

Collections in British Columbia's
Small Claims Court

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Date: February 13, 2009

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A. Introduction

This paper serves as an overview of how the collection process works in the Small Claims Court of British Columbia (the “Court”). It provides a summary of the stages of the collection process, from determining whether your claim falls within the jurisdiction of the Court, to collecting on a judgement from the Court. The intention is that this paper be used as a reference only, not as a replacement for professional legal advice. The legislative mandate of the Court is to provide a “just, speedy, inexpensive and simple”¹ resolution to small civil disputes. As a result of this mandate, the procedures in the Court are simple and flexible enough to allow for self-represented litigants. Despite this, many collection situations can be complicated, even if the value of the claim is relatively small, and the services of a lawyer may be required. These services may include helping or advising on one or two stages of the collection process, or, it may entail full representation on complex matters.

Procedures in Small Claims Court are governed by the *Small Claims Act*² and the *Small Claims Rules*³. This legislation should be consulted for a more in-depth look at the Court’s procedures.

B. Jurisdiction

1. Monetary

Claims brought in the Court must have a value of \$25,000 or less, excluding interest and costs.

Where the amount of the claim is for more than \$25,000, and the claimant still wishes to start the action in the Court, the claimant may abandon the amount of the claim which exceeds \$25,000.

Once the excess portion of the claim is abandoned, a claim for the excess may not be pursued

¹ *Small Claims Act*, R.S.B.C. 1996, c. 430, s.2.

² R.S.B.C. 1996, c. 430.

³ B.C. Reg. 360/2007

unless the entire claim is withdrawn and an action started in Supreme Court. Alternatively, a judge must transfer the proceedings to Supreme Court if he or she is satisfied that the monetary outcome of the claim may exceed \$25,000.

You cannot avoid the monetary maximum of \$25,000 by splitting your claim into two separate actions. For example, a total debt owing of \$50,000 cannot be split into two separate actions claiming \$25,000.

2. Legal

The Court has legal jurisdiction over claims for debt or damages, recovery of personal property, specific performance of agreements pertaining to personal property of services, and relief from opposing claims to personal property.

Some actions are not within the Court's jurisdiction. They include: claims for builders liens, bankruptcy matters, claims against the federal or provincial governments, claims for libel, slander, or malicious prosecution and claims under the *Personal Property Security Act*⁴.

C. Limitation Periods

Claims must be begun within a time period specified by the *Limitation Act*⁵. Most creditors' claims must be commenced within six years of when the action arose. Actions for judgments must be commenced within ten years of when the action arose. The action arises at the earliest possible time at which legal action could be brought.

⁴ R.S.B.C. 1996, c. 359.

⁵ R.S.B.C. 1996, c. 266.

The running period for a cause of action will be renewed where there has been a confirmation of the cause of action.

D. Garnishment

Garnishing orders are available on a claim for a liquidated sum. A garnishing order requires the garnishee, a third party currently indebted to the defendant, to pay funds into the court then owing to the defendant, up to the full amount of the claim. A claimant can apply for either a pre- or post- judgment garnishing order without notice to the defendant. Both types of garnishing orders require the claimant to file an affidavit in support of the garnishment, prepare a draft garnishing order, and serve both the garnishing order and affidavit on the garnishee and the defendant.

If funds are owing to the garnishee at the time of the garnishing order, they must be paid into court. The claimant is then notified by the registry that the funds have been paid into court. The funds will be held in court pending judgment, trial, settlement or an order of the court.

Additionally, the parties may agree that the funds can be paid out of court.

1. Pre-Judgment

Pre-judgment garnishment requires a third party, the garnishee, to pay into court monies owing to the defendant, before a decision on liability. Pre-judgment garnishment does not give the creditor a proprietary interest over the funds paid into court. It is, however, advantageous for the creditor by providing security against asset removal and improving the creditor's bargaining

position. Almost any debt can be garnished prior to judgment, except wages and interest. Jointly held obligations, such as joint bank accounts, are generally not subject to garnishment unless both account holders are defendants.

2. Post-Judgement

Post-judgment garnishment requires a third party, the garnishee, to pay into court monies owing to the defendant. Unlike pre-judgment garnishment, the debtor's wages may be garnished with a post-judgment garnishing order. Up to 30% of the debtor's wages may be garnished, subject to a minimum exempted \$100 per month for a person without dependants and \$200 per month for a person with dependants.

For further information on garnishing procedures in the Court, the *Court Order Enforcement Act*⁶ should be consulted.

E. Procedure

A Small Claims action is commenced by filing a notice of claim in the court registry nearest to where the defendant lives or carries on business, or, where the transaction or event that resulted in the claim took place. If there is more than one registry where the notice of claim may be filed, the claimant may choose the registry most convenient to them or it. The notice of claim is the document that initiates the lawsuit or action. It identifies the nature of the claim and sets out the relief sought. The cost for filing a notice of claim is \$100 for claims under \$3000 and \$156 for claims over \$3000.

⁶ R.S.B.C., 1996, c. 78.

To notify the other party of the claim, the notice of claim must be served on that other party. This must be done within 12 months to avoid the expiration of the claim. Service can generally be completed either personally or by registered mail although special attention should be paid to the nature of the other party. For example, municipalities have special service requirements. Where regular service has proven impossible due to not knowing the other party's address or whereabouts or the other party is avoiding service, a claimant may apply for an order permitting another method of service. This is called substitutional service.

Once the defendant has been served with the notice of claim, they will need to file a reply within 14 days should they wish to dispute the claim. Where the notice of claim has been served outside of British Columbia, the time for filing a reply is extended to 30 days after the date of service. The defendant must file the reply in the same registry where the notice of claim is filed. Once the reply is filed, the registry will serve a copy on the claimant within 21 days of the date of its filing.

If the defendant fails to file a reply and the claim is for debt, an application for default judgment can be made by the claimant. To do this, the claimant must file proof of service by way of a copy of the certificate of service, and an application for a default order. If the filed material is in order, the registrar will issue a default order requiring the defendant to immediately pay the amount claimed, plus interest and expenses.

If the defendant has filed a reply, the next step in the action is a settlement conference. A settlement conference is a meeting between all of the parties and a judge and the date is set by

the court registry. The judge will attempt to mediate the dispute before allowing the matter to go forward to the formal trial procedure. At the settlement conference the judge has the power to do any of the following: mediate any disputed issues, decide on any issues that do not require evidence, set a trial date, discuss the evidence and procedure at the trial, order any documents or information produced as evidence at the trial, make a payment order, and dismiss a claim if it is without reasonable grounds, discloses no triable issue, or is frivolous or an abuse of process. If the judge deems it necessary, a second settlement conference may be set to ensure that documents have been exchanged, witness lists have been completed and that the parties are ready to proceed to trial.

The settlement conference is mandatory and all of the parties must attend. Parties may be represented by legal counsel at settlement conferences if they so desire. If a party fails to attend the settlement conference, the judge may dismiss a claim, make a payment order, or make any other appropriate order against that party.

You may also choose, or be required, to attend mediation. Mediation is where the parties to a dispute meet and attempt, with the assistance of a mediator, to settle the matters in dispute. The mediation takes place in a private, informal setting, where the parties participate in the negotiation and design of the settlement agreement. The mediator is trained to help people settle conflicts collaboratively and has no decision-making power. The purpose of the mediator is not to determine who wins and who loses, but to find solutions that meet the needs of people involved. The dispute is settled only if all of the parties agree to the settlement.

Mediations may be initiated by the court registry or by a judge at a settlement conference. They can also be initiated by either party by completing a Notice to Mediate and serving it on all other parties. If a claim is referred to mediation by the court registry or judge, a mediator will be appointed and a date set for mediation. If the mediation is initiated by one of the parties, those parties must choose a mediator and set a date. Attendance at mediation is mandatory regardless of whether it is initiated by the court registry, a judge, or a party to the action. Like a settlement conference, if a party fails to attend, the judge may dismiss a claim, make a payment order, or make any other appropriate order against that party.

Regardless of the outcome, the results of the mediation will be filed with the court registry. If the parties reach an agreement at mediation, a Mediation Agreement form is completed and filed with the court registry and the parties are required to follow its terms. If there was no agreement, or only agreement on some issues, the matter will proceed to a settlement conference, if one has not yet occurred, or to trial.

If no settlement has arisen from either of the settlement conference or mediation, a party to the action may make a formal offer to settle within thirty days of the settlement conference or mediation. If the claimant's award at trial is equal to or more than an offer that the defendant had declined to accept, the judge may order the defendant to pay the claimant a penalty of up to 20% of the offer to settle. The opposite is also true. If the award at trial was equal to or less than an offer that the claimant had declined to accept, the judge may order the claimant to pay the defendant a penalty of up to 20%.

Before trial, the parties will be required to disclose to each other the documents they intend to rely on at trial. They may also be ordered to disclose the names of their witnesses and a summary of their evidence. If you are unsure that a witness will attend at the trial voluntarily, the summons procedure should be used. The summons procedure requires delivery of a summons to a witness at least seven days before the date of the trial.

Prior to trial you must also decide whether expert evidence will be required. Any party relying on expert evidence must give advance notice to the other party. Expert evidence may be given at trial by way of an expert report as opposed to oral testimony, but a copy of the report must be delivered to the opposition prior to the trial. Despite this, the opposition may decide to exercise their right to call the expert for the purpose of cross-examination.

At the trial, all parties have an opportunity to present their evidence and put forward their arguments. The trial will consist of an opening statement from each party, presentation of evidence by way of witness testimony from each side, and a closing statement from each party. While the regular rules of evidence are to be followed, the judge has broad discretion in this regard.

Once the trial is completed, the judge has the option to give a decision immediately either orally or in writing, or, the judge may reserve his or her decision to a later date. If the judge decides that one party must pay money to the other, the judge will either make a payment order or order a payment schedule. The latter option is usually only used when the debtor requires time to pay the judgment.

If you are unhappy with the Court's judgment, appeals may be brought in the Supreme Court within forty days of the order. An order from the Supreme Court is final and no further appeal is available.

F. Costs and Interest

A judge may also make an order for costs and interest to be paid to the successful litigant. While the procedures in the Court have been designed to minimize expenses to the litigants, certain expenses are inevitable. After judgment, a successful litigant will normally be entitled to recover several types of expenses that were reasonably incurred and related to the proceeding. These expenses include: registry filing fees, expenses for serving documents, travel and other expenses of witnesses, fees for expert reports, and fees for photocopies.

An important factor in deciding to pursue a claim in the Court is that no fees for legal counsel may be awarded. A successful litigant in Supreme Court is entitled to be reimbursed for a portion of their legal fees. Despite this, the Court may still be the least expensive way of proceeding to collect a debt because of its simpler procedure and quicker resolution.

A judge also has the discretion to award a penalty of up to 10% of the amount of the claim if a party's position in the proceeding had no reasonable basis for success. Also, as stated earlier in the Procedure portion of this paper, an award of up to 20% may be made by the judge if there is a declined offer to settle.

The Court is likely to award interest to the successful claimant from the date the matter arose to the date of judgment, unless the court orders otherwise. Pre- and post-judgment interest rates are determined by the *Court Order Interest Act*⁷. The applicable date for a claim for debt is the date the debt became due and owing.

If there is an agreement as to the rate of interest, or if interest is imposed by statute, the notice of claim should include a statement that interest is claimed at that particular rate and the basis for that claim.

G. Post-Judgment Execution

Recovering on a judgment can often be more difficult than obtaining a judgment in the first place. In some cases the debtor will simply pay as ordered by the Court. However, if the debtor fails to make payment as ordered, there are further steps that a creditor can take. Methods by which the judgment creditor may collect payment include the following:

- (1) Apply to the registrar for an order for seizure and sale;
- (2) Apply for a payment hearing;
- (3) Apply for a default hearing, if the debtor defaults in making payments under a payment schedule; or
- (4) Apply for a garnishing order after judgment.

⁷ R.S.B.C., 1996, c. 79.

An order for seizure and sale is a device in which property belonging to the debtor can be seized and sold at public auction. The net proceeds of the sale, if any, are provided to the creditor. A judgment creditor may ask for a seizure and sale order if a payment schedule has not been ordered or if a payment schedule has been ordered but not complied with. The debtor is not notified of the order prior to the seizure.

There are numerous searches which may be utilized to determine the assets of the debtor available for seizure and sale. Examples of searches are a motor vehicle search and a personal property search. Certain types of personal property are exempt from seizure and sale. For further information on exempt personal property you should consult the *Court Order Enforcement Act*⁸.

A payment hearing is a hearing before a judge or justice of the peace to determine the debtor's ability to pay and to consider whether a payment schedule should be ordered. The creditor may wish to have such a hearing so as to have the opportunity to examine the debtor under oath to determine assets in the debtor's possession which may be seized and sold should the debtor fail to comply with a payment schedule.

If a debtor has refused to obey a payment schedule, the creditor may have the debtor brought before a court for a default hearing to request a further order, a warrant for arrest, or imprisonment of the debtor. This step may also be taken if the debtor has failed to comply with a payment schedule which was made in a settlement conference, in mediation, or at trial.

⁸ R.S.B.C., 1996, c. 78.

Failure to attend a payment hearing or a default hearing may result in an arrest warrant being issued if requested by the creditor. After the warrant is issued it is valid for 12 months and will be served by the registry on the person named. If the person served with the warrant does not appear voluntarily in court within 7 days of service, a sheriff or peace officer may arrest the person.

Please refer to the Garnishment section of this paper for information on post-judgment garnishing orders.

H. Vancouver Registry Pilot Project

The Vancouver small claims registry has introduced a pilot project whereby claims for financial debt may be handled by way of a simplified 30 minute summary trial procedure. A claimant who is in the business of lending money or extending credit and is making a claim for a debt which has arisen in the course of that business can utilize this summary trial procedure as opposed to a conventional trial. All evidence at a summary trial is presented by way of written materials only.

These trials represent a significant cost savings over conventional trials and can be held and scheduled much more quickly than a conventional trial..

I. Conclusion

Small Claims Court can be a very efficient and cost-effective manner by which to collect on unpaid debts under \$25,000. Quite often an action, from filing the notice of claim to trial, can take less than a year to complete. The manner in which the Court's procedures have been

fashioned make it a friendly environment for the self-represented litigant. Rules of evidence are more flexible and judges have more discretion as to what evidence is allowed and what is not. Despite this, some actions may be quite complex and the advice of a lawyer beneficial. Specific advice from a lawyer regarding commencing and maintaining an action should always be sought before proceeding with an action.