

Ontario Ministry of the Attorney General

<http://www.attorneygeneral.jus.gov.on.ca/>

The Cost of the Civil Justice System

CHAPTER 11

11.1 Cost and Value of Justice

Justice is such a fine thing that we cannot pay too dearly for it.
—Alain Rene Lesage

The civil justice system costs money.

The "cost" of civil justice accordingly has different faces. Government -- and therefore the public in its taxpaying capacity -- shoulders a major portion of the cost. Litigants, who are at the same time taxpayers, also shoulder an additional cost of the civil justice system. There are institutional or systemic costs on the one hand and user costs in the form of legal fees and administration, on the other hand.

How does one go about assessing these various costs and their impact in order to determine what value the public and litigants are receiving for their money? Are these costs in keeping with an effective, efficient and accessible civil justice system?

These questions are very difficult to answer, partly because very little study has previously been given to them. Having some concept or definition of what the true value of civil justice is to the province and its citizens in this sense, however, could be a useful guide to any assessment of the degree to which that value is actually achieved. No such concept or definition exists at the present time, as far as we have been able to determine.

We do not refer to value in this context in the sense of the qualities of worthiness of the system, but rather in the sense of what might be described in an investment analogy as a return on one's money. Are the public and litigants getting the best return on their

investment and expenditure on civil justice? In our consultations with the public the overwhelming answer to that question was "No". To a lesser extent, the Bar expressed a similar sentiment.

One can catalogue the obvious reasons easily. Most litigants simply want to have their disputes resolved quickly and cheaply, and to move on with their lives. Delays in proceedings are legion, however, and their associated costs enormous. Cost and delay are the twin enemies of the civil justice system.

Perceptions

From wasteful motions through endless discovery to long waiting for pre-trials, trials and appeals, the public perceives the civil justice system to be out of control. Lawyers, too, are frustrated by these impediments. Lawyers are stuck in courtrooms for hours waiting to be heard, forced to charge their clients for at least some of that time, and can only blame the system. Litigants expect to pay something for what happens in court, win or lose. What they learn, however -- if our public consultations are any indication -- is that once they have become enmeshed in the system their destiny is out of control. Too late to get out, they discover that they simply cannot afford the game. They are not only paying to win or lose, they are also paying to wait.

In addition, the public believes that lawyers have an incentive to waste time and effort. The "billable hour", which is the most common basis upon which legal fees are calculated these days, is seen to encourage lengthy proceedings and the inefficient handling of cases. Even a poor job extracts a payment for hours of work at a seemingly exorbitant hourly rate. An advantageous settlement or a successful trial may attract a premium over and above the hourly rate, and although the premium may be justified in the eyes of the lawyer and often by objective standards, the reasons for it may never be properly explained to or understood by the client. As a result, the stereotype of the rapacious lawyer continues to be fed.

The following is a summary of the issues identified by the public during our consultations regarding costs:

- affordability
- waste
- unnecessary complexity
- unnecessary delays
- belief that the billable hour approach to fees for service drives costs up, and an apparent lack of alternatives to this approach (should contingency fees be reconsidered?)
- lack of accountability with respect to the management of the system
- lack of service values
- lack of fairness with respect to access in the sense that middle class people are often excluded by the cost because they are neither eligible for legal aid nor wealthy enough to be able to carry the lawsuit themselves

- Legal Aid itself, and its impact upon the conduct of litigation
- unpredictability
- lack of cost sanctions for abuse or misuse of the system
- lack of incentives to settle
- lack of sensitivity or concern about what it costs people to engage in a lawsuit
- the cost of court proceedings in family matters exacerbating family problems
- lack of control anywhere on costs

Many of these concerns mirror those expressed by respondents in a study conducted by Professors W.A. Bogart and Neil Vidmar in the late 1980's^[16]. Relying upon a survey conducted in Montreal, Toronto and Winnipeg by the Legal Research Institute of the Manitoba Faculty of Law^[17], this study reported^[18],

- that "a majority of respondents indicated that something needs to be done to improve the way the legal system operates, and that the legal system favours the rich and powerful"
- that a majority of respondents thought "that it takes too long to get anything done through the legal process"
- that 44% agreed strongly and 28% somewhat that they "probably wouldn't bother disputing most legal problems because the cost of doing so would be too high"

The same study also reported that 89% of respondents agreed strongly (64%) or somewhat (25%) that "Canada must maintain a good and fair justice system, regardless of the costs". At the same time, 69% agreed strongly (34%) or somewhat (35%) that "Compared to other ways the government spends money, the justice system is a good use of taxpayers' dollars"^[19].

Moreover, with respect to the notion of the stereotypical lawyer, Bogart and Vidmar discovered that^[20]:

"On the whole, people spoke positively of their experience with specific lawyers. Whatever people may think of lawyers in the abstract, many are willing to speak positively, even at times glowingly, about how a lawyer has represented their interests."

With these varying and conflicting views as backdrop, then, how does one assess the reasonable and acceptable "cost" of civil justice? As Bertolt Brecht put it^[21]:

You want justice, but do you want to pay for it? When you go to a butcher you know you have to pay, but you people go to a judge as if you were off to a funeral supper.

11.2 Factors Driving Up Costs

Many of the factors driving up the cost of justice are the subject of much of this Report. Some are identified, in summary fashion, below for purposes of this Chapter:

- the adversarial premise of the system, particularly in Family Law matters

- backlog, delays
- structure - there is no overriding capacity to manage or control costs; parts of the system work independently rather than interdependently
- bureaucracy - its size and centralized decision-making nature mitigate against cost effectiveness fees for service, in particular "the billable hour"
- legislation without impact studies
- the increasing litigiousness of our society
- voluminous and sometimes unnecessary paper, and the handling and storage costs associated with them
- administration fees which do not seem to bear any relation to the cost of providing the service e.g. estate fees
- lack of principles or standards with respect to fees
- the increasing complexity and length of litigation
- the increasing need for resort to "experts" of almost every kind, and the significant cost associated with such consultations (custody and access assessments, medical reports, forensic accounting reports, real estate and appraisal reports, technology reports -- the list is virtually endless)
- under-utilization of available technology (automated court recording/monitoring)
- under-utilization of courtrooms and alternative court room space
- no locus of case responsibility (case management)
- variances in practise directions
- lack of incentives for settlement
- lack of disincentives in the form of sanctions for unnecessarily protracted processes
- the open-endedness of Legal Aid certificates

Legal Aid was identified by the Public, the Bar and the Judiciary as a matter with significant bearing on the cost of the civil justice system. Respondents felt that it encourages unnecessary litigation because it provides few incentives to settle and fewer to be efficient.

This led to another issue involving access to justice. It is important to ensure that access to justice applies fairly to all members of society. There is a particular concern that the middle class, who do not qualify for Legal Aid, cannot afford the costs of litigation and therefore encounter a barrier to access to justice. As well, wealthier members of society can wear down middle-class members since the latter cannot afford to fund lengthier lawsuits.

At the same time, however, the existence of a viable Legal Aid plan is critical to enable low or non-income members of our society to have access to the civil justice system. The cost of Legal Aid, and its impact upon the way in which the system functions, must be balanced against this need.

The cost of Legal Aid, which is funded primarily by the government and, therefore, by the taxpayer, has been steadily and dramatically increasing in recent years. This cannot

be ignored as a factor contributing to the increases in cost of the civil justice system as a whole.

The Civil Justice Review recognizes that Legal Aid is a major, and contentious, issue in society today. Others are examining the implications of this debate. We have not endeavoured to duplicate their efforts.

There are two major issues which need to be addressed, in our opinion, however, as we examine the legal aid question. The first is that the Legal Aid system needs to be reviewed, to see if it still works and if it truly does provide the means for low or non-income members of society to enjoy access to justice. The second is to determine the extent to which the public interest calls for the use of Legal Aid to finance private disputes in the courts or through ADR.

A major examination of the Legal Aid system is currently underway by other bodies. We hope to draw upon the results of that examination in making recommendations respecting Legal Aid in our Final Report.

11.3 Available Data on the Cost of Justice, and its Limitations

Without question, the study of what it costs from a public perspective to provide a civil justice system, and of what it costs from an individual perspective to use that system, is an important issue.

On such an important issue, one would expect to find a wealth of research. Surprisingly, there is little analysis or hard data available. This is true not only for Ontario but for most jurisdictions around the world.

The only report we found which warrants the title "study" is one entitled "The Costs of the Civil Justice System", written in 1982 by the American Institute for Civil Justice^[22]. This study explored the costs of specific types of civil cases in four jurisdictions in the United States. The authors' introductory comments are most apt, however. They said:

As with many other long-standing controversies about the civil justice system, however, neither critics nor defendants have much solid evidence to support their views about overall system costs. Anecdotes abound, of course. Each commentator can cite a few instances within his or her own experience, but no impartial institution has undertaken the laborious task of collecting, standardizing and comparing available cost and workload data to evolve overall estimates with some claim to statistical validity.

The Civil Justice Review has faced similar difficulties. We have reviewed the following sources of data: The Public Accounts of Ontario for 1993-94, the Ministry of the Attorney General Annual Statistical Report 1993-94, and available statistics from the Courts Administration Division of the Ministry of the Attorney General. There are significant limitations in the data available for analysis. Consequently, there are

significant limitations on what we have been able to determine, in concrete terms, about the "cost" of justice in Ontario.

In the first place, there are not many reliable statistics available. With the advent of new technologies, better data gathering techniques and statistics are being generated. However, the statistics-creating process is far from perfected.

Secondly, the process of analyzing statistics involves months of work. It also requires the participation of many people, some of whom are part of the government and some of whom are outside of government. These people have to go beyond the statistics to discover information which will allow them to complete an analysis. For example, they would have to determine at what point cases are actually resolved when those cases have never been set down on the trial list or have disappeared from the system. Without that sort of information, we are dealing only with snapshots at certain end points of a long process, i.e., the number of proceedings commenced and the number of matters disposed of but very little about what happens in between. It is feared, that even those statistics are flawed.

Thirdly, we have found that statistics for even basic information like the number of hours spent in court and the number of cases commenced, vary somewhat depending upon the source document being examined.

Fourthly, the assumptions made by the statisticians who decide what to include and exclude as costs are not always visible to the reader. For instance, it has been variously claimed that case management is less expensive, and also more expensive, than ordinary litigation. We suspect that such conclusions are almost entirely dependent upon what costs are included in the comparison.

Fifthly, many costs for which statistics are kept include both criminal and civil components. No breakdown is available, and any breakdown would require a great deal of work with original source documents, as well as the incorporation of basic assumptions. For instance, Statistics Canada announced in November 1994 that total Canadian Government expenditures on justice rose an inflation-adjusted 3.2% annually between 1988 and 1992, with Legal Aid doubling in the same period. However, of the 3.2% of which spending on justice represents of total government expenditures, 60% is spent on policing, with Legal Aid totalling only 6% for both criminal and civil litigation combined.

It is not that there is any absence of "numbers" in the system. There are "numbers" everywhere. The problem is, as we will discuss in the section of this Report dealing with technology, that there is no consistent and dependable mechanism yet in place for gathering accurate data to generate reliable management information. The perils of such a situation are well summed up by Will Rogers:

It ain't what you don't know that'll kill you;
It's what you know that ain't true.

We have placed some emphasis on the frailties and paucity of the data available on the issue of the cost of justice for two reasons. First, it serves to inject an element of caution regarding our conclusions. Secondly, and perhaps of greater importance, it underlines the need for further study to be conducted on this question.

RECOMMENDATION

We therefore recommend that a research project be commissioned to examine and analyze the question of the "cost" of justice, both from an institutional or systemic perspective and from the perspective of individual litigants.

The Review would have liked to have constructed a costing model for the civil justice system, based on information available, articulated assumptions and the results of a costs survey which we conducted amongst lawyers. Unfortunately, because of the difficulties referred to, we have not yet been able to do so. Our efforts will continue, and we hope to be in a position to say more about this question in our Final Report.

11.4 Preliminary Observations

Notwithstanding the foregoing caveats, our studies to date do enable us to put forward some preliminary observations, and snapshots about current institutional and individual costs of civil justice in Ontario. They point to only the most obvious and easily identifiable parts of the costs issue; however, we believe that this examination of public expenditures is a beginning towards the development of the sort of comprehensive cost model which we hope can ultimately be constructed.

The taxpayer is involved with the civil justice system as both "provider" and "user". We call the former "institutional" costs, and the latter "individual" costs.

The Taxpayer as Provider

As provider, the taxpayer supplies government with the funds to keep the civil justice system in operation. One way of measuring this cost, then, is to examine how much money is allocated to the civil justice system in the governmental budgeting process, how those funds are apportioned, and how they compare with total government expenditures. That will be one of our tasks. We will also examine the revenues which are generated by the justice system to give some indication of the "net" cost of the system to the taxpayer as provider.

The same notion can be approached from other perspectives as well. One way is to examine the cost to the taxpayer of providing a trial to litigants, having regard to the facilities, personnel and other infrastructure necessary to make that service available to the public. While this snapshot does not by any means purport to capture the entire picture of the cost of providing the civil justice support structure, it does give some focus to the institutional price of delivering the piece of the justice system that is most visible to the public i.e., the trial.

Our snapshot image of this aspect of costs is still somewhat fuzzy, because of the limitations on our data to date. We will return to it in our Final Report. In the meantime, we will venture some tentative observations.

The Taxpayer as User

As a user of the civil justice system, the taxpayer as individual has to absorb the outlay of legal fees, administrative fees, witness fees and other expenses relating to witnesses -- including the considerable cost of experts in the growing number of cases where they play a role -- and other forms of disbursements which must be incurred in the course of processing litigation to its conclusion. These user costs are considerable, sometimes insurmountable. They pose a significant problem in respect of access and the affordability of civil justice. We are able to make some tentative observations about them, based upon a survey of the Bar conducted by the Civil Justice Review, in combination with some other data which is available.

1. Institutional Costs: The Taxpayer as Provider Government Expenditure on the Administration of Justice

In this context, the focus of our comments is on the price of the administrative/judicial structure for civil justice. The members of the Review recognize that there are other expenditures which can be viewed, in the broad sense, as a part of the cost of justice. They include policy initiatives such as Legal Aid and the Family Support Plan, police services and community programs, to name but a few. Our purpose, however, is to focus the spotlight as far as possible on the infrastructure costs necessary to provide and sustain the machinery of civil justice -- facilities; judicial and administrative personnel, the salaries, benefits and support networks necessary for them to perform their functions, and services, equipment and technology.

These are the elements of the "cost" of justice which are more easily overlooked in the pressure of government budgeting, because they are the aspects of the system which receive the least public attention.

In 1993, the overall budget of the Ontario Ministry of the Attorney General was \$751,753,271. Of the total Ministry budget, only about one-third is allocated to the Courts Administration Division, which is the division of the Ministry charged with the responsibility of running the court system. This amount totalled \$276,226,100 in 1993, excluding funds attributed to administration of the Family Support Plan.

Although the size of the Courts Administration budget has been increasing in absolute terms over the years, its relative share of the Ministry's budget has decreased steadily from 50.71% in fiscal year 1986 to 37.1% in 1994. Put in another context, the Courts Administration budget represents a mere 0.54% of the

total Ontario Government budget for the year, a percentage which has remained relatively constant for the past number of years^[23].

A breakdown of how the monies attributed to Courts Administration are expended is illustrated in Table 1 on the next page.

The "judicial services" portion of this budget includes remuneration of the judges of the Provincial Division who, for the most part, hear criminal and family matters. It does not include remuneration by the Federal Government for the federally appointed judges of the General Division, who hear both civil and criminal matters.

What all of this means, is that approximately \$250 million (including Provincial Court judges' salaries) is made available for the administrative infrastructure which underpins the justice system in the province. The cost to the taxpayer, in this sense, is roughly 1/2 of 1% of what it costs the taxpayer for the government in its entirety.

Revenues Generated by the Civil Justice System

While the justice system cost the taxpayer money, it also generates revenue at the same time through fees collected, fines collected, and monies held in trust.

In 1994, the revenues from the criminal and civil justice systems totalled close to \$397 million^[24]. Excluding fines and certain reimbursements received from the federal government, provincial revenues still amounted to approximately \$178 million. One could argue that much of the approximately \$250 million (including Provincial Court judges' salaries) which is made available for the administrative infrastructure underpinning the justice system in the province is attributable to the criminal side of the system and that total receipts from the justice system, including fines, offer a fair measure when comparing costs and revenues. Regardless, the comparison indicates that the civil justice system is not a significant net user of public resources overall.

Table 2 below, is a copy of the Statement of Revenue for the Ministry of the Attorney General for the year ended March 31, 1994:

Table 2
PUBLIC ACCOUNTS, 1993-94
MINISTRY OF THE ATTORNEY GENERAL
STATEMENT OF REVENUE
for the year ended March 31, 1994

1994 - \$ 1993 - \$

GOVERNMENT OF CANADA

Reimbursements of Expenditures

Legal Aid:		
>Criminal	34,644,834	33,184,834
>Civil	15,906,722	16,416,083
>The Young Offenders Act	6,976,738	5,753,351
Criminal Injuries Compensation Board	3,529,715	3,405,920
Native Court Workers	696,586	708,135
French Language Services	336,858	659,240
	62,091,453	60,127,563

REIMBURSEMENTS OF EXPENDITURES

Public Trustee	11,752,622	13,815,450
Accountant, Supreme Court of Ontario	2,314,791	621,654
Metropolitan Toronto (Metropolitan Police Force Complaints Project)	511,320	553,750
Official Guardian	162,964	295,501
Family Support Plan (Maintenance Payments from Deserting Parents)	42,225,372	28,260,480
	56,967,069	43,546,835

FEES, LICENCES AND PERMITS

Local Registrars - Estates	60,854,668	51,729,522
Local Registrars - Other	38,084,934	41,012,088
Sheriffs	25,272,057	24,403,799
Provincial Courts (Civil Division)-clerks, bailiffs	11,482,372	6,048,561
Unified Family Court	875,311	1,161,087
Assessment Review Board	2,045,167	0
Other	656,602	381,385
	139,271,111	124,736,442

FINES AND PENALTIES

Provincial Courts	111,644,130	146,361,610
>Criminal Division	9,674	30,049
>Family Division	639,466	555,472
County and District Courts	486,903	473,026
Estreated bail	122,900	47,910
Unclaimed bail and restitutions		
Supreme Court of Ontario		
	112,903,073	147,468,067

SALES AND RENTALS

Photocopies	249,016	228,392
Transcripts	4,043	8,313
Other	12,918	6,011

265,977 242,716

RECOVERY OF PRIOR YEARS' EXPENDITURES

306,381 231,936

MISCELLANEOUS

Public Trustee - escheated estates	1,658,294	516,619
Outstanding cheques and unclaimed monies	1,000,808	313,921
Court Awarded Costs	530,569	131,412
Interest	202,073	118,189
Public Trustee - Investment Account	7,500,000	-
Other	1,908,780	1,022,163
Accountant - OC -suitors support account	12,000,000	0

24,800,524 2,102,304

TOTAL REVENUE

396,605,588 378,455,863

For policy reasons, revenues generated by the system are not attributed to the system when decisions are made about how monies are to be allocated. The revenues earned do not go back into the justice system; they go into the government's Consolidated Revenue Fund. It is neither our mandate nor our purpose to debate the policy behind this approach to budgeting. Obviously, there are ministries and government services which are important to the public welfare and which do not generate revenues. To base their funding on a net accounting approach would not be fair.

At the same time, we believe it to be unfair to ignore completely the revenue aspects of the justice system in determining what its appropriate share of government funding should be. The administrative infrastructure of justice is not a significant net drain on the public purse. Consideration might be given, it seems to us, to re-directing some of those revenues, at least notionally, to modernizing and retro-fitting the civil justice system for the rest of the 20th and into the 21st century. At the very least, any savings that may be attributable to the re-design and re-organization of the system should be available to finance the changes necessary to bring about that re-design and re-organization.

What does it "Cost", Institutionally, for a Trial?

Attempts have been made to determine the cost of a trial to the taxpayer. Such a statistic would be useful because it would shed some light on the public price of

justice through the prism of what is the most visible part of the system to the public -- a trial.

We have endeavoured to gather accurate data and information about the total cost to the taxpayer of a civil court action, taking into account not simply the time spent by administrators and judges in performing the various functions, but also the capital cost of owning and leasing buildings and equipment, the cost of supplies and services, and salaries. This has proved to be an enigmatic task. We are continuing to work on it, and reserve our substantive comments on it for our Final Report.

We note that a study has been done, in the context of the case management pilot projects, which focuses primarily on the "administrative costs for staff" of a case proceeding to a three-day trial^[25]. This study dealt with such costs in terms of the time expended by administrators and judges in the processing of nine different steps in a lawsuit, ranging from the processing of the pleadings through the pre-trial to trial. The administrative cost, in these time terms, was estimated to be approximately \$2500-\$2600.

There are other costs to the taxpayer which must be included in arriving at a true picture of the cost of the administrative and judicial infrastructure underlying a trial, however. We have listed them above as facilities, supplies, equipment, services, salaries. While the Ministry has data available in the form of courtroom utilization statistics and other costing, the data is not in a form which makes it easily formulated as the "cost of a trial". What data is available, not surprisingly, indicates that when such costs are included in the cost of trial the figure is quite substantially larger than the \$2500-\$2600 referred to above -- perhaps as high as \$20,000. The analysis lying behind these initial indications is very limited, however, and consequently we can only put forward this latter estimate in a very tentative way.

There will be more about this aspect of the cost of litigation in our Final Report.

2. Individual Costs: The Taxpayer (and other litigants) as User

o The Model of the Three-day Trial

What is the cost of the average three-day trial to a litigant, individually? Having paid once for using the system as a taxpayer, the litigant must pay an additional time for the "private" costs of a lawsuit. These individual expenses can be substantial.

Their major element is lawyers fees. The following table illustrates the estimated costs of a three-day trial in the

Ontario Court of Justice (General Division). They amount to over \$38,000.

TABLE 3: COST OF THE TYPICAL CIVIL CASE TO LITIGANT
*(assuming the plaintiff's side through a three day
General Division Trial and a solicitor's time at \$200.00 per hour)*

Steps:	
Initial interview, information gathering and research:	10 hours
Draft Statement of Claim:	5 hours
Prepare and Finalize Affidavit of Documents:	10 hours
Assume two motions (including prep):	15 hours
One cross-examination on Affidavits (one day plus prep):	15 hours
Discovery (two days plus prep):	25 hours
Pre-Trial:	10 hours
Notices including Request to Admit:	5 hours
Trial Preparation:	30 hours
Trial Time:	30 hours
Miscellaneous letters, telephone calls, reports (assume one hour per month over 3 years from start to finish):	36 hours
TOTAL	191 hours
191 Hours at \$200.00	
Plus Disbursements	\$38,200.00
Plus G.S.T.	

"Plus disbursements" may appear to be an innocuous addition to this list. It is not. Disbursements can be very substantial. We have been advised, for instance, that the disbursements in a simple uncontested divorce proceeding usually exceed the amount of the legal fees. In other instances, the cost of retaining experts or preparing drawings or surveys -- to name but a few examples -- can run into the many thousands of dollars. In addition, the litigant must pay 7% G.S.T. on fees and disbursements.

- **A Survey of Lawyers' Fees**

The Civil Justice Review commissioned a survey of the private Bar in an effort to gather more substantive information about costs to litigants. 8,300 surveys were sent

to civil litigation practitioners around the Province. A response of 521 completed surveys (6.3%) -- a statistically valid average -- was received.

The demographics of the respondents were as follows:

- average year of call was 1981/82
- practised in Toronto
- (mostly Toronto) practised in firms of 51 lawyers or more
- devoted at least half of their practice to civil litigation

These demographics appear to be representative of the civil Bar in Ontario.

The average hourly rate was \$195.00.

The responses indicated that the median of the largest bill for judge and jury trials in the last two years (only 16% responding) was \$38,500.00. This compares almost exactly to the estimate set out in the Table above, which was prepared quite independently of the survey. 85% of respondents said that less than 1/4 of their bill was due to systemic delay.

Interestingly, most lawyers reported that litigation was usually about matters relating to breaches of contract (86%), rather than family law (71%) and small claims court proceedings (68%).

Another interesting survey relating, at least indirectly, to lawyers' fees was conducted for the Simplified Rules Sub-Committee. It examined party and party costs in a random sampling of 98 court files from six different court centres in the Province^[26]. This survey reveals that the average claim in the General Division is approximately \$197,000; the average judgment is approximately \$58,000; the average allowance of party and party costs, approximately \$8,500. In terms of "medians", as opposed to "averages", the median claim is

approximately \$32,000; the median judgment is approximately \$15,000; the median award of party and party costs is approximately \$4,300.

Keeping in mind that the foregoing figures represent only the costs awarded to one of the litigants, and that those costs are only a portion of what that litigant pays to counsel, the inference is strong that the combined legal costs of the parties to a lawsuit are, on average, about 3/4 of the judgment obtained; and on a median basis, are perhaps more than the judgment obtained.

Clearly, these costs to individual litigants can be a barrier to access to justice. Many of the recommendations which we have made elsewhere in this Report will help to alleviate the pressures associated with legal fees -- the caseflow management framework, technology initiatives, reforms to the discovery and motions processes and the various alternative dispute resolution techniques, to name a few. In addition, we believe, the profession needs to re-examine the way in which it charges its clients for the services it renders. Are there alternatives to the billable hour? Should contingency fees -- one obvious form of alternative that was urged upon us frequently during our consultation phase -- be permitted as an option?

The billable hour has evolved as the cornerstone of legal billing practise only over the past 15 to 20 years. Prior to that time the profession managed to operate effectively on other bases, such as value billing, block billing, or some other form of pre-set billing or agreement for the billing of fees. Presumably it is not impossible for these concepts to work again. This does not mean, necessarily, that other forms of billing will solve the issue of access or result in significantly reduced legal costs. The real savings may come from the streamlining of the system and the implementation of a more efficient process.

Ironically, the concept of the billable hour developed in response to a demand from clients that lawyers "account" for their time, in order to justify the amount that they charged. Now the billable hour is seen in some quarters as a factor driving fees to unaccountably high amounts. As we have mentioned earlier in this Chapter, the public is skeptical that lawyers are tempted to prolong proceedings such as examinations for discovery in order to enhance their billable hours. At the same time, the billable hour is an effective way of monitoring the amount of time a lawyer is spending on a file. In addition, it has become an important tool for the internal management of legal businesses.

Contingency fees -- an arrangement where the lawyer and the client agree in advance to share the proceeds of the lawsuit, if any -- is a popularly offered alternative to the billable hour. It is popular with the public, which sees it in simplified "no win-no pay" terms. It is popular with some members of the Bar, who see it in an entrepreneurial way as an opportunity to earn significant fees. It is seen, from both perspectives and in other quarters as well, as a way of providing access to civil justice for those who have meritorious cases but cannot afford to litigate them and who are not eligible for Legal Aid.

Ontario is the only province which does not allow some form of contingency fee arrangement, except for class proceedings. In 1988, the Law Society of Upper Canada approved adoption of contingency fees in principle, subject to certain safeguards for the public. However, legislation is necessary to permit such an arrangement between lawyers and clients and the necessary amending legislation has not been enacted^[27].

We believe that it is time to re-visit the concept of contingency fees as a possible means of improving access to justice. There are, however, a number of issues to be addressed, including:

- whether contingency fees would, indeed, increase access to civil justice;

- whether they would result in an overall cost saving;
- whether matrimonial and criminal matters should be excluded from the concept
- the safeguards that need to be put in place for clients, with respect to the reasonableness of the fee;
- whether there should be limits on the percentage or recovery that may be agreed to as a fee.

We believe that all of these questions respecting alternatives to the way in which clients are charged for legal services need to be examined, in our view.

RECOMMENDATION:

We recommend that a working group be established, in conjunction with the Law Society of Upper Canada, for the purpose of addressing the issues involving legal fees and making recommendations to the Civil Justice Review in that regard for purposes of its Final Report.

11.5 "Court Costs" and the Imposition of Sanctions

Courts have the inherent jurisdiction to award or refuse to award costs, and to use the cost sanction to control their process and to prevent abuse of that process^[28]. This discretionary authority is supplemented by the provisions of The Courts of Justice Act, s. 131 and Rule 57 of The Rules of Civil Procedure.

There is a growing frustration amongst judges, lawyers and members of the public at what is perceived to be the increasing number of prolonged or unnecessary proceedings. Sometimes it is the lawyer who is blamed, sometimes the client, sometimes Legal Aid. The Review was urged on many occasions, by representatives of all three of the foregoing groups, to recommend that Courts be more vigilant in imposing costs as a sanction against conduct leading to such proceedings.

In the Canadian system of civil justice, costs are generally awarded to the successful party. Generally, as well, those costs are ordered on the lower party and party scale that we have referred to above, as partial indemnification to the successful party for the expense of the litigation^[29].

On occasion, costs will be awarded to a party on what is known as the "solicitor-client scale". Such costs should not be confused with what a client must pay his or her own lawyer. Solicitor-client costs are costs as between the parties to the lawsuit, but they are costs at a higher scale, designed to provide the recipient with "complete indemnification

for all costs (fees and disbursements) reasonably incurred in the course of prosecuting or defending the action or proceeding, but ... not, in the absence of a special order, to include the costs of extra services judged not to be reasonably necessary"^[30]. Costs are awarded on this scale as an indication of the Court's disapproval of the conduct of a party with respect to litigation, but are "reserved for cases where the court wishes to show its disapproval of conduct that is oppressive or contumelious" or, basically, where the Court feels the successful party ought not to have been put to any expense for costs in the circumstances^[31].

Thus, the imposition of solicitor-client costs against a party is one method in which the court may exercise its discretion to impose a sanction for unacceptable conduct in the pursuit of litigation.

The award of costs for this purpose is not limited to an award in favour of the successful party. Even where the party has been successful, the Court may deny that party costs or even award costs against a successful party, in exceptional circumstances. Such circumstances might include situations involving misconduct of a party, miscarriage in the procedure or oppressive and vexatious conduct of proceedings^[32].

In addition, costs may be awarded against a solicitor or counsel personally, where he or she has been responsible for an abuse of process. This is a jurisdiction which Courts exercise cautiously because it raises difficult questions about the duty of lawyers to advance their clients' cases fearlessly and about solicitor-client privilege (which might need to be pierced in order to determine the reasons for counsel's conduct). Nonetheless, courts have awarded costs against solicitors personally in countless cases. It is a power which many have urged on us should be utilized more.

The Supreme Court of Canada has recently revisited the principles upon which this jurisdiction may be exercised. In *Young v. Young* Madam McLachlin said^[33]:

..The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court.

... But the fault that might give rise to a costs award against [the solicitor] does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

It is apparent from all of the foregoing, then, that courts are equipped with the necessary jurisdiction and authority to impose cost sanctions, of varying degrees, on parties and their lawyers in appropriate cases. There appears to be a growing sense amongst the members of the public, the Bar and the judiciary that these powers should be exercised more vigilantly in what seem to be an increasing number of prolix, prolonged and unnecessary proceedings.

We agree that trial judges should be alert to, and prepared to utilize their authority in this respect -- always subject to the cautionary caveats expressed above. We also urge members of the profession to be alert to their obligations in this respect, and to impress upon their clients the necessity of avoiding frivolous and unnecessary proceedings. Society can no longer provide unlimited time and resources for the disposition of lawsuits, given the reality of fiscal and other constraints. What was once thought of as everyone's "right to their day in court" may still be a valid and important concept; it does not mean the right to everybody else's day in court as well, however.

As one judge has put it^[34]:

... The costs sanction is one of the only ways in which the court can protect the integrity of its process in the particular case, and act as a signal to other litigants of what is required of those who wish to have the benefit of the use of our courts to resolve disputes.

11.6 Forward Challenges

As this Chapter on Costs has illustrated, there are many aspects to the "cost of justice" and much still to be done to grapple with the challenges raised by the questions surrounding them.

Some of the fundamental challenges facing the system in the future include:

- development of an accurate management information data base to enable the various aspects of the "cost of justice" to be analysed and improvements effected;
- how savings, if they are found, can be redirected to enhance the effectiveness of the civil justice system;
- how the civil justice system should compete for and protect its resources.
- how Courts Administration can isolate and justify financial requirements to preserve the system;
- how access to the system on a timely and affordable basis can be assured for those who do not qualify for Legal Aid;

It is the intention of the Civil Justice Review to continue to pursue these questions and the numerous questions posed, but not fully answered, in this First Report as part of our implementation strategy. We will have further comment in our Final Report.

Footnotes:

^[16]W.A. Bogart and Neil Vidmar, "Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment", *Access to Civil Justice*, Allan C. Hutchison ed., Toronto, Carswell, 1990 [hereinafter Bogart & Vidmar]

^[17]Moore, "Reflections of Canadians on the Law and the Legal System: Legal Research Institute Survey of Respondents in Montreal, Toronto and Winnipeg," in Gibson & Baldwin, eds., *Law in a Cynical Society: Opinion and Law in the 1980's* (1983).

^[18]Bogart and Vidmar, *supra*, pp. 36-37.

^[19]*Id.*, p. 37

^[20]*Id.*, p. 45, and generally at pp. 45-49.

^[21]The Caucasian Chalk Circle

^[22]J.S. Kakalik & A.E. Robyn, *Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases*, (Rand Institute for Civil Justice: Santa Monica, 1982) R-2985-ICJ.

^[23]Ministry of the Attorney General, Courts Administration Division, Program Development Branch

^[24]\$396,605,588.00. See Ontario Public Accounts, 1993-1994, Ministry of the Attorney General, Statement of Revenue.

^[25]Case Flow Management: An Assessment of the Ontario Pilot Projects in the Ontario Court of Justice, A Report to the Courts Administration Division of the Ministry of the Attorney General, November 1993, Appendix E.

^[26]Party and party costs are not the costs that a client pays to a lawyer. They are costs which are awarded by the court and which are payable by one party to another. "Party and party" is a scale of costs which represents, usually, somewhere between 40% and 50% of the amount paid by a client to the lawyer. They are intended to be partial indemnity only, and when not agreed to are "assessed" by assessment officers connected with the Court.

^[27]Section 28 of The Solicitors Act R.S.O. 1990, chap. S.15, prohibits a lawyer from purchasing any interest in litigation or making payment dependent upon success.

^[28]*Young v. Young*, [1993] 4 S.C.R. 3

^[29]See M.M. Orkin, *The Law of Costs*, 2nd ed. (Canada Law Book Inc.: Aurora, 1994), pp. 2-14.

^[30]See the decision of Henry J., in *Apotex Inc. v. Egis Pharmaceuticals* (1992), 4 O.R. (3d) 321, at pp. 324-328 for a general description of the principles underlying the awarding and fixing of costs.

^[31]*Id.*, p. 325.

^[32]Orkin, *supra*, note 39, pp. 2-23 through 31.

^[33]*Young v. Young*, [1993], 4 S.C.R. 3 (MacLachlin at p. 135-6).

^[34]*Singh v. Singh* (1992), 10 C.P.C. (3d) 42, (Ont. Ct. Gen. Div.), per Feldman J.