B.C.'S SMALL CLAIMS PROGRAM - HAS IT WORKED?

E.D. SCHMIDT, Administrative Judge, Provincial Court of British Columbia

The Advocate published an article in its July, 1990 edition dealing with the proposed B.C. Small Claims scheme. Since that time the Small Claims Act and Small Claims Rules have been proclaimed, a comprehensive government evaluation has been conducted and an international award has been received. After the first year the Rules were revisited and some major amendments have come into effect on October 1, 1993 as a result of the review.

The purpose of this article is to determine whether the scheme has met the original expectations of it and to consider what the future holds. It is proposed to deal with these questions under the following headings:

A. An Overview of The Small Claims Scheme Enacted in 1991

B. The Government Evaluation

C. Response to Evaluation

D. Amendments to the Rules Effective October 1, 1993

E. Concerns that Arise

F. Conclusion

A. AN OVERVIEW OF THE SMALL CLAIMS SCHEME ENACTED IN 1991

In the spring of 1991 the Provincial government of British Columbia revamped its Small Claims process in a major way. With access to justice as the primary goal, the changes combined the use of plain language and a simplified procedure with some flexibility in the rules of evidence. The monetary limit was raised to $10,000.00.

The access to justice initiative resulted from the Justice Reform Committee Report tabled in 1988. The Committee determined that there should be a simple, inexpensive and speedy forum for resolution of disputes under $5,000.00. After the process was developed by the Rules Committee appointed by the Chief Judge of the Provincial Court, the Attorney General decided that the process would be suitable for disputes under $10,000.00, and in February 1991 the Provincial Court accepted its new civil jurisdiction.

A significant aspect of the procedural change was the use of a mandatory Settlement Conference, presided over by a judge. The judge was given broad powers, including the power to mediate disputes. Most Provincial Court judges across the province were to participate and each one that participated received training in mediation techniques.

The Settlement Conferences were designed so that they would be informal. They were not to be held in courtrooms. The judges were not to gown. Rather all parties were to sit around a table. The atmosphere was to be a friendly, non-threatening one which communicated a "How can we

help?" message. Each conference was to be allotted 20 to 30 minutes. The judge was to review the case with the parties in an effort to come to a satisfactory resolution of the dispute. Judges would encourage parties to address the problem with their needs and interests in mind. Judges would facilitate that process and ensure that the rights of the parties were protected. It was thought that a judge would be equipped through legal knowledge and judicial authority to prevent injustice occurring at the Settlement Conference, where it was hoped most cases would resolve. Judges could express an opinion on the strengths and weaknesses of the parties' case and send appropriate cases to trial. A judge could also make any Order for the just, speedy and inexpensive resolution of the claim. If the case went to trial another judge would hear the trial.

Litigants were entitled to have a lawyer represent them and attend the Settlement Conference with them. To limit the cost of attending with a lawyer litigants were given appointments which were staggered throughout the day. Lawyers were welcome to attend with their clients and the appointment scheme was set up to encourage them to do so. However, it was expected that judges would hear from the litigants themselves. It was thought that this would provide an opportunity for counsel and litigants to hear directly from the opposing litigants as to how they view the facts and would also prevent litigants from being inflamed by the positional statements of opposing counsel.

If a defendant did not attend a Settlement Conference, the claimant could obtain a default Payment Order. If the claimant did not attend, the claim could be dismissed for want of prosecution.

If the dispute could not be resolved, the judge was given the responsibility of organizing the case for trial. This was to be done by setting out on a Settlement Conference Record those matter that were not in dispute and those that were. In addition, a judge could make Orders for the discovery and production of documents and for the independent examination of damage.

The number of witnesses were to be canvassed and an estimate of the time required made. This was intended to enable realistic trial dates to be set without overbooking. Sending parties, witnesses and lawyers away for lack of time to hear their case was seen as contrary to the intent of the scheme even though it may be administratively expedient.

The inability of lay litigants to conduct a formal trial was recognized and the trial judge was given the discretion to receive sworn evidence in any way the judge considered appropriate. The rules of evidence were somewhat relaxed, allowing as evidence any oral or written evidence the court considers credible, trustworthy or relevant, even if the laws of evidence don't strictly allow it.

Finally the Rules addressed the issue of collection of judgments and imposed a duty on the trial judge to make an Order regarding payment of the judgment when the judgment is made.

B. THE GOVERNMENT EVALUATION

After the Rules had been in effect for one year the Provincial government undertook a major evaluation of the new procedure. The evaluation was conducted by a private firm and was the most extensive evaluation of a court related program undertaken to date by the Provincial government.

The evaluators, Semmens & Adams, undertook the evaluation in the spirit of the Justice Reform Committee's Report.

> "If Justice reform becomes a continuous function of the system, it can be approached from a long term perspective. Changes can be implemented, results monitored and then adjustments made. Otherwise, there is no one to look back and see whether the changes have had the desired results.
>
> It has been said that law reform abides by the motto of Satchel Paige, the baseball player who used to advise: 'Never look back. They may be gaining on you.' Fine advice for aging ballplayers but poor practice for lawmakers.'"

The evaluators did in fact look back, collecting pre- and post-implementation data from the Provincial Court and the Supreme Court, reviewing case files and surveying litigants, lawyers, judges, registry and ministry staff.

The evaluators examined four objectives identified by the Justice Reform Committee Report and reached performance conclusions in each case.

Objective 1 To provide access to a faster and less expensive means of resolving civil disputes for claims between $3,000.00 and $10,000.00.

Conclusion:

Small Claims Court is a fast and inexpensive means of resolving disputes, but increasing backlogs may eventually turn this success into failure.

Objective 2 To make the Small Claims Court process more understandable by providing information in plain language.

Conclusion:

Small Claims Court is now a more understandable court process.

Objective 3 To encourage mediated settlements and for "consent orders" through settlement conferences.

Conclusion:

Settlement Conferences achieve more settlements and offer litigants a true alternative in dispute resolution.

Objective 4 To obtain better compliance with Small Claim Judgments by providing payment hearings and payment schedules.

Conclusion:

It is doubtful that there is better compliance with Small Claim Judgments.

The evaluation identified an increasing and serious delay factor in bringing cases to Settlement Conference and to trial. The delays resulted from the unexpected increase in claims filed and the increase in rates of Replies filed. The number of claims increased by 13,660 in the first year or by 42%. The number of Replies filed increased by 89%. The latter is significant because the Reply triggers judicial involvement. Because this increase was completely unexpected the judicial resources were not in place to service the demand. The good news was that the Settlement Conference process was resolving 60% of cases which came to that stage.

C. RESPONSE TO EVALUATION

By March 1993, two years after implementation, delays had grown to one to two years or more in most areas of the province. The warning of the evaluators that increasing backlogs could eventually turn this success into failure had been realized.

The Attorney General responded by appointing six additional judges to handle the caseload which had remained constant during the second year and by appointing retired judges on an ad hoc basis to reduce the backlog. The objective was to reduce delay throughout the province to two months between Reply and Settlement Conference and four months between Settlement Conference and trial.

The delay reduction will be gradual over the next year but as of October 1, 1993 the Robson Square Court, which handles 40% of the provincial caseload, had reduced its delay to Settlement Conference from 8.5 months to two months.

As a result of the confirmation by the evaluation that the program effectively addressed the access to justice concerns of the Justice Reform Committee, the Attorney General appointed a committee to review the Small Claims Rules again from the perspective of access to justice, to fine tune what was already in place. That process eventually led to the amendments to the Small Claims Rules proclaimed October 1, 1993.

D. AMENDMENTS TO THE RULES EFFECTIVE OCTOBER 1, 1993

The amendments fall into several broad categories:

1. **Use of Registrars to Streamline Process**

   First there is an attempt to streamline the process for cases that are not opposed. Thus a Registrar can now make a Payment Order where the Reply only seeks time to pay the judgement. Registrars can order Payment Schedules without referring the matter to a judge. In addition, Registrars or Justices of the Peace can hear Payment Hearings. This should provide quicker access to the court for enforcement of judgments.

2. **More Effective Settlement Conferences**

   While most cases that go to Settlement Conference are resolved at that stage, some problem areas have been identified and the amendments are designed to make the conference even more effective.

   It was universally reported by judges that where lawyers attended on behalf of corporate clients, without the client but claiming to have instructions to settle, the incidence of

settlement were negligible. This, of course, defeated objectives 1 and 3 - early resolution was not achieved nor did the judge have the option to mediate. It was often the case that when the lawyer heard the other side of the case his or her instructions evaporated.

The new Rule 7(4) now requires all parties to attend but they may be accompanied by a lawyer or articled student.

In order to make the Settlement Conference more effective there are two new rules. Rule 7(14)(i) allows a judge to dismiss a Claim, Counterclaim or Reply where a judge determines there is no reasonable claim or defence, or the Claim, Counterclaim or Reply discloses no triable issue. Defendants should note Rule 3(i)(d) which requires the defendant to list reasons why a claim is opposed in the Reply. The intent of these rules is to terminate a lawsuit at the Settlement Conference where there is no cause of action or where a defendant has no defense but is simply filing a Reply to buy time.

In either case, a judge on his or her own motion during or at the end of the Settlement Conference may make a final Order or may adjourn to receive affidavit evidence. The rule is framed in this fashion to avoid adding another step in the process (summary judgment applications) which would add to the delay and costs. It is not anticipated that lawyers will apply to have an application heard to have a Claim or Reply dismissed at the same time as the Settlement Conference is to be held. However, at the end of a Settlement Conference counsel may ask the judge for leave to file affidavit evidence to show there is no triable issue or reasonable claim or defense if that becomes clear from the discussions at the Settlement Conference.

If a case goes to trial and it turns out that there was no reasonable basis for success of the Claim, Counterclaim or Reply, the judge may order a penalty of up to 10% of the amount claimed or the value of the claim to be awarded to the successful party. While only 8% of cases filed now go to trial, the trials are longer and there are still a number of trials in which one party had no reasonable basis for their position. This provision is designed to force early analysis of the strengths and weaknesses of a case, at least where counsel is involved.

3. **Minor Amendments**

Some time limits were unreasonable and have been expanded (Rule 10). Service of documents has been clarified and the revolving door of warrants for failing to obey a judge's Order to attend a Payment or Default hearing has been tightened (Rule 14(7)). Specific provisions for affidavit evidence when applying to set aside a Default or Dismissal Order have been added (Rule 17(2)).

E. CONCERNS THAT ARISE

If it is true that an implicit social contract provides that the courts promise to provide dispute resolution in exchange for the citizens' promise to keep the peace while the courts are resolving the issue, then it is paramount to that contract that access to the courts be unrestricted. The three major restrictions are complex procedure, high cost and delay.

Historically, all three have been difficult to control. For example, the County Court Rules were designed for smaller disputes. Eventually the procedure, cost and delay were indistinguishable

from the Supreme Court and the County Court Rules were merged with the Supreme Court Rules.

The drivers of cost, expense and delay appear to be the lengthy discovery processes and motions designed to prepare for trial. It is difficult to design a Small Claims program that will address those factors and provide wide access to the courts. It must meet the needs of lay persons and of skilled professionals. The court process should be structured in such a way that it avoids criticism such as that levied by Professor T. Church, an Australian commentator. He states:

> "Most courts in which I have spent any time are organized for the convenience of judges, of court staff, and of lawyers; usually in that order. If the convenience of the public is considered at all, it comes well behind these court-house 'regulars'. The implicit ranking of priorities is seldom examined, or even discussed."

Criticisms like this have led some jurisdictions to bar lawyers from the Court, substitute lay people for judges, or remove civil jurisdiction from the Courts all together. These approaches, and others, raise some concerns. For example, Professor A.J. Duggan, writing in 1980, worried that these attempts to put the public first may well backfire. He argued that it establishes two systems of justice; one for the institutional litigant (perceptively superior) and one for the individual and small claimant (perceptively inferior). He also anticipated that distortions in the common law will occur, thus making dispute resolution unpredictable.

The legislature in British Columbia has chosen a middle ground. It has addressed the issues of complex procedure, cost and delay by using the Settlement Conference as the one stop on the way to trial. The conference provides all the tools required, two months into the law suit, to resolve the case, or push it to it's final stage, the trial.

In doing so the program is responsive first to the needs of lay users by making the procedure easy to understand and allowing them to take an active role in the settlement conference. At the same time there has been a conscious effort to make the process friendly to professionals by reducing the time required to resolve the dispute while providing the minimal tools they require.

The Small Claims tribunal must of necessity be at the crossroads of informal and formal dispute resolution. There is a concern that as the process evolves, there will be a tendency to respond to the needs of lawyers at the expense of the accessibility to lay litigants. Lawyers are an organized and cohesive lobby and judges are sympathetic to their desire to have at their disposal every tool of the trade. It remains to be seen whether the Provincial Court will be able to withstand the pressure to become more complex to match the process in the Supreme Court.

It is hoped that lawyers will view this form of dispute resolution as an opportunity to develop a unique counsel skill that can be professionally rewarding as well as beneficial to clients. It is not unlike developing particular skills for work in such diverse forums as criminal court, tribunals, arbitrations or jury trials.

F. CONCLUSION

The program, though it has been shown to be effective, should continue to be monitored and evaluated to ensure its relevance to users. The role of independent empirical evaluation is becoming increasingly important in clarifying goals, monitoring performance and providing

accountability in social programs. In an article entitled Recent Research on Small Claims Courts and Tribunals: Implications for Evaluators Eugene Clark states:

> "Indeed so important has programme evaluation become in assessment of public policy that some scholars argue it is now a separate discipline distinct from traditional social science research. Regrettably, courts, in contrast to other public institutions, have been slow to respond to the need for empirical validation of the effectiveness of what they do. As Pozner has observed: 'Lawyers, including judges and law professors, have been lazy about submitting their hunches - which in honesty we should admit are often little better than prejudices - to systematic empirical testing'".

Government has shown initiative and commitment in providing access for individual and small claimants, as evidenced by the granting of a Justice Achievement Award for the program in San Diego this summer.

The amendments enacted on October 1, 1993 are a further demonstration of government's commitment to ensure all litigants in B.C. have access to a forum for speedy and inexpensive dispute resolution.

END NOTES

1. Diebolt, William, The New Small Claims Act and Rules, The Advocate, July 1990, p.585.
2. B.C. Regulations 477/90.
3. Semmens & Adams, Evaluation of the Small Claims Progress, Province of B.C., Ministry of Attorney General.
4. British Columbia's Small Claims Program was nominated for the National Association for Court Management, Justice Achievement Award. Of thirty-eight nominations from the United States and Canada, the program received an Honourable Mention.
5. B.C. Regulations 261/93.
6. Access to Justice: The Report of the Justice Reform Committee, Victoria: Queen's Printer for British Columbia, November, 1988.
7. Rule 7, Small Claims Rules.
8. Rule 16(1), supra.
9. Access to Justice: The Report of the Justice Reform Committee. (Victoria: Queen's Printer for British Columbia, Nov. 1988. p.5).
10. Semmens & Adams, Evaluation of the Small Claims Program, December 1992, p.6.
11. Supra, p.21.
12. Supra, p.22.
13. Supra, p.29.
14. Supra, p.31.
15. Supra, p.36.
16. Supra, p.37.
17. Supra, p.40.
18. Rule 11(6)(a), Small Claims Rules.
19. Rule 11(6)(b), supra.
20. Rule 12(1), supra.
21. Rule 20(5), supra.
22. Church, T., A Consumer's Perspective on the Courts, AIJA, Melbourne, 1990, p.7.
23. Clark, Eugene, Recent Research on Small Claims Courts and Tribunals: Implications for Evaluators, 1992 2 Journal of Judicial Administration, p.117, and particularly see footnotes nos. 134, 135 and 136, p.134.
24. In Manitoba the Small Claims jurisdiction ($5,000.00) is under the administration of the Court of Queens Bench and is presided over by non-lawyer, clerical staff known as Deputy Registrars.

25. Stark, J., Current Topics: Victorian Supreme Court's Concern over the Development of Specialist Tribunals, (1990), 64 Australian Law Journal, p.385-387.
26. Posner, R., The Summary Jury Trial and Other Methods of Alternate Dispute Resolution; Some Cautionary Observations (1986) 53 University of Chicago Law Review 366 at 367. Duggan, A.J., Consumer Redress and the Legal System in A.J.
27. Duggan and L.W. Darvall, (eds) Consumer Protection Law & Theory (The Law Book Company, Sydney, 1980), p.219.
28. Clark, E., op.cit. n.23, p.104.