

Schulich School of Law, Dalhousie University

Schulich Law Scholars

Articles, Book Chapters, & Popular Press

Faculty Scholarship

2022

Intangible Justice? Intellectual Property Disputes and Canadian Small Claims Courts

Anthony D. Rosborough

Dalhousie University Schulich School of Law, anthony.rosborough@dal.ca

Reagan Seidler

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works



Part of the [Civil Procedure Commons](#), [Comparative and Foreign Law Commons](#), [Courts Commons](#), [Intellectual Property Law Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Anthony Rosborough & Reagan Seidler, "Intangible Justice? Intellectual Property Disputes and Canadian Small Claims Courts" (2022) 47:2 Queen's LJ 70.

This Article is brought to you for free and open access by the Faculty Scholarship at Schulich Law Scholars. It has been accepted for inclusion in Articles, Book Chapters, & Popular Press by an authorized administrator of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Intangible Justice? Intellectual Property Disputes and Canadian Small Claims Courts

*Anthony Rosborough & Reagan Seidler**

This article investigates the jurisdiction and institutional competence of Canadian small claims courts and tribunals with respect to complex claims, and in particular, intellectual property (IP) claims. Recent research points to an increase in these types of claims.

A doctrinal analysis finds small claims bodies have wide jurisdiction over intellectual property infringement, contract, and licensing disputes. They can also rule on issues of validity, though they cannot affect registrations in the databases of the Canadian Intellectual Property Office. Remedies including damages, accountings, and the recovery of infringing goods are available in many provinces.

As to their capacity, the article assesses three representative forums within the lens of organizational justice—the British Columbia Civil Resolution Tribunal, Ontario Small Claims Court, and Nova Scotia Small Claims Court—for how they assign claims, support decision-makers to reach “correct” decisions, and govern themselves to ensure quality. The BC and Ontario bodies fare well. Nova Scotia does not.

The article assesses measures taken in the United States and United Kingdom to provide access to justice for IP small claims, and how the disparities in institutional readiness may impact Canadian small and medium-sized enterprises. The authors conclude by calling upon Canadian policymakers to better equip small claims bodies with the resources necessary to resolve IP claims.

* Anthony D. Rosborough, BA, JD, LL.M, PhD Candidate (European University Institute, Italy) is a member of the Nova Scotia Barristers’ Society. Reagan Seidler, BA, MA, JD, is an Intellectual Property Litigator based in Toronto, Canada and member of the Law Society of Ontario. The authors wish to thank the Canadian Foundation for Legal Research, which awarded a research grant to carry out this project.

Copyright © 2022 by Anthony Rosborough & Reagan Seidler

Introduction

I. Jurisdiction

A. Subject-Matter Jurisdiction

- (i) Patents
- (ii) Copyright
- (iii) Trademarks

B. Jurisdiction by Enabling Act

II. Institutional Readiness and Capacity

A. Methodology

- (i) Organizational Justice
- (ii) Interviewing Method

B. Results

- (i) Allocation and Scheduling of Claims
- (ii) Institutional Support for Decision-Makers
- (iii) Internal Governance of Institutions

III. Analysis & Implications

A. Intellectual Property Small Claims & Canadian SMEs

B. Comparative Intellectual Property Small Claims Approaches

C. Bolstering Small Claims Intellectual Property Dispute Resolution Capacity in Canada

Conclusion

Introduction

If it is axiomatic that every right needs a remedy, the saying holds doubly true when the right at stake is a copyright. Something as ephemeral as intellectual property requires legal tools to enforce exclusivity. Yet litigation is costly, so the classic cost-benefit conundrum means many acts of infringement go unaddressed as “negative value suits”.¹

Small claims courts have long been Canada’s answer to this problem. The so-called “peoples’ courts” promise faster, simpler, and cheaper dispute resolution, playing leading roles in virtually all proposals to enhance access to justice. This paper assesses whether small claims bodies have the capacity to suitably resolve disputes in the intellectual property arena—namely, disputes centred around copyright, trademark, and patents. While unquestionably excellent for many straightforward civil matters, these bodies are limited with

1. See Ben Depoorter, “If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process” (2018) 33:3 BTLJ 711 at 714.

respect to more complex and unorthodox claims.² It is a matter of both jurisdiction and readiness.

Part I definitively sets out the jurisdiction of small claims bodies over intellectual property matters. Meant as a guide for litigators and adjudicators, it answers what *can* be done from a doctrinal perspective. Courts in the past have struggled in this regard. Some pronounce judgments while simultaneously expressing skepticism about their ability to do so;³ others miss entry-level IP doctrines entirely, resulting in trials that provide neither justice nor affordability.⁴ Analyzing both federal statutes and provincial enabling acts, we find small claims forums have wide jurisdiction in the IP space, running from infringement actions to more conventional contractual disputes.

Part II examines whether small claims forums facing IP claims have the capability to quickly and inexpensively address them. Quite apart from whether parties *can* take IP to a small claims body, this informs them as to whether they *should*. Viewed through the lens of organizational justice, this assessment zooms in on three bodies that each represent a different setup: the Ontario Small Claims Court, being a division of the Superior Court of Justice; the Nova Scotia Small Claims Court, a stand-alone court headed by local adjudicators; and the British Columbia Civil Resolution Tribunal (CRT), an online administrative body. A comparative analysis reveals differences that bear on whether IP claims are likely to be heard by decision-makers familiar with the subject area, positioned to undertake research where necessary, and subject to internal governance regarding the quality of their work. These differences also reveal significant inconsistencies between jurisdictions that may ultimately impede greater access to justice for intellectual property claimants.

A discussion of the findings follows in Part III. It places our results in the broader context of IP small claims reforms internationally, including the creation of specialized small claims intellectual property courts to improve access to justice for small and medium-sized enterprises. It highlights the value in Canada's largely decentralized framework of small claims adjudication and proposes investment and resource allocation to these bodies to assist in achieving the access-to-justice goals within Canada's national "Intellectual Property Strategy".⁵

2. See Shelly McGill, "Small Claims Court: A Vehicle for Social Change and the Case for Equitable Relief" (2017) 26:1 J L & Soc Pol'y 90 at 105; Shelly McGill, "Small Claims Court Identity Crisis: A Review of Recent Reform Measures" (2010) 49:2 Can Bus LJ 213.

3. See *Figley v Loran*, 2002 CarswellSask 838 at para 9 (Prov Ct), rev'd 2003 SKQB 89.

4. See *Miller Lake Learning Services Inc v Latta*, 2010 NSSM 76 [Miller Lake].

5. See Innovation, Science and Economic Development Canada, "Intellectual Property Strategy" (last modified 28 May 2020), online: *Government of Canada*

I. Jurisdiction

Two constraints bear upon small claims forums: federal legislation, namely the applicable IP and Federal Court acts, and the body's own enabling statutes.

A. Subject-Matter Jurisdiction

(i) Patents

The *Patent Act* permits infringement actions in any court of record, with defendants able to raise in these courts any defence including an attack on the patent's validity.⁶ Though some write as if "court of record" means a superior court,⁷ neither the *Patent Act* nor any binding authority requires it to be so.

There are a few things a small claims court cannot do. Most notably, only the Federal Court has jurisdiction to order that any entry in the records of the Patent Office relating to the title to a patent be varied or expunged.⁸ The Federal Court also has exclusive jurisdiction over cases of conflicting applications for any certificate of supplementary protection, those in which it is sought to impeach or annul a patent or CSP,⁹ and *Patented Medicines (Notice of Compliance)* proceedings.¹⁰

<www.ic.gc.ca/eic/site/108.nsf/eng/home> [Innovation, Science and Economic Development Canada, "Intellectual Property Strategy"].

6. See *Patent Act*, RSC 1985, c P-4, ss 54(1), 59.

7. See *Capitanescu v Universal Weld Overlays Inc* (1997), 75 CPR (3d) 145 at 159, [1997] 10 WWR 666 (QB), rev'd 1999 ABCA 96; *Lawther v 424470 BC Ltd* (1995), 60 CPR (3d) 510 at 511, 1995 CarswellNat 1867 (FCTD); *Maple Creek Manufacturing & Marketing Inc v Hanson Marketing Inc* (1997), 72 CPR (3d) 417 at 418, 1997 CanLII 12363 (Ont Sup Ct); *Farmobile, LLC v Farmers Edge Inc*, 2018 FC 1269 at para 52. Necessity explains many of these references—the relief sought not being available at the small claims level. We endorse the language in *University of Toronto v John N Harbinson Ltd* (2005), 46 CPR (4th) 175 at para 23, 78 OR (3d) 547 (Sup Ct), referring to "provincial adjudication mechanisms".

8. See *Patent Act*, *supra* note 6, s 52.

9. See *Federal Courts Act*, RSC 1985, c F-7, s 20(1). Conflicting applications for patents are an anachronism.

10. *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, s 6(1).

The result of these sections is, firstly, that small claims courts can adjudicate infringement claims and can hold a patent to be unenforceable. However, they cannot invalidate a patent *in rem* or affect the patent register. The patent will be unenforceable as between the parties only, remaining *prima facie* valid as against everybody else.¹¹ Most significantly, all small claims forums, including BC's CRT, can act when matters have no or merely incidental effects on registration, such as contract, employment, breach of confidence, and title disputes. These bodies can also resolve matters concerning unregistered rights, which arise most often when an invention is patented abroad but not in Canada.¹² While this can necessitate a multiplicity of proceedings, the proper course is to resolve the private law dispute provincially then apply to vary the register.¹³ To simplify litigation, patentees at times undertake to consent to a Federal Court expungement order should the provincial body declare their patent invalid.¹⁴

(ii) Copyright

Copyright law allows licensing, infringement, breach of trust cases and more as small claims. A permissive forum designation clause in the *Copyright Act* states:

41.24 The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under sections 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.¹⁵

11. See *Skelding v Daly*, [1941] SCR 184 at 186, 1 DLR 305; *Maw v Massey-Harris Co* (1902), 14 Man R 252 at 257, 1902 CanLII 161 (QB); *Safilo Canada Inc v Contour Optik Inc*, 2005 FC 278 at para 29, aff'd 2005 FCA 434 [*Safilo*]; *Apotex Inc v Eli Lilly Canada Inc*, 2021 ONSC 1588 at para 89. For clarity, the comment in *Safe Gaming System Inc v Atlantic Lottery Corp*, 2013 FC 217 at para 25 (Aronovitch P) that defendants are only able to attack the validity of a plaintiff's patent in Federal Court is incorrect.

12. See *Alpha Marathon Technologies Inc v Dual Spiral Systems Inc*, 2017 FC 1119 at para 38.

13. See *Axia Inc v Northstar Tool Corp*, 2005 FC 573 at paras 18–19.

14. See *Safilo*, *supra* note 11 at para 34. See also David Vaver, "Patents and Precedent in the Canadian Federal Courts" (2018) 30:3 IPJ 341 at 347 (arguing the Federal Court should assume patents struck down by provincial courts are invalid).

15. RSC 1985, c C-42, s 41.24.

“Provincial court” does not necessarily mean “superior court”.¹⁶ A consensus across multiple provinces confirms as much.¹⁷ (This is true even in Alberta, notwithstanding one comment to the contrary).¹⁸ Nor are administrative bodies excluded. The reference to “provincial courts” is meant to confer jurisdiction, not restrict it; its wording “sufficiently general” so as to respect the institutional design choices of provinces.¹⁹ Canada’s first such body, BC’s CRT, routinely—and properly—resolves copyright claims.²⁰

A suggestion has elsewhere been made that “[a]n apparent disadvantage to bringing an action for copyright infringement in a small claims court is that . . . it may not be possible to award the statutory damages that are found in the *Copyright Act*.”²¹ We see no basis for this concern. Small claims bodies can and do award statutory damages per the plaintiff’s election right.²²

16. Contrast this with section 44 that specifies, for the purposes of import/export matters, that “court” means the Federal or superior courts. See *ibid*.

17. See *Belanger v AT&T Canada Inc*, [1994] BCJ No 2792 at paras 15–18, 1994WL1708108 (Prov Ct) [*Belanger*]; *Dolmage v Erskine* (2003), 23 CPR (4th) 495 at 504, 2003 CanLII 8350 (Ont Sup Ct (Sm Cl Div)); *Enrietti-Zoppo v Colla* (2007), 63 CPR (4th) 377 at 380, 2007 CarswellOnt 8622 (WL Can) (Sup Ct (Sm Cl Div)) [*Enrietti*]; *Ligue de DBL Ball inc c Lemire*, 2018 QCCQ 1730 at para 71; *Farsi c Georges*, 2017 QCCQ 7268; *Pilote c Corbus Design inc*, 2007 QCCQ 7961 at paras 11–13; *Lapointe c Broquet inc*, 2017 QCCQ 13516 at paras 29–33; *Carpentier c Fabricville Co inc*, 2019 QCCQ 1515 at paras 31–34; *Paré c Taxis Coop de la Mauricie* 1992, 2015 QCCQ 11581 at paras 15–21; *Hains (Cindy Hains Photographre) c Ermel (Studio Zaf)*, 2015 QCCQ 1152 at paras 32–35 [*Hains*]. See also *Glanzmann Tours Ltd v Yukon Wide Adventures*, 2012 YKSM 3; *Figley v Loran*, 2003 SKQB 89 at para 6.

18. *Geophysical Service Inc v Jebco Seismic UK Ltd*, 2016 ABQB 402 at para 22 is incorrect. Refer instead to *Don Hammond Photography Ltd v Consignment Studio Inc*, 2008 ABPC 9 at para 2 [*Don Hammond*]; *Russell v Nyack*, 2005 ABPC 227; *Alwest Neon Signs Ltd v 464460 Alberta Ltd* (1994), 161 AR 273, 58 CPR (3d) 176 (Prov Ct).

19. See *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17 at paras 42–46 (holding that section 41.24 does not prevent arbitrators from resolving copyright matters). We would nonetheless recommend that Parliament amend the section to read “provincial courts and tribunals” as a signal that less expensive forums are available.

20. See *Bjørnsen v Sharpe*, 2020 BCCRT 1425; *Derek Mailbiot (dba The Junk Guy) v 1095148 BC Ltd*, 2020 BCCRT 945; *Pereira v Hirsch Creek Golf and Winter Club et al*, 2018 BCCRT 136.

21. Michelle Wassenaar & Andrea Long, “Small Change: Small Claims Court and Intellectual Property Disputes” (2014) 30:2 CIPR 183 at 196.

22. See *Piechnik v McFarlen*, 2016 BCPC 245 at paras 22–27; *Donglu c Sinoquébec Media inc*, 2015 QCCQ 2337; *Don Hammond*, *supra* note 18 at para 12, cited with approval in *Mejia v LaSalle College International Vancouver Inc*, 2014 BCSC 1559.

There are only a few things that small claims forums cannot do. Cases of conflicting applications for the registration of any copyright or those in which it is sought to have any entry in the copyright register made, expunged, varied, or rectified are beyond their purview.²³ As with other forms of IP, however, parties may contest the validity of a copyright and obtain an *in personam* finding of invalidity from a provincial forum.²⁴ The second category of forbidden proceedings is that concerning proceedings to stop infringing goods at the border.²⁵ As a result, small claims bodies are free to act in a wide variety of infringement, licensing, title, and contract disputes concerning copyright.

(iii) Trademarks

Infringement, passing off, depreciation of goodwill actions, and more can all proceed as small claims. A small claims court housed within the superior court—in Ontario, Prince Edward Island, Manitoba, or Nunavut²⁶—is given remedial powers under the *Trademarks Act* itself:

52 In sections 53 to 53.3, *court* means the Federal Court or the superior court of a province;

Power of court to grant relief

53.2 (1) If a court is satisfied, on application of any interested person, that any act has been done contrary to this Act, the court may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits, for punitive damages and for the destruction or other disposition of any offending goods, packaging, labels and advertising material and of any equipment used to produce the goods, packaging, labels or advertising material.²⁷

23. See *Federal Courts Act*, *supra* note 9, s 20(1).

24. See *Apotex Inc v Astrazeneca Canada Inc*, 2003 FCA 235 at para 17.

25. See *Copyright Act*, *supra* note 15, s 44.

26. *Courts of Justice Act*, RSO 1990, c C.43, s 22(1) [CJA]; *Judicature Act*, RSPEI 1988, c J-2.1, s 12(1); *The Court of Queen's Bench Small Claims Practices Act*, CCSM c C285, s 1(1), "court"; *Nunavut Act*, SC 1993, c 28, s 31(1).

27. RSC 1985, c T-13, ss 52, 53.2(1). See *Laurentide Cabinet Corporation v Beyond Flooring*, 2010 ONSC 3609 at paras 10–14.

Some reason that this section precludes small claims bodies that stand alone²⁸ or exist within the provincial court²⁹ from acting.³⁰ We disagree. Subsection 53.2(1) is a remedial provision rather than a forum designation clause. Non-superior small claims bodies may properly take cases insofar as their enabling statutes allow. What they cannot do is rely on subsection 53.2(1) to provide remedies—these must flow from provincial legislation.

As always, some matters are within the Federal Court's exclusive jurisdiction. This extends to all cases of conflicting applications for the registration of a trademark, or in which it is sought to have any entry in the trademarks register made, expunged, varied, or rectified.³¹ Thus, while only the Federal Court can make changes to the register,³² defendants may still seek *inter partes* findings of invalidity as in other areas of IP.³³ Relatedly, there are several orders only the Federal Court can grant. In addition to those relating to registration, or the listing of a geographical indication,³⁴ only the Federal Court can allow a user of a confusing mark to continue using the mark regionally.³⁵ While this can result in a multiplicity of proceedings, parties can either resolve the private law question provincially and then initiate registry changes or, if anxious about limitation periods or laches, initiate then stay the Federal Court proceeding.³⁶

28. As in Nova Scotia, New Brunswick, BC's CRT, and Yukon.

29. As in Newfoundland, Quebec, Saskatchewan, Alberta, the BC Small Claims Court, and the Northwest Territories.

30. See *Hains*, *supra* note 17 at paras 36–38; *Belanger*, *supra* note 17 at paras 20–22; Laurent Carrière, *ROBIC Canadian Trade-Marks Act Annotated* (Toronto: Thomson Reuters, 1990) (loose-leaf updated 2021, release 1), at § 53.2:5.2.2 (WL). The reference to “superior court” was added in 1994 with the *North America Free Trade Agreement Implementation Act*, SC 1993, c 44, s 234, as part of a suite of consequential amendments enabling the detention of imported goods. In our view, it was not a deliberate attempt to restrict litigation to the superior and Federal courts.

31. See *Federal Courts Act*, *supra* note 9, s 20(1); *Trademarks Act*, *supra* note 27 at ss 18.1, 57(1).

32. See *Issa v Akkouche*, 2019 QCCS 14 at para 29; *Econome Inc v 349977 Ontario Ltd* (2002), 10 CPR (4th) 235 at para 9, 2000 CanLII 22672 (Ont Sup Ct); *Spiros Pizza & Spaghetti House Ltd v Riviera Pizza Inc*, 2005 ABQB 80 at para 74, *aff'd* 2005 ABCA 305.

33. See *Placements 1360 inc c J Benny inc*, 2016 QCCS 4185 at para 170; *Stenner v ScotiaMcLeod*, 2007 BCSC 1377 at paras 101–07.

34. See *Trademarks Act*, *supra* note 27, s 11.21(1).

35. See *ibid*, s 21(1).

36. See *Hutchingame Growth Capital Corporation v Dayton Boot Co Enterprises Ltd*, 2019 FCA 152 at para 56.

Of course, matters can also proceed irrespective of or only tangentially related to statutory rights. In the core IP wheelhouse, actions for passing off are possible as the cause of action exists at common law.³⁷ There are also many instances when trademarks and business names form part of contractual disputes. These too can be adjudicated at the small claims level even if they require determining a matter of IP law, like infringement.³⁸

B. Jurisdiction by Enabling Act

The second constraint is a body's enabling statute. Provincial law affects whether a case can proceed and whether, at the end, the desired relief is available. In all jurisdictions, the monetary cap is the most important limitation. Ranging at present from \$5,000 in BC's CRT to \$50,000 in Alberta, plaintiffs must ensure their claim—including the value of any order, typically—falls within the limit. Plaintiffs generally *cannot* escape the limit by prosecuting separate acts of infringement in one proceeding.³⁹

Nova Scotians are uniquely disadvantaged by being unable to bring conventional infringement cases in their Small Claims Court. The Court's jurisdiction extends only to claims "arising under a contract or a tort",⁴⁰ phrasing which excludes purely statutory rights as found in IP.⁴¹ Thus, while the Court can hear licensing disagreements or common law passing off actions, plaintiffs have no small claims recourse against a third-party infringer.

Alberta is an outlier in the opposite direction. Its Court is empowered not only to hear claims for damages and unjust enrichment, but also to award equitable remedies in response to any such claim.⁴²

37. See *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at paras 62–63; *Whiting v Peters*, 2021 BCCRT 96 at paras 85–86.

38. See e.g. *Consumers' Choice Awards (3416968 Canada Inc) v Toitures Trois Étoiles inc*, 2010 QCCQ 1064; *Kashruth Council of Canada v 1412189 Ontario Inc*, 2018 CanLII 130064, [2018] OJ No 7039 (Sup Ct (Sm Cl Div)) [*Kashruth*]; *Delane Industry Co Ltd v Atkinson*, 2017 BCCA 79 at para 27.

39. But see *Bjørnsen v Sharpe*, *supra* note 20 at para 12.

40. *Small Claims Court Act*, RSNS 1989, c 430, s 9(a).

41. See *Schwartz v Ingenious Ideas Inc*, 2009 NSSC 255 at paras 12–20. Parties have at times tried to escape this limitation by phrasing IP matters as if they are matters of conventional property law, leading to confusing and bizarre results. See *Miller Lake*, *supra* note 4.

42. See *Provincial Court Act*, RSA 2000, c P-31, s 9.6(1).

In Ontario, some authorities leave the impression that claims are to be resolved by damages only.⁴³ Not so. The jurisdiction of the Court is encapsulated in three sections:

23 (1) The Small Claims Court,

- (a) has jurisdiction in any action for the payment of money where the amount claimed does not exceed the prescribed amount exclusive of interest and costs; and
- (b) has jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed the prescribed amount.

96 (3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.⁴⁴

In *Hodgins v Grover*, the Court of Appeal for Ontario clarified that equitable relief is available so long as the relief requested is a monetary payment under the limit or the return of personal property valued within that limit.⁴⁵ As such, litigants may plead in unjust enrichment⁴⁶ and *quantum meruit*,⁴⁷ or use the court to enforce an arbitration award.⁴⁸ As the key words are “unless

43. See *Dolmage v Erskine*, *supra* note 17 at 519; *Enrietti*, *supra* note 17 at 380.

44. *CJA*, *supra* note 26.

45. 2011 ONCA 72 at para 49, leave to appeal to SCC refused, 34155 (February 2, 2012).

46. See e.g. *ibid*; *Latner v 1651663 Ontario Inc*, 2014 ONSC 1221; *Stahle Construction Inc v Richmer Electric Inc*, 2013 CanLII 71914, 2013 CarswellOnt 15575 (Sup Ct (Sm Cl Div)); *Guay v Pruneau*, [2015] OJ No 7140, 2015 CanLII 107438 (Sup Ct (Sm Cl Div)); *Cedar Sands Roadway Assn v Broadfoot*, [2015] OJ No 3302, 2015 CanLII 35728 (Sup Ct (Sm Cl Div)); *Hike Metal Products Ltd v Rose City Cruises (cob Royal Windsor Cruises)*, [2012] OJ No 6667 (Sup Ct (Sm Cl Div)).

47. See *Traffic Law Advocate (EE) Professional Corp v Yang*, [2011] OJ No 5558, 2011 CarswellOnt 14093 (Sup Ct (Sm Cl Div)), *affd* 2013 ONSC 2887; *Safety First Consulting Professional Corp v Scipione*, [2015] OJ No 3168, 2015 CanLII 34246 (Sup Ct (Sm Cl Div)).

48. See *Evergreen Solutions CA Inc v Depositario*, 2015 ONSC 6664. See also *Anton, Champion, MacDonald & Phillips v Rowat*, [1996] YJ No 130, 1996 CarswellYukon 84 (Terr Ct).

otherwise provided”, parties should also look to the relief IP statutes afford. The *Copyright Act* provides for the disgorgement of profits and the recovery of infringing goods alongside their means of production.⁴⁹ In cases involving statutory trademark rights, the court can make “any order that it considers appropriate in the circumstances” including for the recovery of profits or for any offending goods, packaging, labels and advertising material, and the equipment used to produce the same.⁵⁰ Likewise, in patent cases, the court may make “such order as the court or judge sees fit . . . respecting the proceedings in the action” including a disgorgement of profits.⁵¹ Specific performance,⁵² rescission,⁵³ declarations,⁵⁴ accountings,⁵⁵ and injunctions⁵⁶ remain otherwise unavailable.

In BC, however, the characterization of a remedy as equitable or not is less important. What matters is whether the substance of the claim fits into small claims jurisdiction,⁵⁷ comprised of:

- (a) debt or damages,
- (b) recovery of personal property,
- (c) specific performance of an agreement relating to personal property or services, or
- (d) relief from opposing claims to personal property.⁵⁸

49. See *Copyright Act*, *supra* note 15, ss 34–35, 38.

50. *Trademarks Act*, *supra* note 27, ss 52, 53.2(1).

51. See *Patent Act*, *supra* note 6, s 57(1); *Bayer AG v Apotex Inc* (2002), 16 CPR (4th) 417, 2002 CarswellOnt 127 at para 11 (CA).

52. See *Bennett v Fresh Air Inc*, 2019 ONSC 3469 at para 27 [Bennett].

53. See *ibid*.

54. See *ibid* at para 42; *Hradecky v Hydro One Networks Inc*, [2014] OJ No 1249 at para 23, 2014 CarswellOnt 3316 (Sup Ct (Sm Cl Div)) [Hradecky]. See also *Kotsos v Wang*, [2017] OJ No 2072 at paras 49–52 (Sup Ct (Sm Cl Div)).

55. See *Bennett*, *supra* note 52 at para 26; *Bemjapipatkul v Rungruangwong*, [2014] OJ No 119 at para 30 (Sup Ct (Sm Cl Div)); *Kurtz v Hueckroth*, [2014] OJ No 3506 at para 20, 49 RFL (7th) 210 (Sup Ct (Sm Cl Div)); *Hradecky*, *supra* note 54 at para 15. As an accounting typically implies disgorgement, and monetary payments need not be in the form of liquidated sum, one wonders if these cases are correct. See *Autometric Autobody Inc v High Performance Coatings Inc*, 2014 ONSC 6073 at para 10.

56. See *Kashruth*, *supra* note 38 at para 31.

57. See *Stenerson v Insurance Corp of British Columbia* (1992), 12 CCLI (2d) 111 at para 9, [1992] BCJ No 1911 (Prov Ct). See also *RK v McBride*, [1994] BCJ No 2791 (Prov Ct).

58. See *Small Claims Act*, RSBC 1996, c 430, s 3(1); *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 118(1).

On this basis, plaintiffs may make use of unjust enrichment⁵⁹ and quantum meruit, though not other equitable tools such as injunctions⁶⁰ or declarations.⁶¹ Orders for recovery and specific performance are also possible, as stated, provided the value of doing so falls within the monetary limit.⁶²

Relevant to several provinces is the term “personal property”. IP is a chose in action and therefore an intangible form of personal property.⁶³ This opens up small claims forums for creative remedies. In one BC case, for instance, a slighted cameraman forced a filmmaker to acknowledge his camerawork in the film’s credits.⁶⁴

Similarly important is the term “recovery”. Typically, a recovery implies a matter of detinue or replevin where the plaintiff once had possession of or title to the property.⁶⁵ But for copyright matters, plaintiffs are reminded that the *Copyright Act* contains a deeming provision allowing copyright owners to “recover” infringing assets as if they were their own.⁶⁶ This allows a rights-holder to sidestep the requirement of prior possession and effectively

59. See *Martin v Goes*, 2019 BCPC 355.

60. See *Weetman v Baldwin*, 2001 BCPC 292 at para 53. But see *Whitehall Entertainment Inc v Kaffka*, 2018 BCCRT 196 (where the Vice Chair orders a respondent to remove infringing social media posts “and refrain from such future posts” at para 38).

61. See *Etherington v Morris*, 2009 BCPC 68 at para 24; *Evans v Campbell* (1993), 77 BCLR (2d) 211 at para 5, 1993 CarswellBC 61 (CA); *Canpages Inc v Avi Pizza Factory Ltd*, 2009 BCPC 159 at para 10; *Alpine Insulation v Eagleye Restoration et al*, 2018 BCPC 176 at para 19.

62. See *Cimaco International Sales Inc v British Airways PLC*, 2002 BCPC 226.

63. See *De Montigny v Cousineau*, [1950] SCR 297 at 306, 12 CPR 45; *British Mutoscope & Biograph Co v Homer*, [1901] 1 Ch 671 at 675, [1900-3] All ER Rep 785 (CA); *Forget v Specialty Tools of Canada Inc* (1995), [1996] 1 WWR 12 at para 16, 11 BCLR (3d) 183 (CA). See also *Tucows.com Co v Lojas Renner SA*, 2011 ONCA 548 at para 66, leave to appeal to SCC refused, 34481 (24 May 2012).

64. See *Denny v Dennis*, 2016 BCPC 152 at paras 102–03.

65. See *936464 Ontario Ltd v Mungo Bear Ltd* (2003), 258 DLR (4th) 754 at para 27, 74 OR (3d) 45 (Div Ct); *Szeib v Team Truck Centres – Freightliner*, 2001 CarswellOnt 2026 at para 10, [2001] OJ No 2208 (Sup Ct (Sm Cl Div)); Law Reform Commission of British Columbia, *Report on the Replevin Act*, Report 38 (1978). See also *Absolute Bailiffs Inc v Warbrick*, 2001 BCSC 362 at para 28 (where the court ordered the “recovery” of excess money paid on an unjust enrichment basis).

66. See *Copyright Act*, *supra* note 15, s 38.

obtain an order for delivery up.⁶⁷ While enforcing an order against intangible property is not as straightforward as it is against chattels, courts can reason by analogy to the rules with which they are familiar in deciding what is proper.⁶⁸ The uses for these recovery provisions are many, perhaps the most novel being the potential for victims to have “revenge porn” removed.⁶⁹

Finally, parties in any province should consider the variety of strategic matters that may impact the course of litigation. The availability of Anton Piller and other interlocutory orders, discovery and disclosure practices, the possibility for expert evidence, cost consequences, and enforcement are only some of the conventional issues one must consider before taking a matter for small claims resolution. It may be these present valid reasons to pursue litigation in another forum. As a matter of pure jurisdiction, however, it appears rights-holders have a great deal of room to act at the small claims level.

II. Institutional Readiness and Capacity

Though there are considerable differences between jurisdictions, many IP disputes can be heard by small claims courts and tribunals. The question that follows is whether a prospective claimant *should* bring such a claim. In other words, are these courts and tribunals in a practical position to hear IP claims and offer suitable remedies to claimants? This Part seeks to answer this question.

A. Methodology

(i) Organizational Justice

When it comes to courts and tribunals, institutional readiness and capacity are questions closely related to access to justice. Many iterations

67. In this respect, *Enrietti*, *supra* note 17 at 380, was wrongly decided; the Court ought to have made an order for delivery up upon its finding of infringement. It does not appear counsel, if any, brought section 38 to the Court’s attention. The fact of its omission illustrates the burden that lies on small claims adjudicators to be aware of IP doctrines and, more generally, the value of institutional supports to assist those who may see few IP cases in their careers.

68. See *Small Claims Court Rules*, O Reg 258/98, r 1.03(2); *Coulthard v Lawrence*, 2011 CarswellOnt 15952 (WL Can) at para 32, [2011] OJ No 6207 (Sup Ct (Sm Cl Div)).

69. See Yin Harn Lee, “Delivering (Up) a Copyright-Based Remedy for Revenge Porn” (2019) 14:2 J Intellectual Property L & Practice 99. The media would have to qualify as an infringing copy pursuant to the section 2 definition in the *Copyright Act*.

of “justice” have been identified in the literature over the years.⁷⁰ One such type is “organizational justice” where internal institutional processes are the primary subject of analysis.⁷¹ Three distinct modalities of organizational justice have been established in the context of courts: interactional justice, distributive justice, and procedural justice.⁷² Our analysis follows the latter line of inquiry. It weighs the institutional practices, procedures, and capabilities of small claims courts in their ability to establish fair outcomes for IP claimants. Though our inquiry is not the first to assess Canadian small claims courts from the organizational justice standpoint, it appears to be the first to make this assessment from an institutional perspective rather than from the experiences of lawyers and claimants.⁷³

Viewed through the lens of organizational justice, procedural justice includes several elements for analysis. Broadly, these elements include institutional mechanisms to ensure consistency between decision-makers, the accuracy of the decisions reached, and the efficacy of mechanisms devised to correct errors or omissions.⁷⁴ The structure of our assessment mirrors these elements. It also informed our interviewing approach and structure.

From the outset, we wished to avoid our inquiry becoming a mere assessment of judicial expertise. This is because proactive recruitment of decision-makers with a background in intellectual property is not a priority in any of these jurisdictions. This finding alone would not be a surprise to anyone. Cementing this hypothesis, each of the jurisdictions we canvassed confirmed that disputes featuring IP issues are (as of present) quite rare.⁷⁵ Secondly, we

70. See Sarah Brosnan, “The Evolution of Justice” in Mark LeBar, ed, *Justice* (New York: Oxford University Press, 2018) at 151.

71. See Jason A Colquitt, Jerald Greenberg & Cindy P Zapata-Phelan, “What is Organizational Justice? A Historical Overview” in Jerald Greenberg & Jason A Colquitt, eds, *Handbook of Organizational Justice* (New York & London, UK: Lawrence Erlbaum Associates, 2005) at 3.

72. See Marc W Patry, Veronica Stinson & Steven M Smith, “Evaluation of the Nova Scotia Small Claims Court: Final Report to the Nova Scotia Law Reform Commission” (March 2009) at 15, online (pdf): *Saint Mary’s University* <biblioteca.cejamerica.org/bitstream/handle/2015/2025/SmallClaimsFinaReportFINAL.pdf?sequence=1&isAllowed=y>.

73. See WH Charles, “Small Claims Disputes in Nova Scotia and Access to Justice” (2020) 43:2 Dal LJ 963 at 1000.

74. See Jason A Colquitt, “On the Dimensionality of Organizational Justice: A Construct Validation of a Measure” (2001) 86:3 J Applied Psychology 386 at 388.

75. In fact, our efforts to schedule an interview with representatives of the BC Provincial Court were refused on account of the Court’s lack of small claims disputes featuring intellectual property issues.

wished to avoid delving into the longstanding debate over the efficacy and value of judicial expertise—a subject well beyond the scope of this analysis.⁷⁶ For these reasons, our inquiry was aimed at the broader institutional processes that would contribute to procedural justice in the context of intellectual property small claims.

(ii) Interviewing Method

We conducted key informant interviews with administrators of small claims bodies in Nova Scotia, Ontario, and British Columbia. We selected these jurisdictions because each represents a distinct institutional approach to small claims adjudication. Nova Scotia's Small Claims Court is an independent statutory court run by adjudicators who are generally senior practicing lawyers. Ontario's Small Claims Court is housed within the province's Superior Court. Finally, the British Columbia CRT is an online administrative tribunal run mostly by full-time members.

All of our interviewees were personnel holding administrative positions within these institutions. Given differences in court structures and administration, each occupied somewhat different roles within their respective institutions. Nevertheless, all three were either directly or indirectly involved in the assignment and management of claims, as well as the provision of resources and supports to decision-makers.

We decided not to interview judges, adjudicators, and other decision-makers. This is because the primary subject of analysis is the structure of small claims bodies rather than their decision-makers. Beyond these interviews, we also analysed documentation and information relating to the organization and support for decision-makers working within these jurisdictions. In some cases, this documentation was provided to us or referred to by the interviewees.

Two of the interviews were conducted via an online video platform and recorded to ensure accuracy. The outlier, the Ontario Small Claims Court, was conducted via written questions that were identical to those structured for the two video interviews. All participants were recruited on a volunteer basis and upon our request. We selected the interviewees following consultation with each of these institutions' public-facing staff.

Our questions were built upon the three dimensions of procedural justice identified above: (i) consistency between decision-makers, (ii) accuracy of

76. See Diane P Wood, "Generalist Judges in a Specialized World" (1997) 50:5 SMU L Rev 1755 at 1765.

the decisions reached, and (iii) the efficacy of institutional mechanisms used to correct errors and omissions. In the context of small claims adjudication, we found these three dimensions to correspond respectively to: (i) how claims are allocated between individual decision-makers; (ii) the supports provided to decision-makers in hearing claims, conducting research and drafting decisions; and (iii) the internal governance structure of the institution in providing review and oversight of decision-makers' work.

We used a standardized open-ended interview format.⁷⁷ We prepared a complete set of questions and read them to interviewees in the same order in each case. Standardized questions were based upon the three categories of institutional practice above. The two video interviews allowed us to probe further and ask follow-up questions after initial responses from the interviewees. Each of the interviews were between thirty minutes and one hour in duration, and all took place between February and May of 2021. Finally, all the interviews were conducted under Chatham House Rules where the identity and position held by the interviewee would remain confidential. We found that in general, confidentiality was a necessary condition for the interview to proceed.

There are inherent limitations in the methodology used for these interviews. For one, we only spoke to one individual within each institution. Secondly, we had little in the way of alternative options available to us if an interviewee or institution decided that they did not wish to participate.⁷⁸ The internal processes of Canadian courts are known to few people and largely inaccessible to researchers. It is plausible that future researchers may find it easier to obtain data through surveying and interviewing a large volume of decision-makers. These results could then be used to discern the general approaches to administration and supports provided to decision-makers at the administrative level.

Despite these limitations, our analysis is strengthened by its largely inductive approach. Our goal was to explore and discover new insights into the functioning of small claims bodies in order to develop explanations and theory based on the responses we received. In this vein, our research approach adhered most closely to grounded theory.⁷⁹ Despite limited access to information and interviewees, we were able to identify concepts, themes, and patterns in the

77. See John W Creswell, *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research*, 4th ed (Boston: Pearson, 2012) at 219.

78. For example, following the BC Provincial Court's decline of our request to interview one of its administrators, we learned that judicial administration records and "records relating to support services provided to judges" are exempt from Freedom of Information (FOI) requests in that province.

79. See Kathy Charmaz, *Constructing Grounding Theory: A Practical Guide Through Qualitative Analysis* (London, UK: Sage, 2006) at 6.

responses received to discern a general picture of small claims bodies' preparedness and readiness to hear intellectual property claims.

B. Results

Canadian small claims courts differ significantly in their capacity and readiness to hear intellectual property claims. Below, we canvass the differences between our three study institutions: the Nova Scotia Small Claims Court, Ontario Small Claims Court, and British Columbia Civil Resolution Tribunal. A broader analysis and proposal for reforms follows in Part III.

(i) Allocation and Scheduling of Claims

No institution has quotas or requirements for decision-makers to have practice experience or knowledge in intellectual property law or related subjects. Nova Scotia and Ontario's Courts both express the opposite view—that appointment decisions are often based upon a wide range of experience, reflecting the generalist approach to adjudication. BC's CRT can be distinguished slightly. Its appointment priorities are based upon its four streams of adjudication (i.e., Motor Vehicle Injury, Cooperatives and Societies, Strata Property, and Small Claims), and tribunal members must have at least three years' prior experience in one of those streams. Nevertheless, none of these streams include an emphasis on intellectual property knowledge or experience. Further, its small claims stream is generalist in its orientation.

Scheduling and assignment of claims vary significantly across the three institutions. In Nova Scotia, claims are assigned initially through the sole discretion of court clerks. They assign claims based upon their perception of the complexity and length of the hearing and select an adjudicator who they feel has the appropriate experience to hear the claim. The BC CRT's small claims stream generally does not assign claims based upon the practice experience of individual tribunal members. Under special circumstances, it is possible that an assignment of this sort could be made at the CRT, but this is not the norm. Finally, Ontario's assignment of claims is agnostic to subject matter and instead relates primarily to the scheduling of deputy judges' time. Regional administrative judges for the Ontario Small Claims Court assign claims to deputy judges based upon a predetermined regional schedule that has little to do with background or experience. One explanation for Ontario's approach in this regard may be the relative size of Ontario as a jurisdiction. It is possible that the sheer caseload volume may restrict the assignment of claims based upon subject matter and decision-maker.

The three institutions also vary in their approach to allowing adjudicators the ability to “pass off” or transfer an assigned claim to another decision-maker. The Nova Scotia Small Claims Court’s adjudicators possess this ability, though it has occurred very rarely in practice. More often in these circumstances, adjudicators in this court consult with one another about the proper handling of a claim rather than transferring it. Paradoxically, this consultation seems to occur more frequently between senior adjudicators than among ones with lesser experience. This suggests that among adjudicators with lesser experience, voluntary consultation and advice may be less frequently sought, though further research in this area is necessary to confirm this.

The British Columbia CRT’s tribunal members cannot transfer assigned claims to other members, but they can submit their draft decisions to the Vice Chair of Small Claims for a “peer review” process. This can be seen as a more institutionalized approach to the consultation carried out between Nova Scotian adjudicators. Tribunal members are not bound by the recommendations or comments of peer review but can nevertheless glean some assistance from it. In the Ontario Small Claims Court, deputy judges have no independent authority to reschedule or reassign claims that have been assigned to them. Having said that, they may voluntarily join the Ontario Deputy Judges Association, a not-for-profit which provides educational materials and facilitates online discussions for deputy judges to seek advice from others. This may enable feedback and consultation similar to the CRT’s peer review process, albeit on an ad hoc basis. In any event, deputy judges in Ontario must hear each of the claims they have been assigned.

Each of the institutions we examined demonstrates a distinct approach to assigning claims based on the knowledge or experience of the decision-maker. While the Nova Scotia Small Claims Court assigns claims based on the practice experience and the perceived capacity of the adjudicator, the Ontario Small Claims Court and the CRT actively avoid this approach. Even where decision-makers can transfer or reassign claims, decision-makers are not likely to frequently exercise this option. This suggests that, where an IP dispute is brought before either of these courts or tribunal, the decision-maker originally assigned the claim will almost certainly be the one to hear it. Further, in each of these scenarios, it is unlikely that the decision-maker assigned to an intellectual property claim will have significant experience or knowledge of the subject matter. While not all IP claims brought before a small claims court or tribunal may be necessarily complex, our view is that the availability of research,

educational materials, and other institutional supports are crucial components of these institutions' readiness and capacity to hear these disputes.

(ii) Institutional Support for Decision-Makers

We conceived of institutional support for decision-makers as coming in the form of research materials, research assistance, remuneration models, continuing judicial education, and mentorship arrangements. We postulate that where decision-makers have little practice experience or familiarity in the intellectual property law area, the reliance on such supports can be vital for the proper adjudication of a claim. We found that the three institutions vary widely in the types and amount of support they provide to decision-makers.

Nova Scotia represents the low-water mark for institutional supports for its decision-makers. The only educational resource provided is a manual originally drafted in 1998 and revised in 2006. It is intended to be an introduction to the adjudicator role in a very general sense. It was drafted and revised by a select group of adjudicators upon the request of the Nova Scotia Department of Justice and makes no reference to intellectual property issues. Adjudicators in the Nova Scotia Small Claims Court are not provided access to any subscription research databases, do not have access to provincial judges' libraries for seminal textbooks, nor are they afforded any research assistance or educational programming beyond the manual. Their only research aid in preparing decisions is the publicly available CanLII website and database. In the past, the Nova Scotia Small Claims Court held biannual conferences which featured professional development topics, but in recent years these conferences have been held much more infrequently. Overall, the circulation of educational materials between adjudicators of Nova Scotia Small Claims Court is entirely informal and voluntary.

BC's CRT stands in stark contrast to Nova Scotia's approach. The CRT includes a Vice Chair of Quality Assurance and Training—a role dedicated to the continuing education of tribunal members. This includes regular “lunch and learns” on select substantive and procedural topics, as well as group study sessions led by tribunal members that focus on recent decisions relevant to the adjudication of claims. CRT tribunal members also have access to LexisNexis Advance Quicklaw, Westlaw Next, and can be assisted by CRT staff regarding the uses of these databases. Tribunal members can also request assistance from volunteer counsel or law students in performing more in-depth research tasks and the preparation of legal memoranda. Since the CRT's establishment in 2012, it has developed roughly twenty different categories of disputes that are routinely dealt with. It has curated research and educational materials around these types of disputes. Overall, BC's CRT evidences a high degree of educational resources and support for decision-makers.

Our view is that the CRT is in a relatively good position to equip its decision-makers with the resources and support they might need to hear intellectual property claims.

The Ontario Small Claims Court's structure includes the Deputy Judges Council, which has a statutory duty to "review and approve a plan for the continuing education of deputy judges".⁸⁰ The Deputy Judges Council has prepared a series of videos for new deputy judges to become familiar with the responsibilities of the role. The Ontario Small Claims Court also facilitates, through the Deputy Judges Council's Education Committee, annual "Caswell" seminars. These are annual, day long educational seminars which address substantive and procedural law topics as well as ethics and other issues. Deputy judges who are not members of the Ontario Deputy Judges Association may also belong to one of many regional judges associations which may also provide continuing judicial education.

The fact that Ontario houses the Ontario Small Claims Court within its superior court also offers some additional benefits. Namely, where deemed appropriate by the Ontario Small Claims Court Administrative Judge, a deputy judge may receive assistance from a Superior Court of Justice law clerk in researching a specific area of substantive or procedural law. In the case of an intellectual property law claim, this assistance may be particularly helpful for a deputy judge lacking familiarity in the area. Overall, both the British Columbia CRT and the Ontario Small Claims Court provide decision-makers with a fairly robust suite of materials and assistance to assist them in researching and preparing decisions. These resources could be of vital importance in deciding over lesser-heard intellectual property claims.

Institutional support is, after all, only effective if it is used. A relevant factor in this regard is the extent to which decision-makers are remunerated for their time spent researching and writing decisions. On this point, each of the three institutions showed varying approaches. The Ontario Small Claims Court's deputy judges are generally only remunerated for their time spent during hearings or trials, though exceptions are made where the length and complexity of the trial warrant additional remuneration. It was not made clear to us exactly when this additional remuneration would be triggered, but we infer that this is determined by a subjective and case-by-case evaluation. In contrast, the Nova Scotia Small Claims Court provides no additional remuneration to its adjudicators for researching or writing decisions. Adjudicators in the Nova Scotia Small Claims Court are remunerated only for their time spent hearing the claim (with no exceptions).

BC's CRT is structured around a much different compensatory model for its tribunal members. Whereas Nova Scotia and Ontario's decision-makers are

80. *CJA*, *supra* note 26, s 33(6).

primarily full-time practicing lawyers, the CRT's tribunal members are generally full-time personnel with only a few exceptions. Full-time tribunal members are provided annual salaries for the entirety of their role, which includes research and writing decisions. Further academic research is required to determine the extent to which remuneration for researching and writing decisions may impact decision-makers' inclination and thoroughness in preparing decisions. Nevertheless, we posit that it is a relevant factor in weighing the relative preparedness of small claims bodies to hear intellectual property claims. Prospective intellectual property claimants with identical claims may receive varying treatment of their claims depending on the extent to which the court or tribunal incentivizes investigation, research, and writing on the part of the decision-maker.

Overall, the institutional support provided to decision-makers varies significantly across jurisdictions. It is not clear that each small claims court or tribunal across Canada provides sufficient institutional support or resources for decision-makers to decide over intellectual property claims. In general, it appears to be a very low priority area.

The disparity in institutional support could nevertheless have a significant impact on the treatment given to the substantive legal issues, remedies, or other complexities of an intellectual property claim. The Nova Scotia Small Claims Court model suggests that the ability and willingness of adjudicators to conduct research and provide detailed written decisions is at least partly voluntary. On the other hand, where decision-makers are engaged on a full-time basis and provided with sufficient resources and supports, the story may be different. In the latter scenario, there is likely a much stronger readiness and capacity to render decisions in lesser-heard intellectual property disputes. If (as we propose) the readiness and capacity of these bodies is related to the broader concept of organizational justice, there is currently very little consistency across the country.

(iii) Internal Governance of Institutions

The third dimension to our assessment is the internal hierarchy or governance structure of small claims bodies as institutions. Our view is that this aspect of small claims administration is relevant to capacity and readiness because internal governance may further incentivize decision-makers to utilize available institutional supports to provide reasoned and thorough judgments. This inquiry also reflects the third branch of organizational justice theory—the efficacy of mechanisms designed to correct errors and omissions. In essence, the structure of hierarchical organization among decision-makers can encourage judicial thoroughness and internal accountability.

All three institutions evidence some degree of internal hierarchy, though ranging in formality and approach. In the case of BC's CRT, the Vice Chair of

Small Claims acts similarly to a chief justice relative to judges in a formal court. While tribunal members are afforded significant independence to reach their own decisions, the Vice Chair of Small Claims possesses a largely supervisory and managerial role among tribunal members. In facilitating the peer review process, the Vice Chair can also play an active (though non-binding) role in facilitating legal research and investigation by tribunal members in reaching decisions.

The Ontario Small Claims Court evokes a significant degree of hierarchical organization, but this structure is largely constructed around scheduling and reappointment decisions rather than a proactive involvement in the practice of judging or mentorship of deputy judges. Regional senior judges or superior court judges play a key role in disciplinary action and reappointment decisions,⁸¹ but deputy judges nevertheless enjoy a significant degree of autonomy in conducting trials and preparing decisions. Beyond situations where a deputy judge's lack of competence in the intellectual property area amounts to misconduct or becomes a factor in reappointment decisions, the institutionalized hierarchy appears to have little involvement in ensuring the accuracy or thoroughness of decisions. One explanation for this may again be the sheer number of deputy judges at the small claims level in Ontario, which alone may prohibit formalized internal hierarchies that may facilitate proactive support.

The Nova Scotia Small Claims Court has, through convention, established the role of Chief Adjudicator. The role was described as “amorphous and ad hoc”, which we understand to be largely customary and with undefined powers and privileges. Indeed, the role is not mentioned anywhere in the Court's statute or regulations. The Chief Adjudicator has come to respond to complaints launched by users of the Court but does not possess any power to review decisions. The Chief Adjudicator is seldom involved in the professional development of adjudicators or scheduling decisions. Beyond voluntary consultation among adjudicators in relation to an active trial or decision, Nova Scotian adjudicators do not have any formal structure for governance and oversight in the delivery of their decisions. This lack of formal internal governance structure appears to be consistent with Nova Scotia's largely decentralized and informal approach to adjudication.

Each of these institutions demonstrates a distinct approach to governance among decision-makers. Our view is that proactive governance may play a significant role in assisting decision-makers with increasing competence or professional development in lesser-known subject matter areas, including IP. Nevertheless, we found that such proactive governance is not the norm, and perhaps even unusual. If small claims bodies in Canada are to see a greater

81. See *Rai v Métivier*, [2005] 76 OR (3d) 641 at para 9, 258 DLR (4th) 151 (Div Ct).

number of intellectual property claims, we anticipate that proactive internal governance and support among decision-makers would be a crucial factor in ensuring institutional capacity and readiness.

III. Analysis and Implications

Our assessment of Canadian small claims courts reveals significant inconsistencies between provinces and institutions. The enabling statutes of these courts and tribunals show varying allowances for different types of IP claims. They also greatly differ with respect to their institutional structures and the resources and support they offer to decision-makers. To a certain degree, this is not a new phenomenon. As far back as 1982, commentators have described Canada's network of small claims institutions as an unsatisfactory "hodgepodge" of enabling statutes that fall short of achieving their broader access-to-justice policy goals.⁸²

When it comes to IP small claims, however, the access-to-justice deficiencies transcend a mere hodgepodge of enabling statutes. For one, Canada's IP laws are generally national in scope. Yet, our findings reveal that Canadian small claims courts and tribunals can vary significantly in their capacity to ensure procedural and organizational justice in hearing IP claims. Guaranteeing similar substantive outcomes for IP claimants across the country is neither a laudable nor realistic policy goal. Nevertheless, these institutions ought to provide comparable procedural justice affordances. Our findings, however, reveal the contrary. IP claimants in certain regions may find much better support than others.

Secondly, IP law carries its own unique risks of misperceptions among adjudicators and decision-makers who are not adequately supported. Prior research evidences a significant divergence in perception between lay members of the public and experts as to the objectives, function, and limits of IP rights.⁸³ These lay (mis)conceptions of IP can also represent the mindset and orientation of small claims decision-makers.⁸⁴ This risk points to a specific need for small claims bodies in Canada to provide supports to decision-makers when hearing IP claims.

82. See William AW Neilson, "The Small Claims Court in Canada: Some Reflections on Recent Reforms" (1982) 20:3 *Alta L Rev* 475 at 480.

83. See Gregory N Mandel, "The Public Perception of Intellectual Property" (2014) 66:1 *Fla L Rev* 261 at 276.

84. See Gregory N Mandel, "What is IP For? Experiments in Lay and Expert Perceptions" (2016) 90:3 *St John's L Rev* 659 at 665.

Taken together, there are significant potential risks and deficiencies in the status quo from an access to justice perspective. The following sections canvass these deficiencies in relation to Canadian small and mid-size enterprises (SMEs), refer to measures taken in neighbouring jurisdictions to remedy it, and offer some potential solutions.

A. Intellectual Property Small Claims & Canadian SMEs

The prospect of an increase in intellectual property small claims is not merely a theoretical musing. IP is increasingly important for Canadian SMEs. Exacerbated by the global COVID-19 pandemic and broader technological change, SMEs are also increasingly digitizing and shifting to online-based business models.⁸⁵ These dynamics create fertile conditions for an increase in disputes with an intellectual property dimension.

SMEs play a key role in Canada's innovation and job creation strategy. In 2019, they accounted for over ninety per cent of the private labour force and eighty-five per cent of net employment growth.⁸⁶ They have also become increasingly alert to the importance and benefits of intellectual property protection. For example, in 2007 just over half of SMEs in Canada reported being familiar with IP protections.⁸⁷ Yet in 2019, this familiarity increased to nearly three-quarters.⁸⁸ Further, a 2019 study conducted by the Canadian Intellectual Property Organization found that SMEs which are aware of or hold IP rights have improved outcomes relative to others in their cohort. They are also more likely to expand domestically, request and receive financing, and are generally more innovative.⁸⁹ The trend, therefore, is that IP is becoming vital to SMEs, while SMEs are becoming vital to Canada's economy.

85. See Priya Seetharaman, "Business Models Shifts: Impact of COVID-19" (2020) 54 Intl J Information Management 102173.

86. See Canada Intellectual Property Office, *IP Canada Report 2019*, (Ottawa: Innovation, Science and Economic Development Canada, 2019) at 27 [*IP Canada Report*].

87. See Strategic Counsel for the Canadian Intellectual Property Office, *Canadian Small and Medium Sized Enterprises (SMEs): Baseline Awareness of Intellectual Property* (Ottawa: Canadian Intellectual Property Office, March 2007) at 17, online (pdf): *Innovation, Science and Economic Development Canada* <ised-isde.canada.ca/site/public-opinion-research/sites/default/files/attachments/FinalReportCIPO-SME.pdf>

88. See *IP Canada Report*, *supra* note 86 at 29.

89. See *ibid* at 36.

This technological and market shift naturally leads to questions of effective enforcement and access to justice for smaller-cap intellectual property issues. If these IP rights cannot be effectively defended or protected, their value and utility is called into question. Weak enforcement capability also impairs the innovation incentive provided by exclusive rights. This could amount to a missed opportunity to achieve greater market fairness. Protection and enforcement of IP for SMEs can also ameliorate market power imbalances created by large technology firms, which have long been the lone beneficiaries of IP protection.

B. Comparative Intellectual Property Small Claims Approaches

An increase in IP small claims is not only a likely result of emerging technologies or shifting business models. It is also a present reality that has been anticipated to varying degrees by Canada's closest neighbours and trading partners. Both the United States and the United Kingdom have taken measures in recent years to allocate more judicial resources to hearing these types of claims. Canada's relative lack of emphasis in this area stands in contrast to these approaches.

The UK, for example, reformed its Patents County Court in 2013 and created the Intellectual Property Enterprise Court.⁹⁰ The Intellectual Property Enterprise Court includes a small claims track which hears IP disputes where the amount sought is less than £10,000. The small claims track of the Intellectual Property Enterprise Court is the direct result of reports commissioned in the UK which addressed the need and demand for access to justice among SMEs.⁹¹ Empirical studies of the Intellectual Property Enterprise Court's small claims track shows that it has seen frequent use by entrepreneurs and creators, including photographers, in the years since it was established.⁹² Nevertheless,

90. See generally UK, Intellectual Property Office, *Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010–2013* (Independent Review), Christian Helmers, Yassine LeFouili & Luke McDonagh (UK IPO, 2015) at 5, online (pdf): Government of the UK <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447710/Evaluation_of_the_Reforms_of_the_Intellectual_Property_Enterprise_Court_2010-2013.pdf>.

91. See UK, Ministry of Justice, *Review of Civil Litigation Costs: Final Report*, by Rupert Jackson LJ (London, UK: Her Majesty's Stationary Office, 2009) at xx.

92. See Sheona Burrow, *Access to Justice in the Small Claims Track of the Intellectual Property Enterprise Court (IPEC): An Empirical Inquiry into Use by Creative SMEs* (PhD Dissertation, University of Glasgow, 2018) [unpublished] at 203.

the consensus among researchers seems to be that the Intellectual Property Enterprise Court's larger access-to-justice goals have yet to be realized.⁹³

More recently, the US has established a specialized tribunal for hearing copyright claims. Its jurisdiction is purely voluntary. It is intended to act as an alternative to formal litigation. The 2019 *Copyright Alternative in Small-Claims Enforcement Act* (the *CASE Act*)⁹⁴ established the Copyright Claims Board—essentially a tribunal housed within the US Copyright Office. The Board is restricted in its subject matter jurisdiction to copyright claims and may only hear claims involving damages below \$30,000.

The *CASE Act* and the Board were touted by lawmakers as an access to justice solution. They envisioned the regime as a vehicle to enable timely and affordable enforcement of copyright for creators.⁹⁵ Importantly, however, the Copyright Claims Board acts as a voluntary alternative to disputes in court. A copyright defendant can simply opt out of a proceeding before the Board, leaving claimants without much of an affordable or timely option. The voluntary nature of the Board's jurisdiction coupled with concerns of biased adjudication have resulted in criticism from civil liberties groups and independent creators.⁹⁶

Though neither the US Copyright Claims Board and the UK's Intellectual Property Enterprise Court Small Claims Track are without their shortcomings, they evidence a common policy approach by devoting resources to IP dispute resolution in order to provide access to justice. They both also emphasize the importance of IP adjudication for SMEs.

C. Bolstering Small Claims Intellectual Property Dispute Resolution Capacity in Canada

Canada does not presently have any plans to follow the specialized tribunal approach taken in the UK and the US. This is not necessarily a bad thing. After all, Canada's IP litigation expertise is already highly geographically concentrated

93. See *ibid* at 256.

94. See US, Bill HR 2426, *Copyright Alternative in Small-Claims Enforcement Act of 2019*, 116th Cong, 2019 (enacted).

95. See Emily A Denisco, "United States: The Implications of the Copyright Small Claims Court" (16 January 2020), online: *Mondaq* <www.mondaq.com/unitedstates/copyright/883890/the-implications-of-the-copyright-small-claims-court>.

96. See Mitch Stoltz & Corynne McSherry, "Congress Shouldn't Turn the Copyright Office Into A Copyright Court" (29 November 2017), online: *Electronic Frontier Foundation* <www.eff.org/deeplinks/2017/11/creating-copyright-court-copyright-office-wrong-move>.

and centralized.⁹⁷ From an access-to-justice perspective, a specialized IP small claims tribunal may only exacerbate the inaccessibility and lack of proximity to IP expertise and procedural justice for claimants.⁹⁸

Canada (and its provinces) could nevertheless take guidance from the US and UK. Additional IP resources and supports can be offered to decision-makers within the existing framework of small claims courts and tribunals. This would align with Canada's 2018 national Intellectual Property Strategy's goal of achieving more "efficient and less costly IP dispute resolution" for SMEs.⁹⁹ Coordination between the federal government and provinces could also result in clarification as to the types of IP small claims most suitable for adjudication and assist these institutions in ensuring that they are prepared to hear them.

Overall, the existing framework of small claims bodies in Canada requires increased attention from policymakers as to its role in providing access to justice for small-cap IP claimants. Recent empirical studies of Canadian small claims litigation suggests that case loads in some jurisdictions have in fact decreased in recent years.¹⁰⁰ While further research on this point is required, one explanation for this phenomenon is the changing commercial environment where digitalization is increasingly rendering small-cap disputes outside of the perceived purview of small claims courts and tribunals. This may not merely be a function of judicial readiness and capacity, but also the subjective perception of claimants as to the suitability of these institutions to properly address these disputes. To mitigate this possibility, efforts should also be undertaken to provide notice to the public and SMEs that judicial readiness and capacity in this area is being prioritized. By taking these measures, Canada's small claims bodies may better adhere to the old adage that justice must not only be done effectively, but it must be seen to be done to be effective.¹⁰¹

97. See Joseph Mai & Andrey Stoyanov, "Anti-Foreign Bias in the Court: Welfare Explanation and Evidence from Canadian Intellectual Property Litigations" (2019) 117:1 J Intl Economics at 21, n 13 (noting that during the 2007–2010 period, more than eighty per cent of all intellectual property cases were brought before the Federal Court and the Trademarks Opposition Board).

98. See Jacques de Werra, "Specialised Intellectual Property Courts – Issues and Challenges" at 27, online (pdf): SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=2761209>.

99. Innovation, Science and Economic Development Canada, "Intellectual Property Strategy", *supra* note 5.

100. See Charles, *supra* note 73 at 984.

101. See *R v Sussex Justices, ex parte McCarthy* (1923), [1924] 1 KB 256, [1923] All ER Rep 233 (HCJ).

IV. Conclusion

Our research hits on two counterpoints. On the one hand, Canada's formal system of laws should make it achievable for those with IP small claims to find justice. The legislative framework is quite amenable to adjudications outside of expensive actions—a pleasant finding, in many ways. However, this optimism may fade somewhat as claimants encounter what the “administration” of justice entails in some provinces. To borrow a metaphor, claimants may find that assurances provided by Canada's intellectual property laws are not procedurally accessible inside of the courtroom.¹⁰² While some small claims bodies are well-positioned to deliver just outcomes, others may be under-equipped.

This disparity is troubling from an access-to-justice perspective. It stands to reason that IP claimants across the country should benefit from reasonably comparable procedural justice and institutional capacity to hear their claims. Secondly, the divergence in perception among generalists and experts as to the function, objectives, and limitations on IP rights suggest that small claims decision-makers require ample supports to correct such (mis)conceptions, whether held by themselves or claimants.

As for today's prospective IP small claimants, we highly recommend the BC's CRT. Its enabling statute provides the jurisdiction and remedies fit for many concerns, including infringement, with tribunal members placed well to resolve the finer points of IP law, as necessary. Its main limitation is a low ceiling on the value of claims it can hear—at present, only \$5,000.¹⁰³

Similarly, we encourage Ontario litigants to consider the small claims court as an avenue for justice in IP. Its position within the superior court arms it with an enhanced suite of remedies to see justice done, and gives us confidence that even novel claims can be handled procedurally “correctly”, in the appellate sense. In our view, this promise could be made even stronger with mechanisms to assign cases more individually and to allow greater communication between members of the court.

It may be fair to assume these findings extend to other jurisdictions that also house their small claims court in the superior court, and particularly Prince Edward Island and Nunavut, where matters are heard by judges. Likewise, where small claims go before provincial court judges, as in Newfoundland, Quebec, Saskatchewan, Alberta, the Provincial Court of British Columbia,

102. See Lawrence B Solum, “Procedural Justice” (2004) 78:1 S Cal L Rev 181 at 204.

103. See *Tribunal Small Claims Regulation*, BC Reg 232/2018, s 3. We would trust it with much more.

and the Northwest Territories, it may be reasonable to assume the generalist character of the court offers some assurance of capacity when novel matters arise.

In contrast, we do not recommend taking IP matters to the Nova Scotia Small Claims Court unless they are part of an uncomplicated contractual dispute. A limited jurisdiction puts most matters beyond the court's reach, as an initial hurdle. Those claims it can hear will largely depend on the willingness and personal resources of the adjudicator to sort out. Adjudicative conscientiousness is a matter of public service in Nova Scotia.

Though we have touched upon the specific implications of these findings in relation to IP claims, they are not limited to IP alone. Any type of complex claim outside the typical bailiwick of property damage and debt collection may face a similar institutional response. Nor are the strengths and weaknesses of these forums uniquely attributable to IP. In many ways, the outcomes for IP litigants are symptomatic of larger trends around how small claims bodies are organized and funded.

As to future research, we would be interested to see if these results, taken at an institutional level, are borne out in the subjective considerations of claimants—particularly small and mid-size enterprises. Their willingness to take claims to small claims forums is a litmus test for current and future reforms. We would also be interested to see future studies involving the experiences and views of small claims decision-makers in relation to their institutional supports and resources.

As IP picks up as an area of focus and Canada's own economy becomes increasingly oriented towards tech- and knowledge-based assets, the need to provide access to justice in IP will only grow. While much can be done at the small claims level today, an added emphasis on professional development and resources for decision-makers will help ensure our justice system is ready to meet the claims of tomorrow.