

THE SMALL CLAIMS COURT AND THE ADVERSARY PROCESS MORE PROBLEMS OF FUNCTION AND FORM

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The development of a procedure for the resolution of disputes involving small amounts of money presents perplexing problems striking at the very foundation of the adversary process; a process that is the western paradigm for the administration of the rule of law.¹ The content of civil justice,² a phrase intended to evaluate the procedural efficacy of this administration, is fraught with conflicting values in the context of "small claims". For example, if two people of middle-income status become embroiled over a dispute involving a small monetary sum, each party will want the dispute resolved according to its merits and without regard to the personalities involved. They will want the most creative and exhaustive exposition of the facts and relevant law to be undertaken on their behalf. They will want the arbiter to be impartial, and a man of profound insight and expertise in order that he might comprehend the dispute as well as the sophisticated adversarial argument. They will want to minimize the direct and collateral processing costs because only a small sum of money is involved. Neither party will want to take a day off work, to pay substantial direct disbursements nor to incur the expense of a trained advocate. Now, assume that the parties involved are of meager means and reconsider the value matrix of civil justice. It is apparent that for

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¹ Smith, *Justice and The Poor* (1919), p. 6; Pound, *The Limits of Effective Legal Action* (1916-1917), 27 *Int. J. of Ethics* 150, 161, found in Howard and Summers, *Law, Its Nature, Function, and Limits* (1965), p. 417; Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice* (1906), 29 *A.B.A. Rep.* 395, found in Vanderbilt, *Cases and Other Materials on Modern Procedure and Judicial Administration* (1952), p. 32; Carlin, Howard, Messinger, *Civil Justice and the Poor* (1966), p. 9; Wald, *Law and Poverty: 1965* (1965), p. 46; Semmel, *New Approaches in the Law of Civil Procedure* (1970), p. 41.

² Hazard, *Social Justice Through Civil Justice* (1969), 36 *U. Chi. L. Rev.* 699, at p. 711; Carlin, Howard, Messinger, *op. cit.*, *ibid.*

these people speed, economy, and informality of process are utterly essential.

Society has grappled with this "small claims-civil justice" conundrum, and the small claims court is one product of its deliberations in North America.³ To examine this peculiar institution with its historical and philosophical underpinnings in the light of contemporary criticism is but to canvass a very familiar pattern of dynamic forces at work in society at large: the continual effort to adapt the structure of a legal system to the needs of those people governed; in short, to keep pace with social change.⁴ This article evaluates, at least theoretically, the extent of such societal adaptation in the administration of small monetary claims arising out of the application of the rule of law governing human interaction. It is not an evaluation of these specific rules of substantive law, and so it is not an essay analyzing social justice and low income litigants. Rather, the essay emphasizes various models of procedure or adjectival mechanisms for *adjudicating* disputes involving small monetary claims, and considers which model demonstrates the most potential for providing civil justice. This evaluation will have regard to procedural trends in other forums, trends that cause the

³ *Canada*

(Alberta) The Small Claims Act, R.S.A., 1970, c. 343; (British Columbia) The Small Claims Act, R.S.B.C., 1948, c. 79, as am. by 1968, c. 28, s. 20; (Manitoba) Small Debts Recovery Act, R.S.M., 1970, c. S-140; The County Courts Act, R.S.M., 1970, c. 260, as am. by S.M., 1971, c. 77, Part II; (New Brunswick does not have a small claims court); (Newfoundland and Labrador permit small claims in magistrate court); (Nova Scotia) Municipal Courts Act, R.S.N.S., 1967, c. 158; (Prince Edward Island does not have a small claims court); (Quebec) The Code of Civil Procedure, S.Q., 1971, c. 86; (Ontario) Small Claims Courts Act, R.S.O., 1970, c. 439; (Saskatchewan) Small Claims Enforcement Act, R.S.S., 1965, c. 102.

United Kingdom

The United Kingdom does not have a small claims court as such. Small debts must be submitted to the county court; however, the registrar acts as a lesser judge for small monetary claims. See generally—Jackson, *The Machinery of Justice* (1959), p. 10; The Beeching Commission (1969); The Winn Report (1968); The Payne Committee, Report of the Committee on the Enforcement of Judgment Debts (1969); The Adams Committee, Report of the Committee on Civil Statistics (1968); The Consumer Council Study, *Justice Out of Reach: Case for Small Claims Courts* (1970).

United States

See generally Institute of Judicial Administration, *Small Claims Courts* (1954); Institute of Judicial Administration, *Small Claims Courts in the United States—1959 Supplement* (1959).

⁴ Friedmann, *Law in a Changing Society* (2nd ed., 1972), p. 375; Schur, *Law and Society* (1968), p. 107; and see generally, Friedman and Macaulay, *Law and the Behavioural Science* (1969), p. 197.

procedural developments in the small claims courts to appear quite anomalous.⁵

The article will not consider the cause of small monetary litigation, save for some very general comment. In fact, I have adopted a presumption that these disputes are largely "given", and that their *origin* is quite unrelated to the procedure for processing them. A great deal of the reform literature in this area is wholly concerned with inducing substantive changes by way of procedural "tinkering".⁶ I believe that substantive changes should be approached directly, regulating the origin of the problem; not by denying certain "would-be" litigants access to the small claims courts or denying them representation in this forum. My reasons for adopting this position will soon become apparent. However, this article is not denying a relationship between social and civil justice. Some commentators⁷ have argued that civil justice is a condition precedent to, and possibly determinative of, social justice, and in this regard Professor Rawls has observed:⁸

Some have held that in fact substantive and formal justice tend to go together and therefore that at least grossly unjust institutions are never, or at any rate rarely, impartially and consistently administered. Those who uphold and gain from unjust arrangements, and who deny with contempt the rights and liberties of others, are not likely, it is said, to let scruples concerning the rule of law interfere with their interests in particular cases. The inevitable vagueness of laws in general and the wide scope allowed for their interpretation encourages an arbitrariness in reaching decisions which only an allegiance to justice can allay. Thus it is maintained that where we find formal justice, the rule of law and the honoring of legitimate expectations, we are likely to find substantive justice as well. The desire to follow rules impartially and consistently, to treat similar cases similarly, and to accept the consequences of the application of public norms is intimately connected with the desire, or at least the willingness, to recognize the rights and liberties of others and to share fairly in the benefits and burdens of social co-operation. The one desire tends to be associated with the other.

Furthermore, the kind of procedure that a legal system adopts to regulate the substantive rules of law has an important bearing on the availability of those substantive rules. Procedure can frustrate

⁵ Contrast Ison, *Small Claims* (1972), 35 Mod. L. Rev. 18 and the Code of Civil Procedure, *supra*, footnote 3, with the "due process" trend in other forums reflected in *Kent v. United States* (1966), 386 U.S. 541; *Re the Application of Gault* (1967), 384 U.S. 997; Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, [1965] Wis. L. Rev. 7; *Goldberg v. Kelly* (1969), 397 U.S. 254; Packard, *Fair Procedure in Welfare Hearings* (1969), 42 So. Cal. L. Rev. 600. Cf. Handler, *Controlling Official Behaviour in Welfare Administration* (1966), 54 Cal. L. Rev. 47. See also Skolnick, *Social Control in the Adversary Process* (1967), 11 J. of Con. Res. 52.

⁶ Ison, *op. cit.*, *ibid.*, is representative.

⁷ Fuller, *The Morality of Law* (1964), ch. 4.

⁸ Rawls, *A Theory of Justice* (1971), p. 59.

the application of the rule of law or it can assist in a creative elaboration of those rules in the light of social change. This is one importance of the choice between available procedural models.

On the other hand, it has been argued that law is not imposed upon human conduct from some sovereign source, but rather, law is a product of and in response to that conduct. Consequently, for the most part, law merely codifies pre-existing custom, and were it otherwise, the enforcement of law would be presented with an insurmountable task. Professor Selznick has outlined this position:⁹

Paralleling every major legal concern is a much larger and more finely textured system of codes and relationships. Interests of personality are recognized and protected in many areas of the law, yet how little we really depend on law for the day-by-day comfort we gain from orderly arrangements that save us from embarrassment, unwanted intrusions, or worse. The law of contracts facilitates and protects concerted activity, but the bonds of organization rest far more on practical and informal reciprocity and interdependence than they do on the availability of formal sanctions. Society is still held together by self-help and not by the intervention of legal agencies. Claims of right are asserted, adjudicated, and enforced for the most part outside the formal legal system.

This argument minimizes the importance of judicial procedures but in doing so ignores important features of any contemporary legal system. First, it is true that most claims of right are asserted and enforced without a "formal" hearing, but this is not to say that most claims of right are dealt with outside of and without regard to the formal legal system. Claims are made and settled, at least in part, with reference to the legal rules and the predictability of a court's response. Second, it is true that the rule of law relies heavily upon an informal enforcement of rules or more accurately, a general acceptance of those governed. Before the industrial revolution, kinship was probably the most important institutional source to instill acceptance of and obedience to legal rules. Recourse to the courts was unnecessary, save in exceptional circumstances of aberrant intransigence or where the requirements of law were unclear. Therefore, kinship was a major unit of social organization and control, and the content of formal procedures for rule administration was not that important. Today, because of the "drift toward a mass society", kinship has experienced a declining influence with the result that the importance of formal procedures has correspondingly increased.¹⁰ In fact, there is no more vivid an illustration of this "new found" procedural importance than the small claims court in the modern city.^{10a}

⁹ Selznick, *Legal Institutions and Social Controls* (1963-64), 17 *Vand. L. Rev.* 79. See also Parsons, *The Law and Social Control*, in Evan, *Law and Sociology: Exploratory Essays* (1962), p. 56; Fuller, *Human Interaction and the Law*, in Wolff, *The Rule of Law* (1971), p. 171.

¹⁰ Selznick, *op. cit.*, *ibid.*, at p. 87.

^{10a} Banfield, *The Unheavenly City* (1968).

Another feature of a contemporary legal system which has profound implications for the procedure of small claims courts is the increased complexity of modern life and the trend toward skill and product specialization. This feature leaves few men independent of others for survival. The concomitant interdependency of individuals can be measured by the frequency and sheer number of atomistic transactions that each individual necessarily encounters in his day-to-day activities. The intuitive assertion that these atomistic relationships involving small sums of money far outnumber larger commercial ventures is supported by examining the frequency of transactional breakdowns. This frequency is reflected in the number of claims processed by the Ontario High Court in comparison with the number of claims filed in the small claims courts. For example, in 1970, 31,008 writs were issued in the High Court of Ontario, and 174,892 claims were filed in the small claims courts of that province.¹¹ In 1971, the figures were 29,638 and 168,000 respectively.¹² The civil justice available in small claims courts has important implications for the integrity of law in general, given the pervasive "touch" of this court.

I. *Social Justice.*

Before outlining the procedural models available, I would like to touch briefly on the need for a general substantive accommodation of social change. Many of the problems processed by small claims courts can only be eliminated effectively by an adaptation of the substantive law. The legislatures and the courts have a collaborative role to play in this regard.¹³

The substantive neglect of the broad substratum of society can be partially explained by the degree of access these people have to the ultimate sources of power in our society.¹⁴ Admittedly, the evolving ideology of our society has slowly changed to give these people a claim to some measure of social justice. A paternalistic concern for "the unfortunates" has prompted social welfare legislation and the beginning of a more equitable redistribution of wealth. I say "the beginning" because this government largess is, at present, considered to be a privilege, not a right; and as with most privileges, very restrictive conditions that impinge upon basic

¹¹ Ontario, Annual Report of the Inspector of Legal Offices (1970).

¹² Ontario, *ibid.* (1971).

¹³ See generally, Hazard, *op. cit.*, footnote 2. For a description of their relative institutional capacities see generally Weiler, Two Models of Judicial Decision-Making (1967), 46 Can. Bar Rev. 406; Hart and Sacks, *The Legal Process* (Tent. ed., 1958); Mishkin and Morris, *On Law in Courts* (1965).

¹⁴ See generally, Moore, *Social Origins of Dictatorship and Democracy* (1966); Kariel, *The Decline of American Pluralism* (1961). A very useful model of a particular social system which highlights rule development is Dunlop, *The Industrial Relations Systems* (1958), p. 7.

human dignity and freedom have been attached.¹⁵ The people subjected to these conditions lack a legal doctrine to support feelings of "right" and a great deal depends upon the elasticity of existing legal concepts to accommodate these claims. The concept of property, for instance, must undergo a profound functional transformation to accommodate these "rights"; a transformation that in turn depends, at least in part, upon the willingness and abilities of the courts.¹⁶ The court's role in adapting the legal framework to social change should not be overestimated,¹⁷ but it is important to recognize that the broad substratum of society most in need of this substantive accommodation have the least access to the legislature. Procedural arrangements permitting, the courts represent the opportunity for a "one man lobby".¹⁸

Unfortunately, one has to admit that, to date, the legal concepts of tort and contract have proven quite inelastic in response to social change, raising serious questions about the ability of nineteenth century concepts to regulate twentieth century phenomena.¹⁹ The market arrangements in the economic context have outstripped the once valued notion of "freedom to contract", giving rise to the more invidious freedom "to contract out" of fundamental obligations. To some extent the doctrines of fundamental breach,²⁰ practical compulsion,²¹ and unconscionability,²² are judicial attempts to counter unequal bargaining power and market place realities. On the other hand, the common law has failed to deal with the implications of such complex and unequal market arrangements in franchise and dealership relationships, forcing the

¹⁵ Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues* (1965), 74 Yale L.J. 1245; *The New Property* (1964), 73 Yale L.J. 733; Cahn and Cahn, *The War on Poverty: A Civilian Perspective* (1964), 73 Yale L.J. 1317; cf. Handler, *op. cit.*, footnote 5.

¹⁶ *Ibid.* See also Friedmann, *op. cit.*, footnote 4; Renner, *The Institutions of Private Law and their Social Functions* (1949). The need for a functional transformation of this concept is apparent in many contexts. See Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* (1972), 85 Harv. L. Rev. 1089.

¹⁷ *Op. cit.*, footnote 13. See *Heather Hill Appliances Ltd. v. McCormack* (1965), 52 D.L.R. 292 (Ont. H.C.) for an illustration of such an over-estimation. The whole area of industrial torts paints a very bad picture of over zealous "adaptation."

¹⁸ Weiler, *op. cit.*, footnote 13, at p. 446. See Krislov, *The Supreme Court in the Political Process* (1965); Hurst, *The Growth of American Law: The Law Makers* (1950); Friedman, *General Theory of Law and Social Change in Law and Social Change* (1973).

¹⁹ Friedmann, *op. cit.*, footnote 4.

²⁰ Cumming, *The Judicial Treatment of Disclaimer Clauses in Sale of Goods Transactions in Canada* (1972), 10 Osgoode Hall L.J. 281.

²¹ Crawford, *Mistake of Law and Practical Compulsion* (1967), 17 U.T.L.J. 344.

²² Crawford, *Restitution—Unconscionable Transactions—Undue Advantage Taken of Inequality Between the Parties* (1964), 44 Can. B. Rev. 142.

parties to live outside the law.²³ Similarly, and this has implications for small monetary claims, the courts have been very unresponsive to consumer grievances—people who are continually bombarded by “the psychological warfare” of advertisements for “shoddy” and valueless goods.²⁴ Caught in a “fixed-status” and captured by an “upward mobility” ideology, the consumer is permitted to walk into the serpentine coils of “available credit” which only too willingly facilitates his “compensatory consumption”.²⁵ This is a particularly terrible plight for the low income consumer who lacks the income continuity to live on credit to “death’s door”.²⁶ These latter individuals are in extreme need of institutional arrangements to equip them with necessary financial and market information. It is also essential that consolidation and composition arrangements be made available to them.²⁷ In a very revealing analysis, Professor Caplovitz has detailed the high risk credit arrangements made available to the people who can least afford them and the extensive use these people make of such arrangements.²⁸ The poor, like consumers generally, are a fragmented group with only their atomistic dealings in common. There are few institutional arrangements available to permit them to identify each other in order to form organizations that might speak on their collective behalf.^{28a} The general lack of such arrangements has impeded their access to the sources of power in society explaining the minimal legislative legal framework. Admittedly, the legislature has taken some action in regard to consumer problems,²⁹ but only the surface has been scratched, particularly in the area of advertisements, built-in obsolescence and pricing.

²³ Macaulay, *Non-Contractual Relations in Business* (1963), 28 *Am. Soc. Rev.* 55-56; Macaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System*, [1965] *Wis. L. Rev.* 483, 740.

²⁴ Jones, *The Cultural and Social Impact of Advertising on American Society* (1970), 8 *Osgoode Hall L.J.* 65; Jones, *Wanted: A New System For Solving Consumer Grievances* (1970), 25 *Arb. J.* 234; Kessler, *The Protection of The Consumer Under Modern Sales Law* (1964), 74 *Yale L.J.* 262.

²⁵ Caplovitz, *The Poor Pay More* (1967), p. 13. Note, *Consumer Legislation and the Poor* (1966-67), 76 *Yale L.J.* 745.

²⁶ For instance, in 1948 the balance outstanding of all forms of consumer credit was 835 million dollars; at the end of 1967 it was not less than 8,324 million dollars—an almost tenfold increase over the 1948 figure. J. S. Ziegel, *The Consumer and Credit in Consumer and the Law in Canada*, edited by W. A. W. Neilson (1969).

²⁷ Report of the Special Committee on Bankruptcy and Insolvency Legislation, Canada (1970); J. D. Honsberger, Part 10 of the Bankruptcy Act and the Over Committed Consumer Debtor in *Consumer and the Law in Canada*, *op. cit.*, *ibid.*

²⁸ *Op. cit.*, footnote 25.

^{28a} See Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965).

²⁹ The Consumer Protection Act, R.S.O., 1970, c. 82.

This "poverty" of a substantive legal framework cannot be *eradicated* by civil justice alone. It can be tempered by way of a creative elaboration of existing standards through adjudication, but effective eradication needs the assistance of the legislatures. It is an impartial substantive framework with a just allocation of wealth, wealth in the very broadest sense, that brings social justice.³⁰ In this regard, minority interests are beginning to react to the political realities: realities that the trade union movement responded to years ago. Reform of the legal framework can be induced by the affected parties to accommodate social change, but these parties must take on the form of power organizations. Professor Moynihan adverts to this reality in describing Saul Alinsky's "law of change"³¹:

Alinsky's law, laid down in *Reveille for Radicals*, which appeared in 1946, was that in the process of social change there is no such thing as give, only take. True or not, by the time the community action programs began to be funded, he had behind him some three decades of organizing poor and marginal neighbourhoods (white as well as black) and in every instance this process had taken the form of inducing *conflict* and *fighting* for power. . . . Alinsky's view was nothing if not explicit and public: social stability is a condition reached through negotiated compromise between power organizations. (His origins, of course, are in the trade union movements, specifically the United Mine Workers). The problem of the poor is not only that they lack money, but that they lack power. This means they have no way of threatening the status quo, and therefore that there can be no social change until this organizational condition is changed. Organization first; antipoverty program second.

II. *Civil Justice and Procedural Form.*

Civil justice is a term intended to evaluate the operation of procedural arrangements administering the primary law in any particular context.³² In this article I mean it to evaluate the "fairness" of a procedural arrangement administering primary directives by way of adjudication. The question of fairness is to be posed from the point of view of the affected parties and "justice as fairness", in this procedural sense, conveys the idea of a set of principles that can be used to elaborate the meaning of "fairness".³³ Instead

³⁰ See generally, Adams, *The Poverty Wall* (1970); Adams, Cameron, Hill, Penz, *The Real Poverty Report* (1971); Report of the Special Senate Committee on Poverty in Canada (1971); Batchelder, *The Economics of Poverty* (1966); *Poverty in Canada* edited by Harp and Hofley (1971); Harrington, *The Other America* (1962); Mann, *Poverty and Social Policy in Canada* (1970); Rawls, *op. cit.*, footnote 8; Seligman, *Permanent Poverty* (1968); Simmel, *The Poor* (1965-66), 13 Soc. Prob. 118; Vallieres, *White Niggers of America* (1971); Wald, *op. cit.*, footnote 1.

³¹ Moynihan, *Maximum Feasible Misunderstanding* (1970), p. 185.

³² Hazard, *op. cit.*, footnote 2.

³³ Rawls, *op. cit.*, footnote 8, at p. 13.

of attempting to detail an exhaustive list of these principles, they can be broadly outlined by two evaluative questions:

- 1) In theory, all things being equal, does the procedure resolve the dispute by an impartial application and purposive elaboration of the primary directives involved having regard to the interests of the parties affected by the decision?
- 2) In reality, all things not being equal, does the procedure resolve the dispute by an impartial application and purposive elaboration of the primary rules involved having regard to the interests of the parties affected?

The several assumptions underlying these two questions should suggest the content of civil justice. First, it is assumed that the procedure, at the very least, assists in resolving the dispute; otherwise the parties are no better off, society has incurred an expense and the primary rules will have little more than a declaratory function. Second, a system of law should be applied in an impartial manner to command the respect and co-operation of *all* persons subjected to it. The impartial application of the rule of law is one important feature supporting the acceptability of adjudication.³⁴ Third, a system of law should be applied in a purposive manner in order that it perform and maintain its intended regulatory function; otherwise the result will command little more respect than a biased decision and the system will soon be avoided by the affected parties because the "real dispute" will not have been resolved.³⁵ This is of course just what happened in the area of labour relations prompting the development of administrative tribunals and private boards of arbitration.³⁶ Finally, it is assumed that the theoretical operation of the procedure can vary significantly from what actually occurs in practice. What the parties experience in practice must be put to the test of civil justice, an exercise often neglected in the law schools and the legislatures of this country.³⁷ The availability of the procedures may be so limited that certain actors will be denied an official resolution of their dispute. The substantive rules will have very little meaning for these people and their respect for the law will be accordingly adjusted. Alternatively, the procedure may require that the parties to the dispute possess equal and substantial resources; to the extent that this

³⁴ Weiler, *op. cit.*, footnote 13, at p. 413. This notion is also developed in Fuller, *The Forms and Limits of Adjudication* (unpublished paper); Fuller, *Collective Bargaining and the Arbitrator*, [1963] *Wis. L. Rev.* 3; Fuller, *op. cit.*, footnote 7; *Anatomy of the Law* (1968).

³⁵ Fuller, *Human Purpose and Natural Law* (1958), 3 *Natural L.F.* 68, at p. 74; Weiler, *op. cit.*, *ibid.*, at p. 410; Hart and Sacks, *op. cit.*, footnote 13, p. 1144.

³⁶ Adams, *Grievance Arbitration and Judicial Review in North America* (1971), 9 *Osgoode Hall L.J.* 443, at p. 446.

³⁷ Frank, *Courts On Trial* (1949), p. 1.

condition does not exist, the outcome may be biased against the unendowed party or the purposive application of the law may suffer. It is this second question, examining the relationship between theory and practice, that isolates the "poverty" of procedural arrangements.

To set the tone and theoretical background for the discussion of small claims court procedure and civil justice, I want to outline two procedural models culminating in the adjudication of disputes centered on the application of law.³⁸ These two models will be outlined and their potential for civil justice evaluated. In this way I hope to demonstrate the theoretical justification of the adversary process if conflict is to be resolved by way of adjudication.

A. *Adjudication.*

The primary focus of adjudication is the impartial settlement of disputes arising out of private lines of conduct, by evaluating such conduct in the light of established rules and principles.³⁹ It is a process through which the rule of law is applied to human interaction. It is a necessary process given the incomplete nature of the rules that give rise to individual rights. For example, to the extent that the implications of a legal rule are clear, the legal rights and obligations flowing therefrom are not in doubt and adjudication is unnecessary, save in those circumstances where one party is unreasonable or fraudulent; circumstances that may be increasing with the drift towards a "mass society". But often the outcome of rule application is not so predictable; rights are more or less speculative and adjudication is a process by which the rules, for this particular circumstance, are clarified and applied. I have argued that to meet the requirements of civil justice and thereby, at least procedurally, maintain the integrity of the substantive law, the rules must be applied by an impartial decision-maker. I noted further that if law is to command allegiance it must keep pace with social change, and hence the application of law must be a very creative enterprise. It is almost self-evident that this impartiality and vitality of law application must be apparent to the affected parties for they must accept the law and desire to obey its

³⁸ Adjudication is one form of dispute resolution in a system governed by rules. Other forms might center on negotiation supplemented by mediation. However, adjudication usually lurks in the background. See Cohen, *The Criminal Process in the People's Republic of China* (1968), pp. 123-130, 141-148; Cohen, *Chinese Mediation on the Eve of Modernization* (1966), 54 Cal. L. Rev. 1201; Henderson, *Conciliation and Japanese Law* (1965), pp. 305-311; Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China* (1967), 55 Cal. L. Rev. 1284. See also Berman and Spindler, *Soviet Comrades' Courts* (1963), 38 Wash. L. Rev. 857.

³⁹ Weiler, *op. cit.*, footnote 13, at p. 410; Fuller, *The Forms and Limits of Adjudication*, *op. cit.*, footnote 34.

dictates if enforcement, as we now know it, is to remain a viable enterprise. What procedural forms might adjudication take and yet conform with these prerequisites of civil justice? I want to consider the adversary process and the inquisitorial process as procedural arrangements in this regard. They are of particular relevance to any discussion of civil justice in small claims courts and the procedural choices that have been made.

B. *The Adversary Process.*

It has been argued that the institutional structure of adjudication—"its incidence, access to it, the mode of participation in it, the basis of decision and the nature of relief available in it"—is defined by and flows from its function, and that because of this relationship between the form and function of adjudication, the adversary process is an essential and irreplaceable element of this structure.⁴⁰ Adjudication by way of an adversary process is where, as a prelude to the dispute being solved by the application of law, the interested parties have the opportunity of adducing evidence (or proof) and making arguments to a disinterested and impartial arbiter who decides the case on the basis of this evidence and these arguments.⁴¹ The use of the adversary process in adjudication is distinctive because it guarantees to the parties who are affected by the decision the right to prepare for themselves the representations on the basis of which their dispute is to be resolved. In this sense, the affected parties participate in the solution to their dispute and this form of participation heightens the rationality and acceptability of the result; but this is not the only value of the process. The adversary process decentralizes dispute resolution by eliciting aid for the arbiter's understanding of the case from those who are most likely to see the relevant necessities in the situation from different points of view.⁴² Each party has an incentive to develop the most convincing and complete legal theory and factual presentation. The resultant decision should be very comprehensively and creatively fashioned because of this adversarial input. The fabric of the law will be continually stretched and shaped to best resolve human conflict.

With the parties engaged in the adversarial research and presentation of law and fact, the arbiter is enabled to adopt a relatively passive pose "which enhances his ability *to be* and *to seem*

⁴⁰ Weiler, *op. cit.*, *ibid.*; Hart and Sacks, *op. cit.*, footnote 13, p. 662.

⁴¹ Weiler, *op. cit.*, *ibid.*, at p. 412; Skolnick, *Social Control in the Adversary System* (1967), 11 *J. of Con. Res.* 54; Barrett, *The Adversary System and The Ethics of Advocacy* (1961-62), 37 *Notre Dame Lawyer* 479.

⁴² Weiler, *op. cit.*, *ibid.*, at p. 413; Hart and Sacks, *op. cit.*, footnote 13, p. 229.

impartial".⁴³ He is able to remain impartial because he need not form premature hypotheses with which to discover the necessary factual and legal bases for a proper decision: the parties are doing this for him. As a result, he is less likely to filter out "relevant" data that would be inconsistent with any premature assumption. For this reason his decision is more likely to be the right and proper one in the circumstances. This thesis has been eloquently advanced by Professor Lon Fuller and is worth restatement.⁴⁴

What generally occurs in practice [as evidence is heard] is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.

Most recently, a very significant study gives empirical support to this general claim advanced by Fuller.⁴⁵ The importance of this attribute of the adversary process stems from the greater accuracy of unbiased judgments and from the perception of this impartiality by the affected parties. Impartiality gives a peculiar moral force to a decision, enhancing the acceptability of the result while minimizing the costs associated with enforced adherence to and implementation of a decision.⁴⁶ These, then, are the theoretical bases to such judicial doctrines as the requirement for natural justice if a decision is "judicial"⁴⁷ or the prohibition of "undue interference" imposed upon trial judges.⁴⁸

⁴³ Weiler, *op. cit.*, *ibid.*, at p. 413; Fuller, *Forms and Limits of Adjudication*, *op. cit.*, footnote 13.

⁴⁴ Fuller, *The Adversary System*, in *Talks on American Law* (H. Ber-
man ed., 1971), pp. 43-44 also cited in Thibaut, Walker and Lind, *Adversary Presentation and Bias in Legal Decision-making* (1972), 86 *Harv. L. Rev.* 386, at p. 390.

⁴⁵ Thibaut, Walker and Lind, *op. cit.*, *ibid.*

⁴⁶ Weiler, *op. cit.*, footnote 13, at p. 413.

⁴⁷ *Re Hoogendoorn & Greening Metal Products and Screening Equipment Co.*, [1969] S.C.R. 30; Adams, *op. cit.*, footnote 36; Reid, *Administrative Law* (1971), ch. 6; The Civil Rights Statute Law Amendment Act, 1971, S.O., 1971, Vol. 2, c. 50.

⁴⁸ *Philips et al. v. Ford Motor Co. of Canada Ltd.*, [1971] 2 O.R. 637 (Ont. C.A.); cf., *Re Board of Commissioners of Police for the City of Windsor and Langlois*, [1972] 1 O.R. 833. Wyzanski, *A Trial Judge's Freedom and Responsibility* (1952), 65 *Harv. L. Rev.* 1281.

Finally, the adversary process results in a tremendous saving of costs to society for all those cases that would have gone on to incur the expense associated with an adjudication had they not been *settled* beforehand. Dispute resolution in a legal system of private rights has been analogized to a pyramidal progression, having the settlement of disputes through negotiation at its broad base and a final court of appeal at its apex.⁴⁹ If all disputes arising out of the governance of conduct by rules were to go to adjudication, an enormous bureaucracy would be needed to process the claims; and yet this would be an unnecessary expense if the parties could have resolved the dispute themselves in light of the predictability of the rule application. Negotiation is a process by which affected parties resolve conflict through voluntary agreement when such an agreement is preferable to no agreement at all.⁵⁰ In disputes over "rights" a voluntary settlement will be achieved if it is to be preferred to an adjudication of the issues.⁵¹ This may be the case for at least three reasons. First, the result of the adjudication may be so predictable that the offending party will want to save himself the processing costs of a trial. A party will most readily and accurately come to this realization when confronted with a parallel prediction of his "opponent" and this adversarial prediction culminating in a settlement provides the parties with the same sense of participation as it does at trial. Second, parties may wish to circumvent adjudication because the outcome is undesirability indeterminant. While theoretically the rule of law should lend itself to prediction, prediction is dependent upon certain findings of fact and the quality of judging. Facts, after the event, can be very difficult to "prove" and one need only consider the varying intellects and philosophic outlooks that judges bring to bear on disputes to realize that adjudicative outcomes are not always within the realm of relative certainty.⁵² Furthermore, certain broad or

⁴⁹ Hart and Sacks, *op. cit.*, footnote 13.

⁵⁰ Stevens, *Strategy and Collective Bargaining Negotiation* (1963), p. 16; Schelling, *The Strategy of Conflict* (1960), p. 21; Ross, *Settled Out of Court* (1970), ch. 4; Walton and McKersie, *A Behavioral Theory of Labor Negotiations* (1965); Coulson, *How to Stay Out of Court* (1968). See also Gould, *The Economics of Legal Conflict* (1973), 2 J. Legal Studies 279; Landes, *An Economic Analysis of Courts* (1971), 14 J. Law & Econ. 61; Posner, *The Behaviour of Administrative Agencies* (1972), 1 J. Legal Studies 305 and *An Economic Approach to Legal Procedure and Judicial Administration* (1973), 2 J. Legal Studies 399.

⁵¹ Ross, *op. cit.*, *ibid.*, p. 142. See also Aubert, *Courts and Conflict Resolution* (1967), 11 J. of Con. Res. 40; Coulson, *op. cit.*, *ibid.*

⁵² Adams and Cavalluzzo, *The Supreme Court of Canada: A Biographical Study* (1969), 7 Osgoode Hall L.J. 61; Peck, *A Behavioural Approach to the Judicial Process: Scalogram Analysis* (1967), 5 Osgoode Hall L.J. 1; Peck, *The Supreme Court of Canada 1958-66: A Search for Policy Through Scalogram Analysis* (1967), 45 Can. Bar Rev. 666. I would note that these studies, if taken at face value, might undercut much of the rationale of the adversary process as developed in this article. However, I

indeterminant principles conceal underlying judicial motivations and impede prediction.⁵³ Adversarial preparation and negotiation serves to highlight the vagaries of judicial outcomes and assist the parties in avoiding or minimizing the associated costs and risks. Thirdly, negotiated settlements may be preferred to adjudication because of the more flexible outcomes available or because of a preference for the informality of this process. I have detailed these beneficial characteristics of negotiation to illustrate how important that process is to adjudication and in turn, to further illustrate the more general importance of the adversary process upon which negotiation is dependent. The relationship between function and form is clearly evident.

In summary, these characteristics of the adversary process conform that process to the function of adjudication, a conformity bearing a striking parallel to the rationale underlying the competitive market-place.⁵⁴

The individual adversaries pursue their private interests, a specific decision by the adjudicator in their favour. To this end they each do their best to advance all the reasons which support the principle that favours their own position and to pick out and demolish all the weak links in their opponent's arguments. The neutral adjudicator, able to see the same problem from the relevant opposing points of view, achieves the public good by selecting and establishing the principle with the strongest notional support. The appropriateness of the metaphor of the "invisible hand" is apparent.

C. *The Inquisitorial Process.*

A pure inquisitorial system of adjudication requires an expert decision-maker to actively investigate the claims of unrepresented litigants and then to subject his findings to the relevant law without assistance from the affected parties.⁵⁵ To contrast this procedure with the adversary process, it might be said that the decision-maker plays three roles in the course of his determination: the judge, the plaintiff and the defendant. This procedural model would appear to draw its sustenance from the concept of scientific inquiry.⁵⁶ Adjudication is perceived to be a search for "truth"; a

believe that these studies represent only *one* aspect of judicial decision-making, and are insufficient as an exclusive explanatory device. Furthermore, I believe that the effect of a decision-maker's "past" is minimized as he strives to achieve the aspiration of rationality prescribed by adjudication.

⁵³ Farnsworth, *Legal Remedies For Breach of Contract* (1970), 70 Col. L. Rev. 1145, at p. 1208; Linden, *Down With Foreseeability! Of Thin Skulls and Rescuers* (1969), 47 Can. Bar Rev. 545, at p. 570.

⁵⁴ Weiler, *op. cit.*, footnote 13, at p. 415.

⁵⁵ Thibaut, Walker, Lind, *op. cit.*, footnote 44, at p. 388; Engelmann, *A History of Continental Civil Procedure* (1927), p. 13; Homburger, *Functions of Orality in Austrian and American Civil Procedure* (1970-71), 20 Buff. L. Rev. 9; Kaplan, *Civil Procedure—Reflections on the Comparison of Systems* (1959-60), 9 Buff. L. Rev. 409.

⁵⁶ Barrett, *op. cit.*, footnote 41, at p. 480.

search that can be best accomplished by one impartial decision-maker without assistance from the affected parties. This impartial decision-maker, having no interest in the outcome, will leave no question unasked, no concept unapplied. A thorough investigation will end in a just result, particularly from a societal point of view. Furthermore, this arrangement eliminates the need for advocates and the concomitant expense and delay involved in their adversarial machinations.

The impartial decision-maker need not limit his roles to three, but might assume the additional role of the conciliator. After completing his investigations, and with the threat of a decision lurking in the background, he might "encourage" the parties to voluntarily resolve their dispute without further recourse to official intervention.⁵⁷ In this way, disputes will be resolved by the parties without the expense, delay and coerciveness of an official adjudication of the dispute.

Is this procedural model of adjudication as theoretically fair as the adversary process? I believe it is not, and the reasons stem from the aforementioned relationship between the form and function of adjudication. The inquisitorial process undermines the effectiveness of adjudication and the integrity of the rule of law because of this relationship. It does this in the following ways: first, if the outcome of adjudication is to command respect and allegiance it must be arrived at impartially and this impartiality must be apparent to the affected parties.⁵⁸ Unfortunately, the inquisitorial process does not permit the decision-maker to remain passive and refrain from formulating a premature and possibly erroneous working hypothesis. In fact, it forces him to formulate a working theory in order to effectively investigate the facts, distinguishing the relevant from the irrelevant. It is this premature hypothesis that promotes biased outcomes, and as previously noted, there is empirical evidence to support this position. At least one party, because he has been denied an opportunity to participate in this fact-finding and law-finding process, may come to resent both the working hypothesis adopted in the circumstances and the concomitant outcome. The unilateral character of inquisitions unavoidably raises suspicions of bias and smacks of arbitrariness. The participants are not given sufficient opportunity to give their reasons, or to submit their questions to the decision-maker and the decision-maker cannot possibly foresee all of these positions. Therefore, his reasoning may fail to deal with the grievance as they perceive it. If this happens, one or both of the parties may walk away from the hearing feeling that "if only the judge

⁵⁷ (Quebec), *The Code of Civil Procedure*, *supra*, footnote 3, art. 975.

⁵⁸ Weiler, *op. cit.*, footnote 13, at p. 413.

had considered this" or cynically guessing why the judge failed to consider "this". The effect upon the integrity of adjudication and the rule of law is obvious. Second, the inquisitorial process eliminates the vast majority of negotiated settlements because the parties are unrepresented and must rely upon the expert decision-maker to determine the merits of their case. This means the decision-maker must investigate all but the most obvious dispute. The time, cost and number of judges required to effectively accomplish this task undermines any claim of speed and economy made by this model. Third, the inquisitorial process constrains the creativity of adjudication because of the limited capacity of one man to consider the most effective legal argument for each of the parties. "Three heads are better than one" in virtually any intellectual enterprise and this is particularly true in the adjudication of disputes arising from human interaction. Finally, the ability of this judge to effectively execute the role of a conciliator must be critically examined. The function of conciliation is to assist in the voluntary settlement of disputes by way of negotiation.⁵⁹ Conciliation or mediation facilitates communication between the parties because they can confide in the mediator without prejudice to their "real" and "ostensible" positions. In this way a contract zone may be identified and a determinant solution arrived at. Unfortunately, information revealed to the inquisitor-cum-conciliator may be used to an individual's prejudice should these efforts at settlement fail and adjudication then becomes necessary. Under these circumstances the parties lack confidence in the conciliator undermining the effectiveness of his communicative function. Another failing of this "mixed-function" model is evident when one realizes that settlements coerced by the threat of a decision are not voluntary settlements reflecting the satisfaction of the parties nor do adjudicative decisions appear fair when the threat of a decision has failed during the preceding attempt at conciliation.^{59a} In summary, this model would require an abundance of decision-makers to perform many otherwise unnecessary adjudications and these adjudications would be subject to real and ostensible bias. The inquisitorial model clearly fails to meet the standard of civil justice at this theoretical level, and this explains why procedural arrangements of pure inquisitorial adjudication have seldom been adopted. A prominent historical example occurred in Prussia during the late 1700's under Frederick The Great. Apparently the legislation

⁵⁹ Stevens, *op. cit.*, footnote 50, p. 127; Schelling, *op. cit.*, footnote 50, p. 68; Simkin, *Mediation* (1971); Eckhoff, *The Mediator and the Judge* in Aubert, *Sociology of Law* (1969), p. 171.

^{59a} These criticisms in relation to the role of the labour arbitrator can be found in Weiler, *The Role of the Labour Arbitrator: Alternative Versions* (1969), 19 U. of T. L.J. 16 and Adams, *op. cit.*, footnote 36.

was "inspired in considerable measure by Frederick's obsession that the lawyers were to blame for the unsatisfactory condition of civil justice", and the system which was evolved sought to minimize their influence by enlarging the functions of the court.⁶⁰ In reviewing the operation of this court, Arthur Engelmann concluded:⁶¹

This system remained intact only for forty years, when it began to succumb under adverse criticism. It was supplanted by legislation of 1833 and 1846, re-introducing in effect the principle of party-presentation. The experiment was a remarkable one, and one whose failure makes evident a fact which zeal for procedural reform is even with us, sometimes disposed to obscure, namely, that the interested striving of two contending parties is in the long-run, an infinitely better agency for the ascertainment of truth than any species of paternalistic inquiry.

Consequently, the contemporary European procedural arrangements often cited to support the alleged efficacy of inquisitorial procedures are in fact a mixture of "party presentation" and "judicial prosecution" and even these mixed forms are not without their own problems.⁶²

Perhaps the most unique attempt to combine party presentation with the principle of court prosecution is the Austrian Code of Civil Procedure drafted by the brilliant Franz Klein.⁶³ Klein recognized that the destruction of the principle of party presentation would cause the downfall of the entire system of private rights and duties; but on the other hand, he felt that court prosecution could lead to faster, less expensive determinations more consistent with the public interest. Fully aware of the subtle adjustment needed to integrate the two principles, he created a system which accepts the thesis that it is for the parties, and only for them, to determine the content of the cause (principle of party presentation). He then tempered it by mixing into the system "a solid dose of court initiative, which gives the court a significant role in shaping the case and assembling the proof [court prosecution]".⁶⁴ The most unique characteristic of this system is a trial by colloquy between the court and the litigants. Professor Homberger has analogized this process to the Socratic method of legal education:⁶⁵

The method employed is not foreign to American law teachers versed in the Socratic method of legal education. The judge may summon the parties to appear at the trial, but under the Austrian law he has no power to compel them to come. He has the duty to discuss the case thoroughly and to ask questions designed to lead the parties to a better

⁶⁰ Engelmann, *op. cit.*, footnote 55, p. 18.

⁶¹ *Ibid.*, pp. 18-19.

⁶² *Ibid.*, p. 17.

⁶³ Homberger, *op. cit.*, footnote 55, p. 24.

⁶⁴ *Ibid.*, p. 25.

⁶⁵ *Ibid.*, p. 26.

understanding of their claims and defenses; the parties, however, need not answer the questions. He must use every effort to assure that the parties make a full statement of all pertinent facts and produce the evidence essential to establish their claims and defenses; the parties need not, however, take the advice, well-meant as it may be. Questions are not the sole means of judicial tutoring envisaged by the Code. The judge may also accomplish the statutory purpose by "other means". Suggestions, comments and instructions from the bench seem to be appropriate. The statutory purpose to encourage a meaningful three-cornered dialogue is complemented by the right of the parties to direct questions to each other and by their obligation to be truthful.

In this connection the function of the judge as a peace-maker should not be overlooked. In harmony with the policy of curbing the "social evil" of litigation and in keeping with the active role assigned to the judiciary in civil litigation, the Austrian Code authorizes the judge, at any stage of the litigation, to attempt an amicable adjustment of the controversy, be it by compromise, confession of judgment or discontinuance. The statute is not in the least squeamish about the judge's function as a promoter of settlements. It states expressly that he may act on motion or on his own initiative.

Notwithstanding the genius of this structure, substantial problems accompany it, some of which have been outlined above. It must be emphasized that the Austrian judge has the unenviable task of feeling his way along the borderline between asking too many or too few questions, or explaining too much or too little. While the colloquy humanizes the hearing and puts the judge in the position to assist a litigant whose lack of skill or resources puts him at an unfair advantage, his role is close to the point where the integrity of the adversarial process is in jeopardy. There remains the risk of judicial over-involvement in the partisan efforts which threatens the integrity of the judicial process. "The Austrian courts, in seventy-five years of experience, have not been able to define the court's powers and duties clearly for guidance of the judiciary."⁶⁶ A compromise of the judge's impartiality in fact, or at least in appearance, is the greatest single disadvantage of this process. Finally, because of the unique historical and cultural background supporting the integrity of these procedural arrangements, there is a presumption against their portability to other legal systems not similarly endowed.⁶⁷

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This, then, is a theoretical justification for the almost total acceptance of the adversary nature of adjudication in all English-speaking countries. It is this kind of reasoning which justifies the recent legislative and judicial trends requiring that the parties af-

⁶⁶ *Ibid.*, p. 29.

⁶⁷ Dunlop, *op. cit.*, footnote 14. See generally, Friedman and Macaulay, *op. cit.*, footnote 4, ch. 6.

affected by decisions of administrative agencies be permitted to participate by way of a submission of proofs and reasoned argument.⁶⁸ The adversary process attains a greater measure of civil justice than does inquisitorial alternatives; at least this appears to be the case in theory. Unfortunately, the theoretical justification of a procedural framework is a necessary but not sufficient condition of civil justice. The foregoing discussion will be of little comfort to the affected parties if the promises of theory remain unfulfilled in practice. The integrity of adjudication and legal rules, therefore, depends upon an effective implementation of the procedure in practice, as well. Should operative imperfections be observed, the theoretical understanding of the adversary process, outlined above, will promote an accurate diagnosis of the problem. To refer back to the theoretical parallel between the adversary process and the market place, the "invisible hand" is often unacceptably visible. It is, therefore, commonplace for market "imperfections" to be analyzed and corrective measures taken in order to induce a greater congruence between the theoretical and practical market outcomes.⁶⁹ However, the costs of such remedial measures are sometimes adjudged to be in excess of the probable gains and in such circumstances the imperfection subsists or a less costly and less theoretically appropriate step is undertaken as a half-way measure. Thus, theory permits a meaningful assessment of remedial measures in the light of public policy.

The adversary process of adjudication is not without substantial practical imperfections. Two important imperfections, that will be merely noted, stem from the innovative capacity of the adversary process. In the last century, the economic, social and technological contexts of society have been drastically altered, requiring a vast regulatory framework. The adversary process of adjudication administered by the common law courts was institutionally unequipped to fashion and administer the needed regulatory framework. The result was a tremendous growth in "public" law supervised by administrative tribunals.⁷⁰ This growth in special purpose agencies was a response at the same time, to a second imperfection of common law adjudication: institutional ossification. The adversary process, subject to the natural labour market tendency of skills specialization, soon generated its own technoc-

⁶⁸ (McRuer Report) Royal Commission Inquiry into Civil Rights (1968), Vol. 1; The Civil Rights Statute Law Amendment Act, *supra*, footnote 47; *Goldberg v. Kelly*, *supra*, footnote 5; *Kent v. United States*, *supra*, footnote 5; *Re the Application of Gault*, *supra*, footnote 5.

⁶⁹ Doeringer and Piore, *Internal Labor Markets and Manpower Analysis* (1971), p. 1; Schultze, *The Politics and Economics of Public Spending* (1968), p. 55; Samuelson and Scott, *Economics* (1966), p. 7.

⁷⁰ McRuer Report, *op. cit.*, footnote 68; Davis, *Discretionary Justice* (1969), p. 8; Hart and Sacks, *op. cit.*, footnote 13, p. 188.

racy. This result seems to have spawned doctrinal rigidity oblivious to social change and societal needs. Prisoners of their own unimaginative categorization,⁷¹ the courts failed to react to environmental changes, requiring the legislative creation of administrative agencies to fill the otherwise regulatory void. But the most important imperfection, for the purposes of this article, does not stem from doctrinal rigidity or the greater efficiency of legislative enactments to react to social change. The most important imperfection was the failure of common law courts to be *sufficiently* adversary in adjudicating disputes. This imperfection remains one of the most perplexing procedural problems for both courts and administrative tribunals to this day.

The adversary nature of adjudication, depending as it does upon independent advocates to represent the litigants, has created two legal systems.⁷² One legal system, characterized as "substantively and formally rational", services those people who can afford or merit the services of the independent advocates.⁷³ This legal system most closely approximates the civil justice promised by the theoretical underpinnings of the adversary process outlined above. It is a system which obtains when each of the litigants is represented by capable counsel; commercial litigation in the High Court being the most obvious example. The other legal system governs those people who cannot afford the services of the independent advocates and it is characterized by two salient features which combine to provide not civil justice but what Weber has called "khadi justice".⁷⁴ First, one or both litigants is unrepresented during the adjudication because legal services are too expensive in relation to either the ability of the parties to pay or to the amount of money involved in the dispute. Second, a great number of disputes need to be adjudicated in this legal system in that it governs that monolithic substratum of society characterized by multitudinous atomistic activities and continual conflict. These two features combine to produce "mass" decision-making that, as a consequence, is either uninformed if the judge remains passive, or potentially

⁷¹ Maitland, *The Forms of Action at Common Law* (1909), p. 2; cf. Cardozo, *The Nature of the Judicial Process* (1921), p. 21.

⁷² Edward Shils, trans., Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (1954), p. 351; also found in Aubert, *op. cit.*, footnote 59, p. 153 and Friedman and Macaulay, *op. cit.*, footnote 4, p. 918. The contemporary setting of this legal system is exhaustively described in Carlin and Howard, *Legal Representation and Class Justice* (1965), 12 U.C.L.A. Rev. 381.

⁷³ Edward Shils, trans, *op. cit.*, *ibid.*, p. 351.

⁷⁴ *Ibid.* Khadi—judge of the Mohammedan *sharia* court—used by Weber as a term of art to describe the administration of justice which is oriented not at fixed rules of a formally rational law but at the ethical, religious, political or otherwise expedient postulates of a substantively rational law. ("Palm tree justice"). *Op. cit.*, footnote 72, p. 213.

biased if the judge assumes an inquisitorial posture. Inferior courts of both criminal and civil jurisdictions, as well as many administrative tribunals, are contemporary examples of "khadi" decision-making. In light of the discussion above, the "poverty" of these procedural structures should be clear as should the dire implications for the rule of law. Now that the theory has isolated and explained this practical imperfection of the adversary process, what remedial measures should be undertaken?

The ultimate selection of specific remedial steps should depend upon the value consciously assigned to civil justice in the particular context by society, but more will be said about this later. Numerous arrangements have been instituted in an effort to make adjudicative proceedings more adversary.⁷⁵ Initially, the poor need not pay for the King's Writ. This evolved into the *in forma pauperis* procedure whereby impecunious litigants are given access to legal representation without charge. In turn, this procedure has given birth to the contemporary legal aid schemes that range from the office of the public defender and duty counsel to community law offices.⁷⁶ There has been an increasing concern, primarily in regard to criminal proceedings, to bring the legal technocracy down to the substratum of society.⁷⁷ It would appear that public assistance in funding these schemes has been forthcoming because of the value ascribed to individual freedom and the stigma associated with the criminal law. This approach has *not* been universally employed or accepted in the civil context,⁷⁸ particularly in regard to what are often referred to as "petty matters".⁷⁹ Incarceration is not at issue and the outcome is generally in terms of comparable dollars and cents. The result has been a discretionary and incomplete application of legal aid schemes⁸⁰ and the decision-making in this context remains essentially "khadi". In

⁷⁵ Abel-Smith and Stevens, *Lawyers and the Courts* (1967), pp. 135, 315.

⁷⁶ Handler, *Neighbourhood Legal Services* (1966); Carlin, Howard, Messinger, *op. cit.*, footnote 1; Semmel, *op. cit.*, footnote 1; Wald, *op. cit.*, footnote 1; Jarmel, *Legal Representation of the Poor* (1971).

See Legal Advice and Assistance Programme proposed by The Law Society of Upper Canada, *Report on Community Legal Services* (1972), p. 33.

⁷⁷ *Ibid.* Even when representation is available, an effective adversary process requires that the parties have equal access to the available facts as well as to the relevant law. See Hooper, *Discovery in Criminal Cases* (1972), 50 *Can. Bar Rev.* 445; Glaser, *Pretrial Discovery and the Adversary Process* (1968).

⁷⁸ Note, *The Right to Counsel in Civil Litigation* (1966), 66 *Col. L. Rev.* 1322; Note, *The Indigent's Right to Counsel in Civil Cases* (1966-67), 76 *Yale L.J.* 545; Maguire, *Poverty and Civil Litigation* (1922-23), 36 *Harv. L. Rev.* 361.

⁷⁹ Smith, *op. cit.*, footnote 1; Carlin, Howard, Messinger, *op. cit.*, footnote 1; Report on Community Legal Services, *op. cit.*, footnote 76; Pound, *op. cit.*, footnote 1.

⁸⁰ *Ibid.* See The Legal Aid Act, R.S.O., 1970, c. 239, s. 13.

some sense, much of the academic writing on the delivery of legal services, the plight of welfare recipients, the legal needs of consumers or the poor, attempts to fashion formal support mechanisms to meet the inadequacy of existing public schemes through private collective action.⁸¹ This is not to say that there has been a failure to formally undertake any remedial measures. In fact, this article is directed to a formal step that was taken: the establishment of small claims courts in North America. The important feature of the small claims court as a remedial procedural development is that it moved farther away from the adversary nature of adjudication. The residual of this article is, therefore, an attempt to evaluate the wisdom and policy supporting the procedural evolution of the small claims court, particularly in light of very recent proposals and legislative enactments that formally recommend or establish an inquisitorial adjudication.⁸² How can an inquisitorial procedure—a procedure theoretically destructive to the aims of adjudication and the integrity of legal rules—be seriously proposed to remedy the practical imperfections of the adversary process?

* * * *

This apparent paradox does not seem to be the result of a conscious assessment of, and then choice between, the costs of adversarial reforms and those of inquisition. Rather, the contemporary inquisitorial procedure of small claims courts, a procedure *formally* adopted by recent legislation in Quebec and informally existing in the rest of Canada and the United States, may be no more than unthinking legislative extrapolation from past reforms. Furthermore, recent academic proposals supporting this trend toward inquisition have failed to consider viable adversarial alternatives in an apparent zeal to convert small claims courts into a forum exclusively for low income litigants as opposed to a more general forum for the enforcement of small monetary claims.⁸³ No proponent of the inquisitorial mode of procedure has considered the inherent costs associated with it. It is as if the sole object of procedural reform in the small claims court is to develop the most

⁸¹ *Supra*, footnotes 1, 5, 15, 30, 76. See also Barber, Christie, Kuyek and Whyte, *The Collective Labour Relations Model Applied to Social Welfare Programmes* (1972), 22 U. of T. L.J. 142.

⁸² Ison, *op. cit.*, footnote 5; (Quebec) *The Code of Civil Procedure, op. cit.*, footnote 3.

⁸³ Ison, *op. cit.*, *ibid.* See also, Note, *Resort to the Legal Process in Collecting Debts* (1967), 14 U.C.L.A. L. Rev. 879; Note, *Small Claims Courts as Collection Agencies* (1951), 4 Stan. L. Rev. 237; Comment, *Small Claims Courts and the Poor* (1969), 42 So. Cal. L. Rev. 493; Note, *California Small Claims Court* (1964), 52 Cal. L. Rev. 876; Note, *The Persecution and Intimidation of the Low Income Litigant* (1969), 21 Stan. L. Rev. 1657.

refined inquisitorial procedure possible. Roscoe Pound's "give me one good judge" thesis⁸⁴ remains the captivating paradigm notwithstanding the theoretical superiority of the adversary process. Admittedly, the marginal gains to be derived by instituting a procedural framework in the small claims court that would permit the affected parties to prepare and present a case for adjudication may simply not be justified in light of the "opportunity cost" to society at large.⁸⁵ However, a discussion of alternative adversarial procedures and the associated costs has never been undertaken. This is confirmed by the following very brief historical sketch.

III. *History, Small Claims and Inquisition.*

People governed by the rule of law have always desired an economic and expeditious process to adjudicate disputes involving small monetary claims. The poor cannot "afford" to litigate any monetary claim let alone small monetary claims. The merchant, and the working man cannot "afford" to litigate small monetary claims because the amount in dispute does not justify the necessary direct and indirect processing costs. In 1518, under the reign of Henry VIII, a statute created a small debts court for the City of London.⁸⁶ This court had jurisdiction in all claims under forty shillings and was presided over by two aldermen and "four ancient discrete commoners". A similar inferior tribunal was adopted in Ontario by the first Parliament of Upper Canada "to provide an easy and speedy method of recovering small debts".⁸⁷ This court was known as the Court of Requests, and by 1838 there were 178 such courts in Upper Canada, conducted by 1,068 commissioners.⁸⁸ Economy and speed were the chief values of these tribunals but it was soon recognized that civil justice required a "fair" adjudication as well. Beginning with the *Draper Committee Report* of 1839,⁸⁹ these courts moved towards a more complex and uniform procedural structure manned by officials with legal training and the 1850 statute⁹⁰ is the recognizable father to Ontario's present legislation with various amendments observable through a series of governmental reports beginning with *Draper* and ending with

⁸⁴ Pound, *The Administration of Justice in the Modern City* (1912-13), 26 Harv. L. Rev. 302, at p. 319.

⁸⁵ Weiler, *op. cit.*, footnote 13, at p. 415.

⁸⁶ Riddell, *The Bar and the Courts of Upper Canada or Ontario* (1928), p. 82. See generally, Holdsworth, *The History of English Law* (1927), Vol. 1, pp. 64, 412-413; Plunknett, *A Concise History of the Common Law* (1940), p. 97; A.V., *The Law and Practice of Upper Canada* (1861), 7 U.C.L.J. (o.s.) 34. See also, Dawson, *A History of Lay Judges* (1960) and Abel-Smith and Stevens, *op. cit.*, footnote 75.

⁸⁷ 32 Geo. 3, c. 6 (preamble); A.V., *op. cit.*, *ibid.*

⁸⁸ A.V., *op. cit.*, *ibid.*, at p. 61.

⁸⁹ *Ibid.*, at p. 62; W. H. Draper C.J.U.C. (1863-68).

⁹⁰ The Division Court Act (1850), 13 and 14 Vict., c. 53.

the *McRuer Report* in 1968.⁹¹ Unfortunately, none of these reports dealt specifically with the role of the judge or with the essential nature of the procedure. In fact, this has only been done by indirection through the vehicle of costs. In 1872 a person had the right to be represented by an agent or advocate but when justice appeared to require it, the judge could prevent any person from so acting.⁹² In effect, by exercising this provision, the hearings could be structured on an inquisitorial basis. In time, commercial concerns began employing professional agents to pursue their claims on a volume basis, often resulting in unequal advocacy. However, the preceding power was never invoked. Whether because of professional bias or theoretical insight, the judges began to award counsel fees in an effort "to encourage the retention of counsel by the poor";⁹³ this being the only mechanism at their disposal. In effect, they opted for an adversarial hearing. In 1920, statutory provision was made for awarding counsel fees, but a restriction was placed on the amount that could be awarded so as not to increase the number of contested cases or to make the court less "a court of equity for the poor".⁹⁴ Hence, at this early date, the conflicting values of civil justice in the small claims context are clearly visible and rather than accept the Draconian choice between the Scylla of bias through inexpensive inquisition and the Charybdis of costly due process through adversary proceedings, the legislature attempted to seize upon an intermediary position. The legislation does specifically admonish the judges to "hear and determine in a summary way all questions of law and fact", and to "make such order or judgment as appears to him just and agreeable to equity and good conscience".⁹⁵ However, this mandate has been interpreted to permit relief from technical defects only. A judge is not to disregard the general principles of law.⁹⁶ The first American small claims court was established in Cleveland in 1913, and in 1920 Massachusetts became the first state to create a state-wide framework of general application to small monetary claims.⁹⁷ Today these courts exist in almost every state.⁹⁸ They

⁹¹ These reports are: The Draper Committee (1839); Barlow, Interim Report and Final Reports on a Survey of the Administration of Justice in the Province of Ontario (1939); The Conant Committee (1940); Silk, Certain Studies of the Jurisdiction of County and District Courts and Related matters (1961); McRuer Commission (1968), Rep. No. 1, Vol. 2, *supra*, footnote 68.

⁹² (1892), 35 Vict., c. 8, s. 1.

⁹³ A.V., *op. cit.*, footnote 86.

⁹⁴ S.O., 1920, c. 34, s. 4.

⁹⁵ The Small Claims Court Act, *supra*, footnote 3, s. 55.

⁹⁶ *Smith v. Galin*, [1956] O.W.N. 432, 434 (Ont. C.A.).

⁹⁷ Note, The California Small Claims Court, *op. cit.*, footnote 83, at p. 877; Institute of Judicial Administration, *op. cit.*, footnote 3.

⁹⁸ Institute of Judicial Administration, *ibid.*; Note, Small Claims Court: Reform Revisited (1969), 5 Col. J. of L. and Soc. Prob. 47.

are characterized by the same procedural simplicity as their Canadian counterparts,⁹⁹ and the role of the judge has received no clearer articulation. But the implication of inquisition in both jurisdictions is clear. Virtually all small claims courts discourage lawyers through the aforementioned limited cost provisions and in a few states the presence of lawyers is completely prohibited.¹⁰⁰ In this kind of procedural context the judge must inquire into the dispute in order to expedite the hearing and distill the "essentials". If he remains passive, an institutional litigant will overwhelm the average layman, and if both parties are individuals, the hearing may result in hours of irrelevant and hostile bickering. Roscoe Pound captured this implication, in writing:¹⁰¹

In the higher courts, lawyers of experience on each side will be watchful to see that the claims of the parties are well presented, that the court is fully informed, and that justice is done so far as skilful advocacy may secure it. In petty cases there ought to be no expensive advocacy. One side or the other, unless the game of litigation is played for pure pleasure, cannot afford it. The court, therefore, has no assistance, or no adequate assistance. Hence the judge cannot be a mere umpire. He must actively seek the truth and the law, largely if not wholly unaided. The lay vision of every man his own lawyer has been shown by all experience to be an illusion. The other extreme, a professional lawyer for every man, has no place in petty litigation. The alternative is a judge who represents both parties and the law, and a procedure which will permit him to do so effectively. No doubt he should have assistance in the way of clerks, who may save valuable judicial time by showing parties how to present their respective claims. At any rate our first concern in a people's court is a procedure that will help parties assert and secure their rights, and to get away from the involved and overmechanical procedure which has become in so many jurisdictions a means afforded each party of hindering the other in his search for justice. The law needs perennially an infusion of ideas from outside of professional thought. Happily the Municipal Court Act for Chicago was so drawn as to permit such things, and Judge Olson knew how to look beyond the lines of everyday professional thinking, and had the courage to undertake the simple but revolutionary improvements that make his court not merely a machine for deciding cases but a bureau of justice.

⁹⁹ *Ibid.*; *op. cit.*, footnote 3. This is not to say the legislation is simplified. In 1939 the Barlow Committee observed:

"The [small claims court] is presumably a small debts court to enable claims to be litigated and payment enforced with a minimum of expense and inconvenience. When the present [Small Claims Court Act] is perused and carefully considered, it is found to be probably one of the most complicated pieces of machinery on the statute books. When one considers that it is composed of some 227 sections and in addition thereto a set of complicated rules of practice and a large number of forms difficult to understand, it is readily seen that the purpose which should be served by a small debts court has been entirely lost sight of and instead of being an instrument by which people of small means may collect wages and small amounts at a minimum expense, it has become complicated, technical and expensive."

¹⁰⁰ Note, *Small Claims Court: Reform Revisited*, *op. cit.*, footnote 98, at p. 57; Institute of Judicial Administration, *op. cit.*, footnote 98.

¹⁰¹ *Op. cit.*, footnote 84.

Small claims court legislation, therefore, implicitly sanctions an inquisitorial procedure and it is important to observe that this procedure is conducted on an "assembly-line" basis. In fact, the large volume of claims processed by these tribunals¹⁰² may be, in some cynical way, another reason for this legislative condonation. The cost of providing a more adversary hearing, or of employing more inquisitors, for that matter, may have been deemed excessive: "Petty justice for petty claims" being the major unarticulated premise. Unfortunately, the individuals affected by this *intuition* have little political power to contest the premise's validity. Be this as it may, it is fair to conclude that small claims courts have extended the legal system to a portion of society's generally neglected substratum but Weber's two legal systems remain clearly visible. "Assembly-line" inquisitions, while speedy and cheap, smack of arbitrary autocracy so familiar to the "masses": and this may be only one reason for despair. An inquisition is preferable to leaving unrepresented individuals at the mercy of institutional litigants, and this procedural choice is left in the hands of individual judges. Small claims court legislation does not require an inquisitorial judicial posture and recent empirical evidence highlights the great potential for procedural abuse should a judge decide to remain passive.

At least four studies have found that the vast majority of claims made in small claims courts are initiated by businesses against unrepresented individuals.¹⁰³ More importantly, a default

¹⁰² *Op. cit.*, footnotes 11 and 12. My colleague, Dean Harry Arthurs, has suggested that this large volume may result in a "routinization" which reinforces judicial predisposition, increasing the potential for bias.

¹⁰³ (1) The Oakland-Piedmont-Emeryville Study (Note, The California Small Claims Court, *op. cit.*, footnote 83):

- (i) Business and government agencies were plaintiffs in 60% of all claims filed. Individuals were plaintiffs in 35% of all claims filed. Individuals were defendants in 85% of all claims filed. Sixteen organizations accounted for 45% of all claims filed.
- (ii) Of all claims filed, 30% involved the non-payment of goods; 14% involved government services.
- (iii) Of all claims filed, 50% involved amounts of money between \$25.00 and \$100.00.
- (iv) Of all claims filed, 65% reached the stage where a judge took some action and this action was taken within 40 days of the date of filing.
- (v) Of those cases going to judgment, the plaintiff was successful in 90% of them.
- (vi) Of those cases going to judgment, only 40% of them were contested.

(2) The Moulton Study (Note, The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California, *op. cit.*, footnote 83):

- (i) Corporations, proprietorships and government agencies were plaintiffs in 78.8% of all claims filed. Individuals were plaintiffs in 16% of all claims filed. Individuals were defendants in 93.3% of all claims filed.

judgment rate in the neighbourhood of sixty percent of those claims going to judgment has been observed.¹⁰⁴ Apparently it is this data, or at least data having similar implications, that has prompted the proposals of Professor Ison¹⁰⁵ and the recent small claims court legislation of Quebec.¹⁰⁶ Professor Ison has reacted

- (ii) Of all claims filed, 46% of them went to judgment.
- (iii) Of all claims going to judgment, the plaintiff was successful in 93.5% of them.
- (iv) Of all claims going to judgment, 73.5% were uncontested.
- (3) The Alberta Study (Samuels, *Small Claims Procedure in Alberta, A Report of the Institute of Law Research and Reform of Alberta, Research Project No. 4 (1969)*):
 - (i) Small businesses were plaintiffs in 45.3% of all claims filed. Individuals were plaintiffs in 24.5% of all claims filed. Finance companies were plaintiffs in 12% of all claims filed. Large department stores were plaintiffs in 9.4% of all claims filed. Individuals were defendants in 78% of all claims filed.
 - (ii) Neither party was represented by counsel in 82% of all claims filed. Institutional litigants used counsel in only 25% of their claims.
 - (iii) Of all claims filed, 40% of them involved a sum of money less than \$100.00.
 - (iv) Of all claims filed, 40% of them went to judgment. Professor Samuels reported that a large majority of them were *ex parte* or by default.
 - (v) Most of the cases were disposed of in 10 weeks from the date of filing.
- (4) The Manitoba Study (Gerbrandt, T. Hague and A. Hague, *Preliminary Study of the Small Claims Court Procedure in Manitoba (October 1972—unpublished)*):
 - (i) Businesses were plaintiffs in 69% of all claims filed. Individuals were plaintiffs in 31% of all claims filed. Individuals were defendants in 73% of all claims filed.
 - (ii) Of all claims filed, 58% involved outstanding accounts; 2% involved consumer complaints.
 - (iii) The percentage of cases going to judgment was unreported; however, 17.3% of all claims filed ended in a default judgment.
 - (iv) Neither party was represented by counsel in 84.3% of all claims filed.
 - (v) Of all claims going to judgment, 72.2% were heard within five to six weeks.

¹⁰⁴ *Ibid.* Despite the large number of claims, little has been written concerning the nature and operation of the small claims court. Aside from the studies mentioned, there has been almost no empirical research directed at determining the types of cases filed, the nature of the plaintiffs and defendants, the amounts of the judgments rendered, the number of defaults, the average time to trial, the costs involved, and other pertinent information. It is surprising that so little is known about the working of a judicial mechanism which accounts for so many claims and affects so many citizens. Evaluation of the utility and efficiency of the small claims court is impossible without current data on the functioning of the court.

¹⁰⁵ Ison, *op. cit.*, footnote 5.

¹⁰⁶ (Quebec) The Code of Civil Procedure, *supra*, footnote 3. For the purposes of this article, I have considered Professor Ison's proposal and the Quebec legislation to be related. This is because both proposals support a formalized inquisitorial approach to small monetary claims. I recognize that Professor Ison's proposal is made in relation to Britain; but he is aware of and considered the American and Canadian procedures in making his recommendation.

to this "potential" for procedural abuse by proposing that the investigatory role of the judge be openly declared and that this role be conducted on an informal, consultative basis at the convenience of the parties. In this regard he states:¹⁰⁷

Described by comparison with existing institutions, the *modus operandi* of a small claims judge should approximate more closely to that of a police detective or an inspector of weights and measures than to that of a High Court judge.

Lawyers and other agents would be superfluous and it is therefore recommended that their attendance be prohibited.¹⁰⁸ Once a claim is submitted, the judge is to commence his investigations. Default judgments would be eliminated because the judge will contact the defendant in all cases to get "his side of the story". Professor Ison admits that this would not be workable given the present volume of claims and this leads him to recommend the abolition of all claims arising out of retail transactions.¹⁰⁹ This would permit sufficient time to be devoted to the investigation and resolution of the residual. In his opinion, such a step is justifiable on substantive grounds as well in that the present "assembly-line" system, with its default phenomenon, promotes abuses in marketing. The large number of claims initiated by businesses against individuals leads him to believe that many of these claims must involve fraud, high-pressure techniques and the deliberate sale of defective goods.¹¹⁰ Without enforcement, these techniques would "apparently" be made unprofitable. Furthermore, the procedural prohibition would discourage retailers from extending credit to poor credit risks, thereby reducing consumer insolvency. Retailers would therefore be limited to their self-help remedy of repossession. The Province of Quebec has passed legislation which formally recognizes the inquisitorial role of the judge as well as prohibiting the presence of agents or advocates.¹¹¹ The judge has carriage of the action at the hearing, eliciting evidence by questioning the affected parties.¹¹² He is also encouraged to attempt a reconciliation of the parties when this is possible;¹¹³ a provision which encounters the difficulties of "mixed functions" outlined above. Unlike Professor Ison's proposals, the judge does not investigate the claim prior to the hearing; consequently, the questioning at the hearing is the sole opportunity for him to grasp the detail of the dispute.

¹⁰⁷ Ison, *op. cit.*, footnote 5, at p. 28.

¹⁰⁸ *Ibid.*, at p. 32.

¹⁰⁹ *Ibid.*, at p. 24. For an example of a prohibition against particular claims, see The Limitation of Civil Rights Act, R.S.S., 1965, c. 103, s. 18.

¹¹⁰ *Op. cit.*, footnote 5, at p. 24.

¹¹¹ (Quebec), The Code of Civil Procedure, *supra*, footnote 3, arts 976 and 955.

¹¹² *Ibid.*, art. 976.

¹¹³ *Ibid.*, art. 975.

It is significant that neither of these proposals advert to the inherent costs of inquisitional decision-making nor justify why the great number of people affected by small monetary claims must submit to an arbitrary unilateral form of dispute resolution. Admittedly, the proposals may represent an improvement over the present state of informal and poorly structured inquisition, but this is a very limited claim of success. Inquisitions simply do not meet the requirements of civil justice. Are we to assume that the costs of alternative schemes were evaluated and this compromise reflects the procedural priority assigned to "petty" claims? Surely, if this kind of inquisition is to be effective it will require a large bureaucracy to assist the inquisitor in investigating the great volume of disputes. Would this not involve a substantial expense? Without this assistance, the decision-maker will have to either undertake an incomplete and superficial inquiry or expend a great deal of his own time investigating each dispute. The Quebec structure presumes that the parties will be sufficiently prepared to answer the questions of the judge, a dubious presumption at best. Professor Ison circumvents the expense of a bureaucracy the way closing down schools would eliminate the cost of education or the way a repeal of welfare legislation would eliminate welfare abuses. His "all or nothing" approach to reform implicates everyone to insure that certain invidious commercial practices are made unprofitable. It represents an excessive measure, to say the least. The allegation that the present system reinforces market abuses is pure speculation, no matter how intuitive. But what is more important, his recommendation in this regard would *not* eliminate the market abuses. The abuses would continue outside the judicial system. Credit would not be denied to low income consumers; rather the interest rates would be increased to cover the "new" cost of doing business. Repossession as an exclusive remedy would give rise to even greater injustices familiar to anyone who has experienced the intrusion and abrasiveness of this self-help remedy. Repossessions might be regulated to insure that sufficient grounds first exist, but this would require the bureaucracy that Professor Ison seeks to avoid. Obviously, this kind of a recommendation is an attempt to implement substantive goals through procedural reform and it ends up doing an injustice to both. It is a recommendation that presumes small claims courts to be a forum for the exclusive use of low-income litigants; a presumption which is unfounded, historically.¹¹⁴ Small claims courts were created for *any* plaintiff with a small monetary claim; particularly the merchant or the working man.¹¹⁵ Should not these people continue to have the right

¹¹⁴ *Op. cit.*, footnote 86.

¹¹⁵ *Op. cit.*, footnote 84, at p. 315.

to enforce legitimate claims? On the other hand, the low income defendant should be given an opportunity to settle or argue his case on the legal merits of the circumstances. These rights are not mutually exclusive. Abuses in marketing should be regulated directly by way of substantive legislation, not by procedural indirection that affects all retail transactions to the detriment of the very people intended to be the chief beneficiaries of such reform.

The theoretical discussion above has indicated that the adversary process possesses a much greater potential for civil justice. This leads to the presumption that formalized inquisition is to be preferred only if the costs of a more adversarial small claims court procedure are excessive. Should formal inquisition be adopted, or informal inquisition be permitted to remain, the choice should be recognized for what it is: a compromise of civil justice in this context, and a conscious affirmation of Weber's two legal systems.

IV. *Restructuring Small Claims Courts on an Adversary Basis.*

A. *Universal Considerations.*

Whatever framework is chosen, there are a number of universal considerations that should be attended to. Poor judges give poor justice. It may be necessary to have revolving appointments of members of the bar, particularly the younger member, or law professors may be encouraged to give of their time on various bases. Salaries must be competitive to attract creative and concerned individuals and there should be an adequate support staff to enable the judge to spend time on important issues of law as they arise. In Ontario the small claims court is manned, for the most part, by county court judges, and while they are very skilled craftsmen, the small claims court work does not interest them.¹¹⁶ Many find it unrewarding and are trying to disengage from this court. Maybe this is for the best, for if one is unconcerned with his work or considers it unimportant, he will unlikely invest the requisite effort required to provide more than "khadi" justice. As well, a county court judge may find it difficult to implement the informality and procedural flexibility required in small claims work. It is preferable that small claims courts be manned by full-time appointments and these people should be organized to facilitate a high degree of intellectual interchange and communication between them. Conferences and seminars should be frequent and meaningful.

The direct and indirect costs of the process should be eliminat-

¹¹⁶ The Small Claims Court Act, *supra*, footnote 3, s. 1(1)h. This is my impression after a number of interviews.

ed or minimized as much as possible. Modern modes of communication and transportation render the present extent of decentralization obsolete. The administrative offices can be centralized but they must be open in the evenings or early mornings to minimize indirect processing costs. Greater use must be made of the mail, in this regard.

Post-judgment proceedings have experienced a great deal of criticism, particularly garnishments. This criticism raises the whole question of facilitating recovery of money judgments in a more humane manner and some legislative response in this regard is discernible.¹¹⁷ Consolidation and composition mechanisms are of the essence in this area.¹¹⁸ The Toronto Small Claims Court Referee proves that conciliation between the judgment creditor and judgment debtor can effectively humanize debt recovery.¹¹⁹ Should similar offices be established in other jurisdictions, debt collection agencies will be denied the inclement market they presently enjoy.

Finally, the pre-hearing processes must be reconsidered in light of the substantial default judgment rate highlighted by the above mentioned empirical studies.¹²⁰ The relative absence of individuals as plaintiffs accompanying this default judgment phenomenon raises the basic problem of the delivery of legal services, both preventive and remedial, to low income and consumer groups. The entire organizational structure of the legal profession is inappropriate to this task.¹²¹ The public is said to permit the legal profession to hold a monopoly on the delivery of legal services because it is in the public's long-run interest to have independent advocates available. This rationale does not apply to individuals with small monetary problems. The legal profession has neglected them, a neglect that has created two distinct legal systems. This professional neglect must be kept in mind in considering the following proposal.

B. *Institutionalized Advocacy.*

The position of this article is that the proponents of the in-

¹¹⁷ The Employment Standards Act, R.S.O. 1970, c. 147, s. 5 (garnishments); The Wages Act, R.S.O., 1970, c. 486, s. 7 (garnishments); The Small Claims Court Act, S.O., 1968-69, c. 30, ss 4, 5, 6, 7, 8, 12 (the latter provisions repealed the powers of committal for failure to pay a judgment debt).

¹¹⁸ *Op. cit.*, footnote 27.

¹¹⁹ Scott, The [Small Claims Court] Referee of the [Judicial District] of York: His Role in the Larger Picture in Consumer and the Law in Canada, *op. cit.*, footnote 26. In 1970, this office dealt with a minimum of 4,340 people involving a total debt declared at \$19,915,883. Mr. Scott reported that the total debt being repaid as a result of intervention on behalf of the debtor by the Referee (data as of 1970) is estimated at 90% or \$17,924,295.

¹²⁰ *Op. cit.*, footnote 103.

¹²¹ Carlin, *Lawyers On Their Own* (1962), p. 13.

quisitorial model have not identified and compared the costs of their position to the costs associated with possible adversarial reforms; and secondly, when this calculus is undertaken, certain adversarial reforms may be preferred. All too often the citizen is asked to submit to "Soloman-like" decisions and the adversary process is a valued contradiction to this trend. Adversarial reforms and innovations are transpiring in a number of other legal contexts.¹²² It makes economic sense to utilize them to their maximum capacity throughout the entire legal system, if possible. A neighbourhood law office can, and does, counsel low income litigants with small claims. Legal aid and duty counsel schemes can be adapted to the small claims court and the recent trend toward accessible legal counselling could have an important role in establishing a more effective adversary process in small claims courts.¹²³ These institutions, in addition to well-funded interest and community groups, encourage reliance on rights by providing the expertise and representation needed to implement them in meaningful and creative ways. Accepting all of this, I would like to go a few steps further and outline a specific proposal for small claims courts.

The reform I have in mind might be called "institutionalized counselling and advocacy".¹²⁴ This proposal visualizes a plaintiff's division and a defendant's division of the small claims court. Parties would not be obliged to use the facilities in these respective divisions; the assistance would be voluntary. However, a plaintiff could go to the appropriate office and state his complaint. In addition to the existing functions of the clerk's office, the plaintiff's office would advise him of the apparent legitimacy of the claim and formulate the most feasible theory should the plaintiff wish to proceed. The defendant's division would be contacted and this division would contact the defendant to discuss his position. The defendant's position would be formulated into the most feasible defense or if no defense was available he would be so advised. In this latter regard, on consent of the defendant, the defendant's office would seek the most beneficial settlement from the plaintiff's office, either in regard to the merits of the claim or the equities of the defendant's financial position. The proposal visualizes a very humane negotiation process with settlements providing time to pay and other creative outcomes possible in compromise. These settlements would only be on the consent of the parties. It should be remembered that a majority of the judgments in the small claims

¹²² *Op. cit.*, footnote 76.

¹²³ The Legal Advice and Assistance Programme, *supra*, footnote 76 is particularly relevant in this regard.

¹²⁴ For a comprehensive theoretical perspective to my "proactive" proposal see, Black, *The Mobilization of Law* (1973), 2 J. Legal Studies 125.

courts are by default. This proposal would ensure that such defaults are not due to the ignorance or fear of a defendant. Today, many small claims court clerks advise the parties of the merits of their case, and formulate the claims and defences. Should a settlement not be forthcoming, a hearing would be held at a time convenient to the parties, particularly to individuals. The hearing should be not unlike the informality and procedure of grievance arbitration in labour matters. The judges or hearing officers would be subject to a section similar to section 37(7)(c) of The Ontario Labour Relations Act, which reads:¹²⁵

37(7)(c) to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;

This would eliminate the delay incurred in considering whether certain evidence is admissible and it would permit the judges to act on hearsay evidence to the extent it is relevant and sufficiently reliable in the particular context. This provision would also make the court much more accessible to an unrepresented individual who might wish to pursue his own claim and permit each division to effectively employ para-legal personnel. Parties might be represented by an officer from the plaintiff's division or defendant's division, by a lawyer obtained through legal aid, by an interest group organization, or he might pursue his own claim after being briefed by the plaintiff's or defendant's division. Judgments would be rendered on the most equitable basis possible, having regard to the interests of the respective parties. A debt conciliation office would administer the post-judgment process of the small claims court. This office would bring judgment creditors and delinquent judgment debtors together in order that some satisfactory solution might be reached without the initial use of garnishments and executions. Hopefully, extensive use would be made of consolidation orders and there is an undoubted need for the availability of composition orders in the post-judgment administration of small claims.

Admittedly, this proposal is not free from difficulties, and the single greatest difficulty is manpower. Who would be employed in the respective divisions? The clerks who are presently employed lack the legal skills to effectively undertake the duties visualized by this recommendation. I think a number of alternatives are possible. Law schools are graduating more and more young lawyers and the time may have arrived where a one or two-year "stint" supervising a small claims court division would not be unattractive. These individuals might supervise an office staffed by para-

¹²⁵ R.S.O., 1970, c. 232.

legal personnel. Vocational colleges are beginning to provide opportunities for para-legal training forming a natural source from which to meet the personnel requirements of this proposal. Another source of personnel might be derived by encouraging law schools to structure at least part of their clinical-legal education programmes around the divisions of the small claims court. Should personnel, in the numbers required, not be forthcoming, a number of short-run steps might be undertaken. The existing clerk's office might employ para-legal personnel to advise individuals of the nature of a claim, the chance of success and the necessary documentation and proof for the hearing. These same people might be given authority to undertake conciliation at the pre-hearing stage. The hearing itself might be structured around a civil duty counsel scheme to ensure an equality in representation and to promote settlements. Finally, existing legal aid schemes will have to be more readily available to individuals affected by small monetary claims.

* * * *

All of the foregoing may seem a costly investment in "petty" claims. It is not the purpose of this article to minimize the expense involved. Rather, I have attempted to construct a rational argument in favour of making the investment. These so-called "petty claims" involve a vast sum of money when viewed in their totality; and affect a substantial citizenry. Furthermore, a large investment is necessary to improve the existing inquisitorial process in the direction advocated by Professor Ison. Consequently, if the procedure of the small claims court is in need of reform, should this reform be on an adversarial or inquisitorial basis? This question can only be answered by comparing the costs of each process, having regard to their respective capacities for civil justice. Was this analysis undertaken in the Province of Quebec? Certainly the contemporary proponents of similar inquisitorial reforms have not explicitly undertaken a calculus of this kind, and without systematic inquiry these reforms may be misunderstood as yet another casual political approach to a pervasive human plight.
