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SMALL CLAIMS COURT: TAKING ADVANTAGE OF THE AVAILABLE PROCEDURAL REMEDIES

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I. INTRODUCTION

The purpose of the *Small Claims Act* and Rules is to allow litigants to have their claims resolved and to have enforcement procedures concluded in a just, speedy, inexpensive and simple manner.[1] In February 1991 the monetary jurisdiction of the Small Claims court increased from $5,000 to $10,000. Almost 15 years later, effective September 1, 2005, the *Small Claims Rules* were amended to increase the maximum amount the Court may award, from $10,000 to $25,000.[2]

Given the increase in monetary jurisdiction, one can assume that the Small Claims registries will face increased volume and therefore the time for these matters to reach a trial will no doubt increase also. In most cases, one should expect to have a trial in Small Claims court approximately one year after the Notice of Claim is filed.

II. PROPORTIONALITY BETWEEN DAMAGES AND THE COST OF PROCEDURAL REMEDIES

The legal costs involved in preparing for and attending pre-trial applications, and the like, can add up quickly. Litigants must constantly evaluate whether the additional costs inherent in each of these procedural steps will justify the gains to be had (for example, by obtaining greater disclosure from the opposing party). This evaluation is necessary whether one is prosecuting a subrogation case, or defending a third party claim.

III. POWER OF PROVINCIAL COURT JUDGE TO MAKE ORDERS

The power of a Provincial Court Judge to make orders is quite broad. When an application is heard by a judge, they are empowered to make any order and give any direction necessary to achieve the purpose of the Small Claims Act and Rules,[3] that being the just speedy, inexpensive resolution of matters. A judge may also, in making an order, impose 'any condition or give any direction that the judge thinks is far'.[4] The Small Claims Court has the inherent jurisdiction to deal with matters of procedure in order to ensure justice is done. This allows the Court to make procedural orders even when the Rules may not set out the remedy sought.

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[1] Section 2(1) *Small Claims Act*
[2] B.C. Reg. 179/2005
[3] Section 2(2) *Small Claims Act*
[4] Rule 17(4) *Small Claims Rules*

While often parties wait until the settlement conference to seek orders for disclosure of relevant documents, or other orders as the case may be, it is advantageous to know the case to meet prior to the settlement conference. Not only will you be in a better position to negotiate a settlement, but also in the appropriate cases, the settlement conference can be used as a venue to dismiss cases with no merit, or to decide certain issues in advance of trial. With Small Claims Court matters often reaching a trial within a year after the Notice of Claim is filed, litigants will not have much time to prepare their case, particularly if one waits until the settlement conference to address lack of disclosure issues.

What follows in this article is a summary of the many procedural remedies available and the impact that these procedures will have on the cost of prosecuting and defending claims that would, in the absence of the increased jurisdiction of the Small Claims Court, have been heard in Supreme Court.

IV. PROCEDURAL REMEDIES AVAILABLE IN SMALL CLAIMS COURT

A. DISCLOSURE OBLIGATIONS IN PERSONAL INJURY CASES

In the context of personal injury cases, the Small Claims Court requires that claimants file a Certificate of Readiness, with attached copies of all medical reports and records of expenses or losses suffered, prior to a settlement conference being held. This Certificate of Readiness and attached documents must be filed within 6 months after serving the Notice of Claim, and thereafter the Certificate must be served on the other parties.[5] While the purpose of this rule is to afford the defendant with early disclosure, often claimants include only minimal documentation of their injuries at this stage. In those cases, it is usually advantageous for the defendant to seek orders for production of relevant medical and employment related records that may assist in advancing defences such as the existence of a pre-existing or subsequent injury, causation, or failure to mitigate.

The *Small Claims Rules* provide that if a claimant is not ready to file the Certificate within the six-month period they may apply to the Registrar to extend the time, before of after the six month period has expired. If the Claimant does not file the Certificate of Readiness within six months as required by the *Rules*, and has not brought an application to extend the time, the defendant can apply for an order to dismiss the claim.[6]

[5] Rule 7 *Small Claims Rules*

[6] *Yewchuk v. Cleland et al*, 2002 BCPC 0200

B. DISCLOSURE OBLIGATIONS IN NON-PERSONAL INJURY CASES

The *Rules* provide that parties to a claim must bring to the settlement conference, which will be discussed below, **all relevant documents and reports**.[7] Prior to settlement conference there is no specific provision or requirement in the *Rules* that the parties exchange documents. This is certainly very different than the *Supreme Court Rules* that require the parties to provide a List of Documents within 21 days of a party delivering a Demand for Discovery of Documents.[8]

C. ORDERS TO COMPEL THE DISCLOSURE OF DOCUMENTS

Parties can seek an order for the production of certain documents at a settlement conference pursuant to Rule 7(14)(g) and (l). A party can also seek an order for production of certain documents either prior to, or after a settlement conference pursuant to Rule 16(6)(o). Whether an application is made prior to the Settlement Conference, or documents are requested at the Settlement Conference, it is always advisable to seek court orders for the production of documents with deadlines for compliance. If the claimant then fails to produce the documents within the deadline, the claimant will be in non-compliance with a court order. While a judge may be somewhat reticent to exercise their discretion to dismiss a claim, particularly against a self represented litigant, on this basis, if there are several instances of non-compliance over the course of the litigation a judge may not be so lenient.

D. INDEPENDENT MEDICAL EXAMINATIONS

The Small Claims Court Rules specify that prior to a settlement conference, the defendant may apply to a judge to order that the claimant attend an IME. Upon receiving the medical report, the defendant **must** serve a copy on the claimant 7 days prior to the settlement conference and bring a copy to the conference.[9] The overriding purpose of this rule appears to be early disclosure, and settlement. It may be possible to obtain an order for an IME after the settlement conference if needed, however, it is recommended that litigants consider doing so before the settlement conference if possible. When considering applications for orders that are not specifically set out in the Rules, the Court will consider the purpose of the Court, that being to provide a 'just, speedy, inexpensive and simple' resolution of the claims.[10]

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[7] Rule 7 (5) *Small Claims Rules*
[8] Rule 26(1) *Rules of Court*
[9] Rule 7(12), (13) *Small Claims Rules*
[10] Section 2(1) *Small Claims Act*

E. NO DISCOVERIES IN SMALL CLAIMS COURT

There is no provision in the Small Claims Court Rules for conducting an examination for discovery of another party. In *Lovrich v. I.C.B.C.*,[11] the Court discussed the powers of disclosure at a settlement conference and commented that the settlement conference takes the place of the pre-trial motions and examinations for discovery that one often finds in Supreme Court litigation.

F. ORDERS TO COMPEL WITNESS STATEMENTS

A party can attempt to obtain disclosure of witness statements and materials obtained during the initial investigation of a claim, by making an order for disclosure of those documents. Of course, an order for production of those documents may be impacted by a claim of privilege.

Often at a settlement conference, the judge will order that the parties disclose the names of witnesses they intend to call at trial, their contact information, and a summary of their evidence. Usually a deadline is provided for the provision of this information.

It may be possible in some cases to obtain an order for the names of witnesses even if the opposing party is not intending to call them as witnesses at trial. In the context of a personal injury case, those witnesses may be friends of the claimant who can comment on the claimant's physical condition before and after the loss, or they may be co-workers that can comment on the claimant's physical limitations, or lack thereof. There is no Rule that specifically provides for the names of witnesses that will not be called to testify. Such orders would be at the discretion of the judge and would be made pursuant to Rule 16(6)(o) which gives the court hearing an application to the power to make 'any order that the judge has the power to make and notice which is served in the other party', or 7(14)(l) which applies to settlement conference and gives the court the power to make any order 'for the just, speedy and inexpensive resolution of the claim'.

With greater exposure on Small Claims Court matters, it is this authors opinion that litigants should create a body of precedent decisions that will favour disclosure of such material witnesses and earlier disclosure in general.

G. SETTLEMENT CONFERENCES

Pursuant to Rule 7(14), a judge at a settlement conference may do one or more of the following:

(a) mediate any issues being disputed;

[11] P.C.B.C., unreported, July 28, 1993, Vancouver Registry No. 93-1081

(b) decide on any issues that do not require evidence;

(c) make a payment order or other appropriate order in the terms agreed to by the parties;

(d) set a trial date, if a trial is necessary;

(e) discuss any evidence that will be required and the procedure that will be followed if a trial is necessary;

(f) order a party to produce any information at the settlement conference or anything as evidence at trial;

(g) order a party to

(i) give another party copies of documents and records by a set date, or

(ii) allow another party to inspect and copy documents and records by a set date;

(h) if damage to property is involved in the dispute, order a party to permit a person chosen by another party to examine the property damage;

(i) dismiss a claim, counterclaim, reply or third party notice if, after discussion with the parties and reviewing the filed documents, a judge determines that it

(i) is without reasonable grounds,

(ii) discloses no triable issue, or

(iii) is frivolous or an abuse of the court's process;

(j) before dismissing a claim, counterclaim, reply or third party notice, order a party to file an affidavit setting out further information;

(k) Repealed. [B.C. Reg. 148/97, s. 7 (e).];

(l) make any other order for the just, speedy and inexpensive resolution of the claim.

The court schedules a mandatory settlement conference prior to the matter being set down for trial in almost all cases. The exception to the rule is that the Court will not schedule a settlement conference in cases involving a motor vehicle accident when the only issue in dispute is liability for property damage. Besides the possibility of settling the case, the settlement conference can serve many other purposes if used effectively. The settlement conference allows you to meet, sometimes for the first time, the opposing party. It is an opportunity to assess how that person may present in the

courtroom, and is an opportunity to ask that person questions about their case. In the context of a Supreme Court action, this opportunity usually arises at an examination for discovery.

This leads to another purpose of the settlement conference which is essentially that of a fact-finding mission. You will have the opportunity to informally discuss the case with the opposing party. The settlement conference judge can also exercise their broad discretion to make orders, not limited to their power to order the production of certain documents.

If there are issues, which are not in dispute, then admissions may be sought at the settlement conference, which can become part of the Settlement Conference Order. For example, if liability is not at issue, or if it is admitted that there is no wage loss claim being maintained, these are admissions which ought to be recorded in an order at the settlement conference. By seeking these admissions at a settlement conference, litigants in Small Claims Court can narrow the issues for trial, which will in turn lead to a decrease in preparation time for trial and potentially shorter trials.

The settlement conference judge also has the power to dismiss a claim, counterclaim, reply or third party notice if the judge determines that the claim is without reasonable grounds, discloses no triable issue, or is frivolous or an abuse of the court's process. If there is a point of law or factual issue that could dispose of the matter, it is possible to the settlement conference judge to consider the admitted facts and apply the law to the facts, much as the Supreme Court would do in Special Cases and Proceedings on a Point of Law pursuant to Rule 33 and 34 of the *Supreme Court Rules*.[12] For example the court might consider dismissing a case at a settlement conference if there is a valid limitation defence, or if the Small Claims Court does not have the jurisdiction to hear the particular case.

It should be noted however that recently the Small Claims Court has be extremely cautious when considering whether to dismiss a claim at settlement conference and almost always will refer the matter to the trial judge for their consideration.[13]

Parties can attend settlement conferences by telephone, and even Applications by telephone to avoid unnecessary expense.[14] An order allowing their attendance by telephone is required, and such order may be granted where sworn evidence is not required if the party requesting the telephone hearing does not reside or carry on business within a reasonable distance from the court location, or exceptional

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[12] Rule 7(14)(i) *Small Claims Rules*; *Universal Ventures Ltd.* v. *Gillespie* (7 July 1993), Vancouver C92-10557 (B.C. Prov Ct.), Stansfield J.

[13] *Lloyd Investments Inc. v. Wireless2 Technologies Inc*, 2007 BCSC 1679, Smith J.

[14] Rule 17(16), (16.1) *Small Claims Rules*

circumstances exist. These orders can typically be obtained from the registrar and do not require an appearance at Court.

H. INSPECTION, DETENTION, PRESERVATION AND RECOVERY OF PROPERTY

If the case involves damage to property, whether that be a vehicle, home, or other property, the Court can order that a party permit an expert to inspect the property damage.[15] Keep in mind, as will be discussed below, that the successful party may be awarded the costs of their experts if that was a reasonable cost in the context of the case.

Rule 46 of the *Supreme Court Rules* has been imported into *the Small Claims Court Rule*s by Rule 17(18)(d). This rule allows the court to make an order for the detention of property that is the subject of a proceeding or to which a question may arise. This Rule also allows the court to order funds be paid into court where the right of a party to the monies is in dispute.

I. PRE-TRIAL CONFERENCES

Many Small Claims Court registries are ordering that parties attend a pre-trial conference at least 30 days prior to trial. This conference is in addition to the settlement conference. The purpose of the pre-trial conference is largely to ensure that parties are ready for trial, have complied with the settlement conference orders and may offer a further opportunity to discuss settlement with the opposing party.

There is no specific provision for the scheduling of a pre-trial conference in the Rules. However, pre-trial conferences are now scheduled as a matter of course. Pre-trial conferences are typically scheduled for 30 minutes, and only counsel are required to attend.

J. MEDIATION

The Court Mediation Program began as a pilot program in 1998. Currently mediation is available at the following Small Claims Court Registries: Nanaimo, Surrey, North Vancouver, and Victoria. An additional pilot program has begun at Robson Square (Vancouver) and Richmond registries, discussed further below. Preliminary statistics showed that settlement rates for mandatory mediations were 56%, while voluntary mediations had a settlement rate of 67%.[16] The Court Mediation program has no cost to

[15] Rule 7(14)(h) *Small Claims Rules*

[16] http://www.ag.gov.bc.ca/dro/court-mediation/small-claims/rule7.2.htm as of June 26, 2005

the parties who utilise it. The mediators are trained but are participating in the program to gain experience under the supervision of senior mediators.

The mediations are scheduled for approximately two hours and can serve to be a very cost-effective way to settle claims prior to trial. It is also possible for a party, and their counsel to attend by telephone conference if they do not reside or carry on business within a reasonable distance of the mediation. Limiting the length of mediations to two hours will be seen by many to be a welcome change over the Supreme Court mediations, which even in the simplest of cases can last an entire day, and carry a large price tag.

There are four ways to mediate your case in one of the participating Court Registries:

- There is mandatory mediation for all cases, whether for debt or other than debt, relating to the construction, improvement or renovation of a building;[17]
- There is mandatory mediation for the first several replies filed in the participating registries each month. (In Nanaimo, it is the first 16; Surrey: 15; Victoria: 15; North Vancouver, 10).[18]
- With the consent of the parties, the case can be referred to mediation by the settlement conference judge;[19]
- A party can also initiate mediation by simply filing a Notice to Mediate in the registry before settlement conference.[20]

There are a few exceptions set out in the Small Claims Rules to the claims that can be mediated. Claims that cannot go to mediation include:

- Claims arising out of a motor vehicle accident, if the claim is for $10,000.00 or less;[21]
- Cases involving a party who has obtained against another party a restraining order under section 37 or 38 of the *Family Relations Act* or a peace bond under section 810 of the *Criminal Code*;[22]
- Cases in which the claimant, defendant, and cause of action are the same as the plaintiff, defendant and cause of action in an action brought in the Supreme Court.[23]

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[17] *Small Claims Rules*, Schedule D, s.1; Rule 7.2(2)(a)
[18] *Small Claims Rules*, Schedule D, s.2; Rule 7.2(2)(a)
[19] Rule 7.2(2)(b) *Small Claims Rules*
[20] Rule 7.2(2)(c) *Small Claims Rules*
[21] *Small Claims Rules*, Schedule E, s. 1; Rule 7.2(3); Rule 7.3 (18)
[22] *Small Claims Rules*, Schedule E, s. 2; Rule 7.2(3)

- Cases referred to Mediation before April 28, 2003.[24]

K. ROBSON SQUARE AND RICHMOND

Effective January 2008, at Robson Square, all cases above $5,000.00 will be referred to mediation except for financial debt claims. Furthermore, settlement conferences have been eliminated, and the parties are sent to a pre-trial conference after mediation and before trial. Mediations are conducted in the same manner as discussed above. This project is being closely monitored by the Court and is subject to review at the end of this year.

Also at Robson Square and Richmond, claims below $5,000.00 are submitted directly to a simplified one-hour trial once pleadings are completed. At Robson Square, claims for financial debt are submitted to a half-hour trial directly from the close of pleadings.

This means that counsel will have to be fully prepared to proceed to trial once pleadings have been completed. Counsel should be alive to the amount claimed in light of this program to avoid being caught unprepared for an unexpected trial.

V. COSTS AWARDS

Traditionally the cost awards made in Small Claims Court have been a pittance of the real costs associated with litigation. The *Small Claims Act* specifies that the Court must not order one party to pay counsel or solicitor fees to another party.[25] A successful party may be ordered their disbursements however. This practically means that one needs to weigh the benefit of taking additional procedural steps against the legal costs that will be incurred. Even if a party is successful on their application, or in the proceedings as a whole, they will not receive a portion of their counsel fees.

A. COST AWARDS AT PRE-TRIAL APPLICATIONS

Ask and thou shall receive. Although the *Act* specifically states that the Court must not order one party to pay another's counsel fees, the Court may award a successful party their disbursements, or even a 'penalty' in certain cases. The Court's authority to do so is found at Rule 17(4) which provides that in making an order under the Rules, 'a judge may impose any condition or give any direction that the judge thinks is fair', and Rule 20(6) which provides for the compensation for unnecessary expenses, specifically that a

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[23] *Small Claims Rules*, Schedule E, s. 3; Rule 7.2(3)
[24] *Small Claims Rules*, Schedule E, s. 4; Rule 7.2(3)
[25] Section 19(4) *Small Claims Act*

judge may order a party whose conduct causes another party to incur expenses to pay all or part of those expenses.

For example the author has had the experience of opposing an application made by the claimant to set aside a default order that was entered against them. Although the default order was set aside, the claimant was ordered to pay to the defendant a lump sum cost award for the inconvenience to the defendant in having to take that otherwise unnecessary step in the litigation. In this way, the Court is showing an eagerness to award 'penalties' of costs which serve the objectives of the *Act* and *Rules*, but which do not offend section 19 of the *Act* which prohibits the court to order one party to pay counsel fees to the other party.

There may also be cases were the Court will be inclined to award costs against a party on an Application where it is clear that that party has not been co-operative or even obstructionist in the face of reasonable requests by the opposing party for disclosure, or the like.

B. COST AWARDS AT SETTLEMENT CONFERENCES

If a settlement conference cannot be conducted properly because one of the parties does not come prepared, whether that is because they do not attend with authority to settle, or they do not bring copies of the documents in support of their case, the settlement conference judge can award that party to pay the 'reasonable' expenses of the other parties[26]. It is also possible to seek conditions on the payment of those costs. In a case out of the Kelowna Registry the judge ordered the claimant to pay $300 forthwith due to the fruitless settlement conference caused because the claimant did not bring supporting documentation to the settlement conference. The claimant was to pay the costs forthwith and if it was not paid within 7 days, it was ordered that the claim be dismissed.[27]

C. PENALTY AWARD IF OFFER TO SETTLE IS NOT ACCEPTED[28]

If a defendant makes a formal offer to settle within 30 days after the conclusion of the settlement conference (or longer if permitted by a judge), which is subsequently not accepted by the claimant, and the claimant ultimately is awarded an amount, including interest and expenses, which is equal or less than the defendant's offer, the trial judge may order a penalty against the claimant.[29] That penalty may be up to 20% of the

[26] Rule 7(6) *Small Claims Rules*
[27] *Berge & Company v. Boyd* (1 May 1995), Kelowna 22277SC (B.C. Prov. Ct.), Grannary J.
[28] Rule 10.1(5), (6), (7), (8)
[29] See Form at Exhibits

amount of the offer to settle. Likewise, a penalty can be ordered against the defendant when a claimant makes an offer which the defendant does not accept and at trial the and the claimant ultimately is awarded an amount, including interest and expenses, which is equal of greater to the amount of the offer to settle.

Before awarding such a penalty, the court **must** consider (a) the difference between the amount awarded at trial, and the amount of the offer to settle, (b) the interest of the parties in proceeding to trial to determine the credibility of a witness or a point of law, and (c) the time that the offer was made.[30]

D. COST AWARDS AFTER TRIAL

'*It is here that the balancing interests must be considered by the judge. On the one hand, penalties in costs ought not to represent a barrier to discourage litigants from bringing their disputes before the courts. This court deliberately distinguished itself from the Supreme Court in that very manner. On the other hand, there should be some provision to compensate a successful party where appropriate. It may be especially appropriate when the claimant is advancing an unreasonable claim…*'.[31]

If successful at trial, you may be entitled to array of disbursements including: filing fees, service fees, agents' fees,[32] cost of expert report and expert's attendance at trial, cost of counsel obtaining case law,[33] photocopies, and witness fees. The Rules also contain a general provision that the court may order an unsuccessful party to pay the successful party 'any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceeding.'[34]

Travel cost for counsel has been held not to be an expense which the successful party is entitled.[35] A successful party on the other hand may be awarded their mileage and travel costs for attending court for applications and trials.[36]

If a Judge determines that calling another party's expert at trial was unnecessary, the judge may order that the party who required the expert to attend to pay the expert's expenses.[37]

Section 19 of the *Small Claims Act* specifically prohibits the court to order one party to pay counsel fees to the other party. In a 2001 decision,[38] the successful claimant was

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[30] Rule 10.1(8) *Small Claims Rules*
[31] *Johnston v. Morris* (December 31, 2003), Campbell River C5229 (B.C. Prov. Ct.), Doherty Prov. J.
[32] *Person v. C(J)*, 2003 BCPC 273, Rae Prov. J.
[33] *Gaudet v. Mair*, (1997) Civ. L.D. 27 (BCPC)
[34] Rule 20(2)(c) *Small Claims Rules*
[35] *Durack Contracting v. Vanderwiel*, 2001 BCPC 41
[36] *Hucke v. Klingermann*, 2001 BCPC 20, Rodgers Prov. J.
[37] Rule 10(7) *Small Claims Rules*

awarded legal fees of $574.90 where the claimant had retained a lawyer prior to trial solely to provide advice about the issues which would be raised at trial and provide caselaw which the claimant then presented at trial. While the trial judge did not specifically consider Section 19, the judge found that the case law submitted was of great assistance to the court and the special circumstances of this case warranted an award of legal fees. This case may have been wrongly decided in light of Section 19. That said, it might open the door for parties to seek reimbursement for distinct portions of their legal expense, such as the research component in special circumstances.

If a party proceeded through trial with no reasonable basis for success, the trial judge has the power to award a penalty up to 10% of the amount of the claimed.[39] A recent decision of the Small Claims Court has interpreted this to mean a 10% cost penalty can be awarded in favour of each defendant. In other words, if a claimant proceeds to trial without reasonable prospect of success and the claim is dismissed against two defendants, the claimant may be subject to two 10% penalty awards.

VI. CONCLUSION

A. SUBROGATION CLAIMS

Given the prohibition against awards for counsel fees in Small Claims Court, one must consider the reality that even if your claim is completely successful, you will not recoup the extent of the legal fees that you would have been entitled to had the action been commenced in the Supreme Court. You will therefore need to carefully weigh whether additional pre-trial steps are likely to be advantageous before incurring the extra legal fees associated with applications, and mediations for example. In a small subrogation claim, for example, one may wish to wait until the Settlement Conference to seek pre-trial orders, as opposed to bringing an application before that time.

B. DEFENDING CLAIMS

Where the Small Claims Court will be a much more economical venue for the resolution of claims is, arguably, in cases where you do have some exposure. In cases where you will ultimately bear some liability, and face a damage award, you would be facing a sizeable order of solicitor client costs from the successful party if the claim were in Supreme Court. In Small Claims Court, after a trial on its merits your 'cost' exposure is the successful party's reasonable disbursements. It is therefore expected that the overall cost of defending cases of less than $25,000 will decrease.

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[38] *Hucke v. Klingermann*, 2001 BCPC 20, Rodgers Prov. J.

[39] Rule 20(5) *Small Claims Rules*

The Small Claims Court has a well full of untapped procedural remedies, but it is up to parties to be proactive and creative. As the claims increase in size and it therefore becomes more likely for litigants to be represented by counsel, we can expect that the volume of judicial precedents Small Claims Court for wider procedural remedies to increase also.