ASSOCIATION DES CONSOMMATEURS
POUR LA QUALITÉ DANS LA CONSTRUCTION

CONSUMERS' USE OF SMALL CLAIMS COURT IN CONSTRUCTION DISPUTES

Final Report of the Research Project Presented to
Industry Canada's Office of Consumer Affairs

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POUR LA QUALITÉ DANS LA CONSTRUCTION

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The *Association des consommateurs pour la qualité dans la construction* is member of the Union des consommateurs.

The masculine is used generically in this report.

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ASSOCIATION DES CONSOMMATEURS POUR LA QUALITÉ DANS LA CONSTRUCTION

The organization

The Association des consommateurs pour la qualité dans la construction (ACQC) was founded in 1994 by a group of consumers concerned by the issue of residential construction work quality and organized by the Association coopérative d'économie familiale (ACEF) of Montreal East.

A non-profit organization incorporated under Part III of the Quebec Companies Act, the ACQC is managed by a board of directors comprised of victims, legal experts and real estate professionals (certified architect and appraisers) to whom the coordinator reports, assisted by regular and contractual employees and by volunteers.

In 2005, the ACQC joined Union des consommateurs, which groups numerous ACEFs and is a member of the International Consumer Organization.

Its mission

- To bring together consumers of construction and renovation goods and services in order to defend and promote consumer interests;
- To educate and raise the awareness of consumers of construction and renovation goods and services with regard to their rights, obligations and responsibilities;
- To promote, in collaboration with the various construction stakeholders, any action likely to improve construction quality.

Consumer services

Since its foundation, the ACQC has endeavoured to guide consumers in the complex world of construction. It provides advice and information, notably through its publications and website. The organization answers consumers' questions by telephone or e-mail, and if necessary refers consumers to organizations, professional associations or specialists who can best inform or help them.

The ACQC keeps apprised of complaints and information, fosters the association of consumers facing a similar problem, and thus promotes research, the sharing of solutions, and the development and implementation of non-partisan political action. Some problematic situations may give rise to class actions. In particular, ACQC supports collective action in the face of problems such as cracked houses, ocher deposits, the pre-purchase inspection or other related to the lack of consumer protection against the industry. The ACQC supports any action that might improve the quality of the construction field. As such, it joins the Coalition Proprio-Béton in the case of pyrrhotite in Mauricie.

AKNOWLEDGEMENTS

The Association wishes to express its heartfelt thanks to the people who participated to the realization of this study by sharing their experience and expertise.

Above all, the Association recognizes the essential contribution of Michelle Cumyn, Law professor at Université Laval, whose commitment extended far beyond her methodological mandate. Her availability, contribution and advice ensured continued support to the researcher responsible for the project, thereby allowing the study to reach its targeted objectives, in fact to exceed them in exploring new research avenues. Without doubt, her recommendations significantly enriched the research quality as well as its analytical relevance.

The informal contribution, to no extent less significant, of Ms. Hélène Zimmermann, junior lecturer at Université Laval's Law Faculty, merits equal recognition. In accepting to share her experience regarding methods as well as search tools appropriate to empirical legal research, Ms. Zimmermann encouraged this research project to move forward with methodological rigour, perfectly adapted to the study's requirements. Her sound advice proved essential in ascertaining an optimal start-up procedure of the research project.

Mr. Gaétan Daigle, the project's statistical consultant, strongly supported the empirical analysis of the case law. His patience and interest for the project notably lead to a fortuitous structure of data collection. Thanks to his expertise and time dedication various adjustments and required verifications were carried out, hence leading to greatly refined study results, thereby positively impacting the quality of the analysis.

Finally, the Association give thanks to its collaborator, Madeleine Belisle, who conceived this research project, and which distinguishes itself by the originality of its scientific approach regarding the subject under study and will permit the ACQC to reinforce the expertise of its present and future personnel, a necessity in efficiently supporting consumers in their dealings with the professionals in the construction industry.

EXECUTIVE SUMMARY

Home construction and renovation problems account for most of claims filed by consumers in Canada. Therefore, it is not surprising that disputes in this field also represent an important part of the cases heard by Small Claims courts. This judicial body is specialized in the hearing of disputes linked to everyday life issues involving relatively lesser sums and encourages citizens to act alone throughout the procedure. To ensure that this system functions correctly, it is essential to provide citizens with all the legal instruments they might need, be it applicable law or procedural regulations to follow.

By virtue of its mandate, the *Association des consommateurs pour la qualité dans la construction* is particularly sensitive to these issues. This study proposes to identify the results of a research study conducted regarding submissions to the Small Claims court by consumers facing construction or home renovation disputes. This research adopted an approach focused on the consumer in order to answer to the following questions:

- How do Small Claims courts function in different Canadian provinces?
- What are the legal regulations which apply to construction or renovation disputes that consumers can turn to in order to assert their rights in court?
- What information is provided to citizens to help them in this process?
- What results are obtained by citizens before the Small Claims court?

In addition to conducting classical research to identify the legal regulations governing the Small Claims courts and the construction field, this study is based on an empirical analysis of the Québec Small Claims court case law. The review of minutes from this court's rulings on construction disputes (for 2011) allowed us to make observations and explore avenues of thought to comprehend consumers' behaviour and challenges encountered more fully.

All Canadian provinces use their Small Claims court as a means to guarantee more amenable access to justice, but not all aspects of this major debate are taken into account: while the issue of accessibility to the judiciary system is addressed throughout procedural regulations governing these courts and their efforts to transmit and clarify relevant information, a reflection on access to law is much less dealt with. The application of the main legal regulations that consumers might need to comprehend – and first among them the consumer protection acts – remain complex; the absence of a harmonized regime also forces one to match up information from several decisional entities in order to draw a complete portrait of consumers' recognized rights. The latter situation prevents consumers from acting alone in preparing and defending their case.

This situation is all the more regrettable since in the disputes under study, a factual asymmetry between the opposing parties concerned is evident: the contractor's or the service provider's expertise. In addition to this inequality, the issue of financial means is another irritant. On the one hand, the consumer facing the professional's presumed competency could encounter difficulties in making his claims without the support of an outside expert, a resource that is often costly; on the other hand, with their greater financial means, some professionals are more easily able to consult legal counsel or a

lawyer in preparing or defending their case, a luxury that consumers cannot always afford. The study of applicable law also led to the observation that there exists further inequality due to the nature of the contracts between consumers and contractors: the consumer's burden of proof is often more onerous than the contractor's.

The results of the analysis of the Québec Small Claims court case law reinforced this feeling of inequality between parties, which has an adverse effect on the consumer, in addition to opening other avenues of thought particularly interesting in respect to:

- The relative importance of the elements of proof brought before court;
- The comparison of the strategies adopted by parties;
- The legal basis of the decisions;
- The grounds for refusal of consumers' claims; and/or
- etc.

Obviously, every research methodology has its limits and certain questions raised merit further review to enhance information collection as well as to refine analysis. This present situation however should not prevent the ACQC from formulating recommendations pursuant to this study with a view of remedying certain deficiencies and ensuring greater consumer protection:

- The Association notably encourages provincial governments to continue with their efforts to guarantee a better access to justice by adopting the best practices identified across the country regarding access to Small Claims courts and by doing more to offer easier access to law, particularly to consumer protection regulations;
- The Association strongly suggests that the Gouvernement du Québec takes full stock of the inadequacy of consumer law in construction disputes, due partly to the complex and incomplete formulation of the *Loi sur la protection du consommateur*, and that the Gouvernment du Québec take the necessary steps to correct this inadequacy.

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LIST OF ACRONYMS & ABBREVIATIONS

ACEF	*Association coopérative d'économie familiale*
ACQC	*Association des consommateurs pour la qualité en construction*, Québec
ADR	Alternative Dispute Resolution (equivalent of the French abbreviation "MARC")
AB	Alberta
BC	British Columbia
BCPCA	Business Practices and Consumer Protection Act
CanLII	Canadian Legal Information Institute (Institut canadien d'information juridique)
C.C.Q.	Civil Code of Québec
C.P.C.	Code of Civil Procedure of Québec
CPA	Consumer Protection Act
LPC	*Loi sur la protection du consommateur* (Consumer Protection Act, Québec)
MB	Manitoba
NL	Newfoundland and Labrador
NS	Nova Scotia
ON	Ontario
PEI	Prince Edward Island
QC	Québec
SC	Settlement Conference
SK	Saskatchewan
SOQUIJ	*Société québécoise d'information juridique*

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INTRODUCTION

Home construction and renovation problems account for most of claims filed by consumers in Canada. Much statistical data has been collected in different provinces showing that for several years, complaints in that field have remained in the Top 10 of claims filed by consumers.[1] The systematic repetition of this observation in both time and space challenges the methods implemented to establish good relations between contractors and their clients and to protect consumers efficiently.

Highly concerned by this problem, the ACQC is putting a lot of effort into the development of its expertise in order to better understand the underlying dynamics that contribute to these malfunctions. The Association hereby aims to identify efficient methods and tools to offer to consumers as well as encourage the adoption of orientations or public policies intended to close existing gaps.

In principle, as soon as a citizen decides to assert his rights in the judiciary system, he is supported in his proceedings by one or more legal professionals, who will help him to navigate through procedures while ensuring the optimal use of the applicable legal instruments in his case. There is, however, one important exception to this affirmation: the use of Small Claims court. This judicial body is specialized in the hearing of disputes linked to everyday life issues representing relatively low sums. Therefore, citizens are invited to act alone, since the operating rules of these courts should enable them to take charge of the entire settlement process, from the definition of the dispute right up to its final resolution.

The close relationship fostered by the ACQC with numerous consumers facing problems which could be brought before a Small Claims court lead to the Association's questioning as to the real ability of these consumers to assert their rights before court: Are they well-prepared? Do they have access to all the information necessary to make a strong case and defend it adequately? Which legal protections can they invoke? Which obstacles are they likely to encounter?

In order to provide the relevant answers to these questions, the Association asked for the support of the Office of Consumer Affairs of Industry Canada to conduct a unique study in the use of Small Claims court by consumers involved in a construction dispute. In addition to conducting classical research to identify the legal rules linked to the operation of Small Claims court and the construction field, this study presents an empirical analysis of Small Claims court case law. The adopted approach in this analysis is strongly focused on consumers and their behavior before court to better identify their strategies, mistakes and difficulties.

Well aware that the subject under study is of interest not only in the province of Québec where it is operating, the ACQC first thought of adopting a national perspective in all aspects of its project and notably conduct an empirical analysis comparing small claims case law in two Canadian provinces. However, we had to abandon this ambition because of the methodological obstacles

[1] In Ontario, this field occupies the second or third rank since 2004: Ontario Ministry of Consumer Services (2013). *Top Complaints and Inquiries*. Retrieved on May 18th, 2013 from: http://www.sse.gov.on.ca/mcs/en/Pages/Top_Ten_Complaints.aspx. According to the Consumer Council of Canada, a similar situation can be observed in Alberta and more widely, across the country: Deane, Howard J. and Ken Whitehurst (2009). *Renovation Rip-Offs. Problems and Solutions*, Toronto, Consumers Council of Canada, p. 73-74.

we have encountered. The preliminary research for the formalization of this project showed potential, but we soon discovered that all provinces did not process their case law in the same way. In fact, only Québec had given access on the Internet to a significant volume of settlements, including those of the Small Claims court, which allowed to carry out a quantitative and statistical study focusing on current litigation and not only on settlements of particular public interest.

While the empirical study of case law may concern only Québec's Small Claims court, the other aspects of the research were also compared in order to draw a general portrait of the situation in the different Canadian provinces.

In order to best present the study's results, the present report is comprised of four main sections. A preliminary section on the methodology that served to meet the targeted goals precedes these sections. The project's important steps are presented, along with each of the main information sources consulted and the data collection instruments.

The first section depicts the actual situation of Small Claims courts in all ten Canadian provinces. In addition to presenting these courts in their historical and theoretical contexts, this section briefly exposes the situation of each province, before examining different points of comparison which help to better understand the mandate and the goals set by these courts, the political orientations prioritized to meet these goals and the challenges they must face.

In the second section, the research refocuses on the applicable law in construction dispute across Canada. Therefore, this section aims to identify the major legal regimes dedicated to these disputes, in the common law system as well as in the civil law system prevailing in Québec. Consumer law, which remains a focal point of the study, led to the examination of the legal mechanisms for consumer protection accessible in the field of construction and home renovation. Finally, a more detailed study of the conceptual development of Québec law was necessary, not only because of the particularly complex architecture of the applicable rules which called for a clarification, but also because of the study's methodological needs which required clarification of subject matter terminology.

The third section adopted a point of view that focused on consumers, since it elaborated on the information accessible to them and which supports their judicial proceedings before Small Claims courts. In this case again, data was collected in all Canadian provinces. While reviewing the nature and the scope of the tools made available online to the public regarding the operation of Small Claims courts and the different procedures to conform to, the goal was to identify eventual loopholes and thus prepare for potential obstacles which could restrict the consumers' efforts, or even prevent them from asserting their rights.

This report ends with a fourth section dedicated to the empirical study of the Small Claims Division of the Court of Québec's case law. The methodological details relative to this section of the research are presented and followed by the highlights of the statistical analysis. Notably, these highlights allow one to identify certain strategic consumer choices, clarify the nature of construction disputes settled by the court and sometimes lead to unexpected observations regarding their processing. These observations are completed by a brief discussion of their implications.

The entire discussion conducted as part of this study, of course, leads to a conclusion where the ACQC formulates several recommendations exploring different avenues to improve the situation and optimize the consumers' use of Small Claims courts in construction disputes.

METHODOLOGY

To learn more about the Small Claims court terms of use for consumers facing construction disputes, the present study relied on several methodological instruments, which enabled the collection and analysis of relevant data. Notably, the data was linked to the following:

- History and actual operating rules of Small Claims courts in different Canadian provinces;
- Information and manuals provided to consumers to prepare their case before the Small Claims court;
- Applicable judiciary regimes in the field of home construction;
- Small Claims Division of the Court of Québec's case law regarding construction disputes.

In order to obtain data as precise and recent as possible, important studies were conducted using primary sources of law: legislation and regulations. Several times the analysis also relied on scientific literature and doctrine. The provincial Departments of Justice's websites and other affiliated sites were also consulted. Finally, a sample from the Small Claims court case law was examined empirically to learn more about consumer strategies as well as positive and negative factors influencing the success of their settlement.

A. Acts and Regulations Study

Several aspects of the research called for the study of the acts and regulations of all Canadian provinces. The first point of interest relates to Small Claims courts. In order to establish its features and main operating rules, provincial legislation adopted in this regard was identified and studied. In certain cases, the related provisions also had to be consulted (regarding the legal fees, for example).

Of course, primary sources were consulted to take note of the applicable rules and recourses in the construction field, notably relating to consumer protection measures.

B. Documentary Research

The interest of certain jurists and specialists for Small Claims courts produced a rich and diverse documentation: general presentation of operating rules in certain provinces or countries, empirical studies, comparison of the situation in Canada or in other regions, etc.

The periodical studies conducted on the Small Claims courts and supported by different provincial governments (Manitoba, Ontario or Newfoundland, for example) also constituted an important source of information. Finally, the annual reports published in certain provinces (Québec, British Columbia, Newfoundland and Labrador, notably) gave access to some complementary factual data on these courts.

The documentation obtained enabled to track and put into perspective the history and evolution of the main operating principles of Canadian Small Claims courts, taking other concerns into account, such as access to justice and to law.

Simultaneously, the legal issues raised by the analysis of certain rules and concepts (for example, the concepts of company and consumer) have sometimes received special attention by the doctrine, and the analysis and views presented facilitated the comprehension of often

complex legal mechanisms. In addition to clarifying the application of the existing law, this information was also found essential in preparing for the empirical study of case law.

C. Website Analysis

Internet is one of the primary resources consulted by citizens to get information on their rights and the means to assert them. The Departments of Justice's website as well as other sites presenting legal information and education were consulted and examined to assess the quality and relevance of their content.

In certain cases, these sites constituted a useful gateway to understand the general operation of Small Claims courts, take into account the goals and objectives set by these courts as well as relevant legislation.

D. Study of the Small Claims Court's Case Law

There is no question that the empirical study of Small Claims courts' case law was crucial to the research. Instead of studying the case law like jurists do, traditionally, to learn more about the rules of law that apply, we used it as a source of information on consumers' strategies and factors that influence their chances of success. The methodological approach chosen to conduct this study is fully detailed in the report's section to that effect. However, it is important to underline the important steps of this approach and the necessary adjustments that had to be put in place after encountering certain limitations.

Impossible Interprovincial Comparison

At the beginning, this project proposed a quantitative analysis comparison of case law in two Canadian provinces. However, the easy access to Quebec's court rulings was the exception rather than the rule. In fact, several free and fee-charging databases were consulted, but none provided an annual number of settlements, which represents the actual workload of Small Claims courts in other Canadian provinces. More particularly:

- Some fee-charging databases sort settlements to keep only the most relevant. A preliminary estimation was done in Québec and Ontario. According to the workload presented in the annual reports, the Quicklaw database gives access to about 1% of each year's settlements;

- In some provinces, Small Claims court settlements cannot be explicitly identified and are included in the rulings of higher instances: for example, British Columbia Provincial Court, Saskatchewan Provincial Court, Manitoba Court of Queen's Bench;

- Finally, courts do not all forward their rulings to online resources: CanLII's administrators confirmed that no specific sorting of rulings was done. The results obtained are sometimes similar to those observed in other databases. In Nova Scotia, for 2011, 67 rulings can be found in Quicklaw, on the website "The Courts of Nova Scotia"[2] and the same number on the CanLII site.

For these reasons, the comparative aspect was put aside, and the empirical component of the research focused on Québec's Small Claims court. In the study, the choice of targeting Small Claims court settlements from 2011 was followed through. On one hand, a one-year period gives

[2] The Courts of Nova Scotia, *Small Claims Court Decisions*. Retrieved on June 15th, 2012 from: http://decisions.courts.ns.ca/nssm/2011/01.html

access to a sufficient number of settlements to conduct statistical analysis. On the other hand, 2011 was the most recent year for which settlements from a complete year were accessible.

Identification of the corpus under study

The tests and researches conducted to determine the province to compare to Québec have also oriented the choice of the database for the collection of settlements. For Québec, the two main sources, which present rulings, are CanLII and the www.jugements.qc.ca database of the *Société québécoise d'information juridique* (SOQUIJ). These two sources provide a similar number of Small Claims court settlements, which account for, according to our assessment, about 60% of annual rulings.[3]

While CanLII presents all rulings that meet the research criteria, the SOQUIJ's system displays the 200 most relevant or recent rulings. One must therefore refine the research criteria or the period selected in several timeframes. To reduce data manipulation, the CanLII database was chosen.

The rulings' corpus under study was defined using a threefold test, which aimed to select disputes heard in 2011 implicating a consumer and a contractor or a service provider (hereafter, "contractor") in the case of a construction dispute. The operationalization of research criteria called for a close study of certain legal concepts and their conceptual development in Québec law ("consumer contract" or "contractor", for example).

In sum, the retained definitions were intended to meet the main objective of this study: to better understand the consumers' use of Small Claims court in construction disputes.

To target relevant cases among all Small Claims court settlements of 2011, different keywords were used in the CanLII database.[4] Unfortunately, the vast scope of the subject, particularly in the "construction field", did not enable the identification of adequate keywords to make sure that relevant settlements were included, all the while excluding enough of those which did not meet the research criteria.

Therefore, the corpus was identified using a systematic review of Small Claims court settlements of 2011.

Data Collection and Analysis

When the study corpus was established, we asked for the support of the Statistical Consulting Service at the Université Laval to prepare and complete the case law statistical analysis. Furthermore, Professor Michelle Cumyn, the project's methodologist, took an active part in this phase of the research.

The first discussions mainly served to determine the size of the statistical sample in our corpus, confirm the variables and establish the data codification system to produce an adequate analysis grid for statistical processing. Subsequently, the discussions focused on the nature of the

[3] The 2010 annual report of the Court of Québec presents 13,329 cases "heard, settled and struck from roll" by the Small Claims court between September 1st, 2009 and August 31st, 2010: Court of Québec (2011). 2010 Public Report, p. 32. Retrieved on June 15th, 2012 from: www.tribunaux.qc.ca/c-quebec/CommuniquesDocumentation/RAP_2011_V_FinaleWeb.pdf. For the same period, the www.jugements.qc.ca database counts 8,096 rulings (more than 60%), and CanLII, 7,599 (57%).

[4] The context and the nature of the keyword attempts are not presented in this research report. However, they are explained in the project's working documents.

statistical tests to carry out to find answers to the questions raised by the study, which notably aimed to learn more about the consumers' claims and recourses, as well as regarding the eventual determinants of success or failure of their cases.

Our partner in the Statistical Consulting Service, Mr. Gaétan Daigle, did the selected tests and presented a first report. On the basis of the following discussions, he was asked to conduct additional tests to refine the analysis and obtain complementary results. These results are presented in the report's last section.

1. General Portrait of Canadian Small Claims Courts

1.1. Historical Evolution and Theoretical Foundations

1.1.1. Apparition and Successive Reforms of Small Claims Courts

Small Claims courts are omnipresent in the Canadian legal landscape. Each province has its own adapted processing system for civil litigation where the amount at issue is relatively low, and an organization, which mainly consists of a simplification of rules of procedure.[5]

These courts were built on the foundations of former courts and took the name Small Claims courts or *Cours des petites créances* in the 1970's, with the growth of consumer rights protection movements.[6] Thus, the Courts of Request preceded the creation of Small Claims courts in Ontario[7], and the Small Claims court (*Cour des petites créances*) replaced the *Cour des commissaires* in Québec.[8]

Often presented as a showcase of the legal system for citizens, the Small Claims court plays a leading role in demonstrating the accessibility and reliability of justice, and thus, gives people an insight of the complete system.[9] The ever-renewed debates regarding the principles of access to justice and to law give a distinct appeal to the Small Claims courts and account for the regular reform of their operating rules. In 1990, Ramsay said: "Study of these courts may therefore illuminate the role of civil justice in society – a topic on which there is little broad agreement".[10]

Moreover, this observation predicted an important modernization wave of Small Claims courts in Canada, as observed in the 1990's. In fact, several provinces have made important changes to the operation of their Small Claims courts by putting forward the argument of a better access to justice. In British Columbia, these changes took the form of the use of plain language, a greater flexibility in rules of evidence or then again the recourse to different dispute resolution modes.[11] During that period, Québec also acquired greater leniency in its exclusion principle of legal persons.[12] Recently, McGill pointed out that this trend is not weakening and that "the appetite for

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[5] Only Prince Edward Island has a distinct model: its Small Claims court is governed by a specific rule under the Supreme Court. New Brunswick piloted a similar model between 2009 and 2012. See infra.

[6] Ramsay, Iain (1990). « Small Claims Courts in Canada: A Socio-Legal Appraisal », in Whelan, J.C. (dir.), *Small Claims Courts. A Comparative Study*, Oxford, Clarendon Press, p. 25; Yngvesson, Barbara et Patricia Hennessey (1975). « Small Claims, Complex Disputes: A Review of the Small Claims Literature », *9 Law & Society Review 2*, p. 220 ; Ontario Ministry of the Attorney General (1996). *Civil Justice Review, Supplemental and Final Report*, Toronto, Ontario Civil Justice Review. http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/default.asp, Chapter 6 covers Small Claims courts.

[7] Ontario Ministry of the Attorney General (1996), supra (note 6).

[8] Longtin, Marie José (1999). « De certaines tendances en matière de petites créances », *40 Les Cahiers de Droit 1*, p. 220.

[9] Patry, Marc W., Veronica Stinson and Steven M. Smith (2009). *Evaluation of the Nova Scotia Small Claims Court. Final Report of the Nova Scotia Law Reform Commission*, Halifax, Saint Mary's University, p. 6; Ramsay, Iain (1996). « Small Claims Courts: A Review », in Ontario Law Reform Commission (dir.), *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, vol 2, Toronto, p. 491 ; McGill, Shelley (2010). « Small Claims Court Identity Crisis: A Review of Recent Reform Measures », *49 Canadian Business Law Journal 2*, p. 227.

[10] Ramsay (1990), supra (note 6), p. 25.

[11] Schmidt, Judge E.D. (1993). « B.C.'S Small Claims Program - Has it Worked? », *Advocate 93*, p. 1. www.provincialcourt.bc.ca/downloads/pdf/smallclaimsarticle93.pdf

[12] Longtin (1999), supra (note 8), p. 231.

reform remains strong"[13]: in fact, many changes were undertaken or suggested since the mid-2000s in British Columbia, Ontario, New Brunswick and Nova Scotia.

It is, however, interesting to observe that the first justification given for these changes, regardless of the date or the content, is always the same: to guarantee a better access to justice. This magic phrase badly disguises a given number of contradictions, or negative effects[14], but remains easy to understand once you explore the concept of access to justice.

1.1.2. Access to Justice: Accessibility and Fairness of the Judiciary System

The literature on access to justice is extensive, but the goal of this study is not to review the details of this concept, nor its semantic evolution nor ambitions. In contrast, it is useful to place the debates regarding Small Claims courts in the larger context of access to justice since the existence and operation of this institution are closely interrelated to the regular efforts towards reducing the obstacles of accessing the judiciary system, while at the same time improving its efficiency.[15]

Thus, one finds that Small Claims courts are dedicated to meet the various challenges related to access to justice. According to the classification proposed by Cappelletti and Garth, access to justice was defined in three main successive waves, described as follows[16]:

> The first wave of access to justice, which emerged in the post-war period, was legal aid. The second wave was the representation of "diffuse interests". This includes class actions and public interest litigation, and the emergence of public interest centers. The third wave, according to Cappelletti and Garth, is a more fully developed access to justice approach. The third wave goes beyond case-centered advocacy. It represents a broader panoply of less adversarial and less complex approaches, including changes in forms of procedure, changes in the structure of courts or the creation of new types of courts, the use of paraprofessionals, and changes in the substantive law itself.

Therefore, in their modern version, Small Claims courts operate within the second wave: specific citizen groups' concerns, notably consumers.[17] In this sense, access to the judiciary system was prioritized, a principle that underlies the courts' displayed intention: the simple, efficient and cost-effective dispute settlement, incurring low sums.[18] This series of imperatives result in concerns

[13] McGill (2010), supra (note 9), p. 229.
[14] *Ibid.*
[15] For example, the Québec Act which instituted the Small Claims court, the Act to Promote Access to Justice; in a similar mindset, the reform process of British Columbia's Small Claims court in 1991 originates from an access to justice initiative from 1988. See Schmidt, Judge E.D. (1993), supra (note 11), p. 1.
[16] Department of Justice Canada (2000). *Expanding Horizons. Rethinking Access to Justice in Canada*, p. 38. http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/op00_2-po00_2/op00_2.pdf. Cappelletti and Garth's classification reached consensus in the doctrine: Lafond, Pierre-Claude (2012). *L'accès à la justice civile au Québec. Portrait général*, Montréal, Editions Yvon Blais, p. 20-21.
[17] Lafond (2012), supra (note 16), p. 21 and Ramsay, Iain (1990), supra (note 6), p.25.
[18] Patry and *al.*, (2009), supra (note 9), p. 9; Longtin (1999), supra (note 8), p. 220; McGuire, Seana C. et Roderick A. Macdonald (1996). « Small Claims Courts Cant », *Osgoode 34 Hall Law Journal 3*, p. 511; Law Students' Legal Advice Program (2011). « Small Claims Procedure », in LSLAP (dir.), *LSLAP Manual. U.B.C. Law Students' Legal Advice Manual* 35the, Vancouver, Faculty of Law, University of British Columbia, p. 22:21; Manitoba Law Reform Commission (1998). *Review of the Small Claims Court*, Winnipeg, Law Reform Commission, p. 2. Retrieved from http://www.lslap.bc.ca/main/?Manual_download; McGill (2010), supra (note 9), p. 224.

such as the court's monetary limit, the fees to take action, the simplification of rules of procedure, the lawyer's role, etc. The presentation of Small Claims courts from different provinces draws a good portrait of this affirmation:

> **Alberta:** Provincial Court - Civil is designed for ordinary people to handle their legal disputes without the need to hire a lawyer.[19]
>
> **British Columbia:** Small claims court is a "do-it-yourself" court, where members of the public who are not lawyers can handle their own cases for amounts under $25,000. It is a court of law, but its rules and procedures are designed to make it as easy as possible for people to resolve their disputes. The court process is also intended to be less expensive and less demanding than other courts, such as the Supreme Court. Small claims court users are encouraged to settle their claims by agreement.[20]
>
> **Nova Scotia:** The Small Claims Court provides a quick, informal and cost-effective method for deciding claims up to $25,000 (not including interest). It is not necessary for the person making the claim (claimant) and the person whom the claim is against (defendant) to have lawyers.[21]

The adoption of a holistic, multidimensional and interdisciplinary conception of access to justice enabled, in the third wave of reforms, to focus on population groups using the system, to foster access to law by simplifying procedures or explaining legal terms, encourage a more consensual approach in terms of conflict resolution and to also recognize that "one size does not fit all".[22] Several of these concerns can be found in the latest Small Claims courts' reforms or in their reform projects.

The extensive pilot project conducted in British Columbia is a notable example: it involves the diversification of alternative modes of conflict resolution and the separation of different types of disputes thereby processed; the multiplication of presentation means and popularization of this system also contributes to this global vision of access to justice.[23]

The apparent simplicity of Small Claims courts – limited value of the dispute, simplified procedures, absence of legal representation, etc. – should not lead to the conclusion that a small claims case is necessarily easy to settle, quite the opposite is true. Already, in 1975, Yngvesson and Hennessey sought to demonstrate the underlying complexity of certain disputes processed

[19] Alberta Courts, *Provincial Court – Civil*. Retrieved on January 18th, 2013 from: http://www.albertacourts.ab.ca/provincialcourt/civilsmallclaimscourt/tabid/96/default.aspx

[20] Government of British Columbia, *Ministry of Justice. Small Claims*. Retrieved on January 18th, 2013 from: http://www.ag.gov.bc.ca/courts/small_claims/index.htm

[21] Courts of Nova Scotia, *Nova Scotia Small Claims Court. Introduction to the Court*. Retrieved on January 18th, 2013 from: http://www.courts.ns.ca/smallclaims/index_claims.htm

[22] Department of Justice Canada (2000), supra (note 16), p. 23; McGill, Shelley (2011). « Is It Worth The Paper It's Written On? Examining Small Claims Court Judgement Enforcement In Canada And The United States », *17 Journal of Legal Studies in Business*, p. 5 ; Lafond (2012), supra (note 16), p. 21-22.

[23] See the excellent site http://www.smallclaimsbc.ca, which depicts the education efforts and presents different aspects of the pilot.

by Small Claims courts.[24] In fact, the jurisdiction of courts is not based on the complexity of cases, but first and foremost on the value of the dispute.[25]

In the end, despite the similar origins and the common currency, it is interesting to note that the way to meet targeted goals and organize the operation of the courts vary significantly from one province to another. For example, if all Small Claims courts are aware of the periodic increase of the jurisdictional monetary threshold, the difference between certain provinces is most striking: these limits range from $7,000 to $25,000.

Some of these operation differences exemplify the adoption of the specific conceptions of the nature and role of a "People's Court". They also reflect distinct priorities, which are sometimes contradictory. A number of elements merit review in order to paint a detailed portrait of Small Claims courts across Canada.

The criteria retained in this document are linked to the goals of the study and thus focus mainly on the solutions offered consumers in asserting their rights. Notably, these criteria include accessibility to courts, volume of cases processed, jurisdictional criteria retained, legal fees, legal representation, admissibility of a legal person, alternative dispute resolution modes and possibilities for appeal.

1.2. Comparative Presentation of Small Claims Courts

1.2.1. Alberta

The distinct settlement of small claims in Alberta dates back to 1918[26], but the actual structure of the Provincial Court-Civil or Small Claims Court was established in 1971.[27] Since 2002, the monetary threshold of the Court is $25,000. In the province, 18 localities are habilitated to hear cases that fall under the civil division of the Provincial Court.[28] The latest data collected reveal that 15,894 claims were filed to the Small Claims Court in 2005-2006.[29]

Main acts and regulations:
Provincial Court Act, RSA 2000, c P-31
Mediation rules of the provincial court – Civil Division, Alta Reg 271/1997
Provincial Court Fees and Costs Regulation, Alta Reg 18/1991
Provincial Court Civil Division Regulation, Alta Reg 329/1989

1.2.2. British Columbia

In British Columbia, the settlement of small claims was substantially modernized in the early 1990's. Under the Provincial Court, the Small Claims court hears disputes under $25,000, in 44 municipalities across the province. The system adopted in British Columbia is certainly the most ambitious nationally. It is notably based on pilots focused on alternative dispute resolution (ADR)

[24] Yngvesson, Barbara and Patricia Hennessey (1975), supra (note 8), p. 258.
[25] McGill (2010), supra (note 9), p. 234
[26] Ramsay (1990), supra (note 6), p. 27 and Edmonton Drug Treatment & Community Restoration Court, EDTCR (date unknown). *Provincial Court of Alberta*. http://www.edtcrc.ca/Content_Files/Files/Provincial_Court_of_Alberta.pdf, p. 1.
[27] *Provincial Court Act*, SA 1971.
[28] This data was obtained studying the details presented in each courthouse of the province. In fact, 18 courthouses seem to have a department responsible of civil cases, like in Calgary, Hinton or Lethbridge. See: Alberta Courts, *Provincial Court Locations and Sittings*. Retrieved on October 4th, 2012 from: http://www.albertacourts.ab.ca/ProvincialCourt/LocationsSittings/CityTownListing/tabid/271/Default.aspx
[29] EDTCR (date unknown), supra (note 26), p. 10.

modes. The information and educational efforts in terms of procedures involving citizens are also highly developed. Close to 20,000 cases were opened in 2010-2011.

Main acts and regulations:
Courts Rules Act, RSBC 1996, c 80
Small Claims Act, RSBC 1996, c 430
Small Claims Rules, BC Reg 261/93
Small Claims Monetary Limit Regulation, BC Reg 179/2005

1.2.3. Prince Edward Island

In 1990, this province adopted the Ontario Rules of Civil Procedure. Nonetheless, the settlement of small claims is governed by Rule 74 of the Annotated Rules[30], which sets the monetary threshold at $8,000. However, the court is not distinct from the Supreme Court. This system is similar to the one New Brunswick implemented between 2009 and 2012.

Main acts and regulations:
Judicature Act, RSPEI 1988, c J-2.1
Small Claims Regulations, PEI Reg EC 741/08
Rules of Civil Procedure, r. 74 (Annotated Rule)

1.2.4. Manitoba

Governed by the Court of Queen's Bench, Manitoba's Small Claims courts, operating in 18 localities, hear disputes under $10,000. In this province, no alternative dispute resolution mode is available.

Main acts and regulations:
Court of Queen's Bench Small Claims Practices Act, CCSM c C285
Law fees and Probate Charge Regulation, Man Reg 322/87 R

1.2.5. New Brunswick

In June 2012, the Government of New Brunswick introduced a bill, which aimed to re-establish the Small Claims court. Since its suppression in 2009, Reg. 80 of Rules of Court governed small claims under $30,000.[31] The new act came into effect on August 1st, 2012 and applies to cases opened after January 1st, 2013 (the cases opened earlier under Reg. 80 will be settled following the initial process).[32] The Government of New Brunswick took this opportunity to increase the jurisdictional monetary threshold of the court, which is now set at $12,500.

Main acts and regulations:
Small Claims Act, SNB 2012, c 15
General Regulation – Small Claims Act, New Brunswick Regulation 2012-103

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[30] Rules of Court (date unknown), *Prince Edward Island. Small Claims Section Actions Where the Debt or Damages Claimed Do Not Exceed $8,000. Rule 74*. Retrieved from : http://www.gov.pe.ca/courts/supreme/rules/annotated/a-rule74.pdf
[31] *Rules of Court*, N.B. Reg. 82-73
[32] PLEIS-NB (2013), *What's New, Small Claims Act in effect as of January 1st, 2013.* Retrieved on January 14th, 2013 from: http://www.legal-info-legale.nb.ca/fr/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=201&cntnt01origid=24&cntnt01returnid=252

1.2.6. Nova Scotia

The Nova Scotia Small Claims Court aligned its monetary threshold in 2006 with the country's maximum, increasing the existing limit from $10,000 to $25,000. The latest data collected reveal that 2,812 disputes were heard in 2006-2007.[33]

Main acts and regulations:
Small Claims Court Act, RSNS 1989, c 430
Small Claims Court Forms and Procedures Regulations, NS Reg 17/93

1.2.7. Ontario

In Ontario, the Supreme Court governs Small Claims courts. The $25,000 limit was also adopted in 2010. There are 97 Small Claims courts in the province. Close to 68,000 cases were opened in 2010-2011 and more than 80,000 rulings were pronounced during this period.[34]

Main acts and regulations:
Small Claims Court Jurisdiction, O Reg 626/00
Rules of the Small Claims Court, O Reg 258/98
Small Claims Court – Fees and Allowances, O Reg 432/93

1.2.8. Québec

The *Cour des petites créances* (Small Claims court), *division civile de la Cour du Québec* (Civil Division of the Court of Québec), was established by the Act to promote access to justice[35] (1971). The monetary threshold of claims ($7,000) is currently the lowest in the country. This limit, adopted in 2002, should be increased in the near future. In 2010-2011, almost 20,000 cases were opened in 57 provincial courts.

Main acts and regulations:
Code of Civil Procedure, RSQ, c C-25, sections 953 to 998
Bill 28, An Act to establish the new *Code of Civil Procedure*, 40th Legislature, 1st Session, Québec, 2013, sections 536 to 570

> The present study does not take into account the bill instituting the new *Code of Civil Procedure*. However, at first glance, the bill seems to propose no major changes susceptible of influencing our research of Québec's Small Claims court. The essential change deals with the increase of the court's monetary threshold, which could be raised to $15,000.

1.2.9. Saskatchewan

Since 2007, the Saskatchewan Small Claims court, in 8 localities, hears disputes under $20,000. In this province, the Provincial Court governs the Small Claims court.

Main acts and regulations:
Small Claims Act, 1997, SS 1997, c S-50.11
Small Claims Regulations, 1998, RRS c S-50.11 Reg 1

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[33] Patry and *al.* (2009), supra (note 9), p. 22.
[34] Ontario Court Services Division (2011). *Courts Annual Report 2010-2011*, Ontario Ministry of the Attorney General, p. 35. http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_10/
[35] *Act to promote access to justice*, S.Q., 1971, c.86.

1.2.10. Newfoundland and Labrador

Since 2010, the Small Claims Division of the Provincial Court hears disputes under $25,000. To date, 1,289 cases have been opened in the 10 courts of the province.[36]

Main acts and regulations:
Small Claims Act, RSNL 1990, c S-16
Small Claims Rules, NLR 52/97
Small Claims Regulations, NLR 69/04

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Table 1: Summary of Small Claims Courts in Canadian Provinces

Province	Creation date	Maximum amount	Year of the last increase	Number of courts in the province
AB	1971	$25,000	2002	18
BC	1969	$25,000	2005	44
MB	1971	$10,000	2007	18
NB	1997 2012	$12,500	2012	8
NL	Ø	$25,000	2010	10
NS	1980	$25,000	2006	12
ON	1970	$25,000	2010	97
PEI	Ø	$8,000	Ø	3
QC	1971	$7,000	2002	57
SK	1965	$20,000	2007	8

This summary of Small Claims courts of all ten Canadian provinces already makes it possible to ascertain their diversity while carrying the same name. The comparative review of certain operating rules will clarify the analysis and confirm certain observations.

1.3. Points of Comparison of Courts – Highlights

Across the country, there are many rules which govern the workings of each Small Claims court but not all report with equal acuity the principal mechanisms implemented which frequently underlie the more profound divisions of their adopted perspective (regarding the role and objective of these individual courts). Among the most salient points, one should therefore note the following: the jurisdiction threshold of the courts (2.1), a citizen's possibility to act without engaging the services of a legal professional (2.2), legal costs (2.3) and possible recourse to different alternative conflict resolution modes (2.4). Lastly, and considering the aforementioned criteria, one cannot ignore this striking conclusion: namely, the specificity of the Small Claims Division of the Court of Québec (2.5).

1.3.1. The Trend of Increasing Monetary Thresholds

The evolution and modernization of Small Claims courts are regularly accompanied by an examination of the maximum amount authorized in filing a claim. Thus, all provinces have substantially increased their limit since the 1970's, when the average was about $2,000. Today, $25,000 is the maximum amount in most provinces.

[36] Provincial Court of Newfoundland and Labrador (2010). *Annual Report 2009-2010*, Appendices. http://www.court.nl.ca/provincial/publications/ProvCourtAnnReport09-10.pdf

Three provinces set themselves apart by adhering to a relatively low threshold of under $10,000: Manitoba, Prince-Edward-Island and Québec. In fact, the lowest threshold is Québec's limit of $7,000[37], a limit which could be raised to $15,000 in the near future.

It is also interesting to note that these increases were especially significant in the years of 2000. The monetary threshold of British Columbia, Alberta, Ontario and Nova Scotia all increased from $10,000 to $25,000 in only a decade. The most important difference is observed in Newfoundland and Labrador, where the maximum threshold of $25,000 replaced a previous threshold of $5,000 established in 2004. These increases, needless to say, reach far beyond a simple inflation adjustment.[38]

The debate as to reason and implication of these increases is still ongoing. The main arguments in favor of higher monetary thresholds are as follows[39]:

- A broader access for citizens to Small Claims courts; and
- A reduction of pressure on superior courts.

On one hand, certain disputes engage relatively high sums and citizens are not necessarily able to assume the fees of a more formal trial. The cost-benefit calculation would thus lead to the abandonment of numerous legal actions. Furthermore, citizens who, despite everything, insist on bringing their cases before Small Claims courts are then obliged to relinquish a more or less substantial part of their claim.

In transferring some disputes settled by the superior courts to Small Claims courts, governments also hope to improve the system's efficiency by reducing delays in processing cases.

Despite potential benefits, criticism and apprehension are numerous, including the following:

More complex procedures and fee increases;
Increasingly unavoidable recourse to lawyer services;
Multiplication of overclaim cases; and
Ousting of less important claims.

If the value of disputes presented before the Small Claims court increases, it is possible that parties will be encouraged to make stronger cases and multiply procedures. Likewise, those who have the means will seek the services of a lawyer. All these consequences would go against certain goals set by courts: simplicity, expediency, low cost, etc.

Simultaneously, the monetary threshold increase could impact on disputes with a value at one or the other end of the spectrum: by strategy or lack of knowledge, some citizens present claims exceeding the real value of their prejudice, a temptation even greater considering the amount

[37] Bill 28*, An Act to establish the new Code of Civil Procedure*, 40th Legislature, 1st Session, Québec, 2013, section 536.
[38] See Patry *and al.* (2009), supra (note 9), p. 21-22.
[39] McGill (2010), supra (note 9), p. 232; Ramsay, Iain (1996), supra (note 9), p. 539. Manitoba Law Reform Commission (1998), supra (note 18), p. 32-33. The fear of the effects on the other courts of eliminating the New Brunswick Small Claims court was at the centerpiece of the critics of those opposed to this measure in 2010: CBC News (2012), *Small claims court to be reinstated*, April 5th, 2012. Retrieved on December 7th, 2012 from: http://www.cbc.ca/news/canada/new-brunswick/story/2012/04/05/nb-small-claims-court.html

that can be claimed is high. However, if the procedure becomes more complex and the fees increase, an action's "threshold of profitability" also increases, putting aside disputes of low monetary value, which were previously presented before court.

Some of these assumptions (positive or negative) were in fact observed: in Alberta, the establishment of a new $25,000 limit notably led to the multiplication of legal representation and increased the duration of hearings.[40] In British Columbia, the changes implemented in 1991 resulted in a significant increase of cases presented before the Small Claims court, without significantly reducing the pressure on superior courts.[41]

Be that as it may, the decisions taken in this field are governed by the strategic choices and, to a certain degree, by the goals prioritized by different governments. However, it is essential that these choices be part of a global perspective in order to obtain a coherent result. To this end, the establishment of a monetary threshold must take into account another major asset of Small Claims courts: the citizens' capacity to act alone.

1.3.2. Promotion of « Do-it-Yourself » vs. legal representation

Except for Québec, all provinces allow parties to be represented in court, but they also seek to make it possible for parties to act alone. Moreover, this is one important aspect of the operation of Small Claims courts, which is frequently presented to citizens in different brochures and informative websites.[42]

In order to support citizens in their proceedings, courts have developed guides, brochures and even short videos.[43] In British Colombia, the tools made available to citizens are particularly elaborate: educational websites were created; short videos explain the procedure before Small Claims courts and the workings of alternative dispute resolution modes[44]; a series of eight guides is also accessible.[45] Similar guides and brochures exist in Ontario.[46] In Québec, the Small Claims court is also described in videos[47] or educational websites.[48] In New Brunswick, a detailed brochure regarding the operation of the courts is presented to citizens.[49] Important

[40] Hunt McDonald, Judge Sandra (2006). "Civil Court Practice in Alberta", communication presented at *Into the Future: the Agenda for Civil Justice Reform*, Montréal, p. 2. Retrieved on July 6th, 2012 from: http://www.cfcj-fcjc.org/sites/default/files/docs/2006/hunt-mcdonald-en.pdf

[41] Manitoba Law Reform Commission (1998), supra (note 18), p. 32-33.

[42] Beside previous quotes, see what Ontario presents, for example: Ontario Ministry of the Attorney General, Small Claims Court Brochures, 13 p. Retrieved on October 4th, 2012 from: www.attorneygeneral.jus.gov.on.ca/french/courts/scc/small_claims_court_brochures_FR_Jan_11.pdf

[43] For more details on the information given to citizens, see the section on that topic.

[44] See: Justice Education Society. *Small Claims BC*. Retrieved on June 5th, 2012 from: www.smallclaimsbc.ca/

[45] Government of British Columbia, Ministry of Justice. *Small Claims Procedure Guides*. Retrieved on June 5th, 2012 from: www.ag.gov.bc.ca/courts/small_claims/info/guides.htm

[46] Ontario Ministry of the Attorney General, *Small Claims Court Guides to Procedures*. Retrieved on June 5th, 2012 from: www.attorneygeneral.jus.gov.on.ca/english/courts/guides/; Ontario Ministry of the Attorney General, *Small Claims Court Brochures*. Retrieved on June 5th, 2012 from: www.attorneygeneral.jus.gov.on.ca/english/courts/scc/brochures.asp

[47] Justice Québec. *Action filed with the Small Claims Division*. Retrieved on June 4th, 2012 from: www.justice.gouv.qc.ca/francais/formulaires/creances/demande.htm

[48] Educaloi, The Small Claims Division of the Court of Québec. Retrieved on April 12th, 2013 from: http://www.educaloi.qc.ca/capsules/la-division-des-petites-creances-de-la-cour-du-quebec-description

[49] PLEIS-NB, *Small Claims Court: A Guide for Claimants, Defendants and Third Parties*, Public Legal Education and Information Service of New Brunswick, 56 p. http://www.legal-info-legale.nb.ca/fr/uploads/file/Files/PDF/Small_Claims_FR.pdf

efforts have thus been undertaken to pursue the Small Claims courts' declared ambition: allow citizens to act alone, even if certain provinces seem to indirectly recommend the recourse to a lawyer.[50]

A study on the Nova Scotia Small Claims court underlines the fact that even when citizens are not represented in court, many of them prepared their case with the help of a lawyer.[51] In other words, to suppress the right to legal representation does not necessarily eliminate the asymmetry of relationships between certain parties. Having said that, the concern remains, as to the effect of increasing the competency thresholds on the accrued participation of lawyers:

> It is important to recognize that, due to the increasing caps to allowable claims, there will very likely be a corresponding increase in the number of litigants with legal representation in the Nova Scotia Small Claims Court. This could have the effect of interfering with the informal, speedy, cost-effective basis of the court.[52]

On the other hand, citizens acting alone need other forms of support. Understanding the court proceedings is not enough, so one must have access to the law itself: in this sense, it is necessary to use plain language in acts and regulations applicable to disputes presented before Small Claims courts, notably for consumer protection legislation whose wording in most provinces remains complex.[53]

Even if citizens are aware of the possibility to act alone, legal fees will weigh heavily in their decision to take legal action or not.

1.3.3. Reduced Legal Fees

The repartition of legal fees in the different provinces is complex. Mapping all potential costs related to an action before Small Claims court would require an extensive analysis and would go beyond the goals of this study. However, some of these fees reveal interesting influences on the workings and targeted goals of Canadian Small Claims courts. Table 2 depicts the various fees in different provinces relating to filing a claim, a court challenge or a counterclaim.[54] These are only the minimal legal fees expected to be incurred.[55]

[50] See the situation in Ontario, in McGill (2010), supra (note 9), p. 237 (note 102).
[51] Patry *et al.* (2009), supra (note 9), p. 96.
[52] Id., p. 97.
[53] See infra.
[54] The missing elements of information (which could not be collected) are replaced by "?".
[55] The information was obtained from the following sources: For Québec: http://www.justice.gouv.qc.ca/francais/publications/generale/tarifs.htm#Anchor-Creances; Alberta: *Provincial Court Fees and Costs Regulation*, Alta Reg 18/1991; Ontario : *Small Claims Court – Fees and Allowances*, O Reg 432/93 ; Saskatchewan: http://www.plea.org/legal_resources/?a=359&searchTxt=&cat=28&pcat; British Columbia: BC Reg 261/93; Manitoba: http://www.manitobacourts.mb.ca/faq/faq_small_claims.html; Nova Scotia: http://www.courts.ns.ca/General/fee_docs/small_claims_court_fees_11_04.pdf; Newfoundland and Labrador: http://www.court.nl.ca/provincial/courts/smallclaims/procedures.html and New Brunswick: http://www.legal-info-legale.nb.ca/en/uploads/file/pdfs/Small_Claims_EN.pdf.

Table 2: Comparison of Initial Fees Incurred in Small Claims Courts (by Province)

	Scales (value of dispute)	Claim[56]		Court challenge[57]		Counterclaim[58]	
		Natural person	Legal person	Natural person	Legal person	Natural person	Legal person
QC	<$1,000	$73.75	$124	$62	$110	$62	$73.75
	≥$1,000 and <$3,000	$105	$156	$93.75	$143	$67.25	$81
	≥$3,000 and <$5,000	$136	$185	$124	$174	$73.75	$87.25
	≤$5,000 and ≤$7,000	$167	$218	$155	$204	$81	$93.75
AB	≤$7,500	$100		?		$100	
	>$7,500	$200		?			
BC	≤$3,000	$100		$26		$100	
	>$3,000	$156		$50		$156	
PE	?	?		?		?	
	?	?		?		?	
MB	≤$5,000	$50		$0.00			
	>$5,000	$75					
NS	<$5,000	$91.47		$60.50			
	≥$5,000	$182.94					
ON	Frequent claimant	$145		$40		$75	
	Infrequent claimant[59]	$75					
SK	≤$2,000	$20		?		?	
	>$2,000 and ≤ $10,000	1% claim (max $100)		?		?	
	>$10,000	$100					
NL	<$500	$50		?		?	
	≥$500	$100		?		?	
NB	≤$3,000	$50		$25		$50	
	>$3,000	$100				$100	

First of all, this table shows that fees vary significantly, as to calculation methods from one Canadian province to another. For example, Manitoba and Nova Scotia make a distinction between claims under or over $5,000; this limit represents half of the maximum amount in Manitoba, and only one-fifth of Nova Scotia's. Furthermore, the fees requested in Nova Scotia are nearly double to those in Manitoba.

[56] The term used in other provinces is "notice of claim".
[57] Court challenge is also called "reply", "defence" or "dispute note".
[58] Counterclaim is also referred to as "defendant's claim".
[59] A frequent claimant files more than 10 claims per year; before having filed 11 claims, he is considered an infrequent claimant.

Sometimes, the cost of a counterclaim is the same as for filing an initial claim (AB, BC, NB); in certain provinces, a court challenge is cheaper to file than a counterclaim (BC, ON, QC, NB), and in others, it is not the case (NS). In Manitoba, the defendant does not have to pay fees.

Finally, the additional hearing costs, the fees incurred to enter a default judgment or the prescribed fees payable to a witness served a notice to attend a hearing (which vary mostly according to the expert status of the witness[60]) show that an action before the Small Claims court can quickly represent considerable sums for citizens, notably when the assistance of an expert is essential, which is often the case in the construction field. Therefore, it is important that citizens evaluate properly the possible outcome of their action and take it before court after making an informed decision. The complexity of procedures and the structure of costs can sometimes hinder a citizen from good evaluation.

The study of legal fees also leads to another observation: there are specific rules to set fee scales in Québec and Ontario.

In Québec, the amount of legal fees is set according to a double scale: the first scale is in relation to the value of the claim (four scales apply in Québec, and two in other provinces), and the second scale is established depending on the nature of the claimant (natural or legal person). A legal person will thus have to pay higher fees than a natural person. The multiplication of scales in Québec aims to readjust the cost-benefit calculation, which determines the possible outcomes of the action.

In Ontario, the amount involved in the dispute has no influence on the cost of filing a claim, but the province makes a distinction between an infrequent and frequent claimant (more than 10 claims filed per year), the latter's legal fees are doubled.

The characteristics noted in these two provinces can only be understood in light of another comparison criterion: access of legal persons to courts.

1.3.4. Legal Persons' Access to Small Claims Courts

The mechanisms adopted in Québec and Ontario regarding the setting of legal fees are in fact strategic choices based on empirical observations and theoretical discussions on the place of legal persons in People's Court.

Indeed, Québec is the only province where a clear exclusion principle of legal persons from Small Claims court was adopted. Even if rules were rendered less severe in this field, the restrictions are still important, since only individual contractors and companies with a maximum of five employees can take action before the Small Claims court.[61] Furthermore, by setting higher legal fees for this category of users, Québec aims to limit the power asymmetries between the ordinary citizen and the professional citizen.

Only in Nova Scotia is there a legislative intention (less pronounced) to limit the access of legal persons[62] to Small Claims courts. The mechanism's complexity needs to be recorded in the present document:

[60] Those are only the most notable fees, and there are much more, as the complex rules of certain provinces aptly demonstrate. See, for example, in Alberta: *Provincial Court Fees and Costs Regulation*, Alta Reg 18/1991; or in Ontario: *Small Claims Court – Fees and Allowances*, O Reg 432/93.
[61] *Code of Civil Procedure*, RSQ, c C-25, section 953.
[62] *Small Claims Court Act*, RSNS 1989, c 430, section 5.

> Restriction on corporation or partnership
>
> 5 (1) To better effect the intent and purpose of this Act and to prevent the procedure provided by this Act being used by a corporate person to collect a debt or a liquidated demand where there is no dispute, no partnership within the meaning of the Partnerships and Business Names Registration Act and no corporation may succeed upon a claim pursuant to this Act in respect of a debt or liquidated demand unless the claimant is one of the original parties to the contract or tort upon which the claim is based or unless the claim is raised by way of set-off or counterclaim.
>
> (2) To better effect the intent and purpose of this Act and to facilitate the litigation of claims and defenses of natural persons, the Attorney General may from time to time prescribe the days and hours during which a corporate person, its agent or solicitor, shall not appear before the Court as a plaintiff.

It is noteworthy that the act is explicit regarding the fact that these restrictive measures aim to guarantee that the principles governing the Small Claims court are enforced, notably by making sure that the court does not transform itself into a debt collection service for companies.

This fear echoes the denouncements by several authors who highlight the predominance of companies in disputes, regardless of the region studied.[63] The legal persons frequently take action before court, compared to consumers, who usually file a single claim.[64] This last observation explains Ontario's position and its attempt to discourage frequent claimants. However, this strategy is criticized: when the losing party covers the costs of trial, it ultimately penalizes the debtor and not the company.[65]

1.3.5. Alternative Dispute Resolution Modes

Several alternative dispute resolution (ADR) modes were implemented in different provinces. However, it is difficult to highlight specific trends in this domain, since the rules adopted vary from one court to another.

Two major modes can be identified: mediation and pre-trial conference (or settlement conference).

1.3.5.1. Definitions

According to the *Institut de médiation et d'arbitrage du Québec* (Quebec Institute of Mediation and Arbitration),

> [Translation] Mediation is a process where parties agree to ask a third party, the mediator, to help them find a solution to solve their dispute. Mediation is flexible, and parties retain full control of the proceedings and final outcome. In a private and

[63] Lafond's article is instructive in this respect: Lafond, Pierre-Claude (1996). « L'exemple québécois de la Cour des petites créances: "cour du peuple" ou tribunal du recouvrement? », *37 Les Cahiers de Droit 1*, p. 63-92; McGuire and Macdonald (1996), supra (note 18), p. 515; Vidmar, Neil (1984). « The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation », *18 Law & Society Review 4*, p. 528. For a more moderate position on the legal persons' access to Small Claims courts, see McGill (2010), supra (note 9), p. 239.
[64] See, for example, the study conducted by Yngvesson and Hennessey (1975), supra (note 6), p. 262.
[65] McGill (2010), supra (note 9), p. 239.

> confidential context, **the mediator's role is to assist parties find their own solutions to solve their dispute and not to impose solutions**.[66]

Proposing a simple and consensual definition for settlement conference (SC) is not as easy. The terminology varies from one province to another, which reflects, to some extent, the differences observed in their operating rules. Ontario, Newfoundland and Labrador and British Columbia use the term "settlement conference", while in Saskatchewan, one speaks of "management conference" and in Alberta or Prince Edward Island, one refers to "pre-trial conference". In Québec, this mechanism does not exist in respect of small claims, but the *Code of Civil Procedure* provides this mechanism for other courts and uses the expression "*conférence de règlement à l'amiable (CRA)*", considered as a synonym for judicial mediation.[67]

Moreover, it seems that in Québec, the *conférences de règlement à l'amiable* may be more in line with mediation than with the logic of settlement conferences, for they are voluntary and non-binding.[68] It would then be a matter of making the distinction between private mediation and judiciary mediation using another term. The French translation used in Ontario reinforces this impression, since it does not speak of a settlement conference, but of a conference in view of concluding a transaction.

The goal here is not to elaborate on a comparative semantic analysis, but to underline the characteristics of each province, after an apparent consensus.[69] In the provinces where settlement conferences/pre-trial conferences were integrated in Small Claims courts, they take the form of mandatory meetings before a judge. Ideally, they aim to settle the dispute before the trial or, at the least, to prepare parties for the trial, for example by reducing points of disagreement or clarifying the elements of proof presented by parties. In Ontario[70], the goals of a conference held to conclude a transaction are the following:

- Resolve or limit the issues in dispute;
- Accelerate the settlement of the action (that is to say, contribute to solve disputes more quickly);
- Facilitate a transaction;
- Assist parties in expediently preparing for trial;
- Prepare for the full divulgation of elements of proof and relevant facts by parties.

The British Columbia Settlement Conferences definition reads as follows[71]:

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[66] Quebec Institute of Mediation and Arbitration, under the tab "La médiation" (Mediation). Retrieved on July 31st, 2012 from: http://iamq.org

[67] Lafond, Pierre-Claude (2012), supra (note 16), p. 201.

[68] On the parallel between judiciary mediation and ADR, see also Fondation du Barreau du Québec (2009). *Representing Yourself In Court. In Family Matters.*, Montréal, p. 41.

[69] On a larger perspective, it is interesting to note that often, multiple expressions are used to address concepts with common goals in this field: for example, Pierre-Claude Lafond identified no less than 15 expressions for ADR. Lafond (2012), supra (note 16), p. 170-171.

[70] Ontario Ministry of the Attorney General. *Small Claims Court Guides to Procedures*, p. 2. Retrieved on April 12th, 2013 from: http://www.attorneygeneral.jus.gov.on.ca/french/courts/guides/Guide_to_Getting_Ready_for_Court_FR.pdf

[71] Gallins, Glenn (2008). *Purpose of a Settlement Conference*, Program of the Legal Services Society. Retrieved on June 17th, 2012 from: http://thelawcentre.ca/self_help/small_claims_factsheets/fact_12

> The main purpose of a Settlement Conference is to encourage the parties to a lawsuit to settle the lawsuit and avoid the time, anxiety and cost of a trial.
>
> But a Settlement Conference may also be used for other purposes. For example, a Settlement Conference can be used to learn about the evidence the other party will present at trial, and what documents they may use to try to prove their case.
>
> A party can also try to gauge how effective the other party will be in giving evidence. And most importantly, since a Judge conducts a Settlement Conference, a party can often get an indication from the Judge about the likelihood of success of the claim.

1.3.5.2. Comparison of Alternative Dispute Resolution Modes by Province

Some provinces offer no alternative dispute resolution modes. Such is the case, for example, in Nova Scotia and Manitoba. In the other provinces, the pre-trial conferences are more frequent than mediation, which is only offered in Alberta, British Columbia and Québec. However, in Nova Scotia and Saskatchewan, parties are invited to resort to mediation, but through an out of court process.[72]

On the other hand, if pre-trial conferences are imposed on parties, most of the time, mediation is based on the choice of the parties. However, in Alberta, recourse to mediation can also be imposed by court.[73] The model actually piloted in British Columbia remains the most ambitious nationally. The "Court Mediation Program" automatically refers certain cases to different processes: simplified trial, mediation, settlement conference, etc. For example, numerous cases filed in Surrey, North Vancouver, Nanaimo or Victoria, of a value under $10,000, will be settled through mediation.[74]

The few criteria presented in this document depict the heterogeneity of the Small Claims courts' operating rules. Each province seems to choose from different possible options in each category. That being said, from a more global perspective, another notable element emanates: the singularity of the Québec Small Claims court.

1.3.6. Québec's Apparent Singularity

The singularity of Québec's Small Claims court is almost systematic, regardless of the criterion studied: even if the jurisdictional threshold of the court has been raised since its creation, it remains the lowest in the country. Even if this threshold is similar to Prince Edward Island's ($8,000), the sociodemographic differences between these two provinces tend to highlight even more the singularity of the Quebec court. Moreover, even if all provinces allow and, as often as possible, encourage citizens to take action, only Québec clearly prohibits legal representation in court.[75] Similarly, it is only in Québec that small claims decisions cannot be appealed.[76]

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[72] For Saskatchewan, see Public Legal Education Association (2011). *Small Claims Court*. Retrieved on June 18th, 2012 from: http://plea.org/legal_resources/?a=359&searchTxt=&cat=28&pcat=4; For Nova Scotia: Courts of Nova Scotia. *Devez-vous faire appel à la Cour des petites créances?* (Should you take action before the Small Claims court?) Retrieved on June 15th, 2012 from: http://www.courts.ns.ca/self_rep/self_rep_docs/fr_is_small_claims_court_for_you_08_05.pdf

[73] Alta Reg 271/97, section 2.

[74] *Small Claims Rules*, BC Reg. 261/93, Rule 7.2. It is interesting to note that the construction disputes are specifically targeted by this program: Rule 7.2, Schedule D.

[75] Section 959, C.P.C.

By maintaining a very low jurisdictional threshold, prohibiting legal representation or appeals and by employing other original mechanisms regarding legal fees for example, Québec seems to have adopted an approach distinct from other provinces.

In 1990, Ramsay was particularly in favor of Québec's choice and came to a severe conclusion as to other provinces[77]:

> In summary, Small claims courts in Canada have grown out of earlier institutions, and their jurisdiction and procedure, with the exception of Quebec, and perhaps Nova Scotia, is not consciously designed to respond to more than a general sentiment that there ought to be an inexpensive, and cheaper procedure for 'simple' claims of a small dollar value.

Since, major changes implemented by certain provinces, especially British Columbia, tend to demonstrate that different approaches, more pragmatic and focused on alternative dispute resolution modes can also aim to make justice more accessible, expedient and less formal, while being adapted to citizens' needs.

As there is more than one way to proceed, still it is important not to underestimate what McGill defines as the identity crisis of Canadian Small Claims courts: "Wide variation between jurisdictions reveals differing priorities among the multiple objectives and fuels the small claims court identity crisis".[78]

The author believes that the solution to this crisis lies first and foremost in the acknowledgement that the goals that these courts have to achieve are numerous and often contradictory.[79] Thus, the idea is not to standardize the adopted strategies in all provinces, but to make sure that the adopted mechanisms in each province form part of a coherent strategy. Each commitment to reform should therefore adhere to a global reflection of the mission and concrete goals pursued by this court, beyond the rhetorical argument for a better access to justice.

***

Consumers involved a construction dispute under the jurisdiction of the Small Claims court face a significant challenge: make their case and defend it. Therefore, they must familiarize themselves with the principles and legal rules governing their litigious situation. Two important fields of law here overlap: contract law and consumer law. Although complementary, these specialties are sometimes difficult to articulate.

[76] Section 984, C.P.C. However, the section specifies that the lack or excess of jurisdiction can be subject to the Superior Court's surveillance.
[77] Ramsay (1990), supra (note 6), p. 27.
[78] McGill (2010), supra (note 9), p. 257.
[79] *Id.*

2. Applicable Law in Construction Disputes by Canadian Province

The present chapter aims to identify the applicable legal regimes in construction disputes in Canadian provinces. In all provinces, several bodies of regulations overlap, notably in terms of consumer law and general contract law. There are also standards that govern the exercise of various trades and professions linked to the construction field, as well as technical standards for construction quality and security as provided in the provincial building acts and regulations.[80]

However, the analysis of these dispositions was not privileged in this study, which was mainly focused on contract law and consumer law. In fact, we have noted that the trades and professions regulations as well as the construction technical standards are rarely invoked in disputes brought before the Québec Small Claims court: amongst the decisions integrated in our statistical analysis, only one case explicitly invokes the Building Act to denounce a contractor without a licence, and the acts governing the exercise of certain professions are invoked with the same parsimony.[81]

Also we note that in 1999, the Gouvernement du Québec implemented the New Home Warranty Program, administered by the Régie du bâtiment.[82] This program addresses the sale or the construction of a new building[83], as opposed to the renovation or the maintenance of existing buildings. Consumers who must undertake renovations, even major ones, in their home are not protected by this regime, nor are consumers who contract out improvement or maintenance work. These disputes, which are not governed by the warranty program and can be heard by the Small Claims court, are the ones that are of interest in this study.

Even in this framework, the acts under study form a complex structure wherein the consumer particularly finds his way only with difficulty.

2.1. Consumer Law

All Canadian provinces provide consumer protection measures, which are often similar.[84] These acts were first meant to govern the sale of property, but today, most of them address both property and services In addition to regulating the contractual relations between a consumer and a merchant by condemning certain sales practices (misleading representations, unethical practices), these acts also provide specific dispositions in certain fields (auto-repair, credit, long-

[80] For example: *Building Code Act*, RSNS 1989, c 46; *Building Standards Act*, RSY 2002, c 19; *Building Code Act*, 1992, SO 1992, c 23; *Building Act*, RSQ, c B-1.1.

[81] The Plumbing Code is cited in: *Beauvais c. Lalancette*, 2011 QCCQ 14887. In this case, the work of a contractor without a licence is denounced. We have not found any decisions where the consumers themselves invoke a Building Code violation: in *Diab c. Atelier PB mobile de l'Est inc.,* 2011 QCCQ 1609, the consumers recieved a non-compliance notice in respect of the established code by a municipal inspector, which was then forwarded to the defendants. The claimants reproached the contractor of having omitted to do the necessary corrective work.

[82] *Regulation Respecting the Guarantee Plan for New Residential Buildings,* RRQ, c B-1.1, r 8.

[83] Note that the Civil Code of Québec also contains special regulation regarding the sale of new residential buildings (see section 1785).

[84] To simplify the presentation of rights and recourses in common law provinces, the acts of Ontario and British Columbia were reviewed closely and are thus used as examples (*Consumer Protection Act, 2002, SO 2002, c 30, Sch A* and *Business Practices and Consumer Protection Act*, S.B.C. 2004, c 2). Two acronyms will be used to refer to these acts: BPCPA for British Columbia, and CPA for Ontario. CPA stands for the English version of the Ontarian act: *Consumer Protection Act*. This term was chosen in this report to avoid any possible confusion with the acronym LPC used throughout the report to refer to the corresponding act in Québec.

term rental, telecommunication services) or for contracts of a certain form, such as direct sales or future performance agreements[85] in common law provinces, or for contracts concluded with an itinerant merchant or successive performance contracts, in the case of Québec.

To our knowledge, no provincial act concerns specifically with regulating consumer contracts in the construction field, in spite of the known importance of disputes in that area, a situation which does not impede the application of consumer protection acts in home construction or renovation work:

> Although home repair and renovation agreements are not specifically referred to in the CPA [*Consumer Protection Act*], a typical repair or renovation agreement will trigger certain provisions of the CPA. This is because of two typical qualities of a home repair or renovation agreement: (1) the negotiation process often involves a visit to the home by the contractor, and (2) any significant home repair or renovation will be done over a period of time, rather than as an on the spot repair. These qualities make a home repair or renovation agreement both a "direct agreement" (an agreement negotiated outside of the contractor's place of business) and a "future performance agreement" (an agreement that is completed in the future).[86]

The same applies in Québec, where several construction contracts are concluded with an itinerant merchant, and the consumer can therefore invoke the application of the dispositions of the *Loi sur la protection du consommateur* (LPC) governing this type of contract.

On the basis of their formulation, certain renovation or construction contracts are subject to provincial consumer protection acts, which offer consumers additional protection measures to those of common law dispositions. We shall go over the measures relative to consumer contracts in general and then the ones that apply to specific types of consumer contracts.

2.1.1. Measures Relative to Consumer Contracts in General

All provinces have adopted regulations governing consumer contracts, but they are not always identical. Nonetheless, the important inadequacies observed in the 1990's[87] have been considerably reduced, and today, the main consumer protection principles are rather similar. There is, in British Columbia, the *Business Practices and Consumer Protection Act* (BPCPA) and in Ontario, the *Consumer Protection Act* (CPA), whose modern version (anno 2002) replaces the eponymous 1990 act. The application scope of these acts is rather large and covers situations of specific behavior. For example, in British Columbia, the BPCPA permitted gathering and harmonizing previous standards so that they may apply to consumer contracts, thereby replacing five acts regulating specific fields (credit, debt collection, etc.); furthermore, the BPCPA covers the subject of the ethics of transactions, notably by creating tools to counter unethical practices.[88]

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[85] The translations correspond to the English version of the Ontario *Consumer Protection Act*, 2002.

[86] *Unknown author* (2010). *Home Renovation Contractors and Ontario Consumer Protection Act*, McMillan. Retrieved on July 27th, 2012 from: http://www.mcmillan.ca/Home-Renovation-Contractors-and-the-Ontario-Consumer-Protection-Act

[87] Tassé, Roger et Kathleen Lemieux (1998). *Les droits à la protection du consommateur au Canada dans le contexte du commerce électronique*, Gowling, Strathy & Henderson, p. 39. Retrieved from: http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/cdrcec_f.pdf/$FILE/cdrcec_f.pdf

[88] Law Students' Legal Advice Program (2011). « Consumer Protection », in LSLAP (dir.), *LSLAP Manual. U.B.C. Law Students' Legal Advice Manual* 35the, Vancouver, p. 9:3. Retrieved from http://www.lslap.bc.ca/main/?Manual_download

One of the first principles guaranteed by consumer protection acts often consists of rendering inapplicable any contractual clause that could limit or impede the application of the following acts:

> **LPC, section 7.1**: The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.
>
> **BPCPA, section 3**: Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.

We note that in Québec, section 8 of the LPC confers the right to the consumer to invoke a violation of contract to demand the nullity of a contract or a reduction of the price in the following circumstances:

> **LPC, section 8:** The consumer may demand the nullity of a contract or a reduction in his obligations thereunder where the disproportion between the respective obligations of the parties is so great as to amount to exploitation of the consumer or where the obligation of the consumer is excessive, harsh or unconscionable.

The general provisions of the LPC contain other dispositions that aim to nullify abusive clauses in consumer contracts, notably the penalty clauses, the clauses that authorize the merchant to unilaterally modify the contract, those which exonerate him from his responsibility or those that force the consumer to settle any claim through mediation. The mediation clause covered by this disposition would not only allow the merchant to prevent recourse before judiciary courts – with the possible resulting bad publicity – but also to curb class actions, since the latter cannot be settled through mediation.[89] The acts from Ontario and British Columbia also reaffirm the consumers' right to initiate a class action.[90]

Finally, Québec's LPC expressively addresses the illegality of certain clauses in contracts of enterprise or contracts for services:

> **LPC, section 11.4**: Any stipulation which excludes the application of all or part of articles 2125 and 2129 of the Civil Code regarding the resiliation of contracts of enterprise and for services is prohibited.

As we shall see, certain consumer contracts in the construction field are partly excluded from Québec's LPC, and thus, the previous dispositions do not apply.

2.1.2. Prohibited Sales Practices

The consumer protection acts from different Canadian provinces condemn a series of practices that are considered unfair. Notably, these concern false or misleading representation regarding the characteristics of a property or service, a price higher than the announced price, the guarantee that the transaction will give the consumer rights and recourses when it is not the

[89] For the application of mediation clauses in consumer contracts in Canada, see: *Dell Computer Corp. c. Union des consommateurs*, 2007 CSC 34 and *Seidel c. Telus Communications Inc.*, 2011 CSC 15.

[90] CPA, section 8.1, BPCPA, section 3. In Ontario, it is also prohibited to force a consumer to settle his claim through mediation: CPA, section 6.2.

case, the fact of pretending unjustly that the repairs are necessary, etc. The different provincial acts often propose one or more lists of situations wherein such practices occur.[91]

In the event of such a practice, the consumer has various recourses at his disposal: he can demand the nullity or termination of the contract, the authorization to do corrective work at the merchant's expense, the reduction of the price or compensatory and punitive damages.[92]

2.1.3. Direct Agreement vs. Contract Concluded by an Itinerant Merchant

The concept of the direct agreement found in the acts of common law provinces mostly refers to a contract concluded by an itinerant merchant, as found in Québec's LPC, as demonstrated in the following definitions:

> **LPC, section 20(1):** "direct agreement" means a consumer agreement that is negotiated or concluded in person at a place other than,
> (a) at the supplier's place of business, or
> (b) at a market place, an auction, trade fair, agricultural fair or exhibition; ("convention directe")
>
> **LPC, section 55:** An itinerant merchant is a merchant who, personally or through a representative, elsewhere than at his address,
> *(a)* solicits a particular consumer for the purpose of making a contract; or
> *(b)* makes a contract with a consumer.

The scope of Québec's LPC seems, at first sight, more restrictive due to section 57, which could exclude several contracts in the construction field:

> **LPC, section 57:** Subject to the regulations, a contract entered into at the address of the consumer upon his express demand does not constitute a contract entered into by an itinerant merchant, provided such contract was not solicited elsewhere than at the merchant's address.

However, in order to properly identify the contracts to which this section applies, one must refer to section 7 of the *Regulation Respecting the Application of the Consumer Protection Act*:

> Despite section 57 of the Act, a contract entered into by a merchant, the object of which is:
> *(a)* the sale of a door, window, thermal insulation, roofing or exterior wall covering of a building;
> *(b)* the lease of services with respect to goods referred to in paragraph *a*; or
> *(c)* the simultaneous sale of goods referred to in paragraph *a* and lease of services with respect to such goods;
> constitutes a contract entered into by an itinerant merchant even if it was entered into at the address of the consumer upon the latter's express request.

These sections translate all the complexity of the regime elaborated by the *Loi sur la protection du consommateur* regarding consumer contracts linked to the construction field.

The term "itinerant merchant", used by the LPC, seems less adequate in this context than "direct agreement" referred to by common law provinces. In fact, the itinerant merchant evokes the

[91] BPCPA, section 4.3; Ontario CPA, sections 14, 15 and 16; LPC, section 219.
[92] Ontario CPA, section 18; LPC, section 272.

image of someone going from door to door to sell products or offer services, which is not so often the case of the contractor or the service provider in the construction field. Nonetheless, the definition provided in section 55 is sufficiently broad to cover most contracts in the construction field, since these contracts are often concluded at the consumer's home and not in the contractor's office. Therefore, it is not unusual that construction professionals need an itinerant merchant licence delivered by the *Office de la protection du consommateur*.

As the following comment indicates, the conclusion of a contract at the consumer's home is often associated with high-pressure sales tactics, a problem observed in the home construction field:

> The term 'direct' refers to the fact that it is usually the supplier coming 'directly' to (and sometimes 'at') the prospective consumer. The definition is aimed at capturing sales techniques such as **door-to-door sales** - a technique often associated with shady practices - as well as **home services such as building contractors and renovators**, another problem area[93].

This is why consumer protection acts seek to eliminate these tactics. In general, the consumer who concludes a direct agreement or a contract with an itinerant merchant has a reflection period during which he can terminate the contract (ten days), without having to justify his decision. In addition, if the written contract does not provide all the obligatory clauses or if it was not given to the consumer, he has one year to terminate the contract.[94] In British Columbia, the act also protects consumers from unreasonable advance payments: in this case, the merchant cannot demand the contract's execution.[95] In certain provinces, itinerant merchants must have a licence[96]; without a licence, the consumer's reflection period is extended to one year.[97]

2.1.4. Future Performance Agreements

Here are some definitions of future performance agreements:

> **LPC, section 1**: **"future performance agreement"** means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement; ("convention à exécution différée")
>
> **BPCPA, section 17**: **"future performance contract"** means a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed…

These contracts must be written down and conform to a certain number of content obligations, notably the merchant's identity and the description of the goods or services provided. Then

[93] Shield, Simon (2010). "Consumer Protection Law (Ontario). Chapter 3 – Forms of Consumer Agreements", *Guides to Ontario and Canadian Law*. Retrieved from: http://www.isthatlegal.ca/index.php?name=forms1.consumer_protection_law_ontario#Direct%20Agreements. (emphasis added).

[94] Ontario CPA, section 43; BPCPA, section 21; Québec LPC, section 59. According to the province concerned, other situations can also confer these rights. For example, in British Columbia and Québec, the consumer can terminate the contract if the merchant has not delivered all goods or services agreed to in the 30 days following the contract's signature.

[95] BPCPA, subsection 21(c).

[96] LPC, section 58; *Direct Selling Business Licencing Regulation*, Alta Reg 190/1999, section 2.2.

[97] LPC, section 59; *Fair Trading Act*, RSA 2000, c F-2, subsection 28.2(a).

again, the violation of these obligations gives the consumer the right to terminate the contract in the year following its signature.[98]

Pursuant to Québec's LPC, certain successive performance contracts are subject to specific protections. However, this concerns teaching, training or mentoring contracts on the one hand, or contract for services, but only in the case of long-distance service, and on the other, mainly in the case of telecommunication services. Thus, construction contracts are not usually subject to these dispositions.

2.1.5. Warranties

The protections invoked up to now mostly seek to guarantee the best possible conditions for the consumer when concluding a contract with a merchant. However, these measures do not ensure the correct execution of the contract, while this aspect is crucial in the construction field.

In Québec, the LPC provides rules regarding warranties, which, even if they were first adopted for sales cases, can also apply to certain consumer contracts in the construction field.

These warranties ensure that the contracted goods must serve as agreed and have a reasonable lifespan (quality and sustainability warranties). The goods or services must also conform to the proposed description in the contract, merchant declarations or advertisement. Obviously, merchants are free to offer additional conventional warranties; the latter must include certain obligatory clauses and precisely express certain dispositions (duration of the warranty, nature of possible exclusions, etc.).

Nonetheless, there is an ambiguity regarding the application of the section on warranties in the construction and renovation fields, since section 34 of the act stipulates that these dispositions target sales and services contracts. When referring to the definition provided by the Civil Code, the contract for service does not include contract of enterprises. Therefore, it is possible that this type of contract be excluded from the application of section 34 (and subsequent sections) of the LPC on warranties.

There is also a second ambiguity as to the goods contemplated by quality and sustainability warranties in the contract for service: is it only the goods sold by the service provider that are subject to the warranty (for example, the parts, materials, etc.), or are consumer's goods also subject to the service in question (for example, repaired or refurbished goods)?[99]

In Ontario, the service provided to a consumer must be of a certain "reasonably acceptable quality"; sold goods, on the other hand, are governed by the principle of absence of implicit warranty, but must however be "reasonably adapted to the use" of the buyer/consumer, or conform to the description.[100]

In New Brunswick, the *Consumer Product Warranty and Liability Act*[101], resolves any ambiguity regarding the application of warranties to business or contract for services, since the first section of this act provides that the "contract for the sale or supply of a consumer product" refers to a "contract for services or for labour and materials if a consumer product is supplied along with the services or labour".

[98] Ontario, section 23 and BPCPA, sections 19 and 23.
[99] Be that as it may, this does not include the building itself, since the definition of "goods" excludes real property from the act's scope.
[100] CPA, sections 9.1 and 9.2; *Sale of Goods Act,* RSO 1990, c S.1, section 15.
[101] SNB, c. C-18.1.

In contrast, this act also indicates that the specific recourses it provides in case of a warranty breach cannot be invoked in "contract for services or for labour and materials if a consumer product is supplied along with the services or labour". One must then turn to "remedies that would normally be available under the law".[102] The complexity of the application of consumer protection regulations in cases of standard contracts in the construction field is therefore not an exception only observed in Québec.

2.1.6. Partial Exclusion of Construction Contracts in Québec Legislation

In the previous section, we have seen that the dispositions on warranties for contracts in the construction field can depend on the type of contract in question: be it a business or a contract for service. In fact, one notes that the Québec LPC partially excludes the construction of an immovable from its application scope[103]:

> **6.** Business practices and contracts regarding
> *(a)* transactions governed by the Derivatives Act (chapter I-14.01) or the Securities Act (chapter V-1.1);
> *(b)* the sale, lease or construction of an immovable, subject to section 6.1;
>
> **not in force**
> *(c)* credit secured by hypothec; and
>
> *(d)* the furnishing of services for the repair, maintenance or improvement of an immovable, or both the furnishing of such services and the sale of goods incorporated into the immovable, except respecting credit when the furnishing of services or both the furnishing of services and the sale of goods involve credit not secured by hypothec,
>
> are exempt from the application of this act.
>
> **6.1.** This title, title II respecting business practices, sections 264 to 267 and 277 to 290 of title IV, chapter I of title V and paragraphs *c*, *k* and *r* of section 350 also apply to the sale, lease or construction of an immovable, but not to the acts of a broker or his agent governed by the Real Estate Brokerage Act (chapter C-73.1) or to the leasing of an immovable governed by articles 1892 to 2000 of the Civil Code.

The exclusion of the construction of an immovable is partly due to the legislator's (abandoned) goals, which initially aimed to adopt a specific act on real property, thus justifying the coming into force of subsection 6(d).[104] At present, all consumer contracts in the construction field are governed by the LPC's dispositions on sales practices. The contracts regarding the construction of an immovable are completely excluded from the act's application scope. However, the act

[102] *Consumer Product Warranty and Liability Act*, section 13.
[103] Emphasis added.
[104] L'Heureux, Nicole et Marc Lacoursière (2011). *Droit de la consommation*, 6the, Cowansville, Yvon Blais Ed., coll. CÉDÉ, p. 43 (note 106). In *Systèmes Techno-Pompes inc. c. La Manna,* 1993 QCCA 4388, the judge also specifies that: [Translation] "While waiting for the adoption of the upcoming act on real property, the legislator provided in section 363 that the government will have the authority to postpone the application of certain dispositions. This explains why subsections 6(c) and (d) have not come into force."

applies to contract for services for the repair, maintenance or improvement of an immovable, since subsection 6(d) never came into force.

Nonetheless, the LPC was not created to apply to this type of contract, the initial intention being of adopting another act to that effect. The LPC's application is therefore not well adapted to these contracts. In fact, the distinction between contracts for the construction of an immovable, excluded from the application scope of the act (except for sales practices) and contract for services for the repair, maintenance or improvement of an immovable, governed by the act, is far from being unequivocal.

2.2. Common Law

2.2.1. Construction Contracts – Definition Elements

There exists, in civil law as well as in common law, a contract category adapted to the construction field: the business or contract for service in the Civil Code of Québec and the building contract or construction contract in Canadian common law.

One of these contracts' characteristics lies in the absence of subordination between the service provider or the contractor and his client, which allows one to distinguish this category from a work contract, where the subordination relationship exists. The nature of the dealings between parties is very different in these two cases, even if they can refer to a similar service. In a work contract, the employee reports to the employer, who has, in theory, the required expertise to make decisions. In the business or contract for service, the service provider is free to decide the execution means and usually has the required expertise and thus has an obligation to provide information and advice to the client.

The power balance between parties is often unequal, and to remedy this situation, the legislator tends to protect the employee in the work contract and the client, especially if he is a consumer, in business or contract for services. The same observations apply in common law, where the work contract (contract of employment) is juxtaposed to the general contract for service (contract for services or contract for the supply of services), which includes construction contracts.[105]

In Québec law, the contract of enterprise and the contract for service are considered as two different types of contract, but governed by the same regulations. This is why the Civil Code of Québec addresses these contracts together. The following definition clarifies this:

> A contract of enterprise of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.[106]

The contract for service does not apply to the construction of property, but can apply to the maintenance, repair or improvement of existing property. In cases of construction, new property construction or substantial addition to existing property, one falls into the category of a contract of enterprise. In these two types of contracts, it is possible that the provider of services or the contractor needs to provide parts or materials. Therefore, auto-repair is a contract for service,

[105] See Thomas, Sylvette Savoie and Gérard Snow (2007). *Normalisation du vocabulaire du droit des contrats. Dossier synthèse*, Moncton, Centre de traduction et de terminologie juridique. Faculté de droit, université de Moncton. Retrieved from: http://www.cttj.ca/Documents/droit_contrats/contract_of_service_28A.pdf

[106] Section 2098, C.C.Q.

while the construction of custom furniture is a contract of enterprise. In the field of real property, it may be difficult to contradistinguish between one type of contract and another. We note, in fact, that if the value of the property is higher than the value of the services provided by the contractor or the service provider, the contract will be considered as a sales contract.[107]

In common law, the scope of the construction contract – referred to as building or construction contract – is slightly different. This contract category applies to all cases where a contractor provides services or goods and services to build, renovate, repair or improve a building.[108] Therefore, it only alludes to an immovable and governs indiscriminately service provision and physical work. However, certain contracts considered as contract for services in Québec would not fall in the category of construction contracts, even if they relate to an immovable, because the service is not integrated in the immovable and does not add any plus-value: for example, a snow removal contract.

Moreover, like in Québec law, common law would likely consider this contract as a contract for service which does not fall into the category of construction contracts. In other words, the construction contract in common law is related to the contract of enterprise for work executed on an immovable (civil law), but the former would be more inclusive than the latter.[109] In the two legal traditions, the contract for service fills the vacuity left by the non-application of the contract of enterprise or construction contract.

In light of these definitions, it appears that contracts concluded by consumers in the construction field are considered as contracts of enterprise or contracts for services by the Civil Code. Contrary to consumer law, the Civil Code provides a legal framework directly applicable to these contracts.

The contract of enterprise or the contract for service as defined by the Civil Code can include furniture or real property, as we have mentioned. However, the contracts analyzed in the present study are in the domain of immovables. Therefore, in common law, it is usually the construction contract that applies. The rules governing construction contracts are not codified in any law. They are provided in the contract's express terms and are defined through time in case law (implied terms).

2.2.2. Presentation of Common Law Legal Regimes

Since contracts of enterprise, contracts for services and construction contracts are governed by contract law, parties can invoke the regulations on the formation of a contract, including defects in consent: error and fraud (*erreur et dol*) in Québec law or misrepresentation in common law, violence and lesion in Québec law or duress, undue influence and unconscionability in common law.[110] When the consumer's consent is vitiated, he can, in most cases, choose between the

[107] Section 2103, C.C.Q.

[108] Goldsmith, Immanuel and Thomas G. Heintzman (1988-). *Goldsmith on Canadian building contracts*, Toronto, Carswell, (feuilles mobiles), p.1.

[109] The general concept of contract of enterprise is sometimes translated as "*contract for labour and materials*". See, for example, the French and English versions of the *Loi sur la responsabilité et les garanties relatives aux produits de consommation* or the *Consumer Product Warranty and Liability Act*, LN-B 1978, c C-18.1.

[110] For a comparison of the general regulations governing contract law in civil law and common law, see, respectively: Cumyn, Michelle (2008). « The Law of Contracts », in Grenon, Aline and Louise Bélanger-Hardy (dir.), *Elements of Quebec civil law: a comparison with the Common Law of Canada*, Toronto, Carswell, p. 239s.; Manwaring, John (2008). « Les contrats », in Bélanger-Hardy, Louise and Aline

nullity of the contract, claim for damages or the reduction of the price. We note that the consumer can invoke lesion pursuant to section 8 of Québec's LPC if this act applies, while this means is not usually accepted in common law in contracts.

The regulations of contracts of enterprise, contracts for services and construction contracts specify the contractor's or service provider's obligations as well as the client's recourses (in this case, the consumer's recourses).

In absence of any subordination relationship between the contractor and the client, the former chooses the performance means of the contract.[111] On the other hand, he must "act in accordance with usual practice and [his] rules of art" and do the work prescribed in the contract.[112] Common law provides the same obligation. The relevant case law reads as follows[113]:

> [Translation]
> The contractor who agrees to do certain work, implicitly commits to do so in all diligence, care and workmanship that might be normally expected from a person of his trade. Therefore, there is an implicit guarantee that the work will be executed to meet the situation's requirements.

In these circumstances, the contractor or service provider has an obligation of means or an obligation of result:

> **C.C.Q., section 2100**: The contractor and the provider of services are bound to act in the best interests of their client, with prudence and diligence. […]
> Where they are bound to produce results, they may not be relieved from liability except by proving superior force.

Some consider that the contract for service would also imply an obligation of means, and the contract of enterprise, an obligation of result.[114] However, the Civil Code adopted a more flexible regulation, where the intensity of an obligation does not depend on the type of contract, but on the complexity of the work to be executed, the uncertainty of certain elements and the nature of the agreement between parties.[115] Also, in *common law*, the case law imposes an obligation of result in certain cases.[116]

The goods required to perform the work under contract are, in principle, provided by the contractor or the service provider, who is then "bound by the same warranties in respect of the property as a seller". Notably, these warranties are established by the Civil Code (section 1708

Grenon (dir.), *Éléments de common law canadienne: comparaison avec le droit civil québécois*, Toronto, Carswell, p. 259s.

[111] Section 2099, C.C.Q.

[112] Section 2100, C.C.Q.

[113] *J.E.G. Construction ltée c. Blanchard*, 1996 CanLII 4827 (NB CA).

[114] Québec (Province). Office de révision du code civil (1977). *Rapport sur le Code civil du Québec*, Montréal. Vol II, t. 2 « Commentaires », p. 757 and 763. Sections 686 and 699 of the project led by the *Office de révision du code civil* (ORCC) endorses this idea.

[115] Québec (Province) (1993). *Commentaires du ministre de la Justice: le Code civil du Québec, un mouvement de société*, Québec, Gouvernement du Québec, p. 1321.

[116] *Dietrich v. Kola Building Movers Ltd.* (1984) 33 Sask. R. 173 (Sask. QB), clearly states: "Having contracted to do the work it is no defence for the corporate defendant to claim that it exercised a degree of care and skill that could reasonably be expected of a building mover" (§ 13).

and following sections) and by the *Loi sur la protection du consommateur*. As for the goods' quality, the Civil Code's cardinal principle reads as follows:

> **C.C.Q., section 1726**: The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.

This rule is reinforced a presumption of existence and anteriority of defects in cases of premature deterioration of property, when the buyer does business with a professional seller:

> **C.C.Q., section 1729**: A defect is presumed to have existed at the time of a sale by a professional seller if the property malfunctions or deteriorates prematurely in comparison with identical items of property or items of the same type; such a presumption is not made, however, where the defect is due to improper use of the property by the buyer.

We take note that sections 1726 and 1729 only apply to the components provided by the contractor or service provider and do not relate to the work as a whole nor to the proper functioning of the property which already belongs to the client and was subject to repair or improvement work. In common law, the contractor must provide property of good quality that is well adapted to its ultimate purpose (fitness for purpose or good workmanship).[117]

The Civil Code proposes three ways to calculate the price of the work or service: it can be estimated, a fixed amount or "fixed according to the value of the work performed, the services rendered or the property furnished. Sections 2107, 2108 and 2109 provide respectively the specificities of each of these possibilities. For example, in the case of a fixed-price contract, none of the parties can seek to modify the price of the contract on the basis of the services rendered.[118]

Another interesting specificity of the contract of enterprise or contract for service lies in the conditions related to the reception of the work or the service. In theory, the client is not obliged to pay the agreed price before receiving the work. He may, for example, keep part of the amount that he judges appropriate in light of the repairs and corrections required in cases of apparent defects or poor workmanship.[119] However, if he does not deduct this amount from the price and pays in full, the client abandons his recourses, except in cases of non-apparent defects or poor workmanship.[120]

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[117] In *Laliberté c. Blanchard* (1980) 31 NBR (2d) 275 (CA), the court states that: "the true view is that a person contracting to carry out the work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them" (§11). See also: *Double Dutch Construction Inc v. Colwell*, 2012 NBQB 317 and Heintzman's analysis: Heintzman, Thomas G. (2013). *Which Term Prevails In A Building Contract: The Specifications, Or A Warranty Of Fitness For Purpose?* Retrieved on June 5th, 2013 from: http://www.constructionlawcanada.com/building-contracts/which-term-prevails-in-a-building-contract-the-specifications-or-a-warranty-of-fitness-for-purpose/

[118] section 2109, C.C.Q.

[119] section 2111, C.C.Q.

[120] section 2113, C.C.Q.

In addition, the Civil Code confers certain responsibilities to the contractor, architect, engineer of an immovable when these parties have directed or controlled the work, as well as to the subcontractor for the work he executed:

- "[…] solidarily liable for the loss of the work occurring within five years after the work was completed, whether the loss results from faulty design, construction or production of the work, or the unfavourable nature of the ground."[121]

- "[…] jointly liable to warrant the work for one year against poor workmanship existing at the time of acceptance or discovered within one year after acceptance."[122]

The concept of "loss" is broadly interpreted in case law. One only needs to prove that the defect has become apparent and that it is sufficiently severe to compromise the work's solidity.[123] While the responsibility for the loss of work is covered by previous case law, the warranty regarding poor workmanship was introduced by the legislator in Québec at the time of the adoption of the Civil Code of Québec (1991) to offer a better protection to the client. The one-year period allows time to [Translation] "verify the quality of the work through a certain use, but the period is brief enough so poor workmanship is not confused with normal wear of the tested property".[124]

The legislation also creates an asymmetry favouring the client as to the termination of the contract: while the Civil Code gives the client the right to unilaterally resiliate the contract even though the work or provision of service is already in progress[125], the professional's conditions are much more strict, the latter must notably invoke a serious reason, and never at an importune moment and is "bound to do all that is immediately necessary to prevent any loss".[126]

The general regulations governing contracts of enterprise and contracts for services in Québec law allow for the apprehension of the contractor's or the service provider's main obligations toward the client and the latter's recourses. These regulations are specifically formulated to control this type of transaction, as the specific dispositions related to immovable (sections 2117 to 2124) demonstrate. The latter have the advantage of being relatively accessible to the consumer, who is thus able to grasp their application to his situation.

We have seen that the broad interpretation of the contract for service favours the consumer if he decides to assert his rights under the LPC, but that this act provides protection measures that are clearly insufficient regarding warranties. However, the consumer can base his claim on the responsibility resulting from the work's deficiency or the warranty that protects him against poor workmanship; in order for these Civil Code warranties to apply, the contract of enterprise has to be interpreted broadly, which will then favour the consumer. To protect the consumer regardless of the designated qualification, warranties should be added to the Civil Code or LPC, or existing warranties widened in order to specifically include the provision of services relative to an immovable. The referral to warranties in the sales context should be replaced by a warranty

[121] Section 2118, C.C.Q.
[122] Section 2120, C.C.Q.
[123] Beaudoin, Jean-Louis and Patrice Deslauriers (2007). *La responsabilité civile*, 7the., vol. 2, Cowansville, Yvon Blais Ed., 1150 p.
[124] Québec (Province) (1993), supra (note 115), p. 1332. The ORCC's project would represent a better protection for the client, since it allows him 90 days after the reception of the work to denounce apparent defects and poor workmanship (section 690).
[125] Section 2125, C.C.Q.
[126] Section 2126, C.C.Q.

directly applicable to the quality of the goods provided by the contractor or service provider, thereby facilitating access to the consumer.

Several regulations in civil law are reflected in common law's general regulations regarding contracts for services and construction contracts. The other provincial legislators have not addressed this question, and the case law tends to give free rein to contractual freedom, while past experience demonstrates that it has not always been advantageous for consumers. An extensive case law study would be necessary to allow for a more detailed comparative study.

2.3. Available Regulation and Recourses in the Context of Actions taken before the Small Claims court: the Question of Access to Law

Two main observations can be drawn from the presentation of the provinces' applicable legal regimes in construction disputes: on one hand, the existing regulation is relatively onerous and complex and on the other hand, it is spread across various bodies. Therefore, there is no clear protection regime that consumers can refer to when facing a problem and it is thus essential to establish the different legal qualifications that apply to contracts in order to identify all enforceable recourses.

Professional legal counsels often encounter this type of situation and are trained to solve them. However, in the framework of the present study, a major paradox emerges: while Small Claims courts are meant to allow citizens to act alone, how can consumers do so if they cannot easily access the law providing them legal protection?

By definition, common law is essentially based on non-written rules found in case law; an ordinary citizen will thus have a difficult time finding the applicable regulation and preparing his case well before a Small Claims court. Unfortunately, the consumer protection acts adopted in common law provinces do not help him in this situation, as Simons remarks, taking the Ontarian act as example: "One of the most confusing parts of using the *Consumer Protection Act* (CPA) is determining the rules that apply to your situation". Moreover, the author insists: "In fact, sometimes one fact situation can fall into two 'form' categories that can conflict with each other!"[127] The guide on consumer protection developed by the Law Students' Legal Advice Program in British Columbia[128] is just as instructive: written for law students, the document contains no fewer than 42 pages to guide the reader through the consumer protection system in force in the province.

The system in Québec is based on civil law and is not simpler. Even if the Civil Code gathers most applicable pieces of regulation relative to construction and renovation contracts in a chapter where sections cover the contract of enterprise and the contract for service, we have observed that these dispositions refer to sales regulation for warranties regarding the goods provided by the contractor of the service provider. The exact scope of this referral is not easy to establish by an experienced legal counsel, and even less so by a consumer.

Moreover, the coming into force of the *Loi sur la protection du consommateur* turns out to be particularly complex in the construction field. In addition to distinguishing certain contracts according the specific economic sectors from other contracts as to their form, when the act addresses home construction and renovation, it is in view of excluding these fields, in part, from

[127] Shield, Simon (2010), supra (note 93).
[128] Law Students' Legal Advice Program (2011). "Consumer Protection", in LSLAP (dir.), *LSLAP Manual. U.B.C. Law Students' Legal Advice Manual* 35th e, Vancouver, p. 9:1-42. Retrieved from: http://www.lslap.bc.ca/main/?Manual_download

its application![129] Needless to say, this exclusion has its exceptions and various provisions in addition to being formulated in a convoluted way.

In continuity of the challenges presented previously regarding access to justice, one can but again note the importance of efforts to ensure access to law, which is an essential complement in accessing the judiciary system.

This challenge becomes even clearer in the next section, which presents the process we have followed to outline the scope of our study.

2.4. Delimitation of the Study's Scope: Demonstration of the Complex Articulation of Québec Law in the Construction Field

To conduct the empirical study on the use of the Small Claims court by consumers facing construction problems, we had to define with exactitude the body of our study. To do so, we took into account the relevant legal categories of Québec law and the ACQC's specific mandate, which consists of defending the consumers' interest mainly in the fields of home construction and renovation.

2.4.1. Nature of the Contract

The first selection criterion of decisions is based on the definitions of contract of enterprise and contract for service in section 2098 and following sections of the Civil Code. The presence of this type of contract is a determinant in the choice of decisions to be integrated into the body of case law.

> **C.C.Q., section 2098**: A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.
>
> **C.C.Q., section 2099**: The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.
>
> **C.C.Q.**, **section 2100**: The contractor and the provider of services are bound to act in the best interests of their client, with prudence and diligence. Depending on the nature of the work to be carried out or the service to be provided, they are also bound to act in accordance with usual practice and the rules of art, and, where applicable, to ensure that the work done or service provided is in conformity with the contract.
> Where they are bound to produce results, they may not be relieved from liability except by proving superior force.

In the framework of this study, it is the nature of the contract that prevails, and not its object. It is therefore not sufficient that the case's object is roofing, for example, to be included in the body of cases. If the dispute opposes the consumer vis-à-vis the shingle manufacturer, whose furnished material is judged defective, the warranties provided in the sales contract apply and not those associated with the contract of enterprise. In contrast, any clause addressing hidden defects will

[129] LPC, section 6.

not be automatically rejected, since the quality warranty regarding the goods provided also constitutes an obligation linked to the contract of enterprise or contract for service.

However, the mere presence of such as contract does not suffice to establish the case law body. In addition to this issue, one of the parties implicated in the dispute must also be a consumer.

2.4.2. Consumer Identification

In Québec law, the consumer is defined *a contrario*. One may find it regrettable that the *Loi de protection du consommateur* and Civil Code have not set the same limits in identifying a consumer (1.2.1). In certain cases, this distinction can be confusing, as shown in the situation of income property owners (1.2.2). In this research, it was the Civil Code's definition which was the most amenable in meeting our requirements (1.2.3).

2.4.2.1. Two Distinct Definitions to Establish What a Consumer is not

First of all, the concept of consumer does not seem to be misunderstood, especially since the LPC provides an apparently clear definition which opposes consumer to merchant:

> **LPC, subsection 1(e)**: "consumer" means a natural person, except a merchant who obtains goods or services for the purposes of his business

However, the LPC does not define the concept of merchant. The one proposed by Nicole L'Heureux seems to be widely accepted:

> [Translation] The quality of the merchant who performs the commercial transactions depends on the three following elements. First, he has to have the intention of speculating to obtain a profit. Second, his activity must be permanent, without necessarily it being his main or only activity. However, it must be rather usual than occasional. Third, the commercial transaction must be concluded on a personal basis, because the merchant is [Translation] "self-employed and acting on his personal interest", thereby excluding the concept of employee and performance by an agent".[130]

The Civil Code also defines the consumer contract, but [Translation] "this definition recapitulates several elements of the definition provided by the *Loi sur la protection du consommateur,* but presents differences".[131] Notably, Moore notes that section 1384 [Translation] "does not refer anymore to the concept of merchant, but rather to the concept of enterprise"[132], defined in section 1525 of the Civil Code.

[130] L'Heureux and Lacoursière (2011), supra (note 104), p.49 (emphasis added). This definition comes from case law, see infra.
[131] Moore, Benoît (2008). « Sur l'avenir incertain du contrat de consommation », *49 Les Cahier de Droit 1*, p. 12.
[132] *Id*

> **C.C.Q., section 1384**: A consumer contract is a contract whose field of application is delimited by legislation respecting consumer protection whereby one of the parties, being a natural person, the consumer, acquires, leases, borrows or obtains in any other manner, for personal, family or domestic purposes, property or services from the other party, who offers such property and services as part of an enterprise which he carries on.
>
> **C.C.Q., subsection 1525(3)**: The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the carrying on of an enterprise.

This double definition is not without problems. In fact, the consumer contract can be concluded by a consumer with a merchant (pursuant to the LPC) or with any person considered as a business operator (according to the Civil Code). Thus, it would be possible that a contract be qualified as a consumer contract by the Civil Code and not falling into this category according to the LPC.[133] The case of income property owners clearly illustrates this situation.

2.4.2.2. The Fate of Income Property Owners

It is interesting to note that subsections 1(e) of the LPC and section 1384 of the Civil Code were both specified by case law in order to define income property owners. This question is particularly relevant for our study since we were several times faced with cases implicating a business by this type of owner. The selected criteria would necessarily exclude a self-employed restaurant owner, but it could seem inconsistent to include, in contrast, owners of several rental buildings, the latter being, in various aspects, more similar to the typical consumer than the latter.

In terms of consumer law, the definition of the merchant was not selected to qualify buyers [Translation] "of a condominium unit as an investment"; the judge having observed that it was the claimants' first proceeding of this type".[134] Therefore, there was lacking the characteristic of permanence of the activity as established by Nicole L'Heureux in defining the concept of merchant.

The selected criteria in this definition of enterprise are different. The case law of principle, looking further back, is *Belinco Developpements Inc. c. Bazinet*. [135] In this case, Mr. Bazinet owned a rental building which was the object of a legal hypothec by Belinco Developpements Inc. after default of payment, by the owner, for renovation work. Mr. Bazinet was opposed to the sale of his building as business property, since he was not operating a business.

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[133] See Moore's discussion on ths topic: Moore, Benoît (2008), supra (note 131), p.13-14. The author considers this as the constitution of a double corpus of consumer law, which presents a risk of dilution of consumer contract law.

[134] *Ouellet c. Edifice St Jacques inc.*, 2008 QCCS 4253. This decision confirms the interpretation in: *Chamberland c. Construction Roland Bédard inc.*, 2007 QCCS 541 : [Translation] "Chamberland and Martel's investment proposal was unique and outside the general scope of profession. In fact, Chamberland is a psychiatrist and even if Martel works in the field of home renovation, he is not a "seller" of income property". (§49). The Court of Appeal did not challenge the interpretation in its following judgments: *Construction Roland Bédard inc. c. Chamberland*, 2008 QCCA 1810. See: Bourassa, Sylvie A. (2013). *Loi sur la protection du consommateur et règlement d'application. Consumer Protection Act and Regulation Respecting its Application*, Cowansville, Éditions Yvon Blais, p. 4.

[135] *Belinco Developpements Inc. c. Bazinet*, [1996] RJQ 1390.

In this judgment, the court indulges in a lengthy debate on the concept of enterprise through different doctrinal studies while referring to the legislator's intentions. It seems fairly clear that the Civil Code of Québec intends to replace [Translation] "globally the concept of business and the associated concepts of commercial transactions, for example, by the concept of enterprise". [136] Finally, the court selected several criteria from the doctrine to define an enterprise. Auget summarizes the judge's conclusions as follows:

> [Translation] In the end, the judge concluded that the building was real property used from commercial grounds. Mr. Bazinet acts in a repetitive, frequent and usual manner in view of maximizing his rental revenue, such as the signature of leases, the perception of rent, the conclusion of renovation contracts and the use of personnel. There is a clientele: the leasers. He benefits from his efforts. We are thus in presence of an enterprise.[137]

Several authors quickly observed the impact of the definition change in establishing the building administrators, such that Monsieur Vachon sees therein an [Translation] "upheaval the legislation governing real estate transactions".[138] First, authors seem to agree that a duplex owner could not, in principle, be considered as a business operator; a position which explains the view of the Court of Québec (2003) when it stated that [Translation] "the fact of considering the management of a sole apartment as a business operation, while the manager lives in the other apartment, raises a controversial question of general interest".[139]

However, it is hazardous to determine the existence or non-existence of an enterprise based on the number of apartments in the rental building. In this case, the doctrine and the court prefer the [Translation] "individual approach, taking into account the particular case under study".[140]

2.4.2.3. Choice of Definition – Enterprise vs. Merchant

In the framework of the present research, we chose to select the concept of enterprise of the Civil Code. First, it is worthy of mentioning that these questions do not emanate solely from our research, but instead belong to a wider reflection initiated by consumer law specialists. L'Heureux and Lacoursière propose a detailed analysis of the actual content of debates.[141] In addition to the propositions meant to redefine the meaning of the term "consumer", the authors noted the "outdated nature of the commerciality theory"[142], which bases the definition of merchant (aiming notably to exclude craftsmen and farmers) while preferring the definition of enterprise. This change had, apparently, already been considered during the Civil Code's reform.

Selecting the definition of the LPC could lead to an inequitable settlement of cases, since it would be difficult, on this basis, to exclude some owners and to include others as consumers.

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[136] *Id.*, quoting the Department of Justice, supra (note 11).
[137] Auger, François (2002). « Analyse du concept d'entreprise », in *L'harmonisation de la législation fédérale avec le droit civil québécois et le bijuridisme canadien - Recueil d'études en fiscalité*, Montréal, Association de planification fiscale et financière et Ministère de la justice du Canada, p. 4:13. Retrieved from: www.apff.org/uploads/PDF/Bijuridisme/HARMONISATION_RECUEIL-2002/FRANCAIS/harmonisation_legislation_fed_2002.pdf. The court specifies these elements just before the its reasons for decision.
[138] *Id.*, quoting Patrice Vachon, supra (note 18).
[139] *Vallée c. Chabot*, 2003 QCCQ 4894.
[140] *Belinco Developpements Inc. c. Bazinet*, [1996] RJQ 1390.
[141] L'Heureux and Lacoursière (2011), supra (note 104), p. 47 to 58.
[142] Id., p. 58.

The Civil Code's definition, through its more modern and less restrictive interpretation, is a better fit for our study's needs. The indications provided in the transcription of each case also allow us to take position in a more rigorous manner. Thus, when the decision's content permits to establish fairly clearly that the client operates a business in the field of income property, we chose to exclude these cases.[143]

2.4.3. The Construction Field

This aspect was, without doubt, the hardest to rule on, since the margins can be unclear relating to what falls under "construction field" or not. Thus, numerous regulations propose more or less restrictive definitions, such as the *Building Act*[144], the previous version of *An Act respecting building contractors' vocational qualifications*[145], *An Act Respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry*[146] or the *Loi sur la protection du consommateur*. The latter does not explicitly define the parameters of the construction field, but sets certain limits through deduction using exclusions not in force in virtue of section 6.

2.4.3.1. Variable Legal Definitions Adapted to the Targeted Goals

> ***Building Act,* section 9**: For the purposes of this Act, foundation, erection, renovation, repair, maintenance, alteration and demolition work is construction work.
>
> ***An Act respecting building contractors vocational qualifications*, subsection 1(a)**: In this act, unless the context indicates a different meaning,"construction work";
> *(a)* "construction work" means foundation, erection, maintenance, renovation, repair, alteration and demolition work on buildings and on civil engineering works carried out on the job site itself and in the vicinity thereof, including the preparatory work on the site;
>
> ***An Act Respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry*, subsection 1(f)**: "construction": the foundation, erection, maintenance, renewal, repair, alteration and demolition work on buildings and civil engineering works carried out on the job site itself and vicinity including the previous preparatory work on the ground;
>
> In addition, the word "construction" includes the installation, repair and maintenance of machinery and equipment, work carried out in part on the job site itself and in part in the shop, moving of buildings, transportation of employees, dredging, turfing, cutting and pruning of trees and shrubs and laying out of golf courses, but solely in the cases determined by regulation;

We have already mentioned the interpretation challenges related to section 6 of the LPC. The legislator first thought of adopting a specific law on real property, which would notably justify the coming into force of subsection 6(d).[147] We can thus conclude that it was not the legislator's

[143] For example: *Sidelnikov c. Ovcharenko*, 2011 QCCQ 9916 or *Delvigne c. Pérusse,* 2011 QCCQ 410.
[144] L.R.Q., c B-1.1
[145] L.R.Q., c Q-1
[146] L.R.Q., c R-20
[147] L'Heureux, Nicole and Marc Lacoursière (2011), supra (note 104), p. 43 (note 106). In *Systèmes Techno-Pompes inc. c. La Manna,* 1993 QCCA 4388, the judge also specifies that: [Translation] "While waiting for the adoption of the upcoming act on real property, the legislator provided in section 363 that the government will have the authority to postpone the application of certain dispositions. This explains why subsections 6(c) and (d) have not come into force."

intention to limit consumer protection in terms of real property. The case law interpretation of the concept of construction in *Systèmes Techno-Pompes inc. c. La Manna*[148] confirms this position[149]:

> [Translation] In the specific context of the *Loi sur la protection du consommateur*, subsection 6(d), even if is not into force, encourages one to establish a distinction between the expressions "construction of an immovable" and "provision of a repair, maintenance or improvement service" and not to search in other legislation […] for the meaning of the term "construction".

The demonstration follows based on the conclusions of Judge Meyer in a previous case[150]:

> I do not feel, as counsel for the appellant does, that one must give to the word "construction" in section 6 (b) the same meaning as is given to the words "construction work" in the *Loi sur la qualification professionnelle des entrepreneurs de construction*, ch. Q-1 of the Revised Statute of Quebec, in which repair and renovation are included in the definition of construction work for the purpose of that Act.

This interpretation of the LPC allowed, in this case, to confirm the subjugation to the LPC of [Translation] "mixed sales contracts of movables and service provision, even if these goods are ultimately meant to be incorporated into an immovable".[151] The purchase of installation of a heat pump is the typical example of this kind of contract.

2.4.3.2. The Choice of a Broader and More Inclusive Definition

In any case, and despite extensive interpretation of the LPC, if we based our definition on its dispositions, we would have to exclude all the cases related to the construction of an immovable, such as excavation work.[152] Even if this hypothesis was at first considered[153], it was ultimately put aside because of the targeted goals of the research as well as our organization's mandate. In order to adopt the most inclusive approach as possible, we chose to consider all disputes linked to the construction field, the modification of an immovable or the addition to a property, excluding construction of an entirely new building.

The choice of the term "property" allowed us, for example, to take into account the fields of surveying for construction[154], tree trimming[155], landscaping[156] or exterior paving[157]. A wider interpretation of the activities effecting a modification or an addition also allowed us to consider the installation of a security system[158] and the services provided by an interior designer.[159]

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[148] *Systèmes Techno-Pompes inc. c. La Manna*, 1993 QCCA 4388.
[149] A recent ruling of the Court of Appeal confirms the conclusions in *La Manna* regarding the exclusion of contracts related to the construction of an immovable: *Diamantopoulos c. Construction Dompat inc.*, 2013 QCCA 929.
[150] The quote was taken from *Metropolitan Home Services and Home Improvement Ltd. c. La Reine, C.S. district de Richelieu*, 765-36-000003-84.
[151] See L'Heureux and Lacoursière (2011), supra (note 104), p. 43 and 44.
[152] Id., including note 108.
[153] This explains notably the initial choice of decisions during the keyword tests, see infra.
[154] *Dubé c. Groupe Giroux Arpenteurs géomètres*, 2011 QCCQ 1239.
[155] *Janecek c. Bousada*, 2011 QCCQ 7676.
[156] *Giguère c. Jobin*, 2011 QCCQ 12651.
[157] *Brunet c. Pavages Farinelli inc*., 2011 QCCQ 2686.
[158] *Sécurité Big Brother c. Lisio,* 2011 QCCQ 2546.
[159] *Labonté c. Centre de peinture Multicolore inc.*, 2011 QCCQ 11204.

Following the example of surveying, the provision of services in view of building construction, the modification of an immovable or the addition to a property were taken into account: the services provided by an architect in one of these objectives was included in the studied corpus.[160]

2.4.3.3. Threefold Test to Select Relevant Decisions

Finally, the selection of decisions was based on a threefold test, and each element of the test took into account the aforementioned definitions.

Box 1: Test Elaborated to Select Decisions

1°) IS ONE OF THE PARTIES A CONSUMER?
2°) IS THE DISPUTE RELATED TO THE CONSTRUCTION FIELD?
3°) ARE PARTIES LINKED BY A CONTRACT OF ENTERPRISE OR A CONTRACT FOR SERVICES?

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The research conducted to define the selection criteria of the case law depicts the complexity of the law regarding contracts concluded in the construction and home renovation fields. One may note that these observations are all the more regrettable since this very field encompasses an important part of consumer disputes.[161] The situation in Québec is particularly complex because of the unique settlement of contracts governed by the *Loi sur la protection du consommateur*, on the one hand, and by the division of consumer law between this act and the Civil Code.

In such a context, it is, in the end, rather unrealistic to expect that a consumer implicated in a dispute brought before the Small Claims court will navigate through the different regulations, understand its nuances and subtleties and invoke those best adapted to his case. Moreover, this is not the only task awaiting him since he must also gather all the required information to grasp the nature and operation of the Small Claims court in order to meet its procedural requirements. Fortunately, in this regard, the instruments provided citizens seem better adapted.

[160] The choice was even more relevant since the architect, the contractor and the engirneer are solidarily liable for the loss of the work occurring within five years after the work was completed pursuant to section 2120 of the Civil Code.

[161] As a reminder, the construction field is ranked in the top ten of the most important subjects of consumer claims.

3. How to prepare for court? Information provided to consumers

Despite the relative accessibility of Small Claims courts and the various strategies implemented by governments to ensure a certain simplification of the procedure, the fact of being implicated in a dispute whose settlement must go through a legal process leaves a mark and is a delicate experience for most consumers. Being claimants or defendants, consumers have to commit to the process, apprehend and understand the operation of the justice system and present their arguments within the framework of the established rules.

To help consumers and in accordance with the very spirit of the Small Claims court, various government agencies are dedicated to present, teach and distribute information regarding the operation of these courts and the different steps to proceed through the court system.

In this study, it became relevant to map out information sources and to present a critical review. Do they really encourage the autonomy of consumers before Small Claims courts, pursuant to the Do-it-yourself principle? After presenting the main electronic sources accessible to the public and summarizing their content (2.1), we will present their highlights (2.2).

3.1. Identification of Electronic Information Sources on Small Claims Courts

3.1.1. Alberta

- Alberta Courts. *Civil (Small Claims Court)*, <www.albertacourts.ab.ca/ProvincialCourt/CivilSmallClaimsCourt/tabid/96/Default.aspx>

On Alberta's Small Claims court homepage, citizens are invited to navigate through many pages to learn about the fundamental principles of the court and claim processing; in addition to having access to different forms and publications, they are asked to evaluate the alternatives to the court process and to confirm the admissibility of their case. Mediation is also promoted on a specific information page, a video and an opportunity of direct contact with the mediation service. Despite the extensive information provided, one may regret the website's overall formalism.

- Alberta Justice. *Civil claims / collecting your judgment – Alberta Justice*, < http://justice.alberta.ca/programs_services/civil/Pages/claims_collecting.aspx?WT.svl=programs >

More user-friendly than the previous source, the Department of Justice's website also presents the Small Claims court's legal process. However, this homepage refers citizens to other sources of information via a link to the website "albertacourts.ab.ca" or to the video created by the Canadian Bar Association – Alberta.

- Canadian Bar Association-Alberta. *A Successful Day in Court: How to Present or Defend Your Civil Claim*, online video, 6:15min < http://video.cba.org/alberta/SmallClaims_100.wmv >

This audiovisual document presents citizens with a less formal approach in respect of the Small Claims court and helps them understand within a short time span the main operating rules.

3.1.2. British Columbia

- Government of British Columbia, Ministry of Justice. *Small Claims*, < www.ag.gov.bc.ca/courts/small_claims/index.htm >

This is British Columbia's Small Claims court's homepage. On this site, consumers have access to a vast array of information, including applicable acts and regulations, as well as to eight information manuals:

- What is small claims court?
- Making A Claim
- Replying to a Claim
- Serving Documents
- Getting Ready for Court
- Getting Results
- Mediation Program for Claims Up to $10,000
- Mediation for Claims Between $10,000 and $25,000

In addition to providing an online version of all forms, the website has is interactive in guiding citizens through the completion of several of these documents. The Department's site also refers to the one developed by the Justice Education Society.

- Justice Education Society. Small Claims BC, < www.smallclaimsbc.ca/ >

This website is particularly exhaustive. It allows consumers to learn about the different procedures according to the locale where they will take action. Online videos explain every step of the procedure (mediation, trial conference, trial, etc.). All the relevant information is put together on the site, which also provides numerous links to manuals and information notes. Created by a non-profit organization with a strong experience in the promotion of access to justice, this website is user-friendly and adapted to reach a large public and has resolutely modern approach, as demonstrated by the virtual assistant guiding the user throughout his visit. Nevertheless, such as site seems essential taking into account the complexity of the process before the different Small Claims courts in this province following the implementation of various pilots.

- Provincial Court of British Columbia. Small Claims Matters, < www.provincialcourt.bc.ca/types-of-cases/small-claims-matters >

The Provincial Court of British Columbia's website also presents the operation of the Small Claims court and provides links to relevant acts and regulations. One can also learn about all the practice directives of the Chief Judge.

3.1.3. Prince Edward Island

- Unrepresented Parties – Procedure to be Followed in Court, < www.gov.pe.ca/photos/original/smallclaims.pdf >

This document is the only one we found that guides citizens through the process of the Prince Edward Island Small Claims court. Very brief, the five-page document presents an outline of the procedure. It is rather, as is specified in the document, a list of instructions rather than a guide to possibly assist citizens in preparing for court.

3.1.4. Manitoba

- Manitoba Courts. Small claims, "Court of Queen's Bench SMALL CLAIMS DIVISION, Information Sheet", < www.manitobacourts.mb.ca/faq/faq_small_claims.html >

This website is a relevant source of information on the operation of the Manitoba Small Claims court. Citizens can find general information on the proceedings, fees to take legal action and the different locations where they to file a claim. Eight checklists help citizens prepare their case and follow the different steps related to taking legal action to court:

- Claimants
- Defendants
- Service of documents
- Preparing for the hearing
- The hearing
- Appealing the decision
- Collecting on your judgment
- Sample claim/counterclaim

3.1.5. New Brunswick

- PLEIS-NB, *Public Legal Education and Information Service. Civil and Family Courts*. Publications, < http://www.legal-info-legale.nb.ca/en/civil_and_family_courts >

This non-profit organization prepared a functional guide for court users, which provides all the necessary information to understand procedure. The website also presents information on the processing of certain small claims before reintroduction at Small Claims court. However, it is the only source of information we identified for this province.

3.1.6. Nova Scotia

- The courts of Nova Scotia. *The Courts of Nova Scotia, Small Claims Court,* "General Information", < www.courts.ns.ca/smallclaims/cl_info.htm >

The Courts of Nova Scotia's homepage presents a specific tab for the Small Claims court, where citizens can access numerous sources of information: they can assess the admissibility of their case, learn about legal fees and applicable acts and regulations. The courts' list and some rulings are also accessible. The list of courts is also available as well as certain decisions. Citizens are invited to act alone by consulting the toolkit prepared by the Department of Justice. Notably, the latter gives them access to an interactive website where citizens can complete the different forms requested. They can also consult an information brochure, a guide for creditors or find information on the procedure of serving notice to attend a hearing.

It seems that all available documents are accessible from these pages.

3.1.7. Ontario

- Ministry of the Attorney General, *Small Claims Court*, < www.attorneygeneral.jus.gov.on.ca/english/courts/scc/ >

This website is very exhaustive and provides many information pages on Small Claims courts. One can find, notably, links to eight guides for citizens on established procedures:

- What is Small Claims Court?
- Guide to Making a Claim
- Guide to Replying to a Claim
- Guide to Serving Documents
- Guide to Motions and Clerk's Order
- Guide to Getting Ready for Court
- Guide to Fee Schedules
- After Judgment – Guide to Getting Results

Furthermore, three brochures are also made available and present the proceedings of a trial in the cases of a defended and undefended claim.

- Small Claims Court Brochures
- Small Claims Court Stages – Defended Claim
- Small Claims Court Stages – Undefended Claim

The Department also developed an interactive assistant to help citizens complete the requested forms: https://formsassistant.ontariocourtforms.on.ca/Welcome.aspx?lang=en

- Judge's Library. *Small Claims Court*, Guide to Ontario Courts, < www.ontariocourts.ca/scj/en/scct/ >

The Superior Court's website also provides information on the Small Claims court. As with British Columbia, the information is primarily factual: sitting judges, operating rules, forms, etc. Citizens are also invited to consult the Department's website.

3.1.8. Québec

- Justice Québec. Les petites créances, < www.justice.gouv.qc.ca/francais/publications/generale/creance.htm >

This website presents in detail all procedures of the Small Claims court, from the formal demand to the execution of the judgment. Citizens can take note of the rules pertaining to the admissibility and filing of a case and the defendant's options. They are also guided through the proceedings of a hearing and learn about the different procedures in force relating to the execution of the judgment. Mediation is also presented, and videos on the subject were created. Other videos are also available to help consumers in completing the forms.

Another website from the Department of Justice enumerates the various legal fees related to small claims: http://www.justice.gouv.qc.ca/francais/publications/generale/tarifs.htm#Anchor-Creances

However, one may regret the lack of links to other sources of information, such as the guide prepared by the Department in partnership with the Young Bar Association of Montréal or the Éducaloi website.

- Quebec Law Network (2002), *Guide des petites créances* (2e édition), < http://www.avocat.qc.ca/public/iipcreances.htm >

This website presents a particularly exhaustive guide to assist consumers in their proceedings. It presents all procedural steps, explains legal terminology, gives concrete examples of test-case litigation, defines the rules of evidence, suggests models of formal demand, etc.

- Éducaloi, *Small Claims Division of the Court of Québec – Éducaloi*, < www.educaloi.qc.ca/cotecour/cour_quebec/division_petites_creances/ >

Organization specialized in education and information, Éducaloi proposes a different and more concrete approach than the Small Claims court, while reproducing the information presented in the previous websites. It is probably the most accessible doorway for citizens to learn about their rights and how to assert them before the Small Claims court.

3.1.9. Saskatchewan

- Courts of Saskatchewan, *Courts of Saskatchewan*, "Provincial Court", < http://www.sasklawcourts.ca/index.php/home/provincial-court/small-claims-court >

Via this webpage, consumers have access to general information on the Small Claims court and are invited to assess the possible outcomes of their action. Several documents included present the court's main operating rules:

- Starting your action
- Defendant information
- Case management conference
- Preparing for trial

Of course, citizens have access to the different forms and a guide to complete them. The site also provides a link to the video created by the Canadian Bar Association – Alberta and also refers visitors to the site hosted by the Public Legal Education Association of Saskatchewan (PLEA).

- PLEA, *Public Legal Education Association – Legal Resources*, "Small Claims Court", < www.plea.org/legal_resources/?a=359&searchTxt=&cat=28&pcat=4 >

This association offers information, which is more exhaustive and educational regarding the operation of the Small Claims court. Citizens are then able to better assess the possible outcome and the admissibility of their case, learn about the eventual alternative dispute resolution modes and progress step by step through the process. However, the communication of information is rather formal and does not seem to include interactive tools.

3.1.10. Newfoundland and Labrador

In this province, the information provided to citizens is very general. The Provincial Court's website offers two main pages on the Small Claims court:

- Provincial Court of Newfoundland and Labrador, *Small Claims Court*, < www.court.nl.ca/provincial/courts/smallclaims/index.html >

- Provincial Court of Newfoundland and Labrador, *Small Claims Trials*, < www.court.nl.ca/provincial/goingtocourt/smallclaims.html >

The first page presents the court and its operating principles and the second summarizes the hearing process and the main applicable rules of proof (such as the balance of probabilities).

3.2. Highlights

This overview of government websites (or of websites hosted by the government), which aimed to present the Small Claims court to citizens, raises several important points.

First of all, one notes that there are many information sources and that the vast majority of provinces strive to inform and guide their citizens through the judiciary procedure applicable before these courts. These efforts reflect, as we have explained earlier, the commitment for the protection, promotion and fostering of the citizens' autonomy when implicated in a dispute. In general, citizens have access to the forms they are asked to complete and are able to find information on the main steps to follow.

Some websites are presented in a very formal way (Alberta, Saskatchewan) and others tend to simplify the steps to take and to diversify the information communication tools. An increasing number of videos are created to that effect (Québec, British Columbia), assistants are developed in certain provinces to help citizens complete the require forms (Ontario, Nova Scotia), guides, brochures and toolkits sometimes provide step by step support (Ontario, British Columbia, Manitoba). Not surprisingly, provinces where the courts' caseload is relatively low tend to offer fewer resources (Newfoundland and Labrador, Prince Edward Island).

It is in British Columbia where the most tools are provided to citizens. They are particularly clear and contribute to the accessibility to the Small Claims court. These observations seem coherent in light of the province's latest efforts to increase the status of this court and develop innovative procedures, notably through different pilots. That being said, these innovations undoubtedly make the system as a whole more complex and their success depend largely on the citizens' capacity to adapt to these innovations and to use them when needed. Therefore, it is not surprising that the province has invested in the clarification of information intended for the public.

We also noted that the role of non-profit organizations seems to be at the centerpiece in the communication of information and helps citizens prepare themselves. It is often the most complete and accessible resource for citizens who are not familiar with the judiciary system: Éducaloi in Québec, *Justice Education Society* in British Columbia, *Public Legal Education Association* in Saskatchewan and *Public Legal Education and Information Service* in New Brunswick. The relevance of the work being done by these organizations is notably underlined by the support offered by different Departments, which sometimes provide direct links to these alternative resources.

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After all, it seems that, firstly, consumers have access to extensive information on the nature of the steps to take when taking an action before the Small Claims court or when they are invited to attend a hearing as defendants. However, it is difficult to assess theoretically just how adequately the tools offered consumers meet their needs or how to evaluate their capacity to integrate the information provided them or how to use it accordingly in order to better assert their rights.

4. Consumers before the Québec Small Claims Court: Empirical Case Law Study

In order to better understand the use of the Small Claims court by consumers implicated in a construction dispute, we have conducted an empirical study of the minutes of its settlements of 2011. Although we had to discontinue the comparative study of two Canadian provinces[162], the results of our study reveal particularly relevant elements, which help us to better identify consumer strategies and the difficulties they sometimes face.

Before presenting these results (4.2) – some of them require deeper analysis (4.3) – it is essential to review certain methodological aspects required for the preparation of the study (4.1).

4.1. Methodology

4.1.1. Identification of the Population

The population under study represents the body of decisions rendered in 2011 by the Small Claims court, opposing a consumer against a contractor in a construction dispute. The identification of these decisions needed extensive work. CanLII's search engine was best adapted for the study's purposes, but the research forms and the query syntax it proposes did not allow efficient identification of relevant decisions with one or more keywords.

Finally, the population under study was identified by a virtually systematic review of all of the Small Claims court decisions of 2011. Only a few terms figuring in the title of decisions permitted exclusion some of them, thus putting aside a fraction of settlements beforehand – those not opposing a consumer against a contractor or a service provider.

A summary of the process used to identify the population is presented in the Table 3 below.

[162] See "Methodology" section, supra.

Table 3: General Statistical Data on the Population under Study

Month	Number of decisions in 2011	Number of reviewed decisions	Number of decisions selected in the body	% of selected decisions
January	757	757	53	7%
February	711	711	73	10%
March	850	801	68	8%
April	632	592	60	9%
May	673	652	79	12%
June	578	550	57	10%
July	558	523	55	10%
August	323	303	22	7%
September	496	475	39	8%
October	543	510	43	8%
November	529	492	43	8%
December	519	497	43	8%
TOTAL	7169	6863	635	9%

The months of January and February served as a test, and thus the decisions from this period were not preselected using exclusions terms. The terms *union, city, municipality* and *minister* were excluded from titles starting in March, and *succession* was added to the list starting in April.[163]

4.1.2. Sample Calculation: Selection of the Confidence Level and Margin of Error

The determination of an interval between the confidence level and the importance of the acceptable margin of error constitutes an individual and subjective choice. These elements can thus vary from one study to another, while certain values are more frequently retained.

The **confidence level** is the degree of certainty, expressed as a percentage, given the results of a sampling process. In general, the confidence level is set at 95%. Accordingly, if we review several samples from one population analysis, the estimation of the parameter of interest will fluctuate between a confidence interval of 19/20.

The **margin of error** is the precision of the result obtained. The margin is closely linked to the survey plan and the study's response rate. It allows to judge just how reliable the results are: the smaller the margin of error, the more precise the results.

In all sampling plans, there is a relational link between the size of the sample and the margin of error in estimating the parameter of interest. For a simple random sampling with replacement[164]

[163] Since we obtained several decisions whose title contained (*Succession of*), we chose to exclude this term, which was not part of the results of previous exclusion tests conducted with the joint use of the keyword *construction*.
[164] For the purposes of this study, the plan consisted of selecting one out of two decisions. See infra.

and in the case where the objective is to estimate a percentage (p), this link is obtained using the following formula[165]:

$$n = \frac{z_{\alpha/2}^2 \, p(1-p)}{e^2 + \frac{z_{\alpha/2}^2 \, p(1-p)}{N}} \leq \frac{z_{\alpha/2}^2 / 4}{e^2 + \frac{z_{\alpha/2}^2}{4N}}$$

Where

$z_{\alpha/2}$ = Percentile 1-α/2 of a standard normal distribution (value linked to the confidence level);

e = Margin of error;

N = Population size.

We chose to adopt a 95% confidence level by setting the value $z_{\alpha/2}$ at 1.96. According to a simple random sampling, the following table presents the required sample size in light of different margins of error[166]:

Table 4: Determination of the Sample Size (n) **in a Simple Random Sampling to Estimate a Percentage in a Population Size of** N=635 **with a Certain Margin of Error** (e) **and a Level of Confidence of 95%** *($z_{\alpha/2}$ =1.96).*

Margin of error (e)	$\mathbf{n} = \frac{z_{\alpha/2}^2 / 4}{e^2 + \frac{z_{\alpha/2}^2}{4N}}$
0.01	596
0.02	502
0.03	398
0.04	309
0.05	239

Based on this information, the sample's decisions were selected by retaining 1 decision from the population out of 2, following their chronological order (monthly). The initial expected sample size was 318 decisions, with a margin of error of 3.88%.

In total, 336 decisions were reviewed, and 37 were put aside (11.0 %) because they did not conform to the population selection test. The final sample thus encompasses n=299 decisions. We then had to adjust the population size presuming that the sample is representative of the population. If we apply the margin of error observed in the sample to the population as a whole, the rectified population is N=565 decisions (89%*635). The margin of error is now 3.89% and is comparable to the level obtained without correction for the population size.

[165] For more information on the sampling methods, see: Sharon L. (2010). Sampling: Design and Analysis, 2nd ed., New York, Duxburry Press, 596 p.

[166] Partial reproduction of the table from the consultants of the Statistical Consulting Service at the Université Laval produced at our first meeting.

These basic data, essential to the interpretation of results, must be completed by a presentation of the variables and analysis methods privileged in this study's framework.

Box 2: Summary of the Study's Main Data

Total of the Small Claims court's decisions in 2011: 7,169 **Population size (N = 565)** **Sample size (n = 299)** **Confidence level = 95%** **Margin of error = 3.89%**

These data revealed that 8% of disputes taken before the Small Claims court in 2011 implicated consumers who encountered problems in the construction field.

4.1.3. Codification and Data Analysis Methods

4.1.3.1. Identification of Variables

Codification is a determinant factor to guarantee the coherence and thoroughness of the analysis and was prepared through several steps, including adjustments under way. Case law fact sheets were prepared and tested in order to clarify which data were available, as well as according to frequency and in which form. The information collected helped identify and refine the data analysis grid. Finally, a few minor adjustments were made after the grid was completed. Some qualitative data were obtained in order to explain gray areas and increase precision relative to the results of the quantitative analysis.

One must also note that the adopted methodology in the framework of this study deliberately ignores the question of which party is within its rights – who is right and who is wrong – in the rulings under study. Despite the possible distortions resulting from this choice, it nonetheless permits us to update certain emerging effects of the system in the Small Claims court, such as the nature of power relations between parties, the influence of certain strategies on rulings and appeals, legal rules and then most commonly means of proof employed.

Table 5 below presents the different variables selected for the purpose of this study.

Table 5: List of Variables under Study

FIELD	VARIABLES
General data	▪ Decision reference ▪ Consumer's situation (claimant, defendant, counterclaimant) ▪ Consumer's success (yes or no)
Consumer's allegations	▪ Poorly executed work ▪ Work abandoned ▪ Price requested too high ▪ Indirect damage ▪ Other allegations
Proof	▪ Contractual documents (contract, quotes, invoices, etc.) ▪ Consumer's expertise ▪ Consumer's photos and videos ▪ Mail (letters, electronic messages, etc.) ▪ Consumer's testimony ▪ Lay witness (for the consumer) ▪ Contractor's expertise
Recourse	▪ Invoice reduction/reimbursement ▪ Correction costs ▪ Damages ▪ Other recourses
Legislation	▪ *Loi sur la protection du consommateur* (LPC) ▪ Civil Code or other regulations (building code, etc.) ▪ No regulation mentioned
Grounds for refusal of the consumer's claim	▪ Insufficient proof ▪ Ill-founded or unfounded grounds ▪ No grounds (prescription, no summons, etc.)
Absence of one of the parties	▪ Absence of the consumer ▪ Absence of the contractor
Comments	Consumer's total gain, precision on another allegation or recourse or ground for refusal, amount of damage judged higher than $7,000, etc.

Here are some explanations regarding the choice of variables and their value.

For example, in a dispute, the consumer may adopt three different stances: claimant, defendant or counterclaimant[167], distinctions that, notably, allow for the following:

Distinguish the consumer's solely defensive attitude from that of the party who, despite not having brought the action before court, also intends to make a claim;
Refine the cost assessment of the action before court. We note that in Québec, citizens incur variable legal fees depending on the amount in dispute and the position adopted: if it is somewhat more expensive to enter a claim than a counterclaim, one must include additional fees when presenting a counterclaim.[168]

[167] Sometimes, the case becomes more complex and the consumer can become the counterclaimant. However, this hypothesis is rare and therefore, it was not useful to include it in this study.
[168] For example, in 2013, for a claim under $1,000, the consumer had to pay $73.75 to make a claim, $62 for a court challenge and if he intends to present a counterclaim, the consumer has to add $62 to his challenge fee, which adds up to $124.

The four allegations we have selected as variables are those most often cited by consumers. They can be cumulated. The variable "No allegation" was included and the nature of the other allegations was added in the "Comments" section. The frequency of each allegation was too low to be included in the statistical tests.[169]

The elements of proof presented by parties were also identified using the case law fact sheets. We were particularly interested in knowing the consumers' means of proof and assessing their efficiency, but the presence of the contractors' expertise also seemed important, considering its possible effect on the consumer's chances of success. It was also interesting to learn if expertise is a means of proof often used by one party or the other, or both.

Three main types of recourse are used by consumers, and are represented in the variables we have selected. There again, one variable "other recourses" was included in order to document less frequent situations.

Adhering to the study's objectives it was interesting to see what impact the *Loi sur la protection du consommateur* could have on the outcome of the dispute. During the codification of data, in a significant number of minutes we observed no reference to the legislation at all. A specific variable was thus introduced to take account of the importance of this observation.

As for the consumers' lack of success, it was important to verify if it was due to a lack of proof or the rejection of invoked arguments. Other grounds for refusal were particularly relevant, but their few occurrences led us to group them as a separate variable.

Finally, it seemed necessary to identify cases were one of the parties was absent. In fact, we wanted to verify the hypothesis if this criterion is a determinant in the outcome of the decision: the absence of the consumer and contractor were thus codified.

4.1.3.2. Variable General Characteristics

We chose to work with dichotomous and categorical variables; each variable represents a category and can take only two values, most often depending on its presence or absence in the decision. In this case, it is important to note that its "absence" can only be analyzed in a relative manner and may signify two things: the element to which the variable refers does not figure in the dispute under study or the element was not documented in the minutes of the decision.

In fact, some minutes were particularly brief and provided no clarification as to the nature of the elements of proof presented, the context of the conflict or the basis for the decision. Obviously, this lack of data does not mean that no element of proof or context was presented before court, and that the judge did not base his decision on existing law.

Because of their nature, most variables present cumulative choices[170] (consumer's allegations, means of proof, invoked recourse, grounds for refusal of the consumer's claim or legislation).

However, there is one exception relating to the "No rule mentioned" variable, since it is deducted from the absence of the two precious variables, "LPC" and "Civil Code or other regulation". Also, "Consumer's situation" and "Consumer's success" present exclusive choices. The success of the

[169] This is due to the dispersion of results, which makes it more difficult to establish consistent and significant links.

[170] The consumer's and contractor's absence are, in contrast, mutually exclusive because there can be no trial if both parties do not attend the hearing.

consumer's claim or its refusal represent nonetheless a specific variable that calls for several clarifications.

4.1.3.3. The Consumer's Success, a Dependent Variable

The variables collected are all independent, except the consumer's success, which constitutes the dependent variable of the study. This variable is also dichotomous and can have the value "yes" or "no", which is evidently mutually exclusive.

It was first decided to distribute results on a more precise scale, but this option was not adopted in the end, since it involved a value judgment on a case-by-case basis, which lacked thoroughness. In fact, if we had desired to measure the degree of the consumer's success by comparing the amounts obtained by parties with the amounts requested in their claims, taking into account the legal position of the consumer in the dispute (claimant, defendant or counterclaimant), the success of the consumer would have depended on several parameters, and some of these cannot be established with precision:

To which degree can the consumer's success, who obtains the total amount under claim while the other party presents only a counterclaim, be comparable to the situation where the consumer (counterclaimant) obtains the total amount under claim in addition to disallowing the initial claim of the other party?
How can we review situations where one party receives a portion of its claim equivalent to the amount that the other party agrees to reimburse? What distinction should we make between a situation where a party receives a portion of his claim while the other challenges the total amount requested?

Finally, we chose to broadly interpret the consumer's success. We judged that the consumer succeeded when he, at least partially, had success in winning his case. The different hypotheses are presented in Table 6 below:

Table 6: Evaluation Criteria of the Consumer's Success

CONSUMER'S SITUATION	CONSUMER'S SUCCESS	REFUSAL OF CONSUMER'S CLAIM
CLAIMANT	The **consumer** obtains the **full amount or part of the amount** under claim.	The **consumer** obtains **nothing**.
DEFENDANT	The **contractor's claim** is **reduced** by the **means** invoked by the **consumer**.	The **contractor** obtains the **full amount** under claim. **OR** The **reduction** of the **contractor's claim** is not **due to** the **consumer's defense.**
COUNTERCLAIMANT	The **consumer** obtains the **full amount or part of the amount** of his counterclaim. **AND/OR** The **contractor's claim** is **reduced** by the **means** invoked by the **consumer.**	The **consumer** obtains **nothing AND** the **contractor** obtains **the full amount** under claim. **OR** The **consumer** obtains **nothing AND** the reduction of the **contractor's claim** is not **due to** the **consumer's defense.**

This approach shows the consumer's success at its best. However, one must put these results into perspective by comparing the consumer's success rate to the contractor's adopting the same method. That being said, the selected approach has several benefits worthy of mention.

- It prevents us from making value judgments regarding the parties' behavior (the amount requested was it deliberately set too high? Did a party knowingly invoke unfounded grounds?).
- It avoids the multiplication of formulas in light of the specific data of each case as well as repetitive adjustments permitting integration in very precise situations.
- It integrates a factor other than the amount in the determination of success: the consumer's capacity to influence the decision in his favor by presenting arguments or convincing means of proof.
- Finally, and most importantly, this process is coherent with the perspective selected for the purposes of this study: the consumer's perspective. Here, the main goal is not to compare performances of either party, but to learn more about the factors, which enable consumers to at least partially win their case before the Small Claims court.

4.1.3.4. Double Level of Result Analysis

The data compiled in the analysis grid were subject to a simple descriptive analysis aiming to present the study's main observations, as well as an exploratory analysis to verify the nature of links which could be established between certain variables, thus providing answers to the questions raised in the present study.

The simple descriptive analysis served to establish an average level of consumer success and to assess the prevalence of each variable in order to identify, for example, the means of proof or the recourses that are most often used by consumers.

Because of the low prevalence of certain data, we were not able to obtain conclusive quantitative results. Some elements were therefore subjected to a qualitative study to add clarification to the analysis. Notably, this step permitted to elaborate a more exhaustive list of the consumers' allegations or of the grounds for refusal of their claim.

Two methods of explanatory analysis were retained: Pearson's chi-square test (X^2) and logistic regression. On one hand, using the X^2 test, one can assess the association between categorical variables. One can determine the significance of the association, if any, by reviewing the distribution of decisions in the contingency table. On the other hand, the logistic regression allows identifying the best explanatory variables in order to predict the probability of the consumer's success in his dispute with the contractor.

4.2. Overview of Construction Disputes Heard by the Québec Small Claims Court in 2011

4.2.1. The High Success Rate of Consumers: a Data Requiring Cautious Interpretation

According to the criteria selected to establish the consumer's success or failure, the latter succeeds in 66% of cases. However, this statement needs to be clarified and qualified.

The method selected to assess the consumer's success shows this success in the most favorable light, while, on the other hand, failure is considered in a restrictive way. We take note that the consumer's claim is only refused in the following cases:

As claimant, he obtained nothing;
As defendant, when the other party received the total amount of his claim or the reduction of the amount under claim is not due to the means of defense invoked by the consumer;
As counterclaimant, when the consumer did not manage to reduce the contractor's claim AND as claimant, he obtained nothing.

This methodological choice sometimes led to the overvaluation of the consumer's success, for example, when the consumer only managed to reduce the amount claimed by the contractor by a paltry amount.[171] However, it is very difficult to reflect all these observable subtleties and also to take into account all the strategies that either of the parties adopts in determining their degree of success.

- A consumer who decides to show his dissatisfaction with the quality of part of the work executed may well chose to ignore the whole amount of the invoice and remain passive, waiting to be summoned eventually. In this type of scenario, the consumer does not necessarily look for full exemption, but a mere reduction of his obligations and may be content with a small reduction of the invoice.
- Some consumers may also be knowingly tempted to claim an amount higher than the amount due (*overclaiming*). Here again, the fact that they receive only part of the requested amount can hardly indiscriminately be considered as lack of success.

[171] For example, *Lafontaine v. Gaulin*, 2011 QCCQ 27 or *Dénommé v. Wu*, 2011 QCCQ 5833.

To draw a more accurate picture of the situation, we also included cases where the consumer obtains the full amount under claim. For example:

As claimant, when the consumer obtains the full amount of this claim;
As defendant, when he obtains complete rejection of the contractor's claim;
As counterclaimant, when he obtains complete rejection of the contractor's claim AND he obtains the full amount of this claim.

Table 7: Consumer's Total Gain, Partial Success or Lack of Success

Rate of success	Frequency	Percentage
Total gain	53	17.73%
Partial success	144	48.16%
Lack of success	102	34.11%

However, disputes in which the consumer obtains partial success may just as well be considered as partial success for the contractor. The contractor has total gain when the consumer fails. We can collect this data to draw a more accurate picture of the consumers' and contractors' relative success before the Small Claims court. This data shows that the contractor is generally more successful than the consumer. The following table presents the observed imbalance between the success of consumers and contractors.

Table 8: Better Success Rates for Contractors

Decision outcome	Consumer	Contractor
Total gain	17.73%	34.11%[172]
Partial success	48.16%	48.16%
Lack of success	65.89%	82.27%

Later in reviewing these results we will discuss possible reasons for this difference.

4.2.2. The Choice between Claiming and/or Defending and its Consequences

The review of the consumer's position in the disputes under study reveal that, in most cases, it is the consumer who brings the matter before the Small Claims court, but that this strategy is not the only worthy option.

4.2.2.1. Consumers Mostly Present Small Claims.

The compilation of study data reveals that consumers most often instigate disputes: they are the claimants in 62% of cases.

Table 9: Consumer's Position in Disputes before the Small Claims Court

Consumer's position	Frequency	Percentage
Claimant	185	61.87%
Sole defendant	75	25.08%
Counterclaimant	39	13.04%

This first observation departs from the more general observations from the literature, where one reads that Small Claims courts are mostly used by companies rather than individuals.[173] In the

[172] The contractor's total gain is equivalent to the consumer's lack of success.
[173] See section of the report on the presentation of Canadian Small Claims courts.

field of residential construction, it seems, on the contrary, that debt collection by contractors is less frequent than consumer claims.

Table 10: Consumers' Slight Tendency to Counterclaim

Consumer's position	Frequency	Percentage
Defendant	114	38.13%
As sole defendant	*75*	*65.79%*
As counterclaimant	*39*	*34.21%*

In addition, when they are summoned, consumers tend to defend themselves rather than present a counterclaim: just over a third of defendant's cases include a counterclaim (34%).

4.2.2.2. Claimant or Counterclaimant – Comparable Success Rates

By comparing the consumers' success rates in light of their deposition, one discovers at first that the claimant's deposition favors the consumer: as a claimant, the latter wins his case 73% of the time, while as a defendant, then only in 54% of cases. Yet, when a distinction is made between the simple defense and the defense with counterclaim, it becomes apparent that the consumer-defendant and the consumer-counterclaimant ultimately find themselves in a position just as favorable as the consumer-claimant: the consumer-defendant and the counterclaimant have a success rate of 79%[174]. Therefore, even if this strategy involves additional fees for the consumer[175], it seems to bear fruit.

4.2.3. Major Grounds for Refusal of Consumers' Claims

4.2.3.1. Lack of Proof, First Ground for Refusal

Consumers fail for two main reasons: they are not able to prove their allegations or the grounds they invoked are ill founded.[176] To a lesser degree, consumers face procedural limitations such as the prescription period, the lack of summons or the contractor's bankruptcy. Table 11 presents the frequency of each of these grounds.

Table 11: Grounds of Refusal of Consumers' Claims

Grounds for refusal	Frequency[177]	Percentage
Insufficient proof	56	18.73%
Ill-founded ground	31	10.37%
Consumer's absence	8	2.68%
Prescription period	6	2.00%
Lack of summons	4	1.34%
Contractor's bankruptcy	1	0.34%

[174] In addition, the application of a logistic regression model revealed that the situation of the sole defendant was significantly different from the two other observables situations.

[175] As a reminder, the fees vary according to the procedure; thus, for a natural person, it costs between $74 and $167 to take an action before court; a court challenge costs between $62 and $256; and for a counterclaim, one must add from $62 to 81$ to the cost of the court challenge.

[176] For example, it can be the absence of legal relationship between parties; a challenge of professional fees set by regulations; consumer's manifest bad faith, etc.

[177] The sum of the "Frequency" column is superior to the observed number of consumer failures: 106 vs. 102. Two reasons explain this discrepancy: in two decisions, the judge highlights both the lack of proof and the unfounded grounds invoked (2011 QCCQ 15302 and 2011 QCCQ 5133); two other decisions have been classified as consumer success cases and even though the impact of consumers' arguments was modest, the judge also emphasized the reasons for their meagre success (see note 171).

Sometimes, the decision indicates explicitly that the lack of success is due to the consumer's absence, an observation that led us to identify all decisions rendered in the absence of one of the parties.

4.2.3.2. Absence from Court, a Losing Strategy

All in all, it is relatively rare that one of the parties is absent from the hearing. However, contractors tend to be absent a lot more often than consumers: 11% vs. 3%. Not surprisingly, parties are more likely to not attend court as defendants than as claimants.[178]

Table 12: Absence from Court

Absence from court	Frequency	Percentage	Consumer's success rate
Consumer	9	3.01%	0%
Contractor	34	11.37%	91.18%

Absence from court is a very bad strategy: while it systematically leads to a negative outcome for the consumer, it is not the case for the contractor. In the three rulings where the consumer failed despite the contractor's absence, the following grounds are identified: total lack of proof presented by the consumer[179], legal impossibility to reduce the price of a fixed-price contract[180] and a consumer's unsuccessful attempts to duplicate debts.[181] Those are very specific cases where the lack of success of the consumer's claim is easy to justify.

4.2.4. Poorly Executed Work: Main Consumer Grievance

In the vast majority of cases, consumers complain of poor execution of the work (more than 60%). Next come the following allegations: the price of the amount claimed, indirect damage caused during the execution of the work[182] and the contractor's abandonment of the work.

Throughout the numerous particular cases, other types of allegations are invoked, such as the illegality of the contract (absence of a contractor's license delivered by the Régie du bâtiment or of an itinerant merchant's license delivered by the Consumer Protection Bureau), absence of a contractual relationship between the consumer and the contractor, the uselessness of the work executed and the total absence of work executed by the contractor. The frequency of each of these "other allegations" is, however, marginal.

[178] Consumers are claimants in 7 decisions out of 9 (in almost 78% of cases) and contractors are claimants in 29 decisions out of 34 (in more than 85% of cases).
[179] *Drapeau c. Firme plomberie Ecco-tech inc.*, 2011 QCCQ 2994.
[180] *Cantin c. Gaudreau*, 2011 QCCQ 2473.
[181] *Desrochers c. Emli Construction inc.*, 2011 QCCQ 11662.
[182] For example, water leaks in an apartment due to plumbing work executed in the apartment above: *Lafortune c. Plomberie Ren-ga JQ 0059*, 2011 QCCQ 1407 or damage caused inside of a property after roof repairs: *Shand c. Sears Canada inc.*, 2011 QCCQ 2317.

Table 13: Consumers' Allegations and Corresponding Success Rate

Allegation	Frequency	Percentage	Success rate	Significant positive correlation (X^2)
Poorly executed work	185	61.87%	73.51%	Yes
Price requested too high	56	18.73%	58.93%	No
Other allegations	43	14.38%	67.44%	No
Indirect damage	32	10.70%	65.63%	No
Abandonment of work	31	10.37%	70.97%	No

Not only is the poor execution of work the most frequent allegation invoked, it is also in a significant manner the only allegation positively correlated to consumers' success. . The consumer who makes this allegation wins his case 74% of the time.

4.2.5. General Observations regarding the Recourses Invoked by Consumers

The recourses are stated for reference only. In fact, no truly relevant conclusion could be drawn for consumers based on this information.

Note that the claims presented before the Small Claims court can relate to the amount, the resolution, rescinding or cancellation of a contract.[183] Consumers ask for the following: 1) correction costs of work already executed or costs based on a quote (37%); 2) damages (41%); or 3) reduction or reimbursement of the invoice (21%). If all these recourses are positively linked to the consumers' success, the most significant link resides in the correction costs. Claims for damages seem to be the least favored.

The analysis reveals that when the consumer has undertaken several recourses, his chances of success increase. Table 14 shows the probabilities of winning one's case depending on the different possible recourse combinations.

Table 14: Effects of Recourse Combination

Scenario #	Invoice reduction/ reimbursement	Correction costs	Damage	Probability of consumer's success
1	0	0	0	44.38%
2	0	0	1	60.01%
3	0	1	0	75.69%
4	0	1	1	85.42%
5	1	0	0	74.84%
6	1	0	1	84.84%
7	1	1	0	92.07%
8	1	1	1	95.62%

4.2.6. Unexpected Observations regarding the Legal Basis of the Decisions

The observations relating to the legal basis of decisions are in many ways surprising: first of all, almost half of minutes provide no reference to legislation (44%); the *Loi sur la protection du consommateur* (LPC) is rarely invoked (only 4% of decisions). In contrast, the Civil Code is the

[183] Section 953, C.P.C.

most cited piece of legislation. Decisions rarely mention the Construction Code[184], the Building Act[185] or the regulations of certain professions.[186]

Table 15: Frequency of Invoked Legal Basis in Court

Legislation	Frequency	Percentage
LPC	12	4.01%
Civil Code civil or other regulations	163	54.52%
No regulation	132	44.15%

4.2.6.1. *Loi sur la protection du consommateur*: an Under-Utilized Tool

Unfortunately, this study's methodology does not allow to clearly distinguish different hypotheses, which could explain the feeble occurrence of the LPC in decisions. In fact, after reading the decisions under study, it is often impossible to determine if the consumer invoked the LPC or the judge, who, on his own initiative, bases his ruling on this act. Therefore, it is difficult to know if the LPC is, for example:

- Little known by consumers;
- Ignored by judges; and/or
- Unsuitable for the construction field.

In addition, our study does not allow us to determine if the rare use of the LPC is due to the field (construction) or to the court (Small Claims court). To clarify that point, we should conduct a comparative study with another field (for example, sales) and/or with another court (for example, the Court of Québec or the Superior Court).

This question should not be left unanswered, because it is obvious that the rare use of the LPC adversely affects consumers. In fact, they succeed in 92% of decisions where at least one section of the act is invoked, compared to 65% of cases where the act is not.

Regardless of the explanation for the rare use of the LPC in the construction field and/or before the Small Claims court, this phenomenon causes a problem. It is quite surprising to see that a legislative tool created specifically to protect consumers in their dealings with professionals is not used more often. In addition, while our study includes disputes regarding excavation and other work excluded from the scope of application of the act[187], most decisions in the sample do not fall under the field excluded. Therefore, this factor cannot, in itself, explain the very low occurrence of the *Loi sur la protection du consommateur*.

The analysis of the LPC dispositions used in the very few decisions where they are invoked reveals, notably, that they are varied and that they fall under several different sections of the act. Thus, despite the limitations of the application of the LPC in the construction field, the act applies in numerous situations. The section on warranties is the most frequently invoked.

[184] R.R.Q. c. B-1.1, r 2.
[185] L.R.Q. c. B-1.1.
[186] For example, in *Aubry c. Brunet, Lebel, Léger, 2011 QCCQ 4460*, the ruling refers to the Regulation respecting standards of practice relative to staking and layout, L.R.Q. c. A-23, r.8.1.1.
[187] Section 6 of the *Loi sur la protection du consommateur*, L.R.Q., c P-40.1 (hereafter LPC); see section of the report on the application of the *Loi sur la protection du consommateur* in the construction field.

Table 16: Sections of the *Loi sur la protection du consommateur* Invoked in Decisions under Study

LPC Section	Field	Subject	Occurrence
8	General provisions	When his obligation is excessive, harsh or unconscionable	1
16	General provisions	Obligation to deliver the goods or to perform the service	2
38	Warranties	Goods durable in normal use for a reasonable length of time	3
40	Warranties	Goods or services must conform to the contract	2
41	Warranties	Goods or services must conform to the statements or advertisements	1
42	Warranties	A written or verbal statement respecting goods or services	1
43	Warranties	A binding warranty for the merchant or manufacturer	1
58	Itinerant merchants	Obligatory clauses	2
182	Repair of household appliances	Definitions	1
183	Repair of household appliances	Before the repairs, the merchant must give a written estimate	1
185	Repair of household appliances	Bill's obligatory clauses	1
219	Business practices	False or misleading representations are prohibited	1
228	Business practices	Failure to mention an important fact is prohibited	2
272	Civil recourses	List of recourses	3
321	Permits	List of mandatory permits	2

4.2.6.2. Québec Civil Code: What to Remember from its Adverse Effect on the Consumer's Success

The statistical study brings another interesting glance – and surprisingly so – on the effect of legislation on the consumers' success rate. We found that when the LPC is invoked, the consumers' success rate is very high (92%). The consumers' success rate is also superior to the average in absence of any piece of legislation (72%). In contrast, consumers have a better rate of success when the Civil Code is not invoked (73%) than when it is (60%).

Table 17: Invoked Legislation and Consumers' Success Rate

Legislation	Success rate in presence of the variable	Success rate in absence of the variable
LPC	91.67%	64.81%
Civil Code or other rules	60.12%	72.79%
No regulation	71.97%	61.08%

This last observation is reinforced by another result: taken alone, each variable seems to be linked to the consumer's success (positively for the LPC and the absence of regulation, and negatively for the Civil Code), but when variables are combined, only the negative impact of the "Civil Code or other regulations" is significant. In other words, it is clear that the consumer has a greater chance of losing his case when the Civil Code is mentioned in the minutes of the rulings.

This surprising result led us to test the following hypothesis: do judges have the tendency to base their decision on applicable law when the consumer's recourse is dismissed? To verify this hypothesis, we reviewed attentively the grounds for refusal of consumers' cases, and particularly the variable "other grounds", including notably the prescription period and the absence of summons.

When one of these other grounds is invoked, the Civil Code is mentioned in almost 70% of cases.[188] Therefore, we chose to verify the nature of the relationship between this variable (Civil Code) and the consumers' success, while excluding decisions where "other grounds" were invoked as grounds for refusal. The correlation was confirmed, but the degree of its significance was reduced.

4.2.7. Nature and Value of the Elements of Proof

It is useful to remind here that we were mostly interested in the influence of the elements of proof presented by consumers, but also in the influence of the contractor's second opinion. Table 18 presents the frequency of the different elements presented.[189]

Table 18: Different Elements of Proof Presented

Proof	Frequency	Percentage
Contractual documents	151	50.50%
Consumer's testimony	151	50.50%
Mail	96	32.11%
Consumer's photos and videos	60	20.07%
Consumer's expertise	48	16.05%
Lay witness (for the consumer)	23	7.69%
Contractor's expertise	14	4.68%

The most frequent elements of proof presented are contractual documents, consumers' testimonies and mail. One also notes that contractors are far less likely to bring forth expert evidence than consumers: only 14 decisions (less than 5%) refer to expert evidence provided by the contractor, while the consumer presents expert evidence in 16% of cases.

From a more quantitative perspective, consumers generally present one to two elements of proof, and rarely more than three among the elements of proof under study. However, the number of elements of proof presented seems to have no effect on consumers' success[190]: burdening a file unnecessarily does not increase one's chances of winning a case.

On the flip side, we found it more useful to study each means of proof to determine if some of them had more effect than others on the outcome of the decision.

4.2.7.1. Expertise and Photographic Evidence, the Most Efficient Means of Proof

In our population analysis, two types of elements of proof are in a significant way positively linked to consumers' success: the technical expertise provided by the consumer and the

[188] The Civil Code is invoked in 13 out of 19 decisions implicating "other grounds" for refusal of the consumer's claim.

[189] As a reminder, the decision content does not always permit to identify which elements of proof were presented in court. Thus, the observations must be nuanced in light of this limitation, which is inherent to the study validation.

[190] We observed a difference, not at the level of the number of elements of proof presented, but in the presence or absence of means of proof.

production of photos or videos. In contrast, the expertise presented by the contractor has a negative effect on the consumers' chances of success. The consumer has every interest to use these means of proof.

4.2.7.2. Context of Use of the Different Means of Proof

The relative frequency of each means of proof is, in essence, similar regardless of the consumers' allegations: contractual proof, consumer's testimony and mail exchange remain the most invoked elements of proof.

Table 19: Frequency of Elements of Proof Depending on the Allegations Invoked

	Poorly executed work	Abandonment of work	Price requested too high	Indirect damage	Other allegations
Contractual documents	96	23	33	11	19
Consumer's testimony	87	14	38	16	28
Mail	65	11	15	12	12
Consumer's photos and videos	50	4	5	8	3
Consumer's expertise	47	3	0	5	2
Lay witness (for the consumer)	16	2	5	2	2
Contractor's expertise	14	1	0	0	1

Nevertheless, we found that photographic and expert evidence are used in nearly all disputes regarding poorly executed work (Table 20).

Table 20: Photographic and Expert Evidence used in Disputes regarding Poorly Executed Work

	Frequency	Poorly executed work	Percentage
Photos and videos	60	50	83.33%
Consumer's expertise	48	47	97.92%
Contractor's expertise	14	14	100%

These observations concur with another finding: the targeted elements of proof are most often presented in a scenario where the consumer is the claimant, and the contractor, the defendant. The recourse to expert evidence is thus part of the consumers' offensive strategy and contractors' defensive strategy.[191]

4.2.7.3. The Cumulative Effect of Elements of Proof on the Consumers' Success

One of the most significant results observed in terms of proof relates to the cumulative effect of elements of proof whose correlation with the consumer's success was established: the consumer's or contractor's expertise and the production of photos or videos. The following table presents these results.

[191] It is apt to clarify that the existence of a significant link could not be established between the position of the consumer and the contractor's expertise, while a link was established between the consumer's expertise and the presentation of photos or videos. The rare use of expertise by the contractor partly explains this finding.

Table 21: Cumulative Effect of Elements of Proof having the Greatest Influence on the Consumers' Success

Scenario #	Consumer's expertise	Photos/videos	Contractor's expertise	Probability of consumer's success
1	0	0	0	60.48%
2	0	0	1	22.05%
3	0	1	0	80.44%
4	0	1	1	43.19%
5	1	0	0	81.86%
6	1	0	1	45.47%
7	1	1	0	92.38%
8	1	1	1	69.15%

Note that the consumers' average success rate is 66%. This rate falls to 60% when consumers present no expert or photographic evidence (scenario #1). Worse, if the contractor presents expert evidence in such a case, the probability of the consumer's success falls to 22%.

Assessed independently, the expert and photographic evidence presented by the consumer raise his chances of winning his case from 80% to 82% (scenarios #3 and #5). Together, these two means of proof almost systematically lead to the consumer's success (scenario #7).

The most striking result is, however, the negative effect of the contractor's expert evidence on the consumer: this element causes the consumer's chances of success to drop by almost one half (comparison of scenarios #3, #4, #5 and #6). The consumer can only counter the effect of the expert evidence presented by the contractor by accumulating expert and photographic evidence (scenario #8).

Finally, these results show that an "expertise combat" adversely affects the consumer: in fact, the latter has success in only 45% of these cases (scenario #6).

4.3. Discussion: Food for Thought to Better Guide Consumers

4.3.1. Rather Unfavorable Asymmetries for Consumers

Several cues reveal that dealings between consumers and contractors are not always fair and mostly favor contractors.

In fact, in construction disputes heard by the Small Claims court in 2011, the contractors' success rate was 16.5% higher than the consumers' success rate (see Table 8).

Several hypotheses can be formulated to explain this result. The study does not permit to verify these hypotheses, but they constitute paths of research and reflection we should explore.

First, we could formulate the hypothesis that the consumers' cases are simply less solid than those of the contractors' and their claims are less often justified. This explanation is however not plausible, considering the time and monetary investment required to bring a complaint before court, even before the Small Claims court. The hypothesis of a significant number of frivolous claims presented by consumers was subsequently dismissed.

Second, other elements of explication can be brought forth:

- The contractor's debt is a monetary claim and is most often cash and certain. The price is set when signing the contract, if it is a fixed-price contract, or, in most other cases,

depending on the number of hours required and costs incurred, based on a rate established by parties in advance. The consumer's debt, in contrast, is a non-monetary transaction whose value can be difficult to calculate. Consumer claims are more subject to interpretation and are susceptible of being reassessed by the court. This is maybe one of the reasons explaining the low percentage of decisions where the consumer obtains total success.

- The consumer has to prove that the contractor did not perform the work under contract and that his losses are due to this contractual breach. It is quite a heavy burden and the means to overcome it – by way of presenting elements of proof or argumentation – are more difficult to implement than those of the contractor's in proving his own claim. Most often, the contractor bases his case on the contractual documents, while the consumer needs more elements of proof to make his case. In order to balance the power relationship between parties by easing the burden on the consumer, civil law and consumer law traditionally use the warranty technique (For example, the quality and sustainability of sold property (section 38, LPC)[192], the presumption of knowledge of the defect in cases of malfunction or premature deterioration of the property (section 1729, C.C.Q.), or the warranty for construction defects in cases of loss of the work in the contract (section 2118, C.C.Q). The consumer facing a construction problem has little access to these warranties, which are rather poorly adapted to his situation: the two first warranties mentioned specifically refer to property and not, in a broad sense, to work or services while the construction defect implicates the loss of work and thus does not refer to malfunction or deterioration. If consumers were better informed on the possible application of warranties governed by the LPC and the Civil Code, they could probably take advantage of these warranties in a greater number of cases.

- Also, the consumers might not be as well prepared as the contractors in attending court. They are less familiar with their rights and obligations and are generally not frequent users of the judiciary system.

- Finally, we cannot depart from the possibility that courts are more likely to give more weight to the arguments of an experienced contractor than to those of a neophyte consumer. It is usually easier for the contractor than the consumer to find technical arguments establishing if the work executed by the contractor is at fault and if the consumer's losses, if any, result from poorly executed work. The possible existence of this bias must also be considered in relation to one of the most striking observations of this study, and which relates to the effects of the technical expertise presented by the contractor. As we have seen, the contractor tends to win the "expertise combat" (see Table 21).

These observations highlight with special sharpness the importance for consumers to make a strong case and to make sure that all chances are on their side. To this regard, the study's results revealed certain pitfalls.

4.3.2. Some Pitfalls to Avoid

The results we have obtained show that the elements of proof most frequently presented by consumers in court are not those impacting significantly their chances of winning their case. Thus, their claim is mainly based on contractual proof, mail exchange and/or their own testimony, while each of these elements of proof considered independently represents an equal

[192] This warranty is used in certain decisions, as shows Table 16.

chance of success and failure. Photographic evidence, in contrast, must be privileged. It is far less costly than expert evidence and has an almost equivalent success rate for the consumer. However, photographic evidence was only indicated in one out of five decisions.

We also found that consumers rarely make a counterclaim when they are the defending party. The strategy of the sole defense is not advantageous for them, since they fail in 60% of cases. In contrast, one third of consumers-defendants who presented a counterclaim succeeded: their success rate is near 80%. In other words, it seems that the situation of the defendant/counterclaimant is not more unfavorable than the claimant's situation. These observations encourage us to privilege a passive/reactive strategy for consumers in appropriate cases.

Most often, we observed that an unsatisfied consumer has every interest of refusing to pay the contractor, leaving him the initiative to take his client to court. Before court, the consumer can make his allegations in a counterclaim. This strategy has many advantages. By refusing to pay, the consumer clearly expresses his dissatisfaction, while a client who accepts without reservation retains his right to pursue in cases of non-apparent defects or non-apparent poor workmanship (section 2113, C.C.Q.). The Civil Code explicitly authorizes the consumer to retain part of the price in such a case (section 2111, C.C.Q.).[193]

Moreover, even if the consumer wins his claim, he needs to obtain the enforcement of a judgment. Unfortunately, this last phase of dispute settlement is often problematic, to the point where the breach of decisions is considered as one of the main defaults of Small Claims courts.[194] By refusing to pay the contractor a sufficient amount to cover the costs related to the inexecution, the consumer protects himself from this risk.

In another vein, we also found that consumer claims were sometimes dismissed for reasons that could have easily been avoided. It is the case of the closing of the prescription period or the lack of knowledge of the regulations governing summons.[195] Clearly, these situations are relatively rare in our body of decisions, but they reflect the lack of knowledge, which adds to other mistakes of consumers in their dealings with contractors. These mistakes have negative consequences when the dispute is brought before court: misinterpretation of the fixed-price contract's implications, cash payments without receipt, the fact of not having verified the contractor's license or permit, etc. Consumers seem to lack information in these areas.

4.3.3. Scope Limitations of the Analysis: Review of the Subject under Study

Despite the efforts to identify the tools to efficiently assist consumers in their understanding of the law and in the preparation of their cases before the Small Claims court, we have encountered inherent limitations regarding the subject under study, the latter are worthy of mention.

The study of the Small Claims courts' rulings highlights a certain level of lack of rigor in the preparation of minutes. Thus, some minutes are incomplete and provide no clarity as to the

[193] For examples of decisions on these matters, see: *Duchemin c. 2973-0108 Québec inc. (MES Shervic enr./MES Mini-excavation)*, 2011 QCCQ 5133; *Roy (Intérieur Jean-Claude Roy) c. Paquet*, 2011 QCCQ 5653; *Plomberie Jean Montpellier & Fils inc. c. Morin*, 2011 QCCQ 2185.

[194] McGill (2011), supra (note 22). See also: Lafond, Pierre-Claude (1996), supra (note 63), p. 75 or Patry *and al*. (2009), supra (note 9).

[195] The absence of summons is fatal for the consumer's case, and badly written summons can also limit his recourses: *CEC Ener-tech c. Dubé*, 2011 QCCQ 6915; *Lavigne c. Construction M. Borduas*, 2011 QCCQ 8208; *Lee c. Plancher solutions Montréal inc.*, 2011 QCCQ 6778.

grounds, elements of proof and legal basis for the decision[196]; most often, it is difficult or even impossible to clearly establish if it the parties or the judge invoked the point of law; in nearly half of the studied decisions, the legal basis are not explicitly indicated; finally, it is very difficult to assess the legal fees incurred by parties (Were witnesses served a notice to attend the hearing? Did the expert attend the hearing?) or to identify precisely the ones subject to reimbursement.[197]

These concerns limited the possibility to work with substantial subsamples and sometimes therefore, to obtain unequivocal statistical results. In this context, it is only possible to invoke two hypotheses in respect to the relevant legislation or the higher success rate of contractors. Other research methodologies should thus be associated to the one we selected to draw a more complete portrait of the situation: the studies conducted on court personnel[198] or directly on their users[199], for example, have already proven their reliability, and these methods could be reproduced and adapted to complete the results of the present study.

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[196] For example, *Garant c. Abusca Concrete Design Inc.*, 2011 QCCQ 6718.
[197] For a differential process of the reimbursement of expert professional fees, see, for example: *Duperry c. Toitures Nadeau & Morin inc.,* 2011 QCCQ 1280 or *Perreault c. Yves Fontaine & Fils inc.*, 2011 QCCQ 7673 authorizing the reimbursement, and for a decision to the contrary: *Legault c. Cimentiers RG inc.*, 2011 QCCQ 7891.
[198] Patry et al. (2009), supra (note 9).
[199] McGuire and Macdonald (1996), supra (note 18).

CONCLUSION AND RECOMMANDATIONS

The research conducted during this project shed a clarifying light on the consumers' use of the Small Claims courts when faced with a construction dispute. Furthermore, by seeking to place the empirical analysis of case law in a more theoretical context, we were also able to identify the significant elements of comparison between Canadian provinces.

This shows the diversity of orientations and privileged conceptions behind common principles and terms, particularly when comparing the two coexisting legal systems in Canada: Québec's civil law on one hand and common law in the remaining provinces on the other. These legal traditions shape not only the conception as the formalization of law, but also the judiciary institutions and their operating rules or as well as the conditions of access to law and to justice. Moreover, even if they adopt similar orientations and operating principles, each province has its own regulations, and some provinces are more motivated in certain fields: notably British-Columbia which seeks to innovate in terms of small claims through pilots and the multiplication of educational tools made accessible to the public.

As for Small Claims courts, their evolution in all provinces cannot be separated from the debates on access to justice. Meant to serve as gateways to the judiciary system for the ordinary citizen, these courts:

- Have the mandate to settle disputes whose monetary value is relatively low;
- Operate according to simplified rules of procedure to facilitate the citizens' understanding and access to these courts;
- Imply a lower than average financial engagement from its users;
- Encourage citizen action;
- Seem to aim to resolve a conflict rather than settle a dispute (by the development of alternative dispute resolution modes and rather consensual conflict resolution approaches).

The richness of the debate on access to justice, which involves, notably, concerns linked to access to justice and to law, inclines these courts to adopt new regulations that are often contradictory. The regular increase of monetary thresholds and thus of the financial weight of disputes prompts citizens to seek the services of professional legal counsels or lawyers to prepare their case, and even to represent them in court; this choice causes important cost increases for parties and can reinforce the asymmetries between users. However, to maintain a threshold that is too low unfairly restrains the access to Small Claims courts of consumers whose claims are superior to the amount established: these consumers must then abandon the judiciary recourse, lower their claim or take their action in a far more costly process by appearing before another court. Therefore, the compromises must be assessed with care.

Some provinces seem not to be particularly concerned by their Small Claims court, but others, in contrast, seek to put in place very elaborate systems: without surprise, such is the case of the provinces processing important volumes of cases each year (Ontario, British Columbia and Québec). These provinces adopted specific regulations for their courts, in support of targeted strategies: in British Columbia, the pilots implemented in certain agglomerations focus on preventive conflict resolution through funnel-like conciliation mechanisms (such as mediation,

settlement conference and pre-trial conference), whose mandate is to alleviate hearings and to accelerate procedures; in Ontario, the government addresses the question of the court users' status and of asymmetries between professionals and ordinary citizens by increasing the costs for frequent claimants – however, this strategy is contested. Finally, Québec's situation remains unique, keen to maintain certain principles through stricter regulation, such as the exclusion in principle of legal persons, the interdiction of legal representation in court and the absence of appeals. However, the latter province intends to reduce the disparity between Québec and fellow provinces by increasing the court's monetary threshold, which will nonetheless remain the lowest in the country.

The access to the judiciary system is not all, and court users must have access to the legal protection measures. By reviewing one category of disputes in particular, that of the construction field for example, one finds that there are many inadequacies. In fact, several legal regimes apply to these disputes and it can be rather difficult to determine with precision which ones apply, in which context and under which conditions. Moreover, and even if all provinces have adopted legislation to reinforce consumer protection, these measures are based on complex architectures, often interact with difficulty with the more classical regimes (from the common law or the Civil Code) and demand, if to be used correctly, technical gymnastics whose secrets are only known to legal experts.

In addition to the fact that common law is, by definition, hard to access for the ordinary citizen, the consumer protection acts in the provinces using this system do not offer all the necessary clarification for a consumer who wishes to appeal before the Small Claims court without the services of a specialist. The classifications established by these acts to identify the types of commercial transactions and to apply certain specificities are enough to discourage a consumer, even an informed one: the latter must be able to determine if his situation concerns a specific economic sector and/or corresponds to a specific agreement form (such as an executory or direct agreement); then, he must identify the rights and warrantees which can be invoked (taking into account the eventual architecture and exceptions) and possibly face conflict between applicable regimes. The fact that the construction field is not part of a prioritized economic sector does not even help a consumer in benefiting from an effective start.

Québec civil law, which provides a specific regime for business or service contracts, accessible through the Civil Code, is nevertheless no less questionable. While this regime has the benefit of establishing the main principles that govern the dealings between a contractor or a service provider and his client, it does not provide specific protection measures for the consumer, and this latter role is delegated to the *Loi sur la protection du consommateur* (LPC). However, this act, which constitutes the keystone of consumer law addresses the construction field in a very singular manner. It notably operates a convoluted artificial distinction between the concept of "construction" and the concepts of "repair, maintenance and improvement", excluding as a rule the former from its application scope. To understand the numerous nuances between these terms, one must consult case law, a complex process for a citizen not familiar with the legal discipline. Furthermore, through the game of complex formulations of the various sections of this act and its regulations or even, of this act and the Civil Code, one notes many exceptions (and even contradictions) in the applicable regulations, a challenging situation for a consumer preparing his case.

For example, one notes section 6.1 of the LPC, which reintroduces construction contracts in the application scope of the act's dispositions on business practices; sections 7 and 7.1 of the *Règlement d'application de la loi sur la protection du consommateur* (Regulation Respecting the Application of the Consumer Protection Act), which establishes exceptions to the definition of

what constitutes a contract entered into by an itinerant merchant for certain contracts in the field of home renovation; section 1384 of the C.C.Q., which proposes a different definition of the consumer contract than the one establishes by the LPC in regard to the concept of business.

The extensive methodological difficulties which had to be overcome in this research attest to the challenge for the consumer to find a judiciary solution: be it the unavailability of an important part of decisions regarding ordinary disputes before the Small Claims court in a common law province or of extensive research undertaken to understand the processing of construction disputes in the Québec legal context, one clearly sees the flagrant inadequacy of existing regulations and legal principles and their accessibility for the ordinary citizen.

Therefore, and despite the quality of educational and informative tools developed in some provinces to facilitate the access to Small Claims courts for consumers, one comes to the conclusion that, clearly, consumers would benefit from a more feasible access to the judiciary system, but in sum the access to law remains, in contrast, a thorny problem.

It was thus all the more interesting to focus on the processing of construction disputes before the Small Claims court by adopting the consumer's point of view. The results of the statistical analysis conducted on the Court of Québec case law confirm certain operational hypotheses, yet they are also surprising in other aspects.

Obviously, all the means of proof presented by consumers to support their arguments are not of equal value, and expertise remains a weapon of choice in the technical field of construction. Most often, the consumers' case is dismissed, regardless of their position in the dispute, because of insufficient proof. Logically, one notes that consumers before court are largely unsatisfied with the work executed by the contractor; in fact, and contrary to general observations on disputes brought before the Small Claims court, consumers are more often claimants than defendants.

Beyond the first observations, other more significant elements were updated. Despite the relatively high success rate, one notes that the observed asymmetries between parties mainly benefit contractors: not only do they have better success rates than consumers, but, on a level playing field, their elements of proof seem to have more weight: one notes that when both parties use the services of an expert, the consumer's chances of success are lower than the average success rate of the entire data sample.

Particularly, the analysis revealed that consumers do not always adopt the best strategies and some of their mistakes can be due to their unfamiliarity or misunderstanding of the applicable regulation:

- They sometimes make procedural mistakes that are seriously inappropriate or disabling: inadequately written summons or absence of summons; specific mention at time of payment ; non conformity with prescriptive delays, etc.;

- They do not always take fully advantage of their rights, notably in respect of possible payment reserve in the case of a claim linked to the quality of the work executed by the contractor (section 2111, C.C.Q.);

- They rarely make a counterclaim when they are summoned to attend a hearing, even if this position is clearly more favourable for their case than the simple defensive procedure;

- Unfortunately, they do not use the most efficient means of proof, such as expert or photographic evidence. Expert evidence can be costly, but photographic evidence can be presented inexpensively to confirm the poor execution of the work and resulting indirect damage, for example.

One last observation reinforces the feeling that there are inadequacies in applicable law: that is, the too rare use of the *Loi sur la protection du consommateur*. Subject to the inaccuracies in the decision minutes, it seems however rather clear that this act is rarely used in construction disputes brought before the Québec Small Claims court. This observation is particularly regrettable since the legislator's declared mandate is to regulate efficiently the transactions between a merchant and a consumer and to protect the latter party. The main hypotheses formulated during this study to better understand the situation are not encouraging: be it the malfunction of substantive law, the lack of interest or knowledge from judges regarding applicable regulations or the incomplete information available to citizens, there exists a real problem which needs to be resolved quickly, even urgently, to advance concrete answers regarding the questions raised here.

- Considering that this study encountered methodological challenges that limited the scope of data collection;
- Considering that this study has, however, brought to light several interesting hypotheses, including an extensive review to more fully understand the processing of constructing disputes brought before the Québec Small Claims court and to support consumers in their proceedings;
- Considering that the observed results draw a portrait of the situation in Québec, which should be compared to those of other Canadian provinces in identifying the best practices and eventually in reinforcing measures to protect consumers;
- Considering that other methodological approaches (interviews, study of decisions from court archives) have proved their worth and could bring answers to the questions raised by the present study;

The ACQC encourages the agencies and institutions engaged in research on topics addressed in its study (Small Claims courts, consumer law, construction and home renovation, etc.) to use and deepen an understanding of the results and observations presented in this report in order to enrich knowledge in the targeted areas.

- Considering that Canadian provinces seem dedicated to guarantee a more amenable access to justice for citizens, notably through judiciary institutions such as Small Claims courts;
- Considering that in certain provinces, promising mandates were adopted to facilitate the access to justice through innovative mechanisms or by developing efficacious information and education tools;
- Considering that, nevertheless, these efforts overlook an important dimension of access

to justice: that is to say, access to the law itself;

The ACQC recommends to all provincial governments to pursue their efforts by conducting an extensive assessment regarding the capacity of adopted measures to reinforce access to justice by implementing coherent strategies in respect to the objectives of the Small Claims courts;

The ACQC recommends to provincial governments more dedication to reform and improvement permitting easier access to law: multiplication of legal education instruments, simplification and harmonization of consumer protection regulation, development of clear terminology and use of "plain language".

- Considering that consumer law in Québec is complex in its application and subject to heterogeneous legal definitions affecting its scope of application;
- Considering that the outcome of construction and home renovation contracts was never regulated subsequent to the adoption of the *Loi sur la protection du consommateur*, thereby creating a regime structure of a confusing protection, unnecessarily complex and ineffective, which adversely affects consumers;
- Considering that there is not enough existing regulation to counter balance the power relationships between merchants and consumers in this field;
- Considering that disputes in this field represent almost 10% of cases processed annually by Small Claims courts and are one of the most important categories of consumer disputes;

The ACQC recommends the Gouvernement du Québec dedicate itself to resolve this issue through effective and clear legislation on the applicable protection measures in this concern.

The ACQC proposes the extension of classical warranties in the sales regime for work and services as defined in the Civil Code.

The ACQC proposes to create, entrenched in the *Loi sur la protection du consommateur*, a specific and harmonized protection regime for the construction and home renovation field, for example, similar to that of the automobile, motorcycle or credit regimes.

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