Manitoba Law Reform Commission

ACCESS TO COURTS & COURT PROCESSES: IMPROVING THE SMALL CLAIMS SYSTEM IN MANITOBA

Consultation Report

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CONSULTATION REPORT

Comments on this Consultation Report should reach the Manitoba Law Reform Commission ("the Commission") by **December 5, 2016.**

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba's law. Please refer to the provisional recommendations identified in this report, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

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The Commission assumes that written comments are not confidential. You may submit anonymous written comments, or you may identify yourself but request that your comments be treated confidentially. If you do not comment anonymously, or request confidentiality, the Commission may quote from or refer to your comments in its Final Report.

Alternatively, you can participate in a short online survey in connection with this Consultation Report. A link to the survey can be found on the Commission's homepage at www.manitobalawreform.ca.

ACKNOWLEDGEMENTS

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EXECUTIVE SUMMARY

Small Claims Court is an adjunct of the Court of Queen's Bench, designed to provide quick and inexpensive resolution for people claiming relatively small monetary awards for certain types of claims. The simplified procedure for small claims can be navigated without having to retain a lawyer, which makes the process more accessible for Manitobans compared to the ordinary procedure for claims initiated at the Court of Queen's Bench.

A simplified procedure for the adjudication of small claims was first enacted in Manitoba in 1972.[1] This procedure has evolved over time to the process in place today. *The Court of Queen's Bench Small Claims Practices Act*[2] ("*Small Claims Practices Act*") and the *Queen's Bench Rules*[3] establish the procedure for small claims in Manitoba. Small Claims Court has jurisdiction over all claims which do not exceed $10,000, which may include general damages up to $2,000.[4] This monetary limit has remained unchanged since 2007 and is one of the lowest in Canada.

This is not the Manitoba Law Reform Commission's ("Commission") first report on small claims. In 1983, it published *Report on the Structure of the Courts; Part II: The Adjudication of Small Claims*,[5] where the Commission made a number of recommendations with respect to changes to the system of small claims adjudication in place at that time. As a result, several recommendations were adopted in Manitoba, including a recommended increase in the monetary limit for small claims from $1,000 to $3,000, restricting the subject matter jurisdiction of the court, relaxed rules of evidence, and limits with respect to costs awards.[6] Again in 1998, the Commission undertook a review of the small claims system in Manitoba, and published a report, *Review of the Small Claims Court*.[7] Since the Commission's 1998 report, the monetary limit for small claims and the allowable amount for general damages have been increased twice: in 1999, the monetary jurisdiction was raised from $5,000 to $7,500;[8] and in 2007, the monetary jurisdiction was raised from $7,500 to $10,000, where it currently stands.[9]

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[1] *The County Court Act*, CCSM c C260 [repealed in 1984]. The initial legislation was Part II of *The County Courts Act*, SM 1971, c 77, and it applied only to the Winnipeg area. In 1972, the initial legislation was repealed and replaced a new Part II, which applied province-wide.
[2] CCSM c C285.
[3] *Queen's Bench Rules*, Man Reg 553/88, Rule 76.
[4] *Supra* note 2, s 3(1)(a).
[5] Manitoba Law Reform Commission, Report #55, *Report on the Structure of the Courts; Part II: The Adjudication of Smaller Claims* (March 1983). Available online at: http://www.manitobalawreform.ca/pubs/pdf/archives/55-full_report.pdf.
[6] *The Statute Law Amendment Act* (1985), SM 1985-86, c 51, s 10.
[7] Manitoba Law Reform Commission, Report #99, *Review of the Small Claims Court* (March 1998) at 1. Available online at: http://www.manitobalawreform.ca/pubs/pdf/archives/99-full_report.pdf.
[8] See sections 1(2) to 1(4) of *The Court of Queen's Bench Small Claims Practices Amendment and Parental Responsibility Amendment Act*, SM 1999, c 22, available online at: http://web2.gov.mb.ca/laws/statutes/1999/c02299e.php#1.
[9] See sections 2 to 4 of *The Court of Queen's Bench Small Claims Practices Amendment Act,* SM 2006, c 36 (in force 12 February 2007 (Man.Gaz. 27 January 2007)), available online at: *http://web2.gov.mb.ca/laws/statutes/2006/c03606e.php#*.

In the Commission's view, reform is once again appropriate to put the monetary jurisdiction of the *Small Claims Practices Act* on par with other Canadian jurisdictions. This Consultation Report will consider the need to update the *Small Claims Practices Act* by increasing the monetary jurisdiction and will also discuss other possible amendments in connection with an increase in the monetary limit for small claims, namely: whether to increase the general damages limit; changes to improve the substantive jurisdiction of small claims; who should adjudicate small claims; pre-trial settlement and mediation processes; and costs. The Commission makes five provisional recommendations that seek to strike a balance between ensuring that more people are able to access the simplified process under the *Small Claims Practices Act* with the concern that the small claims system does not become burdened with more complex issues that should be determined by a judge of the Court of Queen's Bench.

Reform of the *Small Claims Practices Act* can enhance access to justice in Manitoba in two ways. First, an increase in the monetary limit means that more people are able to have their disputes resolved in a more cost effective and expeditious forum as opposed to the more onerous procedural steps and stricter rules of evidence at the Court of Queen's Bench. Second, more claims being directed to Small Claims Court will help to relieve the burden on the Court of Queen's Bench and free up judicial resources.

This Consultation Report forms part of a larger project entitled *Access to Courts and Court Processes*, which focuses on specific legislative amendments designed to promote the efficient administration of justice in Manitoba. In 2012, the Manitoba Law Reform Commission published an Issue Paper on Access to Justice, which was intended to contribute to the ongoing discussion about access to justice.[10] This project is considered the Commission's next step in addressing the ongoing access to justice problem in Manitoba.

As this is a Consultation Report, the Commission asks for the input of individuals and organizations engaged in the small claims system in order to put any potential reforms to the *Small Claims Practices Act* in context. The Commission welcomes feedback on the provisional recommendations contained in this report. Feedback will be given careful consideration before the Commission makes final recommendations to the Minister of Justice and Attorney General in a Final Report.

[10]Manitoba Law Reform Commission, *Access to Justice* (Issue Paper #1, 2012), available online: http://manitobalawreform.ca/pubs/pdf/additional/issue_paper_access_justice.pdf.

CHAPTER 1: INTRODUCTION

Small Claims Court is an adjunct of Manitoba's Court of Queen's Bench that hears claims which do not exceed $10,000. Manitoba has one of the lowest monetary limits for small claims in Canada. Should the monetary limit for small claims be increased? Should other changes be made to improve the small claims system in Manitoba?

The purpose of *The Court of Queen's Bench Small Claims Practices Act*[11] ("*Small Claims Practices Act*") is to determine claims in a simple manner as expeditious, informal and inexpensive as possible.[12] The benefits of having a process to deal with small claims are well established. A person can avoid a lengthy and expensive litigation process by going to Small Claims Court in situations where the person is claiming an amount not exceeding $10,000. The simplified process for small claims does not involve pre-trial procedures (such as the exchange of documents between parties, examinations for discovery, and pre-trial conferences) and the evidentiary rules are more relaxed as compared to the procedure and rules at the superior court level, which makes the process easier for individuals to represent themselves rather than having to retain a lawyer. It also helps to reduce the strain on the court system through the reduction of backlogs in higher courts. In 2015, 3793 claims were filed with the Small Claims Court as compared to 2527 claims filed at the Court of Queen's Bench.[13]

Much has been said about the growing access to justice problem in Canada. As noted by Supreme Court of Canada Chief Justice Beverley McLachlin in her introductory remarks on the Access to Justice in Civil and Family Matters 2013 Report, the justice system is failing in its responsibility to provide access to justice:

> Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights.[14]

In Manitoba, many important initiatives are underway to attempt to address access to justice issues, such as the Law Society of Manitoba's Family Law Access Centre;[15] Community Legal Education Association,[16] which provides legal information to members of the public; the

[11] CCSM c C285.
[12] *Ibid*, s 1(3).
[13] According to statistics provided by the Court Registry System in an e-mails dated 19 Sep 2016 and 5 Oct 2016.
[14] Canadian Forum on Civil Justice - Access Committee on Access to Justice in Civil and Family Matters. *Access to Civil and Family Justice: A Roadmap for Change* (October 2013) at i, available online: http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.
[15] The Family Law Access Centre (FLAC) is a pilot project offered by the Law Society of Manitoba to assist middle-income families afford legal services with respect to family law matters. See the Law Society of Manitoba's website: http://www.lawsociety.mb.ca/for-the-public/family-law-access-centre.
[16] Community Legal Education Association (CLEA) is a charitable organization that provides legal information to Manitobans. See CLEA's website: http://www.communitylegal.mb.ca/about/mission-statement/.

establishment of the Legal Help Centre;[17] and an Access to Justice Stakeholders Committee to increase collaboration amongst the various organizations, to name just a few.

Having a robust small claims system in Manitoba improves access to justice in two important ways. First, it means that more claimants are able to have their disputes resolved in an expeditious way without having to retain a lawyer. Second, it frees up judicial resources at the Court of Queen's Bench to deal with more pressing matters such as criminal trials.

Recent decisions of the Supreme Court of Canada have highlighted the need to put access to justice rhetoric into action. In *R v. Jordan*,[18] the Court established a new framework for determining whether a person has been tried within a reasonable time as provided in section 11(b) of the *Canadian Charter of Rights and Freedoms*[19] and set a presumptive ceiling of 30 months between a criminal charge and the end of a trial at superior court. The Court held that an unjustified delay would result in a stay of the proceedings.[20] This change in the law makes the objective of freeing up judicial resources at the Court of Queen's Bench all the more pressing. In addressing the issue of judicial resources, the majority noted:

> We are aware that resource issues are rarely far below the surface of most s. 11(*b*) applications. By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such.[21]

In *Hryniak v. Mauldin*,[22] the Supreme Court of Canada addressed the need for more simplified procedures to promote access to civil justice. Justice Karakatsanis, writing for the Court held:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular

[17] The Legal Help Centre's mandate is mission is to "work in partnership with the community to increase access to legal and social service systems for disadvantaged community members by providing referrals, legal help and public legal education and information." See the Legal Help Centre's website: http://legalhelpcentre.ca/the-legal-help-centre.
[18] 2016 SCC 27 (CanLII), available online: http://www.canlii.org/en/ca/scc/doc/2016/2016scc27/2016scc27.html?autocompleteStr=R.%20v.%20Jordan&autocompletePos=2.
[19] *Canadian Charter of Rights and Freedoms*, s 11(b), Part I of the *Constitution Act 1982* (UK), 1982, c 11.
[20] *R v Jordan*, *supra* note 15. See paras 159-212 for a summary of the framework.
[21] *Ibid* at para 117.
[22] [2014] 1 SCR 87, 2014 SCC 7 (CanLII), available online: http://www.canlii.org/en/ca/scc/doc/2014/2014scc7/2014scc7.html?autocompleteStr=Mauldin&autocompletePos=1.

> case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.[23]

This Consultation Report forms part of a larger Commission project entitled *Access to Courts and Court Processes*, which identifies specific legislative amendments that can be made to improve the efficient administration of justice in Manitoba. While the Commission recognizes that the changes proposed in this report only address one aspect of a large and multifaceted access to justice problem, the recommendations, if implemented, would improve access to courts and court processes by streamlining litigation where the monetary limit is relatively small, so that more claims could be made through the simplified procedure for small claims. Although there are many identified barriers to accessing the courts system, it is well established that the cost and complexity of litigation are two such barriers.[24]

Chapter 2 of this Consultation Report provides the history and background on small claims in Manitoba. Chapter 3 discusses small claims systems in other Canadian jurisdictions. Chapter 4 explores the need for reform and makes provisional recommendations to improve the small claims system in Manitoba.

[23] *Ibid* at para 2.
[24] See *Hryniak v Mauldin, supra* note 22 at para 1. See also McGill, S, "Small Claims Court Identity Crisis: A Review of Recent Reform Measures," (2010) 49 Can. Bus. LJ 2 at 216, available online at: https://legacy.wlu.ca/documents/42428/2010_CBLJ_final_proofs.pdf

CHAPTER 2: BACKGROUND

Before considering whether reform to the small claims system is needed, it is necessary to review the nature of the current system. This Chapter will review the history of small claims in Manitoba and describe how the current system for small claims works in practice.

A. History of Small Claims in Manitoba

In response to concerns about the complexity of civil litigation, as well as the expense it entails, many Canadian jurisdictions began to initiate a simplified, streamlined procedure for small claims in the 1970s and 1980s. This section will provide some background into the evolution of small claims in Manitoba from the first iteration in 1972 to the procedure for small claims in place today.

(a) Small Claims under *The County Courts Act*

Manitoba enacted its first iteration of a province-wide, separate system for small claims in 1972, under Part II of *The County Courts Act*.[25] This simplified procedure for small claims has evolved over time to the process in place today.

When the small claims process was first enacted in Manitoba in 1972, the monetary limit was $1,000. In other words, $1,000 was the maximum amount of compensation an individual could claim for an action commenced under Part II of *The County Courts Act,* more commonly known as the small claims section of that Act. Under Part II of *The County Courts Act*, both County Court clerks and judges were empowered to hear such claims, but they were predominantly heard by clerks. A claimant could commence a small claims action by filing a simple statement of claim in a County Court office. The defendant could object to the proceeding under the less formal small claims procedure by filing a notice of objection with the County Court office, in which case, the defendant was required to file a statement of defence, and the matter would proceed to a trial before a judge. If no notice of objection was filed, then the defendant was presumed to have consented to having the matter heard as a small claims proceeding. The matter would then proceed to a trial before a clerk or a judge. If the claimant was successful the clerk or judge would file a certificate of decision, detailing the amount of the judgment and the costs and disbursements awarded. If the defendant chose not to appeal the decision, then the certificate of decision could be filed with the County Court office and upon filing, would become a judgment of that court and could be enforced in accordance with the County Court Rules.

[25] CCSM c C260 [repealed in 1984]. The initial legislation was Part II of *The County Courts Act*, SM 1971, c 77, and it applied only to the Winnipeg area. In 1972, the initial legislation was repealed and replaced a new Part II, which applied province-wide.

If the defendant chose to appeal the certificate of decision, the appellate procedure differed, depending upon whether or not a County Court clerk or judge heard the initial claim. If it was a clerk that had heard the initial claim, then the appeal would be heard by a County Court judge, and would be heard as a trial *de novo* (a completely new trial). If the initial claim had been heard by a County Court judge, then the matter could be appealed to the Manitoba Court of Appeal, and could only be appealed on a question of law alone.[26]

(b) Emergence of the Current Structure of *The Court of Queen's Bench Small Claims Practices Act*

In 1981, the Commission received a request from the then Attorney General to examine whether or not the Manitoba Court of Queen's Bench and the County Courts of Manitoba should be merged. It was also asked to study "means to ensure and improve the speedy, inexpensive and appropriate adjudication of small claims."[27] In its first report on this matter, entitled *Report on the Structure of the Courts; Part I: Amalgamation of the Court of Queen's Bench and the County Courts of Manitoba*[28] the Commission recommended amalgamation of these two courts, as well as the Surrogate Courts of Manitoba,[29] a recommendation which was adopted by the Legislative Assembly. Amalgamation of these courts into one court, the Manitoba Court of Queen's Bench, occurred in 1984[30] and *The Court of Queen's Bench Small Claims Practices Act* was enacted.[31]

As part of this project, the Commission published a second report entitled *Report on the Structure of the Courts; Part II: The Adjudication of Small Claims,* where the Commission made a number of recommendations with respect to changes to the system of small claims adjudication in place at that time, including:

- that small claims continue to be adjudicated by a court, rather than by an administrative tribunal, mediator or arbitrator;

- that small claims be heard by a separate division of an existing court, and that this court be the Provincial Court of Manitoba;

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[26] The above information regarding small claims procedure under Part II of *The County Courts Act* has been taken from Manitoba Law Reform Commission, Report #55, *Report on the Structure of the Courts; Part II: The Adjudication of Smaller Claims* (Winnipeg: Queen's Printer, March 1983) at 7 and 8. This report is available online at: http://www.manitobalawreform.ca/pubs/pdf/archives/55-full_report.pdf.
[27] *Ibid* at 1.
[28] Manitoba Law Reform Commission, Report #52, *Report on the Structure of the Courts; Part I: Amalgamation of the Court of Queen's Bench and the County Courts of Manitoba* (Winnipeg: Queen's Printer, October 1982), available online at: http://www.manitobalawreform.ca/pubs/pdf/archives/52-full_report.pdf.
[29] *Ibid* at 36-38.
[30] An Act to Amend *The Queen's Bench Act* and to repeal *The County Courts Act, The Surrogate Courts Act* and *The County Court Judges' Criminal Courts Act* and to amend *The Municipal Boundaries Act*, SM 1982-83-84, c 82.
[31] SM 1982-83-84, c 83 (Assented to 18 August 1983).

- that all adjudicators of small claims be legally trained;

- that the monetary limit for small claims be increased from $1,000 to $3,000;

- that certain matters be excluded from the jurisdiction of the small claims court division, including matters in which the title to land is brought into question; matters in which the validity of any devise, bequest or limitation is disputed; matters involving the administration of estates or trusts; actions for malicious prosecution, false imprisonment or defamation; and actions filed against any judge, justice of the peace or peace officer for any act done in the course of performing his or her duties;

- that the small claims division have no jurisdiction to award an injunction or an order of specific performance;

- that costs awards for counsel be restricted to special circumstances;

- that a pilot program with respect to mediation for small claims be established, in order to determine whether province-wide mediation for small claims is feasible;

- that the rules with respect to admissibility of evidence in small claims court be relaxed:

- that that the information regarding small claims court and the forms for these types of actions be examined, and if necessary, redesigned so that the public can better understand how to bring and defend a small claims action; and

- that steps be taken to increase public awareness of the court, generally.[32]

Some of the Commission's recommended reforms were adopted by Manitoba's Legislative Assembly in the years following the 1983 report, including the recommended increase in the monetary limit for small claims from $1,000 to $3,000, restricting the subject matter jurisdiction of the court, relaxed rules of evidence, and limits with respect to costs awards.[33] Others, such as the pilot program with respect to mediation, were not implemented.

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[32] See Manitoba Law Reform Commission, Report #55, *Report on the Structure of the Courts; Part II: The Adjudication of Smaller Claims*, *supra* note 23 at 50-54. Also see the Canadian Forum on Civil Justice's Inventory of Reforms: Small Claims Court and more specifically, the webpage entitled "Manitoba Small Claims Court;" http://www.cfcj-fcjc.org/inventory-of-reforms/manitoba-small-claims-court.

[33] *The Statute Law Amendment Act* (1985), SM 1985-86, c 51, s 10. See also Manitoba Law Reform Commission, Report #99, *Review of the Small Claims Court* (Winnipeg: Queen's Printer, March 1998) at 1. This report is available online at: http://www.manitobalawreform.ca/pubs/pdf/archives/99-full_report.pdf.

On January 1, 1989, a new provision was added to the *Small Claims Practices Act* specifying that general damages (non-specific damages that are difficult to quantify, such as pain and suffering, for example) in an amount not exceeding $1,000 may be awarded as compensation in respect of a small claim.[34] Subsequently, on September 1, 1989, the monetary limit with respect to small claims was increased from $3,000 to $5,000.[35]

In 1998, the Manitoba Law Reform Commission undertook a second review of the small claims system in Manitoba, this time, on its own initiative. In its report, entitled *Review of the Small Claims Court*,[36] the Commission noted that several task forces, in Manitoba and elsewhere, were examining the civil justice system in Canada, and whether changes were required to the system, including the system for adjudicating small claims. It stated:

> In light of all of these developments, the Commission decided that it was timely to revisit the small claims system in Manitoba with a view to determining whether further changes to the system were necessary or advisable, and whether some of the changes recommended in 1983 but not implemented, were still advisable.[37]

In its 1998 report, the Commission reiterated some of the recommendations it had initially made in its 1983 report, and made some additional recommendations. In particular, the Commission recommended:

- that small claims hearing officers should be lawyers licenced to practice in Manitoba with at least 5 five years of experience in practice;

- that, subject to Section 96 of the *Constitution Act, 1867*[38], hearing officers should be entitled to adjudicate more complex subject matter and order a wider array of remedies;

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[34] See the Small Claims Court website: http://www.cfcj-fcjc.org/inventory-of-reforms/manitoba-small-claims-court.
[35] See s 4 of *The Court of Queen's Bench Small Claims Practices Amendment Act,* SM 1988-89, c 10 (in force: 1 Sep 1989 (Man. Gaz.: 2 Sep 1989)), available online at: http://web2.gov.mb.ca/laws/statutes/1988-89/c01088-89e.php.
[36] Manitoba Law Reform Commission, Report #99, *Review of the Small Claims Court* (Winnipeg: Queen's Printer, March 1998). This report is available online at: http://www.manitobalawreform.ca/pubs/pdf/archives/99-full_report.pdf.
[37] *Ibid* at 2.
[38] (UK), 30 & 31 Vict, c 3, available online at: http://laws-lois.justice.gc.ca/eng/const/page-1.html. Section 96 of the *Constitution Act, 1867* empowers the Governor General to appoint superior, district and county court judges for each province. However, in this instance, by alluding to section 96, the Commission was referring to:

> . . .the constitutional prohibition on clothing provincially-created courts with "section 96" powers. That is, if small claims matters are adjudicated otherwise than by a judge of a superior, district or county court, the province is prohibited by section 93 of the *Constitution Act, 1867* from investing the Small Claims Court with powers that were historically exercised solely by those courts. [footnote omitted] (Review *of the Small Claims Court, supra* note 17 at 35.)

- that the monetary limit for small claims jurisdiction be increased from $5,000 to $7,500 and that the limit on claims for general damages be increased from $1,000 to $3,000;

- that the court's substantive jurisdiction be amended to allow the court to hear and determine interpleader applications[39] as long as the matters fall within the monetary jurisdiction of the court;

- that a voluntary mediation program be instituted for the purposes of resolving small claims disputes;

- that steps be initiated to allow for better enforcement of small claims judgments, including establishing a new default judgment procedure requiring defendants to respond to claims and enabling claimants to obtain judgments against defendants that do not respond without having to appear in court, and allowing judgment creditors to have judgment debtors summonsed to court to answer questions regarding why they have not paid a claim; and

- that a process be introduced that would enable parties to introduce written evidence without having to call the author to testify in court.[40]

Since the Commission published its 1998 report, *Review of the Small Claims Court,* the monetary limit for small claims and the allowable amount for general damages have been increased twice. On July 14, 1999, the monetary jurisdiction was raised from $5,000 to $7,500, and general damages limit was raised from $1,000 to $1,500.[41] Subsequently, on February 12, 2007, the monetary jurisdiction was raised from $7,500 to $10,000, and general damages limit was raised from $1,500 to $2,000.[42]

(c) Recent Amendments to the Act

In 2014, the Legislature enacted *The Court of Queen's Bench Small Claims Practices Amendment Act,*[43] which introduced several changes to the *Small Claims Practices Act,* including

[39] Interpleader applications are applications made by persons who hold but do not own property, where the ownership or entitlement to that property is currently being disputed by two other parties. An interpleader application essentially forces the two disputing parties to litigate their dispute, so that the person who holds the property may obtain clarity with respect to whom the property in question actually belongs.
[40] *Review of the Small Claims Court, supra* note 32, at 51-52.
[41] See sections 1(2) to 1(4) of *The Court of Queen's Bench Small Claims Practices Amendment and Parental Responsibility Amendment Act,* SM 1999, c 22, available online at: http://web2.gov.mb.ca/laws/statutes/1999/c02299e.php#1.
[42] See sections 2 to 4 of *The Court of Queen's Bench Small Claims Practices Amendment Act,* SM 2006, c 36 (in force 12 February 2007 (Man.Gaz. 27 January 2007)), available online at: *http://web2.gov.mb.ca/laws/statutes/2006/c03606e.php#*.
[43] SM 2014, c 30, available online at: http://web2.gov.mb.ca/laws/statutes/2014/c03014e.php#.

new sections specifying who may hear claims;[44] provisions allowing judges or court officers, subject to the provisions of the Act, to hear and decide claims in the absence of the defendant;[45] and a new appeal process,[46] all of which will be described in the next section. Some of these changes were said to be a response to the problems caused by the appeal procedure under the *Small Claims Practices Act*, where the automatic right of appeal from a court officer's decision to a Court of Queen's Bench judge was purportedly being overused and was placing a burden on the Court of Queen's Bench.[47]

As noted by the then-Attorney General Andrew Swan at the second reading of Bill 64, *The Court of Queen's Bench Small Claims Practices Act*[48]:

> This bill will provide Manitobans with a more appropriate response to resolving monetary disputes that are under $10,000. It will continue to ensure a fair, efficient and effective way of achieving a just outcome at a reasonable cost and within a reasonable time. This approach is in keeping with the principles of access to justice, in particular, proportionality where steps taken to resolve a legal dispute should properly correspond to the complexity of the legal issues involved.[49]

On November 26, 2015, during the 5th Session of the 40th Legislature, former Justice Minister Gord Mackintosh introduced Bill 9, *The Court of Queen's Bench Small Claims Practices Amendment Act*,[50] in the Legislative Assembly of Manitoba. Had this bill been enacted, it would have amended Section 3(1)(a) and various other sections of the *Small Claims Practices Act* to remove any mention of a $10,000 monetary limit with respect to small claims, replacing "an amount of money not exceeding $10,000" in Section 3(1)(a) of the Act, and similar phrases or references to $10,000 in various other sections of the Act, with the words "claim limit."[51] Bill 9 would also have added a definition of "claim limit" to the section 1(1) of the Act. Pursuant to clause 2 of the bill, "claim limit" would have been defined as "$10,000 or any greater amount prescribed by regulation." In other words, Bill 9, if enacted, would have allowed for changes to the monetary limit to small claims to be made by regulation, as long as the limit was set at some amount greater than the current $10,000 limit.[52] The bill would also have allowed for the current $2,000 limit for general damages found at Section 3(1)(a) of the *Small Claims Practices Act* to likewise be amended upward by regulation.

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[44] *The Court of Queen's Bench Small Claims Practices Amendment Act*, *supra* note 43, s 2.1(1) and (2).
[45] *Ibid*, ss 9-11.1(3).
[46] *Ibid*, ss 12(1)-15(3).
[47] Manitoba, Legislative Assembly, *Hansard*, 40th Leg, 3rd Sess, (26 May 2014) at 2893-2894 (Hon Andrew Swan).
[48] Bill 64, *The Court of Queen's Bench Small Claims Practices Amendment Act*, 3rd Sess, 40th Leg, Manitoba, 2014 (assented to 10 December 2014), available online: http://web2.gov.mb.ca/bills/40-3/b064e.php.
[49] *Ibid* at 2894.
[50] Bill 9, *The Court of Queen's Bench Small Claims Practices Amendment Act*, 5th Sess, 40th Leg, Manitoba, 2015, available online at: http://web2.gov.mb.ca/bills/40-5/b009e.php.
[51] *Ibid* at clauses 3(1), 4 and 5.
[52] *Ibid.* at clauses 2 and 7.

Bill 9 was never enacted. It died on the *Order Paper* on March 16, 2016 when the 40th Legislature was dissolved in anticipation of Manitoba's 41st General Election.

B. Overview of Small Claims Procedure in Manitoba

Small claims procedure in Manitoba is currently governed by the *Small Claims Practices Act* and Rule 76 of the *Court of Queen's Bench Rules*.[53] This section will provide an overview of the current procedure governing the adjudication of small claims in Manitoba.

(a) Who Can Adjudicate Small Claims?

Pursuant to the *Small Claims Practices Act*, only judges and court officers have authority to adjudicate small claims.[54] In practice, most small claims are heard by court officers. "Court officer" is defined as "the registrar, a deputy registrar or an assistant deputy registrar of the court."[55] As is stated on the Manitoba Court of Queen's Bench Small Claims information website, "Small Claims, for the most part, are heard by Court Officers who may or may not be legally trained but have experience and training in the court system" although "[s]ome Small Claims may be heard by judges of the Court of Queen's Bench."[56] Currently there are five court officers that hear small claims in fifteen locations throughout Manitoba.[57]

As mentioned above, in 2014, the Manitoba Legislature amended the *Small Claims Practices Act* to ensure that most claims continue to be heard by court officers. Section 2.1(1) of the Act now states:

> 2.1(1) Subject to subsection (2), a claim under this Act **must** be heard and decided by a court officer. [emphasis added]

Section 2.1(2) then goes on to state:

> A claim under this Act must be heard and decided by a judge if
>
> (a) not yet proclaimed;
>
> (b) a person or entity specified in the regulations is a party to the claim; or
>
> (c) a court officer directs that, in the interest of the administration of justice, the claim be heard and decided by a judge.

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[53] *Court of Queen's Bench Rules*, Man Reg 553/88.
[54] *Small Claims Practices Act, supra* note 11, s 2.
[55] *Ibid*, s 1(1).
[56] See the Manitoba Court of Queen's Bench Small Claims Information website: http://www.manitobacourts.mb.ca/court-of-queens-bench/court-proceedings/small-claim-information-claims-filed-after-january-1-2015.
[57] Manitoba, *Annual Report of Manitoba Justice and the Justice Initiatives Fund 2014-2015* at 45, available online: http://www.gov.mb.ca/justice/publications/annualreports/pubs/annualreport1415.pdf.

With respect to section 2.1(2)(b) of the Act, the only person or entity specified in the regulations is the government.[58] Accordingly, a claimant will only have his or her small claim heard by a judge if a court officer so directs, in the interest of the administration of justice, or if the Government of Manitoba[59] is a party to the claim. The reason why claims involving the Government of Manitoba must be heard by judges, as opposed to court officers, relates to the degree of independence of court officers. As explained by the then-Attorney General Andrew Swan in legislative debates, court officers "...don't have the same guarantee of independence. So as to ensure no concerns as to their independence, any small claim cases which involve the provincial government, agency or Crown corporation would then go to the Queen's Bench."[60]

(b) Limits on Monetary and Subject Matter Jurisdiction

As stated previously, pursuant to section 3(1)(a) of the *Small Claims Practices Act*, a claim made under the Act must be for an amount of money not exceeding $10,000, which may include general damages in an amount not exceeding $2,000. In other words, the claimant must be seeking monetary compensation, and not some other type of remedy or relief, and the amount of compensation being sought must not exceed $10,000 in total. This monetary limit can include up to $2,000 in compensation for injury or harm that is not easily quantifiable. Accordingly, if a claimant wants the advantage of the relaxed rules of evidence and the simplified court processes available under the *Small Claims Practices Act* and the amount of the claim is more than $10,000, the claimant may abandon the portion of his claim that is greater than $10,000 so that it may be dealt with under the Act.

The $10,000 limit to the claim does not include a claim for pre-judgment interest.[61] In other words, if a claimant is successful, the claimant could be awarded pre-judgment interest over and above the $10,000 monetary limit.

The jurisdiction of the *Small Claims Practices Act* also extends to some types of motor vehicle accident claims. Section 3(1)(b) states that a person may file a claim under the *Small Claims*

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[58] See *The Court of Queen's Bench Small Claims Practices Regulation,* Man Reg 283/2015, s 1, which came into force on 01 January 2015. This regulation is available online at: http://web2.gov.mb.ca/laws/regs/current/_pdf-regs.php?reg=283/2014.

[59] There is no definition of "government" in either the *Small Claims Practices Act* or in *The Court of Queen's Bench Act*, CCSM c C280, available online at: http://web2.gov.mb.ca/laws/statutes/ccsm/c280e.php (pursuant to section 1(2) of the *Small Claims Practices Act*, "words and expressions used in this Act have the same meaning as they have in *The Court of Queen's Bench Act.*" However, the definitions contained in the Schedule to the *Interpretation Act*, CCSM c I80 (available online at: http://web2.gov.mb.ca/laws/statutes/ccsm/i080e.php) apply to every Act and regulation in Manitoba. The Schedule to the *Interpretation Act* defines "government" as "Her Majesty the Queen acting for the Province of Manitoba."

[60] Manitoba, Legislative Assembly, *Hansard*, 40th Leg, 3rd Sess, (26 May 2014), *supra* note 47 at 2894 (Hon Andrew Swan).

[61] *Small Claims Practices Act, supra* note 11, s 3(3). Pre-judgment interest refers to the interest accruing on the amount of an award from the time the damage occurred to the time the judgment is entered by the court.

Practices Act to obtain "an assessment of liability arising from a motor vehicle accident in which the vehicle of the claimant is not damaged.

In terms of the type of subject matter which may form the basis for the monetary relief sought under the Act, rather than specifying the types of matters which may form the basis for a claim, the Act provides a list of types of claims which may not be decided under the Act, regardless of whether or not the claimant is only seeking monetary compensation. The following types of claims may not be dealt with under the Act:

- disputes between a landlord and tenant over a residential tenancy;[62]
- disputes over real property or interests in real property;[63]
- disputes over inheritance under a will[64] or over the administration of a trust or an estate;[65]
- disputes over family law matters that would come within the jurisdiction of the Family Division of the Court of Queen's Bench, including matters involving family status, child custody and access, division of property upon relationship breakdown, and child or spousal support;[66]
- allegations of malicious prosecution, false imprisonment or defamation;[67] or
- allegations of wrongdoing by a judge or a justice.[68]

Most of the above restrictions as to subject matter have been put in place because of the complexity of the subject matter involved in the disputes and the interests at stake. Many of the types of disputes described above do not lend themselves easily to the relaxed rules of evidence, lack of interlocutory proceedings,[69] and informal processes available for small claims matters. In addition, many of these types of disputes are likely to involve claims exceeding $10,000 in value. Finally, in order to adjudicate many of the above disputes, it would be necessary for the

[62] *Ibid*, s 3(2).
[63] *Ibid*, s 3(4)(a).
[64] *Ibid*, s 3(4)(b).
[65] *Ibid*, s 3(4)(c).
[66] *Ibid*, s 3(4)(d).
[67] *Ibid*, s 3(4)(e).
[68] *Ibid*, s 3(4)(f).
[69] Interlocutory proceedings are legal proceedings that occur between the commencement and the end of a lawsuit. These types of proceedings are designed to have temporary or provisional, rather than permanent effect, and are generally initiated by parties to, for example, preserve property or seize or freeze assets, so that they are not sold between the time that a claim has been made and the time that a judgment has been rendered on a claim or counterclaim which would frustrate the ability for the successful party to collect on his or her claim.

adjudicator in question to have either specialized legal knowledge or formal legal training, which court officers, who are responsible for adjudicating most disputes under the Act, may not have.

(c) How to Make a Claim

A person begins a claim by filing a claim form with one of the various court centres throughout Manitoba (generally, the one that is closest to where the defendant lives or alternatively, to where the dispute arose).[70] The claimant must set out the particulars of the claim in the form prescribed by Rule 76 of *The Court of Queen's Bench Rules* and sign the claim form.[71] The claimant must also pay a filing fee of $50, if the amount of the claim is less than $5,000, or $75, if the amount of the claim is between $5,000 and $10,000.[72] Upon receipt of the filed claim and payment of the requisite fee, the court officer is required to set a hearing date for the claim.[73] Prior to January 1, 2015, the court officer was required to schedule the hearing date within 60 days of the date that the claim was filed. However, this requirement was eliminated when the 2014 *Court of Queen's Bench Small Claims Practices Amendment Act*[74] came into force, and section 8(2) of the Act, which had contained this 60 day time limit, was repealed.[75]

Once the claim has been filed in one of Manitoba's court centres and a court officer has set the date, time and location for the hearing, the claimant has 30 days to serve the defendant(s) with a copy of the claim, unless the court officer, upon motion by the claimant, grants the claimant an extension of time.[76] The claimant must also serve the defendant with a Notice of Appearance.[77] The defendant is not required to file a Notice of Appearance with the court registry, but may do so in response to the claim in order to signal his or her intention to appear in court, either to dispute the claim (in which case, the defendant is required to provide his or her reasons for doing so) or to request time to pay the amount claimed.[78] The Notice of Appearance must be filed with the appropriate court registry no later than seven days before the scheduled hearing date.[79]

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[70] *Ibid*, s 6(1) and the Manitoba Court of Queen's Bench Small Claims Information website: http://www.manitobacourts.mb.ca/court-of-queens-bench/court-proceedings/small-claim-information/ and http://www.manitobacourts.mb.ca/court-of-queens-bench/court-proceedings/small-claim-information-claims-filed-after-january-1-2015/.

[71] Section 6(1) of the *Small Claims Practices Act, supra* note 11 and Rule 76.03(1)(a) of *The Court of Queen's Bench Rules, supra* note 53.

[72] See the Manitoba Court of Queen's Bench Small Claims Information website: http://www.manitobacourts.mb.ca/court-of-queens-bench/court-proceedings/small-claim-information-claims-filed-after-january-1-2015.

[73] *Small Claims Practices Act, supra* note 11, s 8(1).

[74] *Supra* note 43.

[75] See section 8(2) of the *Small Claims Practices Act* as it read prior to 01 January 2015, available online at: http://web2.gov.mb.ca/laws/statutes/archive/c285(2014-12-31)e.php?df=2012-06-14.

[76] See sections 6(2.1) and 6(3) of the *Small Claims Practices Act, supra* note 11.

[77] Service of documents is dealt with under sections 21(1) to 21(5) of the *Small Claims Practices Act, supra* note 11, and by Rules 76.03(3), 76.04 and 76.06 of *The Court of Queen's Bench Rules, supra* note 42. The relevant sections of the Act set out the manner and procedure for service, while the rules dictate the forms to be used.

[78] See Rule 76.03(1)(b) and Form 76 D of *The Court of Queen's Bench Rules, supra* note 53.

[79] See Rule 76.05(1) of *The Court of Queen's Bench Rules, ibid.*

Having said this, however, Rule 76.05(2) states that notwithstanding a defendant's failure to file a Notice of Appearance, if the defendant shows up at the hearing, he or she is entitled to be heard.

The defendant may also make a counterclaim against the claimant by filing it at the appropriate court centre and serving it on the claimant.[80] If the counterclaim is for an amount not exceeding $10,000 and the counterclaim is not joined with a counterclaim for a remedy other than money, or alternatively, if the defendant chooses to abandon that portion of the counterclaim which exceeds $10,000, then the counterclaim may be dealt with under the *Small Claims Practices Act.*[81] If the defendant is counterclaiming for an amount over $10,000, or is including a claim for a remedy other than monetary compensation in a counterclaim, then the court officer will adjourn the small claims matter for 30 days in order to give the defendant an opportunity to commence a civil action in the Court of Queen's Bench under *The Court of Queen's Bench Act*[82] and the regular rules of civil procedure contained in the *Court of Queen's Bench Rules*,[83] rather than under the *Small Claims Practices Act* and Rule 76 of *The Court of Queen's Bench Rules.*[84] The defendant must provide the court officer with proof that the defendant has commenced an action, via statement of claim, under *The Court of Queen's Bench Act* within 5 days of the date scheduled for the hearing of the small claim. Once this has been done, the small claims matter will be deemed to be discontinued.[85]

In general, there are no interlocutory proceedings allowed in a small claims matter.[86]

Sometimes, small claims matters will settle prior to the matter being heard or adjudicated by a court officer or a judge. In such cases, if the defendant consents to judgment, the claimant is entitled to costs and disbursements.[87] If, conversely, the claimant withdraws the claim before the

[80] See rule 76.06 of *The Court of Queen's Bench Rules, ibid.*
[81] See sections 4 and 5(1) of the *Small Claims Practices Act, supra* note 11.
[82] *The Court of Queen's Bench Act*, CCSM c C280.
[83] *Supra* note 43.
[84] See section 5(1) of the *Small Claims Practices Act, supra* note 11.
[85] *Ibid*, s 5(2).
[86] See section 8.3 of the *Small Claims Practices Act, supra* note 11. Interlocutory proceedings are legal proceedings that occur between the commencement and the end of a lawsuit. These types of proceedings are designed to have temporary or provisional, rather than permanent effect, and are generally initiated by parties to, for example, preserve property or seize or freeze assets, so that they are not sold between the time that a claim has been made and the time that a judgment has been rendered on a claim or counterclaim which would frustrate the ability for the successful party to collect on his or her claim.
[87] *Ibid*, ss 19(3) and 14(1). Costs, when awarded, are generally designed to compensate the successful party to an action for legal fees incurred in pursuing or defending against a claim. Disbursements are the expenses that one incurs while pursing or defending a claim, such as mailing costs, expert reports, photocopying costs, and so on. In small claims matters, pursuant to section 14(1) of the Act, a costs award may not exceed $100, except in exceptional circumstances. If a defendant makes a counterclaim and the claimant consents to judgment, then the defendant is entitled to costs (not exceeding $100, except for exceptional circumstances) and disbursements with respect to his or her counterclaim. See sections 19(2) and 14(1) of the Act.

hearing then the defendant is entitled to disbursements he or she has reasonably incurred in respect of the claim.[88]

(d) The Hearing Process

The purpose behind developing a separate process for small claims was, as stated previously, to "provide for the determination of claims in a simple manner as expeditious, informal and inexpensive as possible."[89] To that effect, the hearing process is designed to be quicker and simpler than the ordinary litigation process under the *Court of Queen's Bench Rules*. For instance, the *Small Claims Practices Act* states that a claim may be dealt with in a summary matter and that the *Court of Queen's Bench Rules*, other than Rule 76 (the small claims rule), do not apply. Further, the Court Officer may conduct the hearing as he or she considers appropriate in order to effect an expeditious and inexpensive determination of the claim.[90] Claimants and defendants are not required to be represented by a lawyer, articling student or a student-at-law, but they may be represented by such counsel if they so choose.[91]

Subject to the limited exceptions noted above, hearings are presided over by court officers.[92] If both the claimant and defendant appear at the hearing, then both parties may introduce evidence, including evidence provided by witnesses,[93] and the court officer may admit as evidence anything that they consider relevant, regardless of whether or not it would be admissible under the laws of evidence, with the exception of evidence that is subject to solicitor-client privilege or any other type of privilege recognized under the laws of evidence.[94] Evidence must be recorded, but if for some reason, a recording is not possible, the court officer is required to prepare a summary of evidence and, upon request, provide it on all parties to the claim.[95]

After hearing the evidence, and submissions, the court officer decides the claim, including any counterclaim or set-off.[96] The court officer must issue a certificate of decision, containing a summary of reasons for the decision, and provide it to each of the parties.[97] Once a certificate of decision has been issued, it is considered a Court of Queen's Bench judgment and may be enforced as such.[98]

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[88] *Ibid*, s 19(1).
[89] *Ibid*, s 1(3).
[90] *Ibid*, s 1(4).
[91] *Ibid*, s 8.1.
[92] *Ibid*, ss 2.1(1) and (2).
[93] *Ibid*, ss 8.4(1) and 8.5.
[94] *Ibid*, ss 8.4(1) and 8.4(2).
[95] *Ibid*, ss 8.8(1) and 8.8(2).
[96] *Ibid*, s 9(1).
[97] *Ibid*, s 9(3).
[98] *Ibid*, s 9(4).

As part of the 2014 amendments, if the defendant does not appear at the hearing, then the court officer must allow the claimant to prove service of the claim, hear and decide the claim in the defendant's absence and dismiss the defendant's counterclaim.[99] This may result in a default judgment being made against the defendant.

The Act provides defendants an opportunity to have default judgments set aside. The defendant may file an application to have such a default judgment set aside, by filing an application in the appropriate form in the court centre where the claim was filed.[100] The defendant must also pay $150 as security for costs.[101] The court officer will then set a date for the court to hear the application to set aside the original decision (default judgment in favour of the claimant).[102] The defendant must then serve a copy of the application of the claimant and any other parties within 20 days of the date of filing his application to set aside the original decision.[103] If the original decision was made by a judge, then the application to set aside the decision must also be heard by a judge. If the original decision was made by a court officer, then the application to set aside the decision must be heard by a court officer.[104] At the hearing, the defendant must satisfy the judge or court officer that he or she did not wilfully or deliberately fail to appear at the original hearing, that the defendant applied to set aside the original decision as soon as reasonably possible, or alternatively, if there was a delay in doing so, is able to give a reasonable explanation for delay, and that it is fair and just in the circumstances for the decision to be set aside.[105] If the judge or court officer is satisfied on all of these counts, then the matter will be scheduled for a new hearing on the merits, and the original default judgment in favour of the claimant will be set aside.[106] If the judge or court officer is not satisfied of this, then the original decision stands, and the original decision may be enforced as a judgment of the court.[107] In either case, the judge or court officer must provide reasons.[108] The decision of a judge or court officer on the matter of whether or not to let the default judgment stand or alternatively, to schedule a new hearing, is final and is not appealable.[109]

If the claimant does not appear at the hearing, then the judge or court officer may dismiss the claim, without hearing any evidence or adjourn the hearing to a specified date, imposing such terms and conditions as the judge or court officer feels are appropriate.[110] If the defendant has made a counterclaim then the judge or court officer may decide the counterclaim in the

[99] *Ibid,* s 9(2).
[100] *Ibid,* ss 11(1) and 11(2) *and* Rule 76.12(1) of *The Court of Queen's Bench Rules, supra* note 53.
[101] See Rule 76.12(2) of *The Court of Queen's Bench Rules, ibid.*
[102] See s 11(3) of the *Small Claims Practices Act, supra* note 11.
[103] *Ibid,* s 11(4) and Rule 76.12(3) of *The Court of Queen's Bench Rules, supra* note 53.
[104] See s 11(5) of the *Small Claims Practices Act, supra* note 11.
[105] *Ibid,* s 11(6).
[106] *Ibid,* ss 11(7) and 11(8).
[107] *Ibid,* s 11(9).
[108] See Rule 76.13(2) of *The Court of Queen's Bench Rules, supra* note 53.
[109] See s 11(10) of the *Small Claims Practices Act, supra* note 11.
[110] *Ibid,* s 20(1).

claimant's absence and render a default judgment against the claimant.[111] In such a case the claimant may apply to have the default judgment in respect of the counterclaim set aside in the same manner as a defendant might do with respect to a default judgment rendered on a claim.[112]

(e) The Appeal Process

Different rules for appeals apply, depending upon whether or not the small claim in question was filed prior to January 1, 2015, the date that the 2014 *Court of Queen's Bench Small Claims Amendment Act*[113] came into force. This section will describe both sets of rules; however, it appears that appeals made under the old procedure are decreasing so that the old procedure will no longer be applicable.

(i) Small Claims Filed Prior to January 1, 2015

If a claimant or defendant wishes to appeal a court officer's decision in respect of a small claim, and that claim was filed prior to January 1, 2015, the claimant does not require leave of a judge of the Manitoba Court of Queen's Bench to appeal, unless the person wishing to file the appeal did not appear at the original hearing, in which case leave to appeal from a Court of Queen's Bench judge is required.[114] The Notice of Appeal must be filed within 30 days of the date the original decision was rendered by the court officer on the small claim.[115] Any attempts to enforce the original judgment are stayed until the decision is rendered on the appeal.[116]

Under this procedure, a judge of the Manitoba Court of Queen's Bench hears and renders a decision on the appeal. The appeal, in these circumstances, is conducted as a new trial.[117] The appeal is to be dealt with in a summary manner, and the *Court of Queen's Bench Rules* do not apply unless the judge so orders at the request of one of the parties. The judge's decision on this appeal is generally considered final, and may be enforced as a judgment of the Court of Queen's Bench. Although a further appeal to the Manitoba Court of Appeal is possible, such an appeal may only take place with leave of that court, and on a question of law alone.[118] The Court of Queen's Bench judge hearing the appeal may order costs to the successful party in such an amount as the judge may allow.[119]

The limitation period for most claims filed prior to January 1, 2015 has already expired. According to statistics provided by the Court of Queen's Bench Registry, it appears that the

[111] *Ibid*, s 20(2).
[112] *Ibid*, s 20(3).
[113] *Supra* note 37.
[114] See ss 12(2) and 12(3) of the *Small Claims Practices Act* as it read prior to 01 January 2015, *supra* note 43.
[115] See s 12(4) of the *Small Claims Practices Act* as it read prior to 01 January 2015, *supra* note 43.
[116] *Ibid*, s 12(6).
[117] *Ibid*, s 12(5).
[118] *Ibid*, s 13(b) and s 15.
[119] *Ibid*, s 14(2).

number of claimants filing Notice of Appeals has gone down considerably as a result of the changes brought in by the 2014 amendments to the *Small Claims Practices Act*. For example, in 2014, prior to the amendments, 176 Notices of Appeal were filed; in 2015, 64 Notices of Appeal were filed; and in 2016, between January 1 and August 31, only 11 Notices of Appeal were filed.[120] This shows that the old process for appeals is gradually being replaced by the new process, and soon will no longer be applicable.

(ii) Small Claims Filed After January 1, 2015

With respect to claims that have been filed with the court after January 1, 2015, regardless of whether or not the original decision on the claim was rendered by a court officer or a judge, leave is required before the appeal will be heard, and an appeal may only be made on a question of law or jurisdiction.[121]

In situations where the original decision was made by a court officer, both the request for leave to appeal and the appeal itself will be heard by judges of the Court of Queen's Bench.[122] The appellant must file an application for leave to appeal and notice of appeal at the court centre where the claim was originally filed within 30 days of the Certificate of Decision being issued by the court officer. Once the application for leave to appeal and Notice of Appeal have been filed, the appellant has 20 days to serve these documents on the respondent or on any other parties to the claim.[123] Until such time a decision has been made to dismiss the application for leave to appeal, or, if the application for leave is granted, until the judge who decides the appeal makes a further order, enforcement of the original judgment of the court officer is stayed.[124]

A Court of Queen's Bench judge will first set down a hearing of the application for leave to appeal. At that time, the appellant will need to convince the judge that an error of law or jurisdiction was made at first instance by the court officer. If the appellant is successful in this regard, the judge will set the matter down for appeal.[125]

The judge who hears the appeal is responsible for determining the appeal process. The judge can determine whether the appeal is to be heard by oral argument or by a new hearing of the evidence; what written materials must be filed; and whether to order some or all of the transcript of the original hearing be provided to the court.[126] After hearing the appeal, the judge may confirm the original decision made by the court officer, or allow the appeal, set aside the court

[120] Based on statistics compiled by the Court Registry System Statistics, provided to the Commission via e-mail on 19 September 2016.
[121] See ss 12(1) and 15(1) of the current *Small Claims Practices Act*, *supra* note 11.
[122] *Ibid*, ss 12(1) and 12(8).
[123] *Ibid*, s 12(5).
[124] *Ibid*, ss 12(6) and 12(7).
[125] *Ibid*.
[126] *Ibid*, ss 12(8) and 12(9).

officer's decision and make any ruling the court officer might have made.[127] The judge must also, in his or her decision, give directions with respect to the stay of proceedings to enforce the original judgment.[128] The judge will issue a Certificate of Decision, and provide it to all parties to the appeal.[129] The Certificate of Decision is considered a judgment of the Court of Queen's Bench and may be enforced as such.[130] The Court of Queen's Bench judge may also order costs to the successful party in such amounts as the judge may allow.[131] There is no appeal available to the Manitoba Court of Appeal.[132]

In situations where the original decision was made by a judge, a party may appeal the decision to the Manitoba Court of Appeal, with leave, on a question of law or jurisdiction. If leave to appeal is granted, the Court of Appeal may confirm or set aside the judge's decision and make any order that the judge of the Court of Queen's Bench could have made.[133]

The Manitoba Court of Queen's Bench Small Claims Checklist for Appeals for small claims filed after January 1, 2015 stresses the challenges entailed in demonstrating that a court officer or judge has made an error on a question of law or of jurisdiction. The checklist strongly suggests that the appellant consult a lawyer and seek legal advice on these points.[134]

(f) Enforcement of Judgments

Decisions made by either a court officer or Court of Queen's Bench judge adjudicating a small claim at first instance, or decisions made by a Court of Queen's Bench judge on an appeal from a decision made by a court officer, may be enforced as judgments of the Court of Queen's Bench.[135] This means that all of the enforcement mechanisms available to successful parties to enforce judgments in any other action pursued in the Court of Queen's Bench are also available to successful parties in small claims matters. As small claims are claims for monetary compensation, the most common mechanisms used by successful parties to enforce their

[127] *Ibid*, s 12(10).
[128] *Ibid.*
[129] *Ibid*, s 12(11).
[130] *Ibid*, s 12(12).
[131] *Ibid*, s 14(2).
[132] *Ibid*, s 13. With respect to claims filed with the court after January 1, 2015 that were heard and decided by a Court of Queen's Bench judge, rather than a court officer, an appeal is potentially available to the Manitoba Court of Appeal. As with an appeal of a decision of a court officer, in circumstances where the original claim was filed after January 1, 2015, leave to appeal is required and an appeal may only be made with respect to a question of law or jurisdiction. If leave to appeal is granted, the Court of Appeal may confirm the original decision of the Court of Queen's Bench judge or substitute his or her decision for that of the Court of Appeal and make any order that the Court of Queen's Bench judge could have made. See the *Small Claims Practices Act, supra* note 11, ss 15(1)-(3). Also see Rules 3, 3.1, 4. 9 and 10 of the *Court of Appeal Rules,* Man Reg 555/88 R, available online at: http://www.canlii.org/en/mb/laws/regu/man-reg-555-88-r/latest/man-reg-555-88-r.html.
[133] *Small Claims Practices Act, supra* note 11, ss 15(1)-(3).
[134] *Supra* note 34.
[135] See ss 9(4) and 12(12) of the *Small Claims Practices Act, supra* note 11.

judgments appear to be garnishment, writs of seizure and sale and registration of judgments as liens against real property owned by unsuccessful parties.[136]

As noted by the Commission in its 1998 *Review of the Small Claims Court* report:

> Ultimately, however, it is up to the judgment creditor, and not the court, to enforce the judgment. Many individual claimants fail to realize this fact before filing their claim, and are subsequently disappointed.[137]

Note that, unless otherwise specified in Rule 76, the other *Court of Queen's Bench Rules* do not apply to proceedings under the Act.[138]

[136] See Rule 60.02(1) of the *Court of Queen's Bench Rules, supra* note 53 and s 2 of *The Judgments Act*, CCSM, c J10, available online at: http://web2.gov.mb.ca/laws/statutes/ccsm/j010e.php. Also see the *Manitoba Small Claims Court Checklist – Collecting on Your Judgment*, available online at: http://www.manitobacourts.mb.ca/site/assets/files/1672/collecting_on_your_judgment_-_e_2015_clean-6.pdf.
[137] *Review of the Small Claims Court, supra* note 32 at 11.
[138] See s 1(4) of the *Small Claims Practices Act, supra* note 11 and Rule 76.07(1) of the *Court of Queen's Bench Rules, supra* note 42, the latter of which incorporates Rule 53.04 of the Rules (the rule which governs the summonsing of witnesses) into Rule 76.

CHAPTER 3: OTHER CANADIAN JURISDICTIONS

In considering reform to Manitoba's small claims system, it is helpful to review the small claims systems in other Canadian jurisdictions.

The details of small claims procedure varies somewhat from jurisdiction to jurisdiction, as does the monetary limit for small claims. However, in enacting a procedure for the adjudication of small claims, all jurisdictions appear to be motivated by the goal of allowing certain types of less complicated claims, where the amount being claimed by the person making the claim was below a certain monetary threshold, to be heard in a less formal and more expeditious manner, such that neither the claimant nor the defendant would require a lawyer, and would be capable of representing him or herself in court.

A. Monetary Limits in Other Canadian Jurisdictions

As the chart below will demonstrate, Manitoba's $10,000 monetary limit is one of the lowest monetary limits for small claims in Canada. In fact, only Prince Edward Island's small claims monetary limit is lower than Manitoba's.

Jurisdiction	Monetary Limit	Date Current Monetary Limit Instituted
Alberta	$50,000	01 August 2014[139]
British Columbia	$25,000	01 September 2005[140]
Saskatchewan	$30,000	04 February 2016[141]
Manitoba	$10,000	12 February 2007[142]
Ontario	$25,000	01 January 2010[143]

[139] See AR 139/2014, available online at: http://www.qp.alberta.ca/documents/orders/orders_in_council/2014/714/2014_271.html.
[140] See s 1 of the *Small Claims Court Monetary Limit Regulation,* BC Reg. 179/2005, *supra* note 6.
[141] See *The Small Claims Amendment Regulations, 2016,* available online at: http://www.qp.gov.sk.ca/documents/gazette/part2/2016/G2201606.pdf.
[142] See ss 2 to 4 of *The Court of Queen's Bench Small Claims Practices Amendment Act,* SM 2006, c 36 (in force 12 February 2007 (Man.Gaz. 27 January 2007), *supra* note 38.
[143] See s 1(1) of the *Small Claims Court Jurisdiction and Appeal Limit,* O Reg 626/00.

Quebec	$15,000	01 January 2015[144]
New Brunswick	$12,500	01 January 2013[145]
Newfoundland and Labrador	$25,000	28 June 2010[146]
Northwest Territories	$35,000	25 August 2011[147]
Nova Scotia	$25,000	01 April 2006[148]
Nunavut	$20,000	31 October 2007[149]
Prince Edward Island	$8,000	01 January 2009[150]
Yukon	$25,000	01 April 2006[151]

[144] See *An Act to amend the Code of Civil Procedure and Other Provisions,* SQ 2014, c 10, available online at: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2014C10A.PDF.
[145] See s 3 of NB Reg 2013-103, available online at: http://laws.gnb.ca/en/ShowTdm/cr/2012-103///en.
[146] See *Small Claims Regulations (Amendment),* NL Reg 37/10, available online at: http://www.assembly.nl.ca/legislation/sr/annualregs/2010/nr100037.htm,
[147] See *An Act to Amend the Territorial Court Act,* SNWT 2011, c 31, available online at: https://www.justice.gov.nt.ca/en/files/bills/16/2011.6/Bill%2022.pdf and s 16(1) of the *Territorial Court Act,* RSNWT 1998, c T-2, available online at https://www.justice.gov.nt.ca/en/files/legislation/territorial-court/territorial-court.a.pdf.
[148] See *An Act to Amend Chapter 430 of the Revised Statutes, 1989, The Small Claims Court Act,* SNS 2005, c 58, available online at: http://nslegislature.ca/legc/bills/59th_1st/3rd_read/b236.htm. Also see M.W. Patry, V. Stinson and S.M. Smith, *Evaluation of the Nova Scotia Small Claims Court: Final Report to the Nova Scotia Law Reform Commission* (March 2009) at 21. This report is available online at: http://www.lawreform.ns.ca/Downloads/SmallClaimsFinaReportFINAL.pdf.
[149] See s 3.1(2) of the *Small Claims Rules of the Nunavut Court of Justice,* Nu Reg 023-2007, available online at: http://gov.nu.ca/sites/default/files/gnjustice2/justicedocuments/Gazette/Part-II/633386654879843750-6837192-2007gaz10part2.pdf.
[150] See *Small Claims Regulations,* EC741/08, available online at: http://www.gov.pe.ca/law/regulations/pdf/J&02-1.pdf and *Index to Part II of the Royal Gazette Containing Regulations of Prince Edward Island* at 4. This *Index* is available online at: http://www.gov.pe.ca/photos/original/gaz_2008part2.pdf.
[151] See *An Act to Amend the Small Claims Court Act,* SY 2005, c 14, amending ss 2(1)(a) and 2(1)(b). The amendment also provides that s 2(1) of the Act is further amended by adding the following paragraph:

> "(d) The Commissioner in Executive Council may by Order increase the monetary jurisdiction of the Small Claims Court under paragraphs 2(1)(a) and 2(1)(b)."

Available online: http://www.gov.yk.ca/legislation/acts/smclco_amend.pdf.

In many Canadian jurisdictions, namely British Columbia, Alberta, Saskatchewan, Ontario, New Brunswick, Newfoundland and Labrador, and Prince Edward Island, the monetary limit is set out by regulation rather than statute.[152]

Most Canadian jurisdictions do not specify a limit for general damages. In addition to Manitoba, the only other jurisdiction that provides a general damages limit is Nova Scotia, where the limit is set at a mere $100.[153]

B. Small Claims Adjudicators in other Canadian Jurisdictions

Manitoba appears to be the only jurisdiction in Canada to employ hearing officers who are non-lawyers to adjudicate small claims matters. Some jurisdictions only empower judges to adjudicate small claims,[154] while many others allow for adjudication by non-judges, which, at minimum, are lawyers. In Ontario, small claims are mainly heard by Deputy Judges, who are senior lawyers appointed for a term,[155] but may also be heard by judges of the Superior Court of Justice assigned to Provincial Court (Civil Division) prior to September 1, 1990.[156] In Nova Scotia, small claims are presided over by adjudicators appointed by the Governor in Council on the recommendation of the Attorney General, who must be practising lawyers in good standing.[157] Alberta's *Provincial Court Act* provides that "court" includes justices of the peace[158] and Saskatchewan's *Small Claims Act, 1997*, defines "judge" as a Provincial Court Judge or justice of the peace.[159] In both Alberta and Saskatchewan, while some justices of the peace are not lawyers, only those who are lawyers may preside over trials.

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[152] see s 1 of the *Small Claims Court Monetary Limit Regulation*, BC Reg 179/2005, available online at: http://www.bclaws.ca/Recon/document/ID/freeside/11_179_2005); Alberta (see section 1.1 of the *Provincial Court Civil Division Regulation*, A.R. 329/1989, available online at: http://www.qp.alberta.ca/documents/Regs/1989_329.pdf); Saskatchewan (see section 3 of the *Small Claims Regulations, 1998*, R.R.S. c. S-50.11 Reg. 1, available online at: http://www.qp.gov.sk.ca/documents/English/Regulations/Regulations/s50-11r1.pdf); Ontario (see section 1(1) of the *Small Claims Court Jurisdiction and Appeal Limit*, O. Reg. 626/00, available online at: https://www.ontario.ca/laws/regulation/000626); New Brunswick (see section 3 of the Regulation under the *Small Claims Act*, NB Reg 2013-103, available online: http://laws.gnb.ca/en/showfulldoc/cr/2012-103/#anchorga:s_1); Newfoundland and Labrador (see NL Reg 37/10); and Prince Edward Island (see s 2 of the Small Claims Regulations, EC741/08, available online: http://www.gov.pe.ca/law/regulations/pdf/J&02-1.pdf.) See also Yukon's *Small Claims Court Act*, SY 2005, c 14, s 2(1)(d), which allows the Commissioner in Executive Council to increase the monetary jurisdiction by Order.

[153] *Small Claims Court Act*, RS 1989, c 430, s 11.

[154] See *Small Claims Act*, RSBC 1996, c 430, s 3; *Code of Civil Procedure*, c C-25.01, s 958; and *Small Claims Act*, RSNL 1990, c S-16, ss 2(c) and 3(1).

[155] See Ontario Superior Court of Justice website, "About Judges and Judicial Officials", available online at: http://www.ontariocourts.ca/scj/judges/about/#Deputy_Judges_of_the_Small_Claims_Court.

[156] *Courts of Justice Act*, RSO 1990, c C43, s 24(2) & s 32.

[157] *Small Claims Court Act*, RS 1989, c 430, s 6(1) & (3).

[158] *Provincial Court Act*, RSA 2000, c P-31, s 22.

[159] *Small Claims Act, 1997*, c S-50.11, s 2.

C. Pre-trial Processes in Other Canadian Jurisdictions

In most provinces and territories, an increase to the monetary limit for small claims has not taken place in isolation. One of the most common changes to occur in conjunction with increasing the monetary limit for small claims is the introduction or enhancement of pre-trial mediation and settlement processes for small claims.[160] The purpose of these pre-trial processes is to try to streamline or consolidate issues, encourage settlement or resolve a matter without the need for a trial.

Some Canadian jurisdictions require parties to attend some form of pre-trial conference. For instance, in Ontario, a settlement conference must be held with a judge in every defended action.[161] Likewise in Saskatchewan, a case management conference is required before a trial date is set, unless the judge is of the view that it would not be beneficial.[162] Although voluntary mediation was already available in Quebec, the Government of Quebec recently introduced a pilot project on mandatory mediation for small claims.[163]

In Alberta, where the monetary limit for small claims is the highest in Canada at $50,000, the court may direct the parties to appear before the court for a pre-trial conference.[164] The matter will not be set down for trial or otherwise continued until the conclusion of the pre-trial process.[165] Further, at any time after the notice of dispute is filed, the court may refer the action for mediation or any party can request it.[166]

In British Columbia, the procedure for pre-trial settlement depends on the monetary value of the claim and the location where the claim is filed.[167] Subject to certain exceptions, small claims begin with a pre-hearing settlement conference with a judge, where the matter may be settled

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[160] See, for example, Legislative Services, Government of Saskatchewan's *Small Claims Court Review Project: Consultation Paper* (the consultation closed on 01 April 2015) at 9 and 10. This paper is available online at: http://www.justice.gov.sk.ca/small-claims-court-review/consultation-paper. See, as well, sections 39 to 43 of the Yukon's *Small Claims Court Regulations*, O.I.C. 1995/152, available online at: http://www.gov.yk.ca/legislation/regs/oic1995_152.pdf, which deal with pre-trial conferences and mediation; and the Northwest Territories' Territorial Court webpages on judicial mediation for small claims matters: https://www.nwtcourts.ca/Courts/small-claims.htm and https://www.nwtcourts.ca/Courts/judicial-mediation.htm.

[161] *Rules of the Small Claims Court*, O Reg 258/98, Rule 13.01(1) & 13.01(5).

[162] *Small Claims Act 1997*, c S-50.11, s 7.1(1). See also the mediation requirement under the *Territorial Court Civil Claims Rules*, R-034-92.

[163] Information regarding Quebec's mandatory mediation pilot project is available online at: http://www.justice.gouv.qc.ca/english/programmes/mediation_creances/accueil-a.htm.

[164] *Provincial Court Act*, RSA 2000, c P-31, s 64(1).

[165] *Ibid*, s 66.

[166] *Ibid*, s 65. See also Alberta's *Mediation Rules of the Provincial Court – Civil Division*, A.R. 271/97, s 2(1). As noted on the Alberta Courts website, mediation and pre-trial conferences are available at some court locations. Available online: https://albertacourts.ca/provincial-court/civil-small-claims-court/civil-claim-process/mediation-and-pre-trial-conferences.

[167] *Small Claims Rules*, B.C. Reg. 261/93.

without the need for a hearing.[168] If the matter is not settled, then a Trial Preparation Settlement Conference may be required. Finally, if settlement is not reached at this second pre-hearing conference, then a date for the hearing is scheduled.

If the claim is between $10,000 and $25,000, any party to the proceeding may initiate mediation.[169] If a matter is not settled pursuant to the mediation session, either a settlement conference with a judge will be scheduled (if a settlement conference has not yet taken place) or the matter will be set down for trial.[170] British Columbia's rules also provide for optional mediation for claims under $10,000, although the availability of mediation is somewhat limited compared to claims between $10,000 and $25,000.[171]

While approaches may vary, it appears that every province and territory's approach seeks to strike a balance between the encouragement of early resolution of disputes and keeping the small claims process relatively quick and simple.

[168] *Ibid*, Rule 7(1) & (2).
[169] *Ibid*, Rule 7.3(5).
[170] *Ibid*, Rule 7.3(52).
[171] *Ibid*, Rule 7.2(2). Mediation for claims under $10,000 is only offered for claims that have been filed in the mediation registry, referred to mediation, or a Notice to Mediate form has been filed before July 30, 2015. See also Rules 7.4: In 2007, a pilot project was initiated for small claims of $5,000 or more or for damages for personal injury, and only in Vancouver. However, this project has been phased out, and mediation is not offered where the registrar has not, on or before February 1, 2016, served a notice of mediation session.

CHAPTER 4: THE NEED FOR REFORM

In considering reforms to improve the small claims system in Manitoba, the Commission has identified four broad areas where reform may be appropriate:

- Increasing the monetary jurisdiction of the *Small Claims Practices Act*;
- Increasing the general damages limit of the *Small Claims Practices Act*;
- Changes to ensure that a larger monetary limit does not unduly increase the complexity of small claims; and
- Changes to the substantive jurisdiction of the *Small Claims Practices Act* that would improve the efficient administration of justice.

This section will consider the need to update the *Small Claims Practices Act* by increasing the monetary jurisdiction as well as other reforms that should be made to improve the small claims system in Manitoba.

As this is a Consultation Report, the Commission recognizes that input from those who interact with the small claims system is required in order to gain a better understanding of the implications of any proposed changes and to ensure that the recommendations it makes are practical. For this reason, after making provisional recommendations to improve the *Small Claims Practices Act*, the Commission will discuss several other areas of possible reform. The Commission does not make provisional recommendations with respect to these areas, and instead asks for feedback; the Commission will give careful consideration to the feedback it receives during the consultation process before it comes to a decision on final recommendations.

A. Increasing the Monetary Jurisdiction

As previously stated, the monetary limit for small claims in Manitoba is $10,000. This monetary limit has remained unchanged since 2007. In the Commission's view, reform is appropriate to bring the monetary limit for small claims in line with other Canadian jurisdictions.

If the monetary limit for small claims were increased, this would enable a greater number of claims to be heard using the simplified process under the *Small Claims Practices Act*. It would recognize the fact that, as the cost of living rises, many claims that exceed $10,000 in value may still involve relatively simple issues such as collections, and the more formal process at the Court of Queen's Bench may be unnecessary in those cases.

In recommending an increase to the monetary limit for small claims, the Commission is aware of the concern that too high a limit could potentially detract from the purpose of the *Small Claims Practices Act*, which is to determine claims in a simple manner as expeditious, informal and

inexpensive as possible.[172] The concern is that too high a monetary limit could run the risk of inviting complex litigation into small claims adjudication where claims are not heard by judges and evidentiary rules are relaxed. At the same time, the Commission understands that the complexity of a claim is not necessarily linked to the monetary value of the claim,[173] and therefore is not persuaded that an increase in the monetary jurisdiction of the *Small Claims Practices Act* will inevitably lead to more complex claims. This view is consistent with the Supreme Court of Canada's recent decision in *Hryniak v. Mauldin*, where the Court held that the justice system requires a shift toward simplified procedures in order to achieve greater access to civil justice.[174] Further, changes to the subject matter jurisdiction of the *Small Claims Practices Act*, discussed below, can help to alleviate some of these concerns.

An increase to the monetary limit between $20,000 and $30,000 would put Manitoba on par with most other Canadian jurisdictions. The most common monetary limit is currently $25,000; five out of thirteen provinces and territories have a limit of $25,000.

In determining an appropriate monetary limit for small claims, one approach would be to set the limit just below the amount at which a lawyer would be willing to pursue the dispute at the Court of Queen's Bench. With the current limit, it appears that some disputes exceed the monetary jurisdiction of small claims yet the monetary value is too small to be cost-effectively pursued at the Court of Queen's Bench. It puts claimants in the position of having to either abandon the excess and proceed at small claims court or have most of the claim effectively canceled out by expenses and delays. Accordingly, the Commission recommends that the monetary limit for small claims under *The Small Claims Practices Act* be increased to a value that would capture many of these relatively small claims that cannot be cost-effectively pursued at the Court of Queen's Bench.

Provisional Recommendation #1: The monetary limit under *The Small Claims Practices Act* should be increased.

In making the recommendation to increase the monetary limit for small claims, the next question is whether section 3(1)(a) of the *Small Claims Practices Act* should be amended to reflect this

[172] *Small Claims Practices Act, supra* note 11, s 1(3).
[173] See McGill, S., "Small Claims Court Identity Crisis: A Review of Recent Reform Measures," (2010) 49 Can. Bus. LJ 2 at 213, available online at: https://legacy.wlu.ca/documents/42428/2010_CBLJ_final_proofs.pdf. Although statistics are not available regarding the monetary value of claims, it appears that roughly 40% of claims filed at Small Claims Court are regarding collections (i.e. unpaid accounts) in each of the last three years. According to statistics provided by the Court Registry System in an e-mail dated 19 Sep 2016, in 2015, 1684 of the 3793 claims filed at Small Claims Court were for unpaid accounts; in 2014, 1448 of the 3678 claims filed at Small Claims Court were for unpaid accounts; and in 2013, 1437 of the 3720 claims filed at Small Claims Court were for unpaid accounts.
[174] *Hryniak v Mauldin, supra* note 22 at para 2.

value, or whether the Act should be amended to allow the monetary limit to be adjusted upward by regulation, which was the approach used in Bill 9, *The Court of Queen's Bench Small Claims Practices Amendment Act*,[175] as well as the approach used by most other Canadian jurisdictions.

There are some practical advantages to allowing the monetary limit to be adjusted upward by regulation as opposed to fixing the monetary limit under section 3(1)(a) of the Act. Experience suggests that additional increases to the monetary limit will be needed in future. Accordingly, the Commission recommends that section 3(1) should be amended to allow the monetary limit to be adjusted upward by regulation to allow for maximum flexibility.

Provisional Recommendation #2: Section 3(1) of *The Small Claims Practices Act* should be amended to allow the monetary limit for small claims to be adjusted upward by regulation.

B. Increasing the General Damages Limit

As mentioned previously, section 3(1)(a) of the *Small Claims Practices Act* not only creates an overall limit for the amount of money that constitutes a small claim under the Act, but also restricts the amount that may be claimed as general damages. Had Bill 9, *The Court of Queen's Bench Small Claims Practices Amendment Act*, been enacted it would have enabled the current $2,000 limit for general damages found in the *Small Claims Practices Act* to be amended upward by regulation.[176] Currently, Manitoba and Nova Scotia are the only Canadian jurisdictions that specifically provide for a general damages limit in their small claims legislation.[177]

While the Commission recognizes that a general damages limit for small claims is uncommon in Canada, it nevertheless favours retaining such a limit. In the Commission's view, considering the complexity as well as the precedential value of claims involving significant general damages, a Court of Queen's Bench judge, rather than a court officer at Small Claims Court, should determine these claims. However, if the monetary limit is being increased, it is appropriate to increase the general damages limit proportionately.

Provisional Recommendation #3: The general damages limit under the *Small Claims Practices Act* should be increased to an amount proportionate to the increase in the monetary limit for small claims.

Consistent with Provisional Recommendation #2, which recommends that section 3(1) of the *Small Claims Act* should be amended to allow the monetary limit to be adjusted upward by

[175] Bill 9, *supra* note 39.
[176] See section 3(1.1) of Bill 9, *The Court of Queen's Bench Small Claims Practices Amendment Act*, *supra* note 9.
[177] See sections 9(a), 10(e) and 11 of Nova Scotia's *Small Claims Court Act*, R.S.N.S. 1989, c. 430, available online at: http://nslegislature.ca/legc/statutes/smallclm.htm.

regulation as opposed to statute, the Commission recommends that section 3(1) should likewise be amended to allow the general damages limit to be adjusted upward by regulation.

Provisional Recommendation #4: Section 3(1) of the *Small Claims Practices Act* should be amended to allow the general damages limit to be adjusted upward by regulation.

C. Substantive Jurisdiction of *The Small Claims Practices Act:* Wrongful Dismissal Claims

In other Canadian jurisdictions, concerns have been raised that the increased monetary limit for small claims has led to Small Claims Court capturing wrongful dismissal cases, which are complex matters more suited to formal procedures, stricter rules of evidence, and adjudication by a judge rather than a court officer.[178] In addition to the concern about complexity, in the Commission's view, wrongful dismissal claims are not appropriate for small claims adjudication because they can lead to new developments in the law and may carry precedential value. However, these concerns can be alleviated with a legislative amendment to the substantive jurisdiction of the court under section 3(4) of the *Small Claims Practices Act*.

Section 3(4) of the *Small Claims Practices Act* provides a list of types of claims which may not be decided under the Act, regardless of whether or not the claimant is only seeking monetary compensation. As discussed previously, most of the restrictions as to subject matter have been put in place because of the complexity of the subject matter involved in the disputes and the interests at stake. The matters listed under section 3(4) do not lend themselves easily to the relaxed rules of evidence, lack of interlocutory proceedings, and informal processes available for small claims matters. Additionally, in order to adjudicate these matters, it would be necessary for the adjudicator in question to have either specialized legal knowledge or formal legal training, which court officers, who are responsible for adjudicating most disputes under the Act, may not have. In the Commission's view, if the monetary limit of small claims were to be increased, it would be appropriate to amend section 3(4) by adding wrongful dismissal claims to the list of claims which may not be decided under the Act.

Provisional Recommendation #5: Wrongful dismissal claims should be added to the list of excluded proceedings under section 3(4) of the *Small Claims Practices Act.*

[178] See for example Inga Andriessen, "Increasing small claims court limit would result in more delays" *Advocate Daily*, available online: http://www.advocatedaily.com/areas-of-law/increasing-small-claims-court-limit-would-result-in-more-delays.html. ("If you're going to increase the limit to $50,000, you're definitely going to be putting more wrongful dismissal cases through small claims, and there's more potential harm to employees who are giving up rights they didn't even know they were giving up.")

D. Other Areas of Possible Reform

In addition to the Provisional Recommendations made in this Consultation Report, the Commission is examining other areas of possible reform regarding the *Small Claims Practices Act*.

(a) Adjudication of Small Claims

As stated previously, very few small claims matters in Manitoba are heard by judges. Recent amendments to the *Small Claims Practices Act* appear to have been expressly enacted to ensure that this continues to be the case. The Act specifies that a claim must be heard by a court officer unless a court officer, in the interests of the administration of justice, directs otherwise, or the Government of Manitoba is a party to the claim.[179]

Court officers are not necessarily lawyers or individuals with any sort of legal training. Manitoba appears to be the only jurisdiction in Canada to employ hearing officers who are non-lawyers to adjudicate small claims matters.[180] In its 1983 and 1998 reports on small claims procedure in Manitoba, the Commission recommended that small claims adjudicators have formal legal training.[181] To date, this recommendation has not been implemented. In the 1983 report the Commission noted "legal training is essential because of the importance of the concept of equality before the law and the fact that the court system must not be seen to be administering a different form of justice for claims of lower sums."[182]

Without going so far as to recommend that small claims adjudicators must be practising lawyers with a minimum number of years' experience, the Commission is considering whether small claims adjudicators should have at least some form of formal legal training. As this is a Consultation Report, the Commission seeks input from those working within the small claims system on this point.

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[179] *The Court of Queen's Bench Small Claims Practices Regulation,* Man Reg 283/2015, s 1.
[180] See McGill, S, *supra* note 24.
[181] See Recommendation 2, Manitoba Law Reform Commission, Report #55, *Report on the Structure of the Courts; Part II: The Adjudication of Smaller Claims*, *supra* note 32 at 17 and 18, and Recommendation 1, Manitoba Law Reform Commission, Report #99, *Review of the Small Claims Court*, *supra* note 36 at 28 -31. In the Commission's report, *Review of the Small Claims Court*, the Commission was quite specific in its recommendation, stating that "[s]mall claims hearing officers should be appointed from the ranks of practicing lawyers with at least five years experience in practice."
[182] Report #55, *supra* note 32 at 17.

(b) Substantive Jurisdiction of the *Small Claims Practices Act*: Liability Arising from Motor Vehicle Accidents

In the Commission's view, other reforms to the substantive jurisdiction of the *Small Claims Practices Act* may be desirable to further the efficient administration of justice.

As previously discussed, section 3(1)(b) of the *Small Claims Practices Act* allows claimants to file claims for an assessment of liability arising from a motor vehicle accident in which the vehicle of the claimant is not damaged. Essentially, these claims are for the determination of the payment of deductibles. The Commission notes that, in each of the past three years, approximately 10% of small claims filed in Manitoba were for assessments as to liability arising from motor vehicle accidents.[183]

Claims arising from motor vehicle accidents can be heard by Small Claims Court in many other Canadian jurisdictions.[184] However, due to Manitoba's more extensive no-fault insurance system through Manitoba Public Insurance Corporation ("MPIC"), the circumstances under which these types of claims are brought in Manitoba are more limited.

In the Commission's view, claims under section 3(1)(b) may be better suited to the administrative scheme under *The Manitoba Public Insurance Corporation Act*[185] rather than adjudication at Small Claims Court. The Commission notes that, currently, assessments for liability can take place through two different channels: Small Claims Court or the Liability Review process of MPIC, where an independent adjudicator will provide an opinion on liability. The assessment under the *Small Claims Practices Act* can take place either as the only assessment or as an appeal from MPIC's Liability Review process.[186]

If the *Small Claims Practices Act* no longer conferred jurisdiction for these assessments, it would relieve some of the burden on Small Claims Court and divert motor vehicle claims to a forum with more expertise in assessing liability from motor vehicle accidents. Accordingly, the

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[183] According to statistics provided by the Court of Queen's Bench Registry in an e-mail dated 19 Sep 2016, in 2015, 358 of the 3793 claims filed at Small Claims Court were for motor vehicle accidents; in 2014, 452 of the 3678 claims filed at Small Claims Court were for motor vehicle accidents; and in 2013, 456 of the 3720 claims filed at Small Claims Court were for motor vehicle accidents.

[184] In most cases, while the relevant legislation does not specifically provide that the court has jurisdiction to hear claims related to motor vehicle accidents, these claims are captured under the court's jurisdiction to hear claims for damages up to the monetary limit. Procedural guides in some Canadian jurisdictions discuss claims related to motor vehicle accidents. See for example British Columbia, Ministry of Justice "Making a Claim – Small Claims Procedural Guide", ("If it was an auto accident that led to your claim: You may want to name as defendants both the driver and the registered owner or lessee of the vehicle, if the vehicle was leased.") available online at: http://www.ag.gov.bc.ca/courts/small_claims/info/guides/making_a_claim.htm.

[185] CCSM c P215, s 46.

[186] See the description of the Liability Review process on the Manitoba Public Insurance website, available online: https://www.mpi.mb.ca/en/Claims/Vehicle/Collision-Appeals/Pages/liability-review.aspx.

Commission is considering whether section 3(1)(b) of the *Small Claims Practices Act* should be repealed or replaced.

(c) Pre-trial Process

As previously discussed, small claims legislation in most Canadian jurisdictions provides for some form of pre-trial settlement conference, or alternatively, voluntary or mandatory mediation, for small claims matters. Although it appears that the Small Claims Court in Manitoba will provide support to parties interested in mediation, there is no legislated voluntary or mandatory pre-trial process for small claims in Manitoba.[187] The only Canadian jurisdictions that do not provide for pre-trial settlement or mediation are Manitoba and Nova Scotia.

In its 1983 *Report on the Structure of the Courts; Part II: The Adjudication of Smaller Claims*, the Commission had recommended that a mediation pilot project be established, in Winnipeg or another centre, "from which the feasibility of a province-wide mediation system [for small claims] be assessed."[188] In its 1998 *Review of the Small Claims Court*, the Commission recommended that "a mediation programme . . . be instituted for the purposes of resolving claims filed in Small Claims Court; mediation should not be mandatory but available if all parties agree."[189] In the Commission's view, those recommendations are still valid today. There is evidence to suggest that small claims litigants who reach settlement through mediation (in jurisdictions where mediation is offered) are more satisfied with the process and outcomes than those whose cases were adjudicated.[190]

The Commission favours a voluntary approach to pre-trial procedures, recognizing that pre-trial procedures may not be appropriate in every case. A voluntary approach would allow for more flexibility in the system, so that adjudicators and parties would have the ability to refer a claim outside the adjudication process, the purpose of which would be to try to streamline or consolidate issues, encourage settlement or resolve the matter without the need for a hearing.

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[187] See the Manitoba Courts website, *Small Claims Information (Claims Filed after January 1, 2015)*, available online at: http://www.manitobacourts.mb.ca/court-of-queens-bench/court-proceedings/small-claim-information-claims-filed-after-january-1-2015/. ("If you do decide to file a Small Claim, the Court Officers who hear Small Claims may also be able to resolve your claim through mediation, if you and the defendant are open to trying to settle the dispute that way. A mediation can be arranged by either the claimant or defendant contacting the court office and speaking with a Deputy Registrar about this process. If the mediation is not successful, then your claim would proceed to be heard by a different Court Officer.")

[188] See Recommendation 11, Manitoba Law Reform Commission, Report #55, *Report on the Structure of the Courts; Part II: The Adjudication of Smaller Claims*, *supra* note 32 at 32.

[189] See Recommendation 7, Manitoba Law Reform Commission, Report #99, *Review of the Small Claims Court*, *supra* note 36 at 42.

[190] See Wissler, R L, "Mediation and adjudication in the small claims court: The effects of process and case characteristics," *Law & Society Review*, 29 (1995), 323-358, as cited in Law Reform Commission of Nova Scotia, "Evaluation of the Nova Scotia Small Claims Court" (March 2009) at 16, available online: http://www.lawreform.ns.ca/Downloads/SmallClaimsFinaReportFINAL.pdf.

The Commission has chosen not to recommend a specific procedure for pre-trial settlement or mediation in this Consultation Report, and instead seeks input from the public, legal practitioners, and those involved in the small claims system in order to craft a recommendation on pre-trial settlement procedures that would best achieve the goals of resolving claims in a simple manner as expeditious, informal and inexpensive as possible without imposing unnecessary burden on the small claims system.

(d) Costs

Costs awards are generally designed to compensate the successful party to an action for legal fees incurred in pursuing or defending against a claim. In the case of small claims, maximum costs awards are typically very low. The rationale for this is that, while Canadian jurisdictions (with the exception of Quebec) do not exclude representation by lawyers, limited costs awards work as a disincentive for lawyers to represent claimants with respect to small claims.

Section 14(1)(a) of the *Small Claims Practices Act* allows a judge or court officer to make a costs award to a successful party. However, the costs award cannot exceed $100, except in exceptional circumstances.[191] By contrast, section 14(2) provides that, on appeal, the court may order the successful party such costs as the court may allow. In its 1983 *Report on the Structure of the Courts; Part II: The Adjudication of Smaller Claims,* the Commission had recommended that "no counsel fees [costs] be generally awarded unless the Court is satisfied that the special circumstances of a case make it necessary in the interests of justice to do so."[192] The Commission noted that costs awards in small claims matters were severely restricted in other Canadian jurisdictions, and, more importantly, that "this Court is designed for self-representation. Therefore, if parties wish legal representation, they should do so at their own expense."[193]

An increase to the monetary limit for small claims could mean that more claimants will choose to have legal representation as the claims get higher. If the monetary limit were increased, it may be appropriate for an adjudicator to award a higher cost award depending on the circumstances of the case. In the Commission's view, although the cost award should remain quite limited, it is important to allow some discretion for special circumstances.

The Commission has chosen not to make a specific recommendation as to costs, and instead seeks input from the public, legal practitioners, and those involved in the small claims system in order to craft a recommendation on costs that would best achieve the goals of resolving claims in

[191] The court may also award the successful party "disbursements that are reasonably incurred for the purposes of the claim." See section 14(1)(b) of the *Small Claims Practices Act, supra* note 11.
[192] See Recommendation 2, Manitoba Law Reform Commission, Report #55, *Report on the Structure of the Courts; Part II: The Adjudication of Smaller Claims, supra* note 32 at 42-43.
[193] *Ibid* at 42.

a simple manner as expeditious, informal and inexpensive as possible without imposing unnecessary burden on the small claims system.

(e) Other Issues

The Commission would like to hear from legal practitioners, community groups, users of the small claims system, those working with the small claims system and anyone else who wishes to submit comments on the Provisional Recommendations and areas of possible reform contained in this Consultation Report. Additionally, the Commission is interested in hearing about other issues related to the *Small Claims Practices Act* not mentioned in this report and will consider whether additional recommendations should be made.

CHAPTER 5 – SUMMARY OF PROVISIONAL RECOMMENDATIONS

<u>Provisional Recommendation #1</u>: The monetary limit under *The Small Claims Practices Act* should be increased.

<u>Provisional Recommendation #2</u>: Section 3(1) of *The Small Claims Practices Act* should be amended to allow the monetary limit for small claims to be adjusted upward by regulation.

<u>Provisional Recommendation #3</u>: The general damages limit under the *Small Claims Practices Act* should be increased to an amount proportionate to the increase in the monetary limit for small claims.

<u>Provisional Recommendation #4</u>: Section 3(1) of the *Small Claims Practices Act* should be amended to allow the general damages limit to be adjusted upward by regulation.

<u>Provisional Recommendation #5</u>: Wrongful dismissal claims should be added to the list of excluded proceedings under section 3(4) of the *Small Claims Practices Act*.