Civil Procedure
Fall Term 2017

LECTURE NOTES NO. 1

INTRODUCTION

"Adversarial" Justice

Rules 1.04 (1)

> General Principle
>
> 1.04 (1) These rules shall be liberally construed to secure the **just, most expeditious** and **least expensive** determination of every civil proceeding on its merits.

- In normal circumstances the contest is fought by adversaries before a judge who acts as neutral umpire respecting the rules of the contest and its ultimate result. Whichever side convinces the trier of fact (judge or jury) on a **'balance of probabilities'** wins.

- While the Court is neutral, the realities of economic disparities and resources challenge the judge to ensure that the weaker party is not denied justice. Judges may have to provide some guidance to an unrepresented party just to keep the matter on track and allow other cases to be heard before the end of time.

- **Procedures should be proportional to what is at stake.** Lawyers should bear in mind what things cost and how long procedures take and should then mould them to suit the nature of the dispute and how much money is at stake – i.e. use some common sense (an underrated quality, much prized in practice).

What exactly are 'The Rules'?

There are various types and sources of procedural rules:

- There are regulations under the statutes that create the court in question which we refer to as "rules or procedure" or "rules of practice". We will be dealing primarily with the "Rules of Civil Procedure" that are created under the *Courts of Justice Act*, Section 66, for proceedings in the Superior Court and the Court of Appeal.

- Superior Courts (and some inferior courts) have an inherent jurisdiction to deal with procedural points.

- 'Practice Directions' issued by courts provide procedures in a given region for particular kinds of litigation.

Access to Justice

"Access to Justice" has become a catch-all phrase in relation to the ability of a person to have reasonable recourse to the law. While there is a lot of talk, there is unfortunately not a lot of money. Legal Aid has been cut back substantially in recent years causing a glut of self-represented litigants before the courts (nb: there is no constitutional right to be represented by a lawyer; see *British Columbia (A.G.) v Christie*, [2007] 1 S.C.R. 21). Where the courts have confronted such issues it is most often in relation to the imposition of additional road-blocks, such as fees charged for court time.

Trial Lawyers Association of British Columbia v. British Columbia (A.G.) **2014 SCC 59**

The B.C. Rules of Civil Procedure provide for 'hearing fees' for the use of a courtroom during trial; $156 for the first half-day of a trial and rising to $624/day after ten days. The imposition of the fees was struck down at first instance in this case. At trial, McEwan J held that fees were within the legislative ambit of the province but the level of fees rendered them unconstitutional as they went far beyond cost recovery. In the Court of Appeal (*Vilardell v. Dunham*, 2013 BCCA 65), Donald J.A. largely agreed with the reasoning of the trial judge but cured the constitutional defect by enlarging the jurisdiction of a judge to order relief based on need:

> [26] **… What makes hearing fees constitutionally suspect is in their potential to impede persons who cannot afford them. Wealthy individuals and corporations may not like paying the fees but they are unlikely to alter their litigation strategy because of them. In that sense, the government efficiency objective is invidious because the fees impinge only on the economically disadvantaged. Only they, not the well-to-do, will be discouraged from pursuing their rights in a hearing of sufficient length to do justice to the issues. However, an effective exemption defeats the invidious purpose but allows the cost recovery objective to be achieved.**
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> …
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> [32] *Schachter v. Canada* is the leading case on constitutional remedies. Chief Justice Dickson in B.C.G.E.U. noted at 229 that "the rule of law is the very foundation of the Charter". Section 52(1) of the Constitution Act, 1982, states that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In effecting a constitutional remedy under s. 52(1), Chief Justice Lamer for the majority in *Schachter* stated that the first step is to properly define the extent of the Charter inconsistency. In this case, **the constitutional inconsistency consists of an under-inclusive exemption from hearing fees, which restricts it to people who would be defined as impoverished. As I stated earlier, an enlarged interpretation of the indigency provision is**

> **necessary to uphold the constitutionality of hearing fees and remove a barrier to court access.**
>
> [33] The next step is to determine the appropriate remedy for a constitutional violation, which can include severance, reading down or reading in provisions into the Rules. **Reading in is the most appropriate remedy in this case. Striking down the hearing fees or the exemption in its entirety would be undesirable for the reasons already given. This violation stems from an exemption which omits people who, while not impoverished, cannot afford the hearing fees. The effect of this omission limits their access to the courts, which violates the rule of law. The most effective way to deal with this omission is to read in the words "or in need" to Rule 20-5**.

The matter was then brought to the Supreme Court of Canada by interveners on the question of remedy. The appeal was allowed and the legislation struck down with immediate effect. Per McLachlin CJC:

> [40] **In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law.** If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631 (CanLII), 262 D.L.R. (4th) 51, at paras. 68-9, per Newbury J.A.
>
> [41] **This Court's decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in Christie — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not "every limit on access to the courts is automatically unconstitutional" (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts.** The tax at issue in Christie, on the evidence and arguments adduced, was not shown to have a similar impact.
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> …
>
> [46] **A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it**

> **subjects litigants to undue hardship, thereby effectively preventing access to the courts.**
>
> [47] Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.
>
> [48] **It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them.** Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts — a tradition that goes back to the Statute of Henry VII, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees.

[Please note that Ontario courts do not charge hearing fees. However, there are filing and other charges from which Courts may order relief.]

Proportionality

See Rule 1.04 (1.1)

> **Proportionality**
>
> (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.

This is of increasing importance in the conduct of litigation - Cadillac-procedures are not required in a fight over an old beater.

Professionalism: Fees

Fees = charges for professional services performed under a contract.

The usual practice is **hourly fees**; in some areas, **contingency fees** (payable at a percentage of an award only in case of success) or **block fees** are used. Minimum fees may be charged. In some cases, lawyers work *pro bono* or their fees are paid by Legal Aid (on an hourly or block-fee basis) or are ordered by the Court to be paid by the Crown (rarely). A contract between a lawyer and a client is called a **retainer agreement**. Money paid 'on retainer' is held in trust and applied to the amount owing after **an account is rendered**.

A client can have a lawyer's account '**assessed**' under the *Solicitors Act*, s.3 by an 'Assessment Officer' within 30 days after the final account is rendered. The bill can be reduced where it is outside the retainer agreement or unreasonable based on the following factors:

1. The time expended by the solicitor;
2. The legal complexity of the matters to be dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matter to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The client's expectation as to the amount of the fee.

Professionalism: Rules of Professional Conduct

Examples:

> 5.1-5 A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.
>
> 5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation.
>
> …
>
> 7.2-1.1 A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.
>
> 7.2-2 A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

See also R. 57.07(1) of the Rules:

> 57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
>
> (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
>
> **(c) requiring the lawyer personally to pay the costs of any party.**
>
> (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.
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> (3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

Standard Life Assurance Co. v Elliott
2007 CanLII 18579 (Ont. S.C.J.)

Here the claim was made against an insurer and all of its former and present employees who dealt with the plaintiff's insurance claim for disability payments. The claim against the third parties was both unnecessary practically (the defendant admitted vicarious liability if the principal allegations were proved) and failed on legal grounds. The effect was to increase the defendant's costs which were sought on an elevated basis from the lawyer for the plaintiff *personally*.

Per Molloy J.:

> 10 In exercising discretion as to an appropriate costs award, it is relevant to take into account "the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding" and "whether any step in the proceeding was improper, vexatious or unnecessary": Rules of Civil Procedure, Rule 57.01(1)(e) and (f).
>
> ...
>
> 13 Counsel for Standard Life gave Mr. Masters several opportunities to drop the third party claim against the employees without the necessity of a motion, but he refused.
>
> ...
>
> 15 As a result of the third party proceeding alone, Standard Life will have incurred nearly $40,000.00 in legal fees. This kind of tactical litigation is

not conducive to the legitimate settlement of disputes in our judicial system. On the contrary, it is exactly the kind of conduct that makes litigation so prohibitively expensive that legitimate disputes cannot be litigated. It is appropriate in this kind of situation to discourage such conduct by imposing stiff costs consequences...

...

20 There is no evidence whatsoever to support that accusation. There is, in my view, considerable merit to Standard Life's request that Mr. Masters be personally liable for the costs. Although Ms Elliott is an intelligent, well-educated person, she is not a lawyer, has no legal training and cannot have been the inspiration behind the third party proceeding. That litigation strategy must have been developed and recommended by her lawyer...

21 Furthermore, from what I have seen of Mr. Masters' conduct in the material before me, I believe it goes well beyond a lawyer "forcefully and aggressively" advocating for his client...

...

23 In Ontario, the test is now set out in Rule 57.07 (1) (c), which states:

> 57.07 (1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (c) requiring the solicitor personally to pay the costs of any party.

...

26 In *Young v. Young* (1993), 108 D.L.R. (4th) 193 (S.C.C.), the Supreme Court of Canada held that costs ought not to have been awarded personally against the solicitor for the father in protracted child custody proceedings dealing with the extent to which the father could involve the children in his Jehovah's Witness religious activities during periods of access. The Supreme Court recognized that the proceedings had been lengthy and acrimonious. However, the Court held, at p. 284 that costs are compensatory and are not awarded for the purpose of punishing a barrister. McLachlin J, (writing for the majority on this point), stated p. 284:

> . . . **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 that abuse and delay. It is as clear that the courts possess that 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. . . . 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.**
>
> 31 **Costs are meant to be compensatory. The likelihood of recovering the costs thrown away as against the defendant are remote. The only way to truly compensate the plaintiff insurer for its costs would be to make them payable by the solicitor.** Given my finding that Mr. Masters was the instigator of the action taken and that he took the steps he did for an improper purpose, as well as the fact that his general conduct of the litigation excessively drove up costs, it is in my view appropriate that he pay the costs personally.

Best v. Ranking
2016 ONCA 492

The typical part of this case is that a litigant alleged a widespread conspiracy against him involving the judiciary, lawyers, the police, and others that opposed his claims. The less typical part if that costs of $84,000 were ordered to be paid by the plaintiff and his lawyer (personally) jointly and severally. The plaintiff already owed huge sums for costs in the same proceedings. The lawyer argued that other lawyers would be reluctant to provide forceful advocacy in weak cases if costs were ordered against him personally – the Court of Appeal would have none of it.

Pardu J.:

> [50] I agree with the submission of the appellant that the fact that a lawyer starts an action which is unlikely to succeed is not, on its own, a basis to award costs personally against that lawyer.
>
> [51] Rule 57.07 is "designed to protect and compensate a party who has been subjected to costs being incurred without reasonable cause, not to punish a lawyer": *Galganov* [*Galganov v. Russell (Township)*, 2012 ONCA 410], at para. 14.
>
> [52] The motion judge here did not make Mr. Slansky liable for costs personally simply because he started a case that was weak. As the motion judge pointed out, the nature of the proceedings is an important contextual factor in assessing whether costs wasted by a solicitor justify an order that he pay costs personally.
>
> …
>
> [54] The motion judge examined the entire course of the litigation in assessing the specific actions and conduct of counsel, as she was required to do. In particular, she focused on the vexatious or abusive nature of the proceeding. This is not a necessary element of an award of costs against counsel personally but is not unfamiliar in this context…
> [55] On appeal, Mr. Slansky argues that Action 2 was not abusive. It was against many different parties and for different causes of action. That issue has now been conclusively determined by the dismissal of Mr. Best's appeal from the decision striking Action 2 as an abuse of process. Action 2 made

similar allegations of impropriety as had been voiced in the course of Action 1. The motion judge did not err in considering that Mr. Slansky incorporated into the pleading in Action 2 accusations of criminal misconduct against opposing counsel that had repeatedly been judicially rejected as baseless.

[56] Finally, as this court indicated in *Galganov*, at paras. 23-25, deference is owed to a motion judge's decision as to whether a lawyer should pay costs personally:

> The determination as to costs is a matter within the discretion of the application judge. An appellate court may set aside a costs award if the application judge made an error in principle or if the costs award is plainly wrong.
>
> In *Rand Estate*, this court held that:
>
> The application judge who managed the proceedings was in a much better position than this court to make the necessary assessments underlying the findings of fact he eventually made. Those findings are, by their nature, somewhat subjective and the cold paper record cannot, in our view, capture all of the considerations that would be relevant to those findings. We defer to the [application] judge's findings unless they are clearly in error and clearly material to his ultimate determination.
> As a result, this court owes a high degree of deference to the application judge's holding…. [Citations omitted.]

[57] I see no basis to interfere with the motion judge's discretionary decision to order Mr. Slansky to pay some portion of the costs wasted.

[58] In the event leave to appeal a costs order against counsel personally is necessary, I would grant leave.

Resolution of the Dispute

(a) Adjudication, Mediation and Negotiated Settlements

- Adjudication is one method of dispute resolution. A facilitated negotiation ('mediation') may be preferred and in some jurisdictions (Toronto and Ottawa for example) must be attempted before a matter may be listed for trial. See Rule 24.1.

- 'Negotiation' usually refers to facilitated settlement discussions.

(b) Settlement Offers, Agreements, and Minutes of Settlement

- Settlements usually represent a compromise between the parties to end the dispute. The settlement is itself a contract which will include such terms as

dismissal of the proceedings. The terms are normally contained in a document entitled 'Minutes of Settlement' executed by the parties.

- A settlement in favour of a party under a 'disability' (e.g. a child) must be approved by the Court.

Introduction to the 'Costs Rules'

- **Costs** = money paid by the unsuccessful party to the successful party in litigation, adjusted for offers to settle, bad behaviour, and proportionality.

- Aim: compensation for the costs of litigation.

- 'Partial indemnity' is the norm (expect 60% of reasonable costs at best), 'substantial indemnity' (90% of reasonable costs) are exceptional and usually based on offers to settle, and 'full indemnity costs' are rare.

- ***These are discretionary awards and very hard to predict.***

Courts of Justice Act, R.S.O. 1990, c.C.43

131.(1) 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.

See Rules 49 (Settlement Offers), 57 (Costs)

Plaintiff's Offer

49.10 (1) Where an offer to settle,

(a) is made by a plaintiff at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant,
and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

...

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;
(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
  (iii) any other matter relevant to the question of costs.

Clarington (Municipality) v. Blue Circle Canada Inc.
2009 ONCA 722

Epstein J.A. held:

> [30] The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p.23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to *Orkin* at para. 219.
>
> **An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:**
>
> **[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.**
>
> [31] The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H. & W. Sales Co.* (2002), 59 O.R. (3d) 97 where, at para. 39, she said:
>
> Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were **specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.**
>
> …
>
> [45] Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex v. Egis Pharmaceuticals* substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation...particularly where a party has conducted itself improperly in the view of this court." For other examples of abuses of process leading to elevated costs, see *Dyer* at pp.184 - 85.
>
> [46] Here, there is no finding or evidence in the record of "harassment…by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. **In the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court.** In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court.

Clarington is difficult in that the Court does not provide much insight into the level of fault that is required other than to repeat certain traditional characterizations of conduct (such as 'reprehensibility') that are not related to values, except for one: abuse of process.

Barlow v Citadel General Assurance Co.
2008 CanLII 3215 (Ont. S.C.J.)

Here the plaintiff was awarded $100,000 in damages and sought $250,000 in costs; costs in the amount of $90,000 were awarded (the trial judge held that the claim was 'outlandish' and seemed to have been made under the assumption that the defendant insurer should be punished for vigorously defending the claim). Aside from illustrating the general method by which costs are assessed, this case considers whether a lawyer may seek a premium from the losing party to assure that the lawyer's bill is paid fully (that is; that the shortfall between actual costs and the costs ordered are paid by the losing party where the winning party has insufficient funds).

Per Lalonde J.:

> 4 **Counsel for the plaintiff seeks a $50,000.00 premium on the basis that he took on the plaintiff's case on the basis that he would not recover any fees or disbursement unless the plaintiff was successful in a settlement or at trial. He states that his client had no financial ability to retain his services.**
>
> ...
>
> 10 It is not my role in fixing costs to engage in another piece of litigation. I find that the argumentative supplementary costs submissions of plaintiff's counsel were not helpful. Counsel can find any number of costs decisions that, if improperly applied, can support outlandish positions.
>
> 11 The plaintiff claimed a premium of $50,000.00 basically because she did not have the financial means to retain counsel (paragraph 3 of the plaintiff's submissions on costs)... In.. Ward v. Manufacturers Life Insurance Co., [2007] O.J. No. 4882 (Ont. C.A.)... In that case, Manufacturers Life froze Mr. Ward's vested commission account. Weiler J.A... states at paras. 69-71 that:
>
> ¶ 69 The concerns underlying the decision in Walker apply equally to the new language of Rule 57.01. **First, the new factors, like the old ones, are neutral in character and can apply equally to plaintiffs or defendants. Second, although the new factors do not specifically relate to the nature of the case or the conduct of the parties, they serve to uphold the principles of transparency and predictability that should govern costs awards. The two new factors merely make explicit the fact that, in the absence of a costs grid, there should be fairness and consistency in the amount that can be charged for lawyers' time across similar pieces of litigation involving similar conduct and counsel.**

¶ 70 I would note that the phrase "the principle of indemnity" in the new legislation is qualified. The listed considerations are the experience of the lawyer, the rates charged, and the hours spent. While the clause is phrased inclusively, a risk premium is not of like kind to these considerations.

¶ 71 **Clause (0.b) confirms this interpretation by insisting that costs be what the unsuccessful party could "reasonably expect to pay." This engages the other concern about risk premiums explicit in Walker: that the defendant is not aware of his potential cost exposure because the premium is a private agreement between the plaintiff and his counsel.** As noted in Walker, this is particularly important where, as here, a Rule 49 offer to settle has been made, and the defendant must be aware of the risk of refusing the plaintiff's offer.

12 Weiler J.A. cancelled the $50,000.00 premium award. For the same reasons, I dismiss the plaintiff's claim for a $50,000.00 costs premium in this case.

JURISDICTION

In which jurisdiction will the proceedings be held? Such a simple question; such a complicated answer. Consider that the precipitating event to the dispute may have occurred in one place, the parties reside in another, the thing subject of a dispute is somewhere else, and the people who will be witnesses yet somewhere else again.

Club Resorts Ltd. v. Van Breda
2012 SCC 17

This is the leading case. Where there is a foreign element, an Ontario court will have jurisdiction over a dispute when there is a *real and substantial connection* between the dispute and Ontario. In the *Van Breda* litigation, the 'real and substantial connection' principle was refined. Rather than a direct test, there are now two stages of basic inquiry:

> First, **the plaintiff must establish that a 'presumptive connecting factor' connects the litigation to the jurisdiction**. Such factors include whether the defendant is domiciled or resident in the province; the defendant carries on business in the province; if a tort case, whether the tort was committed in the province; and, if a contract case, the contract connected with the dispute was made in the province. The fact that the plaintiff is resident in the jurisdiction is not itself sufficient.
>
> Second, **if a 'presumptive connecting factor' is established, the onus shifts to the defendant who may rebut by establishing presumed jurisdiction by showing that the connection is insufficient to establish a real and substantial connection.** Here the real question will usually become whether another jurisdiction will be more convenient for the litigation.

This is a new framework for jurisdiction (sometimes called "territorial competence") and the courts are adding detail to that framework as cases are decided.

Babington-Browne v. Canada (Attorney General)
2016 ONCA 549 (Ont. C.A.)

A British soldier died while being transported in helicopter in Afghanistan. The helicopter was operated by Canadian Forces. The family of the soldier brought a claim in negligence against individual Canadian soldiers, "John Doe" defendants, and the federal Crown in an Ontario court. Did the Court have jurisdiction over the federal Crown? No, the *Crown Liability and Proceedings Act* provided otherwise.

Laskin J.A. :

> (1) The Rationale for s. 21(1)
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> 9 Section 21(1) came into effect by amendment to the CLPA in 1992. By the amendment, for claims against the federal Crown, a court of the province "in which the claim arises" has concurrent jurisdiction with the Federal Court. The wording of s. 21(1) has changed since it was introduced, but the effect of the provision is the same. Section 21(1) now states:

> In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.
>
> …

2) Does Van Breda Apply to the Interpretation of s. 21(1) of the CLPA?

15 In Van Breda, the Supreme Court of Canada discussed — in the context of private international law — when a provincial court can assume jurisdiction over a claim. The Supreme Court reaffirmed that the governing test for the assumption of jurisdiction is the "real and substantial connection" test. Plaintiffs must show a real and substantial connection between the subject matter of their claim and the province in which they seek to litigate that claim. LeBel J., writing for the court, said that in a tort claim four factors can be considered presumptive connecting factors, which, unless rebutted, entitle a provincial court to assume jurisdiction over a dispute:

- the defendant is domiciled or resident in the province;
- the defendant carries on business in the province;
- the tort was committed in the province; and
- a contract connected with the dispute was made in the province.

16 The appellants submit that Van Breda should be applied to determine whether the Ontario Superior Court has jurisdiction under s. 21(1) over their tort claim against the federal Crown. Doing so, they contend, would give effect to the very purposes of s. 21(1): to limit or eliminate multiple proceedings and promote access to justice.

17 I do not accept the appellants' submission. It is arguable that the appellants could have sued all defendants, including the three John Doe defendants, in the Federal Court in the light of s. 17(5)(b) of the Federal Court Act. Section 17(5)(b) gives the Federal Court concurrent original jurisdiction "in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown." But even if s. 17(5)(b) does not apply, the appellants' claim may be one of those cases where, despite s. 21(1) of the CLPA, the federal Crown must be sued in the Federal Court and the three John Doe defendants in the Ontario Superior Court.

18 Even in Van Breda itself, LeBel J. was careful to note at para. 68 that his "comments about the development of the common law principles of the law of conflicts" — that is, the development of the real and substantial connection test — "are subject to provisions of specific statutes . . . " Section 21(1) of the CLPA is a specific statutory provision that sets out a different test from Van Breda's real and substantial connection test. In short, the words of s. 21(1) and not Van Breda should be used to decide a provincial superior court's jurisdiction under the CLPA.

19 That Van Breda does not apply to the resolution of a provincial superior court's jurisdiction under s. 21(1) is evident from considering Van Breda's presumptive connecting factors. The first connecting factor is whether the defendant is domiciled or resident in the province. The "head office" of the federal Crown is in Ottawa and so it is domiciled in Ontario. If Van Breda applies, the Ontario Superior Court presumptively would have jurisdiction over every claim against the federal Crown. The second connecting factor is whether the defendant carries on business in the province. The federal Crown has a presence and numerous offices in every province in Canada. It can thus be said to carry on business in every province. Again, if Van Breda applies, presumptively every province in Canada would have jurisdiction over every claim against the federal Crown, no matter where that claim arose. These results would be inconsistent with the language and intent of s. 21(1).

20 The only Van Breda connecting factor that parallels s. 21(1) is the third — whether the tort was committed in the province. Whether the tort was committed in the province is similar to "the province in which the claim arises". Under s. 21(1) of the CLPA, "the province in which the claim arises" is the sole criterion or connecting factor that gives a provincial superior court jurisdiction over claims against the federal Crown. If we were to give effect to the appellants' submission, we would have to add words to s. 21(1) that are not there.

21 The test under s. 21(1) is simply different from the test in Van Breda. The application of the real and substantial connection test to the federal Crown would lead to impractical results that do not take account of the language of the CLPA. I add that since Van Breda was decided in 2012, courts have considered jurisdiction under s. 21(1) and have not applied the real and substantial connection test: see, for example, David S. Laflamme Construction Inc. v. Canada (Attorney General), 2014 ONCA 775, 34 C.L.R. (4th) 187 (Ont. C.A.); and Martell v. Canada (Attorney General), 2016 PECA 8 (P.E.I. C.A.). Therefore, I would reject the appellants' submission that Van Breda applies to decide jurisdiction under s. 21(1) of the CLPA.

Goldhar v. Haaretz.com
2016 ONCA 515 (Ont. C.A.)

This is an interesting case dealing with jurisdiction and internet libel. Maccabi Tel Aviv Football Club is an established and successful soccer team. It is owned by a Canadian. A newspaper published a critical article available on a website. The owner sued the newspaper for defamation in an Ontario court. Two principal questions are dealt with jurisdiction *simplicter* (*Van Breda*) and whether Ontario is the most convenient jurisdiction. The Court of Appeal split 2-1 on the second issue. The majority held focussed on the plaintiff’s jurisdiction of residence in whic he complained the real harm occurred. The dissent maintained that for a variety of contextual reasons the action should be brought in Israel. (I’m not sure whether an appeal has been taken.)

Forsythe v. Westfall
2015 ONCA 810 (Ont. C.A.); leave to appeal denied, 2016 CarswellOnt 3759 (S.C.C.)

An Ontario woman was injured in a motorcycle accident in British Columbia. She was the passenger but had auto insurance in Ontario. The motorcyclist's driver was an Alberta resident and insured through an Alberta policy. The plaintiff alleged a third party unknown driver ("John Doe") was the cause of the accident. Could the action be maintained in Ontario? The plaintiff argued that Ontario was the "forum of necessity" notwithstanding *Van Breda*.

MacFarland J.A.:

> Is Ontario the forum of necessity?
>
> 52 Finally, the appellant argues that an Ontario court should assume jurisdiction on the basis of the forum of necessity doctrine. She says that Ontario should assume jurisdiction to avoid a multiplicity of proceedings and the potential for inconsistent judgments in Ontario and British Columbia. In her view, the only practical approach is for one court to hear all matters relating to liability and damages.
>
> 53 I do not accept this submission. The forum of necessity doctrine is available in extraordinary and exceptional circumstances. For Ontario to accept jurisdiction as the "forum of necessity" the appellant must establish that there is no other forum in which she can reasonably seek relief: West Van Inc. v. Daisley, 2014 ONCA 232, 119 O.R. (3d) 481 (Ont. C.A.), at para. 20, leave to appeal refused, [2014] S.C.C.A. No. 236 (S.C.C.).
>
> 54 The appellant has failed to establish that she cannot reasonably seek relief elsewhere. She can, and has, pursued a claim against Westfall in British Columbia. She may also continue her claim against AXA in Ontario.
>
> 55 In respect of this submission, I agree with and adopt the motion judge's reasons, at paras. 27-29:
>
> > I see no room for the operation of the forum of necessity doctrine. This doctrine is an exception to the real and substantial connection test that recognizes that there will be extraordinarily and exceptional cases where the need to ensure access to justice will justify the domestic court's assumption of jurisdiction: West Van Inc. v. Daisley, 2014 ONCA 232 (CanLII) at paras. 17-38; Van Breda v. Village Resorts Ltd., 2010 ONCA 84 (CanLII), [2010] O.J. No. 402 (Ont. C.A.) at para. 100, affd. S.C.C. (sub nom. Club Resorts Ltd. v. Van Breda), supra.
> > The exception is very narrow, and the plaintiff must establish that there is no other forum in which he or she reasonably could obtain access to justice: Bouzari v. Bahremani, [2011] O.J. No. 5009 (S.C.J.). Typically, the doctrine is unavailable because of its high bar, and its availability has been rejected in numerous cases: West Van Inc. v. Daisley, supra; Van Kessel v. Orsulak, 2010 ONSC 619; Elfarnawani v. International Olympic Committee, 2011 ONSC 6784 (CanLII); Mitchell v. Jeckovich, supra. The doctrine is reserved for exceptional cases such as where

there has been a breakdown in diplomatic or commercial relations with the foreign state or where the plaintiff would be exposed to a risk of serious physical harm if the matter was litigated in the foreign court.

There is no chance in the immediate case that Ms. Forsythe will be denied access to justice. She remains free to sue in Ontario to enforce her claim against Intact after, or even before, she obtains access to justice for her claim against Mr. Westfall in British Columbia. It may be inconvenient that she is denied one-stop access to justice, but there is no room here for the forum of necessity doctrine.