

COSTS AND FEES IN COMMON LAW CANADA AND QUEBEC

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Civil procedure in Canada, including the law of costs and fees, is largely provincial in origin and therefore varies from province to province. The provincial civil procedure (in the form of Rules of Civil Procedure (RCP) in the common law provinces and a Code of Civil Procedure (CCP) in Quebec) applies in the provincial and superior courts of each province. There is a Federal Court, with Federal Rules of Procedure, but neither the Federal Court nor the Federal Rules enjoy the level of prominence enjoyed by the U.S. Federal Courts and the U.S. Federal Rules of Civil Procedure.

The law relating to costs and fees varies from province to province but there are considerable similarities amongst the common law provinces. The law of Quebec shares some basic rules with the other provinces but Quebec law is the most distinctive of the Canadian provinces.

I. The Basic Rules: Who Pays?

1. All Canadian jurisdictions follow the ‘world rule’ that costs in principle are ‘in the cause’. The loser pays, subject to the discretion of the court.¹ This extends to both attorney fees and court costs, though they are separately determined. Court costs are recoverable as ‘disbursements’ made in the course of litigation by the successful party or his or her counsel. Attorney fees are recoverable as such, though the amount of recovery varies greatly between Quebec and the common law provinces. The ‘loser pays’ rule was received in Canada through reception of French and English law and rests on the traditional justification, that a successful party should not have to bear the cost of establishing their right against an unjust claim or defence. Some maintain that a further justification for the rule would be its deterrent effect on litigation, in the form of the down-side risk of having to cover costs of the other side in addition to one’s own costs.

2. While the rule is that the loser pays, application of the rule varies considerably. In Quebec the loser pays very little, since the tariff of costs payable is maintained at a very

¹ See, for example, Art. 477, CCP; Rule 57 (9), British Columbia *Rules of Court* (‘costs ...shall follow the event unless the court otherwise orders’). The rule may also be based on case law, as judicial practice in the exercise of the court’s discretion in awarding costs, stated statutorily in Ontario in s. 131 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. 43, as amended (‘... the costs... are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid’).

low level, making the Quebec situation closer to the ‘American’ rule that each side bears their own costs. This position may also reflect the historic French position that lawyer’s fees are not recoverable (*‘frais irrépétibles’*). In the common law provinces the winner will recover more than in Quebec, but the amount will vary depending on the level of costs fixed by the court, which may vary from full through substantial to only partial indemnity, and by any further element affecting the discretion of the court, e.g., abusive procedure in a winning cause. Costs awards may therefore fill an important disciplinary function. Further information on the determination of costs is found below in section IV.

3. Costs on appeal are fixed by the appellate court according to the same principles. The appellate court enjoys a wide discretion in fixing costs at its own level but also in adjusting costs awards made in the lower courts. The *Supreme Court Act*² thus provides in s. 47 that ‘The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.’ This provision is applicable across the entire jurisdiction of the Supreme Court of Canada, which is an appellate court in all matters of law and not only in matters of constitutional or Federal law. As a general rule it is said that a court of appeal which reverses a trial court decision will grant costs in the cause (as determined by the court of appeal) at both trial and appellate level, in the absence of circumstances justifying a different exercise of its discretion.³

4. Costs for the taking of evidence are assumed initially by the parties, and are recoverable as part of the eventual costs award. Experts are traditionally named and paid by the parties in all jurisdiction of Canada. Their fees are treated as disbursements and are recoverable as part of the costs award, subject to the discretion of the court. Costs of experts are a very significant part of the overall costs of litigation and in complex litigation may well run into the hundreds of thousands of dollars. Provisions now exist authorizing a court-appointed expert, in which case ‘the responsibility of the parties for payment of the remuneration of an expert shall be determined in the first instance by the judge.’⁴

5. A very high percentage of cases are settled, given the costs of a trial. Estimates given are often in the order of 95%. The parties may agree on costs and fees as part of the settlement. The nature of the agreement on costs and fees will vary depending on the circumstances and the relative bargaining position of the parties. In the absence of empirical evidence, the usual model may be that each side bears their own costs and fees. In particular circumstances a party may assume costs and/or fees of the other side.

Settlement offers are highly relevant to eventual costs orders. In general a party refusing a settlement offer will suffer costs consequences if the eventual judgment is more prejudicial to them than the settlement offer. For example, if a plaintiff refuses a defendant’s offer and then recovers less than the offer, the plaintiff will recover costs on a

² R.S.C. 1985, c. S-26.

³ G. Watson and P. Lantz, ‘Bringing Fairness to the Costs System – An Indemnity Scheme for the Costs of Successful Appeals and other Proceedings’ (1981) 19 Osgoode Hall L. J. 447 at 447.

⁴ Ontario RCP. 52.03(4).

partial indemnity basis up to the date of service of the defendant's offer and no costs thereafter, while the defendant will recover partial indemnity costs from the date of service of the defendant's offer. If a defendant refuses a plaintiff's offer and then is found liable for more than the amount of the offer, the defendant is liable for partial indemnity costs to the date of service of the offer and substantial indemnity costs thereafter. This solution is codified in Ontario in RCP 49 and is the object of case law in at least some other provinces, including Quebec.

II. Exceptions and Modifications

1. There are few if any statutory exceptions to the general rule. The situation is different from the U.S.A. where many statutes shift fees, given a basic U.S. rule that fees are not shifted. In Canada there is no need for fee-shifting statutes, and if fees should not be shifted in a particular case this is dealt with through exercise of the discretion of the court. There are cases where a court refuses to shift costs and fees where the matter in dispute is of constitutional or public importance and the plaintiff has lost, but these cases are exceptional and fall within the exercise of the court's discretion.

2. In at least one province (Ontario) mediation has become mandatory for case-managed cases (those of some complexity)(Ont. RCP 24.1) and cases involving estates or trusts (Ont. RCP 75.1). In such cases each side makes an equal contribution to the mediator's fees, which are fixed at a maximum of \$600 for one-half hour's preparation and three hours mediation (all figures \$Can, app. \$US .91). This can increase in steps where there are additional parties, to \$825 in cases involving five parties or more.

3. It is frequently the case that mortgages, or hypothèques in Quebec, contain a clause providing that debtors pay the costs of recovery against them in the event of default. A certain level of costs may be stipulated. Since such clauses reflect the general rule that costs are in the cause, they do not appear to have been found abusive or illegal.

4. Parties are allowed to represent themselves and because of the costs of litigation this has become a frequent occurrence, with estimates of up to 30% of cases now involving self-representing parties. This has become a concern of the judiciary given the adversarial nature of proceedings. Counsel is generally required only in cases of representation of a moral person or a person under a disability (see, e.g, CCP, art.61, Ont. RCP 7).

III. Encouragement or Discouragement of Litigation.

1. Most would agree that the process of shifting of costs and fees acts as a deterrent to litigation. This will depend on the extent of shifting but in the common law provinces in particular the down-side risk may be substantial. Counsel are ethically obliged to explain this risk in discussing the case with their client. The greatest deterrent is with respect to

litigation by out-of-province plaintiffs, who may be required in all provinces to post security for costs. Orders for posting of security for costs are made on motion and are in the discretion of the court, but are frequently made. Plaintiffs may generally avoid such an order only by showing that they have assets within the province which can satisfy a costs order, or that they are impecunious. Orders have required costs to be posted in amounts of over \$1M. See generally Ont. RCP 56, CCP art. 65. Security for costs has been challenged constitutionally in many provinces but has generally survived these challenges. The coming into force of the North American Free Trade Agreement (NAFTA) has had no effect on such provisions for security for costs in North America.

Given the cost of litigation, parties may ask for provisional or interim costs orders to be made, to allow them to finance their litigation. This is exceptionally granted, e.g., where the plaintiff could not afford the litigation, appeared to have a meritorious claim, and raised issues of public importance; *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003) 43 C.P.C. (5th) 1. The Quebec Court of Appeal recently refused such an order, however, on the ground that an action against a doctor with respect to a child born prematurely does not raise questions of public interest; *St. Arnaud c. C.L.* [2009] R.J.Q. 239.

2. Parties will provide a retainer to their counsel, frequently in the order of \$10,000 and this will be used for disbursements (including court filing costs, expert witnesses, etc.) and as an advance payment on counsel fees. This will be replenished on an ongoing basis and in extended litigation billing may be on a monthly basis. This has an unquestionable deterrent effect and leads to great pressure for law-firm financing or third-party financing of suits.

IV. The Determination of Costs and Fees.

1. Court costs are fixed by Regulation under the relevant statute of the court in question. Court costs will generally be lower for small claims cases but will usually be the same for other levels of provincially-administered courts, e.g, the Quebec (provincial) court and the Quebec Superior Court. Whether there is variation depending on the amount of the claim depends on the province. Variation in Quebec is set out in the *Tarif des frais judiciaires en matière civile et des droits de greffe*, and costs vary according to Six classes of litigation. Filing of an action may thus cost from \$56 to \$656 depending on the amount in question. In Ontario there is no variation and filing of an action costs a uniform amount of \$181. As mentioned above, these court costs are recoverable as disbursements under the rules for shifting of costs and fees.

2. Lawyers' fees are subject to market forces and there is no statutory or regulatory control of them. Empirically fees vary according to province, rural or urban environment, and large or small firm size. A recent survey (The Canadian Lawyer, June, 2009) p. 33 gave average hourly fees for a lawyer with 10 years experience of \$382 in Ontario and \$467 in the western provinces. In Ontario fees are said to range up to \$900 per hour. In Quebec a recent survey showed that only 2% of the profession was charging

more than \$500 per hour, with a further 1% at more than \$400 (Le Journal du Barreau du Québec, Mai, 2009, p. 32).

3. Costs which are to be shifted between the parties (including court costs, other allowable disbursements and counsel fees) may be fixed either by the presiding judge or by an assessment or 'taxing' officer (variously named). Traditionally the presiding judge would give the appropriate costs order (on which, see below), and the taxing officer would hear representations of the parties and fix the actual amount based on proof of the work done, usually in reliance on a fixed tariff of costs which would set out allowable items and rates for them. In recent years, probably because of the size of costs awards, both the awarding and the fixing of costs may be done by the trial judge, at his or her discretion. Appeal is possible both from an order of an assessment officer or from a costs order of a presiding judge, depending on usual criteria for appeal.

It is with respect to the nature of the costs order and the general scale of its amount that the greatest differences exist amongst the provinces. In general three models are discernible.

The first model is that of Quebec, where there is an established tariff of recoverable costs and fees but which has been (deliberately?) neglected, such that recoverable costs are very low. This removes much of the down-side risk of litigation, and there is a view that this is the main reason for the government's failure to revise the tariff. The Quebec Bar has officially and publicly protested against the lack of revision, but to no avail. Currently the *Tarif des honoraires judiciaires des avocats* allows, for example, for \$1000 in fees recoverable from the other side in the most expensive class of cases (over \$50,000) for obtaining a contested judgment on the merits, without regard to the length of the trial. Fifty (\$50) is allowed for each contested motion. Since recoverable fees are so low, there are a number of exceptions. Two are provided by the Tariff itself. Article 15 thus allows for a 'special honorarium' in an 'important' case. This provision has generated a large amount of case law but it is not the case that it has become a general means of subverting the low level of recoverable costs. In *J.T.I. MacDonald Corporation c. Procureur Général du Canada* [2009] R. J.Q. 261 Justice Nuss of the Quebec Court of Appeal stated that a requested sum of \$90,000 'far exceeds any amount previously granted as a special fee....This special fee is not meant to be a substitute for extra-judicial fees'. A further exception provided by the Tariff itself is found in art. 42, which provides that in cases valued at over \$100,000, a further honorarium of 1% on the amount exceeding \$100,000 is recoverable. In a case in which \$1M is recovered this would provide a further amount in fees of \$9,000. Given the obvious limits of the Tariff, efforts have been made to include lawyers' fees in recoverable damages but with only limited success. In *Viel c. Entreprises immobilières du terroir Ltée* [2002] R. J. Q. 1262 it was decided that such damages could be awarded only for abuse of process and not as simple compensation for the cost of recovering damages.

The second model is the traditional common law model, which prevails in some provinces outside of Ontario. Here there is a tariff of costs or fees, as in Quebec, which bears a closer relationship to market amounts, and the costs order made by the court will

be followed by taxation or verification of precise items before an assessor, a Master or a taxing officer. Depending on the frequency of revision of the Tariff, the recoverable costs here will be significant. They may be made more significant if the presiding judge orders not simply 'party and party' costs, as they are traditionally known, but 'solicitor-client' costs which are still higher. Party and party costs are usually estimated at 50-60% of lawyers' actual fees; solicitor-client costs will cover up to 90% of such fees. There is even a further category of 'solicitor-own client' fees which requires full compensation of the opposing side's counsel. The type of award varies on the presiding judge's appreciation of the conduct of the litigation. Solicitor-client costs are generally awarded only in cases of 'scandalous' or 'reprehensible' conduct on behalf of a party.

The final model is that of Ontario, which has recently abandoned the idea of a tariff or 'Grill' of costs in favour of the presiding judge ruling on costs, generally after submissions by the parties on the complexity of the case, time actually spent, hourly rates and other factors. The assessment may be made on a 'partial indemnity', 'substantial indemnity' or 'full indemnity' basis, which largely corresponds to the prior distinction between party and party costs, solicitor-client costs, and solicitor-own client costs. Here a global amount will be fixed, though a judge may also order a 'line-by-line' assessment to be undertaken by a taxing officer. Costs here may be very substantial and the deterrent effect of the common law costs rule is fully evident.

In all three models, costs may be awarded personally against counsel for their conduct of the action. These are known colloquially as 'Torquemada' costs and they have been awarded. In some provinces such as Nova Scotia, they may be awarded for 'undue delay, neglect or other default' (N.S. RCP 63.15(2)). The most intimidating costs order, for counsel, is for costs payable personally by counsel on a full indemnity basis and forthwith. The disciplinary authority of the court is thus exercisable on a regular basis in the course of litigation and the costs order is usually an integral part of the judgment, though in a large and complex case may be the object of a special hearing and order.

The above discussion relates to the shifting of costs and fees between the parties. It is also the case that the fees owed by a client to his own counsel is subject to some form of control other than through normal litigation. In the common law provinces there is a procedure of 'taxation' or assessment of counsel fees, which is available to either client or counsel on simple motion within a case or on its completion. The assessment officer or taxation Master bases his fee award on a range of criteria which include market rates for counsel of similar standing and expertise, time spent on the case, importance of the case, success in the case, and so on. Case law thus develops which is the origin of the notion of 'solicitor-client' costs, used when a costs order is made on this basis, in order to substantially compensate a party for their costs. In Quebec there is no procedure for taxation of fees by a court officer but the Quebec Bar offers an arbitration programme under which fee disputes may be resolved by arbitration, a reflection of the traditional jurisdiction of the *Batonnier* in France to resolve fee disputes.

V. Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, and Litigation Insurance.

1. Given the cost of litigation, and the fees charged by lawyers, a number of devices have been adopted in an attempt to overcome them. Historically, contingent fees based on a percentage of the amount recovered have been permitted in some provinces since the late 19th century and most provinces adopted them in the course of the 20th century. Ontario was the last to do so in the early years of this century. Quebec has historically prohibited the *pacte in quota litis* for lawyers and this prohibition remains in the Civil Code (art. 1783) but is ignored in practice. Contingent fees are combined with no win-no fee arrangements and are thus properly designated as contingent fees and not conditional fees on the UK model. It is abusive to combine a contingent fee with an agreement to be compensated on a normal basis in the event of loss, though this has been attempted. Success premiums are built into much billing practice but may now be explicitly agreed to. Contingent fees are subject to restrictions in some provinces, e.g., in Quebec contingent fees have been declared by the courts to be unacceptable in family law cases. There are also caps on the use of contingent fees in certain types of cases, e.g., in British Columbia the maximum percentage in an automobile accident case is 33 1/3 %; in other cases of personal injury or death it is 40%. Even where there are no caps on such fees, however, the client is entitled to taxation of the fee according to the procedure for general taxation of fees discussed above, so there is judicial control on the reasonableness of a contingent fee in the circumstances of the case. In *Walker v. Ritchie* [2006] 2 S.C.R. 428 the Supreme Court of Canada decided that a 'risk premium' was not payable by the losing defendant when plaintiff's counsel was acting on a contingency basis.

Contingent fees are less frequent in Canada than in the United States, however. There are few if any civil juries in Canada (they are precluded in Quebec); medical costs are entirely covered by the public Canadian health care system; and there are few punitive damages awards. Some reluctance towards contingent fees may also be generated by the costs shifting rule. If counsel has agreed that the plaintiff client is to be free of all cost, and costs are awarded against the losing plaintiff, who is liable to pay those costs? Lawyers who have paid them have been allowed to deduct them as an expense for income tax purposes and this potential liability to the other side may deter some lawyer use of contingent fees. There appears to be no 'after the event' insurance developed in Canada, as in the U.K., to cover the possibility of an adverse costs award in the case of a suit brought on a contingency fee basis.

2. Common law jurisdictions have been historically adverse to assignment of claims though as a matter of general law the more permissive attitude of Equity came to prevail. French civil law in contrast has historically been very open. Where the assignment is for a litigious claim, however, there remain particular limitations which are those of champerty and maintenance in the common law provinces and the '*retrait litigieux*' (litigious redemption) in Quebec.

At common law it was tortious to maintain the lawsuit of another by providing financial assistance (maintenance) or by doing so and taking a part of the proceeds of the litigation

(champerty). These torts are still alive today though they no longer apply to the lawyer acting on a contingent fee. They remain applicable to third persons, though it is now the case that maintenance and champerty can be justified if there is a valid business purpose to the assignment or the assignee has some pre-existing financial interest in the enforcement of the claim. A garage selling automobiles might thus maintain or provide assistance in a suit for the damage of its clients when the warranty company which the garage has recommended fails to honour the terms of the warranty of the vehicles sold. In the absence of such an interest, however, a third-party stirring up litigation for its own profit may be guilty of champerty and may even be found liable for solicitor-client costs against a winning defendant; *Smith v. Canadian Tire Acceptance Ltd.* (1995) 36 C.P.C.(3d) 175. There are firms advertising their willingness to financially support litigation for a share of the proceeds (Lexfund, BridgePoint Financial Services) but the practice does not appear to be widespread in Canada. The shadow of maintenance and champerty falls across such practices, and ethical objections have been raised that third-party financing is inconsistent with the lawyer's ethical obligation being owed uniquely to the client; P. Fuchs, 'Innovation or Interference? Third-party litigation funding offers access to justice – but is the ethical price too high?' *The National*, Oct-Nov 2008 at p. 49.

In Quebec there has historically been no objection to the sale of litigious rights (except in the case of sale to lawyers), reflecting the open attitude of French civil law. There are no torts of maintenance or champerty in Quebec. A remedy against Pothier's '*odieux acheteur de créances*' is found however in article 1748 of the Quebec Civil Code (the litigious redemption) which allows the debtor to discharge the debt by paying to the purchaser of the litigious right the amount of the sale plus any costs of the sale and interest. This in itself may deter third-party financiers.

3. Class actions have brought about particular rules for their financing. All Canadian provinces now allow class actions but there is considerable diversity with respect to the costs and fees which they generate.

Quebec has been described as the 'paradise' of class action funding, since the Quebec government established and annually funds a Class Action Fund for the purpose of financing class actions. The Fund was felt necessary because of the costs of litigation and the risk of losing class representatives being held liable for (even low) costs awards. In the result, a class representative (in reality the lawyer acting for such a representative) may apply for funding to cover court costs and lawyer and expert fees, while the Fund will assume liability for any eventual costs award in the event the class action is rejected. The Fund finances many class actions and a portion of the proceeds is now returned to the Fund to assist in its ongoing work. As an administrative agency of the government, its decision to refuse funding is subject to judicial review.

Ontario has also established a Class Action Fund but without government financing. The resources of the Fund are drawn from the interest on lawyers' trust accounts. The Ontario Fund does not cover lawyers' fees or eventual costs awards, and costs awards have been made against unsuccessful class representatives in Ontario, though usually on a lower basis than those awarded against unsuccessful class action defendants.

Other provinces have provided no institutional means of funding of class actions and have either prohibited the awarding of costs in class actions, though subject always to the court's discretion (British Columbia) or simply allowed the usual costs rule to stand (Alberta). In the latter case in particular the costs rule may constitute a considerable deterrent to class actions.

4. It has become possible to insure against the costs of litigation but the practice is not, or at least not yet, widespread in Canada. It should be recalled, however, that public health and hospital insurance in Canada obviates the need for much litigation. In Quebec it is also the case that the no-fault automobile accident regime precludes any litigation relating to automobile accidents. Some large unions do offer legal expense insurance to their members. In Quebec there appear to be more private insurers offering plans than in the common law provinces and in Quebec legal expense insurance is actively promoted by the Quebec Bar. Some litigation costs are also born by insurers when the contract of insurance imposes an 'obligation to defend' on the insurer. The German insurance company DAS is reported to be expanding its legal expense insurance practice to Canada in 2009.

VI. Legal aid.

1. Publicly funded legal aid was significantly expanded in the 1960s and 1970s in Canada but has significantly declined since those decades. The provincial schemes vary from province to province but generally employ a mix of 'store-front' legal aid offices, with salaried lawyers, and 'judicare', with private lawyers being paid by the legal aid plan. Most funding goes to private lawyers and there is clearly governmental reluctance to increase their fees. At the time of writing of this report there is a legal aid boycott in Ontario on the part of criminal law practitioners because of the low level of fees. Across the provinces fees to lawyers are often set at rates of less than \$100 per hour even for senior counsel.
2. Pro bono work is organized by law firms but varies considerably from firm to firm.
3. Legal aid is limited by areas of practice and by financial criteria. Generally it is available for matters of criminal law, immigration and refugee law, family law and matters of housing. It is more sharply limited by the financial criteria for eligibility. To be eligible a single person must be generally be earning under \$17,000 and in some provinces well under that, often as little as \$12,000. Maximum rates for families do not go significantly beyond these figures. In Quebec the maximum rate of income for a couple with one child is \$19,170. Eligibility may be maintained at slightly higher figures if the applicant makes a contribution to the legal costs. There are also maximum rates of capital assets. Eligibility is established through a financial eligibility test administered by legal aid offices, who may exercise some discretionary authority but whose budgets are very limited.

4. Litigation costs and fees are a serious barrier excluding parties from access to justice. It is paradoxical that the solution to this problem has often been seen in devices such as the contingent fee and the class action which allow lawyers to charge still higher fees.

5. Litigation costs are a major barrier in all cases which are not fee-generating, and even for many which are if the client is not able to sustain the costs of ongoing litigation.

VII. Examples.

1. Costs and fees of litigation vary according to the type of court. In Small Claims Courts the court costs are low and lawyers may be prohibited (as in Quebec) or very rare (as in the common law provinces). A claimant in Quebec Small Claims Court pays a court fee varying from \$69 to \$157 dollars according to the amount claimed (from \$.01 to \$7000). Similar amounts are payable in the common law provinces. Small Claims Courts appear to be effective and are widely used.

A claim beyond the jurisdiction of a Small Claims court may be brought in an intermediate court, such as the Quebec Court in Quebec, or in the Superior Court of first instance of the province. The procedure is largely the same in both cases though some provinces have now initiated Simplified Procedure Rules for cases under \$100,000, which has the effect of severely limiting, or even eliminating, discovery. This reduces lawyer fees considerably but is dependent on the province and the extent to which procedure is simplified. A recent survey of fees charged by lawyers, based on responses given by lawyers, gave as the lawyer's fee for one party for a two day trial in Ontario (with no indication of the amount in question) a minimum of \$18,738 and a maximum of \$90,404, with an average of \$45,477.⁵ For both parties combined this would yield fees of:

Minimum: \$37,476

Maximum: \$180,808

Average: \$90,954.

The significant factor appears therefore to be the length of trial as opposed to the amount in question, and the amounts indicated above would indicate a daily lawyer's fee to each party of approximately \$22,738, this including preparation time but not disbursements, court costs or expert fees.

2. In addition to the above fees for a losing plaintiff's own lawyer, costs payable to the other side would also depend not on the amount in question so much as the duration of the trial. For a trial of two days duration, as above, a partial indemnity costs award in Ontario (at 60% of the average of fees charged, not including court costs, disbursement or expert fees) would add a further \$27,286 to the plaintiff's overall bill, for a total bill of the two day trial of \$45,477 (own lawyer's fee) + \$27,286 (costs to winning defendant) = \$72,763. This would increase substantially if there was considerable use of experts. In

⁵ Canadian Lawyer, June, 2009, p. 32 at 37.

Quebec the costs award might be as low as \$1000, yielding a total bill, again excluding court costs, disbursements and expert fees, of \$46,477.

3. The calculations above at 2. are the same for a losing defendant.

Conclusion

Lawyers' fees and costs rules are the single largest problem in the administration of justice. They are the chief cause for very significant declines in litigation rates in Canada. The question of whether such fees are justifiable in the rendering of a public service through a publicly-financed court system has become more pressing. The German model of fixed litigation fees (subject only to explicit contractual variation) appears more and more attractive.