

2-1-1978

A Small Claims Court for Nova Scotia - Role of the Lawyer and the Judge

Christopher S. Axworthy

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Courts Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Christopher S. Axworthy, "A Small Claims Court for Nova Scotia - Role of the Lawyer and the Judge" (1977-1978) 4:2 DLJ 311.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

1. *Introduction*

Nova Scotia is one of only three Canadian provinces without a small claims court.¹ The rationale behind the establishment of small claims courts throughout North America has been the need to provide access to the avenues of justice for persons with claims that are small in monetary terms and which, because of cost, complications and delay cannot be pursued through the normal court channels. Claims with low dollar values are not necessarily small to the claimants, and it can readily be appreciated that this phenomenon will be more prevalent in lower-income groups. While all small claimants are prejudiced when the jurisdiction in which they live has no small claims court it is the poor who suffer most.

2. *The Adjudication of Small Disputes in Nova Scotia*

A. *Municipal and City Courts*

The *Municipal Courts Act*² establishes a Municipal Court, presided over by a Provincial Court Judge, in every town in Nova Scotia.³ These courts have jurisdiction in all debt and tort actions except where the title or right of possession of real estate is in dispute, up to a limit of \$500⁴ if the cause of action arose in, or the defendant resides in, the city or town⁵ or the surrounding county. These courts also have jurisdiction to adjudicate upon actions by towns or cities for the recovery of rates and taxes. Legal representation is provided for.⁶

Although informality of procedure is encouraged,⁷ it cannot be said that Nova Scotia's Municipal Courts are small claims courts in the true sense. They do not provide a forum in which people with

*Associate Professor of Law Dalhousie University

1. Prince Edward Island and Newfoundland are the other two.

2. R.S.N.S. 1967, c. 197

3. *Id.*, s. 3

4. *Id.*, s. 8

5. *Id.*, s. 8(1)

6. *Id.* s. 7

7. *Id.* s. 42

small claims can obtain a quick, cheap, and simple adjudication of those claims, with court officials available to encourage, assist and advise individuals.

A similar procedure is contained in the City Charters of Halifax, Dartmouth, and Sydney,⁸ which establish City Courts with a similar jurisdiction to that of the Municipal Courts in those cities.⁹

B. *Nova Scotia Legal Aid*

The function of a legal aid scheme is to ensure that persons are not denied legal assistance because of an inability to pay for it. However funded, a scheme is required to set priorities and in the process of so doing to set a minimum amount of claim that will qualify the claimant for the receipt of its services. Claims below that minimum will, therefore, go uncared for and the claimants unrepresented.

While a small claim in dollar terms may be uneconomical for the legal aid scheme to pursue it may be a large amount to the claimant, considering his disburseable income. In these circumstances, even if the claimant satisfies the scheme's earning tests,¹⁰ there will be instances of claims not being pursued. While at present there is no minimum amount of acceptable claim laid down as a matter of policy by Nova Scotia Legal Aid, it is unlikely that a claimant with a claim valued at less than \$75 would receive assistance. In certain cases, however, the legal aid lawyer might feel that a smaller claim could be pursued. Also the claim might be pursued on the understanding that the claimant covers any disbursements. This being the case, then, there is the probability of many small claims not being pursued. There are also many claims held by persons ineligible for legal aid which are not pursued because of the cost involved.

8. See e.g. Halifax City Charter, City Ordinance 107

9. These procedures are discussed in some detail in R. W. Kerr, *Small Claims Courts In Nova Scotia*, A Legislative Research Project, Dalhousie Law School, 1966.

10. In Nova Scotia a claimant is eligible for Legal Aid in the following circumstances:

Individual (no dependents)	\$3,000 p.a. maximum
Married with no children	\$4,200 p.a. maximum
first dependent	\$300 extra
every other dependent	\$180 extra

These amounts were laid down in 1970 and, as the result of inflationary trends, are now quite outdated. As a result, certain liberties are taken with them when the need

3. *Proposal for the Establishment of a Small Claims Court for Nova Scotia*

In an attempt to increase the impetus in Nova Scotia towards a small claims court the Law Reform Advisory Commission has drafted and circulated a *Provincial Small Claims Court Act*.¹¹

Small claims courts present a number of very difficult and interrelated problems. An effective statute establishing a small claims court must be based upon an accurate assessment of the constituency to be served by the court. Some decision must be made as to whether any persons or classes of persons are to be prevented from using the court. Jurisdiction, both monetary and subject, must also be established. Consideration must be directed towards whether a small claims court is, by its very nature, an unsuitable forum for hearing certain actions. For instance, defamation, replevin,¹² or disputes in which the title to land is in question, or in which the validity of a bequest or devise is disputed,¹³ have been precluded in some jurisdictions. The question of what remedies should be available in small claims courts must be studied. It might be, for instance, that such courts should be given novel powers of settling disputes and granting remedies.

Methods of simplifying rules of procedure and evidence so that laypersons can understand the functioning of the court process should also be the subject of investigation. Quebec has excluded lawyers from its small claims court¹⁴ and the effect and application of a similar exclusion in Nova Scotia must be contemplated in framing legislation in this province. The actions of the judge are of crucial importance to the effectiveness of a small claims court. It is submitted that legislation dealing with small claims in Nova Scotia should stipulate the duties of these judges only after careful consideration of their role and the special function of the courts in which they operate. Unfortunately, the proposed Act does not attack these difficult and contentious issues. If a small claims court is to be introduced into Nova Scotia, and if it is to be suited to the task, it is submitted that the enacting legislation must deal with these issues.

arises. For instance, if the payment of installments on debts takes up a large part of the claimant's income, the maximum salary permitted for eligibility may be raised.

11. Copies of the draft act proposal are available from the Commission's office at 1690 Hollis Street, Halifax, Nova Scotia.

12. For instance, the Ontario *Small Claims Act*, R.S.O. 1970, c. 439, precludes both actions (at s. 54)

13. See e.g. the Alberta *Small Claims Act*, R.S.A. 1970, c. 343, s. 4(1)

14. Code of Civil Procedure of the Province of Quebec, art. 955

Elsewhere the writer has discussed the question of whether or not small claims courts should discriminate between classes of claimants.¹⁵ It is submitted the most satisfactory method of controlling the abuse of these courts by business interests is not to exclude them altogether but rather to restrict the availability of default judgments by requiring claimants actually to prove their claims whether or not the defendant appears at the hearing.¹⁶

Small claims courts have been set up to enable individuals to obtain justice for small claims to provide an avenue to the judicial system for those who otherwise would have claims go unsatisfied. An effective small claims adjudication procedure is fast, cheap and easy to use. This article will discuss the role of the lawyer and the judge in facilitating the achievement of these objectives, and the implications for Nova Scotia.

4. *Legal Representation and Small Claims Courts*

There can be little doubt that the right to legal representation protects individuals from pitfalls in the law and that this right should be curtailed as little as possible. It is submitted, however, that in the area of the small claims court there is a serious question as to the usefulness of the presence of lawyers,¹⁷ and, in fact, there is evidence to suggest that their presence has had a debilitating effect upon the courts.¹⁸ The prime reason for this has been the desire, perhaps unconsciously held, by the legal profession to mould the small claims court into a forum in which it feels comfortable and wherever possible to encourage the handling of disputes as far as procedure and evidence are concerned, in the same way as in the ordinary courts. Since judges, almost without exception, are lawyers it is not difficult for them to accede to such requests. This

15. See C.S. Axworthy, *Controlling The Abuse of Small Claims Courts* (1976), 22 McGill L.J. 480, at 481-5

16. *Id.*

17. R. J. Fowks, *Small Claims Courts: Simplified Pleadings and Procedures* (1968), 37 Bar Association of Kansas Journal 167, at 171

18. See e.g. J. W. Samuels, *Small Claims Procedure in Alberta*, Research Project No. 4, A Report to the Institute of Law Research and Reform of Alberta, 1969, Tables 10 and 12; J. R. Gerbrandt, T. Hague and A. Hague, *A Preliminary Study of the Small Claims Procedure in Manitoba*, 1972, Table 7; J. Weiss, *Little Injustices — Small Claims Courts and the American Consumer*, 1972, at 100; National Institute For Consumer Justice, *Redress of Consumer Grievances*, 1972, at 203; K.J. Dore, Third Report of the Consumer Protection Project, Fredericton, N.B., 1976, at 309 ff.

leads to an unnecessary rigidification and formalization¹⁹ without which small claims courts would be far more effective.

The presence of lawyers increases the cost of litigating any claim: in the realm of small claims, where it is essential to keep costs down in order to make it worthwhile to litigate, this is another important reason to question the usefulness of the legal profession.²⁰

The United Kingdom Consumer Council report *Justice Out of Reach*²¹ stated that solicitors were not very interested in consumers' complaints for three reasons: 1) financially it was unprofitable;²² 2) many were not used to handling contentious matters in court; and 3) clients who are personally involved harass the solicitor and make him or her uncomfortable. (The impersonal task of completing documents does not suffer from this drawback.) Faced with these reasons, there would appear to be little opposition (at least from the legal profession) to excluding lawyers from small claims courts altogether. This in fact was recommended in the U.K. report.²³ This impression would, however, seem misplaced at least if the reaction of the Quebec bar to Article 955 of the Code of Civil Procedure, which prohibits legal representation in these courts, is any guide.²⁴

The Quebec bar took the view that, while procedures should be set up to enable individuals to litigate their claims without representation, the right of litigants to legal representation (should they wish to use it) should never be taken away.²⁵ It also contended that the exclusion would decrease the workload of many lawyers. It is worth noting, at this stage, that Quebec is the only Canadian jurisdiction barring lawyers from small claims courts.²⁶ Some

19. (1969), 5 Col. J. of L. & Soc. Probs. 47, at 65; C. Pagter, R. McCloskey and H. Reinis, *The California Small Claims Court* (1964), 52 Calif. L. Rev. 876

20. A. M. Jewell, *Do The Small Claims Courts Portend An Informal Trial Procedure?* (1974), 49 Cal. St. Bar. J. 459, at 462

21. 1970, London, H.M.S.O., at 10

22. See also R.J. Hollingsworth, W.B. Feldman and D.C. Clark, *The Ohio Small Claims Court: An Empirical Study* (1973), 42 U. Cin. L. Rev. 469, at 498

23. *Supra*, note 21, at 31

24. L. LaPierriere, *L'avenir des professions juridiques en regard du bill 70* (1972), 32 R. du B. 2; cf. F. Forbes, *What the Legal Community Needs To Know About the Small Claims Court* (1973), 6 Creighton L. Rev. 317, at 327. Article 956, however, permits an employee to represent a claimant or a defendant, and this presumably permits a "house lawyer" to appear. See *Demeule v. Canadian National Express*, [1973] R.P. 1 (Cour. Prov.). The U.S. position is dealt with in *Prudential Insurance Co. v. Small Claims Court* 173 P 2d 38 (Cal. D.C.A. 1946).

25. M. J. Trebilcock, *Private Law Remedies For Misleading Advertising* (1972), 22 U. of T. L.J. 1, at 16

26. *Supra*, note 24

provinces do, however, discourage legal representation by providing relatively low ceilings for costs.²⁷ Under the British Columbia and Saskatchewan statutes, no costs for legal fees are recoverable at all.²⁸ In Nova Scotia little has been done to reduce the cost of legal representation at trials of small claims. The costs awarded to a successful party in a disputed action in the Halifax City Court can amount to \$50 plus disbursements.²⁹ Fees for appearances and other related activities in actions under the *Municipal Courts Act*³⁰ are as laid down in *The Costs And Fees Act*³¹ and are, therefore, the same as for County Court actions.

The argument that to bar legal representation is a drastic step because it prevents both plaintiffs and defendants from having their cases espoused for them by a lawyer should not be taken at its face value. It is clear that the main beneficiaries of the right to counsel in small claims courts are those interested in the litigation from a commercial point of view. Few individuals have legal representation at small claims court hearings.³² The price of legal representation is so high in comparison to the size of the claims involved that individuals simply cannot afford legal help. Commercial enterprises, on the other hand, are not as perturbed about cost. If the cost of discounting a debt to a collection agency is more than the lawyer's fees to enforce it in the small claims court the latter approach will be the one chosen. Private individuals will not normally have the luxury of a choice. If they wish to enforce a claim or defend an action brought against them they will have to do so without legal help or not at all.

To retain the right to legal representation will do nothing to help individuals who need help most because they do not, and, it is submitted, frequently cannot afford to, use a lawyer to help with the pursuit of their cases. Those who need help are not given it by the provision for legal representation: in fact, if anything, the opposite holds true because it means the commercial plaintiffs can use legal representation to enforce their claims against *pro se* defendants, giving them an extra advantage over individuals.³³

27. *E.g.* R.S.O. 1970, c. 439, s. 104; but see s. 110. R.S.M. 1970, c. C260, s. 88(1); R.S.A. 1970, c. 343, s. 44

28. R.S.B.C. 1960, c. 359, s. 80; R.S.S. 1965, c. 102, s. 22

29. *Supra*, note 8, s. 25(25)

30. *Supra*, note 2 at s.30

31. R.S.N.S. 1967, c. 63

32. See *e.g.* *Justice Out of Reach*, *supra*, note 21, at 15; Dore, *supra*, note 18

33. See *Justice Out of Reach*, *supra*, note 21, at 31

Of course, an employee (who may or may not be a lawyer) who appears in the small claims court on behalf of his company with any frequency will acquire a mastery of the skills required for the successful pursuit of cases in the court. A company representative who is not a lawyer will not, however, normally have acquired the knowledge and experience of the adversary system to impress upon the small claims court in the way lawyers can.³⁴

5. *The Problems*

There are, then, three principal problems involved in legal representation before small claims courts:

1. The rigidifying effect on the procedure of the Court;³⁵
2. The increased costs; and
3. Business claimants with legal representation are invariably pitted against *pro se* individual defendants.³⁶

These three principal problems will be dealt with in turn but it is worthwhile pausing for a moment to question the validity of the adversary or gladiatorial process in this context. The view is expressed that, it is not as fair as might at first be thought. California Small Claims Court Judge Jewell writes:³⁷

The formal adversary procedure requires almost ideal conditions in order to function well. From my observations, this does not often occur. Either one lawyer is very superior in ability to the other, or he and his client are much better financed, or he and his client are so emotionally motivated as to expend far more energy, effort and money in litigating than the case is reasonably worth. Any of these factors results in a considerable advantage over the other litigant I have serious doubts whether we are producing as much justice per case as we like to believe. Thus, I am not persuaded that the formal adversary procedure is the last step in man's pursuit of justice.

34. See T. Ison, *Small Claims* (1972), 35 Mod. L. Rev. 15, at 32

35. (1969), 5 Col. J. of L. & Soc. Probs. 47, at 58, 59. It has recently been said that the right to legal representation and the conduct of litigation in a gladiatorial fashion preserves "in the modern world the archaic theory of litigation as a fair fight, according to the canons of the manly art, with a court to see fair play and prevent interference — what Dean Wigmore has called the sporting theory of justice. This production machine requires highly skilled personnel and almost unlimited time to properly operate. It is slow. Its production capacity is very limited. It is thus very expensive to operate" per Jewell, *supra*, note 20, at 462.

36. See note 18, *supra*

37. *Supra*, note 20 at 463

a) *The Rigidifying Effect*

There is a considerable body of evidence illustrating the tendency of small claims courts before which lawyers can appear to become more rigid in procedure with the passage of time.³⁸ It also appears that hearings in which lawyers are present on both sides generally proceed in accordance with the rules of procedure and evidence pertaining in the higher courts.³⁹ This is not a surprising phenomenon. Lawyers accustomed to the adversary system in other courts want the same procedures to apply in small claims courts.⁴⁰

It has been suggested that if lawyers were forbidden to hinder the informal and fast process of the court with objections and delays, their exclusion would be unnecessary.⁴¹ This proposal suffers from the fact that the presence of lawyers over a period of time is likely to wear down any opposition to increased formalization;⁴² “. . . when lawyers appear regularly, courts tend to become more formal, more forbidding, slower and altogether less geared to the individual.”⁴³ Procedural rules tend to grow up even where expressly provided against.⁴⁴

There is, then, evidence that the availability of legal representation tends to formalization and rigidification of small claims courts.

b) *Increased Costs*

In those jurisdictions in which lawyers are permitted and normal legal fees can be charged as costs, the cost of pursuing a claim in a small claims court will be higher.⁴⁵ It is not only court costs that are involved in this assessment. Delay is also costly. As R. L. Walker

38. *Supra*, note 21, at 25

39. *Id.* See also Hollingsworth, Feldman & Clark, *supra*, note 22, at 500

40. *Supra*, note 34, at 32

41. S.G. Olson, *The Establishment of Small Claims Courts in Nebraska* (1967), 46 Neb. L. Rev. 152, at 157

42. (1971), 121 New L. J. 299; U.K. Consumer Council, *Justice Out of Reach* (1970), *supra*, note 21, at 31

43. *Id.*, at 31

44. *Problems of Small Claims Courts* (1971), 121 New L.J. 229. Judges, registrars and lawyers have been trying their best to “simplify, shorten, and cheapen the procedures of the law, and the result is the procedure which we have today”, R. Egerton, letter (1971), 121 New L.J. 70

45. See (1934), 34 Colum. L. Rev. 932, at 937; Pagter, McCloskey and Reinis, *The California Small Claims Court*, *supra*, note 19, at 878; *Small Claims and the Poor* (1969), 42 South Cal. L. Rev. 493, at 495

46. R. L. Walker, *Compulsory Arbitration Revisited*, [1966] Penn. B. Ass. Q. 36, at 43

has said, in a rather colourful style, with relation to what must be done to obtain an effective small claims adjudication procedure:⁴⁶

“First and foremost must be the minimization of lawyer-caused delay. To the lay litigant “pigs is pigs” and delay is delay. It seems clear from the experience . . . that many lawyers, left to determine the rate of flow of litigation without court supervision, will move with glacial speed. Perhaps this could be developed into a new corollary to Parkinson’s law — ‘the delay in a lawsuit increases according to the square of the number of lawyers involved’.”⁴⁷

Costs (arising from delay, from the use of solicitors to complete forms and acting as a representative in court) are of crucial concern in the success or failure of a small claims court. One of the main reasons for setting up this type of court is to provide an inexpensive procedure for the settlement of claims⁴⁸ which would not otherwise be enforced. If the costs are too high, and perhaps “too high” means higher than there is an absolute necessity to be, this avenue will be a *cul-de-sac*. Lawyers increase the costs involved in proceeding with a claim; therefore, *prima facie* there is good reason to exclude them from the small claims court.

c) *Represented Businesses v. pro se Individuals*

The third problem which occurs if legal representation is unrestricted involves business claimants being represented and appearing against unrepresented individuals. It is also possible that unrepresented individuals may not appear in court for fear of being humiliated by a lawyer representing the other side.⁴⁹

If representatives are to be permitted, it has been suggested⁵⁰ that they merely be permitted to answer questions posed to them by the judge or the opposing party and that they be prevented from advocating their client’s case. It appears unlikely that such a provision would be successful.⁵¹ Where a business litigant is represented against a *pro se* individual on the other side the scales are indeed heavily weighted against the latter.

47. See also (1969), 5 Col. J. of L. & Soc. Probs. 47, at 65

48. See e.g. F. P. Renner, *Statutory or Constitutional Provisions Relating to Participation by Attorney or Representative in Small Claims Court* (1947), 167 A.L.R. 827, at 828

49. Hollingsworth, Feldman and Clark, *supra*, note 22, at 500

50. *Inter alia* by Trebilcock, *Private Law Remedies for Misleading Advertising*, *supra*, note 25, at 16

51. See *supra* text to note 38 ff.

6. *The Available Solutions*

Once it is accepted that legal representation in the context of small claims courts is a problem, a suitable solution has to be sought. There are essentially three possibilities:

- i) exclude lawyers and give the judge powers beyond those of a referee. Give the judge complete control over the proceedings, permit the asking of questions by the judge, and give him or her complete freedom to ensure that all available evidence is presented to the court. In this way, the judge can ensure that neither party obtains any benefit as the result of experience in the court;
- ii) provide the individual with free legal advice;
- iii) only permit the facts as conceived by the party to be stated by that party or his or her representative — do not allow the representative to advocate the claim or defence.

(i) *Exclusion of Lawyers From the Small Claims Court*

It is submitted that when a small claims court is established in Nova Scotia lawyers should be excluded from it. This solves the basic problems once and for all. This really has to be done, however, by a statutory prohibition; although it has been suggested that it can also be done by providing that lawyers' fees will not be recoverable.⁵² It is submitted that this would effectively remove the influence of lawyers from the court. It would, however, still enable plaintiffs or defendants who were prepared to pay a lawyer to represent them (even though no reimbursement for those costs would be received in the event of a victory) to sue using a legal representative. Presumably in any case in which it would be cheaper to use a lawyer than to use another collection procedure a lawyer will be used. The provision that lawyers' fees be non-recoverable or minimal would, however, clearly discourage their use in many instances.

The exclusion of lawyers from small claims courts will have detrimental side effects. It is clear that the absence of lawyers involves, at least potentially, a sacrifice of accuracy and in some cases a lessening in the soundness of judgment.⁵³ It may mean that appropriate pieces of evidence are not produced by the parties or their witnesses because they were not aware or informed that they would be useful. Similarly, important defences may be unknown to

52. This view has received legislative sanction in British Columbia and Saskatchewan, see *supra*, note 28

53. Forbes, *supra*, note 24, at 328

the parties, and they may be unable for various reasons to present their own cases.⁵⁴ The judge must ensure that the difficulties are overcome, that the required information is conveyed to the parties and that they are aided as much as possible in the preparation of their cases and the presentation of their arguments.

Lawyers who are on retainers may often find themselves in a rather difficult position with their clients when dealing with small claims. Where the jurisdiction in which they practice precludes lawyers from appearing, the best they can do is to counsel their client, or an employee of the client, as to the best way of handling the litigation in court. Provided the procedure is straightforward and the client or employee is reasonably articulate, little disadvantage should be suffered. The consumer, on the other hand, who may be faced with such an opponent receives none of the benefits of such advice, counsel, or assistance. While lawyers can help prepare their client's case in spite of not being able to appear, the individual will get little or no help. In court the only assistance the claimant might receive will be supplied by the judge of the small claims court. At the pre-trial stage assistance can be provided by clerical staff attached to the court. Lawyers, then, even though excluded, can still be useful to the clients, and can still give rise to difficulties on the part of individuals. In this regard individuals must receive the same sort of help if the contest is to be a fair one.

After judgment lawyers can also be useful in advising their clients as to collection methods and procedures. Again, this advice *must* be available to individuals without lawyers and this only the court can provide. The problems caused by lawyers helping their clients behind the scenes, as it were, must be countered. It must be recognized that such assistance is available and given, and aid must be supplied to the individuals by the court. The exclusion of lawyers from small claims courts will not affect this particular phenomenon; indeed it may even increase its scope.

(ii) *Legal Aid*

If lawyers are not excluded from the court in a direct manner as outlined above, it is submitted that the next best solution is to provide the individual with free legal assistance: in other words, to counter the business litigant's advantage in the most traditional way. There is one type of situation in which the adoption of this

54. Hollingsworth, Feldman and Clark, *supra*, note 22, at 498

suggestion could arguably be more effective than total exclusion. Where a business claimant acts through an employee who has become accustomed to the procedure in the small claims court, the individual will require protection. Against such a representative, something will be required to protect the individual to redress the balance. It is eminently preferable that this be left to the judge, but it can be achieved by supplying legal advice, gratuitously, to the individual. To adopt the latter solution will, of course, increase the operating costs of the court, even though that increase will not directly be paid for by the litigants. Some commentators have felt that this cost is worthwhile,⁵⁵ and others have felt it to be a far better solution than total exclusion.⁵⁶ However, if the English position is any guide, this service is unlikely to be available if a lawyer would not advise bringing an action.⁵⁷ As far as small claims are concerned, this criterion virtually excludes legal aid. It would seem that in Nova Scotia somewhat less stringent criteria are utilized, but claimants with claims of less than \$75 in value will still probably not receive legal aid. As a result, free legal aid does not provide an answer.

It has been suggested⁵⁸ that a number of full and/or part-time lawyers be appointed and attached to the court, to be paid out of public funds, to act on behalf of litigants in cases in which the small claims court judge certified that representation would be desirable. As well as being useful in cases where individuals are faced by corporation employees well versed in the court procedure these lawyers would also be useful when complicated legal problems arise. Although the traditional attitudes of the legal mind have been said to create complexity where there is none and to leave the courts with such defects as "inaccessibility, excessive technicality, a lack

55. *Supra*, note 25, at 10

56. B. Moulton, *The Persecution and Intimidation of the Low-Income Litigant As Performed by the Small Claims Court in California* (1969), 21 Stan. L. Rev. 1657, at 1671; *Small Claims Courts And The Poor*, *supra*, note 45, at 502; *Small Claims Courts Revisited* (1969), 5 Col. J. of L. & Soc. Probs. 47, at 65; D. Coats, C. D. Gantz and B. Heathcote, *Small Claims In Indiana* (1969-70), 3 Ind. Leg. For. 517, at 534; *Problems of Small Claims Courts* (1971), 121 New L.J. 229; *The Small Claims Bill* (1971), 121 New L.J. 95; *Small Claims and Legal Representation* (1971), 121 New L.J. 3; H.J. Fox, *Small Claims Revision — A Break for the Layman* (1971), 20 De Paul L. Rev. 912; A. Prujinier, *L'ambiguité des «small claims courts» et ses effets sur leur adaptation québécoise* (1971), 12 C. de D. 1975, at 182

57. *Justice Out of Reach*, *supra*, note 21, at 17

58. *Small Claims and Legal Representation*, *supra*, note 56

of specialist expertise in particular classes of litigation, and above all dilatoriness,"⁵⁹ it has also been said that these defects could be overcome by this special type of lawyer and that costs of the traditional method of settling disputes would be cut.

It would be advisable for lawyers attached to the small claims court to advise and aid individuals in obtaining redress outside the small claims court structure where this appears to be beneficial. They could also provide a useful service by keeping judges and clerks of the courts up-to-date on recent developments in the law dealt with in small claims courts.⁶⁰ For such a scheme to be effective, a new breed of lawyer would be required.⁶¹ What is envisaged is a legal aid lawyer with a special skill in dealing with small claims.⁶²

The problem is much more acute if commercial plaintiffs are permitted.⁶³ If, however, only individuals could sue in the court, the oppression characteristic will be to a great extent alleviated. It has been said:

"The rule barring attorneys in small claims court is a two-edge sword. Whatever is gained in simplification of procedure is counterbalanced by the experience which plaintiffs derive from being frequently represented by attorney-employees. Failure to provide defendants with any legal advice only tips the scales more dramatically in plaintiffs' favour."⁶⁴

There is considerable merit to this, and in many cases valid defences might be raised if the defendant knew of his rights and knew how to assert them. Where there is no legal representation to bring the defences to light and express them, there is the considerable danger that commercial litigants can bulldoze their cases through the small claims court with little or not examination of their merits. Much more careful scrutiny of the legal position of defendants is ensured when they have legal representation.⁶⁵ As

59. *Id.*, at 95. See also The Report of the Committee On Administrative Tribunals and Enquiries (1957), Cmnd. 218

60. The Small Claims Study Group, *Little Injustices: Small Claims Courts And The American Consumer*, 1972, at 165

61. *Supra*, note 56, at 95

62. *Representation Or Not — And the Price* (1971), 121 New L. J. 50. See also (1969), 42 South Cal. L. Rev. 493, at 502, 503; Coats, Gantz and Heathcote, *Small Claims In Indiana*, *supra*, note 56, at 535, 536; and Fox, *Small Claims Revision — A Break for the Layman*, *supra*, note 56, at 913

63. *Small Claims Courts Revisited*, *supra*, note 56, at 67

64. *Small Claims Courts And The Poor*, *supra*, note 45, at 502

65. Moulton, *The Persecution and Intimidation of the Low-Income Litigant As Performed By The Small Claims Court In California*, *supra*, note 56, at 1661

most individuals are not used to public speaking and appearing in a court before a judge they are at a natural disadvantage — one which could be overcome by having a lawyer put forward arguments on the litigant's behalf.⁶⁶ It may even be that without representation an individual may be so discouraged and frightened that he simply will not appear to defend against the claim, even if he feels he does not owe the money claimed.⁶⁷

(iii) *Lawyers As Reporters*

The third possible solution suggests that lawyers might be permitted to appear in court not as advocates of their clients' cases but as reporters of facts of their clients' cases. Small claims courts face difficulties because individuals who appear before them to advocate their own cases are often inarticulate. As a result it is often a long, tedious and tortuous process to obtain the full facts. The presentation of the facts could be done in a coherent fashion by lawyers.

It is submitted, however, as stated earlier, that if lawyers are permitted to appear before small claims courts these courts will tend to become more like traditional courts with the commensurate complicated rules of procedure and evidence. In spite of the arguments to the contrary itemized above, legal representation should therefore be effectively discouraged and the function of the judge extended to cope with these problems. Despite opposition from the bar, it is submitted that the best method would be to include a provision in the small claims court statute prohibiting lawyers from representing claimants or defendant.

7. *Advocacy or Inquisitorial Process*

Having discussed the relative merits of legal representation before small claims courts, it is worthwhile pausing to compare processes of adjudication employing an advocacy approach to those utilizing an inquisitorial approach. G. W. Adams⁶⁸ is strongly critical of the use of an inquisitorial process to adjudicate small disputes and favours a small claims court with lawyers present functioning in their traditional adversarial manner.

66. *Id.*, at 1665

67. *Id.*, at 1671

68. G. W. Adams, *The Small Claims Court And The Adversary Process: More Problems Of Function And Form* (1973), 51 Can. Bar. Rev. 583

Adams states that, in order to fulfill the objective of fostering civil justice, courts must assist in the adjudication process, do so impartially, and in such a way as to carry out the wishes of the legislature and society as a whole.⁶⁹ One could not argue with these assumptions, but he goes on to say that without lawyers a small claims court cannot fulfill these objectives. He suggests that only in the presence of lawyers can a judge be seen to be impartial; in other words, if the judge is attempting to obtain the views of each party as to what transpired, he will appear by his questions and comments to favour one party or the other.⁷⁰ A conclusive retort to this suggestion would appear to be that a judge can equally appear partial in a litigation process in which lawyers are present. Admittedly, he may not have the same scope for conveying this impression but, nonetheless, may do so. The crucial aspect would appear to be the person of the judge, not the presence or absence of lawyers.

Adams also indicates that pre-trial negotiations and settlement are not possible without an adversarial approach.⁷¹ The success of conciliation procedures would appear to refute this idea. Settlement and negotiation is not the sole domain of the adversary process. It is submitted that Adams' praise of the adversary process is not wholly justified and that the results he claims for the process may also occur with a nonadversary approach.⁷²

Also worthy of criticism is Adams' approach to the inquisitorial process. He postulates a very rigid form of terminology and suggests that as the arbiter has to play three roles of judge, plaintiff, and defendant he cannot be impartial.⁷³ Again, this would appear to be a problem of personnel rather than of the process. He concludes that the adversary process is much more equitable than the inquisitorial process,⁷⁴ but it is submitted that there is no validity in this conclusion, and that Adams' other arguments in favour of his argument are similarly not persuasive. He says that the "inquisitorial process does not permit the decision-maker to remain passive and refrain from formulating a premature and possibly erroneous working hypothesis."⁷⁵ Why this is so is difficult, if not

69. *Id.*, at 591

70. *Id.*, at 593, 595

72. Jewell, *supra*, note 20, at 461

73. *Supra*, note 68, at 596, 597

74. *Id.*, at 597

75. *Id.*, at 597

impossible, to fathom. It is not necessary for the arbiter or judge to come to a working hypothesis merely because he is asking questions. In fact it would be necessary for the judge to have two working hypotheses — one as a basis for questioning the claimant's argument and one as a basis for questioning the defendant's argument as would be the case with the adversary process. There would appear therefore to be no justification for the statement that the inquisitorial process "forces [the judge] to formulate a working theory in order to effectively investigate the facts, distinguishing the relevant from the irrelevant. It is this premature hypothesis that promotes biased outcomes", certainly as far as small claims courts are concerned.⁷⁶

Adams' interpretations of the inquisitorial process appear far too restrictive. He suggests that the parties are passive⁷⁷ when there is no reason at all why this should be the case. In fact, active litigants will be necessary. Questions will be directed to them and they will be entitled and required to give their versions of what occurred. There would appear to be no reason to categorize litigants in an adversary process as active and litigants in an inquisitorial process as passive. Such may be the case in some situations but, that is not the fault of the process but of the personalities involved and need not be so in all, or even most, cases.

A quotation for Adams will, perhaps, illustrate his narrow interpretation of the inquisitorial process as it applies in small claims court situations. He says:

The participants are not given sufficient opportunity to give their reasons, or to submit their questions to the decision-maker and

76. Adams mentions the behaviour of labour arbitration tribunals as authority for these observations. There would appear to be no reason why this experience should be the same in small claims courts. Also referred to in this regard is J. Thibaut, L. Walker and E. A. Lind, *Adversary Presentations and Bias in Legal Decision-Making* (1972), 86 Harv. L. Rev. 386, in which is detailed the results of investigations into the area prompted by a preference stated by L. L. Fuller for the adversary process in *The Adversary System In Talks On American Law* (H. Berman, ed., 1971, at 43 and 44), which preference is quoted by Adams, at 594. In the Thibaut, Walker and Lind article the authors concluded (at 401), first, that "an adversary, as compared to an inquisitorial, presentation of evidence *may* make a substantial difference in the outcome of cases"! [emphasis added] and, secondly, (at 386, in the headnote to the article) that their "results lend *some* support to the proposition that an adversary presentation is an effective means of combating bias". [emphasis added] It is submitted that this is hardly sufficient support upon which to base a decision.

77. *Id.*, at 597

the decision-maker cannot possibly foresee all of these positions."⁷⁸

If, rather than being given these characteristics, the process provides ample opportunity for participants to give their reasons and submit questions to the decision-maker, the argument fails, and surely any small claims court process which is going to have any chance at all of being effective will provide such an opportunity. Adams' criticism does not stand up because the process will still be inquisitorial in nature but more flexible than his model.

Another point that should be mentioned is Adams' criticism of the judge's role as conciliator on the ground that there is a possibility that as conciliator the judge may accept one point of view and then allow that to affect his view when acting as a judge in the event that the conciliation fails.⁷⁹ This is a distinct possibility but it is submitted that it is not just a criticism of the inquisitorial process. If the judge acts as conciliator in an adversary-type system the same argument will apply. Also, of course, the judge need not act as conciliator in either the inquisitorial or adversary process. This, then, is not a criticism of a process but of an institution which could be, but need not be, an aspect of any type of adjudication process.

As it is not accepted that the inquisitorial process is inherently worse than the adversary process in theory, and definitely not in practice, there is little purpose in looking at the ways to improve the adversary process suggested in Adams' conclusion. One comment is required, however. The answer in small claims adjudication is seen by Adams to be the attachment of lawyers to the small claims court to represent litigants who cannot afford lawyers.⁸⁰ As previously stated, not only would this be very expensive (detracting from one of the essential aspects of small claims adjudication — cheapness) and therefore not be attractive to legislatures, it would increase the rigidification of the court procedure, as has been documented in the United States, and contribute to the individual's confusion over what is happening to him.⁸¹

In conclusion, then, it is submitted that the most beneficial course of action, in terms of cost and service, both theoretically and practically, is for the judge to be at the centre of the proceedings, with the result that legal representation of the parties is unnecessary.

78. *Id.*, at 597

79. *Id.*, at 598

80. *Id.*, at 613-616

81. This is discussed *supra*

8. *The Role and Function of the Judiciary in the Small Claims Court*

As alluded to earlier, the judge in the small claims court should not be a judge in the traditional sense. The judge's activities and approach, if they are to be effective, must be unconventional. He is going to be the key figure in the court. It is, therefore, essential that his duties and qualifications be carefully considered.⁸² The quality of the judges who serve on this court is a pressing problem because of the expansion of the traditional role envisaged and required.⁸³ It is also submitted that the court cannot effectively function with a passive judge merely acting as a sort of referee. Active participation in the hearing is essential.⁸⁴ A civil version of the *juge d'instruction* in France is required.⁸⁵ Ison has said that more than anything else "the judge's function must be recognized as first and foremost the task of investigation, with adjudication being on ancillary role".⁸⁶

The role of the judge need not be confined to the walls of the courtroom, or wherever a hearing might be held, nor indeed within the parameters of the trial. The judge can be much more involved than is the case in normal pre-trial procedures and investigations. Article 975 of the Code of Civil Procedure of the Province of Quebec requires the judge to attempt a reconciliation of the parties whenever possible; in other words to try to get the parties to amicably settle their dispute. Only after this attempt fails (and, of course, it will fail in a large number of cases because the institution of an action indicates that at least one of the parties is not favourably inclined to conciliation) is the judge to proceed to a hearing.⁸⁷ It is, of course, expecting a great deal of any person to provide that he be

82. See e.g. Olson, *The Establishment Of Small Claims Courts In Nebraska*, *supra*, note 41

83. See e.g. (1969), 5 Col. J. of L. & Soc. Probs. 47, at 50. In this regard, R. Pound, in *The Administration of Justice in the Modern City* (1912-13), 26 Harv. L. Rev. 302, wrote at 327 that a "difficulty is that we assume a petty judge is good enough for petty causes. In these cases we must have free scope for the good sense of the judge, tempered by knowledge of the law, trained reason and experience of many causes, or we must deny justice." As one commentator has said, the "quality of judges and the nature of their service is crucial determinant of whether small claims are to work" [(1969), 5 Col. J. of L. & Soc. Probs. 47, at 55]

84. C.D. Robinson, *A Small Claims Division For Chicago's New Circuit Court* (1963), 44 Chic. B. Rec. 421, at 422, 423

85. For a good summary of the activities of this official, see J. Larguier, *The Preliminary Investigation by the French Juge d'Instruction* (1968), 19 N.I.L.Q. 32.

86. *Supra*, note 34, at 27

87. See also *Justice Out of Reach*, 1970, *supra*, note 21

involved in a conciliation attempt in which sympathies are bound to be established and then, if this is unsuccessful, make a decision on the facts as presented.⁸⁸

9. *The Role of the Judge at the Hearing*

If Nova Scotia is to have an effective small claims court, the legislation establishing it should stipulate how the judges should execute their duties and what those duties should be.

It is clear that the small claims judge must *not* portray a typical judge and must therefore not require the arguments of both sides to be presented in the traditional manner for decision. It is submitted that the best, fastest, and most equitable way for a hearing to take place is with the judge taking the central role,⁸⁹ asking the questions, eliciting the required information and helping both parties to state their cases.⁹⁰ In other words, the judge must be a sort of legal adviser to both parties and an adjudicator at the same time — a complex and demanding combination of tasks.⁹¹ The very nature of the duties will furnish the judge with a wide discretion. The judge must be free to do unusual things in unusual ways.

It is submitted that the rules of evidence should not be in effect in a small claims adjudication; at this level they can do nothing but hinder the ascertainment of the truth.⁹² The “luxury of strict adherence to formal rules of admissibility must be abandoned”⁹³ and “the positive duty to develop the facts of the case must

88. Prujiner, *L'ambiguïté des «small claims courts» et ses effets sur leur adaptation québécoise*, *supra*, note 56, at 186, but see M. H. Staring, *Conciliation In The Municipal Court For the District of Columbia* (1946), 34 Geo. L.J. 352. See *infra*

89. Hollingsworth, Feldman and Clark, *supra*, note 22, at 495-497

90. Fowks, *Small Claims Courts: Simplified Pleadings and Procedures*, *supra*, note 17, at 171; Robinson, *A Small Claims Division For Chicago's New Circuit Court*, *supra*, note 84, at 433; Coats, Gantz and Heathcote, *Small Claims In Indiana*, *supra*, note 56, at 532; Pagter, McCloskey and Reinis, *The California Small Claims Court*, *supra*, note 19, at 881; Stoller, *Small Claims in Texas: Paradise Lost* (1969), 47 Texas L. Rev. 448; Legislation Note, (1934), 34 Colum. L. Rev. 932, at 937; Pound, *The Administration of Justice In The Modern City*, *supra*, note 83, at 321 K. Foster, *The Manchester Arbitration Scheme* (1972), 116 Sol. Jo. 502; Staring, *Conciliation In The Municipal Court For the District of Columbia*, *supra*, note 88, at 360

91. Moulton thinks that a judge cannot be expected to act as a lawyer for both sides, *The Persecution And Intimidation Of the Low-Income Litigant As Performed By The Small Claims Court In California*, *supra*, note 56, at 1679; see also Pagter, McCloskey and Reinis, *The California Small Claims Court*, *supra*, note 19, at 881

92. *Small Claims In Indiana*, *supra*, note 56, at 533

93. *Id.*

necessarily fall upon the judge".⁹⁴ Clearly, if the gladiatorial aspect of the trial is removed and the rules of evidence and procedure are dispensed with the onus must fall upon the judge to ensure that the truth is arrived at without prejudice to either of the parties. In order to achieve this, it is essential for the judge to take and keep command of the trial and to ask the questions required to arrive at the truth. The lack of legal representation and the inexperience of individual litigants should be compensated for,⁹⁵ as should the fact that few individuals retain receipts or other evidence of their transactions. A decision will have to be made on the basis of what the judge hears and deduces from the appearance of the parties. Clearly this requires an approach of supreme objectivity which at least one study did not find illustrated.⁹⁶ It is also clear that if legal representation is precluded small claims court judges must be lawyers. To have a lay judge with no lawyers to aid him or her in reaching a decision would be most undesirable.

In many cases a good judge will also ensure, as a useful side effect, that the litigant can leave the court, whether after a success or a failure, understanding what occurred in the courtroom, feeling that there was a full participation in the hearing, and feeling some respect for the court and for the judicial system.⁹⁷ If the judge is ineffective in maintaining a fair and equitable hearing, individuals may feel considerable resentment for the judicial system, especially as their rough treatment was dispensed by a court supposedly set up for their benefit. The avoidance of disillusionment of a large section of society with the judicial system is a prime impetus to improve access to the legal structure. The judge, then, has an important role to play at the trial; he must be given every opportunity and discretion in order to fulfill this task effectively.

10. *The Judge and Pre-Trial Activities*

So much for the role of the judge during hearing; what should the judge's activities consist of apart from this? In other words, should

94. *Id.*

95. *Id.* at 535

96. *The Persecution And Intimidation Of The Low-Income Litigant As Performed By The Small Claims Court In California*, *supra*, note 56, at 1667: "in only a few of the contested cases observed did the judge skillfully elicit both sides of the story, help examine witnesses, and treat the plaintiff and defendant as equals in their courtroom contest". This was the case even though legal representation is not permitted in California [§ 117(g) California Code of Civil Procedure].

97. (1969), 5 Col. J. of L. & Soc. Probs. 47, at 56

there be an involvement in the case outside the confines of the trial? There are two possible situations where these questions become applicable:

1. Where an assessment of the facts presented at the hearing can best be made by going to the place where the subject matter is situated and making an examination;
2. At the pre-trial stage it should be required that some official provide assistance to both claimants and defendants; the former with regard to the completion of the required forms and advice as to evidence which might be brought to the hearing, and the latter with regard to the courses open to them. It may even be necessary to make a number of telephone calls and pay some visits to individuals to ensure that their actions are made with all the relevant information and procedures known to them.

There would appear to be no valid objection to permitting, and in fact encouraging, the judge to leave the courtroom to examine possible evidence. Endless time and money can be saved by removing the need for elaborate diagrams and submissions to the court if the judge can go and ascertain the facts personally.⁹⁸ There would appear to be no serious objection to a decision of the judge being based upon the written submissions of the parties without requiring them to appear. Similarly, a hearing conducted over a three-line telephone hook-up could very often be useful. The decision-making process, then, has scope for considerable change. One important requirement in this process is the time of judgment. It should be required that, wherever possible, as soon as the judge has considered the evidence the judgment should be rendered so as to reduce the delay to an absolute minimum. Also, the notification of recovery or non-recovery may be of immediate concern to the parties. A speedy procedure is called for and this should include the giving of the judgment.

If a clerk is appointed to the court, he or she carries much, if not all, of the pre-hearing duties. The wisdom of appointing a clerk or "investigator" to complete these tasks has been questioned⁹⁹ and it has been suggested that the judge should do them, the main reason being that it would save time and report-writing if the information were to be gleaned at first hand. Also, it may prove almost impossible to attract men of the required calibre to act as virtual

98. See U.K. Consumer Council, *supra*, note 21, at 20; Ison, *supra*, note 34, at 29

99. Ison, *supra*, note 34, at 30.

“dogs’ bodies”. It is clear, then, that the judge must be under a duty to aid would-be litigants as much as possible. It is also clear that in some instances the judge should be under an obligation to investigate allegations to ascertain if a *prima facie* case is made out by the claimant.

It is submitted that in any legislation setting up or dealing with small claims courts there should be provisions dealing with the judicial function.¹⁰⁰ Quebec, as was mentioned, has touched upon this¹⁰¹ and provides that the judge should be able to leave the courtroom to examine evidence,¹⁰² that the judge should attempt a reconciliation of the parties,¹⁰³ that he or she should conduct the hearing according to rules of evidence, but that he or she can proceed with regard to procedure as he or she pleases.¹⁰⁴

11. *Conclusions As To the Role of the Judiciary In Small Claims Courts*

It is submitted that a statute dealing with claims courts in Nova Scotia should specify the following:

1. The conduct of the trial should be at the complete discretion of the judge.
2. The judge should have a positive duty to develop all the facts of the case. He or she should ask questions of both the parties and their witnesses, should be able to summon any person to appear as a witness and should ensure that one party does not succeed in dominating the other. The judge should be required to act as an investigator and an adjudicator. If the evidence is situated outside of the courtroom, the judge should go and see it and assess it. The possibility of novel methods of hearing cases should not be excluded.
3. At all times the judge should be mindful of the purpose of the court to bring about a speedy, cheap and fair adjudication of small claims which cannot be pursued through the normal court structure, due primarily to cost considerations.
4. As far as pre-trial procedure is concerned, the judge should be under an obligation to ensure that anyone who needs advice (whether the need be expressed or not) receives it from the judge or from other qualified persons. Such advice should include assistance in the completion of various forms,

100. See Hollingsworth, Feldman and Clark, *supra*, note 22, at 496

101. Code of Civil Procedure, articles 973, 975-977

102. Art. 977

103. Art. 975

104. Art. 973

information relating to the simple procedures which must be followed, the kind of evidence to bring, and reassurance.

5. Any person who indicates that he or she has a valid claim should not be permitted to withdraw that claim until he or she has received consultation and advice. No withdrawal should be permitted to be made without full knowledge of the facts and knowledge that the claim will be fairly adjudicated. Positive encouragement should be rendered to ensure that a defendant knows that his or her arguments will be fairly heard, that assistance will be provided by the judge, and that the judge is not on the same side as the commercial enterprise.

Without specific guidelines as to the functions of the small claims court judiciary, it is unlikely that judges will feel free to innovate and adapt their courts to the needs of those who use them. Without guidance they are likely to consider their role to be that of traditional judges and this will reduce the possibility of success for their courts.¹⁰⁵ Legislative guidance is, therefore, essential. It is also clear that the powers granted to judges under such a system will require very capable persons to fulfill the judicial function.

12. *Qualities of the Small Claims Court Judge*

The judges must feel absolutely free from the rules of evidence and procedure of the normal court structure. There should be no desire on the part of the judge to allow any of these rules to creep into the small claims court. They must ensure that the courts assist their constituency to the greatest extent possible. They and their staff must be sensitive to the individual's problems and difficulties. They must also ensure that the proper respect is tendered to small claims courts and must, therefore, make sure that they and their staff act with the required decorum and dignity.¹⁰⁶

A judge in a small claims court must be patient and must be prepared to listen to arguments which are badly articulated, difficult to understand, whose purpose is often difficult to appreciate, and which are often boring and tedious. This may take time and although speed is essential to the success of the courts it must not be used as an excuse for rushing the parties and their witnesses. Where businesses are represented by "seasoned campaigners", or even by lawyers or legally trained persons who are full-time employees, the

105. Hollingsworth, Feldman and Clark, *supra*, note 22, at 496, 497

106. Forbes, *supra*, note 24, at 331

judge must be on guard to prevent them for acting like technical lawyers.¹⁰⁷

The judge must do all in his power to remain disinterested in the result of the case and must always ensure that his disinterest is conveyed to the parties. This may be a very difficult task¹⁰⁸ but it is essential if the efficacy of the court is to be maintained.¹⁰⁹ Consumer education is also important to the success of small claims courts and the judges should take every opportunity to present information about their courts, their roles and functions, and how and when they can be utilized.¹¹⁰

Ison is quite forthright about the type of person suitable for such a position and the incentives required to obtain the best judges possible. He says:

“If they are to function as suggested, small claims judges must be men of high intelligence, they must be in some ways more versatile than High Court judges and yet will not enjoy the same prestige, and they must above all be willing to meet the convenience of working-class litigants. How would men of sufficient calibre be attracted to the position? Probably the only way is to pay them well and appoint them young. By the time they have reached their early thirties, men of the calibre required will generally have found other positions with higher incomes, or jobs that they find more satisfying, more enjoyable, more challenging, or more prestigious. Small claims courts would fail miserably if they became, as they have in some jurisdictions, repositories for lawyers who, because of senility, incompetence, or ill health, had become an embarrassment in some other position.”¹¹¹

Clearly, without judges of high calibre, small claims courts will be, and are, ineffective. In order to attract men and women of the required calibre, Ison suggests that they be well-paid and appointed young. Well-paid they must be. Without a good financial return no capable person would think of becoming a small claims court judge. With a good salary, of course, comes the danger of attracting people who are not of the required standard. The employment decision will be a very important one. In suggesting that small claims court judges be appointed young Ison assumes a correlation between age and crusading spirit and suitability for the post. This, it is

107. *Id.*, at 332

108. *Supra*, note 68, at 594

109. *Supra*, note 68, at 597 ff

110. Forbes, *supra*, note 24, at 332

111. *Supra*, note 34, at 31, 32

submitted, does not always resolve itself in favour of persons of younger years. However, one factor which does tip the balance in favour of a younger appointee is that the younger a lawyer is the less likely he is to have become indoctrinated with the procedures of the higher court and convinced of their superiority for all purposes. It is, therefore, submitted as a guideline that those appointed to the bench of small claims courts in Nova Scotia should, whenever possible, be quite young and well-paid.

It would not appear necessary for the judges to have been practicing lawyers. Those that have not practiced will be even more divorced from the adversary system. It is submitted, however, that to appoint non-lawyers would be a mistake even if they were appointed after being trained in the basics of the law. Legally trained people such as academics could well be appointed but, bearing in mind that the substantive law must be followed to give the court any credibility at all, the appointment of non-lawyers is unlikely to be satisfactory. There is no correlation between the difficulty of a claim and its size so small claims judges like any others must be well versed in the law. As stated previously, if lawyers are not permitted to appear it is essential that the judge be a lawyer to ensure that the substantive law be followed.

The ideal situation would, therefore, appear to be that young men and women with law degrees should be appointed as judges and paid a high salary. They should have had little or not experience in the traditional court structure. They must be mentally equipped to deal with the special problems this court will produce. Great care should be taken in the selection of judges, and their particular functions and duties should always be borne in mind, for the judge is the kingpin of the adjudication process and if he or she is effective the court will be effective also.

13. *Conciliation in the Context of Small Claims*

As noted above, the United Kingdom Consumer Council in *Justice Out of Reach*¹¹² indicated that a small claims court judge should first attempt to persuade the parties to arrive at an amicable settlement. The Report quite rightly says¹¹³ it is "far more satisfactory for the parties and for society as a whole that both sides emerge from the dispute in an amicable frame of mind". It

112. *Supra*, note 21, at 32

113. *Id.*

continues, "[a] judgment assigns blame to one party, it pre-supposes that one party was wrong and the other right and so emphasizes the conflict between them. The parties are unlikely subsequently to sustain any friendly relations whereas in a freely made settlement neither is put in the wrong."¹¹⁴ Also, as noted above, the Quebec rules require the judge to attempt a reconciliation wherever possible,¹¹⁵ presumably for these reasons.

Conciliation is a method of peaceably disposing of disputes. It comprises, in essence, an attempt by the conciliator to bring the parties to a voluntary settlement but in the end requires the two parties to get together voluntarily and come to a mutually acceptable decision. "Conciliation is a desirable feature of a system of courts" writes Staring,¹¹⁶ "and if used to advantage it can be an important factor in the promotion of happiness and welfare of the community."

In describing the compulsory arbitration procedure in existence in Pennsylvania, Walker¹¹⁷ has said it is "an efficient method of disposing of small claims, an ally in the mounting battle against delay in litigation and a procedural innovation which dispenses substantial justice." Recently, arbitration procedures have been established in Manitoba and in the United Kingdom, and both arbitration and conciliation have long existed in other jurisdictions.¹¹⁸

114. See also Staring, *Conciliation In The Municipal Court For The District of Columbia*, *supra* note 88, at 353; S.C. Jackson and W. L. Taylor, *Centre For Dispute Settlement — A New Use For An Old Tool* (1969), 27 Leg. Aid Brief — Case 130; Stoller, *Small Claims in Texas: Paradise Lost*, *supra*, note 90, at 456; H. Harley, *Justice Or Litigation* (1919-20), 6 Va. L. Rev. 143, at 144 154; Coats, Gantz and Heathcote, *Small Claims In Indiana*, *supra*, note 56, at 532:

"Perhaps the greatest advantage of the conciliation conference lies in the fact that it can have a positive psychological effect on the parties involved. Whereas a trial usually leaves one and often both parties dissatisfied with the legal process and antagonistic toward the court, the judge, the lawyers, and the law, a mutually satisfactory agreement achieved away from the confusion and the technicality of the court room can result in a positive rather than a negative reaction of the parties involved. Such a reaction would be especially beneficial among those potential litigants who presently are unable to press their claims because of the expense involved."

115. Art. 975

116. *Supra*, note 88, at 364

117. Walker, *Compulsory Arbitration Revisited*, *supra*, note 46; Jackson and Taylor, *Centre For Dispute Settlement — A New Use For An Old Tool*, *supra*, note 114; Cf. M. Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies In The Court, The Public and The Law Explosion*, ed. by Harry W. Jones, 1965

118. *E.g.*, Pennsylvania, Florida, Minnesota, District of Columbia, and

Where the conciliation procedure is optional claimants should be so advised, thus enabling them to decide which course of action they would prefer to follow,¹¹⁹ and the clerk or judge of the small claims court should also discuss this option with the defendant. Harley has suggested¹²⁰ that a conciliation attempt should be compulsory before litigation in a normal court is permitted.¹²¹ He indicates that it would be useful in both rural and urban centres¹²² and that it need not be viewed as a competitor to the normal court structure¹²³ but rather as complementary to it, dealing with situations (especially those involving small amounts) which the court structure has for various reasons ignored.

Both Ison¹²⁴ and Trebilcock¹²⁵ criticize the concept of conciliation in the area of consumer complaints on the ground that it requires arriving at a half-way point between the positions of the two parties, meaning that no party would be considered right or wrong. Those who are in the right therefore stand to lose. It is respectfully submitted that conciliation need not necessarily be an attempt to find some middle ground to split the loss or damage "50-50" although in many situations that is clearly what the conciliator attempts. This penalizes people with more agreeable attitudes and people who are more easily intimidated, and it gives an advantage to the party with more litigation experience. Conciliation exercised in this way is clearly an unsatisfactory procedure. Conciliation, however, can and, it is submitted, should operate so as to allow the parties in the presence of the conciliator to discuss what has occurred between them in the hope what each will realize

Cleveland. See also Norway and Denmark, as referred to in Harley, *Justice Or Litigation*, *supra*, note 114, at 145, 146

119. See (1969), 5 Col. J. L. & Soc. Probs. 47, at 53

120. *Justice Or Litigation*, *supra*, note 114, at 151

121. Coats, Gantz and Heathcote, *Small Claims In Indiana*, note 56, at 531; Stoller, *Small Claims In Texas: Paradise Lost*, *supra*, note 90, at 456

122. *Supra*, note 114, at 151:

"the need for cheapening justice to small claimants is not limited to populous centres. The greatest progress has been made in the cities because they have possessed courts capable of nurturing such a delicate plant as conciliation appears to be in a land habituated to harsh and rigorous litigation."

123. *Id.*, at 152. Fox, *Small Claims Revisions — A Break for The Layman*, *supra*, note 56, at 921, on the other hand, sees the conciliation procedure as an alternative to litigation rather than as a part of it. The Manchester Arbitration Scheme operates as an alternative to the County Court, rather than as a part of complete whole — it does not come under the jurisdiction of any court, although, of course, its decision can be enforced in the County Court.

124. *Supra*, note 34, at 30.

125. *Private Law Remedies For Misleading Advertising*, *supra*, note 25, at 17.

what was the cause of the dispute and come to some arrangement as to responsibility. There would appear to be no reason why conciliation should not result in one party assuming complete responsibility for the other's loss. Conciliation does not mean arriving at a solution equi-distant for each party's claim; it means that an attempt will be made to arrive at a mutually acceptable conclusion. Viewed in this light it is a very valuable procedure.

If a decision can be reached on amicable terms, it will be beneficial for all concerned. If no settlement can be reached, then the case can go before the small claims court judge. The attempt at a settlement must, of course, be determined, but there is no purpose in permitting one party to browbeat the other into agreeing to a proposal.¹²⁶ Careful supervision must be exercised by the conciliator.

Who should be the conciliator? Should the conciliation procedure be attached to the court? These two questions require an answer. As suggested earlier,¹²⁷ it is perhaps not advisable for the conciliator and the judge to be the same person. It is submitted, however, that owing to practical considerations of scheduling conciliation attempts and hearings on the same day, and the cost involved in having both conciliators and judges, the judge may be the best person to attempt to bring the parties to an amicable settlement although the difficulties in first attempting a conciliation and then holding a judicial hearing are not to be overlooked.¹²⁸

Bearing these points in mind, the following recommendations are put forward for Nova Scotia with regard to the role conciliation can play in the settlement of small disputes.

1. Conciliation should be a statutory prerequisite to a hearing before the small claims court.
2. The conciliation procedure should be attached to and controlled by the court and should be presided over by the judge.
3. While acting as a conciliator, the judge should not use or apply rules of evidence or procedure of any kind and should

126. Hollingsworth, Feldman and Clark, *supra*, note 22, at 494.

127. See the criticisms of the U.K. Consumer Council, *supra*, note 21, at 26; see also Hollingsworth, Feldman and Clark, *supra*, note 27, at 495.

128. The only alternative is to have some court official, such as the clerk, act as the conciliator, and if unsuccessful, could pass the case on for a hearing before the judge; or if it is felt that the conciliation procedure need not be attached to the court, then the vista opens wide. For instance conciliation could take place with provincial consumer bureau officials acting as conciliators.

advise the parties as to the applicable law.

4. If the attempted conciliation is unsuccessful the hearing should be held as soon as possible after the attempt — preferably on the same day.
5. If the conciliation is successful, the conclusion should be reduced to writing and signed by both parties and enforced as a judgment of the small claims court.

14. *Conclusions*

The roles of the lawyer and the judge in the context of small claims courts pose difficult questions; of that there can be little doubt. It is submitted that by dispensing with legal representation before the courts, many of the problems caused by lawyers can be solved. Delays, costs, rigidification of procedure all can be reduced if lawyers are removed from the courts. If litigants cannot have their causes espoused by legally-trained persons, a greater onus is then placed upon the judge; he or she will not only have to decide the issue before the court but will also have to ensure that the parties can tell their stories so that the facts can be discovered. It must also be ensured that litigants who are at a disadvantage for educational, social or other reasons are aided as much as possible. The judge must be prepared, then, not only to decide the issue but also almost to represent the parties present at the hearing. This is all the more necessary if business claimants are permitted to sue in the small claims court.

The role and duties of the judge in small claims courts have been discussed, and it can be seen that the task is by no means an easy one. The particular question of conciliation in the context of small claims has also been considered, and envisaged as a useful institution but one which poses special problems for the conciliators especially if the conciliator is also the judge, and if the issue cannot be satisfactorily resolved at the conciliation stage. It is submitted that when the Nova Scotia Legislature acts on the question of small claims courts it must 1) exclude lawyers from appearing; 2) specifically provide for a more crusading and inquisitorial role for the judges at, and prior to, the hearing; and 3) establish a conciliation procedure as a prerequisite to a hearing before such courts.

The Dalhousie Law Journal

Editorial Committee

Faculty

Innis Christie

Editor, Nova Scotia Issue

John Yogis

Chairman and Editor

Leon Trakman

Associate Editor and Articles Editor

Alastair Bissett-Johnson

Comments Editor

Barbara Hough

Book Review Editor

R. St. J. Macdonald, Q.C.

Students

Jane MacFadgen

Editorial Assistants

Catherine Frazee

Art Matheson

Jai Pachai

The Dalhousie Law Journal is published by the Faculty of Law of Dalhousie University. Communications having to do with editorial matters should be addressed to The Editor, Dalhousie Law Journal, Faculty of Law, Dalhousie University, Halifax, Canada, B3H 3J5. The Editorial Committee welcomes the submission of material for possible publication and advises potential contributors that a style sheet is available from the Editor. Views expressed in a signed contribution are those of the writer, and neither Dalhousie University nor the Faculty of Law accepts responsibility for them.

The Journal is printed by Earl Whynot and Associates Limited, Trade Mart, Scotia Square, Halifax, Nova Scotia. All communications concerning subscriptions should be addressed to The Carswell Company Limited, 2330 Midland Avenue, Agincourt, Ontario, M1S 1P7. The price of an individual copy is \$6.00.

“Indexed”: Index to Canadian Legal Periodical Literature