

LITIGATION FUNDING AND COSTS IN CANADA *

ERIK S KNUTSEN** AND JANET WALKER***

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I. INTRODUCTION: WHAT IS THE COST OF LITIGATING IN CANADA?

In Canada, as in most countries with an adversary system, the primary cost of litigating comes from the expense of obtaining legal advice and representation and, where necessary, expert evidence and other disbursements.¹ Together, legal fees and disbursements comprise the “costs” of litigating in the Canadian legal system. The courthouses, the court staff and the adjudicators are publicly funded, and the filing fees are modest.²

In Canada, in principle the costs of litigation are borne in the first instance by the parties, but they are subject to redistribution by the court at the end of the litigation through costs awards. The expense of litigating disputes is such that the economic framework for the costs system has a significant impact on the decisions of potential litigants about whether to

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** Assistant Professor, Faculty of Law, Queen’s University, Kingston, Ontario, Canada (LLM (Harvard), of the Ontario Bar).

*** Professor, Osgoode Hall Law School, York University, Toronto, Ontario, Canada (DPhil (Oxon), of the Ontario Bar).

¹ References in this paper are made primarily to Ontario statutes and rules, which are generally representative of the statutes and rules in other provinces.

² And there is no practice of informal payments to officials for the processing of claims or defences.

sue and how to frame the litigation. The economic framework also has a significant impact on the decisions litigants make once they have become engaged in the process. It affects their decisions about whether and when to settle and, if they do not, how to proceed to trial and how to conduct themselves at trial.

This economic framework or “costs system” consists of three main aspects: first, the way in which legal fees are calculated and charged; second the way in which legal fees and disbursements are financed through the course of the litigation; and, third, the way in which costs are ultimately allocated between the parties through costs awards, or “fee-shifting”. This paper considers each of these aspects of the Canadian costs system and assesses the incentives and deterrents created by current features of the system as a means of calibrating access to justice and encouraging a sound approach to the conduct of litigation once commenced.

II. HOW ARE LEGAL FEES CALCULATED AND CHARGED?

The financial dealings between lawyer and client are governed by a contractual relationship called a “retainer”. The term “retainer” is used to describe three things: the general arrangements for legal services between lawyer and client; the actual contract for legal services, if one is concluded; and the deposit for legal fees and disbursements that is held in trust by the lawyer, if this is part of the arrangement.

The client is initially and ultimately responsible for the costs of the litigation. In the adversary system in Canada, this appears to be a fundamental requirement for securing party prosecution on the principle that “he who pays the piper calls the tune.” Accordingly, any adverse impacts that this might have on access to justice or on the manner in which litigation is conducted have not served to draw this basic approach into question. Rather, adverse impacts have sought to be ameliorated by the development of various mechanisms that are discussed below, such as fee-shifting.

In many cases, when a client chooses a lawyer and he or she enters into a retainer relationship, this relationship does not involve a formal written agreement. By requesting and receiving legal services, the client impliedly agrees to pay for them and the lawyer agrees to charge only a reasonable fee. On the one hand, even in the absence of a written retainer, a lawyer’s fee is secured, in part, by the operation of the solicitor’s lien on the file, which could impede a client’s ability to transfer the matter to another lawyer without first resolving any outstanding issues over fees owing to the lawyer. The lawyer’s fee is also secured by the ability of the lawyer to seek an order for payment following a formal assessment, or “taxation” of the account. It is rare for either of these means of securing payment to be invoked. On the other hand, even in the absence of a written retainer, the client is protected from overcharging by the rules of professional conduct, which require the lawyer to ensure that the nature of the economic relationship with the client is fair and reasonable.³

In situations where there is a written agreement setting out the terms of the retainer, it is relatively uncommon for it to specify in any detail the amount a client will pay his or her lawyer for legal services in respect of the matter for which the lawyer has been retained. In Canada, where lawyers are both admitted to the bar and given licenses to practice as solicitors, they may be retained to serve a client in a variety of capacities in respect of the matter—giving advice, representing the client at a mediation or negotiation, or appearing on behalf of the client in court. As a result, a retainer agreement will often specify the nature of

³ Ontario Rules of Professional Conduct, Rules 2 and 3 (rules respecting reasonableness of fees).

the matter for which legal services are to be provided, but it will speak in broad terms about the nature of the advice and representation to be provided and about the financial aspects of the retainer, usually specifying only the lawyer's hourly rate and the client's promise to pay.

Whether or not there is a written retainer, lawyers are often reluctant to provide written estimates at the outset as to the total fees likely to be payable for their services. However, they may give their clients verbal estimates, based on the anticipated course of the litigation and its degree of complexity.

Where the retainer agreement does cover the subject of the lawyer's remuneration, it may provide for the fees to be payable through periodic billings or at specified points in the litigation. Often, clients will be billed monthly, or, when the lawyer is retained on a contingency fee basis, under which the lawyer may take as a fee a percentage of the final proceeds in the matter, it may provide for the client to be billed for services only at the end of the matter. The agreement will also explain whether or not the client is responsible to pay disbursements as they are made in the course of the litigation, or only when the matter has been concluded. Disbursements include the out-of-pocket expenses the lawyer pays on the client's behalf, such as fees for experts, photocopying, postage, and court fees.

The retainer agreement may also require the client to pay a deposit, also referred to as a "retainer", to be held by the lawyer in trust, and used to fund the disbursements and fees as services are rendered. In some cases, where a retainer is taken, the agreement may provide for the periodic replenishment of the retainer as the matter progresses and as the legal fees are earned and the other expenses are incurred.

Although a high proportion of litigation is conducted without formal written retainers or with written retainers that specify only an hourly rate or a contingency fee formula, complex matters involving litigation over large sums between sophisticated parties may proceed on a very different footing. In those cases, the parties may seek bids from several firms for their "litigation business." These proposals may relate to individual matters, or to all matters that might arise on an ongoing basis or for a fixed period of time. These requests for tender or "beauty pageants" can involve highly detailed specifications for the full range of legal services, including the staffing of files, the rates to be charged, the principles governing charges for disbursements, the obligation to obtain instructions for steps to be taken, and when and how invoices will be rendered. Although interesting issues arise for the profession in this context, many aspects of these dealings are driven by and responsive to market conditions. Accordingly, the costs of litigation between sophisticated parties in large matters will not be dealt with in detail in this paper.

A lawyer's hourly fee varies, depending upon the lawyer's experience and geographical market. For example, a lawyer's hourly fee in a smaller, rural setting could be \$125 an hour. In a larger urban setting, an experienced lawyer at a large firm could charge between \$300 to \$900 or more an hour. Where a large firm is involved and the hourly fees among lawyers vary greatly, there will exist formal or informal practices and policies for the staffing of files so as to ensure that the work is done efficiently and the client is billed appropriately.

In all lawyer-client relationships, including those involving institutional clients and individual clients, and those with written retainers and without them, as a matter of law, a Canadian lawyer's fees must be "fair and reasonable."⁴ Provincial rules of professional

⁴ *Boucher v Public Accountants Council (Ontario)* (2004) 71 OR (3d) 291 (Ont CA) ("*Boucher*").

conduct such as Ontario's Rules of Professional Conduct⁵ list the factors that are used to determine whether a fee is "fair and reasonable":

- (a) the time and effort required and spent,
- (b) the difficulty and importance of the matter,
- (c) whether special skill or service has been required and provided,
- (d) the amount involved or the value of the subject-matter,
- (e) the results obtained,
- (f) fees authorized by statute or regulation,
- (g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency.

If either a client or a lawyer has a dispute regarding payment of the fee, the courts can review the arrangement through a process called an assessment (or "taxation" in some Canadian jurisdictions). A court assessment officer examines the lawyer's account and determines if the fee is "fair and reasonable." The assessment officer's findings are enforceable as a judgment of the court, and the lawyer and client can rely on it as such. Typical criteria for assessing a lawyer's bill, like those found in Ontario's Rules of Civil Procedure,⁶ include the following factors, which parallel closely those found in the rules of professional conduct:

- (a) the amount involved in the proceeding;
- (b) the complexity of the proceeding;
- (c) the importance of the issues;
- (d) the duration of the hearing;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted; and
- (h) any other matter relevant to the assessment of costs.

The assessment process is not frequently used either by clients or by lawyers in resolving disputes over fees. In fact, it is even less likely to be used by litigants who have large claims or who are repeat players in the litigation system, like large corporate clients.⁷

Despite the relatively infrequent occurrence of formal disputes over billings, some have criticized the legal profession's practice of billing on an hourly basis from a systemic perspective as inefficient and unfair because it creates an incentive for work that is not tied to results but to the time the lawyer spends on the case.⁸ This may be of particular concern in a legal community that has only recently relaxed the historical restrictions on advertising and competition, and in which the practice of openly soliciting clients is far from the norm. Under such circumstances, restraint in the legal work performed and billed depends primarily upon the lawyer's desire to maintain a good relationship with client, and compliance with the lawyer's professional obligations.

⁵ Ontario Rules of Professional Conduct, Rule 2.08.

⁶ Ontario Rules of Civil Procedure, Rule 58.06(1).

⁷ Herbert M Kritzer, "Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario" (1984) 47 *Law and Contemp Probs* 125 at 126 (noting that the nature of the relationship between large corporations and lawyers is not affected by the taxation process; also noting that taxation is often for the "little guy").

⁸ Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should be Done about It" (2004) 83 *Can Bar Rev* 859 (Canadian law firms are just as affected as American law firms by the temptations to practice unethical and over-inflated billing due to the unique nature of hourly billing).

III. HOW IS THE LITIGATION FINANCED?

A. Direct Client Billing

The traditional method for financing most Canadian litigation is to bill the client directly on the basis of an hourly rate multiplied by the number of hours spent on the client's matter. This is still the norm in business litigation, as well as most defence litigation for institutional defendants, such as insurance companies or banks. In other words, clients pay for increments of a lawyer's time, and they are billed periodically, often monthly, for the lawyers' time plus any disbursements expended on the client's behalf.

Large institutional clients who are often defendants (*eg.* railways and banks) sometimes contract with large law firms for a negotiated bulk hourly rate or a block rate for a certain set of hours of legal work. In this fashion, institutional clients who can expect to have regular litigation work benefit from being repeat players with a particular law firm. These institutional clients negotiate preferential or block rates of the law firm's hourly time in exchange for exclusive guaranteed legal work from the institution.

B. Alternatives to Litigation for Individuals

The expense of ordinary litigation is such that few persons other than large institutional clients can afford to finance it on a current basis by paying a lawyer's regular billings as the case proceeds. This has given rise to a range of responses. Some of these responses have altered the way in which some claims are resolved so as to remove them from the ordinary litigation process.

For example, one response to the widespread crisis of access to justice for individual claimants that would inevitably result from the high cost of litigation has been the establishment of specialized administrative procedures for compensation for harm. The federal and provincial governments in Canada have created administrative regimes for claims relating to employment matters, workplace injuries and motor vehicle accidents.⁹ In some of these regimes the right to sue is abrogated entirely. In others, the right to sue is restricted to claims above a specified level of harm or quantum of damages.

In addition, although there is no meaningful "litigation insurance" market in Canada for insurance against the costs of bringing a lawsuit, most private law tort and insurance lawsuits in Canada are actually brought by liability insurance companies. These suits are brought in the names of insured parties on a subrogated basis by the insurers.¹⁰ Tort and insurance litigation makes up a large component of civil litigation in Canada.

⁹ For example, a number of Canadian provinces, such as Manitoba, Saskatchewan, and Quebec, have no-fault automobile insurance regimes, where the right to sue in tort for automobile accident-related injuries is eliminated altogether in exchange for a menu of first-party insurance benefits from the driver's own insurance company. Ontario operates a hybrid tort–no-fault auto insurance system where access to the tort system for auto accident-related injuries is reserved only for the very serious cases. The inability to sue in tort for auto-related injuries in some Canadian provinces has shifted the civil litigation landscape with respect to automobile accidents and the necessity of lawyers in the process. Claims in those jurisdictions are focused more on issues between the injured victim and his or her insurance company.

¹⁰ Canadian insurance policies provide that the insurance company has the right to sue the wrongdoer in the insured's name, to recoup the company's losses. The injured insureds themselves are paid directly by their insurer, which then chases the alleged wrongdoer to recoup its losses from the one at fault: Gordon Hilliker, *Liability Insurance Law in Canada*, 4th ed (2006).

Further, most liability insurance policies in Canada provide for the funding of the cost of a litigation defence in the event the insured is sued.¹¹ These insurance contracts also usually stipulate that the insurer will choose and instruct the lawyer in defending the insured. Insurers generally negotiate preferential rates with particular law firms because of the high volume of defence-side legal work created in the liability insurance industry. Unlike their policyholders, insurers are able to pay for defence litigation work on an hourly basis.

C. Specialized Forms of Litigation for Smaller Claims

It has long been clear that the litigation of smaller claims is not economically viable in the ordinary courts. As a result, “Small Claims Courts” for cases under specified amounts, ranging from \$10-25,000, have been established with simplified procedures that were designed to enable parties to appear without legal representatives. In theory, therefore, under these circumstances there would be no need for litigants to incur expenses for legal fees. Although the procedures have become somewhat more detailed over the years, and parties are sometimes represented, the costs awarded cannot ordinarily exceed 15% of the amount claimed, or the value of the property sought to be recovered.

For slightly larger cases, there exist simplified procedures that significantly limit the steps that may be taken before the matter comes to trial and limit the length of the trial.¹²

The aggregation of economically non-viable claims in class actions is a well-established means of enhancing access to justice in Canada. All class action legal fees are subject to the approval of the court, in the best interests of the class members.¹³ There are many challenging issues currently being addressed in connection with the funding of class actions, such as third-party financing, and in connection with costs, such as whether fee-shifting is appropriate. However, these are beyond the scope of this paper.

D. Contingency Fees

Where the claims of individuals are not covered by insurance or an administrative regime and are above the monetary limit for small claims courts or special procedures, it has been necessary for the legal system in Canada to respond in other ways to finance the litigation.

One such response has been for lawyers themselves to provide financing for the litigation through deferred payment schemes. Until recently, Ontario’s laws proscribing champerty and maintenance precluded lawyers from entering into contingency fee arrangements. However, the need for legal services for persons who were unable to finance them on a current basis, particularly in personal injury cases, led to an informal practice of deferring the billings in such cases until after the matters were concluded. It was prohibited by the Solicitor’s Act to charge a premium for success, and a retainer that purported to provide for this would be unenforceable, but there was nothing to prohibit a lawyer from providing legal services for free, and so the practice emerged in such cases of charging a fee only in the event of success.

¹¹ Physician’s liability insurance is provided by the Canadian Medical Protective Association, which represents and defends Canadian physicians.

¹² Ontario Rules of Civil Procedure, Rule 76–Simplified Procedure, which, as of 2010, will apply to cases up to \$100,000.

¹³ Class Proceedings Act, SO 1992, c 6.

Every jurisdiction in Canada now permits lawyers by statute, regulation, case law, or as a matter of practice, to be paid by a contingency fee.¹⁴ A contingency fee arrangement is an agreement between the lawyer and client whereby the lawyer's fee is tied to the success of the client's matter. With these recent changes in the law, if the client is successful in the litigation, the lawyer may take a fee in the form of a percentage of the proceeds of the litigation. This percentage is typically for between one-fifth and one-third of the client's net proceeds of the litigation. Factors which may affect the agreed-upon fee proportion include the expense and risk that will be undertaken by the lawyer, the complexity and type of matter, the likelihood of success, and the amount the client and lawyer expect to recover. Clients generally do not shop around among lawyers for preferable contingent fee rates.

The fees recoverable under a contingency fee arrangement are subject to the Solicitors Act, as follows:

20.1(1) In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client's solicitor is being compensated in accordance with a contingency fee agreement.

(2) Despite subsection 20 (2), even if an order for the payment of costs is more than the amount payable by the client to the client's own solicitor under a contingency fee agreement, a client may recover the full amount under an order for the payment of costs if the client is to use the payment of costs to pay his, her or its solicitor.

(3) If the client recovers the full amount under an order for the payment of costs under subsection (2), the client is only required to pay costs to his, her or its solicitor and not the amount payable under the contingency fee agreement, unless the contingency fee agreement is one that has been approved by a court under subsection 28.1 (8) and provides otherwise.

Contingency fees have increased access to justice for clients who are unable, or unwilling, to pay for a lawyer on an hourly basis.¹⁵ It has been argued that permitting lawyers to provide legal services on a contingency fee basis with a fee based on a percentage of the result would address the potential for hourly rates to provide an incentive to inefficient or ineffective legal services. By aligning the lawyer's interests with the client's interest in an expeditious resolution of the matter with the maximum recovery, the introduction of contingency fees were heralded as improving access to justice and the quality of legal services. While there is no doubt that contingency fees have become a regular feature of personal injury litigation, there do not appear to have been any studies that have confirmed that any previous lack in the efficiency and effectiveness of the legal services have been remedied by introducing them.

One aspect of contingency fees that has been at issue recently is the practice of Ontario courts ordering a risk "premium" as part of a successful plaintiff's costs award when the plaintiff's lawyer took the case on a contingency fee basis.¹⁶ The concept of a risk premium was introduced to encourage lawyers to risk their time and money on behalf of indigent clients by taking on meritorious cases which have a high risk element. The risk premium was designed as a sort of bonus, on top of the usual costs award, to reward a lawyer for taking on a meritorious, risky case and gambling his or her time and money for the good of the client's interests.

Risk premiums became something of a feature in successful Ontario contingency fee cases until the Supreme Court of Canada shut the practice down with its decision in *Walker v*

¹⁴ Ontario's Rules of Professional Conduct, Rule 2.08 and Ontario's Solicitor's Act, RSO 1990, c S-15, as amended by SO 2002, c 24, Sch A.

¹⁵ *McIntyre Estate v Ontario (Attorney General)* (2002) 61 OR (3d) 257 (CA).

¹⁶ *Desmoulin v Blair* (1994) 21 OR (3d) 217 (CA).

Ritchie.¹⁷ In *Walker*, the Court held that risk of non-payment was not an enumerated factor in the costs analysis applicable in Ontario's costs rule, Rule 57, so courts could not award a "bonus" to plaintiffs' counsel. In addition, the Court held that the fee arrangement was a matter between the plaintiff and her counsel, and a defendant could not reliably predict her costs exposure if premiums were to exist in the costs regime. Curiously, the Court rejected access to justice as a reason to have risk premiums to encourage plaintiffs' counsel to take on meritorious, risky cases. Instead, the Court stated a litigant could find counsel willing to take the case *pro bono*, a litigant could use publicly funded legal aid, or a litigant could apply to a court for interim cost funding for public interest cases. Regardless, the Court of Appeal for Ontario in *Ward v Manufacturers Life*¹⁸ has followed *Walker* and reversed a risk premium originally granted at trial, again citing the inability of the current costs rules to accommodate costs premiums and bonuses based on risk.

In an interesting turn of events and despite *Walker* and cases such as *Ward*, courts continue to award a kind of risk premium to lawyers who take on meritorious, risky cases. They simply now do so by reference to the enumerated factors for discretionary costs awards as stated in Rule 57.01. For example, in *Sandhu v Wellington Place Apartments*,¹⁹ the Court of Appeal for Ontario reversed a \$350,000 risk premium awarded at trial because the trial court awarded the premium to reward the lawyer for risking non-payment. Instead, the Court of Appeal increased the Adverse Party costs award by \$50,000 and used the enumerated factors in Rule 57.01 to justify the increase, namely that the case was complex and lengthy, the issues were important, and the result achieved was outstanding. In *Berendsen v Ontario*,²⁰ while acknowledging that *Walker* and *Ward* eliminated risk premiums, the trial judge nevertheless awarded a \$50,000 "cost premium" to the plaintiff's counsel because the case was complex and important. There is something compelling these courts to award costs bonuses to successful counsel who taken on meritorious, risky cases.

Despite the similarities with personal injury litigation in the United States that the introduction of contingency fees might have appeared likely to produce, there remain marked differences. Plaintiff personal injury litigation is far less lucrative for lawyers in Canada than in the United States. As a result, despite the existence of contingency fees, the Canadian personal injury bar is not as large, as entrepreneurial, or as well-compensated as its American counterpart.²¹ Personal injury litigation is not "big business" because the recoveries are smaller. Universal health coverage in Canada tends to keep the extent and urgency of tort recovery small in comparison with that in the United States. Furthermore, the practice of fee-shifting makes it unnecessary to take into account legal fees when determining the quantum of compensatory awards. Finally, most civil cases are litigated without a jury and by a judge alone, and punitive and exemplary damages awards are uncommon and small by comparison with those granted in the United States.

¹⁷ *Walker v Ritchie* [2006] 2 SCR 428.

¹⁸ *Ward v Manufacturers Life Insurance Co*, [2007] ONCA 881 (CA).

¹⁹ *Sandhu v Wellington Place Apartments* [2008] ONCA 215 (CA).

²⁰ *Berendsen v Ontario* [2008] CarswellOnt 4142 (SCJ).

²¹ For example, non-pecuniary damages ("pain and suffering") are capped by law at a maximum of \$321,000 for the worst kinds of injury imaginable, or \$100,000 in 1978 dollars for a 21 year old quadriplegic: *Andrews v Grand & Toy* [1978] 2 SCR 229. Punitive damages are exceedingly rare, reserved for only malicious and high-handed conduct: *Whiten v Pilot Insurance* [2002] 1 SCR 595; and *McIntyre v Griegg* (2006) 83 OR (3d) 161 (CA).

D. Pro Bono Legal Services

In addition to deferring payment for legal services, the profession in Canada has played a role in the financing of legal services through a strong tradition of providing litigation advice and representation on a “*pro bono*” basis. Many lawyers and law firms regularly take cases for indigent clients and for clients whose matters have a strong social justice component. These clients pay no fees for the legal services they receive. This *pro bono* work is seen as part of the professional duty of a Canadian lawyer to promote access to justice. It is not mandatory and is up to the individual lawyer whether or not to take a case on a *pro bono* basis. However, many large firms have established substantial *pro bono* programs.

Even *pro bono* work is subject to Canada’s fee shifting scheme, which is discussed below. If a lawyer acting *pro bono* for a client is successful on a client’s behalf, that client remains eligible under the fee-shifting scheme to recover from the losing party the legal costs that would have been payable had the client been paying for the legal services.²²

E. Third-party Financing

There is little evidence in Canada of third parties financing civil litigation in exchange for a proportion of the proceeds because of the concerns about maintenance and champerty. However, third-party financing may be on the horizon.²³

F. Public Financing

Beyond providing the courthouses, the court staff and the judges,²⁴ the governments in Canada contribute relatively little to the funding of civil litigation. The provinces in Canada each have schemes called “legal aid” for providing public funding for legal assistance for those who cannot afford a lawyer. However, this once robust institution has been subject to cutbacks for such a long time that much of the focus of the assistance is now almost entirely directed to criminal defence work and only clients who are truly indigent are eligible to receive it for civil matters, and only in a small range of cases.²⁵ In addition, for those who do qualify for legal aid, it is necessary to find a lawyer who is willing to provide services for the modest rates that are paid.²⁶

²² *1465778 Ontario Inc v 1122077 Ontario Ltd.* (2006) 82 OR (3d) 757 (CA) (successful *pro bono* counsel are entitled to fee-shifted costs) (“*1465778 Ontario Inc*”).

²³ Poonam Puri, “Financing Litigation by Third Party Investors: A Share of Justice,” (1998) 36 Osgoode Hall LJ 515 (arguing that, in the interests of access to justice, the Canadian legal market should allow greater participation of third party investor financing in litigation).

²⁴ Colleen M Hanycz, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform” (2008) 27 Civil Justice Quarterly 98 at 108 (noting the contributions of the state to the administrative costs of the public justice system in Canada).

²⁵ Parties generally have to demonstrate that they are incapable of funding any aspect of the litigation. This typically requires that the potential applicant for legal aid be qualified as having severe economic limitations. For more on Canada’s publicly funded legal aid system, see Report of the Ontario Legal Aid Review, “A Blueprint for Publicly Funded Legal Services” (Toronto: Queen’s Printer, 1997); Frederick Zemans and Patrick Monahan, “From Crisis to Reform: A New Legal Aid Plan for Ontario” (Toronto: Osgoode Hall Law School, 1996); Michael Trebilcock, “Report of the Legal Aid Review” (Toronto: Ontario Ministry of Attorney General, 2008) (“Trebilcock”); and Michael Fenrick, “Habermas, Legal Legitimacy, and Creative Cost Awards in Recent Canadian Jurisprudence” (2007) 30 Dalhousie LJ 165 at 168 (reliance on either *pro bono* counsel or legal aid funding as a method of funding for Canadian legal services is less than optimal).

²⁶ Trebilcock, *supra*, note 25 (noting that the rates paid by the legal aid program are often far lower than the lowest market rates for the legal service).

In most provinces in major centres there are, however, legal aid clinics, that are specialized government-funded law centres where those with modest economic means can go for legal assistance. The centres are staffed with salaried lawyers as employees, and in some cases, with law students who assist the lawyers for a period of time as part of their course of study. The focus of these centres is on poverty law issues (*i.e.*, immigration, landlord and tenant issues, family matters, elder law) and only lower-income Canadians are eligible to receive legal advice and assistance.

In principle, there also exists a method by which a court may order interim funding of public interest cases from government funding sources but the eligibility requirements are very restrictive.²⁷ To date, only a handful of cases have met the strict test for interim funding of litigation, which provides that it is to be made available only in “rare and exceptional circumstances:

1. the litigant must be genuinely not able to afford to pay and have no other option for payment of interim litigation expenses;
2. the claim must be meritorious, such that it is against the interests of justice to preclude it from being heard; and,
3. the issues in the case must transcend the individual litigant and be of public importance and not previously decided by another court.

Most of these cases have been in the area of aboriginal law. Thus, the test is of little practical assistance to the broader range of cases that are sought to be litigated.

IV. WHO FUNDS THE LITIGATION?

A. Fee Shifting in Canada

Despite the various ways in which legal fees and disbursements may be financed through the course of the litigation, in most cases, a large part of the costs of litigating are ultimately ordered to be paid by the unsuccessful party through a “costs award.” Accordingly, in general, in addition to any award in damages, the unsuccessful party will pay a portion of the successful party’s legal fees and disbursements. This is called “fee shifting.”

In an environment in which the expense of litigating is otherwise often prohibitive, the chance of recovering one’s own costs or being required to pay the opposing party’s costs can have a significant influence on the decision to commence or to continue litigation. As a result, the fee shifting regime has given rise to an entire body of law regarding the amount of costs that should be recovered in litigation and the process through which such orders should be made. In addition, considerable commentary has been devoted to the way in which costs awards can facilitate access to justice, discourage frivolous litigation and encourage the

²⁷ *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371 and *Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Revenue)* [2007] 1 SCR 38 (interim costs not awarded in case where bookstore challenged customs seizure of gay and lesbian material). A number of commentators have noted that the substantive law test to meet for interim funding of public interest cases is too difficult and impedes the evolution of public interest law: Chris Tollefson, “Costs and the Public Interest Litigant: Okanagan Indian Band and Beyond” (2006) 19 Can J Admin L & Prac 39; Lara Friedlander “Costs and the Public Interest Litigant” (1995) 40 McGill LJ 55; Brian McLaughlin, Cheryl Tobias & Craig Cameron, “Interim Costs: The Impact of Okanagan Indian Band” (2005) 54 UNBLJ 126; Chris Tollefson, Darlene Gilliland & Jerry DeMarco, “Towards a Costs Jurisprudence in Public Interest Litigation” (2004) 83 Can Bar Rev 473; Faisal Bhabha, “Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions” (2007) 33 Queen’s LJ 139; and Christopher Tollefson, “When the ‘Public Interest’ Loses: The Liability of Public Interest Litigants for Adverse Costs Awards” (1995) 29 UBCL Rev 303.

parties to conduct the litigation in a way that will “secure the just, most expeditious and least expensive determination of...(the) proceeding on its merits.”²⁸

The underlying reasoning for fee shifting is to compensate a successful party in civil litigation for some of the expense incurred in exercising a legal right.²⁹ Had the unsuccessful defendant satisfied the plaintiff’s claim rather than resisting it, the plaintiff would have been spared the expense of litigating, and should be indemnified for this expense. Similarly, had the unsuccessful plaintiff not brought the claim, the defendant would have been spared the expense of defending against it, and should be indemnified for this expense.

Costs are included in the prayer for relief in the parties’ pleadings and they are akin to a damage award consistent with the principle that it is the losing party’s fault that the successful party was put to the cost of hiring a lawyer and prosecuting or defending the claim. As the Court of Appeal for Ontario explained in a 2006 decision:³⁰

Traditionally the purpose of an award of costs within our "loser pay" system was to partially or, in some limited circumstances, wholly indemnify the winning party for the legal costs it incurred. However, costs have more recently come to be recognized as an important tool in the hands of the court to influence the way the parties conduct themselves and to prevent abuse of the court's process. Specifically, the three other recognized purposes of costs awards are to encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps that unduly prolong the litigation.

The Court also mentioned a fifth purpose: access to justice.

B. Judicial Discretion

Costs awards are assessed either by the judge or by an officer of the court appointed for that purpose, either at the end of a step in the proceeding, or at the end of the hearing of the matter, or in a separate hearing for that purpose. The courts have considerable discretion in making a costs award. As the Courts of Justice Act in Ontario provides:

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.³¹

The courts exercise this discretion pursuant to a range of factors. For example the Ontario Rules of Civil Procedure provide:

57.01(1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
 - (a) the amount claimed and the amount recovered in the proceeding;
 - (b) the apportionment of liability;
 - (c) the complexity of the proceeding;

²⁸ Ontario Rules of Civil Procedure, Rule 1.04.

²⁹ J Robert S Prichard, “A Systematic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law” (1988) 17 J Legal Studies 451 at 456 and Mark M Orkin, *The Law of Costs*, 4th ed (looseleaf), s. 1 (“Orkin”).

³⁰ 1465778 *Ontario Inc*, *supra*, note 22.

³¹ Courts of Justice Act, RSO 1990, c C.43, s 131(1).

- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
- (i) any other matter relevant to the question of costs.³²

In all cases, a court will assess an unsuccessful party's cost awards based on what is "fair and reasonable" for that party to pay.³³ A party is free to take a "money is no object"³⁴ approach to the presentation of its claim or defence but, if successful, it is entitled to recover only "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed."³⁵

In most cases, counsel's submissions on costs at the end of the hearing of a motion or a short trial, will be relatively brief. It is understood that "it is not the role of the judge to minutely examine and dissect docket entries or to second guess the utilization of personnel and resources by counsel."³⁶ This means that the court will generally rely on counsel's submissions, and counsel will be concerned to maintain a good reputation so that the court will have confidence in doing so. The court will also assess counsel's submissions with an eye to the costs incurred by both parties. For example, in one case where the successful plaintiff had spent more than four times on its case than the defendants had spent on the defence, the Court observed, "the comparison of the fees charged to the Defendants and the cost being claimed by the Plaintiffs is persuasive in determining the reasonable expectations of the losing party."³⁷

Finally, the concept of proportionality³⁸ has recently been introduced into the Rules of Civil Procedure as follows:

1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

³² Ontario Rules of Civil Procedure, Rule 57.01(1).

³³ *Boucher*, *supra* note 4. See also *Celanese Canada Inc. v Canadian National Railway Co* [2005] CarswellOnt 1124 (C.A.) (costs fixed by a court must be fair and reasonable).

³⁴ *Canadian National Railway Co v Royal and Sun Alliance Insurance Co of Canada* (2005) 77 OR (3d) 612 ("Canadian National Railway Co").

³⁵ Ontario Rules of Civil Procedure, Rule 57.01(1) (0.b)

³⁶ *Canadian National Railway Co*, *supra* note 34.

³⁷ *Ibid*; and *Smith v Mardana* (2005) 45 CCEL (3d) 140 (Ont SCJ) (the court must account for the reasonable expectations of the losing party); *Westlake v Westlake* [2006] CarswellOnt 3022 (SCJ) (court must account for reasonable expectations of the losing party).

³⁸ Coulter M Osborne, QC, "Civil Justice Reform Project" (Ontario: Ministry of Attorney General, 2007) (calling for increased attention to proportionality to the matter at stake and the step in the legal proceedings in awarding costs in litigation).

The amount of the claim, the amount of the judgment at the end of the matter, the complexity, and the importance of the dispute are all considerations in assessing proportionality of the costs award. For example, if a successful party's actual costs to litigate the matter were \$80,000 and the amount at stake was \$100,000, those costs are likely not proportional in relation to the amount at stake. In small to medium-sized matters it is increasingly difficult to prevent the legal costs from eclipsing the amounts at stake.

C. Standard Costs Awards — Partial Indemnity

There are, in principle, three scales upon which a court may order an unsuccessful party to pay a successful party's costs: partial indemnity,³⁹ substantial indemnity,⁴⁰ and full indemnity.⁴¹

Ordinarily, costs are awarded on a partial indemnity basis. In other words, the award will only partially indemnify the successful party for the expense of bringing the claim or defending against it. The award will provide some contribution toward the successful party's legal costs without putting the award out of reach of the unsuccessful defendant to pay.⁴² The Courts have not defined with precision what portion of the actual expense incurred is appropriate for a partial indemnity award.⁴³ Partial indemnity costs generally range from 40% to 75% of the actual, reasonable legal fees and disbursements of the successful party, with 60% frequently being cited as representative.⁴⁴ Because costs awards depend upon so many factors in a case and are based on an assessment of what is "fair and reasonable", it is not possible to be more precise.

D. Costs Sanctions — Substantial and Full Indemnity

Exceptionally, a court will award costs payable on a substantial indemnity basis and, in very rare circumstances, on a full indemnity basis. These scales of costs awards are reserved for circumstances involving sanctionable behaviour in the manner in which the litigation was conducted, or the failure to accept a reasonable offer of settlement. A substantial indemnity costs award is closer to dollar-for-dollar indemnity of the expenses incurred to bring or defend the claim, yet is still mediated as always by fairness and reasonableness. Substantial indemnity awards are typically 90% of a successful litigant's actual legal costs.⁴⁵ In Ontario,

³⁹ Called "ordinary costs" in British Columbia, and "party and party" costs in most other provinces.

⁴⁰ Called "special costs" in British Columbia, and "solicitor and client costs" in other provinces.

⁴¹ Once called "solicitor and his own client" costs.

⁴² *Buchanan v Geotel Communications Corp* [2002] CarswellOnt 1720 (SCJ) (courts must avoid awarding excessively high costs for fear of putting litigation out of reach of most litigants); *Stratton Electric Ltd. v Guarantee Co. of North America* [2007] CarswellOnt 599 (SCJ) (costs must be proportionate in order to avoid chilling effect on modest claims); *Leggat Estate v Leggat* (2003) 64 OR (3d) 347 (CA) (financial means of losing party taken into account in fixing reasonable costs).

⁴³ Orkin, *supra* note 29, s 2-3, 2-34 (noting that Canadian courts have not attempted to define with any precision the various scales of costs); *Wasserman, Arsenault Ltd. v Sone* [2002] CarswellOnt 3230 (CA) at para 5 (partial indemnity costs have "never been defined").

⁴⁴ Orkin, *supra* note 29 at 2-36; *Riddell v Conservative Party of Canada* [2007] CarswellOnt 4202 (SCJ) (partial indemnity costs are 60%); *Canadian National Railway Co, supra* note 34 (partial indemnity costs were 65%); *Computerized Security Systems Inc v Eco Tech Cleaning Systems* [2006] CarswellOnt 4368 (substantial indemnity costs reduced by one-third to arrive at partial indemnity costs).

⁴⁵ *Venture Refractories Inc v Technical Strategies Inc* [2007] CarswellOnt 3392 (SCJ) (substantial indemnity costs are 90% of actual legal fees); *Li v Huang* [2007] CarswellBC 2986 (BCSC) (special costs in British Columbia are 90% of actual legal fees); *but see College of Optometrists v SHS Optical* [2007] CarswellOnt 624 (SCJ) (substantial indemnity costs are 80% of actual legal fees).

this is 1.5 times partial indemnity costs.⁴⁶ Awards for full indemnity, or dollar-for-dollar indemnity for legal services, are rare, and this is the ceiling for Canadian costs awards.⁴⁷ Successful parties cannot profit from cost awards.

If an unsuccessful party has conducted itself in a manner that unnecessarily increased the time and expense of the litigation, the court may order that party to pay substantial indemnity costs as punishment for such behaviour. In this way, adverse cost awards can be used to discourage frivolous or vexatious behaviour⁴⁸ or to punish the failure to respond to requests to admit information and thereby unnecessarily lengthen proceedings.⁴⁹ Certain other instances also attract sanctions of substantial indemnity costs. If a party brings a motion for summary judgment, advocating there is no genuine issue for trial, and loses such a motion, the losing party is subject to substantial indemnity costs.⁵⁰ There are similar sanctions for maintaining unfounded allegations of, for example, fraud, that attack the integrity of the opposing party, or for improperly seeking punitive damages, and failing to prove the basis for them.⁵¹

These examples would suggest that costs awards depart from the norm only to increase the sanction for unsuccessful parties. However, the court also enjoys broad discretion to limit the recovery of costs for successful parties who have been inefficient in their conduct of the litigation, and to apportion the costs recovered in cases in which the success has been divided. In this way, counsel are vigilant throughout the litigation about the way in which their handling of the case will affect the award of costs.

In addition, it is not uncommon for costs to be awarded and made payable forthwith at the end of interlocutory motions. This encourages counsel on both sides to develop the case in preparation for trial in a way that will not unduly give rise to the need for motions, especially where they create unnecessary expense and delay for the parties.

However, in truly extraordinary circumstances, the court also has the power to award costs against a lawyer personally as sanction for improper conduct in the course of the litigation.⁵²

E. Encouraging Settlement

Cost-shifting mechanisms are also used to prompt early settlement of lawsuits. For example, in Ontario, special rules for costs provide a strong incentive to both parties to settle that goes

⁴⁶ Ontario Rules of Civil Procedure, Rule 1.03(1). So, if a partial indemnity award is 60% of a party's actual legal costs, substantial indemnity is 90% of that party's actual legal costs.

⁴⁷ *Stellarbridge Management Inv v Magna International (Canada) Inc* (2004) 71 OR (3d) 263 (CA) (parties cannot recover in costs more than is actually spent on the litigation, so the actual amounts billed and paid for are relevant to consider).

⁴⁸ *Lanty v Ontario (Ministry of Natural Resources)* (2007) 61 RPR (4th) 161 (Ont CA) (the plaintiff's unreasonable and uncooperative behaviour warranted a higher costs award).

⁴⁹ *Tricontinental Investments Co v Guarantee Co of North America* (1988) 29 CPC (2d) 99 (Ont HC) (costs denied to successful defendant for six out of nine days of trial because defendant refused to admit a fact which plaintiff proved at great expense).

⁵⁰ Ontario Rules of Civil Procedure, Rule 20.06(1) (failing to prove a motion for summary judgment typically attracts substantial indemnity costs against failing party).

⁵¹ *DiBattista v Wawanesa Mutual Insurance Co* (2005) 78 OR (3d) 445 (CA) (substantial indemnity costs when unfounded allegations made and not proven with respect to party being fraudulent, dishonest or other seriously prejudicial character allegations).

⁵² *Standard Life Assurance Co v Elliott* (2007) 86 OR (3d) 221 (SCJ) (court awarded costs payable jointly and severally by both lawyer and client due to sharp conduct in litigation) and Ontario Rules of Civil Procedure, Rule 57.07(1) (liability of lawyer for costs).

beyond the ordinary practice of fee-shifting.⁵³ On the one hand, if a plaintiff makes an offer to settle at least seven days before trial that remains open until the trial, and the plaintiff obtains a judgment at trial that is at least as favourable as the terms of the plaintiff's offer, then the plaintiff receives costs on a partial indemnity basis up to the date of the offer, and costs on a substantial indemnity basis from the date of the offer onward. The theory is that the offer was reasonable and should have been accepted by the defendant; and the costs incurred after that time were unnecessary.

On the other hand, if a defendant makes an offer to settle at least seven days before trial that remains open until the trial, and the plaintiff obtains a judgment at trial that is no more favourable than the terms of the defendant's offer, then the plaintiff receives costs on a partial indemnity basis up to the date of the offer, and the *defendant* receives costs on a partial indemnity basis from the date of the offer onward. The theory is that the offer was reasonable and should have been accepted by the plaintiff; and the costs incurred after that time were unnecessary.

In most cases, where the costs are significant in relation to the amount in dispute, this mechanism provides a powerful incentive to make reasonable offers to compromise and to resolve the matter early on in the process and to consider seriously any offers received. Moreover, it provides an incentive that operates throughout the pre-trial process, giving the parties good reason to evaluate and re-evaluate the benefits of settling at each stage of the litigation.

F. Calculating Costs

At the end of a matter before the court, or at the end of an interlocutory step in a matter before the court, the parties make submissions to the court with respect to costs. If possible, the parties may agree on costs. If the parties do not agree, each submits a costs outline which details the years of experience of each lawyer involved, the partial indemnity and the actual hourly rate of each lawyer, a detailed description of the time spent on the matter, and all disbursements spent on the client's behalf.⁵⁴ The court hears submissions and then determines the costs. If it is a trial, the trial judge will determine the total cost award for the matter that was before that particular judge, including any interlocutory motions, discovery, and other steps in the litigation. Costs generally follow the matter in Canada, such that the losing party pays the cost of prosecuting the entire claim.

If the matter is an interlocutory motion, the numerical value of the costs for that step in the proceeding will be set by the judge who heard the motion but those costs will only be borne by the eventual losing party, barring exceptions where the motions judge wishes to sanction a party's behaviour on the motion with costs. If there are multiple parties in complex litigation, courts may make costs orders directing certain unsuccessful parties to pay the costs of certain successful parties. For example, a Bullock order directs an unsuccessful defendant to reimburse a successful plaintiff for the costs that plaintiff had to pay to an additional successful defendant in the litigation.⁵⁵ A Sanderson order directs that an unsuccessful defendant directly pay the costs of a successful defendant in multi-party litigation. For

⁵³ Ontario Rules of Civil Procedure, Rule 49.

⁵⁴ Ontario Rules of Civil Procedure, Rule 57.01(6) (requirement for costs outlines).

⁵⁵ *Rooney v Graham* (2001) 53 OR (3d) 685 (CA) (details when a court can order a Bullock or Sanderson order) and *Moore v Weinecke* (2008) 90 OR (3d) 263 (CA) (outlining factors for overturning a Sanderson order).

appeals, costs are set at the conclusion of the appeal. In some instances, if an appeal reverses a trial judgment, the cost order for the prior trial below may also be set aside.⁵⁶

Costs submissions by counsel can be lengthy if the matter was complicated and involved many parties, many lawyers, and many days at trial. It may involve a separate hearing and the documentation required to substantiate a party's claim may be substantial. Sometimes the submissions degenerate into criticisms of opposing counsel's hourly rate or the way in which the time or resources were spent.

The court's process in arriving at the end result costs award is not strictly mathematical, where the judge takes the hours spent and multiplies that by the lawyer's hourly rate.⁵⁷ In addition to the economic reality of the actual cost of the litigation, a court must make certain that the cost award to the unsuccessful party is not putting litigation out of reach of a litigant, in a general sense. The amount must be what the losing party would reasonably expect to pay. In arriving at such an amount, some Canadian jurisdictions provide some guidance as to reasonable lawyers' hourly rates. For example, in Ontario, the Civil Rules Committee in 2005 produced the following guidelines for courts and lawyers alike to use in setting the maximum hourly rates on a partial indemnity basis:

Law Clerks	Maximum of \$80.00 per hour
Student-at-law	Maximum of \$60.00 per hour
Lawyer (less than 10 years)	Maximum of \$225.00 per hour
Lawyer (10 or more but less than 20 years)	Maximum of \$300.00 per hour
Lawyer (20 years and over)	Maximum of \$350.00 per hour

Substantial indemnity rates in Ontario would thus be 1.5 times the above rates. These are suggested guideline maximums only. While unsuccessful litigants would not be forced to pay costs of a "Cadillac variety,"⁵⁸ courts also do not expect that successful litigants would have shopped around for a less expensive alternative to their counsel of choice. Courts also expect that the lawyers take responsibility for keeping costs proportional to the matter at stake.⁵⁹ As one court put it:

Judges and assessment officers have a duty to fix or assess costs at reasonable amounts and, in this process, they have a duty to make sure that the hours spent can be reasonably justified. The losing party is not to be treated as a money tree to be plucked, willy nilly, by the winner of the contest.⁶⁰

⁵⁶ The discretion of the trial judge to award costs at trial attracts great deference by appellate courts. Before a party can appeal a costs award from a lower court, it must seek leave from the applicable court (i.e. in Ontario, from the Divisional Court). See *Ontario Courts of Justice Act*, RSO 1990, c C.43, s 133(b). A costs award in a lower court will only be set aside by a higher court if the lower court judge abused his or her discretion in setting the costs award, or if the lower court misapplied applicable costs law. This system of reversing costs awards on appeal has met some criticism, because the reversal on appeal is typically not the fault of the parties but the fault of the trial judge who arrived at an incorrect legal conclusion: Garry D Watson and Paul Lantz, "Bringing Fairness to the Costs System – An Indemnity Scheme for the Costs of Successful Appeals and Other Proceedings" (1981) 19 Osgoode Hall LJ 447 (arguing that the loser on appeal should perhaps not have to pay the costs of the entire proceeding, even though the error at trial resulted from a trial judge's incorrect application of the law).

⁵⁷ *West v Workplace Safety and Insurance Board* (2005) 78 OR (3d) 270 (Div Ct) (court refused to apply a simple mathematical approach of hours worked multiplied by hourly rate); *Trapeze Software Inc v Bryans*, [2007] CarswellOnt 1229 (SCJ) (costs does not "begin and end with a calculation of hours times rates").

⁵⁸ *Liu v Sung* (1995) 37 CPC (3d) 44 (BCSC).

⁵⁹ *Roach v Saito* [2004] CarswellOnt 4825 (SCJ) (counsel has a duty to limit time spent so it bears "some passing resemblance" to what is at issue in the case); *Volchuk v Kotsis* [2007] CarswellOnt 8027 (SCJ) (proportionality important in assessing costs).

⁶⁰ *Pagnotta v Brown* [2002] CarswellOnt 2666 (SCJ).

Despite the fact that Canada is a common law jurisdiction, where the principle of *stare decisis* – comparing like cases to like cases – is strongly held, the courts appear to make a special exception for costs cases. Courts often do not look to other similar cases as assistive when calculating the value of costs,⁶¹ though some cannot resist in doing so.⁶² There is no consistent, set percentage for partial or substantial indemnity costs.⁶³ Litigants in Ontario have the maximum partial indemnity guidelines from the Rules Committee but there is no strict requirement to adhere to the guidelines or no assistance about when to use the maximum rate. Litigants and courts are left with the simple notion that adverse costs awards are to be “fair and reasonable.” Indeed, as the Court of Appeal in *Boucher* put it, in deciding what is “fair and reasonable:”

I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.⁶⁴

V. CONCLUSION

It is difficult to predict the final dollar amount of a costs award in Canadian civil litigation. Guided by the principle that costs borne by an unsuccessful litigant in Canada’s fee shifting regime are to “fair and reasonable,” courts fix cost awards on a contextual, case-by-case method.⁶⁵ Courts must account not only for the market rates the successful party would expect to pay her own lawyer, but also for the behaviour of the parties throughout the litigation, the proportionality of the costs award to the amount at stake in the matter, and whether or not there were any offers to settle that attract settlement cost consequences. The result is a multi-factorial, fact-specific analysis with little predictive value from case to case.

It appears that costs awards are effective in regulating the conduct of litigation, but the amounts of the awards are difficult to predict at the outset of the litigation. Costs sanctions in Canada are used as behavioural modification devices—to punish litigants who waste court time, party resources, take frivolous and vexatious actions,⁶⁶ and refuse to accept reasonable settlement offers. There are indications that they achieve a measure of the desired results in Canada, because costs sanctions for litigation behaviour are not reserved for exceptional circumstances and there are often reasons in the judgment to guide litigants and counsel in future cases.

⁶¹ *Andersen v St. Jude Medical Inc.* (2006) 264 DLR (4th) 557 (Ont Div Ct) at para 42 (difficult to make comparisons that will “provide firm guidance” on costs issues); *Mandeville v Manufacturers Life Insurance Co.*, [2002] OJ No 5388 (Ont SCJ) at para 28 (“comparisons are probably not very useful”).

⁶² *See Toronto Transit Commission v Gottardo Construction Ltd* (2005) 77 OR (3d) 269 (CA) (costs award reduced when bills of costs of one party were twice as high as those of the other party); *Orkin*, *supra* note 29 at 2-32 (“the concept of comparing the costs of opposing parties appears to have taken hold”).

⁶³ *Lawyers Professional Indemnity Co v Geto* [2002] CarswellOnt 769 (SCJ).

⁶⁴ *Boucher*, *supra* note 4 at para 38 (per Armstrong JA).

⁶⁵ *Boucher* *supra* note 4. *See also Celanese Canada Inc. v Canadian National Railway Co* [2005] CarswellOnt 1124 (CA) (costs fixed by a court must be fair and reasonable); *Coldmatic Refrigeration of Canada Ltd v Leveltek Processing LLC* (2005) 75 OR (3d) 638 (CA) (overriding principle of reasonableness should drive cost awards); *Ellis v MacPherson* (2005) 15 CPC (6th) 253 (PEICA) (reasonableness important in awarding costs); *Yendrowich v Yendrowich* (2004) 50 CPC (5th) 167 (Man QB).

⁶⁶ *Standard Life Assurance Co. v Elliott* (2007) 86 OR (3d) 221 (SCJ) (court sanctioned both lawyer and client for frivolous conduct in litigation).

However, as a means of making sound decisions about whether to commence litigation, the lack of predictability of the ultimate cost of litigating can have a strong deterrent effect.⁶⁷ In this way, costs may be disproportionately driving the decision-making concerning whether to commence a claim and whether to continue the claim. The current high price of litigation keeps the risk of adverse cost awards foremost in the minds of litigants and their lawyers. This may have the effect of supplanting the concern about vindicating the substantive rights being asserted in the litigation with a concern about the risk of considerable expense in doing so. Litigants cannot *ex ante* predict the twists and turns of their case any more than they can predict the costs that might be awarded at the end. There are just too many factors involved to make an informed, reliable risk calculus. The fee shifting costs system has resulted in the creation of an entire body of complex substantive law, all measured by discretion and amorphous “reasonableness.” Flexibility in itself may have a cost: predictability.

⁶⁷ Paul Lantz, “Costs as a Regulatory Device” (1979) 2 *Advocates Quarterly* 396 (examining 468 cases in 1979 and concluding that the “most disturbing” aspect of costs was the “apparent lack of consistency” for regulatory cost orders in the form of sanctions for behaviour).