supra*, footnote 36.

[43] *Supra*, footnote 34.

[44] *Supra*, footnote 20. The same conclusion was reached by Pagter *et al.*, *supra*, footnote 20.

[45] The N.I.J.C. study, *supra*, footnote 18, suggests the following alternatives:

| Parties | Venue |
|---|---|
| Individual *v.* Individual | Where defendant resides<br>or<br>Where claim arose<br>or<br>Where plaintiff resides<br>and where claim arose |

| | |
|---|---|
| Individual *v.* Business | Where plaintiff resides<br>or<br>Where defendant resides<br>or<br>Where claim arose |
| Business *v.* Individual | Where defendant resides |
| Business *v.* Business | Where defendant resides<br>or<br>Where plaintiff resides and cause of action arose. |

[46] S.L. Dreyfuss, *supra*, footnote 19.

[47] See Appendix A, Table 4, 7, and 13.

[48] See Appendix A, Table 5.

[49] *Supra*, footnote 32.

[50] T. Ison, *Small Claims*, (1972) Mod. L. Rev.18.

[51] See Appendix A, Table 7.

[52] Eovaldi & Estrin, *Justice for Consumers* (1971), 66 Nw. U.L. Rev 2 81.

[53] M. Segal, *Bill 70 Analysed*, 1973, unpublished.

[54] *Supra*, footnotes 32 and 33.

[55] See Appendix A, Tables 10 and 11.

[56] See Appendix A, Table 9.

[57] See Appendix A, Table 11.

[58] *Supra*, footnote 34.

[59] See Appendix A, Table 6.

[60] See G.W. Adams, *Towards Mobilization of the Adversary Process*, (1974), 12 Osgoode Hall L. J. 569.

[61] Hollingsworth *et al.*, *The Ohio Small Claims Court* (1973), 42 U. of Cinc. L. Rev. 469.

[62] Caplovitz D., *Debtors in Default*, Columbia U. Bureau of Applied Social Research (mimeo).

[63] See Gould, *supra*, footnote 18.

[64] *Supra*. footnote 32.

[65] *Supra*, footnote 33.

[66] *Supra*, footnote 37.

[67] *Supra*, footnote 36.

[68] *Supra*, footnote 34.

[69] Arguments raised by Canadian judges in favour of privately-retained advocates:

1. Leads to better administration of justice
2. Judge doesn't have to act as counsel
3. Issues are expressed more clearly and are thus resolved faster
4. Good training for junior lawyers
5. Acts as example for litigants without lawyers
6. Educates the judge as to the law
7. Helpful if a technical defence is pleaded
8. Acts as calming influence on the aggressiveness of litigants
9. Cases better prepared, witnesses ready, evidence available
10. Prehearing consultation leads to settlement and takes away some of the adversary atmosphere
11. Saves time in defining issues
12. Of assistance when there are complex issues
13. Avoids being side-tracked or having irrelevant issues argued
14. Usuallly avoids frivolous claims
15. Acts as a balance if the judge tends to be "too radical"
16. Assists in keeping the court within the rules of evidence and procedure.

Arguments raised by Canadian judges against allowing privately retained advocates:

1. More expensive
2. Lawyers often prevent the issue from ever being arrived at
3. Causes the process to be too formal
4. Tends to complicate the most simple issues
5. Wastes time in cross-examination and argument
6. Level of advocacy is deficient, putting a heavy burden on the judge because of lack of preparation, the failure to understand the issues, and unnecessarily slowing the trial down
7. Confuses the parties and often the judge with legal jargon so that judge often has to inter vene to make things more readily understandable
8. Evens out the inequality between the parties
9. Not helpful to the court because of their insistence on formality
10. Leads to mass decision-making that is either uninformed if the judge takes a passive role or potentially biased if the judge assumes the posture of an inquisitor.

[70] G.W. Adams, *The Small Claims Court.* (1973) Can. Bar Rev. 583.

[71] *Supra*, footnote 32.

[72] See Appendix A, Table 3.

[73] T. Viccars, *Small Claims Survey*, 1972, unpublished.

[74] *Supra*, footnote 2.

[75] A. Leal, Ontario Law Reform Commission Report on the Administration of Ontario Courts, 1973.

[76] *Supra*, footnotes 60 and 70.

[77] R.H. Smith, *The Administration of Justice in Norway*, (1929), 22 Monthly Labour Rev. 1119, *The Danish Conciliation System*, (1921) 22 Monthly Labour Rev. 980; N. Grevstad, *Norway's Conciliation Tribunals*, (1918) 2 J. Am. Jud. Soc'y.5.

[78] See generally: P. Deemer, *Small Claims Courts* (1975) 28 Vand L. Rev. 711; Determan, *The Arbitration of Small Claims*, (1975), 10 Forum 831; Jones & Boyer, *Improving the Quality of Justice*, (1972), 40 Geo. Wash. L. Rev. 357; McFadgen T., *Dispute Resolution in the Small Claims Context*, 1972, Harvard Law School, (unpublished thesis); Mentschikoff, S., *Commercial Arbitration*, (1961) 61 Colum L. Rev. 846; *Small Claims Reform Revisited* (1969) Colum J. of Legal & Social Problems 47; *Try Conciliation in Iowa*, (1971), J. Am. Jud. Soc'y.7.

[79] *Supra*, footnote 21.

[80] Articles 382 to 394, C.C.P.

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# THE USE OF MEDIATION AND ARBITRATION FOR THE RESOLUTION OF CONSUMER GRIEVANCES

by

Larry A. Roine

February 1976

# TABLE OF CONTENTS

# PREFACE

Shortly after giving delivery to this paper I was struck with the "post-partum blues". Having laboured for some nine months since the conception of the paper's structure and general contents, I wondered "who cares? ". I was concerned that the problems identified in the paper would not be recognized by the public and, therefore, the proposed solutions would not be explored or implemented, even partially.

During this period I was completing a case in the trial division of the Supreme Court of Ontario. There were two plaintiffs, each represented by his own counsel (myself being one). Towards the end of the trial I analysed the time, manpower, money and formality expended on the case. The trial had lasted five days. One of the plaintiffs had been represented by two counsel, the defendant had been represented at various times by three different counsel and the third party against whom the defendant was claiming indemnification had also used three separate counsel. The parties themselves had spent little time in court (relative to the time taken to try the matter) and when they were in attendance, they sat at the rear of the courtroom, somewhat mystified by the whole procedure. Although the issue involved was of a civil nature, without danger of physical harm to anyone in attendance, five court officials were present in addition to the judge and court reporter (who are admittedly necessary for disposition). A quick calculation of the costs (i.e. counsel fees, salaries, transcript fees and other disbursements, and rent for the courtroom) involved indicated they exceeded the amounts finally awarded.

I am not suggesting that this particular case should have been handled in any other way. Nor am I suggesting that a trial does not warrant the expenses involved, but this case made me think that someone should consider a less expensive and less time consuming method of adjudication of disputes. This realization alone is sufficient to justify the writing (if not the quality) of this study.

There are several alternatives: the court structures and jurisdictions could be changed; jurisdiction might be given to administrative tribunals; or the parties themselves could decide their own method of settlement. There may be unique cases but generally they could be settled in one of these ways. Whether the often expressed dissatisfaction with the judicial system is strong enough for various segments of society to demand some change depends on the strength of the criticism. There *are* alternatives if a real need and desire is shown for them. This paper considers two of these alternatives; mediation and arbitration. I feel both are viable and attractive.

# CHAPTER 1

## GENESIS

> It is obvious, therefore, that we are dealing with potential changes in a system of resolving civil disputes; alterations in any one aspect of it will almost invariably affect the functioning of the remainder.[1]

Negotiation, conciliation and adjudication are the three devices available for the resolution of any dispute. Negotiation denotes a settlement of a dispute through discussion by the parties to the dispute personally or by their representatives. Conciliation adds a third party to the dispute; this third party, by providing an objective outlook to the issue in dispute and hopefully by virtue of his persuasive powers, obtains a result which is accepted by each party. Adjudication of a grievance occurs when the dispute is referred to some third party whose decision as to which of the two parties to the dispute is correct is binding, subject always to the right to appeal or review as the case may be.

These three devices have been used ever since a system was established for the reconciliation of disputes. However, in the past three decades there has been an increased awareness of the deficiencies of these devices. Attempts have been made to achieve a quicker, fairer and cheaper system. These efforts have concentrated on improving the position of a consumer in bargaining for satisfactory adjustments by the business with whom he is in disagreement. Where bargaining has not been successful, the aim has been to make representation of the consumer's complaint by or before a third person better or more efficient.

Negotiation has been aided most by the growth of consumer interest groups who represent the consumer's point of view in individual negotiations, and also provide the consumer with the information necessary to carry on more informed negotiations with the members of the business community with whom he is in dispute.

Although during the past thirty years the Canadian consumer has become far more aware and informed, it was obvious during the late 1950's and early 1960's that some method of reconciliation was needed to settle disputes between a consumer and a business. Thus, in the mid-1960's we saw the establishment and growth of provincial government consumer protection bureaus and the birth of the federal Department of Consumer and Corporate Affairs. The responsibilities of these various bureaus and agencies included the tasks of representing the interest of consumers in specific complaints against particular businesses and of attempting to obtain a settlement of the complaints acceptable to both parties. At about the same time several of the newspapers in the major centres in Canada began to publish consumer complaint columns, which perform much the same function as the government consumer protection agencies.

Traditionally the consumer considered the courts as the only place he could obtain settlement of a complaint if negotiation or conciliation failed. His only alternatives were to abandon the complaint or accept whatever redress, if any, the business concern was prepared to grant.

Consumers in Canada, as in most other countries, appear reluctant to commence court actions to obtain satisfaction of their disputes. There seem to be[2] many reasons for this:–

(1) The consumer may be unaware that his claim has any merit to it and/or he may be unable to afford expert advice on his case. Or he may be too frustrated with the matter to seek a professional opinion.

(2) The consumer may be unfamiliar with the existence, location, or purpose of the forums or agencies available to help him.

(3) The consumer may have failed to obtain or retain documentary evidence or information concerning the transaction in a form acceptable to the court either because of the informality or the minor nature of the transaction giving rise to the dispute.

(4) If the consumer had been disillusioned with a previous experience in court, particularly if it had been as a defendant in an action, then he may be reluctant to pursue even a valid claim.

(5) The consumer may find the location of the court; its hours of operation or its rules of procedure inconvenient or impractical.

(6) In addition, he may consider that the cost of prosecuting his claim in court is too high. When he considers the costs of lost working time and travel, and the possible costs of a lawyer, whether he really needs one or not.

(7) The consumer may find that the time between filing his claim and obtaining judgment in court is unnecessarily long. Many factors can cause this delay: preparation of documents, delay in the court hearing because of the backlog of cases, and adjournments caused by successful requests of the defendant.

(8) If the consumer obtains successful judgment in court, he is still faced with the problem of enforceability of the Order. In this instance he may be confused as to what procedures to follow to effect enforcement of the judgment and again may be disillusioned with the amount of time and effort required to effectively enforce the order of the court because of the consumer's own ignorance of the procedure.

(9) The consumer may feel that the court is unwilling or unable to design an appropriate remedy for his situation because of the narrowness of the jurisdiction of the courts.

(10) The possibility of a counter-claim against him may preclude the consumer from prosecuting his own claim because he may feel that he lacks the necessary resources.

(11) If the consumer finds that complaining is an unpleasant and embarrassing activity, then he or she will be even more reluctant to voice that complaint in a formal court setting.

It should not be forgotten that a consumer might appear before the court as both plaintiff and defendant. As a defendant, he faces the same restrictions as a plaintiff but in addition the consumer may or may not appear in court or use the court to the best advantage for a number of reasons, including:

(1) The service of the Writ of Summons on the defendant may have been improperly carried out, so that he may not be aware that he is to have the case against him heard in court.

(2) The plaintiffs in this type of case may select a court which is not convenient to the consumer-defendant, thereby effectively depriving him of his right to present his defence.

(3) The form and wording of the summons may confuse the defendant, particularly if he is not familiar with legal terminology. Therefore he may not be aware of the seriousness of the

situation. This misunderstanding may be compounded by the fact that some collection agencies phrase their letters to debtors in such a fashion that it appears to the debtor that the collection agencies' demand letter is itself a Writ of Summons, requiring him to consult a solicitor and forward to the collection agency within a specified number of days a statement of defence,when in fact no court action has been initiated.

(4) The consumer-defendant may find it difficult to determine the precise location of the court on the day and at the time his case is listed for hearing.

(5) When the consumer-defendant does finally locate the court he may find that the wait before the actual hearing of the case will be intolerably long; indeed the hearing may not even occur on the date first set but will be remanded to another date, However, the consumer may not be able to ascertain this until he has already spent a full day uselessly and unprofitably. Contrast this with the situation of the business party who has either a law firm or para-legal representative "watching the list". The businessman's witnesses can then be called at short notice, avoiding inconvenience and the chance of being absent when the case is called.

(6) Sometimes the consumer-defendant may attend, find that his case is far down the list and may leave the courtroom, assuming that his case will not be heard for some time. Returning later he may find that the case against him was heard, and judgment entered for the plaintiff by default.

(7) The consumer who has had a default judgment obtained against him may find it extremely difficult to have that judgment set aside in order that the case might be heard on its merits, or if the default judgment is set aside, the consumer-defendant may find that the terms upon which it was set aside are too stringent for his compliance. In addition, the consumer may not be aware of his right or the procedure to follow to have the default judgment set aside.

(8) Where the plaintiff in an action against a consumer-defendant runs a substantial commercial concern and the case, while of relatively minor monetary value, has some significant importance to the firm, the latter may wish to be represented by counsel. In this kind of situation, it may be unattractive to the consumer-defendant to retain counsel because the value of the particular claim does not warrant the payment of legal fees. Even if the consumer does desire to be represented by counsel, he may have difficulty in finding a lawyer willing to become involved in a minor case.

Such factors contributed to general discontent with the use of courts as the sole means of resolution of consumers' disputes. This discontent began to be vocalized in the 1960's, at the same time as the suggestion of alternative forums for the resolution of consumer disputes. In 1968 in the United States at hearings before the Federal Trade Commission there were representations made[3] that alternatives should be established and it was suggested that one of the alternatives should be the use of arbitration. The same sentiments of dissatisfaction were being expressed in Canada by H. Buckwald when he said:

> ... meanwhile the combination of the inability to know that he has a legitimate complaint and, having been emasculated of most of his rights to enforce it, have neutralized the consumer in most of his dealings in the everyday marketplace. Even for those who conclude they have a genuine claim for which they cannot get satisfaction, the costs of expertise and the amounts involved almost invariably make it prohibitive

to pursue what remedies remain to them, particularly for those in the moderate income strata. The imbalance is not just practical or legal; it is, of course, also financial[4].

Another alternative was the growth in the number and nature of the regulatory tribunals whose function was *inter alia* to protect the consumer by regulation, licensing, revocation of licences and the granting of orders of a nature similar to injunctions. The expansion of the jurisdiction of such regulatory tribunals to order compensation to consumers may, if found to be constitutionally valid, provide an attractive alternative to the prosecution of actions in court.

In the meantime, another means of protection for the consumer may exist, but the legality has not yet been tested in the courts. In many of those industries where a business is required to obtain and maintain a licence issued by an officer of a provincial government, it is a condition of the continued possession of such licence that the licensee display sound business practice and demonstrate by its conduct that the continuation of the licence is not contrary to the public interest.[5] Thus, where it can be shown that the conduct of the applicant or its officers or directors affords reasonable grounds for belief that the business will not be carried on in accordance with integrity and honesty[6] the licence may be subject to suspension, cancellation or non-renewal. If it can be said that failure by the licensee to comply with decisions respecting the disposition of disputes arising between the licensee and those with whom it does business constitutes conduct not in accordance with honesty and integrity, the licence might be terminated. Complaints against a licensee might be referred to a board composed of one representative from each of the industry, consumers and the government. If the licensee fails or refuses to abide by the conclusion (whether it be an opinion or a binding decision) this could be taken into consideration when deciding whether to terminate or renew the licence.[7] Such schemes are obviously open to much criticism but nonetheless the seed is planted for more consideration and debate. The role, jurisdiction and effectiveness of such administrative tribunals is not within the scope of this study.

The Ontario Law Reform Commission in its Report on Consumer and Guarantees in the Sale of Goods,[8] after reviewing the mechanisms in existence in Sweden and elsewhere, recommended that a combination of mediation and arbitration be established as an alternative to the courts. The Ontario Government in its response[9] to the Law Reform Commission's report said that any such system must meet the following conditions:

(*a*) must be easy to initiate

(*b*) be readily acceptable to the consumer

(*c*) be speedy

(*d*) be inexpensive to the consumer

(*e*) should encourage manufacturers and retailers to assume greater responsibility for their products

(*f*) emphasize the relationship between the consumer and the businessman and demonstrate the natural opportunity this relationship affords for informal redress

(*g*) involve as few costs to industry and the taxpayers as possible

(*h*) does not cost more than the value of the benefits received from the existence of such a system or phrased alternately, does not cost more to settle a claim under the system than the claim itself is worth

(*i*) be fair to large and small businesses and the public alike

(*j*) provide for the establishing of broad questions of policy as well as setting individual disputes

(*k*) should be designed to facilitate the widest possible choice for the consumer between products and places of sale

These and other considerations should be borne in mind when reviewing the variety of possibilities which exist for the resolving of consumer complaints in an informal setting. This paper is concerned with only two such possibilities: the use of arbitration as an adjudicative technique for the obtaining of a final and binding determination of the merits of the case of the respective parties and the extension and variation of the common notion of conciliation to provide for conciliation machinery with even greater effectiveness than has been experienced to date. In order to effect this the balance of the paper will concern itself with experiments and developments in the fields of conciliation and adjudication of consumer complaints and weigh the results of each experiment in an effort to determine a system which will resolve such disputes with the greatest "speed, economy and justice".[10]

## CHAPTER 2

## EXODUS

Almost simultaneously with the expressions of dissatisfaction referred to in the previous chapter, various experiments were commenced in several countries. The objects were to explore possible alternatives to the use of courts as the sole machinery for the redress of disputes involving consumers. The experiments represented a search for an informal, quick, efficient and just process for the disposition of consumer grievances or to conceive an attractive, realistic alternative to the courts. Some of these experiments by their nature are attempts at effecting a settlement through conciliation although it may appear to a casual observer that they are processes whereby the rights of the respective parties are being adjudicated.

It is important to emphasize the essential distinction between conciliation and adjudication, especially in view of the fact that some persons directly involved or interested in the consumer evolution have themselves occasionally misconstrued the two concepts.[11] If informed persons commit this error, then it can be reasonably expected that business representatives and consumers, particularly those with little experience in the resolution of disputes, will make similar mistakes, possibly resulting in unfortunate deprivation of the rights of the parties to a dispute.

"Conciliation" in its strictest terms means the persuading of one party to agree with the position of the other party to the dispute. The element in conciliation which may result in a settlement of the dispute is persuasion. In the context in which conciliation is used in this paper it means that the persuasive function is performed by a person who is not a party or representing a party to the dispute. "Mediation" commonly means the insertion of a third party into a dispute for the purpose of reconciling the differences of the parties to the dispute and to act as a medium for the obtaining of an agreement to settle the dispute. Historically, there was some distinction between the terms "conciliation" and "mediation", it being generally understood that mediation required the playing of a more active role by the person invited to effect a settlement by agreement of the differences between the parties. The terms "conciliation" and "mediation" now seem to be used interchangeably except in certain circumstances where they are used as labels to describe particular functions in a process.[12] In the area of consumerism the preference appears to be to use the word "mediation" to describe the function of the third persons whose objective is to obtain a reconciliation of the differences existing between the parties to the dispute by persuading the parties to reach an agreement on the terms of the settlement.

Adjudication, on the other hand, as previously indicated, is the process whereby a person or tribunal is called upon to decide the disposition of a particular dispute and whose decision is final and binding on the parties to the dispute. Thus, the adjudicator might be a judge or court or tribunal of virtually any nature as long as its purpose is to finally determine the rights and obligations of the respective parties. Arbitration is "the submission for determination of disputed matter to private, unofficial persons selected in a manner provided by law or agreement".[13] Thus, arbitration serves as an adjudication other than as occurs in a judicial process. It arises either by agreement between the parties voluntarily obtained, or in some cases by statutory compulsion.[14] Outside the field of labour relations, arbitration is usually voluntary and dependent upon some agreement to have the particular dispute arbitrated. This agreement might be contained in the terms of a contract which provides for the arbitration of any future disputes concerning the rights and obligations flowing from the contract. Thus, unlike conciliation or mediation, arbitration for our purposes is a process whereby a decision which is binding upon the parties is delivered by the

arbitrator (being either an individual or a board composed of more than one person, usually three, two of whom are usually selected to represent the respective interests of each of the parties to the disputes with the third person being the impartial chairman mutually agreed upon by the parties or their representatives). It is in the sense that arbitration provides for a binding decision that it serves as a substitute for adjudication by the courts. One important distinction between arbitration and judicial decision-making is that in an arbitration ordinarily the parties to the dispute have the right, if not to actually select their arbitrator, to at least approve the person who shall be the arbitrator or the chairman of the arbitration board deciding the matter. This is one of the aspects of arbitration which advocates of its use suggest as being strongly in its favour when comparing the relative benefits of the judicial process and arbitration.

Certain of the experiments and projects which have been tried or are in existence have been selected for examination to demonstrate the numerous different devices available for reconciling consumer-business disputes and to illustrate the essential differences between mediation and arbitration. Some of these experiments or schemes appear at first glance to be an arbitral exercise in that a chairman or tribunal convenes a "hearing" at which the respective parties present their view of the factual situation and make submissions on the inferences to be drawn from such facts and the conclusions which should result; these tribunals operate within varying degrees of formality in compliance with rules of procedure established by the tribunal or the agency sponsoring the process; these aspects are the trappings of an arbitration hearing. What is, however, lacking in some of these processes is that while the tribunal may render a "decision" in which it reviews the facts, states the relevant issues in the dispute, examines the representations and submissions made by the parties, relates its conclusions as to the credibility of witnesses and the interpretation of any contracts or other documents and gives its conclusions on the validity of the claim this "decision" is not binding on the parties to the dispute and constitutes only the tribunal's opinion or recommendation of what would be a fair result in the matter should the parties choose to accept its recommendations. In such a "decision" the tribunal may, indeed, outline what action each or either party should take to conform to the tribunal's opinion in order to obtain a just or fair result in the particular case. This observation is not intended to malign such a form of conciliation since a process in this form serves a valuable purpose for some persons. Many persons want simply to have both sides of a particular case submitted to a knowledgeable, respected, impartial person or persons for an expression of an opinion of what should be a fair disposition of the dispute. The parties acknowledge that this opinion is not binding upon either of them and many situations may arise where, in fact, one or both of the parties do not wish to be placed in a situation where the opinion is a binding determination of their rights and obligations. What is important is that the parties to a dispute being referred to a tribunal for some kind of disposition be fully aware of the nature of the tribunal's "decision", in particular whether or not it will be a final and binding determination of the rights of the respective parties (subject always to the right to review by a court).

The experiments have been variously sponsored by the state, the legal profession, the business communities themselves, the courts or by the societies of arbitrators. The examination of the experiments has been arbitrarily divided by reference to the sponsors of a process rather than to the difference appearing from each of the experiments because it would appear that the major difference or differences in the various processes is or are directly referrable to the nature of the sponsor of the process. In some cases, it will be seen that the schemes utilize or are sponsored by a combination of these institutions.

## 1. THE STATE-SPONSORED PROCESSES

Each of the governments of the provinces of Canada and the Federal Government have established departments or agencies, one of the primary purposes of which is to educate and represent the consumer and to provide where necessary a mediation function in an effort to effect a settlement of a consumer-business dispute. These agencies, when entering upon the mediation function, attempt to be as objective as possible, experience having shown that not every consumer complaint possesses merit or can be substantiated. The responses from these agencies to a request for information indicate that in their opinion something more than one-half of the complaints referred to them are resolved by the efforts of the agency's personnel. It is not stated whether or not or what proportion of the resolutions are in favour of the consumer nor were any conclusions suggested as to what was the predominant factor in obtaining the settlement.

The most sophisticated mediation process sponsored by a government seems to be that devised and in current usage in Sweden. The Swedish Public Complaints Board is only one of the several interlocking innovations of the Swedish government in the development of consumer protection legislation, policy and devices.[15] In 1968 the Swedish Consumer Council created the Public Complaints Board on an experimental basis. The experiment was extended in 1973 when responsibility for the Public Complaints Board was assumed by the National Swedish Board for Consumer Policies (Konsumentverket).[16] The purpose of the Board is to examine complaints submitted to it by consumers of goods and services and to issue recommendations to the sellers, suppliers and producers of the goods or services for correcting any abuses which the Board may find have occurred. The Board's feeling is that in this manner the public has access to a tribunal which can hear and deal with disputes between buyers and sellers in a cheaper and simpler fashion than the regular courts. A portion of the membership of the Public Complaints Board is drawn from and identifies with the parties appearing before it, being the various manufacturers, retailers and consumers associations and organizations. The Board is divided into ten sections, each of which is headed by an impartial but legally qualified chairman. In each of such sections there are at most ten additional members representing either the commercial or the consumer interest. The sections of the Board are Travel, Motor Vehicle, Electrical Appliances, Textile, Laundry, Fur, Insurance, Marine Articles and General (comprising, for example, furniture, optical aids, photography equipment and domestic cleaning devices). The Board has jurisdiction to deal with several other areas of potential dispute between consumers such as complaints concerning legal and dental services.

Since its inception the Board has dealt with approximately 100,000 complaints by consumers. During 1974 the office received approximately 18,600 telephone calls.[17] Members of the public seeking assistance from the Board can be advised initially by members of the staff of approximately thirty employees. The complaint is made to one of the several Public Complaints Board offices and is then investigated by one of the officers of the Board. The officer will contact the seller or manufacturer to obtain the business' reaction to the complaint. If the person against whom the complaint is filed is a retailer, then he, the retailer, may add as a respondent to the proceedings the manufacturer of the article. A copy of the respondent(s) reply is forwarded to the consumer for his comments.

If the officer of the Public Complaints Board is unable to effect a settlement of the matter by discussion with the parties it is then prepared for reference to the appropriate section of the Public Complaints Board. The documentation thus exchanged forms the submission to the Board although the Board is free to elicit information from other sources and to commission independen

appraisals and examinations of the product which is the subject matter of the complaint and utilize such additional information as it feels necessary in reaching its conclusion.[18] The parties to the complaint have the right to insist on being present at the meeting wherein the Board will make its determination, but this is not common. In the opinion of the Board[19] the absence of the parties does not materially affect the quality of the decision rendered and the Board also feels that the parties to the dispute do not resent not being present.

There is no charge whatsoever to the consumer for any of the services of the Public Complaints Board.

The Konsumentverket monitors the activity of the Public Complaints Board and conducts studies of the effectiveness of the Board's decisions. The most recent such examination indicates that 81% of the sellers who appear before the Board accept and follow the recommendations of the Board.[20] However, in two previous government publications[21] it was indicated that the recommendations of the Public Complaints Board are not accepted or followed in 40% of the cases. Couple these statistics with an earlier statement[22] to the effect that about 50% of the consumers' complaints are approved by the Board, and one is left with a mathematical dilemma in that the statistics do little to indicate the real effectiveness of the Board.

It is obvious from the foregoing that what results from the deliberations of the Board is not a decision to which the parties are required to adhere but rather is a recommendation of the Board reflecting what it feels would be a fair or just disposition of the claim. However, the names of the commercial respondents who do not accept and follow the recommendations of the Board are published in various magazines and newspapers throughout Sweden. The Board has found that one of the reasons some commercial respondents did not follow the recommendations of the Board was that they had already made an assignment of bankruptcy. In other cases, the Board found that the consumer had arrived at an agreement with the commercial respondent other than one which complies with the recommendations of the Board. The Board feels that, in view of these factors and the 81% compliance by the sellers with the recommendations of the Board, that to a great extent the business respondents act in accordance with the recommendations.

Notwithstanding that the decisions of the Public Complaints Board are not themselves binding, a recent development has rendered them even more effective. Until July 1974 Sweden had no equivalent of the Ontario Small Claims Court. In July of 1974 a Swedish statute entitled an Act to Simplify Legal Procedure for Civil Actions came into force. The Act establishes that where claims for small amounts of money (the equivalent of roughly $1,000 Canadian) are made, a simplified legal procedure will be available to the consumer. It is anticipated that the parties will present their views of the case before the court without legal representation. As far as this study is concerned the important aspect is that the jurisdiction of the Court under the Simplified Legal Procedures Act is extended to allow decisions rendered by the Public Complaints Board in the matter referred to the Court to be cited. The right to appeal from decisions of the Court in these circumstances is very limited.

The Simplified Legal Procedures provisions apply to claims of various natures but which are very similar to the nature of the cases which can be heard by the Public Complaints Board. A condition in a contract to the effect that the particular dispute shall be settled by an arbitrator does not prevent a party to the contract from having recourse to the Simplified Legal Procedures Act.[23]

The established judicial policy concerning cases utilizing the legal procedures is to give recognition to the reliability of the decisions flowing from the Public Complaints Board. The specialized knowledge of the members of the various sections of the Board provides a sound foundation on which the court can base its findings under the simplified legal procedures statute.

It would appear[24] that even if the value of the dispute exceeds the financial jurisdiction under the Simplified Legal Procedures Act the case might still be heard under the provisions of that Act where the party in support of this case will be adducing an opinion of the Public Complaints Board on the claim being litigated. Thus, the recommendations of the Public Complaints Board which are not followed can be quickly and simply executed under the provisions of the simplified procedure assuming always that the court agrees with the recommendations contained in the decision of the Public Complaints Board. In addition, if the Public Complaints Board feels that in a particular case it will be impossible to establish the facts (because in most cases the Public Complaints Board does not hear oral evidence and is, therefore, deprived of the opportunity to weigh the credibility of the various witnesses) or where the Board has reason to assume that the commercial party will not abide by the decisions of the Public Complaints Board then the simplified legal procedures are again available to the consumer complainant.

It is not anticipated that the presence of the Simplified Legal Procedure Act will diminish the importance of the Public Complaints Board since many cases will continue to be settled by the efforts of the officers of the Board, or by the Board's recommendations being accepted by the parties. In addition, the fact that the courts are entitled to take cognizance of the recommendations of the Public Complaints Board will likely ensure a continued flow of cases to the Board in an effort to obtain a recommendation supported by the experience and the specialized knowledge of the members of the tribunal.

In the United States the Federal Trade Commission is currently conducting hearings on the structure of a satisfactory informal mechanism adequate for the resolution of most consumer controversies. The enabling legislation is the Magnuson-Moss Consumer Product Warranties – Federal Trade Commission Improvement Act.[25] By virtue of the statute, the Federal Trade Commission has published[26] three proposed rules, one of which deals with an informal dispute settlement procedure required by the Statute. While the provision of a settlement mechanism is required of warrantors covered by the Statute, the adherence to the decision issued by the "mechanism" is purely voluntary; in this respect it has been called "advisory arbitration".[27] The proposed rule provides for certain minimum requirements of the "Warrantor" (any manufacturer or supplier of consumer products who makes any promise in connection with the product which may be regarded as a warranty of the attributes of the product) in that he must fully inform the consumer of the existence and nature of the mechanism, of its minimum requirements, and of the keeping of records of activities of the mechanism.

The Warrantor is required to clearly and conspicuously disclose on any written warranty a statement of the availability of the informal dispute settlement mechanism, information concerning the location of the mechanism and to describe the manner of obtaining further information concerning the mechanism. In addition, the Warrantor must advise the consumer of the manner of triggering the mechanism and indicate any time limits adhered to by the mechanism and the types of information the mechanism may require for prompt resolution of warranty disputes. The rule does not prohibit a Warrantor from attempting to resolve a dispute with a consumer without recourse to the mechanism but does provide that in such cases the consumer must be advised of the availability of the mechanism but must also be informed that his options in seeking

redress are not restricted. If the Warrantor decides that the dispute cannot be resolved by negotiation, then he must immediately refer the dispute to the mechanism and respond fully and promptly to any requests from the mechanism for information. When the decision of the mechanism is received by the Warrantor, he must immediately notify the mechanism whether and to what extent he will abide by the decision and perform any obligations to which he agrees.

The proposed rule requires that the mechanism be funded and competently staffed at a level sufficient to ensure efficient and expeditious solution of disputes without any costs to the consumer for the use of the mechanism. The Warrantors are to take such steps as are reasonably necessary to ensure that the members of the staff of the mechanism are insulated from influence by the Warrantor or their representatives. The members of the mechanism deciding the particular issue shall not be a party or an employee of a party to the dispute other than for the purposes of sitting in judgment on consumer complaints. The proposed rule sets out certain minimum requirements relating to the operation of the mechanism, including the establishment of written rules of procedure and certain minimum procedures to be carried out by the mechanism. In essence the rule requires immediate action on the part of the mechanism to contact the parties, obtain information relating to the disputes and inform the parties of its conclusions. The rule anticipates the use of independent consultants in obtaining information and opinions. The mechanism is to render a fair decision within forty days of the notification of it of the dispute, and the decision shall include a statement of any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedy available under the written warranty or the enabling legislation and shall indicate a reasonable time for the performance of the remedial action.

It is anticipated that most disputes referred to such a mechanism will be decided on the basis of written submissions or reports obtained by the mechanism. However, provision is made for an oral presentation to the members of the mechanism by the parties to the dispute if both the Warrantor and the consumer agree to such oral presentation. This agreement has as a condition precedent to its operation the provision of certain information to the consumer by the Warantor. If an oral presentation is agreed on, then each party has the right to attend at the time of the presentation of the facts by the other party.

The decision of the members of the mechanism must point out to the consumer his rights in the event of his dissatisfaction with the decision of the mechanism or with the "Warrantor's" actions in compliance with the mechanism's decision. The rule expressly provides that the decision of the mechanism is admissible in evidence in a court of law.

The mechanism is required by the proposed rule to maintain records on all disputes referred to it and to compile statistics concerning the decisions of the mechanism and the results obtained by such decisions. The effect of this, of course, will be to provide a system whereby the effectiveness of the mechanism can be monitored.

Prior to the enactment of the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act the Federal Trade Commission had already experimented with the use of arbitration as a device to be used in determining the rights of the respective parties to a dispute.

In 1974 an investigation by Federal Trade Commission officials led to the filing of a proposed complaint against Josephs Furniture Company, a New York business selling furniture and appliances at the retail level. The complaint alleged that the respondent in many instances

delivered defective or damaged merchandise and failed to repair or replace the merchandise when the purchasers complained. The resulting Federal Trade Commission order, granted with the consent of the respondent, requires the respondent to take, when requested, remedial action. The order grants consumers the right to submit grievances concerning the respondent's merchandise to legally binding arbitration. There is to be no charge to the consumer for the use of this procedure. The arbitration is to follow the rules of the Consumer Business Arbitration Tribunal of the Better Business Bureau of Metropolitan New York.[28] Any question concerning the jurisdiction of the Federal Trade Commission to order remedial relief such as the restitution of money or goods to deceived consumers may have been settled with the enactment of the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act which became law on 4 January 1975. If the Statute gives, as it apparently does, the Federal Trade Commission broad powers to impose restitution, then the Federal Trade Commission's ability to negotiate restitution as part of any settlement will be materially enhanced.

In the future the Federal Trade Commission may refer more individual disputes to arbitration after determining misconduct on the part of a business. This type of reference to arbitration of a large number of consumer complaints against a particular business concern after a finding of liability or misconduct on the part of the business concern has also been utilized on some occasions by the court; a reference to this is made later in this chapter. It is sufficient to simply point out here that if the Restrictive Trades Practices Commission is granted remedial powers similar to those of the Federal Trade Commission, then that Commission may also consider the use of arbitration as a device for at least determining the nature and quantum of the redress once liability is ascertained by the Commission.

In Manitoba under The Landlord and Tenant Act and recently in Ontario under The Residential Premises Rent Review Act[29], provision has been made for the reference to a provincial government employee of certain disputes arising between landlords and tenants. In Ontario the only matter which is to be referred to the Rent Review Officers under the statute is the question of the maximum allowable increase in rent, whereas in Manitoba the Rentalsman and his staff can, with the consent of both parties, arbitrate other disputes. For the most part arbitration is used only in resolutions of disputes regarding the disposition of security deposits, the amount of which rarely exceeds $100. On a few rare occassions the Rentalsman has arbitrated disputes of another nature. It has been found in the great majority of the disputes concerning security deposits that the parties are quite willing to consent to arbitration as the manner for the resolution of the dispute and it has been found to be more expedient than litigation.[30]

## 2. THE LEGAL PROFESSION

Members of the legal profession and their professional organizations have assisted in the operation of some arbitration schemes. The legal profession probably cannot claim credit for the conception of the schemes in the two experiments discussed here; however, there is evidence of their sponsorship and assistance in the operation of the programs. The Manchester Arbitration Scheme For Small Claims and The Wesminster Small Claims Court are two examples in point. The labels given to these two programs, particularly The Westminster Small Claims Court, are misleading in that they seem to indicate to an observer from a country where small claims courts are in existence that they are courts forming part of the judicial hierarchy. Such is not the case since both schemes are, in fact, arbitration schemes requiring the voluntary submission of the dispute to the schemes by both parties to the dispute. Both schemes claim as sponsors, in addition to the regional law societies, various consumer groups, municipal councils and business organizations. The costs are subsidized by grants from The Nuffield Foundation.

Both schemes[31] are designed to deal with claims which are not sufficient to warrant the cost of litigation in the courts because of their minor monetary value. The arbitrator is appointed by the president of the applicable law society and is usually a lawyer. In the information given to prospective users of the scheme it is pointed out that the arbitrator's decision is binding and can be enforced, if necessary, in the courts. In The Manchester Scheme both parties to the dispute contribute equal fees, the amount of which is determined by the value of the claim. In The Westminster Small Claims Court mechanism the claimant only pays the court fee which likewise varies depending upon the amount of the claim. Under The Manchester Scheme the arbitrator has the power to order one side (usually the loser) to pay all the fees including the cost for any expert evidence required by the arbitrator. There is a maximum limit to the fees payable by a party for reports from experts. Under The Westminster scheme the claimant, if successful, can have his filing fee returned to him if the arbitrator so orders. Again, in The Westminster scheme the arbitrator can allocate between the parties the cost of obtaining any expert opinions.

Under The Manchester scheme both sides state their cases briefly in writing which together with any helpful documents are forwarded to the arbitrator. The arbitrator then convenes a hearing during which each party is entitled to be represented by lawyers or other professional representatives. The arbitrator can, with the consent of both parties, decide the case on the basis of the written material only.

Under The Westminster scheme the application to submit a dispute must be made to the administrator who, after deciding that the dispute is suitable for submission to the arbitrator invites the respondent to agree to a submission of the dispute to the court and asks the respondent to complete a form giving details of his position. These statements, together with any other documents are sent to the arbitrator who decides whether any further inquiries must be made before the case is ready for hearing. The arbitrator may decide that it is important that he obtain an expert opinion and is entitled to commission such reports as are necessary. The court has made some special arrangement for obtaining some reports from experts on a reduced fee basis. The arbitrator then arranges for a hearing at which the parties are in attendance if they wish and after which he provides the parties with his decision.

## 3. SELF-REGULATORY DEVICES

The schemes established by business to provide an opinion or decision of a third party respecting the disputes between a consumer and a member of the particular sponsoring industry are many and varied. Such efforts are so numerous that no attempt has been made to compile an inventory of them. However, various schemes have been selected to show the many ways in which such schemes can operate. Those schemes which constitute "in house" complaint bureaux have been disregarded insofar as they only provide a representative of the particular business concern with whom the consumer can discuss his grievance in an effort to settle the matter by negotiation. What is examined are those schemes whereby some person or persons not being employed by the particular business with which a consumer has a dispute are provided by the industry, business concern or by the trade or profession of which the business concern is a member to hear, examine and report to the parties on the issue in dispute whether such reports contain only a non-binding recommendation or a final and binding decision. There are six different forms such schemes could take:

(1) Company-sponsored mediation

(2) Company-sponsored arbitration

(3) Industry-sponsored mediation (i.e. companies carrying on similar businesses which have banded together to form an organization to represent their common interests, e.g. Canadian Appliance Manufacturers)

(4) Industry-sponsored arbitration

(5) Association mediation (i.e. an organization representing business interests generally)

(6) Association-sponsored arbitration.

While the potential benefit to a company which might be derived from a company-sponsored mediation technique is great, no evidence was found to indicate any such plan is in existence. It should be pointed out that the proposed rule of the Federal Trade Commission referred to earlier appears to create an environment in which such a mechanism could come into existence.

While no company-sponsored mediation schemes were found, there are several incidents where individual companies have offered their customers the use of arbitration as the means to obtain satisfaction from the company in a given dispute. In the United States, for example, the Montgomery Ward Company[32] offers such a scheme to the customers of its Albany, New York stores, while in Harrisburg, Pennsylvania, Sears-Roebuck and Co. and Bulmans Department Store[33] have agreed to participate in a pilot project which requires them to submit consumer complaints to final and binding arbitration. In the latter case, the disputes are referred to arbitration only after the Pennsylvania Consumer Arbitration Service has determined that the dispute is arbitrable. The board of arbitration is made up of an equal number of representatives from industry, the consumer sector and a panel of arbitrators established by the National Center for Dispute Settlement.[34] Arbitrable disputes are those disputes which, regardless of monetary value, involve:

(*a*) an interpretation or application of warranties and guaranties

(*b*) an alleged product defect, improper service or repair

(*c*) an alleged misrepresentation of a product, service or repair

(*d*) an alleged erroneous billing of charges and

(*e*) failure to deliver within reasonable time in accordance with the agreement of the parties

Non-arbitrable disputes are those disputes involving:

(*a*) personal injury claims

(*b*) claims for damages to property other than the product or property purchased or serviced when the claim exceeds $100 or is covered under the Retailer's Liability Insurance; and

(*c*) claims where the sole issue is the purchase price.

Probably only companies of substantial size would be interested in such schemes because only those companies would have the necessary financial resources, manpower and consciousness of consumer relations to attempt such an experiment successfully.

The industry-sponsored mediation mechanism most often referred to is the Major Appliance Consumer Action Panel (MACAP)[35] operating in the United States. MACAP was established early in 1970 and is sponsored by manufacturers of major appliances (including dishwashers, home laundry equipment, ranges, refrigerators, and air conditioners) and by retailers who sell such products under their own brand names. Three national trade associations act as a medium for such manufacturers and retailers in the sponsorship of the MACAP program. The panel to which disputes are referred is comprised of persons knowledgeable in home economics, engineering and consumerism in general. The members are not related to the sponsoring industries. In addition to handling individual consumer complaints, the panel is designed to represent consumer views and advise the industry generally on consumer relations and to make recommendations to the industry on industry practices affecting consumers.

The panel has had seconded to it by the sponsoring organizations several professional staff members which spend all their time dealing with MACAP and its complaint-handling activities. Complaints referred to MACAP are handled first by the staff who communicate with the manufacturer of the product, relying on the manufacturer's good faith to attempt to settle the complaint. If the complaint is not resolved then the matter is referred to the panel for its study and recommendations.

As of May 1972[36] MACAP had processed 4,939 complaints of which 3,650 (73.9%) were resolved to the consumer's satisfaction, 164 (3.3%) were not and 1,125 (22.8%) were pending. Of those resolved to the consumer's satisfaction 96% were so resolved by the activity of the staff members and 4% were resolved as a result of the panel's deliberations.

Where the complaint has not been resolved by a staff member of MACAP, the staff member prepares a report on the complaint giving a summary of the subject matter of the complaint and referring it to the panel. One panel member reviews the entire file and occasionally requires that a third party establish further facts by contacting the consumer. After discussion of the file, the panel issues its recommendations which are not binding on either party to the dispute.

Similar programs are being conducted in Canada by segments of the Insurance industry, the Canadian Textile Institute, and the Canadian Appliance Manufacturers Program whose program is entitled "RSVP". In some areas of Canada the members of the Insurance industry have voluntarily established panels, comprised of industry representatives and consumer representatives, which meet on a regular basis to review correspondence concerning complaints, and issue their recommendations as to what constitutes a fair and equitable solution. The Canadian Textile Institute and the Drycleaners Association make arrangements to provide dissatisfied consumers with laboratory tests, which are carried out by a laboratory sponsored by the industries.

Organizations of professionals have likewise initiated certain mediation programs. One such program is sponsored by the Ottawa Dental Society which purportedly provides dissatisfied clients of local dentists with an avenue for redress of complaints. The Society refers to its efforts as mediation; however, a case in point demonstrates the latitude to which the meaning of mediation can be stretched. A widow in her late sixties, of modest education and means, was fitted for a denture and following several visits to the dentist who performed the work, felt that the device was not properly inserted and that a fragment of it protruded, irritating the portion of the jaw against which it came into contact. After several discussions with the dentist who performed the service, the widow attempted to contact the Ottawa Dental Society. Contact was made only after

a great deal of effort on the widow's part and when made, results only in a brief exchange of correspondence. The widow indicated the nature of her complaint and received a reply from the Dental Society indicating discussions with the dentist concerned had taken place and, after pointing out that some discomfort is to be expected after the installation of such devices, stated, without any examination of the device, that in the writer's opinion the widow should, if she so desired, consult another dentist for an opinion on the matter. In some situations, such advice may be appropriate. However, where the patient involved is not a relatively wealthy person, is living on a fixed income and whose complaint is one relating to the structure of the device, then the cost of an additional opinion may be prohibitive. Such activity on the part of a profession, while it may constitute mediation, does so in a most limited sense of the word.

Following an exposé in an area newspaper the businesses involved in the servicing and repair of electronic entertainment devices in the Ottawa area formed The Electronic Technicians Association. The Association established a grievance committee which is comprised of members of the Association on a rotating basis. If a customer is dissatisfied with the work done on an electronic device, he can contact the Association by telephone or by correspondence. If the member of the Association receiving the complaint feels that there is merit to the complaint, he will refer the complaint to the grievance committee who will consider it and decide whether or not to bring the matter before a meeting of the members of the Association. Where it is determined that the work was not properly performed, whether or not it was performed by a member of the Association, the Association will undertake the repairs at its own expense. Most independent shops in Ontario belong to the Association.[37]

A major manufacturer of electrical appliances devoted a great deal of time to the establishment of the Association and underwrites the cost of printing material.

There are several industry-sponsored arbitration schemes in existence in the United States.[38] Of these, the scheme inaugurated in 1974 by the United States National Association of Home Builders, known as the Homeowner Warranty Program, indicates the manner in which such industry-sponsored arbitration mechanisms might operate. The scheme was designed to offer a program for the settlement of claims arising from major construction defects, warranties on the installation of plumbing, heating, electrical and cooling systems and faulty workmanship and defective materials in the construction of a residential premises.[38] Under the program if the parties to the contract are themselves unable to resolve any such complaints, they can arrange for the investigation of the dispute by a conciliator. The conciliator, after examining the matter, attempts to obtain a consensual settlement. If he fails to do so, either party has the right to refer the dispute to final and binding arbitration. For this purpose, rules known as The Expedited Home Construction Arbitration Rules have been established by the American Arbitration Association, who also administer the dispute settlement mechanism.

There is little experience in Canada of industry-sponsored arbitration schemes. It was, however, recently announced[40] that members of the legal profession in Manitoba have established a system whereby clients who are dissatisfied with the fees charged by a lawyer in respect of a matter may refer the question of an appropriate fee to arbitration. The arbitrator in such situations is a lawyer. The spokesman for the legal profession[41] stated that in his opinion the use of lawyers as arbitrators would work to the advantage of the client in that he felt that no one would be more skeptical of the fees charged by a lawyer than another lawyer and in a situation where the fees charged were unwarranted, no one would be harsher on a lawyer than another lawyer. Residents of Ontario and some other provinces have the right to have their solicitors' accounts "taxed" by

referring the account to a court official for the purpose of determining an appropriate fee for the services rendered.

There is a substantial difference between association-sponsored schemes, operating in Canada and in the United States. In Canada the association schemes only constitute mediation efforts whereas in the United States there have been several efforts to establish and maintain arbitration programs. In both countries, however, the associations most active in establishing such devices have been the Chamber of Commerce and the Better Business Bureau, although in Canada the Chamber of Commerce efforts have been much less than those of the Better Business Bureau.

One aspect of the attempts of the Chamber of Commerce in Canada should be noted before exploring the mechanism set up by the Better Business Bureau of Canada. In Windsor, Ontario, the local Chamber of Commerce sought to establish a program of mediation whereby complaints after negotiation and discussions by and between the parties would be referred to an independent, impartial person for review. This person would, after examining the dispute, issue a proposed settlement. What is unique about this particular effort is that the third person was drawn from the student body of the faculty of law at the University of Windsor.[42] This reliance on law students reflects the availability of a pool of talent at no or at reasonable cost for consideration of consumer disputes.

The most massive Canadian campaign for the establishment of some mediation machinery is that launched by the Better Business Bureau of Canada in late 1974. The operation and potential effectiveness of the Better Business Bureau of Canada is better understood when one understands its organization. The Bureau has been in operation for more than sixty years. There are two organizations under the general umbrella of the Better Business Bureau of Canada. The parent organization which is known as the Better Business Bureau of Canada is comprised of members drawn from national organizations. Local Better Business Bureaux are autonomous organizations established by local business concerns and operating under licences granted them by the parent Bureau, which sets standards for the local Bureaux and provides them with information and assistance in their operations. The Better Business Bureau of Canada is financed by its membership while the local Bureaux are financed by their local members and by Better Business Bureau of Canada.

There are thirteen local Better Business Bureaux in Canada stretching from the Maritimes to Vancouver Island. The Bureaux are situated in locations which make them available to 47.42% of the Canadian population.[43] A survey commissioned by the Better Business Bureau of Canada and undertaken during August 1973 shows that of a sample of 4,700 households across Canada, some 87.3% of the respondents were aware of the existence of the Better Business Bureau and that 31.3% of those responding had at some time contacted one of the Better Business Bureau offices. This degree of awareness and usage should be contrasted with the information contained in the same survey that the Federal Government's "Box 99" had an awareness rate of 16.8% and a usage rate of 1.1% from the same respondents.[43a] It must be pointed out that a majority of those contacting the Better Business Bureau did so to inquire about the business reputation of the concern with which they were intending to do business, whereas contacts with Box 99 usually only dealt with complaints arising after a contract had been formed. This is borne out by statistics received from all Better Business Bureau offices during 1974 which indicate that there were 490,600 inquiries and 26,867 complaints received by the Bureau. Thus, the inquiries outnumber complaints by about twenty to one.[44] The Bureau reports[45] that in 1974,61% of the complaints received were satisfactorily resoved, 6% were found to be not valid and 33% were not reconciled

by the parties. The Better Business Bureau of Canada estabished the mediation scheme to provide one more opportunity for the parties to reconcile their differences without having recourse to the courts.

The Better Business Bureau of Canada has printed two booklets describing their "Plan". The booklet sets forth the outline of the Plan, its rules of practice and procedure, recommended forms for use by the local Bureaux offering the Plan and provides instruction to those persons consenting to act as mediators.

The Better Business Bureau of Canada has not suggested any monetary limits on the disputes referred to mediation, pointing out that these are in large part dictated by the local scene and are in the discretion of those Bureaux offering the scheme. One of the parties must, in advance of the mediation hearing, agree to abide by the mediator's recommendation. The business party may so agree either by blanket pre-commitment (if it is a member of the Better Business Bureau) given to the Bureau before any dispute arises or it may give its agreement on an *ad hoc* basis. The consumer will obviously only give such agreement for the particular dispute in which he or she is involved. The purpose of extracting such a commitment is to ensure, so far as is possible without constituting the exercise an arbitration, that the parties enter into the use of the scheme with an earnest desire to obtain a settlement. In the event that the party which has not so agreed refuses to accept the recommendation of the mediator, then the person who has agreed to be bound is released from the obligation to abide by the recommendation. Implicitly acknowledging that such one-sided commitment is likely of no legal effect, the Better Business Bureau has provided that the sanction for failure to honour the commitment is the loss of the right to use the Better Business Bureau mediation program in the future. In addition, where the party which breaches its commitment agreement is a member of the Better Business Bureau, the Bureau reserves the right to expel such party from membership and to publicize the reasons for such expulsion.

When a Better Business Bureau office is informed that a person wishes to make use of the mediation program the Bureau will contact the other party informing it of the availability and nature of the program and will determine whether the other party also wishes to submit the dispute to mediation. Where a positive response is received, the Better Business Bureau will appoint a mediator from its pool of mediators and advise the parties of the name of the mediator and the date, time and place of the hearing. The Plan anticipates that in some disputes a panel of more than one mediator will be desirable. In such cases the model Plan of the Better Business Bureau calls for the respective parties to each select one person from the pool of mediators to represent their interest on the board and thus the Better Business Bureau will then select from the pool a person to act as chairman of the board. During the formative stages of the scheme some variance in the selection process has been experienced. Generally, thus far, the Better Business Bureau has selected as a representative of the business concern on the board an individual involved in a similar business undertaking. The consumer's representative is drawn from persons active in some consumer organization. The chairmen of the mediation panels have been persons in each city who have volunteered to act as chairman without remuneration.

The Plan contemplates that hearings will be held at times and places convenient to the consumer. Occasionally the hearing may take place in the consumer's home, particularly if it is found to be necessary to inspect the product or the workmanship which gave rise to the dispute. If it is

advisable, the Better Business Bureau will arrange for an examination of the product or workmanship by a person with expertise in the field to which the complaint relates and who will then provide the mediator with a report of his findings and, where appropriate, his opinion.

The mediation exercises are intended to be informal. However, the majority of persons chairing such hearings[46] feel that while the atmosphere should be relaxed and informal, some procedural regularity is required to ensure a complete and uninterrupted flow of facts. Each party is entitled to call such witnesses as he or she wishes. The parties may be represented by legal counsel or any other person; however, this has only occurred in one case so far. The mediator can and usually does elicit information by his own questioning of the witnesses. After the material information is thus obtained, the hearing may turn into a general discussion of the matter in dispute. During such discussions the mediator is to be free to attempt to have the parties themselves reach some consensus of an appropriate settlement. If the parties do not come to an agreement between themselves, the mediator will, following the hearing, make a recommendation for settlement which, as previously mentioned, does not legally bind either party to any course of conduct.

Because each of the local Better Business Bureaux is an autonomous operation, not all the bureaux in Canada are offering the Mediation Program to the public in their respective areas. Initially, the bureaux of Winnipeg, Hamilton and Ottawa offered the program. Indications are that they have been or will shortly be joined by the bureaux in Edmonton, Vancouver and Toronto.

Although the Plan has been in operation for approximately eighteen months there have not been many cases heard under the mechanism. The latest statistics available indicate that there have been approximately twelve or thirteen complaints submitted to mediation, relating to such things as the cleaning of diamond rings, construction of living room furniture, performance of a five-year old refrigerator, drycleaning of garments and carpets, installation of aluminum siding and claims relating to the performance of automobiles, both new and used. The monetary value of the complaints dealt with range from an award of $75 in the case of the drycleaning of a suede coat to $2,850 in a case involving an automobile dealership. Of the cases disposed of to the writer's knowledge, six resulted in an award in favour of the consumer and three in favour of the firm. There are several cases pending across the country.[47]

Despite the fact that the decisions awarded under the Better Business Bureau Plan are not binding on the parties, the exercise has certain benefits attached to it which it could not enjoy if the decision was binding. Some of these benefits relate to the informality of the exercise and are best displayed by the recitation of an example which shows that problems respecting privity of contract and rules against hearsay evidence can be waived by the parties in an effort to have the merits of the matter proceed to determination or to obtain a settlement which is satisfactory to the parties to the mediation. A woman took a suede coat into "Drycleaner A" for cleaning. Drycleaner A in turn subcontracted the cleaning work to "Drycleaner B". Notwithstanding reasonable efforts on the part of Drycleaner B the dye in the pigskin faded in various parts of the coat and no amount of redying would restore an even colour throughout the garment. The complaint was launched not by the woman but by her father who had purchased the coat as a present for his daughter but who assured the hearing that he was authorized to act on his daughter's behalf. Drycleaner B agreed to let the father represent the woman's interest. Drycleaner A never appeared at any of the hearings. The coat was sent for laboratory inspection. The laboratory reported that the uneven discoloration was not due to any fault in the cleaning process. Prior to the delivery of the mediation panel's recommendation but with the knowledge of the mediation panel, Drycleaner B agreed to pay a sum of money as a gesture of customer relations

and Drycleaner A agreed to return the price paid for the drycleaning service. The woman was satisfied with the settlement proposed and the matter was, therefore, concluded by agreement. All parties to the mediation, while not completely happy with the result, were on balance satisfied that they had been better served by this process than by proceeding to litigation.

In the United States the Council of Better Business Bureaux, in cooperation with the local Better Business Bureaux, has for the past several years been offering American consumers arbitration through the National Consumer Arbitration Program. There are approximately eighty-five bureaux in the United States, covering most of the larger urban centres, which have opted for the arbitration program. Unlike the Canadian experience, the United States mechanism is an arbitration exercise and, subject to local variations determined by the differences in the state statutes, each of the bureau's programs conform to the model plan established under the National Consumer Arbitration Program. When the parties to the dispute have agreed to refer the dispute to arbitration, the local bureau forwards to each of them a list of five arbitrators drawn from the pool of arbitrators available to that bureau. The parties are asked to delete those arbitrators not acceptable to them and to number in order of preference those arbitrators who are acceptable to them. From the resulting list the arbitration board is selected by the bureau. The pool of arbitrators includes not only lawyers but also senior citizens, active teachers, technical experts in one field or another and representatives from various community organizations. Where necessary, and it is found to be so in most cases, the arbitrators undergo a brief training program undertaken by the staff of the Council of Better Business Bureaux. There are more than 3,000 persons in the United States who have been trained under this program. The time and place of the hearing is then selected, it being most common to hold the hearings in the early evening or on the weekend. Either of the parties or the arbitrator has the right to request an independent examination of the goods or workmanship and to include the resulting report as part of the evidence taken during the arbitration. The arbitrator has ten days following the receipt by him of the evidence in which to issue his written award, but the most common practice is for the arbitrator to state his award at the conclusion of the hearing and to issue it in writing later. The average time taken by the proceedings from the initial request from the party for arbitration to the date of the issuance of the award is twenty-one days.[48]

The program is largely voluntary but some businesses (over 12,000 as of late 1975) have committed themselves to arbitrate any dispute where the consumer so chooses.

As in Canada, the process is entirely without charge to either party. If an independent examination is commissioned, the fees are usually absorbed by the Better Business Bureau sponsoring the arbitration.

In both Canada and the United States the hearings are generally quite long and provide ample opportunity for the presentation of the case. In the United States prior to the hearing both parties are provided with literature and advice on the manner of preparation of cases as well as the rules governing the arbitration. Some of the United States bureaux have established maximum monetary values for the claims which might be submitted to arbitration.

## 4. THE COURTS AND ARBITRATION

There are several instances of the use of arbitration as an aid to the judicial process. Although there are variations in the models developed for this purpose, they are usually used as either a pre-trial or a post-trial device.

The best known and highest regarded[49] use of arbitration as a pre-trial device is that established by the New York City Small Claims Court which processes approximately 70,000 claims each year.[50] The maximum monetary jurisdiction of the court is $500. The court sits in the evening and prior to the opening of the court, a court official calls a roll of the plaintiffs and defendants in the cases on the list for that evening. Both parties to a dispute must indicate whether they are ready to proceed. The court clerk then explains to each the availability and nature of the court's arbitration scheme and urges the parties to select arbitration as the means for disposing of the case. The parties are not compelled to use the arbitration service and either party can, if they so desire, insist that the case be heard by a judge. However, about 80% of the cases filed by the court are decided initially by the arbitrators.[51]

Usually there are between five and fifteen lawyers present who have consented to act as arbitrators. These arbitrators will each dispose of five to fifteen claims in an evening's sitting. The arbitrators are selected by New York Supreme Court judges after an evaluation process designed to establish the lawyer's suitability.

Once the parties have indicated their willingness to have the dispute arbitrated, they are invited to a small office in the court house in which the hearing will take place. The hearings are informal and are also private, mostly because of the size of the hearing rooms. The rules and procedures are flexible enough to allow even an inexperienced person ample opportunity to present his case fully and effectively. In some cases, either because of the personality of the arbitrator or the character of the claim, the hearings may be more an exercise in mediation than arbitration with the arbitrator attempting to design a compromise acceptable to the parties. Nonetheless, if the parties do not agree on any such settlement, the award issued by the arbitrator remains a final and binding decision.

In a pilot project operated in the City Court of Rochester, New York claims under $3,000 were compelled to be heard by arbitration before trial.[52] All such cases are referred to a panel of three lawyers for the panel's decision on all issues of fact and law involved in the case. Following the award of the panel either party may reject the award and obtain a trial *de novo* by the court. In such event, the person seeking the new trial must reimburse the state for the fees paid by it to the members of the panel. Statistics for the period from October 1970 to June 1972 indicate that of the 3,303 cases referred to arbitration, only 108 or 6.08% requests for trial *de novo* were filed.[53]

The courts' use of arbitration as a post-trial mechanism has increased over the past several years. It has generally occurred in cases in which the court at the suit of a state attorney-general has found that the respondent has been guilty of fraud or deception in its marketing practices.[54] In such cases the identity or number of persons induced by these practices to do business with the respondent may be unknown at the time of trial. Similarly, where the individual complainants are known, it may not be determined during the trial itself whether or not in each particular instance the complainants actually relied on the deception. The respondents in such cases may, in the settlement of any resulting consent decree, agree that any persons alleging that they acted in reliance upon the deception may have the question of the respondent's liability to them, or the quantum of damages, determined by arbitration. The first incorporation of such an arbitration clause in a consent decree in which consumer claims were involved occurred in a case in which the Office of the Consumer Protection Division of the Attorney-General of the State of Washington alleged that a Seattle carpet firm was guilty of unfair trade practices in its advertising, delivery and installation practices.[55] In that case, after finding the respondent had committed deceptive practices, the court issued a decree on consent which provided that the respondent should forward

offers of settlement to the individual complaints by a specified date. In the same offer the respondent was required to notify the complainant that in the event of any controversy relating to such offer the matter would be determined by arbitration in accordance with the Arbitration Rules established by the American Arbitration Association and that the award issued by any such arbitrator would be enforceable in the appropriate court. Thirty-one arbitration hearings flowed from this consent decree, all of which were decided in the plaintiff's favour. The awards ranged in value from $25 to $1,975. A lawyer was appointed as one of the arbitrators, to decide any issues of law relating to the claims, and a carpet expert was also appointed, to resolve factual issues concerning alleged material defects or faulty workmanship.

In several cases[56] the parties fashioned consent decrees concerning arbitration provisions similar to those used in the *Carpeteria's Case* with some modifications to reflect a changed environment or to remedy deficiencies in previous arbitration schemes. In one order, for example, the consumer was allowed the option of filing suit in court or referring the matter to arbitration. In either case the consumer's choice was binding on the respondent. Other terms in such orders relate to the reduction of the penalty assessed in the court disposition if the respondent cooperates with the claimant's referral to arbitration and promptly pays any arbitral awards. Similar incentives can be established by requiring the respondent to establish a trust fund to which the claimants can look if the respondent fails to pay in accordance with any arbitral award. Similarly, such a trust fund might be established to ensure the payment of any arbitral fees resulting from the use of a mechanism offered by a consent decree. In some situations there may be complex questions, both as to fact and as to law, in which events the parties may, in fashioning the decree or order, stipulate that any arbitrator presiding in such a hearing shall possess certain specific attributes. This occurred in a case involving claims relating to the sale of used automobiles[57] where after the respondents' attorneys pointed out the complexity of the legal issues involved, the parties agreed that the arbitrator should be an attorney and the decree provided that the arbitrator in any arbitration hearings held pursuant to the decree would "be a lawyer and a member of the Washington State Bar Association and have experience and background in automobile mechanics".[58]

## 5. SOCIETIES OF ARBITRATORS

In the United States and the United Kingdom much of the activity in the area of consumer arbitration has been under the tutelage of the American Arbitration Association and the Institute of Arbitrators respectively. Both of these organizations are societies of arbitrators whose predominant purpose is to make available the services of the members of their panels of arbitrators and also to increase the use of arbitration as a dispute settlement device.

The American Arbitration Association was established in 1926 and has grown to a point where, during 1975, it estimates it will have administered more than 28,000 arbitration cases in the areas of commercial, labour and social disputes. Through its association with the New York Cleaners and Dryers Institute, the American Arbitration Association has been active in the mediation and arbitration of consumers' disputes for more than twenty years.

In 1968 the National Centre for Dispute Settlement (NCDS), a division of the American Arbitration Association, was established by the Association as a dispute settlement vehicle, with the aim of expanding the use of fact-finding, mediation and arbitration beyond the areas of commercial and labour management disputes in which they have traditionally been used. So far, the NCDS has been involved in racial protest, public employee strikes, citizen participation

conflicts, school discord, landlord and tenant matters and consumer-merchant hostilities. The American Arbitration Association itself continues to be active in the arbitration of consumer claims under insurance policies, claims relating to allegations of medical malpractice and contractor-home purchaser disputes.

Through the NCDS the American Arbitration Association has succeeded in assisting in the establishment of arbitration projects throughout the United States. The NCDS, being a private agency, cannot force its services on anyone, participating only on invitation from the parties to the dispute. The Centre makes itself available in part through the twenty-odd regional offices of the American Arbitration Association. These offices can provide information about the Centre and receive requests for the use of the services of the Centre. The Centre can draw from the panel of arbitrators of the American Arbitration Association but it is also actively recruiting persons in many localities to act as mediators or arbitrators in local disputes so that a local panel can be established, made up of persons familiar with the environment, its problems and the dispute and who, while being familiar to the parties, will not be regarded with suspicion by either party. The Centre provides an information and education service for the use of enquirers. It recruits, trains and maintains a list of locally available arbitrators from which the parties can choose in a given dispute. If required, the Centre can also arrange for the facilities to be used in the arbitration or mediation exercise. The Centre aids the parties in designing a procedure most appropriate to the particular dispute and its participants.

Initially, NCDS concentrated its efforts in areas of conflict other than consumer-merchant disputes. However, in its early days it promoted the use of arbitration in the consumer arena. It was not until 1970 that NCDS turned a portion of its energy towards an active effort to found a program of consumer arbitration. Success did not come quickly. The first efforts were unfruitful except for the experience gained. Realizing that widespread acceptance by merchants would come only after some testing of the facilities of NCDS, it attempted to have the Neighbourhood Consumer Information Center in Washington, D.C., refer a portion of its unresolved complaints to the Centre for resolution by mediation or arbitration. However, the Neighbourhood Consumer Information Centre was apparently unable to obtain the consent of any local merchants to the use of arbitration under the Plan. Thus no cases were ever referred to the Centre by the Neighbourhood Consumer Information Centre. In 1971, again in the Washington area, NCDS made another attempt at creating a market for its services. It founded the Consumer Arbitration Advisory Council as an aid in the development of the use of arbitration in consumer disputes. It was intended that the NCDS would provide two months of service or service to one hundred cases after which time its effectiveness would be evaluated. NCDS was unable to arrange sufficient advertising and it was therefore necessary to rely on referrals from an existing agency to have any cases for resolution. The agency chosen was unable to refer any cases to the Centre and the two months' evaluation period passed without any arbitrations being held. Gradually, by altering its approach and seeking business participation in the formation of arbitration schemes, NCDS has reached a point where it now has several arbitration schemes operating. It is the administrator of the arbitration schemes initiated by the Pennsylvania Consumer Arbitration Service (described earlier) and it is cooperating with the United States Better Business Bureau in several of its programs.

In England, the Institute of Arbitrators has for some time offered a low cost "documents only" arbitration. In 1969 and 1970 the Institute started an arbitration scheme for small claims for people doing business with the Motor Agents Association and the National Housebuilding Council.

In the former case arbitration was made available for disputes concerning the sale of second-hand cars and in the latter instance, arbitration was used in determining the standards of building construction in private dwellings. The Director-General of Fair Trading in the United Kingdom, after becoming aware of the "documents only" arbitration scheme of the Institute, sought and obtained the cooperation of the Institute in establishing arbitration mechanisms for the resolution of consumer disputes which are included in the Codes of Practice of several trade associations.[59]

The Director-General of Fair Trading saw the Institute's resources as the means for requiring fair and effective self-regulation by the Trade Associations of its member businesses. Using the Institute's resources as a means of creating some form of industry-sponsored arbitration scheme, the Director-General negotiated with various trade associations to establish Codes of Ethics or Codes of Practice for the various associations which would provide the members of the public using the services of the Association with a means of obtaining redress without recourse to the courts. Thus, in several associations dealing with automobiles, residences, travel and travel agencies, arbitration has offered a means of disposition of complaints, and it has been or is about to be introduced by about twenty other trade associations, all using the Institute of Arbitrator's services and facilities in the execution of the scheme.[60]

The schemes may vary from association to association; however, they have a number of features in common. Since the amounts being claimed are relatively small, the costs incurred in carrying out the arbitration must be, and are, kept to a minimum. For this reason all the schemes should, if possible, be dealt with by arbitrators who will only consider documents prepared and filed by the parties to the complaint. The arbitrator is free to obtain the assistance of two assessors familiar with the industry who will provide him with guidance on industry practices and reasonable expectations concerning the quality of the service or goods. In all schemes the consumer-complainant is required to pay a registration fee or deposit, primarily to discourage frivolous claims. The arbitrator, when making his award, deals also with costs and is limited in the amount he can impose upon the consumer-complainant. The amount of the limitation varies from scheme to scheme; in some cases the costs which the consumer can incur are limited to the amount of his deposit and in other cases they can be twice the amount of any deposit. Thus, in each case, the consumer-complainant is aware when he refers the matter to arbitration of the amount of money he risks losing should his claim be found to be unmerited. The consumer is entitled to request a hearing at which the parties are in attendance; however, if he does so the limitiations in the scheme concerning the amount of his costs are not applicable and he bears the risk of having an award of costs made against him which is substantially more than the amount of his deposit or registration fee.

The amount of costs payable by the consumer-complainant should he not choose to have an attended hearing does not wholly cover the expenses of the arbitration hearing. Therefore, either the trade association or the member of the trade association involved in the dispute subsidizes the cost to the consumer of the use of the arbitration scheme by paying the balance of the expenses of the arbitration hearing.

All the Codes of Ethics require members of the Association to attempt to settle the disputes with the consumer by negotiation. If negotiation fails to result in a settlement, then the Codes of Ethics provide that the conciliation machinery established in the codes shall be utilized in an effort to settle the dispute. It is only after these two steps have been unsuccessful that the matter is referred to arbitration and it is only at this point that the Institute of Arbitrators becomes

involved. Because the Institute is not active in the negotiation and conciliation phases and because of the widespread use of "documents only" arbitration, the costs of the arbitration process in individual cases are minimal.

When negotiation and conciliation are unsuccessful, the scheme provides that if the consumer agrees to have the matter arbitrated, each party is required to sign a joint application form referring the matter to arbitration under the particular scheme and to pay the appropriate registration fee. The referral is then forwarded to the Institute which then sets in motion the machinery for the arbitration hearing.

The members of the Association are required by the Codes of Practice of the Association to offer and agree to the referral to arbitration of any disputes arising with their customers. Failure to offer or agree to arbitration results in disciplinary action being taken by the Association. The threat, of course, that is ever-present is that should the members of the Association consistently fail to offer arbitration, the government may by legislation require that members of trade associations offer their customers the choice of arbitration as the means of dispute resolutions. Once the parties to the dispute execute the required application form and referral to arbitration agreement, it sets in process the provisions under the applicable arbitrations statutes and any resulting award is final and binding on the parties thereto in accordance with the provisions of the arbitration statutes.

Until 1973 Canada had no organization comparable to the American Arbitration Association or the Institute of Arbitrators in the United Kingdom. Then in that year a retired executive[61] gathered together a group of retired persons and with the assistance of a grant from the Federal Government founded "Arbitration and Arbitrators, A Group". Since the group, by its nature, was confined to senior citizens, it was soon realized that a sister organization would have to be established in which all members of the public could participate and that, following the original group, would have to be incorporated in the Arbitrators Institute of Canada. The original group of retired persons was not designed to offer its members as arbitrators but rather only to locate qualified arbitrators and to foster the greater use of arbitration in Canada.

The Arbitrators Institute of Canada is funded by membership fees. It recruits and trains arbitrators where necessary. The Institute hopes that its services will be used in disputes in many fields, only one of which is consumer-merchant conflicts. A modest training program has been established whereby arbitrators or potential arbitrators receive the benefit of the advice and experience of persons with substantial backgrounds in arbitration. The arbitrators recruited thus far include not only lawyers but persons whose backgrounds qualify them to act in conflicts arising out of landlord and tenant relations, labour, construction, banking, real estate, insurance and consumer contracts.

While the Institute is a non-profit, independent organization, it is not intended that the arbitrators chosen from its panel of arbitrators will serve without remuneration. In most cases submitted for arbitration, the amount of the fee paid to the arbitrator is still an attractive alternative to the cost of litigating the same dispute. However, in cases where the monetary value of the dispute is small, or in virtually all consumer complaints relating to the quality of material or workmanship, the fees set by the Institute for its arbitrators may be too high to make the use of the Institute's services possible. The Institute is concerned with this aspect of its operations and it is anticipated that as the Institute increases its expertise and becomes more efficient, a plan will be developed to offer arbitration in these situations at a relatively minor cost to the consumer-complainant.[62]

# CHAPTER 3

## REVELATIONS

While the foregoing models display the fundamental difference between mediation mechanisms and arbitral systems and show the possible variations in design of these models, certain characteristics are common to all models when compared to the alternative of the judicial process. When discussing the benefits of an informal dispute resolution mechanism, the finality of the disposition in an arbitral system should not be forgotten but should not hinder the consideration of the many benefits of a mediation plan. Thus, most of this chapter will deal with the benefits of an informal hearing procedure without distinguishing for the most part between a procedure which is essentially mediation and one which is essentially arbitration.

The debate about whether arbitration forms a more attractive forum for the resolution of disputes between parties than the use of the judicial process is not a recent one. Arbitration is known to have existed in the United Kingdom prior to the 14th century as the means used by merchants for the resolution of disputes between themselves. As early as the 14th century steps were taken to provide court facilities in response to the use of arbitration by local merchants and an arbitration statute is known to have been enacted as early as 1698 in England[63]. Statutes providing for the use of arbitration exist in every province in Canada[64] and in some cases have existed for several decades.

It is known that arbitration is used in Canada in the commercial sector for the disposition of disputes between businesses engaged in the construction industry, the garment industry and the disposition of disputes arising in some manufacturer-retailer relationships. Regrettably, no great mass of information is available concerning the incidents of commercial arbitration or the regard in which it is held by its users in the commercial sector. On the other hand, the use of arbitration is well-established in the field of labour-management relations and there is much literature in existence documenting the number of cases referred to arbitration, the nature of the cases, the precedents established thereby, the administration of records of arbitration, and the views of the parties involved.

Thus, many of the comments concerning the desirability of an informal dispute resolution mechanism relate generally to arbitral systems but are applicable also to the particular field of consumer complaints. Arbitration is more attractive in the area of the consumer complaints than in other areas because of the alleged imbalance of power existing between the average consumer and the business concern with which he or she has a dispute. The attraction to arbitration is often summed up by reference to the motto of the American Arbitration Association; "speed, economy, justice". On the face of it the motto reflects only three attributes of arbitration which make it a desirable alternative to litigation, but a closer examination of those elements indicates that there are several other aspects of such a system included within each of those headings. As in any debate, a point in favour of a particular position can, when placed in another context, be used also as a point against the proposition. Thus, for example, when speaking of the fact that an arbitral system provides for a just award fashioned to the needs of the parties to the dispute, it can similarly be said that the same flexibility gives rise to conflicting awards which, in turn, leads to a lack of clarity of governing principles. Nonetheless, each of the arguments must be presented, weighed and continually examined in the light of experience, should any informal arbitral system be created.

Virtually all proponents of the use of arbitration point first to financial savings as the most attractive feature of arbitration. In those systems which are tantamount to "advisory arbitration", i.e. mediation, the consumer party is not required to pay anything for the use of the mechanism, which is financed largely by the sponsoring industry or the government concerned. Even in the arbitral systems examined, where a filing fee was required of the consumer, such a fee was, when compared to the cost of litigating in court and retaining counsel, comparatively small. Arbitration avoids the cost of issuing and serving writs, retention of counsel in most cases, payment of security for costs, disbursements for transcripts and reporters and, when unsuccessful, the payment of counsel fee to the successful party except in rare cases. In the United States there is provision for pre-arbitration discovery in some cases in commercial matters but even when used the cost of such discoveries is substantially less than the cost of examinations for discovery in cases before the court. Critics of the arbitration system quickly point out that all of the foregoing procedures or practices are designed for the better presentation of the case of an honest litigant and the protection of citizens against unwarranted and frivolous actions. While this criticism is certainly valid, it does not take into account the large number of claims where a case can and should be decided quickly on its merits because of the simplicity of the issue or the relatively minor monetary considerations. The cost of litigation is borne not only by the litigants but by the public as well, since the judicial process requires space and officials adequate to maintain the respected position of the court. On the other hand, an arbitration hearing can generally be held in a small, informal office without bailiffs, court clerks and court reporters, thus reducing the cost of the dispute on the public as a whole. Any arbitral system will, of course, incur certain costs for facilities and administration, but the highest visible cost will be the price or fee paid to the arbitrator, or members of the board of arbitration should there be a tripartite board. During 1972 and 1973[65] it was found that in the labour-management area the fees charged by the chairmen of the boards of arbitration ranged from a low daily fee of $50 to a high of $1,000 a day. The most common daily fee was in the vicinity of $300 to $350, but it was found that in British Columbia and Ontario the average daily fee was between $390 and $425.

Contrast this with the American Arbitration Association where the large majority of its arbitrators sitting on hearings of commercial matters not relating to labour-management relations usually serve for the first couple of days of hearing without fee[66]. Thus great care should be taken in selecting the panels of arbitrators available for the arbitration of disputes, particularly in the area of consumer-business disputes, in order to ensure that the cost of the arbitrator in a given case is of such minimal consequence that it does not act as a prohibition against the consumer or the business using such a system. Marshall Lipman[67] suggests that it can be argued that all the costs of an informal dispute resolution mechanism should be borne by industry because if such a process is successful, more consumer complaints will be settled at the negotiation stage rather than by awaiting an adverse decision by arbitration. Thus, as the number of arbitrations decreases, so too does the cost of the system, thereby creating an incentive for business to negotiate a reasonable settlement with the consumer-complainant whenever possible. To suggest that industry will, in fact, be responsible for the cost of the system is naïve since it will be remembered that the costs of the system will be derived from revenue which is derived from the prices charged the consuming public. Lipman agrees, however, that the arbitrator should be given the discretion to levy costs at an appropriate level to the consumer to discourage groundless and frivolous references to arbitration; however, arbitrators should, it is submitted, be cautioned that the imposition of costs should not be used simply as a means for reimbursing the business which has succeeded in an arbitration that proceeded from an honest belief by the consumer in his action.

If the mechanism is one which results in a final and binding award, consideration should be given to the employment of a single legal officer responsible for the implementation of the arbitral award when it has not been voluntarily complied with by either party. Consideration should be given to the question of whether the cost of any such legal officer should be borne by the mechanism or whether the service can be performed by consumer advocacy groups or by government legal officers.

Where data are available, it appears to be well-established that time taken to obtain an award from an arbitration hearing is substantially shorter than the time taken to obtain a judgment. The time is shortened because in an arbitral system the mechanism provides for nearly instantaneous service of the initiating documents and for quicker scheduling of hearings without having to allow time for each step in the court process, including the scheduling of cases in an already overloaded court docket.

The length of time taken to obtain the award and also to complete a hearing once commenced is important. Since the arbitrator does not lose time over such details as the gowning of counsel and debates concerning relevancy and admissibility of evidence, is generally able to allow for a full but shorter hearing, usually providing the parties with his decision at the conclusion of the hearing or within a couple of days after. Advocates of arbitration argue that the time taken to obtain an enforcement of an arbitral award is usually shorter than that taken to enforce a judgment of a court; however, it must be remembered that this argument proceeds from the assumption that both parties to an arbitration are present voluntarily and are anxious to obtain a speedy disposition of the matter. Where one of the parties to an arbitral award is not anxious to comply with the provisions of the award, then it is submitted that the time taken to enforce the award against him would be longer than the time taken to enforce a judgment, if for no other reason than that counsel may not be familiar with the procedure required to file an arbitration award in the appropriate court and then to commence the usual court enforcement procedures.

At present there is no great demand on any such arbitration system so that discussions concerning the length of time taken to complete an arbitration exercise from the point of initiation are in large part hypothetical and would have to be determined if and when such a system comes into being. In the meantime, there is evidence that some labour representatives are unhappy with the length of time taken to obtain an arbitral award under the labour relations arbitration machinery. One study[68] chronicled evidence of the time lapse in obtaining awards from arbitral boards. Among the factors affecting the length of time taken were the use of lawyers by either or both parties to the arbitration and whether the arbitration board was composed of a single arbitrator or was a tripartite board. Generally the study found that where a single arbitrator was used, the time lapse varied from 175 to 224 days and where a tripartite board was used, from 225 to 275 days. If the time frame runs from the date the grievance arose to the date of the final award it is lengthened by the necessity of the grievance having to be presented and considered at the various steps of the grievance procedure before it could be referred to arbitration. A parallel exists in an arbitral system which requires as a condition to entry the use by the consumer of any prior negotiation or mediation processes. The information is important in that it demonstrates the probable result of the overtaxing of an arbitral system of whatever nature.

A comment frequently made[69] is that the courtroom environment by virtue of its size, physical appearance, location of personnel, elevation of the judge and garments of the advocates, instils such fear in many litigants that they present their evidence ineffectively. On the other hand,

arbitration hearings are generally held in more familiar and comfortable surroundings and operate under a procedure more understandable to the parties. Generally, the parties are free to smoke, drink coffee and sit around in their shirt sleeves while the case is presented in an informal but orderly manner. It is felt that this lack of trappings dispels the fear which might exist in the parties and removes in part the natural reticence of some persons to present their complaints. The simplicity with which this latter argument is often presented overlooks the fact that arbitration is often also a foreign concept to the parties, which caused one visitor to a series of arbitration hearings[70] to observe that parties to an arbitration were not familiar with the mechanism and should be provided with an explanation of the method of procedure and the nature of the result. Nonetheless, it is generally agreed that the informality of an arbitration hearing is conducive to a freer flow of information from the parties. Thus, the informality can operate to provide a greater latitude to explore the real dispute existing between the parties whether or not there is a valid existing legal issue to be determined. Where no valid legal issue does exist, then the system operates as an inexpensive form of venting frustrations.

This same informality can create pitfalls for the arbitrator in that it may lead him into the consideration of irrelevant or immaterial facts and result in a decision which is improper because it is founded on inadmissible evidence. A balance must be struck between the informality and proceeding with the hearing in an orderly fashion to obtain the best evidence possible in an expeditious manner.

Given a sufficient number of cases to compare, it would likely not be found that the results flowing from arbitration hearings were more just more often than court judgments; however, the informality of the arbitration hearings, enabling the real issue between the parties to be determined, may very well result in an award which would not be available in the courts because of the alleged rigidity with which the courts must operate. Even if this is not the case in reality, the parties may feel that the result is one more appropriate to their particular case because they have played such an intimate role in the choice of location, of arbitrator, and of the procedures to be followed, and the manner in which the evidence was led. Given appropriate terms of reference in the agreement to arbitrate the arbitrator is free to fix terms of compliance satisfactory or appropriate to the particular case, which a court may not be entitled to do. For example, should the case before the arbitrator be one concerning the non-payment of instalments under a conditional sales contract, the arbitrator may, if his terms of reference permit, reschedule the monthly payments to better suit the financial abilities of the consumer. This result cannot be obtained in ordinary court procedures except by use of the judgment summons procedures available in some Small Claims Courts or by making an appropriate application to a court to increase the wages which are exempt from garnishment to an amount above that in the Wages Act (where such rights exist).

Care must be taken to see that the quality of justice emanating from arbitration tribunals is of a consistent uniform nature and extent; this is particularly so since it is anticipated that the arbitral system will initially proceed on a random basis, using as arbitrators a number of persons not fully trained in the law. A properly designed system and the existing judicial powers of supervision over arbitration awards will combine to provide adequate safeguards to handle flagrantly wrong awards. Basic training of arbitrators in the art of conducting an orderly hearing and providing them with a firm understanding of the essential rules of evidence will also go far to minimize the development of a faulty body of law. These factors should be coupled with the realization that it is unlikely that any system of arbitration put into effect will be compulsory but will rather be a voluntary system operating only as an alternative to the court procedures. The continued use of the courts

will ensure a steady flow of judicial pronouncements relating to the interpretation of contracts and the extent and application of warranties and the rights of the parties to the contracts. In the labour field, the arbitrators have established a large body of law relating to all matters arising out of grievances submitted to arbitration and these are being chronicled and indexed in a reporting series available to members of the profession and the public.[71] This body of law is in large part held in high regard by practitioners in the labour relations field and it can be expected that a similar body of law can be developed by arbitrators operating in the consumer field.

Generally, arbitral systems allow for parties themselves to select the arbitrator who will decide the dispute. Where the parties are compelled to resolve their disputes by arbitration as in the labour relations arena, the authority making it mandatory to arbitrate the dispute usually reserves the right to appoint an arbitrator if either party fails to choose one, thus defeating any delaying tactic. In fact the requiring authority usually possesses an inventory of persons prepared to sit as members of a tripartite board, representing the interests of either of the parties to the dispute. Where the arbitration is to result from a voluntary submission to arbitration and one of the parties fails to name his nominee to the board, or if the matter is to be decided by a single arbitrator, and one party fails or refuses to concur in the appointment of the arbitrator, the provincial arbitration acts provide that the other party may require concurrence with a named arbitrator. If he fails to obtain such concurrence he may apply to a judge of the appropriate court to name an arbitrator, who will act as if he had been chosen by the parties.[72] Assuming that the parties to the dispute desire a quick resolution, the right to select the arbitrator serves the twofold purpose of giving the parties the feeling of being in control of the disposition of the case and more importantly, allowing them to choose a person they feel is more knowledgeable and capable of deciding their particular dispute than a judge would be. This latter aspect is demonstrated by the choice of a lawyer with a background in automobile mechanics as an arbitrator in the *Midway Autos* case.[73] Since arbitration is a fairly new concept for the resolution of disputes involving consumers the apprehension about the abilities of the arbitrator is fairly widespread among business concerns.[74]

If there is justification for the observation that most members of the public regard judges as being too remote from their particular circumstances to have an understanding of their needs, then by allowing the parties to choose the arbitrator they will not be left with the feeling that the complaint will be decided by a member of an elevated class, but rather by a person chosen by themselves for his particular attributes. While there are distinct benefits in allowing the parties to select their own umpire, care should be taken that the umpire thus chosen possesses certain minimum qualifications rendering him capable to decide the dispute in a fair and just manner. The Federal Department of Labour statistics for 1972 and 1973 indicate that the academic background and the occupation of a substantial majority of the arbitrators used in labour matters is related to the law. It is expected that this would continue to be the experience in an arbitral system, particularly in the early stages of its development. However, as the system progresses, training facilities and programs can be established for persons interested in becoming arbitrators who have little or no background in the law but possess a substantial knowledge of other matters. The arbitrators chosen must be drawn from an unimpeachable source so that the parties cannot raise reasonable objections about their impartiality. The suspicion of bias was one of the most common criticims made of the U.S. Council of Better Business Bureaux' arbitrations programs and care should, therefore, be taken in the early stages of the development of any arbitral system for the establishment of a panel of arbitrators drawn from persons who have demonstrated an acceptable degree of objectivity in relation to their former occupations or professions. This objectivity and impartiality can usually be easily determined by some simple screening process conducted by persons not having an interest other than the establishment of a fair system.

One of the major difficulties facing consumer litigants in the courts is to locate a person capable of acting as an expert witness on their behalf. This is not uncommon in most cases concerning the quality of work or goods. Once having located such a person it is another question again to obtain his consent to act as an expert witness testifying against a colleague in his own trade or calling. Even when such expert witnesses are retained, their may be prohibitive, thus preventing the consumer litigant from taking any further action. Most of the schemes surveyed in the preceding chapter make arrangements to locate and have in attendance at the hearing such experts or to obtain their reports for consideration. This assistance is invaluable both to the consumer and to any counsel he may retain to represent him at the hearing since generally speaking an attorney is no more comfortable with the technological aspects of a case than is his client.

Professional representatives, being mainly lawyers, if not precluded from acting in many of the schemes, are at least discouraged. This exclusion effects less formality, lower costs and a quicker disposition from the filing of the complaint to the final award. Whether the perpetual universal exclusion of attorneys from arbitrations would prove to be a benefit remains to be seen. Notwithstanding valid criticisms of the function of counsel, it is generally admitted that their presence assures a methodical flow of relevant evidence which may be of particular importance should the chairman of the tribunal not have sufficient training or experience in the conduct of hearings and the weighing of evidence. One of the alleged benefits to exclusion of counsel is that the consumer will not thereby suffer from an imbalance of expertise existing between his counsel and the counsel used by substantial business concerns. Where no counsel is present or where it is not anticipated that counsel will be present, both parties should be provided with basic instructions on the manner of preparing their case in order that the best possible effect can be obtained from their presentation. This can be secured in the "documents only" arbitration schemes by designing questionnaires appropriate to the particular type of case being submitted. The guidelines should familiarize the parties in simple terms with the nature of the process, the procedures to be followed, and assist them in marshalling their evidence, organizing their case for presentation and excluding irrelevant material. The fact that arbitration hearings are generally held in smaller rooms to which the public is only admitted on invitation and acceptance of the parties, provides a private hearing in which the parties are more relaxed and are not apprehensive of the image they will leave observers of the hearing. On the other hand, publicity must be given to the awards issued in order to secure compliance with the award and to inform the public generally and arbitrators in following cases of the general direction the law in particular fields is taking. Of course, if the arbitral award must be enforced by means of filing in the appropriate court, then the awards themselves become a matter of public record.

There appears to be little doubt that an arbitral system provides for greater flexibility in many areas than does a court. The hearing itself can be conducted in a manner more suitable to the parties without the fear of losing an otherwise meritorious case because some material fact has not been proved, resulting in a motion for nonsuit. The arbitral hearing can be held at such places as are most satisfactory to the parties, including the premises of the business concern or the plaintiff, a local shopping centre, or small office provided by the mechanism. Similarly the hearings can be scheduled for evenings or weekends, thus not causing the consumer to lose time from work. There is greater latitude allowed in the manner in which evidence is presented and in the type of evidence admitted but perhaps not considered. Generally the procedure of an arbitration hearing, because it is in large part dictated by the parties themselves, is considerably simpler than that which must be necessarily followed in a court. Given appropriate terms in the reference to arbitration, the parties can themselves define the jurisdiction of the arbitrator, perhaps giving him more latitude than that which can be exercised by a judge. It is not unusual for the arbitration to provide for on-site

inspection of the goods or workmanship and while such inspections are available to the courts, they are used only on rare occasions because of the demands currently made on the time fo court officials.

There are a number of other factors of relatively minor significance which must be considered when establishing or considering the establishment of an informal dispute resolution mechanism:

(*a*) if the mechanism is of a voluntary nature then it operates only as an alternative to the courts and, therefore, there is an advantage to establishing such a mechanism simply to provide the freedom of choice to the consumers

(*b*) if business organizations or industry generally support such a mechanism, it will demonstrate to the public the genuine concern of the business for the interests of their customers

(*c*) if an easier, quicker disposition is available, it will force both parties to make honest attempts to settle their differences by negotiation since they will no longer be in a position to say with any validity that the complaint went no further because of the prohibitive costs or time involved; a business on the other hand will not be able to fail to react to customer complaints because of the belief that very few of its customers will persevere in the prosecution of their claim in the courts

(*d*) if the mechanism is industry-sponsored then care will have to be taken to ensure that business is not simply setting up a "smoke-screen" to avoid imminent legislation establishing such a mechanism and that the business interests do, in fact, provide sufficient support to allow the mechanism to commence and continue operation on an independent basis

(*e*) the mechanism should avoid lengthy, detailed, complexly-drafted forms, but should provide a simple procedure easily comprehended for initiating and processing the arbitration

(*f*) some existing mechanisms prohibit the use of the mechanism unless the consumer has exhausted any other avenues of obtaining redress, i.e. negotiation or mediation. If such exclusions are necessary, some discretion should be allowed the administrator to permit the use of the mechanism when good cause is shown for not having used any required pre-arbitration devices

(*g*) while there probably must be time limits imposed upon the parties within which they must refer the matter to arbitration, such time limits should be reasonable and the arbitrator should be given the jurisdiction to abridge them where failure to do so would render an unjust result

(*h*) One of the concerns of business about the provision of such an alternative mechanism is that it will open the "floodgates of litigation". If this should result, then perhaps there was a greater need for such a system than was anticipated. Legitimately, business interests feel that the provision of such an alternative will only provide one more means for the venting of the frustrations of the chronic complainer. Until such a system is established, this criticism is largely unsubstantiated and in any event it remains to be seen what proportion of the persons using the system will fall into the category of the "chronic complainer". If the number of chronic complainers is, in fact, small in relation

to the number of persons using the mechanism, then surely it is unfair to deprive those persons with valid complaints of the use of such a system because of the abuses and excesses of a few

(*i*) Informal dispute resolution devices which do not comprise arbitrations proceed on the basis of unsworn evidence and thereby operate under a disadvantage, since most people exercise greater caution in the choice of words and description of events when giving evidence under oath

(*j*) As far as possible the accessibility of the mechanism should be universal and available to persons in all regions of the country. One of the greatest criticisms of the Canadian Better Business Bureau Plan is that there are only a few of the local bureaux offering the plan, but even if they all did so, it would still only be available to those persons in the fourteen regions in which local bureaux are located. Additionally, because it is Better Business Bureau sponsored, there is a widespread misunderstanding that only customers of businesses who are members of Better Business Bureau may make use of the mechanism. Even among members of the local bureaux there is a feeling that the mechanism is ineffectual because, as one speaker at the 1975 Annual Meeting of the Better Business Bureaux stated, members are not the kinds of businesses which give rise to complaints which need resolution by arbitration or otherwise; the complaints are directed at businesses which are not members of the Better Business Bureau and which cannot be compelled to use the plan.

One of the features of arbitration which distinguishes it from a trial in court is that the award of the arbitrator cannot itself be appealed. That is not to say that the arbitrator is free to issue awards without due observance of certain rules, since if he fails to comply with certain strictures his award can be reviewed or quashed by a court having jurisdiction to supervise the execution of an arbitrator's responsibilities.

One writer[77] considers the court has supervisory power to set aside an arbitral award or remit it to the arbitrator for reconsideration when the award falls into one of the following general categories:

(1) Where the arbitration on the face of its record contains an error of law.

(2) Where the arbitrator in the exercise of his duties has misconducted himself or the proceedings.

(3) Where there has been a mistake admitted by the arbitrator.

(4) Where evidence, which could not be discovered prior to the award, notwithstanding diligent investigation, has been discovered after the award issues.

Within the first two of these broad classifications, several individual causes for judicial review appear. Simply phrased, some of the more prominant of these are:

(*a*) The arbitrator based his decision on inadmissible evidence

(*b*) The arbitrator refused to act on important, admissible evidence

(*c*) The award is ambiguous and uncertain

(*d*) The award does not finally dispose of all matters referred to the arbitrator

(*e*) The award purports to decide matters not referred to the arbitrator

(*f*) The arbitrator was wilfully deceived by the evidence adduced or by the suppression of important evidence

(*g*) The arbitrator was corrupted by one of the parties.

(*h*) The arbitrator was biased or appears to be biased in favour of one of the parties

(*i*) The arbitrator failed to provide all of the proper parties to the disputes with a full and fair hearing, giving equal opportunity to all to call evidence, examine evidence and make submissions.

There is no reason to believe that arbitrators sitting in judgment on consumer disputes will be more likely to escape supervision by the courts then their more experienced colleagues sitting as arbitrators in commercial and labour relations matters. However, the presence and exercise of judicial review has served as a means of disciplining the arbitrators, yielding a well-established set of rules of practice and procedures to be followed by arbitrators. The extent of such judicial review has not reduced the confidence of the users of arbitral systems to a point where they no longer desire to use arbitration.

The referral of a dispute to arbitration can arise in one of several ways. The parties can voluntarily and knowledgeably agree after a dispute has arisen to refer the dispute to arbitration. The parties can be induced by threats of delay to refer a matter to arbitration as in the experience of the New York Small Claims Court where the clerk of the court persuades the parties to utilize the arbitration facilities available by pointing out the disadvantages of awaiting a hearing before a judge. The parties can, in the body of the contract governing their contractual relations, commit themselves to arbitrate any dispute which might arise out of the execution of the contract. In this latter instance, one of the parties may not be aware that he has committed himself to arbitrate any dispute, particularly so if the contract containing the agreement to refer the dispute to arbitration is a "standard form" contract designed by the other party. Lastly, the parties can be compelled by legislation to refer their disputes to arbitration. Compulsory arbitration is usually found only in labour-relations statutes and is justified in those cases because of the interest of the public in maintaining production without numerous work stoppages. Consumer disputes have been compelled to be arbitrated by the courts in a number of instances as described in the previous chapter.

Compulsory arbitration of consumer disputes other than as a pre-trial device have been ruled out as an attractive alternative.[78] Pure voluntary arbitration is preferred. Where arbitration is used as a pre-trial device, it is usually initiated because of an extensive workload of the courts. As such, while the parties may be uncomfortable in the presence of such persuasive tactics, on balance it is probably better to opt for the arbitral route if they wish the matter disposed of quickly.

While compulsory arbitration is not advocated, the present status of consumer arbitration in Canada demands that some form of forceful persuasion be brought to bear on the parties to establish and maintain a viable arbitration mechanism. The experience of the National Centre for Dispute Resolution in the United States is not encouraging in that it took several attempts and many months of great effort and persuasion to finally arrive at a point where arbitration of consumer disputes was being fairly widely accepted by the business community. Canada lacks an organization of the same depth and strength as the American Arbitration Association and therefore the responsibility and role of initiating and promulgating an active arbitration system

will have to be spread among several institutions. In his article "Marketing a Modern Commercial Arbitration System"[79] Robert Coulson points out that it is not sufficient for the American Arbitration Association to simply make its services available, but that it must also market its services and make them attractive to potential users. Throughout the article, Coulson outlines the benefits of the use of arbitration and describes the facilities of the American Arbitration Association, leaving one to conclude that like any other service or commodity, potential customers must be attracted by its virtues and the good reputation and credibility of the seller. Thus, a concentrated campaign will have to be launched to inform business of the benefits which it can derive from the use of the system, including the fact that if voluntary arbitration is not made available to consumers, some form of legislation can be expected if the demand for arbitration continues at its present pace. Lawyers should be advised of the benefits to them of having a matter arbitrated rather than litigated, since as Coulson points out[80] a lawyer can usually achieve a higher hourly income through arbitration because the hearings can be scheduled at the lawyer's convenience and entail less preliminary procedure and office preparation.

Whether any arbitral system is successful should not depend solely on consumer reaction to the system. If the system results in awards almost exclusively in favour of the consumers without due regard to the merits of the case of the business concerns coming before it, then the suspicion will arise that the mechanism neglects one of the fundamental reasons for its existence – provision of equal justice for both parties to the conflict. Its awards, while allowing for the balancing of the equities existing between the parties, must primarily mete out consistently fair decisions based on recognized, established principles of law called into play by the nature of the dispute rather than being decisions engendered by sympathy.

The ideal system will also operate as a vehicle to assist in negating continual faults or abuses by either a particular business concern or whole industries. This function can be satisfied by direct persuasive contact with the company (or industry) by the administrator of the mechanism, by providing sufficient publicity of the patterns of abuse and by the support of government agencies in their dealings with industry. Its effectiveness will be gauged only by demonstrating positive results. The mechanism must be able to show that as a result of its existence and efforts, changes in company or industry practices have been effected.

In order to comply with the requirement that the mechanism provide a system of justice for its users, it must conform to certain minimum demands. It should be:

(*a*) *Visible* – if the public is not sufficiently aware of its existence and purpose, the scheme becomes a shadow with no substance.

(*b*) *Accessible* – conveniently and regularly located in appropriate facilities close to public transit and convened at hours suitable to the needs of its users. Its use should be easily triggered without prohibitive cost to the consumer and with simply-worded forms, understandable by all persons, regardless of their level of education and native tongue.

(*c*) *Impartial and independent* – adjudicators must not be accountable for their actions to nor influenced by one of the parties to the dispute, and should be selected from screened and approved panels.

(*d*) *Efficient* – providing for speedy disposition without unnecessary delays and adjournments but reaching conclusions with due regard to the requirements of a full and fair hearing. Assistance in enforcing the award should be provided if necessary. Quick disposition reduces the chance of lost documents, appeals to court and frustrated parties.

(*e*) *Informal* – but orderly in its hearings, allowing equal opportunity to each party to present and examine the whole case in a relaxed manner and with relaxed rules of evidence.

(*f*) *Final* – or encourage a final and conclusive disposition of the dispute so that unsuccessful parties cannot or are discouraged from reconstituting the action in another forum.

(*g*) *Operable without frequent intervention by other lawyers* – but should provide assistance in the preparation of claims (and defences) and advice on the preparation and presentation of evidence at the hearing in those cases where counsel will not be present.

(*h*) *Informative* – providing parties with access to precedents and general principles of law relating to the claim and should keep the parties to a particular case informed of the status of the case.

(*i*) *A forum of first choice available to the consumer* – the consumer should not be restricted to the use of other avenues of reconciliation before using the mechanism.

(*j*) *Optional* – to the consumer as a plaintiff and as a defendant. The consumer should be allowed to use the courts as a litigant; however, the consumer should be allowed to have business claims against him dealt with by arbitration rather than by litigation if he or she so desires.

(*k*) *Accountable* – for its performance to an impartial board of directors or inspectors.

As the device evolves, questions relating to its improvement will arise. It may have to be modified to satisfy changing needs. There are a number of questions as yet unresolved such as:

(*a*) Should the system be "local", if so, to what extent and to what cost?

(*b*) Is it really better to have local citizens act as arbitrators? ; in all cases?

(*c*) Should arbitration be offered by individual companies? , or by trade associations?

(*d*) What should be the scope of issues referrable to arbitration?

(*e*) To what extent should government intervention be encouraged?

(*f*) Will compulsory arbitration become attractive?

(*g*) What training facilities should be made available?

(*h*) Is there really a "need" for such a system?

(*i*) How will the conflict between "expertise" and "impartiality" be reconciled where the expert arbitrator has or has had ties with the vendor or its industry?

(*j*) Will "tripartite" boards prove too cumbersome or inefficient? ; too costly?

(*k*) What incentive should be available to encourage businesses to comply with arbitral awards?

(*l*) Will arbitration itself become too expensive for consumers' and merchants' purposes?

(*m*) Will the development of principles of law be unduly retarded by such arbitral systems?

To obtain the answers to these and such other questions which will arise from time to time concerning the effectiveness of an arbitral scheme the administrator of each such scheme will have to be responsible for the maintenance of adequate records and to conduct periodic evaluation tests. The records should show how complaints are received, processed, filed and concluded. Information should be available about the arbitrators, the nature of the claims processed, the awards issued, the proportion of the awards in each party's favour and the degree of compliance with the awards. The administrator should attempt to ascertain any changes of industry practices attributable to the existence and operation of the scheme. Evaluation of the scheme will result from examination of the foregoing data together with interviews with the staff of the mechanism, the users of the mechanism and independent examiners of the process.

# CHAPTER 4

# PROPHECIES

## GREAT EXPECTATIONS

It is difficult to perceive of an arbitral system operating with the greatest effectiveness if it is not in some way associated with the government agencies responsible for the consumer interest in public affairs. One of the main aims in creating an arbitral system is to create a device which will, in addition to resolving individual complaints, set in motion changes on a larger scale. If industry and particular businesses are to be encouraged to curtail improper business practices or to correct abuses inherent in their marketing systems, they should be faced with a great body of credible evidence of the existence of such abuses. To effect this would probably require the funnelling of all information concerning consumer disputes to one central agency who would, in turn, assimilate data and present to the public and the industry concerned a stronger case for the need for change. It is for this reason that in Ontario persons who are endeavouring to create a viable arbitral system have proposed that the administration of such a system be the responsibility of the provincial Consumer Protection Bureau. The research team engaged by the Ontario Law Reform Commission to work on the Commission's project on Consumer Warranties and Guarantees in the law relating to the sale of goods recommended an arbitral system which would utilize personnel in the Consumer Protection Bureau together with other public servants. The Commission in its report and recommendations substantially agreed with the proposals of the research team; however, it differed in some minor aspects from the proposal of the research team. Because the scheme envisaged by the research team and the Commission is extensive and comprises a plan, the parts of which are each interdependent upon other parts, that section of the report of the Commission dealing with an arbitral system has been reproduced in its entirety in Appendix A of this paper.

The most significant difference between the scheme recommended by the research team and the plan adopted by the Commission is that whereas the research team suggested a form of "advisory arbitration" similar to that of the Public Complaints Board in Sweden, the decision of which might upon agreement of the party become final and binding, the Commission recommended that personnel of the Consumer Protection Bureau might be given the power to persuade the parties to consent to arbitration prior to the convening of the hearing of the tribunal.

The Report of the Ontario Law Reform Commission was conveyed to the Minister of Justice for the Province of Ontario in 1972. The Government of the Province of Ontario later published its "Green Paper" on Consumer Product Warranties and requested submissions from interested sectors of the public. The Consumers Association of Canada responded to this invitation by submitting an extensive brief outlining its position on most of the matters raised in the Commission's Report and the Green Paper. It included therein the arbitral system the Consumers' Association would prefer to see created. That portion of the Consumers' Association's brief detailing the scheme envisaged by the Association has been reproduced in its entirety in Appendix B of this paper because the Association devised a scheme incorporating most of the recommendations of the Law Reform Commission but supplied a great deal of detail on the manner in which the scheme would work and pointed out that the monetary value of the claim will likely dictate the necessity for slightly different procedures for different classes of cases.

## IN RETREAT

The Consumers' Association brief was submitted in late November, 1973. To date the Ontario Government has demonstrated no great interest in implementing the recommendations contained in the Law Reform Commission's report or the Consumers' Association's brief as they relate to an arbitral system. Whatever the cause, there has been little interest shown in assuming responsibility for the creation and administration of an arbitral system as proposed by the Commission or the Consumers' Association. It may be that as the economic climate improves and if it can be demonstrated that there is a widespread need for an arbitral system, that governments will assume this responsibility in the face of unsuccessful systems with other sponsors. In the meantime, some steps can be taken to bring into being an arbitral system which satisfies, at least in part, the requirements of an effective arbitral system and which, in part, complies with the requirements of the Ontario Law Reform Commission and the Consumer's Association.

The program of the Better Business Bureau of Canada is already established and receiving a fair amount of publicity. It is suggested that this vehicle be embraced but expanded to provide an arbitration service rather than simply mediation. However, to overcome certain suspicions respecting the viability and impartiality of the Better Business Bureau scheme, it will be necessary for the Better Business Bureau to expand its panel of adjudicators beyond that which currently exists. It is proposed that the Arbitrators Institute of Canada be invited to participate in the Better Business Bureau scheme on mutually acceptable terms. It is not anticipated that the negotiations between these two bodies or, indeed, the terms of any final arrangement reached by them will be effected without some support and persuasion by other institutions. In this respect, the Consumers' Association should also be invited to participate in the design of such a scheme with the costs attendant upon such meetings being borne for the time being by government agencies. In those regions of Canada where there is no Better Business Bureau local office now in existence or where there is no chapter of the Arbitrators Institute of Canada, government personnel will have to assume the responsibility of contacting a local business group such as the Chamber of Commerce and Board of Trade to determine the interest of those parties and thereafter to absorb the cost and provide the manpower necessary to identify and train persons suitable to act as arbitrators under the scheme.

Once established such schemes will, of course, have to account for their performance and in this regard if the scheme continues to be business-sponsored a board of directors should be established to which the administrator of the scheme is accountable. The board should be comprised of persons drawn from the business community, citizens and consumer groups and government personnel together with the administrator of the scheme.

A government's role will not cease upon the establishment of such a system but will have to include the duty to persuade businesses not identified with the sponsoring body to consent to the reference of consumer disputes to arbitration. This role should not be left entirely to government. It should be undertaken also by three other main parties to the program, but government should give due consideration to underwriting the cost of any promotion and publicity necessary for the expansion of the use of the scheme.

The scheme should give careful consideration to "documents only" arbitration for disputes involving minor amounts and as the nature of the cases becomes clearer, to some disputes which can be as well explained in a short, written document as by having a full hearing.

Neither business nor government should conclude that the mere establishment of such a scheme absolves them from any responsibility to ensure that the scheme operates as intended and, in the case of governments, that their future responsibility has been identified with the establishment of the first of such schemes. If the existence of such a system creates great demands on the schemes it is anticipated that government will have to underwrite some of the costs of the operation of such a scheme since the very presence of a scheme should reduce the expenditures of government in the administration of justice generally. Initially the cost of administration of the scheme should be borne by the business community since if the scheme does operate successfully, it will reduce the costs of disputes in the long run by forcing the parties to resolve their differences at the earlier stages of negotiation and mediation.

Since the primary initial sponsor of the scheme will be the business community itself, it is unlikely that the scheme will generate industry-wide changes in practice and the possibility of such results occurring are remote unless those agencies responsible for the consumer interest undertake some activity in this area using the information gleaned from the arbitral award as the basis for its requests for change. Therefore, the administrator of the scheme and the supervisory board will have to maintain open communication with the consumer protection agencies in order that they are fully informed of the activities of the scheme.

How soon, or whether, the arbitral scheme has to come under the sponsorship of government will be determined only when the evaluation of the business-sponsored arbitral mechanism demands it.

# APPENDIX A

The proposals of the Research Team of the Ontario Law Reform Commission and the Ontario Law Reform Commission's recommendations concerning an arbitral scheme.

## 3. THE PROPOSALS OF THE RESEARCH TEAM

The Research Team concluded that substantial changes were necessary and desirable in Ontario's public law programme for alleviating the general powerlessness of the consumer in today's economy. In order to demonstrate properly the scope and significance of their proposals, the Commission here quotes at length from their study.

[W]e recommend the adoption of the following measures . . . . .

1. *The Consumer Protection Bureau Act* should be amended to state that one of the functions of the agency shall be to act as mediator in disputes between consumers and third parties.

2. The Bureau should engage in a more vigorous campaign of publicity across the province and make itself physically more accessible to consumers in the metropolitan area and elsewhere. The Bureau currently publishes a Consumer Information Digest, we fully subscribe to the purposes of the publication but we also think that it can be considerably improved in scope and content. We should like to see a monthly newsletter comparable to the Bulletin published by the Ontario Securities Commission and containing *inter alia* a running summary of all the activities pursued by the Bureau, including a digest of the important complaints investigated and disposed of by the agency. The Bureau should be, and should appear to be, the primary champion of consumer rights in the province.

3. The Bureau should be authorized to hire technical personnel to the extent necessary and funds should be made available for this purpose. Arrangements should also be made for the provision of assistance by other government departments and by government laboratories which possess technical resources.

Not all mediational efforts are successful, and the question remains what should be done with this category of cases. The appropriate solution, in our opinion, will depend on the nature of the individual case. If the principal issue is a question of law, such as the applicability of a statute to a given factual situation, then resort to the courts may be unavoidable and, if the circumstances warrant it, should be supported by the Consumer Protection Bureau. More frequently, however, the issue between the parties is factual in character and the courts are not a convenient forum. To meet this type of case we recommend the establishment of a new type of advisory committee with quasi-judicial functions which would be modelled along the lines of the Swedish Allmanna Reklamationsnamnden (General Complaints Bureau).

We see many important advantages flowing from the type of grievance settlement procedure exemplified by the Swedish model as compared with the conventional court structure. The procedure would be wholly informal, the

committee would be free to gather its evidence as it saw fit, and not least important the committee would contain at least one member knowledgeable in the area to which the dispute relates or have access to technical advice – all at no or little cost to the consumer. We have considered the question whether the decision of the committee should be binding on the parties. We have decided not to recommend this step on several grounds. One is that it would create constitutional difficulties because of the provisions of Section 96 of the British North America Act. An even more important reason is that it would endow the proceedings of the committees with a strong legal flavour (a turn of events which we are most anxious to avoid) and practically compel the establishment of an appeal procedure for decisions of the committees. We recognize that there may be recalcitrant defendants who may not pay much heed to an advisory opinion unsupported by legal sanctions. It is important therefore to mobilize public opinion and the support of individual industries to gain voluntary compliance with the committee's recommendations, and we recommend that, as in Sweden, the committee's opinions should be published.

So far as the other operational details of the arbitral system are concerned, we recommend the following features:

1. As in Sweden, different committees should be set up for different industries and committees should be established in various parts of Ontario. Wherever possible the committee should hear the parties and their witnesses in person, but where this is not practical the committee should be empowered to receive written evidence. In our opinion, the committee should be authorized to handle all disputes which are not purely legal in nature.

2. Committees should have a maximum composition of three persons, in general comprising one member of the consuming public, a representative of the industry whose member is the recipient of the complaint, and one independent professional person (who need not be a lawyer) experienced in the sifting of facts and of unimpeachable integrity. The committee members should be entitled to receive a modest *per diem* honorarium. Where the amount in dispute is, say, less than one hundred dollars the committee may consist of only one person unless the director is of the opinion that the facts involve a test case and warrant a three member board.

3. As in Sweden, the director should be responsible for compiling the dossier for the use of the committee. He should not refer a case to a committee until his own mediational efforts have failed and then only if he is satisfied that the consumer has at least a *prima facie* case. The consumer's consent should be necessary to refer any case to the committee but not the consent of the respondent.

4. If both parties agree the opinion of the committee will be binding and will have the same effect as an arbitral award under the Ontario *Arbitrations Act*,[20] subject to such special regulations as may be adopted from time to time.

[20] *The Arbitrations Act*, R.S.O. 1970, c.25.

5. Where there is in existence an industry sponsored grievance settlement procedure the consumer should have a right to elect between that scheme and the government sponsored scheme. In general we feel that unnecessary duplication of efforts should be avoided, but since most of the industry sponsored schemes are relatively untried and of recent origin it will be some time before their worth and durability has been established.

6. In any event we are of the opinion that certain basic ground rules should be established concerning the structure and conduct of the industry sponsored schemes. These safeguards are necessary to ensure that the consumer's grievance is being dealt with fairly and that he is not unwittingly bargaining away important remedial rights. The ground rules should be evolved under the aegis of the general *Consumer Products Warranties Act* which we propose and should encompass *inter alia* the following points:

(a) The arbitrating body (however it is denominated) should include at least some consumer representation unless its members are chosen separately on an *ad hoc* basis by both parties to the dispute:

(b) The arbitrating body should observe the rules of natural justice, should render written judgments, and in the absence of special circumstances should generally make its decisions available for public inspection. The Consumer Protection Bureau should be entitled to request a copy of every decision as of right:

(c) As a condition of obtaining access to the arbitral services the consumer should not be required to waive any substantive or procedural rights to which he may be entitled by statute or at common law:

(d) The rules of the sponsor governing the composition and procedure of the arbitrating body should be subject to review and disallowance by the Consumer Protection Bureau (or any other designated official) with appropriate rights of appeal from any decision of the Bureau.

*Director of Consumer Warranties.* In this chapter and in others we have indicated the important role to be played by the Consumer Protection Bureau as consumer ombudsman in the warranties area and as the agency responsible for administering the new warranties legislation. To summarize, the agency (or a designated official within the agency) would be entrusted with the following powers and functions:

(a) to investigate consumer complaints involving warranties;

(b) to act as mediator between the consumer and the other party or parties to the dispute;

(c) in appropriate cases to refer unresolved disputes to a complaints committee and to act as secretary of the committee;

(d) to issue cease and desist order to enjoin violations of the Act and to prosecute violations in the courts;

(e) to bring class actions and test cases, either in his own name or on behalf of named individuals. In our opinion, there should also be a general power to

institute individual actions which are not suitable for adjustment by the complaints committees or where a respondent has failed to comply voluntarily with the recommendation of a committee;

(f) to assist the warranties advisory committees in their work and to help draft regulations for adoption under the new Act;

(g) to conduct inquiries and studies into warranties and their administration, whether on his own initiative or at the request of the Minister or one of the advisory committees.

## 4. THE COMMISSION'S CONCLUSIONS

Subject to some changes in detail, particularly in relation to the allocation and exercise of statutorily conferred powers, the Commission concurs with the principle of a government sponsored programme that is similar in concept and scope to that described above by the Research Team. It should have as a primary object the expeditious and inexpensive resolution of many of those genuine grievances of consumers that now fall outside the practical ambit of the ordinary courts. In addition to its dispute settlement features, such a scheme will provide many other valuable services, both direct and indirect, to the consumers of this province. We are of the view that this programme should be carried out within the existing organizational framework of the Department of Financial and Consumer Affairs. We are not, however, in a position to evaluate all of the particular or detailed administrative structures suggested by the Research Team for the execution of this sort of programme. As a general rule, therefore, the Commission will only identify what it considers to be necessary or desirable functions, and will leave to the appropriate responsible officials the task of determining what organizational arrangements will best serve the overall needs that are apparent from the whole of this report.[21]

We are of the view that the responsibility for acting as "consumer ombudsman" should rest with the Consumer Protection Bureau. The Commission therefore recommends that, in addition to the existing power of the Bureau to investigate complaints and the powers proposed earlier in this chapter, the statute governing the Consumer Protection Bureau should specify that it has the power to mediate consumer disputes, and to take such further steps as may be appropriate in each case. Depending upon the nature of the case, these steps could result in arbitration, prosecution, or reference of an issue to the Commercial Registration Appeal Tribunal. The Bureau should be able to investigate and act upon any legitimate consumer complaint. The

[21] *E.g.*, the selection of the title "Director of Consumer Warranties" may or may not be appropriate for an officer of the Department of Financial and Commercial Affairs' Consumer Protection Bureau, since the Bureau is headed by a Registrar and is a unit of the Consumer Protection Division, which is headed by a Director. Similarly, in a portion of the Research Team's Study not reproduced above, proposals were made for detailed methods of ensuring coordination between the Consumer Protection Bureau and the Registrar of Motor Vehicle Dealers in dealing with warranty policy questions. These are clearly matters not amenable to legislative changes that are recommended by this Commission, and should be left for resolution within the Department.

standards that should be employed for assessing the duty of a manufacturer or retailer should be those of *The Consumer Products Warranties Act.* Although there are significant divergences in detail, the general model which the Commission has adopted for this programme is that already employed for the mediation, arbitration and settlement of disputes under *The Labour Relations Act.*[22] The major features of our proposals are as set out below.

### *a.* INITIATING THE PROCEDURE; MEDIATION, PROSECUTION AND CEASE AND DESIST ORDERS

A complaint by a consumer to the Consumer Protection Bureau would be the first step in the procedure. If the complaint discloses an apparent violation of *The Consumer Products Warranties Act*, the Bureau, or a designated official thereof, should forthwith inquire into the complaint and endeavour to effect a settlement thereof. At this stage, the Bureau should have the power, in appropriate cases, under the direction of the Attorney General, to prosecute any violation of *The Consumer Products Warranties Act.* As an alternative to prosecution, the Bureau, at this time, should also have the power, with the consent of the respondent, to issue a cease and desist order covering the practice or behaviour which has been the subject matter of the complaint. Such an order should be filed in the office of the Registrar of the Supreme Court, whereupon this order should be entered in the same way as a judgment or order of that court and be enforceable as such.

### *b.* ARBITRATION AND THE COMMITTEE SYSTEM

If mediation efforts fail, the Bureau should have the power to ask the parties to agree to arbitration, and should have under its jurisdiction and appropriate machinery for conducting arbitrations in Toronto and in those regional centres around the province where branch offices of the Bureau are established.[23] Such arbitration should be conducted in accordance with *The Arbitrations Act,*[24] and would be binding on the parties. The fee payable to the arbitrator, or arbitration committee should be borne by the Consumer Protection Bureau.

(i) *Arbitration Committees.* The Research Team proposed the establishment of arbitration committees as has been successfully done in Sweden. A full committee would consist of three persons, one of whom is from the industry in question, one of whom is a member of the consuming public and one of whom is an independent professional person, although not necessarily a lawyer. These committees were to be established for major sectors of the Ontario consumer industries.

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[22] *The Labour Relations Act,* R.S.O. 1970, c. 232. Particular attention is invited to section 79 of this Act.

[23] Inquiries at the Consumer Protection Bureau disclosed that branch offices are located in Sault Ste. Marie, Windsor, London, Ottawa, Peterborough, Kitchener and Hamilton.

[24] *The Arbitrations Act,* R.S.O. 1970, c. 25.

The Commission favours the establishment of such committees, and sees them as playing a key role in the future development of the consumer protection field in Ontario. We recognize, however, that the problem involved in organizing and staffing arbitration committees will be a large one, and that until this is successfully accomplished, the arbitration functions carried out under the direction of the Consumer Protection Bureau might be seriously delayed. A second consideration is that all industry sectors and all areas of the province may not require full committees. These are questions that only time and experience can answer. It is therefore recommended that initially, arbitration should be done by a single individual from or designated by the Consumer Protection Bureau in Toronto and from or designated by each Bureau branch office. Establishment of full committees for major sectors of consumer industries should follow, once the basic arbitration machinery is working in all centres, in those places where experience shows that the volume of business and necessity for specialization justify this step.

(ii) *Warranty Advisory Committees.* A second feature of the programme suggested by the Research Team was that there should be "warranty advisory committees" – bodies that were familiar with the conditions in a particular industry and the experience of the consumers with the products of that industry. These advisory committees could provide a feedback of information and remedial proposals to those charged with the responsibility of administering the provincial consumer protection programme. The Commission concurs with this suggestion and therefore recommends that certain of the arbitration committees should also be designated as warranty advisory committees. One such committee should be designated for each major segment of Ontario's consumer industries. A warranty advisory committee, under the direction of the Consumer Protection Bureau, should have the responsibility for employing its empirical knowledge about its specialized area to attempt to work out satisfactory warranty standards with the industries in question, to evaluate product performance, to assess the adequacy of service and repair facilities provided by the industry, and to advise the Bureau about all aspects of the industries in question that relate to warranties and consumer protection. The warranty advisory committees should be required to report on their activities and recommendations on a regular basis.

### c. REFERENCE TO THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Where the parties do not agree to arbitration or, notwithstanding such agreement, the matter is of such a nature that a more formal hearing is appropriate, the Commission recommends that the Consumer Protection Bureau should have the power to refer the issue to the Commercial Registration Appeal Tribunal of the Department of Financial and Commercial Affairs.[25]

[25] Established by section 7 of *The Department of Financial and Commercial Affairs Act*, R.S.O. 1970, c. 113.

The Tribunal should be governed by the provisions of *The Statutory Powers Procedure Act, 1971*,[26] with power to require witnesses to appear, compel production of documents and do all other things necessary for a full and fair hearing. It should have jurisdiction to inquire into and determine whether there has been a violation of *The Consumer Products Warranties Act*, and to assess the quantum of the loss to the complainant, as a matter of restitution, caused by the breach. If the Tribunal finds the complaint justified, it should have power to:

a. make an order for restitution (but not for general damages) in favour of the complainant; and

b. make an order that the respondent cease and desist from the violation of the particular provisions of the Act identified by the Tribunal.

These orders should have the same effect as an order of the Supreme Court, and should be capable of being filed and enforced in the same way as a consent order issued by the Consumer Protection Bureau, as described above.

Proceeding to obtain a remedy through the Tribunal should bar the complainant from subsequently bringing suit in the same matter or cause before a court. A complainant whose losses cannot be redressed satisfactorily by a restitutionary order should proceed in the ordinary manner through the courts in the first instance.

### *d.* PRODUCT TESTING AND PERFORMANCE EVALUATION[27]

A major portion of the work of the consumer protection programme proposed herein will involve products that are unsafe, unreliable, lacking in durability, or which otherwise fail to perform up to the standards that might reasonably be expected by a purchaser. Where this is not so, there would be little need for such a programme in the first place. The Commission agrees with the Research Team that the hiring of technical specialists by the Consumer Protection Bureau and the use of existing public scientific facilities should be a part of the consumer protection programme in Ontario.

The cost of unsafe or defective goods is now borne by the public as individual consumers. In effect, each purchaser now conducts his own product tests and performance evaluation, often at considerable personal expense. Objective and scientific product analysis done by the Consumer Protection Bureau could not only support the work of the committees in their arbitral and advisory roles, but could also reduce the individual costs now experienced by great numbers of consumers across the

[26] *The Statutory Powers Procedure Act, 1971*. Stat. Ont. 1971, c. 47.

[27] The Research Team of the Warranties and Guarantees Project prepared a useful study of existing public and private programmes for the testing of consumer products, and included several suggestions that should be of value in developing new policies in this area. This material is appended to this report under the heading "The Role for Consumer Product Testing Programmes".

province. The work of the Consumers Union in the United States is a good example of what can be done along these lines. The Commission therefore recommends that a programme of product testing and performance evaluation be established under *The Consumer Protection Bureau Act* as a function of the Bureau.

### *e.* PUBLICITY

The Research Team was emphatic in its belief that wide publicity should be given to all aspects of the provincial consumer protection programme. We agree that this would not only be necessary, but would also be a highly effective means for ensuring the success of the measures recommended in this report. The Commission therefore recommends that the means be provided to the Consumer Protection Bureau to engage in a vigorous and continuing public information programme across the province. This should include regular publication of an account of the activities of the Bureau and digests of important cases dealt with by mediation, arbitration or consent orders. Such a publication should also include reports of cases of violations of *The Consumer Products Warranties Act* prosecuted by the Bureau under the direction of the Attorney General, warranty cases referred to the courts by the Lieutenant Governor in Council under the procedure described earlier in this chapter, cases arising under *The Consumer Products Warranties Act* that are dealt with by the Commercial Registration Appeal Tribunal, and reports of the activities and recommendations of the Warranty Advisory Committees.

## RECOMMENDATIONS

The Commission recommends that:

1. *The Consumer Protection Bureau Act* should provide that the Consumer Protection Bureau has the duty, in appropriate cases, to request that the Attorney General seek to initiate proceedings to refer any matter with respect to a warranty complaint to the courts under the provisions of *The Constitutional Questions Act.*

2. The proposed *Consumer Products Warranties Act* should contain a section under which a reference as described in recommendation 1, above, in respect of a matter arising under the proposed Act, is specifically authorized. Such a section might read as follows:

   > The Lieutenant Governor in Council may refer to the Court of Appeal or to a judge of the Supreme Court for hearing and consideration any matter arising under or in connection with this Act that he thinks fit, and the court or judge shall thereupon hear and consider the matter so referred.

3. *The Consumer Protection Bureau Act* should provide that, in addition to the existing powers of the Bureau, it has the power:

   a. to mediate consumer disputes;

   b. with the consent of the parties, to initiate arbitration in consumer disputes, if mediation fails;

c. in appropriate cases, under the direction of the Attorney General, to prosecute any violation of *The Consumer Products Warranties Act*;

d. as an alternative to prosecution, with the consent of the respondent, to issue a cease and desist order covering the practice or behaviour which has been the subject matter of the complaint; and

e. where the parties do not agree to arbitration or, notwithstanding such agreement, the matter is of such a nature that a more formal hearing is appropriate, to refer the issue to the Commercial Registration Appeal Tribunal of the Department of Financial and Commercial Affairs.

4. *The Consumer Protection Bureau Act* should provide for the establishment of arbitration machinery for carrying out recommendation 3. b., above, consisting initially of a single individual from or designated by the Consumer Protection Bureau in Toronto and from or designated by each Bureau branch office.

5. Once the basic arbitration machinery is operating as described in recommendation 4, above, arbitration committees should be established in those centres and for those consumer industries where the volume of business and necessity for specialization justify this step.

6. Arbitration committees should be established for particular sectors of the consumer industries, and should consist of three persons, one of whom is from the industry in question, one of whom is a member of the consuming public and one of whom is an independent professional person, although not necessarily a lawyer.

7. The fee payable to the arbitrator or arbitration committee should be borne by the Consumer Protection Bureau.

8. Certain of the arbitration committees should also be designated as warranty advisory committees, with one such committee for each major segment of Ontario's consumer industries, with responsibility, under the direction of the Consumer Protection Bureau:

   a. to employ empirical knowledge about the specialized area dealt with the committee to attempt to work out satisfactory warranty standards with the industries in question;

   b. to evaluate product performance;

   c. to assess the adequacy of service and repair facilities provided by the industry; and

   d. to advise the Bureau about all aspects of the industries in question that relate to warranties and consumer protection.

9. The Commercial Registration Appeal Tribunal should have jurisdiction, upon reference of a matter from the Consumer Protection Bureau, to inquire into and determine whether there has been a violation of *The Consumer Products Warranties Act*, and to assess the quantum of the loss to the complainant, as a matter of restitution, caused by the branch.

10. In a hearing of a matter pursuant to recommendation 9, above, the Commercial Registration Appeal Tribunal should be governed by the provisions of *The*

*Statutory Powers Procedure Act, 1971*, with power to require witnesses to appear, to compel production of documents, and to do all other things necessary for a full and fair hearing.

11. If the Commercial Registration Appeal Tribunal finds a complaint referred to it pursuant to recommendation 3. e., above, to be justified, it should have power to:
    a. make an order for restitution (but not for general damages) in favour of the complainant; and
    b. make an order that the respondent cease and desist from the violation of the particular provisions of *The Consumer Products Warranties Act* identified by the Tribunal.

12. Where the Consumer Protection Bureau, with the consent of the respondent, issues a cease and desist order in accordance with recommendation 3. d., above, or where the Commercial Registration Appeal Tribunal issues an order pursuant to recommendation 11, above, such an order should be filed in the office of the Registrar of the Supreme Court, whereupon this order should be entered in the same way as a judgment or order of that court and be enforceable as such.

13. *The Consumer Protection Bureau Act* should provide that the establishment and execution of a programme of consumer product testing and performance evaluation should be a function of the Bureau.

14. Means should be provided to the Consumer Protection Bureau to engage in a vigorous and continuing public information programme, including regular publication of:
    a. an account of the activities of the Bureau;
    b. digests of important cases dealt with by mediation, arbitration or consent orders;
    c. reports of cases of violations of *The Consumer Products Warranties Act* prosecuted by the Bureau under the direction of the Attorney General;
    d. reports of warranty cases referred to the courts by the Lieutenant Governor in Council pursuant to recommendations 1 and 2, above;
    e. reports of cases arising under *The Consumer Products Warranties Act* that are dealt with by the Commercial Registration Appeal Tribunal; and
    f. reports of the activities and recommendations of the Warranty Advisory Committees.

## APPENDIX B

Extract of the brief of the Consumers' Association of Canada relating to the redress of grievances.

The criterion that "the system must not cost more to settle a claim than the claim is worth" is a cliché which begs several questions. What is "the system" referred to? Whose "cost" is to be considered; and in this calculation, what price or value is to be assigned to obtaining justice? Worth to whom? The criterion of "speedy and inexpensive" raises similar questions. All in all, we are left with the uneasy feeling that the Ministry has given little thought to the entire question of remedies and redress procedures.

More specifically, our criticism of redress procedures of both the Commission's report and of the Green Paper is as follows:

i. It is too vague. Like a recipe which lists possible ingredients but does not tell us which ingredient should be used in which situation, or how much of each should be used, we are left with no clear impression as to what, if anything, is being recommended, or how it would work in practice in different situations.

ii. There seems to be no consideration of the dollar value of disputes, which is the key deterrent to the use of existing Ontario procedures. Obviously, the quantum of the dispute involved is a relevant factor in determining which mechanism for conflict resolution is appropriate in the circumstances.

iii. There is no discussion of the incentives to use or not to use the different mechanism on the part of prospective defendants. For example, what is the incentive to manufacturers or retailers to submit to voluntary conciliation or arbitration when they do not have to? How many, if any, will voluntarily submit?

iv. There is no discussion of the prospective workload, and the probably resultant backlog of cases which might result before the Commercial Registration Appeal Tribunal. If no defendant must submit to conciliation or arbitration, but can insist upon a hearing before the Tribunal, the Tribunal might very easily become jammed with a hopeless backlog of cases in a short time.

v. No thought appears to have been given to the speed with which remedies are required in particular situations. For example, if a refrigerator has broken down, or if an automobile is not being repaired properly, and cannot be driven, how satisfactory will it be to go through the successive stages of voluntary conciliation, arbitration, and a hearing before a Tribunal? A lot of food will rot while waiting for these successive procedures (assuming that the consumer has sufficient persistence to go through three procedures before obtaining redress).

In designing a system of consumer redress procedures, certain assumptions must inevitably be made. Ours are as follows:

i. In most instances, consumers do not want to go to court. They will not do so very often even if the substantive legal impediments (e.g. privity of contract) are removed.

ii. The majority of claims will be to cover the cost of repairs, not for rescission.

iii. The cost of most claims (i.e. probably 60 – 80% of all claims) will fall in the $20 to $200 range. This would cover everything from the repair of small appliances to simple repairs of automobiles.

iv. The aggregate cost of these individual claims is substantial and is well worth doing something about.

v. Different procedures will be required for dealing effectively with these smaller claims than with claims over $200.

For purposes of analysis, three classes of claims can be defined, on the basis of the quantum of damages involved:

Class I would include all claims where the cost of repairs (or of rescission if that is requested) is less than $200;

Class II would be for claims from $200 to $1,000 and

Class III would be for claims in excess of $1,000.

*Different procedures and/or forums should be available for each.*

**Class I**

For Class I claims the primary method of dispute resolution should be *conciliation,* backed up if necessary by arbitration. This should be through the use of an expert, knowledgeable in the industry or field, who would receive written or oral requests for assistance to investigate, counsel, mediate and to report to an arbitration tribunal. This officer should have access to testing facilities to determine the validity of the complaint; or if wide-spread defects are suspected, to test for these in a whole line of products. His primary function, however, would be to settle disputes in similar fashion to a mediator in labour situations – with one important addition. His report would also go to the arbitration tribunal. It would contain a recommendation as to the disposition of the case on its merits, and the quantum of damages or means of redress (e.g. rescission) he considers just.

Unless either party requests reconsideration, this recommendation would become the award of the arbitration tribunal, and would be enforceable as such.

It is important to note that this could not work, in CAC's opinion, if submission to this forum were consensual. There would be no incentive for most manufacturers or retailers to submit their dispute to conciliation and arbitration; they would be in a much better position if they waited for the consumer to chase them to court. Therefore, at this level there must be compulsory conciliation and arbitration.

The arbitration tribunal would deliberate on the basis of the conciliation officer's report. No further evidence should be allowed to be presented to the tribunal unless it is to *correct* the completeness and accuracy of the conciliator's report (in most cases, as a matter of practice, the mediator would allow the parties to comment on the report during its draft stages. This procedure has worked reasonably well in the labour field, in the work of the Official Guardian in divorce cases, and in pre-sentence reports in criminal cases. We feel that it would work well in the consumer warranty area too.

There would be no oral argument before the arbitration tribunal unless either party desires a hearing for this purpose; submissions to correct the mediator's report would normally be in the form of a simple letter. The weapon of costs could be used to deter frivolous oral argument. These

proposals would reduce substantially the total cost of handling claims under $200, while retaining fundamental fairness.

To ensure fair and reasonable access to mediators and to the arbitration tribunal, some mediators should be available to meet with consumers after normal working hours and some of the arbitration tribunal sessions should be held in the evening as well.

Although there is no wish to preclude consumers from the Small Claims Court (in those rare instances when consumers will actually want to sue) it would clearly be an abuse of the process of the Court if consumers were to attempt to litigate via the Small Claims Court at the same time as using the mediation and arbitration procedures. Therefore the consumer should elect his forum – conciliation and arbitration or Small Claims Court – before he goes too far with either procedure. We would recommend that if conciliation is selected first, the consumer be required to change to Small Claims Court prior to his seeing the conciliator's report. The conciliator should be required to advise each consumer, before releasing his report, that the report is prepared and will be released unless the consumer wishes to stop the proceedings and go to Small Claims Court.

If the consumer decides to receive the conciliator's report, he will be deemed to have elected this procedure and to waive the use of Small Claims Court.

If Small Claims Court is the procedure first selected, at any time up to the date of the actual Small Claims Court trial, the consumer should be allowed to abandon his action (with an appropriate order as to costs, if required) and proceed by means of conciliation.

It must be assumed that arbitrators would be given powers equivalent to those exercised by a judge of the Small Claims Court so that all the remedies presently granted by Small Claims Court judges (including rescission) could also be granted by the arbitrator.

In most instances a single arbitrator should preside; in complex cases, a panel of three might be used.

The conciliators could be either full-time employees of the Consumer Protection Bureau, selected for their knowledge and expertise in the particular product areas involved, or they could be retained for a single case or group of cases on a fee basis. These experts might include, for example, independent TV repairmen, appliance repairmen or automobile mechanics. The arbitrators could similarly be employees of the Department or others selected on the basis of knowledge and skill. The only limitation should be that the same person cannot be both a conciliator and an arbitrator in the same dispute.

**Class II**

Cases in Class II ($200 to $1,000) should allow both the consumer and the seller the choice of electing conciliation and arbitration or Small Claims Court. The proceedings should start with *compulsory* mediation in every case; but *either* the consumer *or* the seller could elect, prior to seeing the mediator's report, not to use it but go to court. (The advantage of this procedure is that a high percentage of disputes would be settled at this stage.) Furthermore, the jurisdiction of Small Claims Courts should be expanded to at least $1,000 (this is approximately equivalent in value to the present limit of $400, at the time that limit was adopted). With consent of both parties, the jurisdiction of Small Claims Court should be extended to $5,000.

Small Claims Courts should also have evening sittings, as should arbitrators, to allow greater consumer access. Legal Aid Duty Counsel should be available in these Courts and arbitration hearings, and consideration should also be given to allowing consumers to apply for individual legal aid certificates where the monetary value of the claim and the issues of fact or law would appear to justify it.

As with Class I procedure, the matter would commence with compulsory conciliation. It would then proceed to arbitration, assuming neither party had elected to go to court.

The decision by the consumer plaintiff to receive the conciliator's report should constitute a binding election to proceed to arbitration; and proof of this election should constitute a defence to an action in Small Claims Court. Where either party agreed to conciliation but would not accept arbitration, or where he accepted arbitration but would not honour the award, the award should be binding and enforceable as an order of the Small Claims Court. To aid with enforcement, the conciliator's report should be admissible as evidence in the Small Claims Court, and should be accepted as *prima facie* proof of the contents of the report without the officer having to appear in court to prove it.

**Class III**

Class III matters – those involving $1,000 to $5,000 – should have the same procedures as for Class II matters above, except that if Small Claims Court jurisdiction is not extended to $1,000 from the present $400 (or if consent is not obtained to use Small Claims Court in matters over $1,000) the consumer will have to report to the County Court.

There are presently rules in the County Court procedure which place cost penalties on plaintiffs and defendants who unnecessarily select or force actions in the higher court. These cost penalties should also be invoked for actions unnecessarily raised from Small Claims Court level to County Court level.

## NON-METROPOLITAN AREAS

Consideration should be given to the installation of a toll-free telephone number for use of persons located in areas where no representative of the Ministry exists or regularly visits. (This toll-free line could be used in conjunction with other Ministries, dealing, for example in landlord and tenant problems, since the resolution of these problems is equally difficult in small towns. Information, advice, and perhaps even mediation could be provided via this telephone line.)

## ACCESS TO CONCILIATION

It is critical to the success of the entire scheme that access to the conciliator be easy throughout the Province. The telephone number must be widely publicized and easy to remember. There must be a sufficient number of available telephone lines and operators. When the consumer telephones he should not perpetually encounter a busy signal. Nothing could be more discouraging to the consumer's attempt to obtain redress than being unable to get through to the first step in the redress procedure. Similarly, if there are an insufficient number of branch offices (or conciliators retained on a part-time basis outside the larger centres consumers may have to wait several days or even weeks before a conciliator is available to visit his locality. If, while waiting for the conciliator, food is rotting, or laundry not being washed, or an automobile not being driven, there will be a great deal of consumer frustration and discouragement. Adequate manpower allocation must be provided to guarantee consumers speedy access to redress procedures.

## FOOTNOTES

1. Jones, Gardner & Boyer, B.B., *Improving the Quality of Justice in the Marketplace: Need for Better Consumer Remedies,* (1972) 40 Geo. Wash. L. Rev. 369.

2. Lippman, *Arbitration as an Alternative to Judicial Settlement -- Some Selected Perspectives,* 24 M.A.L.R. 215; see also L.I. Jacobsen, *Informal Procedures for Resolving Disputes,* N.Y.L.J., September 26, 1974, Vol. 172, No. 62.

3. S.C. Jackson, Vice-President-Director of the American Arbitration Association, addressing hearings of the Federal Trade Commission, November 21, 1968.

4. H. Buchwald, "The Consumer and the Law in Canada" in William A.W. Neilson (ed.) *The Consumer and the Law in Canada.* (1970) Osgoode Hall Law School, 4.

5. See, for example, the *Real Estate and Business Brokers Act,* R.S.O. 1970, c. 401.

6. *Pyramidic Sales Act*, S.O. 1972, c. 57.

7. See, for example, T.D. Finn of the Department of Consumer and Corporate Affairs – description of a similar operation under the *British Columbia Hearing Aids Regulation Act* in his address on September 27, 1975 to the symposium on consumer law held at the University of Montreal, September 27, 1975.

8. Ontario Law Reform Commission. *Report on Consumer Product Warranties and Guarantees in the Sale of Goods.* Toronto, Queens Printer, 1972.

9. Response of the Ontario government to Ontario Law Reform Commission Report.

10. The motto of the American Arbitration Association.

11. A representative of one provincial Consumer Protection Bureau in a reply to correspondence indicated that the consumer protection bureau with which he was connected relies on arbitration as the means for the settlement of complaints referred to the Bureau by consumers, when, in fact, a closer examination reveals that such complaints are subjected rather to conciliation. In addition, at a conference at the University of Montreal in the fall of 1975 dealing with developments in the law relating to consumer transactions, several of the persons in attendance, including members of the legal profession, sometimes used the terms "arbitration" and "conciliation" (or "mediation") interchangeably.

12. For example, the *Public Service Staff Relations Act,* R.S.C. 1970, c. P-35.

13. Black's Law Dictionary, 4th ed., rev. 1968.

14. For example, *Ontario Labour Relations Act,* R.S.O. 1970, c. 232 and most other labour relation statutes in Canada require that grievances arising during the course of the existence of a collective agreement must be referred to arbitration for disposition.

15. For further recent reviews see Donald B. King, *Consumer Protection Experiments in Sweden*, 1974, Frederick B. Rothman and Company, South Hackansack, New Jersey.

16. A letter from Berit Ström-Hutn of the legal section of the Konsumentverket dated July 5, 1975 in response to inquiries by the author.

17. Letter from Ström-Hutn, ibid.

18. *Jansson v. Fiskarboden*, a decision of the Public Complaints Board rendered March 9, 1970 involving a case in which a fisherman who had purchased an outboard motor from the respondent, Fiskarboden, and complained that the motor did not function properly. On instructions from the Public Complaints Board the gear housing of the outboard motor was inspected by an officer of the National Board of Shipping and Navigation who filed a report indicating that the owner's claims were unwarranted.

19. Correspondence in November 1971 replying to an inquiry from Professor J.S. Ziegel.

20. Letter of Ström-Hutn, *supra*, footnote 16.

21. Fact sheets on Sweden published by the Swedish Institute, January, 1973, based on statistical data effective November, 1972 and a memo on aspects of consumer policy issued by the government officers at Malmo, May 6, 1971.

22. *Supra*, footnote 19.

23. *Supra*, footnote 16.

24. *Supra*, footnote 16.

25. Pub. L. 93-637, 15 U.S.C. 2301-2310. The Act applies to all consumer products distributed in inter-state commerce and sold with a warranty.

26. 40 F.R. 29892, July 16, 1975.

27. Gerald Akson, General Counsel of the American Arbitration Association in his remarks to the Federal Trade Commission Hearings on the matter on September 23, 1975.

28. E.M. Hanford, Commissioner of the Federal Trade Commission in her address to the North Carolina Council in May of 1975.

29. Bill 20, 1st Session, 30th Legislature Ontario, 3d Reading, December 18, 1975.

30. Correspondence of October 10, 1975 from John E. Mason, Associate Deputy Minister of Consumer Affairs, Department of Consumer, Corporate and Internal Services, Manitoba.

31. The description of the schemes is drawn from the following sources: an undated pamphlet entitled "The Manchester Arbitration Scheme For Small Claims"; an undated pamphlet entitled "Westminster Small Claims Court" and the rules of each.

32. See Robert Coulson, *Arbitration*; N.Y.L.J., November 13, 1974, Vol. 172, No. 93.

33. J.J. McGongale, Jr., *Developments in Consumer Arbitration*, The Brief, Winter 1974-75.

34. Section of the American Arbitration Association described more fully later in this chapter.

35. National Institute for Consumer Justice; staff studies *circa* 1973.

36. Ibid.

37. Interview with a representative of the Association.

38. For example, New York Movers Association, see the study referred to in *Business Week*, June 10, 1972 edition and also the New York Cleaners and Dyers Institute, see D.W. Determan, *The Arbitration of Small Claims*, (1975) 10 Forum (2) 831.

39. *Supra*, footnote 27.

40. Television newscast early January 1975.

41. Harold Buchwald.

42. Conversation with a member of the Windsor Chamber of Commerce at the Annual Meeting of the Better Business Bureau in Toronto, Ontario in May, 1975.

43. Undated release by Better Business Bureau of Canada, Information Section.

43a. Ibid.

44. Better Business Bureau of Canada. 1974 Annual National Service Summary.

45. Ibid.

46. Conversations and correspondence with persons acting as mediators under the Plan.

47. Press release of Better Business Bureau of Canada, July 16, 1975 and conversations with officials of Better Business Bureau of Canada.

48. *Supra*, footnote 38.

49. The Small Claims Study Group, *Little Injustices*; report to the Center for Auto Safety, 1972.

50. *Supra*, footnote 38.

51. Ibid.

52. Staff studies for NICJ – *supra*, footnote 35.

53. Ibid.

54. Hoellering, M.F., N.Y.L.J., November 1975.

55. *State of Washington v. Carpeteria et al*, discussed by R. Wexler in "Court-ordered Consumer Arbitration", (1973) 28 Arb. J. (N.S.), 1975.

56. *State of Washington v. Dare To Be Great Inc. et al*, No. 203543 Superior Court of Spokane County, Washington, September 24, 1971; *State of Washington v. Transmission Expediters Inc. et al*, No. 747925 Superior Court, King County, Washington, March 28, 1973; *State of Washington v. Midway Auto Wholesale et al*, No. 758780 Superior Court, King County, Washington, June 7, 1973.

57. *State of Washington v. Midway Auto Wholesale et al*, ibid.

58. Ibid.

59. Methven, John, Director-General of Fair Trading address to the Institute of Arbitrators, (1975) 42 Arbitration, no. 2, 76.

60. Correspondence with the Secretary of the Institute of Arbitrators.

61. Lionel J. McGowan, former President of the Foundation Company of Canada and the former Chairman of Taylor Woodrow of Canada, Toronto Star, June 13, 1974.

62. Discussions with R.A. Mackenzie, Secretary of the Arbitrators Institute, September 1975.

63. 9 and 10 will 3, c. 15, cited in Ellenboten, "English Arbitration Practice", (1953) L. and Contemp. Prob. 656 at 657.

64. The Arbitration Act, R.S.A. 1970, c. 21, s. 10(1); Arbitration Act, R.S.B.C. 1960, c. 13(1); The Arbitration Act, R.S.M. 1970, c. A120, s. 20(1); Arbitration Act, R.S.N.B. 1973, c. A-10, s. 16(1); The Judicature Act, R.S.N. 1970, c. 184, s. 201; Arbitration Act, R.S.N.S. 1967, c. 12, s. 12(1); The Arbitrations Act, R.S.O. 1970, c. 25, s. 11(1); The Arbitration Act, R.S.P.E.I. 1974, c. A-14, s. 11(1); The Arbitration Act, R.S.S. 1965, c. 106, s 9(1).

65. "The Use of Arbitration Mechanism In Canada, 1972 and 1973" published by Labour Canada.

66. Discussions with Rosemary Page, Counsel, *American Arbitration Association*, December 1975.

67. Marshall E. Lippman, *Arbitration As An Alternative To Judicial Settlement*, (1972) 24 Maine L. Rev. 215.

68. Goldblatt, "Justice Delayed . . ." published in May 1974 by the Metropolitan Toronto Labour Council.

69. Determan, *Supra*, footnote 38.

70. *Supra*, footnote 55.

71. Labour Arbitration Cases, First and Second Series.

72. See, for example, Arbitrations Act, S.O. 1970, c. 25, s. 8.

73. *Supra*, footnote 57.

74. Remarks of James Clare, Better Business Bureau of Canada Annual Meeting, May, 1975 describing a conversation with manufacturer from southern Ontario who indicated that he did not wish to have a dispute concerning his plastic products decided by a retired school teacher, a fisherman from the Maritimes and a clergyman from the Yukon Territories.

75. *Supra*, footnote 65.

76. *Supra*, footnote 35.

77. G.R. Bretton, "Commercial Arbitration: Judicial Review of Proceedings and Awards" in Fridman, *Studies in Canadian Business Law*, Butterworths, 1971.

78. *Supra*, footnote 35.

79. 54 Judicature, no. 2, August-September.

80. Ibid.