

# Bringing Fairness to the Costs System: An Indemnity Scheme for the Costs of Successful Appeals and Other Proceedings

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## Citation Information

Watson, Garry D. and Lantz, Paul. "Bringing Fairness to the Costs System: An Indemnity Scheme for the Costs of Successful Appeals and Other Proceedings." *Osgoode Hall Law Journal* 19.4 (1981) : 447-472.  
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# OSGOODE HALL LAW JOURNAL

Vol. 19

No. 4

December 1981

## BRINGING FAIRNESS TO THE COSTS SYSTEM — AN INDEMNITY SCHEME FOR THE COSTS OF SUCCESSFUL APPEALS AND OTHER PROCEEDINGS

By GARRY D. WATSON\* and PAUL LANTZ\*\*

"[A] suitor ought not to pay for the errors of a judge" *per* Mellish L.J. (*Denny v. Hancock* (1870), 40 L.J. Ch. 193 at 194.)

### I. INTRODUCTION

Under the cost indemnity principle followed in Canada and other Commonwealth countries an unsuccessful litigant will normally be ordered to pay the costs of the successful litigant. Thus, if A sues B and is successful at trial, B will typically be ordered to pay A's costs. The rationale is that B's conduct, in resisting A's claim, necessitates the law suit; therefore, he should bear the costs. But what if B appeals, is successful and the trial judgment is reversed? Typically A is ordered to pay B's costs throughout—of both the trial and the appeal. How do we justify placing liability for the costs of both the trial and the appeal on A? Bringing the ultimately unfounded litigation and necessitating the trial was A's "fault," but the second hearing—the appeal—may now be viewed as the result of error<sup>1</sup> of the trial judge, not of A. The simple answer is that we cannot fairly justify placing this liability on A. As Mellish L.J. said as early as 1870, "[A] suitor ought not to pay for the errors of a judge."

The recognition that the cost indemnity principle may operate quite

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<sup>1</sup> It does not follow that, because he was reversed on appeal, the trial judge was in fact necessarily at fault or in error. On the existing state of the authorities he may have come to the only conclusion open to him. The point in such cases is that the litigant should not have to pay for the uncertainty of the law and for the making of new law at the appellate level.

unfairly in certain circumstances has led several Australian jurisdictions to enact legislation giving effect to the philosophy that:

... a citizen is entitled to a correct decision from the court to which he first comes or is brought. If through some error of law on the part of the court, or through some shortcoming in the legal system or some chance happening not attributable to fault on his part, he does not get what is due to him, then he should be entitled to be paid the cost of getting the correct decision or of otherwise having the matter put right.<sup>2</sup>

This paper proposes a scheme for indemnifying parties against certain costs that may be incurred in civil litigation which it is not just and reasonable to expect them to bear. The proposal builds on the legislative schemes developed in Australia and adapts them, with a variety of modifications, to the Canadian context. The proposed scheme is embodied in a draft Act designed as a model statute suitable for enactment, with some modifications, in any province. (See Appendix.) The scheme and the draft Act are discussed in detail, below. It will, however, be useful to first summarize the key features of the scheme.

The basis of the scheme is a "litigant's indemnity fund" [hereinafter referred to as the "Fund"]. This Fund could be financed out of Consolidated Revenue but, as explained below, our proposal is that it be financed by contributions from litigants, collected by means of a modest increase in court filing fees. The Fund would be used to indemnify parties for certain legal costs which are directly traceable, not to their own fault, but to court malfunctioning. Indemnification would be available in three types of situations. The first, and by far the most important situation, is that of costs incurred in respect of a successful appeal. In such cases each party would usually receive from the Fund the amount of their taxed party and party costs of the appeal. The second concerns the costs of abortive proceedings: for example, where a judge dies before delivering judgment. Here, if a new trial takes place the Fund would cover the party and party costs of the original trial "thrown away" as a result of the death of the judge. The third situation relates to costs incurred where a judge refuses to approve an infant settlement (or the settlement of a claim by any other party under disability) and the party fails to recover more at trial.

The level of indemnity provided by the scheme would be the same as that which a successful party would usually receive from a losing party, that is, party and party costs.<sup>3</sup> The Act does not provide for the payment of the

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<sup>2</sup> Winneke, *An Indemnity for the Cost of Litigation* (1964), 5 Aust. Law. 161 at 162.

<sup>3</sup> Fixing the maximum level of indemnity at party and party costs, see draft Act, s. 6(2), would mean that the actual impact of the proposed scheme would vary depending on the relationship, in any given province, between such costs and solicitor and client costs. In Ontario party and party costs tend to be about two thirds of solicitor and client costs and hence an order against the Fund would give a party substantial financial relief. However, this would not be so in provinces where the degree of indemnity provided by party and party costs is much lower, for example, see the comment of Bouck J. in *McGrath v. Goldman* (1975), 64 D.L.R. (3d) 305 at 314, [1976] 1 W.W.R. 743 at 753 (B.C.S.C.) to the effect that in British Columbia party and party costs provide on the average only a thirty percent indemnity. In provinces where the degree of indemnity provided by party and party costs is this low it would be unwise—if the proposed scheme is to provide litigants any significant relief—to limit costs recoverable against the fund to party and party costs.

full indemnity of solicitor and client costs. While it may seem that ideally a party should be fully compensated for costs incurred as a result of court malfunctioning, there are factors weighing against this. The scheme is designed as a supplement to, not as a general reformation of, the law of costs. By that law parties normally receive only party and party costs. Were the scheme to provide for solicitor and client costs, parties would be better off financially if the system malfunctioned than if it were to perform properly. Costs on the higher scale might even encourage appeals.

## II. HISTORY

Cost indemnity schemes have been developed in a number of Australian states during the last three decades. The first, in 1951, was the New South Wales *Suitors' Fund Act*.<sup>4</sup> Four other states now have operating schemes<sup>5</sup> and a sixth state, South Australia, has enacted a scheme which has not yet been proclaimed.<sup>6</sup>

The original New South Wales Act applied only to appeals and then only to appeals on questions of law. Since its enactment it has been amended to cover additional matters, including abortive proceedings and new trials ordered on the grounds that damages were excessive or inadequate.<sup>7</sup> Other Australian statutes have also been extended to cover more types of proceed-

<sup>4</sup> *Suitors' Fund Act, 1951* (No. 3 of 1951, N.S.W.).

The following is a list of published articles and reports dealing with the Australian schemes. Note, *Suitors' Fund Act* (1956), 30 Aust. L.J. 117 (discussion of problems with N.S.W. legislation, constitutional cases and statistics); Note, *An Indemnity for the Cost of Litigation* (1959), 33 Aust. L.J. 289; Jeffrey, *The Suitors' Fund Act, 1951-1959 (N.S.W.)* (1959), 33 Aust. L.J. 306 (discussion of amendments to the Act, problems remaining and brief review of constitutional decisions); Winnecke, *An Indemnity for the Cost of Litigation* (1964), 5 Aust. Law. 161 (discussion of the Victorian *Appeal Costs Fund Act* of 1964, comparison with N.S.W. legislation); Misra, *An Indemnity for the Cost of Litigation in Australia* (1965), 14 I.C. L.Q. 692 (brief discussion of N.S.W. and Victorian legislation on appeal costs); Law Reform Committee of South Australia, *Relating to The Enactment of an Appeal Costs Fund Act* (Adelaide: Gov't Printer, 1974) (consideration of Tasmanian Act and changes necessary to adapt it to South Australia); Note, *Appeal Costs Fund Act 1964* (1975), 49 Law Inst. J. 470 (procedure for making applications under the Victorian legislation, problems being experienced by the Appeal Costs Board); Law Reform Commission of Western Australia, *Report on the Suitors' Fund Act, Part A: Civil Proceedings* (Perth: Law Reform Comm'n, 1976) (discussion of deficiencies in then current legislation, comparison to legislation in other Australian states); Law Reform Commission of Western Australia, *Report on the Suitors' Fund Act, Part B: Criminal Proceedings* (Perth: Law Reform Comm'n, 1977) (recommended that *Suitors' Fund Act* no longer apply to criminal proceedings, discussion of other legislation applicable to criminal proceedings and recommendations for extensions thereto, criminal costs legislation in Australia, New Zealand and England); White, *Orders As to Costs—A Note* (1979), 5 Queensland Law. 46 (suggests that courts should be more generous in the application of the Queensland *Appeal Costs Fund Act*).

<sup>5</sup> *Appeal Costs Fund Act* (No. 7165 of 1964, Victoria); *Suitors' Fund Act, 1964* (Australia); *Appeal Costs Fund Act* (No. 57 of 1968, Tasmania); *Appeal Costs Fund Act* (No. 51 of 1973, Queensland).

<sup>6</sup> *Appeal Costs Fund Act, 1979* (No. 33 of 1979, South Australia). Subsequent references to these Australian statutes will be by reference to the state names only, as abbreviated.

<sup>7</sup> *Suitors' Fund (Amendment) Act, 1959* (No. 20 of 1959, N.S.W.), s. 3(b).

ings, including compromises of actions by infants and persons under disability.<sup>8</sup> All of the Australian schemes are funded by contributions from litigants.

Two Ontario bodies have recommended the adoption of schemes to provide for the payment of appeal costs. The McRuer Commission on Civil Rights suggested that the Court of Appeal should have the power to order that the costs of an appeal be met by the government if the appeal was necessitated by judicial misconduct or error.<sup>9</sup> The Ontario Law Reform Commission recommended that the government should, in some cases, indemnify litigants involved in successful appeals. The Court of Appeal and the Divisional Court would be given the power to order such an indemnification.<sup>10</sup> The Commission based its recommendation on the fact that under current practice the litigants bear the expense of an error made by the court, an institution of government, when an appeal is successful. Both the McRuer Commission and the Law Reform Commission proposals involved the use of public funds as opposed to an insurance scheme funded by contributions from litigants.

The scheme proposed in this paper is narrower than the Australian scheme in that it does not extend to criminal proceedings. It does, however provide somewhat broader coverage to civil litigants.

### III. FUNDING

Two methods of funding the scheme are readily apparent—direct funding by the government out of general revenue or contributions from litigants.

Arguably, the ideal method of funding would have the state bear the expense out of general revenue.<sup>11</sup> Since the scheme is one directed at relieving litigants from expenses resulting from the malfunctioning of the courts, an institution of government, it may be said that the state should pay. Pragmatically, however, this solution is in conflict with governmental reluctance to incur new additional expense in times of restraint. A scheme so funded would run a real risk of never being implemented. As already indicated, none of the Australian schemes is directly government funded, but instead all rely on compulsory contributions from litigants. This is also the method proposed for the scheme discussed here where the contributions would take the form of a modest increase in court filing fees. Thus the scheme is one of compulsory insurance for litigants. The principal advantage of this approach is that it would not increase net governmental expenditures, therefore removing a major political barrier to its implementation.<sup>12</sup> But once the

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<sup>8</sup> See, e.g., *Suitors' Fund Amendment Act, 1978* (No. 37 of 1978, W. Aust.), s. 2.

<sup>9</sup> Ont., 4 *Second Report of the Royal Commission of Inquiry into Civil Rights* (McRuer Report) (Toronto: Queen's Printer, 1969) at 1405.

<sup>10</sup> Ontario Law Reform Commission, 1 *Report on the Administration of Ontario Courts* (Toronto: Queen's Printer, 1973) at 240.

<sup>11</sup> But see comment note 12, *infra*.

<sup>12</sup> Arguably, this may be its only advantage. However, since the source of most of the general revenue is from taxation of various kinds, it can be argued that, notwithstanding that an institution of government is at fault, it is fairer to the non-litigating public that the Fund be financed only out of a "tax" on those who may benefit from the scheme, that is, litigants.

scheme is framed as one of compulsory insurance (as opposed to state indemnification), can it be justified? Imposing a compulsory insurance scheme on litigants raises the question: if litigants are concerned about this risk, why has a private insurance market not developed to meet this need? The answer appears to be twofold. First, the risk is not one that is usually perceived in advance and the desirability of insuring against it only becomes apparent when the resulting costs are incurred.<sup>13</sup> This is related to the fact that since litigation is largely an unplanned and non-recurring activity, there are few institutional litigants and hence there is no recurring consumer group. Moreover, the particular risk of court system malfunction is almost certainly not one that is regularly brought to the attention of litigants by their legal advisers at the outset of litigation. Second, the transaction costs involved in the marketing of private, voluntary insurance of this kind would be substantial, resulting in high premiums which would likely make such private insurance unattractive to even informed litigants who perceived the need for it.<sup>14</sup>

In contrast, the transaction costs of "marketing" a government-run compulsory insurance scheme would be minimal, resulting in the possibility of very modest "premiums."<sup>15</sup> Already existing court fee collection systems could be used to raise the funding; by simply raising the fees payable in each court by a specified percentage, the marginal increase in existing transaction costs would be negligible. All that would be involved is a quarterly or annual book transfer of an amount to the Fund.

Ideally the amount of contribution each class of litigants should pay would depend upon the likelihood of their incurring the risk insured against (for example, a successful appeal) and the amount they would be entitled to claim against the Fund in such circumstances. Since the risk and cost of a successful appeal would be much greater in respect of superior court actions than small claims court proceedings, the contribution per litigant should be greater in the superior court than in the small claims court. The concept of basing contribution on risk could be extended beyond merely varying the contribution from court to court. If it could be shown that a particular type of case were very likely to result in an appeal (for example, a personal injury action) then the amount levied in respect of such an action could be more than the amount for other types of cases. But obviously the benefit of differential contributions, that is, fairness, is rather quickly outweighed by

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<sup>13</sup> There is one type of malfunction covered by the scheme where private insurance has played a role—where a judge dies before delivering judgment. Though rare, it is not unheard of for parties to take out insurance on the life of the judge in cases where a very lengthy trial is anticipated and his mid-trial death would be financially ruinous for the parties in terms of wasted counsel fees. For a recent account of this practice see Strauss, "Policy on judge used as insurance in long court fights", *The Globe and Mail* (Toronto), Nov. 23, 1981 at A-5, col. 1.

<sup>14</sup> It is interesting to note that where private insurance has played a role, see *id.*, it is in the form of life insurance for which there is an already established market.

<sup>15</sup> There will be transaction costs associated with claims adjustment, that is, administrative costs in the Accountant's office and some limited judicial time spent on adjudicating entitlement, but these costs should be modest.

the added costs of identifying various types of cases and collecting differential amounts for different types of cases. Almost certainly, however, cases that go to trial are much more risk prone in terms of appeals. Consequently, in those courts which levy a fee for setting cases down for trial, "loading" the levy more heavily into this aspect of the fee structure would seem appropriate.

With a scheme financed by contributions from the litigant—beneficiaries the question of funding and coverage becomes closely interrelated, at least if the idea that only those classes of litigants who have contributed should receive benefits is adhered to. Problems arise, for example, with regard to courts that do not collect fees from their users. The collection of contributions from litigants in such courts can be a nuisance, may involve substantial increased expense and may run counter to a government policy of free access to the court, for example, family court. A doctrinaire approach would be to say that if litigants in such a court do not make contributions, they should be excluded from coverage. A preferable approach would be to have the government make direct contribution to the Fund in respect of such courts, in lieu of direct user contributions, or to simply include such courts within the scheme even though there is no user contribution. With an isolated instance such as the family court, either approach would be tolerable. However, the problem becomes more acute if proceedings before, or originating with, administrative tribunals are to be brought within the scheme. Fairness and the solvency of the Fund might necessitate the imposition of a levy by those tribunals that do not impose fees if their users are to participate in the scheme.

The approach adopted in the draft Act follows the example of most of the Australian schemes and abandons any direct relationship between contributing to, and benefiting from, the scheme. The Fund would be financed by transferring a certain percentage of all court fees to the Fund<sup>16</sup> with appropriate increases in relevant court fees being made to generate the new funds. The list of eligible proceedings has been developed without direct reference to whether all who may benefit have in fact contributed, and the coverage extends to all civil courts.<sup>17</sup>

#### IV. ELIGIBLE PROCEEDINGS

##### A. *General*

The cost indemnity scheme is limited to civil proceedings. This is noteworthy, since the Australian schemes often apply to both civil and criminal proceedings. The scheme proposed here is not particularly appropriate for implementation in criminal proceedings. While indemnity for costs in civil cases is well-established, in Canada there is no general principle of cost in-

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<sup>16</sup> Draft Act, s. 2(5).

<sup>17</sup> Since the definition of "courts" in s. 1(b) does not include administrative tribunals, successful "first level" appeals from such tribunals would not be covered. On this point see text at note 26, *infra*.

demnity in criminal cases and the law of costs in such cases is neither well-defined<sup>18</sup> nor extensive in its application.<sup>19</sup>

Several Australian states have, in addition to the litigation indemnity schemes of the type proposed here, criminal costs statutes specifically directed at assisting or indemnifying acquitted persons.<sup>20</sup> Similar legislation exists in England<sup>21</sup> and New Zealand.<sup>22</sup> Although the Australian litigation indemnity schemes often extend their coverage to criminal proceedings, the Law Reform Commission of Western Australia has pointed out that this is illogical. It recommended rationalization by transferring all provisions relating to criminal proceedings from the litigation indemnity scheme to its criminal costs statute.<sup>23</sup> It pointed out that the litigation insurance scheme was not an appropriate means of providing compensation in criminal cases, because it was a contributory scheme and convicted persons should not, and were not, required to make contributions.<sup>24</sup>

In addition to not extending to criminal proceedings, the proposed scheme is limited to proceedings in courts as opposed to administrative tribunals. The courts to which it applies are enumerated in an inclusive list.<sup>25</sup>

By restricting the scheme's coverage to court proceedings, where a statutory appeal taken from an administrative tribunal succeeds, no appeal costs benefits under the draft Act will be payable in respect of the first appellate court level.<sup>26</sup> Administrative tribunal proceedings are not excluded from the scheme as a matter of principle; indeed there is no reason why they could not be included, providing the parties were required—at the tribunal level—to contribute to the Fund. They are excluded under the draft Act until more experience can be obtained in the operation of the scheme in the pure court context.

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<sup>18</sup> Law Reform Commission of Canada, *A Proposal for Costs in Criminal Cases* (Ottawa, 1973) at 2.

<sup>19</sup> Sharp, *Costs on Acquittal* (1968), 16 Chitty's L.J. 77 at 81.

<sup>20</sup> See, e.g., *Official Prosecution (Defendants' Costs) Act, 1973* (No. 46 of 1973, W. Aust.).

<sup>21</sup> *Costs in Criminal Cases Act 1973*, c. 14 (U.K.).

<sup>22</sup> *Costs in Criminal Cases Act 1967* (No. 129 of 1967, N.Z.).

<sup>23</sup> Law Reform Comm'n of W. Aust. *Report, Part B, supra* note 4, at 48.

<sup>24</sup> *Id.* at 6. If the scheme proposed here were to be funded out of general revenue there would be little objection to extending it to criminal proceedings. However, in respect of criminal proceedings the more urgent need is for the adoption of a general rule that acquitted persons should be paid their defence costs by the state.

<sup>25</sup> Draft Act, s. 1(b). The failure of some Australian states to set out inclusive lists has resulted in needless litigation as to whether a particular body is or is not covered by the statute. See, e.g., *Gosford Shire Council v. Anthony George Pty. Ltd.*, [1969] 1 N.S.W.R. 59, (1968), 89 W.N. (Pt. 1) (N.S.W.) 350 (Land & Valuation Ct.); *Builders Licencing Bd. v. Pride Constructions Pty. Ltd.*, [1979] 1 N.S.W.L.R. 607 (Com. L. Div.).

<sup>26</sup> This is because, under the draft Act, the costs of a successful appeal are payable out of the Fund where the appeal is from "a court"; s. 3(1). However, if there is a further appeal and it succeeds, cost benefits would be payable since the situation would now be one of a successful appeal from "a court".

### B. *Successful Appeals*

The major coverage under the proposed scheme deals with successful appeals, since they are considerably more common than abortive proceedings or unapproved settlement cases. Where an appeal from a court succeeds in whole or in part, the court<sup>27</sup> may make an order against the Fund in favour of any party to the proceeding, with respect to the costs of the appeal and any further court proceedings ordered by the appellate court,<sup>28</sup> for example, a new trial. Under the draft Act, the court's power to make an order applies to all appeals that succeed; there is no requirement, for example, that the appeal concern a question of law only. By contrast the Australian statutes limit the types of appeals in which compensation is payable to appeals which succeed on questions of law (in all states),<sup>29</sup> appeals on the quantum of damages (in all states except South Australia)<sup>30</sup> and appeals on the ground that the verdict of the jury was against the evidence (in Queensland and Victoria only).<sup>31</sup> The limitation to appeals on matters of law only has attracted criticism in Australia. In 1974, for example, the South Australian Law Reform Committee recommended that appeals on mixed questions of fact and law be covered; in 1976, the Law Reform Commission of Western Australia recommended that the limitation to appeals on questions of law be removed.<sup>32</sup> The basis for the limitation to appeals which succeed on questions of law is unclear. Chief Justice Burbury of Tasmania commented:

As there is also a risk common to all litigants that a court may err on questions of fact, it is perhaps anomalous that the provisions of the Act do not extend to all appeals. A layman might be forgiven for failing to understand why he should be indemnified against costs occasioned by mistakes made by judges and magistrates on questions of law but not on questions of fact<sup>33</sup>

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<sup>27</sup> As to who may make the order where the appellate court is the Supreme Court of Canada, see text accompanying notes 62-67, *infra*.

<sup>28</sup> Draft Act, s. 3(1) and s. 3(5).

Where a new trial takes place after an abortive proceeding the parties will recover from the Fund the costs of the initial abortive trial: see text accompanying note 43, *infra*. However, where a new trial is ordered after an appeal the situation is different. Section 3(5) of the draft Act provides that at the new trial the court may award the parties the costs of the new or the old trial, whichever is less. The reason is that a new trial after an appeal, because it may be on a limited question (for example, the quantum of damages), may be much shorter than the original trial, in which case the parties should only have the costs of the new trial from the Fund. It would be unsound to permit the court to order the costs of the new trial *simpliciter* against the Fund, since the parties then would knowingly be litigating at the expense of the Fund.

<sup>29</sup> W. Aust., s. 10; Tas., s. 8; S. Aust. s. 7; Q'ld., s. 15; Vic., s. 13; N.S.W., s. 6.

<sup>30</sup> W. Aust., s. 15; Tas., s. 16; Q'ld., s. 23; Vic., s. 19; N.S.W., s. 6B.

<sup>31</sup> Vic., s. 19; Q'ld., s. 23.

<sup>32</sup> See Law Reform Comm. of S. Aust., *supra* note 4, at 4; Law Reform Comm'n of W. Aust., *Report, Part A, supra* note 4, at 10. However, in neither of these states have these recommendations been implemented, notwithstanding that in Western Australia all the bodies who commented on the Commission's report, including the Law Society of Western Australia, supported the recommendation.

<sup>33</sup> *Tasmanian Pulp and Forest Holdings Ltd. v. Woodhall Ltd.*, [1972] Tas. S.R. 41 at 43 (S. Ct. Full Ct.).

Another judge, Mr. Justice Moffitt of New South Wales, suggested that the limitation may be related to the fact that where a decision is reversed for reasons other than an error of law, the initial decision may be traceable to the conduct of a party or his lawyer.<sup>34</sup> As a general proposition this statement is open to question. In any event, the solution is not a blanket prohibition on granting cost compensation to certain classes of cases. The preferable approach, adopted in the draft Act, is to give the court a general discretion and to permit it to take into account, where relevant, any fault attributable to the parties.<sup>35</sup>

Following the example of the general law of costs, the draft Act stresses the court's discretion. In no circumstances does a party have an absolute right to costs against the Fund. With regard to all eligible proceedings, the court has a discretion whether it should make an order against the Fund,<sup>36</sup> and in whose favour it should be made.<sup>37</sup> Moreover, it may order that a party recover only part of his costs<sup>38</sup> and it may take into account, where relevant, the conduct of the parties and their lawyers.<sup>39</sup>

It may be useful at this point to follow a typical case through an appeal to illustrate the impact of the scheme on the overall costs of the parties. The example below relates to an appeal from a trial judge, however, the proposed scheme would apply to all successful appeals from a court whether the judgment appealed was interlocutory or final.

Plaintiff v. Defendant is an action tried in a superior court. Plaintiff is successful at trial and is given judgment for \$30,000 with costs. Let us assume that in conducting the action each party incurs legal expenses (fees and disbursements) totalling \$4,000 and that the party and party costs recoverable by the successful party are taxed at \$3,000.

	Situation after Trial			
	Own Costs	Costs Paid	Costs Received	Net Costs
Plaintiff	\$4,000	—	\$3,000	\$1,000
Defendant	4,000	\$3,000	—	7,000

If Defendant's appeal is unsuccessful, under current practice Defendant will be responsible for all his costs (of both the trial and appeal), and he will normally be ordered to pay Plaintiff's party and party costs of both the

<sup>34</sup> *Acquilina v. Dairy Farmers Co-op. Milk Co.*, [1965] N.S.W.R. 772 at 774, 82 W.N. (Pt. 1) (N.S.W.) 531 at 533 (S. Ct.).

<sup>35</sup> How the court might deal with the problem of what weight to give lawyer or party misconduct is discussed in text accompanying notes 72-74, *infra*.

<sup>36</sup> See draft Act s. 3(1), s. 4(1), s. 5 and s. 6(3). This is also the case in all the Australian states with regard to successful appeals on questions of law. In some states, however, a party has a *right* to costs out of the fund in other cases, for example, in abortive proceedings (*e.g.*, Vic., s. 18(1); Tas., s. 15(1); failure to approve infant settlements (*e.g.*, Vic., s. 19A); where a new trial is ordered on the grounds that the verdict of the jury was against the evidence (*e.g.*, Tas., s. 16(1)).

<sup>37</sup> See draft Act, s. 6(3) (a).

<sup>38</sup> *Id.*, s. 6(3) (b) and (c).

<sup>39</sup> *Id.*, s. 6(4).

trial and the appeal. Under the proposed scheme, the result would be *exactly the same* where an appeal is unsuccessful. Assuming the actual legal expenses incurred by each party on the appeal are \$2,000 and the recoverable taxed costs are \$1,500, the situation would be as follows:

Situation after Unsuccessful Appeal					
		Own Costs	Costs Paid	Costs Received	Net Costs
Plaintiff	— Trial	\$4,000	—	\$3,000	\$1,000
	— Appeal	2,000	—	1,500	500
					<u>\$1,500</u>
Defendant	— Trial	4,000	\$3,000	—	7,000
	— Appeal	2,000	1,500	—	3,500
					<u>\$10,500</u>

If Defendant's appeal is successful, then under present practice Plaintiff would normally be ordered to pay Defendant's party and party costs of both the trial and appeal. In addition, Plaintiff would have to pay his own costs incurred at trial and on appeal. It is in this situation—a successful appeal—that the proposed scheme would alter the costs outcome. Consider the outcome with and without the proposed indemnity fund:

Situation after Successful Appeal (By Defendant)					
(a) Without Indemnity Fund					
		Own Costs	Costs Paid	Costs Received	Net Costs
Plaintiff	— Trial	\$4,000	\$3,000	—	\$7,000
	— Appeal	2,000	1,500	—	3,500
					<u>\$10,500</u>
Defendant	— Trial	4,000	—	3,000	1,000
	— Appeal	2,000	—	1,500	500
					<u>\$1,500</u>

It may be seen that with a successful appeal under present practice the positions of Plaintiff and Defendant are simply reversed from the case of an unsuccessful appeal by Defendant. However, with the indemnity fund scheme operating the situation changes if the appeal succeeds. Both Plaintiff and Defendant will normally<sup>40</sup> recover from the Fund their taxed costs of the appeal. Plaintiff remains responsible, however, for Defendant's trial costs.

(b) With Indemnity Fund					
		Own Costs	Costs Paid	Costs Received	Net Costs
Plaintiff	— Trial	\$4,000	\$3,000	—	\$7,000
	— Appeal	2,000	—	\$1,500 (from fund)	500
					<u>\$7,500</u>
Defendant	— Trial	4,000	—	3,000 (from plaintiff)	1,000
	— Appeal	2,000	—	1,500 (from fund)	500
					<u>\$1,500</u>

<sup>40</sup> As already indicated, the court has a discretion as to whether to order costs against the Fund: see note 36, *supra*.

The difference is that with the indemnity fund operating the overall costs of the unsuccessful respondent, Plaintiff, are reduced from \$10,500 to \$7,500, that is, by the full amount paid out of the Fund. The costs situation of Defendant, the successful appellant, are unchanged by the scheme.

Will the operation of the indemnity scheme increase the incidence of appeals by changing litigants' attitude to the financial risks attending appeals? This question is relevant as increases in the number of appeals may affect the financial soundness and political acceptability of the scheme. Moreover, since many appellate courts are already working at or near full capacity, sound court management calls for some estimate of the likely impact of the scheme on the workload of the courts.

An analysis of this question indicates that the scheme is unlikely to have any significant impact on the incidence of appeals. Essentially, it is the appellant who determines whether there will be an appeal and, since the indemnity fund scheme does not change his net cost situation—win or lose—it offers him no added incentive to appeal. If his appeal is *unsuccessful* he will still have to bear his own costs of the appeal and pay his opponent's party and party appeal costs: the very same result that follows if the scheme is not in operation. If his appeal is *successful* he will also be in the same position as to costs as if he had successfully appealed under the present practice. He will receive his party and party costs of the appeal, though the source of those funds will be different from under the present practice.

The only person whose overall financial situation is improved by the operation of the scheme is the respondent, and then only if the appeal is successful. When an appeal succeeds, his net cost situation will be better than under the present practice by an amount equal to both parties' party and party appeal costs, which will be borne by the Fund rather than by the respondent. Using the example given above, his overall net costs would be reduced from \$10,500 to \$7,500 by the operation of the scheme.

Hence the question is: will this reduction in the net cost situation of a respondent, if the appeal is successful, likely change his attitude towards the appeal in a way which would increase the incidence of appeals? The answer would appear to be negative. Since he is the respondent, *ex hypothesi* he is not the one who decides whether the appeal should be initiated. He can, however, affect whether an appeal ever goes to a hearing by offering to settle the appeal. The scheme does somewhat reduce his incentive to offer to settle the appeal, because it reduces his "downside risk" in the event that the appeal succeeds. Today if the appeal succeeds he will usually be ordered to pay the appellant's party and party costs and be left to pay his own solicitor and client appeal costs, while under the indemnity scheme the respondent will be relieved from paying the successful appellant's costs and will recover his own party and party appeal costs from the Fund. But it seems unlikely that this risk reduction will often change his attitude towards settlement, that is, lead him to decline to settle where under the present situation he would have settled. By settling he may at least keep some of the "bird in the hand," that is, his trial judgment; by allowing the appeal to proceed, with the risk that it will succeed, he may lose it all and be ordered to pay the appellant's trial costs. In short, considerations other than the appeal costs

will ultimately determine his decision whether or not to settle the appeal. In the overall financial picture (that is, the amount of the judgment, plus trial costs, plus appeal costs) the appeal costs do not loom very large. Even where the costs of the appeal are likely to be high (because the hearing will be long and complex) this situation is unlikely to change, as these will almost invariably be cases where the judgment under appeal is large and the trial costs considerably higher than those of the appeal.

The essential point is that the basic deterrent aspect of the cost indemnity system still remains in full force as against the moving party—the appellant. In making a decision to appeal he will know that, as under the present system, unless the appeal succeeds he will be required to pay the respondent's costs.

### C. *Abortive Proceedings*

Various situations can arise where parties incur the costs of a trial or hearing without having their dispute resolved because, for reasons beyond their control, the proceedings are aborted before a decision is reached. Examples are where a jury disagrees and cannot render a verdict, or where the presiding judge dies before delivering judgment. In such cases, if the parties wish to continue and to have their dispute resolved judicially, there will have to be a new trial or a rehearing. A similar situation can arise where the rendering of a decision is unreasonably delayed and legislation provides (as in Ontario)<sup>41</sup> that a rehearing may be ordered. In all of these situations, if the parties elect to proceed with a new trial (rather than to settle) they should not have to bear the cost of both hearings and relief should be available from the Fund.<sup>42</sup>

Such aborted proceedings are the second category of eligible proceedings under the draft Act. Under section 4, where the initial trial or hearing fails to produce a result by reason of the disagreement of a jury, the death of the presiding judge or his failure to render judgment within the time required by law, and a subsequent trial or hearing is held, then the parties are entitled to be compensated out of the Fund.<sup>43</sup> The costs recoverable in such cases would be limited to the cost of the aborted hearing itself (that is, counsel fee at trial and trial disbursements, for example, witness fees) and would not extend to all the costs of the proceeding, such as pre-trial costs, for example, pleadings, discovery and preparation for trial. These latter costs, though incurred for the first trial, are not thrown away and will be necessary expenditures in respect of the subsequent hearing. The require-

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<sup>41</sup> Pursuant to the Ontario Rules of Practice, Rule 401, the Chief Justice may order, *inter alia*, a re-trial or rehearing where a judge has not given judgment within six months of reserving it.

<sup>42</sup> The Australian schemes all provide for indemnity in the event of the presiding judge dying or being unable to complete a proceeding due to illness: Vic., s. 9A; Q'ld., s. 22(1) (a); Tas., s. 15(1) (a); S. Aust., s. 8(a); W. Aust., s. 14(1) (a); N.S.W., s. 6A(1) (a). Victoria, Queensland and Western Australia also extend protection to cases involving disagreement on the part of the jury.

<sup>43</sup> Section 4, the abortive proceedings section, also extends to situations where a mistrial is declared: see text accompanying note 44, *infra*.

ment that a subsequent hearing take place before the parties become entitled to compensation is a necessary one, since the purpose here is to relieve the parties of the expense of two hearings, not to give them a free hearing should they decide to settle rather than to hold a new trial. The following example illustrates the operation of the scheme with respect to abortive proceedings. In *Smith v. Jones* the trial judge dies midway through the trial. At that point each party has incurred party and party costs as follows:

Pretrial costs (for example, pleadings, discovery, preparation for trial)	\$4,000.00
Counsel fee at trial	5,000.00
Trial disbursement (for example, witness fees)	500.00
	\$9,500.00

A new trial is ordered and the parties decide to proceed because they cannot agree on a settlement. At the conclusion of the new trial the trial judge will dispose of the costs of that trial in the normal way (for example, judgment for the plaintiff with costs) and he will order that in respect of the first (abortive) trial each of the parties has their trial costs (that is, \$5,500—the original counsel fee and trial disbursements) from the Fund. The \$4,000 in respect of pre-trial costs will not be paid out of the Fund; rather they will form part of the costs ordered to be paid by one of the parties under the cost order covering the new trial. If the parties settle the case and do not proceed with the new trial they will recover nothing from the Fund.

There is a further, and more problematic, type of abortive proceeding: the situation in which a mistrial is declared due to the occurrence of certain events during the course of the trial, for example, the discharge of the jury because a party or witness spoke to a juror or because of the mention of insurance or other prejudicial conduct in the presence of the jury. Should not the court at least have a discretion to order that the costs incurred by an innocent party in such cases be paid out of the Fund? All six Australian schemes provide that compensation is payable where a trial is prematurely terminated for reasons not attributable to the fault of a party. But the statutes are all typically worded very broadly, that is, they require that the termination not be due to “the act, neglect or default . . . of all or *any one* or more of the parties thereto or their legal practitioners.”<sup>44</sup> While one writer has suggested that under a provision so worded a court could indemnify an innocent party out of the fund,<sup>45</sup> at least one decided case held to the contrary.<sup>46</sup> Under the draft Act, where a mistrial is declared the court would have a general discretion. Hence, it could consider the degree of responsibility of each party and make an order against the Fund where that was

<sup>44</sup> See, e.g., Vic., s. 18(1) (c).

<sup>45</sup> *Supra* note 2, at 167.

<sup>46</sup> *Greaves v. Blackborrow* (1960), 78 W.N. (N.S.W.) 517 (S.Ct.). In this case, the jury was discharged when the plaintiff spoke to a juror, albeit not about the case. The court declined to order the plaintiff to pay the defendant's costs of the abortive proceedings. It also held it could not make an order against the fund, because the termination was caused by the action of a party.

appropriate, or it could simply order costs to be paid by the party who caused the mistrial if that were more appropriate.

#### D. *Settlements Requiring Court Approval*

Where a person under disability, such as a minor or mental incompetent, makes a claim, the settlement or compromise of the claim requires court approval.<sup>47</sup> If the court refuses to approve a proposed settlement the parties are forced to proceed to trial unless, of course, the defendant improves his offer to the point where the court will approve a settlement. Although it is not a common occurrence, it can happen that at the resulting trial the disabled plaintiff recovers no more, or even less than, the offer of settlement which the court refused to approve. When this occurs, it is quite unfair that the parties should have to bear the costs incurred subsequent to the court's refusal to approve the proposed settlement. *Ex hypothesi*, the parties were content with the proposed settlement. In retrospect it was a reasonable settlement. The costs incurred in going to trial are attributable not to any fault on the part of the parties, but solely to the "error" of the judge in refusing to approve the settlement.

Such cases represent the third category of eligible proceedings under the draft Act.<sup>48</sup> Following the example of the Australian statutes,<sup>49</sup> the draft Act provides that where a court refuses to approve a proposed settlement of the claim of a person under disability, and at trial the plaintiff recovers an amount not greater than he would have received under the rejected settlement, the court may order payment out of the Fund of the costs of the parties incurred subsequent to the refusal to sanction the compromise, that is, the costs of that part of the proceedings which was held at the instance of the court and not the parties.

### V. LIMITS ON RECOVERY

#### A. *Amounts*

Should there be a ceiling on the amount payable out of the Fund in respect of any given party or proceeding? All of the Australian schemes provide such limits. Ideally, if otherwise entitled under the draft Act, a litigant should not find the costs he can recover limited by means of a ceiling. However, to ensure the solvency of the Fund it is probably wise to provide a ceiling.<sup>50</sup> The ceilings provided in Australian legislation do not provide par-

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<sup>47</sup> See, e.g., New Brunswick Rules of Court 1982 (Reg. 81-174) Rule 7.07; Ont., *Report of the Civil Procedure Revision Committee* (Toronto: Min. of A.G., 1980), Proposed Rules of Civil Procedure, Rule 7.07.

<sup>48</sup> Draft Act, s. 5.

<sup>49</sup> With the exception of New South Wales, all of the Australian statutes provide that where a settlement of an action by an infant is rejected by the court and at trial the infant recovers an amount not greater than he would have recovered under the settlement, the parties may recover all or part of their costs. Western Australia has extended this provision to cover all persons under disability. See, Vic., s. 24; Q'ld., s. 24; Tas., s. 17; S. Aust., s. 8(d); W. Aust., s. 14B.

<sup>50</sup> An alternative might be to provide that the Fund could "re-insure" against the possibility of a claim being in excess of a given amount. If such re-insurance were available at reasonable cost, then the draft Act need contain no ceiling on recoverable costs.

ticularly meaningful guidelines due to the difference in the costs of the litigation in Canada and Australia.<sup>51</sup> The draft Act contains an arbitrary figure<sup>52</sup> of \$10,000 as the maximum amount that any one person may be paid in respect of costs of any one proceeding.

### B. Parties

All of the Australian states prohibit the Crown from benefiting under the scheme.<sup>53</sup> This exception seems reasonable on the ground that the scheme is designed to compensate for costs incurred through the malfunctioning of an arm of government and hence the government should not be a beneficiary.<sup>54</sup> Section 11(b) of the draft Act excepts the Crown from participation.

In Australia, two states—New South Wales and Western Australia—make a further exception: they exclude corporations with a paid-up capital of more than \$200,000.00.<sup>55</sup> This exception seems unreasonable. Since the scheme is one of compulsory insurance for litigants, and not a form of legal aid, the means of the party should not be relevant to eligibility for compensation. If a party has contributed to the Fund it should be entitled to benefit from it. The draft Act would not exclude any party other than the Crown.

## VI. PROCEDURE AND ADMINISTRATION

The draft Act seeks to keep the procedure for operating the scheme as simple as possible and to make full use of existing procedures. In several respects it deviates from the Australian model.

When a court decides that costs should be paid out of the Fund to a party it simply makes an order in favour of that party against the Fund, just as if the Fund were a party to the proceeding. The Australian approach is different and involves a two step procedure. For example, in the case of a successful appeal, the court first makes its order for costs as between the parties, that is, the successful appellant is usually given his costs as against the respondent. The respondent then applies to the court for an order against the Fund covering *both* his own appeal costs and those that he has been ordered to pay and that he has actually paid.<sup>56</sup> This approach involves

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<sup>51</sup> The most recent legislation, passed in South Australia in 1979, restricts the total amount payable to a party in respect of an appeal (including any previous appeal) to Australian \$5,000 or approximately Canadian \$6,350, at present exchange rates.

<sup>52</sup> Draft Act, s. 10. To allow flexibility it is provided that some other figure may be prescribed by regulation. A guideline for fixing a real, as opposed to an arbitrary, figure, is that it should be at least equal to the average taxed costs of an appeal. The draft Act or a regulation could go further and provide different ceilings for appeals, abortive proceedings and cases where the court refused to approve a settlement.

<sup>53</sup> N.S.W., s. 6(7); S. Aust., s. 10(2); W. Aust., s. 13(3); Vic., s. 17(3); Tas., s. 19(2); Q'ld., s. 21(3).

<sup>54</sup> However, it can also be argued that if the Crown contributed to the scheme through the payment of court fees there is no reason why it should not benefit from what is, in fact, an insurance scheme. But in Ontario at least, the Crown does not presently pay court filing fees.

<sup>55</sup> N.S.W., s. 6(7); W. Aust., s. 13(3).

<sup>56</sup> See, e.g., *Suitors' Fund (Amendment) Act, 1960* (No. 8 of 1960, N.S.W.), s. 2(b) (ii).

rather obvious difficulties which have necessitated statutory amendments adding "hardship clauses" permitting payment directly to the appellant in certain instances,<sup>57</sup> for example, where the respondent is unable to pay the costs of the appellant, refuses or neglects to do so, or just cannot be found. The Australian double step, "flow through" method, appears to have no advantages and carries with it considerable difficulties. Consequently the draft Act provides for an order to be made directly against the Fund in favour of all parties eligible for compensation.

An order for costs against the Fund will normally be for the party and party costs of the relevant proceeding.<sup>58</sup> The party receiving such an order would simply tax the costs and recover the taxed costs from the Fund.

In each of three Australian states—Victoria, Queensland and Western Australia—there is an Appeal Costs Board responsible for administering the fund. When a court grants an indemnity certificate in respect of a proceeding, the Appeal Costs Board acts almost as a check on the court: the Board is required to be satisfied that any payment out of the fund is authorized by the legislation. Legislative history in Victoria indicates concern that in other states "courts were a little loose in giving their certificates and did not comply with the requirements of the Act."<sup>59</sup> Hence some states have created Boards as "watchdogs" over the fund. While several Australian states have a mechanism for scrutinizing the courts' indemnity certificates, some monitoring on a regular basis may be useful. However, a less complex mechanism than a Board seems preferable. The draft Act provides, in section 7, that a court which grants an order against the Fund shall give notice of that order to the Attorney-General. Within three weeks of the order being made the Attorney-General may apply to the court to review the order. If the Attorney-General is not satisfied with the court's review of the order he may appeal the review to the Court of Appeal. This procedure ensures that there will be a mechanism for reviewing orders against the Fund while maintaining ultimate control of the payment in the hands of the court rather than a government board. Notice to the Attorney-General is given by the court, rather than by a party, to ensure a standardized procedure. The notice must give sufficient information about the order so that the Attorney-General may determine whether he should apply for review. A party in whose favour the order is made will be entitled to appear on review.

In all of the Australian states the grant or refusal of an indemnity certificate is at the sole discretion of the court and no right of appeal is pro-

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<sup>57</sup> *Legal Assistance and Suitors' Fund (Amendment) Act, 1970* (No. 10 of 1970, N.S.W.), s. 3(1) (c) (ii). See also Tas., s. 9(2); Q'ld., s. 16; W. Aust., s. 11(1); Vic., s. 14(2).

<sup>58</sup> This is the most generous award that can be made: see draft Act, s. (6)2. Where appropriate a court may make a less generous order, for example, it could be restricted to cover only part of the proceeding or it could be restricted to a percentage of taxed costs: see draft Act, s. 6(3).

<sup>59</sup> *State of Vic. Legis. Council Deb.* March 25, 1964, at 3383 (R.J. Hamer, Minister of Immigration).

vided.<sup>60</sup> It is desirable to have some limited right of appeal, especially in cases where a certificate has been refused by a lower court. Such a right of appeal could help to encourage uniformity in the criteria used by courts when granting certificates. In a recent Australian case, a litigant tried to appeal a judge's refusal to grant an indemnity certificate. The Court of Appeal of New South Wales held that no such appeal was available, but suggested that there were some problems in having no means of appeal. The court proposed that "[s]ome consideration be given to amend the Act to provide for an appeal to this Court by leave, limited in appropriate terms to exceptional cases, so that this Court can ensure uniformity."<sup>61</sup>

Section 8 of the draft Act provides that an appeal may be brought with leave of the Court of Appeal from the grant or refusal of an order against the Fund. This is the litigant's only means of appeal related to an order against the Fund. In practice, the Court of Appeal should probably restrict appeals under that section to cases of wide application or gross error by the first court.

The administration of the Fund would be relatively simple. The Fund would be vested in the Accountant of the Supreme Court and managed by him in the same manner that money paid into court is managed. Payments into the Fund would be made from court fees, the funds would be invested and money would be paid out pursuant to the order of a judge and the certificate of the taxing officer.

## VII. MISCELLANEOUS MATTERS

### A. *Appeals to the Supreme Court of Canada*

Ideally, to be fully comprehensive, the scheme should extend to appeals from provincial appellate courts to the Supreme Court of Canada. However, the Australian experience and existing Canadian law indicate that there may be constitutional difficulties in making the plan applicable to that court.

The first problem is that the legislation might be considered incompetent to a province as being legislation in relation to the Supreme Court.<sup>62</sup> However, since the scheme does not apply solely to appeals to the Supreme Court this problem is not likely to be serious. The second problem concerns the procedure by which an order against the Fund would be granted in respect of an appeal to the Supreme Court. Difficulties will result if the legisla-

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<sup>60</sup> See, e.g., N.S.W., s. 6(5).

<sup>61</sup> *Cordell v. Goodwin*, [1976] 1 N.S.W.L.R. 417 at 419 (C.A.), per Moffitt J.

<sup>62</sup> Laws in relation to the Supreme Court of Canada are within exclusive federal jurisdiction under section 101 of the *British North America Act, 1867*. Cf. *Crown Grain Co. v. Day*, [1908] A.C. 504 (P.C.), where *The Mechanics' and Wage Earners' Lien Act*, R.S.M. 1902, c. 110, s. 36 provided that in suits relating to liens, the judgment of the Manitoba Court of King's Bench "shall be final and binding, and no appeal shall lie therefrom." The Privy Council held that the provincial Act could not circumscribe the appellate jurisdiction granted to the Parliament of Canada by s. 101 of the *B.N.A. Act*, even where the subject matter of litigation is in the sphere of legislation allocated to the provincial Legislatures.

tion attempts to give the Supreme Court of Canada jurisdiction to grant an order against the Fund. Such an attempt by a provincial legislature to confer jurisdiction on the Supreme Court would likely be *ultra vires*. The Canadian case law on the subject of the Supreme Court and provincial attempts to alter its jurisdiction is, not surprisingly, entirely composed of attempts by provinces to restrict that jurisdiction. However, in at least two cases where it struck down such attempts, the Supreme Court stated that an attempt by a province to add to the courts jurisdiction would also be invalid.<sup>63</sup>

In Australia, the original New South Wales legislation provided simply that the court determining the appeal could grant an indemnity certificate.<sup>64</sup> A trilogy of cases in the mid-1950s made it clear that the *Suitors' Fund Act* provided no assistance to litigants once an appeal went beyond the state courts.<sup>65</sup> In *Commissioner for Stamp Duties v. Owens*<sup>66</sup> the High Court allowed an appeal from the Supreme Court of New South Wales. The respondent to the appeal applied to the High Court for an indemnity certificate. The High Court held that the Act did not give it the power to grant a certificate and that an attempt to give it that power would have been invalid. In *Selby Shoes (Aust.) Pty. Ltd. v. Erickson*<sup>67</sup> the Supreme Court of New South Wales held that it could not grant a certificate in respect of an appeal to the High Court. Finally, in *Gurnett v. Macquarie Stevedoring and Lighterage*<sup>68</sup> the High Court stated that it could not grant a certificate in respect of the costs of the appeal up to the state Supreme Court.

As a result of these decisions the New South Wales legislation was amended in 1959. Now all of the Australian statutes provide that the state Supreme Court may grant a certificate in respect of an appeal beyond the state courts, that is, to the High Court of Australia or the Privy Council. Similarly, section 3(3) of the draft Act provides that where the Supreme Court of Canada decides a successful appeal, any party to the proceeding may apply to a judge of the provincial Supreme Court for an order against the Fund.

### B. *Series of Appeals*

How should indemnity from the Fund be dealt with where there is a series of appeals; for example, where a successful appeal is taken from a decision at first instance to an intermediate appellate court and subsequently a further successful appeal is taken to another court which reinstates the decision at first instance?

The first issue raised by this scenerio is whether, given that the decision

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<sup>63</sup> *Halifax v. McLaughlin Carriage Co.* (1907), 39 S.C.R. 174 at 183; *L'Ass'n. St. Jean-Baptiste de Montréal v. Brault* (1901), 31 S.C.R. 172 at 174.

<sup>64</sup> N.S.W., s. 6(1).

<sup>65</sup> The possibility of constitutional problems with this aspect of the legislation was recognized during debate, see *N.S.W. Legis. Council Deb.* May 15, 1951, at 1929-30.

<sup>66</sup> (1953), 88 C.L.R. 168 (H.C. of Aust.).

<sup>67</sup> (1956), 73 W.N. (N.S.W.) 116 (S.Ct.).

<sup>68</sup> (1956), 95 C.L.R. 106 (H.C. of Aust.).

at first instance was ultimately upheld, any indemnity should be payable out of the Fund? One Australian case has suggested that no indemnity at all should be payable in such a case.<sup>69</sup> It is submitted that this result and the reasoning employed is unacceptable. It gives weight only to the ultimate outcome (the upholding of the initial decision) and overlooks the costly process by which the court system achieved that result. In such a case it will have taken the system three hearings to get the correct result and the parties should only have to pay for one hearing. The Fund should be liable for the costs of the first appeal because it was a successful appeal. Similarly, the Fund should also be liable for the costs of the second appeal reversing the "incorrect" decision of the intermediate appellate court.

A second issue raised by successive appeals relates to the timing for payment made from the Fund. Should the parties be entitled to payment out of the Fund in respect of the appeal to the intermediate court while they are pursuing, or could still pursue, a further appeal? The Australian statutes contain provisions postponing such payments out of the fund to ensure that the payments are not used to finance further appeals, that is, an order against the fund is automatically stayed by the commencement of a subsequent appeal.<sup>70</sup> While an argument can be made for a contrary rule, on balance, the Australian approach to this issue seems a wise one: the immediate payment of benefits out of the fund may well encourage second level appeals. Hence, section 9(4) of the draft Act provides that no payments may be made out of the Fund until the time for appeal or for seeking leave to appeal has expired, and that the order for payment is stayed by obtaining leave or by launching a subsequent appeal.

A third issue raised by successive appeals regards the operation of the scheme where the decision at first instance is affirmed on appeal but is then reversed on a subsequent appeal, for example the Court of Appeal upholds the trial court but is then reversed on a further appeal to the Supreme Court of Canada. In such a case, the court system malfunctions not once, but twice, and *prima facie* the party should only have to bear the costs of the initial trial. Section 3 of the draft Act provides that in such a case the court may order that the parties recover against the Fund not only the costs of the ultimately successful appeal, but also the costs of any unsuccessful intermediate appeal. It is also provided that when an appeal succeeds, the court may include in an order against the Fund the cost of any motion for leave to appeal.

### C. *Judicial Discretion*

As already indicated, the draft Act adopts the approach of giving the court a discretion to order costs against the Fund in respect of eligible proceedings, rather than giving the party a right to costs. The intention is that, normally, both parties to an eligible proceeding should be given an order

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<sup>69</sup> *Pataky v. Utah Construction & Engineering Pty. Ltd.*, [1966] 1 N.S.W.R. 689, 84 W.N. (Pt. 1) (N.S.W.) 201 (S.Ct.).

<sup>70</sup> See, e.g., S. Aust., s. 7(6).

against the Fund for their party and party costs. But in respect of any of the eligible proceedings cases may arise where this is not appropriate. Consequently, unlike many of the Australian statutes,<sup>71</sup> the draft Act gives the court a general discretion in all cases.

The draft Act contains two provisions specifically dealing with the court's discretion. Section 6(3) authorizes orders in favour of only some of the parties or limited to only part of an eligible proceeding or restricted to only a proportion of the taxed costs of the eligible proceeding.<sup>72</sup> Section 6(4) directs the court to consider the conduct of a party or that of his counsel<sup>73</sup> and, in respect of partially successful appeals, the degree of success. Neither of these provisions is unusual and they involve matters which can and are taken into account today in awarding costs between parties. Situations where the misconduct of counsel might be a relevant factor to be considered can be envisaged, such as the deliberate adducing of inadmissible evidence before a jury causing a mistrial.<sup>74</sup> More problematic is what weight is to be given to the "misconduct" of counsel who leads a court into error through his submissions, thus causing a successful appeal. This has been discussed in the Australian case law<sup>75</sup> and the cases have been distinguished between submissions that "should not have been made," that is, submissions that either deliberately or through negligence on the part of the lawyer misled the court (justifying the refusal of an order against the fund) and "unsuccessful submissions," that is, those which are arguable but ultimately unsuccessful (and which do not disentitle a party to an order against the fund).

#### D. *Financial Viability of the Scheme*

Is the scheme proposed here one that can be financially viable? Illustrative data, developed in the Ontario context, indicates that relatively small increases in court fees would produce a substantial Fund, one that would be

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<sup>71</sup> Some of the Australian statutes (*e.g.*, Vic., Tas., and Q'ld.) give a party a right to costs against the fund in some situations, such as abortive proceedings, cases where the court refused to sanction infant settlement or where a new trial is ordered on the ground that the verdict of the jury was against the weight of the evidence. In all of the six states, however, relief is discretionary where the proceeding involved was a successful appeal on a question of law.

<sup>72</sup> This power to make a limited order in favour of a party, for example, for only half of his costs, is absent from five of the six Australian schemes. Only in South Australia does the legislation give the court power to specify the extent of the certificate: see S. Aust., ss. 7(2), 8(1). In one New South Wales case the court commented: "[o]ne would have thought the scheme more workable if the discretion extended to limiting . . . that portion of the costs of any appeal to which the certificate was to apply." *Acquilina*, *supra* note 34, at 777 (N.S.W.R.), 537 (W.N.) (Pt. 1) (N.S.W.).

<sup>73</sup> All the Australian schemes deny recovery, in certain cases, whenever there is a misconduct by *any* party or counsel: see text accompanying note 44, *supra*.

<sup>74</sup> However, given that this type of trial decision is one over which the client has virtually no control, *quaere* whether such conduct should deprive the party of access to the Fund, unless the court is prepared to make an order requiring counsel to personally bear the party's costs?

<sup>75</sup> See, *e.g.*, *Di Battista v. Motton*, [1971] V.R. 565 (S.Ct. Full Ct.); *McLennan v. McBroom*, [1969] V.R. 566 (S.Ct. Full Ct.); *Zappulla v. Perkins (No. 2)*, [1978] Qd. R. 401 (S.Ct. Full Ct.); *Builders Licensing Bd.*, *supra* note 25.

sufficient to meet likely claims. The following table<sup>76</sup> reveals the amount of revenue that could be generated by increasing the fees payable<sup>77</sup> in the Supreme and County Courts in Ontario:

	No. of Cases	Fee Increase	Additional Revenue
<i>Supreme Court</i>			
Proceedings Commenced	54,868	\$ 5.00*	\$274,340
Appearance	(27,434) <sup>78</sup>	5.00**	137,170
Set Down for Trial	6,539	10.00***	65,390
<i>County Court</i>			
Proceedings Commenced	71,923	5.00*	359,615
Appearance	(26,866) <sup>78</sup>	5.00**	134,330
Set Down for Trial	29,092 <sup>79</sup>	10.00***	290,920
			\$1,261,765

\*from \$30 to \$35

\*\*from \$15 to \$20

\*\*\*from \$40 to \$50

Hence it can be seen that by modest increases in only the fees payable in the Supreme and County Courts an annual fund of some \$1.26 million would be produced. If small increases were made in the fees payable in other courts (for example, the Surrogate Courts,<sup>80</sup> which had 27,716 applications in 1978-79 and the Small Claims Courts,<sup>81</sup> which had 159,321 cases filed in 1980) substantially greater revenue would be generated in the Fund.

What of payments out of the Fund? In 1979 the Court of Appeal of Ontario allowed 166 appeals.<sup>82</sup> If orders against the fund in each of these cases averaged \$5,000, the total of payments out would be \$830,000, leaving \$431,765 remaining to meet the cost of successful interlocutory appeals and appeals to courts other than to the Court of Appeal, and abortive proceedings.

<sup>76</sup> Ontario Ministry of the Attorney-General, *Court Statistics Annual Report 1980/81*, 1978/79 court statistics.

<sup>77</sup> The present fees are those prescribed by O. Reg. 517/80, made pursuant to the *Administration of Justice Act*, R.S.O. 1980, c. 6.

<sup>78</sup> This figure as to the number of appearances (that is, defences) entered is the authors' rough estimate. It is based on the fact that the court statistics indicate that in County Court about half of all actions commenced end in default judgment, suggesting that in the other half at least an appearance is entered.

<sup>79</sup> The figure for the number of cases set down for trial appears to be much higher in County Courts than in the Supreme Court because the Court Statistics report divorces which are destined to be disposed of by County Court judges sitting as local judges of the Supreme Court, as being *commenced* in the Supreme Court but *set down for trial* in the County Court.

<sup>80</sup> *Supra* note 76.

<sup>81</sup> Figure provided by Ronald McFarland, Director of Small Claims Court, Ontario Ministry of the Attorney-General.

<sup>82</sup> This figure was supplied by W.F. Shaughnessey, Registrar of the Court of Appeal. The court statistics, see, *supra* note 76, indicate that in 1978-79, 473 civil appeals were argued before the Court of Appeal. Most appeals came from the Supreme and County Courts.

### VIII. CONCLUSION

The litigation insurance scheme, as proposed in this paper,<sup>83</sup> would serve to protect litigants from costs that they presently incur through no fault of their own. It would reduce the burden on the costs of successful appeals and certain other proceedings.

The proposal is fair to all litigants in that it protects them from the costs of errors made by the court system. If the scheme were implemented a party could expect only to pay the costs of "doing things once," that is, the costs that would have been incurred had no judicial error been made. Since this amount is what litigants expect to pay in a normal case, it cannot be claimed that the scheme would tend to encourage a great deal of new litigation.

The institution of this litigation insurance plan could be accomplished without an increase in public spending and without setting up any new agency of government. The scheme would not require the adoption of any new principles for determining costs.

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<sup>83</sup> There is a further, possible extension of the schemes which has not been incorporated into the draft Act. This would be to allow for orders against the Fund to compensate parties for the cost of *unsuccessful* appeals, where the appeal decided a question of law that had previously been unclear. The rationale would be that if neither party could be particularly certain of success on the appeal, then both acted reasonably in either pursuing or not settling the appeal. The extension would recognize the interest of all litigants in having the law clarified and thus removing the need for a later appeal or trial. On such an extension see Gower, *The Cost of Litigation* (1954), 17 Mod. L. Rev. 1 and *Final Report of the Committee on Supreme Court Practice and Procedure* (Evershed Committee) (Cmd. 8878, 1953) Section IX.

## APPENDIX—DRAFT ACT

This draft Act assumes an Ontario court and legislative structure. With suitable modifications it could be enacted by any Canadian jurisdiction.

## LITIGANT'S INDEMNITY FUND ACT

## INTERPRETATION

1. In this Act, unless a contrary intention appears,
  - (a) "appeal" includes a cross-appeal and an application by way of a stated case.
  - (b) "court" means
    - (i) a Small Claims Court
    - (ii) a Provincial Court (Civil Division)
    - (iii) a Provincial Court (Family Division)
    - (iv) a County or District Court
    - (v) a Surrogate Court
    - (vi) a Unified Family Court
    - (vii) the Supreme Court, including the Divisional Court, and
    - (viii) the Court of Appeal,and includes an officer of a court.
  - (c) "court fees" means any fees payable to a court in respect of the initiation of a proceeding, the taking of any step in a proceeding or the filing of any documents in a proceeding.
  - (d) "fund" means the litigants indemnity fund established under this Act.

## THE FUND

2.
  - (1) For the purpose of this Act, there shall be a fund entitled the "Litigant's Indemnity Fund."
  - (2) The fund shall be vested in and managed by the Accountant of the Supreme Court.
  - (3) The fund shall consist of
    - (a) money paid into the fund pursuant to this Act, and
    - (b) all interest that accrues from investment of the fund.
  - (4) The Attorney-General may appropriate from the fund such money as is necessary to meet the expense of managing the fund.
  - (5) There shall be paid into the fund, at times determined by the Attorney-General, an amount equal to such proportions of the revenue derived from court fees as may be prescribed by regulation.
3.
  - (1) Where an appeal from the decision of a court in a civil proceeding succeeds in whole or in part, an order may be made that the costs of the appeal of any party, are, to the extent specified in the order, payable out of the fund.
  - (2) An order under sub-section (1) may also provide that any party shall recover from the fund, to the extent specified in the order,

- (a) the costs of any previous appeal in the same case before a lower appellate court, and
  - (b) the costs of any motion for leave to appeal.
- (3) Subject to subsection (4), an order under subsection (1) may be made by the court hearing the appeal.
- (4) Where an appeal referred to in subsection (1) is heard by the Supreme Court of Canada any party to the proceeding may apply to a judge of the Supreme Court for an order under subsection (1).
- (5) Where the judgment on an appeal referred to in subsection (1) directs a new trial or hearing, the court conducting the new trial or hearing may order that the costs of the original or the new trial or hearing, whichever is less, of any party are, to the extent specified in the order, payable out of the fund.

#### COSTS OF ABORTIVE PROCEEDINGS

4. (1) Where the trial or hearing of a civil proceeding is rendered abortive by
- (a) the disagreement of the jury,
  - (b) the declaration of a mistrial,
  - (c) the death of the judge or other presiding officer prior to the delivery of judgment, or
  - (d) the failure of the judge or other presiding officer to deliver judgment within the period prescribed by the Judicature Act, including any extension granted thereto,
- the court in which the proceeding was commenced may order that the costs of such trial or hearing of any party are, to the extent specified in the order, payable out of the fund.
- (2) No order shall be made in respect of a proceeding referred to in sub-section (1) unless there is a subsequent trial or hearing of the proceeding.

#### COSTS WHERE COURT REFUSES TO APPROVE COMPROMISE

5. Where in a proceeding brought by a party under disability the court refuses to sanction a proposed compromise and at the trial or hearing the amount recovered by the plaintiff does not exceed the amount the defendant offered to pay under the compromise, the court in which the proceeding was commenced may order the costs of any party
- (a) incurred subsequent to the refusal of the court to approve the compromise, and
  - (b) to the extent specified in the order, payable from the fund.

#### ORDERS AGAINST THE FUND

6. (1) An order against the fund shall be made, in the same manner as an order against a party, except as otherwise provided in this Act or by regulation.
- (2) An order against the fund shall not provide for payment out of

the fund of any more than would be allowable on a party and party taxation in respect of the proceeding, trial or hearing in question.

- (3) In granting or refusing to grant an order against the fund the court may
  - (a) determine in favour of which parties, if any, to make the order, and
  - (b) restrict the order to the costs of part of the proceeding, or
  - (c) restrict the order to a proportion of the taxed costs.
- (4) In granting or refusing to grant an order against the fund or in determining the nature and extent of that order, the court may take into account
  - (a) the conduct of the party in whose favour the order is sought and the conduct of that party's legal counsel, and
  - (b) where an appeal succeeds only in part, the degree of success.

#### REVIEW OF ORDER AGAINST FUND ON MOTION OF THE ATTORNEY-GENERAL

7. (1) The court making an order against the fund shall give notice of the order to the Attorney-General within 7 days of making the order.
- (2) The Attorney-General may, with notice to the party in whose favour the order against the fund was made, apply to the court that made the order to have the order reviewed by that court, and the Attorney-General shall make such application within 21 days of date of the order.
- (3) On an application to review an order the court may confirm, vary or set aside the order.
- (4) An appeal lies to the Court of Appeal by the Attorney-General from the decision of any other court on an application to review under this section.
- (5) On appeal under sub-section (4) any party in whose favour an order against the fund was, or might have been made, shall be entitled to appear.

#### APPEAL OF ORDER

8. (1) An appeal lies to the Court of Appeal, with leave of that court, from the grant or refusal of an order against the fund by any other court.
- (2) The Attorney-General is entitled to notice of any application for leave to appeal or of any appeal under this section.

#### TAXATION AND PAYMENT OUT OF THE FUND

9. (1) A party shall be entitled to payment out of the fund upon presentation to the Accountant of the Supreme Court of
  - (a) an order of a court directing such payment, and
  - (b) the certificate of a taxing officer as to the amount of the costs.

- (2) The taxation of costs payable out of the fund shall be on notice to the Attorney-General.
- (3) In taxing costs payable out of the fund the taxing officer shall allow a party such costs as were reasonably incurred in respect of
  - (a) the taxation, and
  - (b) any review of the order or appeal of the order under section 7, unless otherwise ordered.
- (4) An order for costs against the fund is stayed
  - (a) during the time in which the appeal may be taken from the decision in the proceeding in which the order against the fund was made,
  - (b) during the time in which an application for review may be made under section 7(2) or an appeal may be taken under section 7(4) or section 8(1), and
  - (c) pending the disposition of any such appeal or review, as the case may be.

#### LIMITATIONS

10. No person shall be paid, in respect of an order against the fund under this Act, more than \$10,000 or such other sum as is prescribed by regulation.
11. No order shall be made against the fund
  - (a) in respect of a proceeding commenced before the date upon which this Act comes into force, or
  - (b) in favour of the Crown or any agency thereof.

#### ADVANCES TO THE FUND

12. Where the amount of the fund is or is expected to become inadequate to meet the orders made against it, an advance to the fund may be made from Consolidated Revenue on such terms as may be prescribed by regulation.

#### REGULATIONS

13. The Lieutenant Governor in Council may make regulations regarding any matter referred to in this Act as being the subject of regulations, and for generally carrying the Act into effect, including
  - (a) prescribing the percentage of court fees from any court to be paid into the fund,
  - (b) the maximum amount that may be paid to a party under an order against the fund,
  - (c) the procedure to be followed under the Act.

#### COMMENCEMENT

14. This Act comes into force on a date to be proclaimed.

#### SHORT TITLE

15. The short title of this Act is the *Litigant's Indemnity Fund Act*.