

**Rules of Costs and Fees for Lawyers –
A Comparison of German Law and the Law of the Province
of Ontario/Canada**

by

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Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

* A *Referendar* is a German trainee lawyer receiving practical training in judicial and other legal work having completed at least five years of formal legal studies at university and having passed the first of two state examinations for admission to the legal profession (as a judge, lawyer, state attorney, etc.).

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A. THE GERMAN LAW

I. Introduction

Effective July 1, 2004, the German system of legal costs and fees for attorneys at law has been changed under the *Modernization of the Law of Legal Fees Act (KostRMoG)*. Since the *Federal Code of Lawyers' Fees (BRAGO)* was repealed, a new statute called *Regulation of Attorney's Fees (Rechtsanwaltsvergütungsgesetz = RVG)* provides a system of legal fees for German lawyers. The revised rules have positive impact on the way to determine attorneys' fees and costs in Germany: (i) They provide a clearly arranged system of legal fees and costs, (ii) they achieve remuneration according to the individual performance of a lawyer and (iii) they describe the different areas of legal work of a lawyer.

It is important to note, however, that the *RVG* does not constitute a claim for remuneration; rather, it is seen as a precondition. Normally, a solicitor and client will conclude a service contract (§ 611 BGB). Therefore, the solicitor can claim for remuneration unless the contract provides otherwise (§ 612 I BGB). The concrete amount of the legal fees and costs is provided by the *RVG* and considered part of the arrangement. A different agreement has to be proven by the client.

II. Overview

The *RVG* is divided into 61 *paragraphs* and two appendices. The main body of the *RVG* provides basic rules on costs whereas *Appendix 1* contains all units of fees and basic fees as decimal value or outlines of amounts.

The *RVG* and its *Appendix 1* apply to all branches of law so that the amount of legal fees and costs in civil cases, criminal cases or contentious administrative matters are all provided for. The amount of the remuneration corresponds to the value of the matter in dispute (§ 2 I *RVG*).

In order to bill a client, the lawyer will have to consult *Appendix 1*, where all services provided are either connected to a concrete amount or a fee ratio. A fee ratio has to be multiplied by the specific rate of legal fees stated in *Appendix 2*, which corresponds to the value of the matter in dispute (§ 13 *RVG*).

The value of litigation is also significant for court fees pursuant to § 3 of the *Law of Court Fees*

(*Gerichtskostengesetz = GKG*)¹. The *GKG* is divided into a section of basic rules and an *Appendix 1* that contains a list of basic fees. Its system of rules is similar to that of the *RVG* because the amount of court fees also increases in proportion to the value of litigation. The plaintiff is obliged to pay the court fees upon filing his statement of claim.

III. Scope of payment for fees

A solicitor's work is thoroughly compensated for by the specific legal fees stated by the *RVG* and its *Appendix 1*. A solicitor is only allowed to claim legal fees once in the same matter, except for a bonus fee for participating in a court proceeding, which applies once in every level of jurisdiction (§ 15 *RVG*). The right to claim legal fees does not expire unless a law provides otherwise (§ 15 IV *RVG*).

If the solicitor-client relationship terminates or settles and that same solicitor resumes working on the same matter, he or she cannot claim a higher amount of legal fees than he or she would have received if he or she had been mandated for the complete matter at hand in the first place (§ 15 V 1 *RVG*). As an exception, if the solicitor-client relationship had settled more than two years earlier, the solicitor could legally claim an additional legal fee (§ 15 V 2 *RVG*). In these cases, the law assumes the necessity of a new familiarization with the matter.

If different rates apply for different aspects of the same matter, every legal fee has to be separately calculated, based on the applicable rate (§ 15 III *RVG*). The entire sum of those legal fees has to be lower than the hypothetical legal fee had the highest rate been applied.

The *RVG* distinguishes between “the same legal matter” (§ 16 *RVG*), “different legal matters” (§ 17 *RVG*) and “special legal matters” (§ 18 *RVG*). A lawyer is not allowed to claim more than one legal fee in the same legal matter. In different or special legal matters, a lawyer can claim legal fees for each legal matter. A definition of the terms “the same legal matter,” “different legal matter” or “special legal matter” is provided by the *RVG*.

IV. The remuneration schedule (*Appendix 1 - VV RVG*) – the fees in detail

All general expenses of a lawyer related to a legal matter will be compensated by the legal fees for that legal matter (*No. 7000 ff. VV RVG*). The *RVG* provides a list of flat charges for items that a lawyer can charge, such as copies, travel disbursements or communication expenses.

A lawyer receives a 1.5 legal fee for settling a legal dispute (*No. 1000 VV RVG*). If there is already a proceeding pending, this legal fee will be reduced to an amount of 1.0 legal fee. If the

¹ Download <http://bundesrecht.juris.de>.

settlement contains an extrajudicial legal dispute and a proceeding, both legal matters will be charged separately.

An advisory opinion about the chances of success of an appeal will be charged with a legal fee that is usually 0.55 (in this case, a lawyer is allowed to charge a just fee that is anywhere between 0.1 – 1.0).

The limit on general fees for out-of-court work (*Geschäftsgebühr*) is between 0.5 – 2.5 (*No. 2300 VV RVG*). Therefore, the average legal fee is 1.5 and the legal fee for a matter of a medium level of difficulty is 1.3. A higher legal fee will only be charged if a legal case is more extensive or has a higher level of difficulty. It is recommended that a lawyer keeps a record of his or her work and expenses, such as times and dates of business meetings, trial dates and correspondence. The level of difficulty of a legal matter is measured with objective criteria such as complexity of the legal issue or the amount of work.

Also, there is a legal fee for court-related work (*Verfahrensgebühr*) in the amount of 1.3 (*No. 3100 ff. VV RVG*). It applies to civil litigation, labour law proceedings, legal proceedings in administrative, financial and social courts as well as enforcement proceedings, proceedings related to an order of attachment securing its enforcement, proceedings of temporary injunctions and jurisdiction over non-contentious matters. Additional legal fees could be credited by 0.5 to 0.75 against said legal fees for court-related work (*No. 2300 ff. VV RVG*).

In addition to legal fees for court-related work, there is a legal fee for the court appointment itself called a trial-date fee. The trial-date fee arises in a legal proceeding according to *No. 3104 VV RVG* and will also arise if a lawyer represents his client during a private settlement or if he or she negotiates a non-pending claim. Finally, a trial-date fee will be charged when the parties of a proceeding make a settlement in court (§ 278 VI ZPO).

The legal fee for court-related work in proceedings on appeal, complaints procedures and in proceedings before financial courts is 1.6 (*No. 3200 VV RVG*). The trial date fee is 1.2.

Legal fees for summary court proceedings for an order to pay debts are 1.0 or 0.5 (in case of a termination of the substantive dispute or a legal fee for a writ of execution – *No. 3305 ff VV RVG*).

In enforcement proceedings, the legal fee for court-related work and the trial date fee are 0.3 (*No. 3309 and 3310 VV RVG*).

V. Other agreements

1. Lower fees

Generally, a lawyer is not allowed to accept lower fees than the *RVG* provides (§ 49b I *BRAO*). An exception to this rule is that a lawyer may agree to a flat fee or time-related fee that is lower than statutory fees (§ 4 II 1 *RVG*). Such a system of flat fees has the advantage that a lawyer does not need to keep any documentation about the hours spent on the case or his expenses. However, such a flat fee turns into a disadvantage if the client uses the lawyer's services excessively. On the other hand, it is possible that the case will be settled quickly and the calculated and charged costs are thus higher than the lawyer's expenses. Therefore, as a client, it is advisable to carefully consider the option of having a flat fee or not.

2. Higher fees

A lawyer is allowed to charge a higher legal fee if a legal matter requires time-consuming research or special skills (§ 3a I *RVG*). Instead of having remuneration according to the *RVG*, lawyers and clients can agree to an hourly fee. This enables lawyers to work on cases that require much more time than usual while still being able to work economically.

If higher fees are necessary, then the agreement must be made in a separate document and cannot be part of another document such as a power of attorney or retainer. If an agreement for higher legal fees is not provided for by the client, then this separate document must be clearly labeled and distinguished from any other document related to the matter at hand (§ 3a I 2 *RVG*). In addition, the document must also contain a description of the specific work that has to be done or has already been done by the lawyer. In particular, a lawyer is supposed to specify every legal fee of his or her account including hours worked, travel expenses, taxes and a description of how billable hours are being charged.

Individual fee agreements have recently become common in Germany, especially at bigger law firms. Other law firms also work with this kind of agreement in business-related matters.

3. Contingency fee

Due to a judgment of the German Constitutional Court (1 BvR 2576/04), the German legislation had to enact a law enabling a client to close a contingency fee agreement with a lawyer. This is an exception to the general rule of not allowing such agreement.

While the general rule is still valid, the client has to be able to have a contingency fee agreement

if, without having such agreement, the client would not be able to enforce or defend his or her rights in a proper manner for personal financial reasons (§ 4a RVG). Besides that, a client will still have the opportunity to seek legal aid.

VI. Extrajudicial legal advice

Since July 1, 2006, there are no specific regulations about fees with respect to extrajudicial legal advice. As such, the account has to be made pursuant to the rules of the *German Civil Code*. The fee for verbal or written advice to a consumer (a private person who's legal matter is not connected to a business run by that person) may not exceed €250 (§ 34 RVG). On the other hand, the lawyer must not bill more than €190 for the first consultation. However, it is important to note that this is not a flat rate. Moreover, the value of the litigation has to be considered. The result is as follows: If the calculated rate is higher than €190, then the client is not liable to pay more; if the calculated rate is lower than €190, then the solicitor must bill the lesser of the two amounts.

If the client is not a consumer, the lawyer has to ensure that the client signs a fee agreement.

VI. Mediation

Mediation is considered to be part of a lawyer's billable work. A lawyer shall work toward a fees' agreement because this is in the spirit of mediation (§ 34 RVG). If such agreement is not reached, the services are billed pursuant to the rules of the *BGB*. That is, the usual remuneration is owed. In the case of mediation, the applicability of the *RVG*'s fees' table is excluded by law.

VII. Determination of fees payable by client

Remuneration is due when the matter is settled or closed (§ 8 I I RVG), or if the court has issued a decision regarding costs, as in the case of a proceeding which has been finished or suspended for more than three months. The solicitor is also allowed to ask for a retainer (§ 9 RVG).

After the matter has been settled or closed, the solicitor sends an invoice to the client (§ 10 I RVG). The following information must be included in each invoice: (i) The amounts of each single fee, (ii) the applicable sections of the *VV RVG*, depending upon the value of litigation, disbursements, and the retainer and (iii) a short description of the relevant provision (§10 II RVG).

The client has a right to obtain a transparent bill even if he or she has paid already without receiving an invoice.

The solicitor is entitled to have the court assess his or her client fees if the client is in default on

payment (§ 11 RVG). In order for the assessment to take place, the solicitor must show (i) the fees incurred under the RVG and (ii) that no fees agreement was made. The proceeding for fixing costs is a precondition for an action for a fee claim against the client.

The motion for fixing costs must be rejected if the client has already raised objections that do not refer to the law of fees (§ 11 V 1 RVG); for example, in case of the lawyer's defective performance of the retainer agreement or a plea based on the statute of limitations, the lawyer can directly sue the client without a prior fixing costs (§ 11 V 2 RVG).

VIII. Obligation of bearing costs

In principle, a solicitor will only explain legal fees and costs to the client if the client asks. If the client does not ask, the solicitor has no duty to offer the information.

1. In civil law matters

Generally, the losing party has to bear all costs (§ 91 ZPO). The winning party can claim its costs for bringing the action, whereas the losing party must bear its own as well as the winning party's costs. This also applies to court fees incurred. Nevertheless, depending on the outcome of the proceeding, the costs can be imposed on both parties at a rate determined by the court.

The court decides on party to party costs and the rate of such costs. Later, based on the court decision, a registrar will calculate the actual costs and add any fixed costs. Because of the principle of *res judicata*, the court is bound by its own judgment. Simply put, subsequent changes are not allowed.

A motion for fixing costs has to be brought to the court of the first instance (§§ 103 ff. ZPO). The fees accrued according to the value of litigation and disbursements have to be set forth. If there was a fees agreement between a party and its lawyer, the court will merely fix the costs accrued according to the RVG in harmony with its decision on costs. Each individual party has to bear the costs that exceed the agreed amount. The costs' decision is an enforceable title.

2. In criminal matters

Reimbursement of costs for a criminal proceeding depends on whether the costs can be refunded in accordance with § 91 II ZPO (§ 464a II Nr. 2 StPO). Whenever the StPO (*German Code of Criminal Procedure*) permits the defendant to be represented by a lawyer, the lawyer will be remunerated, even if his or her involvement was not deemed necessary in accordance with § 140 StPO. The defendant's lawyer must not have been rejected pursuant to § 146a StPO. The costs

will not be refunded before a request is made by one of the parties involved (§§ 103 ff. ZPO, 464b StPO).

3. In administrative matters

In administrative matters, it is important to distinguish the administrative procedure from legal proceedings before an administrative court.

As in civil and criminal matters, the order for the payment of costs is part of the judgment (§ 161 VwGO²). More specifically, the statute states that the losing party bears the costs but, depending on the case, quotas are possible (§§ 154 I, 155 VwGO). Upon application, the registrar of the court of the first instance fixes the amount of the costs to be refunded; court fees are usually refundable. In administrative matters – in contrast to civil or criminal law cases –, a lawyer’s fees and disbursements will only be refunded if the action brought is deemed necessary. In order for a case to be considered necessary, “a reasonable, neither very anxious nor very relaxed plaintiff would consider the representation through a lawyer necessary.”³ This requirement will usually be met in matters dealing with both German and Canadian law.

The model for refunding costs in administrative procedures is similar to the model in administrative proceedings before the court: The costs will only be refunded if they can be considered necessary. The costs’ decision by the administrative body must include a decision on the necessity of being represented by a lawyer. To be on the safe side, an application for such a decision should be brought during the procedure. The application for fixing costs has to be brought to the administrative body that made the costs’ decision (§ 80 III VwVfG).

In all branches of the German law, only the fees that are legally fixed will be refunded.

If a foreign lawyer is retained, only the costs that would have arisen under German law will be refunded. The German legal system does not allow the application of foreign fee regulations.

B. THE CANADIAN LAW

I. Introduction

In Canada, there are varying rules for each of the provinces. This paper refers to the law of Ontario which, in many instances, may be similar to the laws of other provinces, except Quebec.

² Download: <http://www.gesetze-im-internet.de/>.

³ BVerwGE 17, 245.

II. Overview

The Canadian legal system differs from the German legal system because it does not specify the amount of fees for services rendered by lawyers. Rather, fees are negotiable. A fees agreement will usually specify a fixed hourly rate, a contingency fee or, if the facts are simple and straight forward, a flat rate, as seen in routine real estate matters. The hourly rate is between \$200 and \$1000, depending on work experience, specialization and location of the lawyer⁴. As a cost-saving measure, law clerks and students-at-law are usually engaged in relatively simple legal issues.

The hourly rate, which signifies the amount and modalities of the lawyer's engagement, is usually fixed and specified in a retainer agreement. If there is no written retainer, the court will apply the hourly rates as agreed upon from the point of view of the client. Simply put, a lawyer acts at his own peril if he acts without a written retainer.

Plaintiffs or applicants not ordinarily resident in Ontario have to deposit a security for costs if the defendant or respondent moves for a security of costs and such an order is granted by the court.

III. The written law

Even if there is no uniform remuneration act, one can find the basic rules in several statutes and regulations. The main sources are (i) the *Courts of Justice Act*, R.S.O 1990⁵, (ii) the *Rules of Civil Procedure*⁶, (iii) the *Solicitors Act*, R.S.O. 1990, Chapter S. 15⁷ and (iv) the *Rules of Professional Conduct*, RPC 2000, Rule 2.08⁸.

IV. Types of fees agreements

1. Flat rate

Although not mandatory, a retainer that is accepted based on a flat rate should be in writing. The written agreement should reflect the amount, the method of payment and the matter in dispute. The flat rate can be based on the matter in dispute or on the estimated time to be spent on the case. It is common practice for solicitors to work for a flat rate mostly in non-litigious matters because they are the least complex.

⁴ Download: <http://www.bfai.de>.

⁵ Download: <http://www.e-laws.gov.on.ca>.

⁶ Download: <http://www.e-laws.gov.on.ca>.

⁷ Download: <http://www.e-laws.gov.on.ca>.

⁸ Download: <http://www.lsuc.on.ca>.

Payments can be made by means of a single flat rate or monthly payments. The lawyer bears the burden of proof that the client understands the agreement and his or her duty to pay.⁹

2. Contingency fees and *quota litis*

Since 2002, contingency fee agreements and *quota litis* agreements are allowed in Ontario. This was confirmed by the Ontario Court of Appeal in *McIntyre v. A.G. of Ontario* (2002). The test courts employ to ensure the validity of a contingency fee agreement is designed to ascertain whether the contingency fee agreement is allowable under the given circumstances and, if so, whether the agreement is fair and reasonable.

In *Raphael Partners v. Cherster Lam* (2002), the court substantiated the *McIntyre* court ruling when it considered whether an agreement was fair and reasonable. In its decision, the court provided that the contingency was to be 15% for the first million and 10 % for each additional million, plus disbursements and taxes.

Contingency fee agreements are allowed in all cases except criminal and family matters (s. 28.1 (3) of the *Solicitors Act*, R.S.O. 1990). Contingency fee agreements must (i) be in writing, (ii) describe the matter in dispute, and (iii) account for the contingency and consequence of an early termination of the retainer agreement by one of the parties (Section 28 (4)).¹⁰

It is important to note that an exact limitation on the percentage share in a contingency fee agreement has never been codified in Ontario. However, it is common practice to have contingency rates between 20 % and 45 % of the amount recovered in the proceeding. The percentage rate should reflect the difficulty of the matter, risks, costs of bringing the action and the likelihood of success.

The judicial consent of the Superior Court of Justice is necessary if the amount payable to the lawyer via a contingency fee exceeds the prescribed maximum rate defined by law or the value of the property in dispute. In Ontario, the court can exercise complete discretion regarding this regulation because no maximum rates have been codified thus far.¹¹ This also applies to cases where an additional fee is incurred for an award or a settlement¹² or if the lawyer acts on behalf of a person in custody¹³.

Contingency fee agreements are beneficial to those clients who lack the financial means to pay a

⁹ *Gokavi v. Lojek, Jones & Co.* (1986).

¹⁰ For further requirements see: <http://www.attorneygeneral.jus.gov.on.ca/>.

¹¹ *Solicitors Act*, R.S.O. 1990, Chapter S. 15, subsec. 28.1(6) und (9).

¹² *Solicitors Act*, R.S.O. 1990, Chapter S. 15, subsec. 28.1(8) und (9).

¹³ O. Reg. 195/04, subsec. 5 (1)(a) und (b).

retainer or single bills during a proceeding. A further benefit is that the client is not obliged to pay the lawyer's fees in case of failure. When a contingency fee agreement is made, the client should determine whether he must pay for disbursements such as court fees – which are much lower in Canada than in Germany – and costs for witnesses and experts. It is common practice for most lawyers to exclude disbursements from contingency fees so that they can have a claim for compensation if they lose the case.

V. Solicitor and client costs

A bill of costs is sufficient in form if it contains a short description of the particular job performed. Generally, indication of the lump sum is sufficient, but disbursements and expenses have to be detailed.¹⁴ Furthermore, a bill of costs allows the client to verify its adequacy and to examine his or her file. The acting lawyer or a legal partner must sign the bill. In bankruptcy cases, an executor or trustee may also sign the bill if the circumstances require it. Failure to sign a bill does not render it void; however, the lawyer will lose all rights to sue the client for payment whereas the client will still retain the right to have the bill assessed. The amount of the bill is due upon its delivery and the lawyer is entitled to sue for the amount 30 days after mailing. If their relationship is long-term, the lawyer is allowed to send the client interim bills.

VI. Client's possibilities of assessment

1. Bill

In order to ensure that the lawyer does not overbill, section 3 of the *Solicitor's Act* provides the client with the possibility to have the bill assessed.¹⁵ However, before filing the application for assessment, it is permissible for the lawyer at any time to correct the bill.¹⁶ There are different court opinions concerning the question whether judicial consent is required for such a correction. Most courts answer this question affirmatively.¹⁷ In such instances, the lawyer must prove that the first bill was issued incorrectly by mistake.

a) Persons entitled to file a motion

Both lawyers and their clients are entitled to apply for assessments of the bill under the

¹⁴ Solicitors Act, R.S.O. 1990, Chapter S. 15, 2(3).
¹⁵ Solicitors Act, R.S.O. 1990, Chapter S. 15, sec. 3.
¹⁶ *Lumsden v Shipcote Land Co.* (1906).
¹⁷ *Re Walsh and Fitch* (1904).

Solicitor's Act. In addition, persons named under section 9 of the *Solicitor's Act* are entitled to file this motion as well (i.e., pledgors or mortgagors of the client, third party debtors, or creditors). The general rule is intended to entitle every person, against whom a claim for payment could be enforced, to apply for assessments.

b) Form and time limit

An application to the court for an assessment must begin with the words "IN THE MATTER OF [name of the solicitor]."

The application must be filed within one month of the date on which the bill was received by the client.¹⁸ This limitation is equal to the period to be observed by the lawyer in case he desires to bring an action against the client.¹⁹ Furthermore, the time period gives the lawyer a fair chance to defend the bill and make detailed comments on the costs, if the client requests this.

Having a settlement is always an optimal solution, especially because it relieves the court from deciding and is cheaper for both parties involved. If twelve months pass after the bill or judgment has been received, an application for assessment cannot be granted anymore.²⁰ If the payment was already made, an assessment is not generally barred, but the matter remains within the discretion of the court.²¹

The lawyer is not obliged to prove receipt and notice by the client but may be obliged to prove that the bills were delivered in a lawful manner. It is up to the client to decide whether to submit evidence that the bill does not comply with legal requirements.

c) Jurisdiction

The application for an assessment of a bill has to be filed with the local registrar of the Superior Court of Justice. The request will be processed by an assessment officer.

d) Proceeding

aa) Application of the client or other entitled persons

(1) If the retainer is not in dispute and if there are no special circumstances, the client has two options: (i) He or she can either apply for delivery of a bill and its assessment or, if the bill was

¹⁸ Solicitors Act, R.S.O. 1990, Chapter S. 15, subsec. 3(b).

¹⁹ See below: d) Proceeding: bb) Application by the lawyer.

²⁰ Solicitors Act, R.S.O. 1990, Chapter S. 15, sec. 4.

²¹ Solicitors Act, R.S.O. 1990, Chapter S. 15, sec. 11.

already delivered, (ii) he or she can apply for the assessment within one month of its delivery.²²

Circumstances may be considered special if they affect the costs of the case, or the credibility of the client – for example, if there was pressure exerted on the lawyer, strong suspicion of fraud or serious misconduct. However, each case is determined by the particular facts and circumstances.

When an application for delivery and assessment of a bill is filed, the bill must be submitted to the assessment officer within 14 days.²³ Upon the request of the assessment officer, the lawyer is obliged to bring a detailed statement of costs, which has to show the amounts and expenses paid by the client. According to the *Rules of Professional Conduct*, a lawyer has a duty to accept a delayed application. A proceeding will generally only be continued when the invoice is presented, independent of any agreement between the parties that may exclude the issuing of a bill.

(2) In the case of non-observance of the time limit, or if a retainer is in dispute, or under special or unusual circumstances, an application for assessment can be filed within 12 months of the delivery of the bill.

If the retainer is denied, then the assessment procedure must be interrupted and a decision about its validity must be made in a court action. The assessment officer is not legally authorized to make a decision in regard to the retainer. However, the assessment can be continued if he or she believes that the retainer was rescinded with malicious intent. Therefore, it can be said that the assessment officer has an examination function with regard to the question whether further proceedings must be pursued.

Interim invoices cannot be assessed separately, as the assessment officer always has to consider the entire amount of work done on the matter in making his or her decision. The bills can, however, be assessed by examining partial invoices. As such, the period of 12 months commences only when the retainer is finished.

bb) Application by the lawyer

A one month limitation period is applicable to lawyers who make an application, as long as the circumstances of the development and the content of the retainer are undisputed. Such a request cannot be granted if questions of law and facts have to be solved first or if there are discrepancies between the positions of the client and the lawyer. In such a case, it would be necessary to file an application; the 12-month limit would not apply.

cc) Discretion of the assessment officer

²² Solicitors Act, R.S.O. 1990, Chapter S. 15, sec. 3.

²³ Solicitors Act, R.S.O. 1990, Chapter S. 15, subsec. 6(1).

When assessing a bill, the assessment officer has to consider the following factors for a discretionary decision:

1. The time expended by the solicitor;
2. The complexity of the matters to be dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matter to the client;
5. The importance of the matter to the client;
6. The degree of skills 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.²⁴

These factors also apply to an assessment in criminal matters. The assessment officer must always consider that the costs should be fair and reasonable. If the lawyer and his or her client made a fixed fee agreement, not only will the fixed fee be assessed, but the entire agreement will be subject to an assessment. The bill will be reduced if the following conditions apply:

1. failure of the lawyer to convince or attempt to convince the client to accept an offer to settle if the settlement offer would have been advantageous for the client;
2. unnecessary steps taken in the proceeding that were not in the client's interest. Pursuant to sec. 7 of the Solicitors Act, R.S.O, 1990, Chapter S. 15 the assessment officer has to consider if the *ex ante* view of the lawyer can justify the activities;
3. negligence on the part of the lawyer to advance the client's interests;
4. failure on the part of the lawyer to inform the client about the hourly rates when retained, or to inform the client about any change of the hourly rate.

2. Contingency fee

A contingency fee agreement can be subject to approval by the Superior Court of Justice.²⁵ Two different procedures may be followed.

The client is allowed to file an application for approval to the Superior Court of Justice 30 days

²⁴ Cohen v. Kealey & Blaney (1985), Peterson & Peterson v. Cochrane (1989).

²⁵ Solicitors Act, R.S.O. 1990, Chapter S. 15, subsec. 28.1(11).

after the delivery of the invoice or within a period of one year after payment if the amount payable to the lawyer does not exceed the maximum permissible percentage of the monetary award (or the value of the property) recovered in a proceeding.²⁶

If the fees initially agreed upon are exceeded, the parties can file an application to the Superior Court of Justice up to six months after delivery of the final bill. Since there are no regulations in Ontario with respect to the maximum permissible percentage, the admissible rate is in the court's discretion.

When the contingency fee agreement terminates early, the lawyer cannot file an application for assessment until the end of the proceedings, insofar as billing by a single invoice has been agreed upon.²⁷

In determining if a contingency fee agreement is fair and reasonable, the assessment officer has to consider the following factors:

1. The importance of the contingency agreement in making the litigation process available to an impecunious client;
2. The law firm's willingness to undertake the time, expense and risk associated with a commercial contingency case;
3. The fact that there are no known funds available from the defendant to satisfy any potential judgment;
4. The law firm's willingness to pay disbursements necessary to prosecute the claim;
5. The fact that the case involves complex and difficult issues;
6. The fact that a case was carried through to the Supreme Court of Canada;
7. The experience and wisdom of the law firm available to the client;
8. The extensive time records that were prepared;
9. A lengthy trial;
10. The ultimate success of the litigation;
11. The time frame available to the law firm;
12. The expediting of the case at all levels by the law firm.²⁸

These factors will affect the decision cumulatively. An invoice that has already been assessed

²⁶ Solicitors Act, R.S.O. 1990, Chapter S. 15, subsec. 28.11(a).

²⁷ *Pierce v. Sinkovits* (1997).

²⁸ *Bell v. Fraser Milner Casgrain LLP* (2003).

cannot be subject of another assessment unless the court finds special circumstances.

VII. Reimbursement of costs

1. General provisions

In the early days of the common law, there was never any reimbursement of costs to the parties. Initially, the “Statute of Gloucester” (1278)²⁹ gave the successful plaintiff the right to reimbursement of costs. Later on, the defendant was entitled also to reimbursement of costs. However, in 1842, the official role of “taxing master”, now called assessment officer³⁰, was introduced by statute in Ontario.

In contrast to the principle of section 91 of the *German Code of Civil Procedure* (the losing party bears all costs incurred), the decision on costs is within the full discretion of the court under the laws of Ontario. Thus, the judge basically decides about the apportionment of the costs and the assessment officer fixes them.

The basis for this system is the idea of free access to justice for everybody. Everybody shall have the possibility to claim his or her rights before a court without being overcharged. According to Ontario law, every claim for costs is within the discretion of the court. Nevertheless, decisions on costs in Ontario are in practice often consistent with comparable German decisions, although the losing party is only obliged to refund parts of the costs or not all.

2. Guidelines

Since January 1, 2002, reimbursable costs are divided into three categories in Ontario: (i) partial indemnity costs, (ii) substantial indemnity costs and (iii) full indemnity costs. Part I of Tariff A (see below) initially contained cost examples for hourly rates (“costs grid“), which were considered to be appropriate by the law and which the court should apply. The costs grid, however, was annulled on January 1st 2005.

a) Tariff A

Tariff A is further divided into two parts: Part I deals with reimbursable lawyer’s fees and Part II with expenses.

Part I only refers to the factors set out in subsection 57.01 (01) of the *Rules of Civil Procedure*,

²⁹ G Edward I, c. 1.

³⁰ In Ontario in Form des Solicitors Act, R.S.O. 1990, c.S.15.

and to s. 131 of the *Court of Justice Act*. The court has to consider them in its decision, even though the decision on costs is within the discretion of the court. The intent of the legislator to have the courts decide on the reimbursement of costs can clearly be seen in the abolition of legally prescribed hourly rates. However, court decisions regarding the costs grid delivered in the period from 2002 to 2005 can still be considered precedents because of the guidelines they provided. Nevertheless, the courts are not bound by these previous decisions

Part II lists reimbursable expenses according to nature and amount.

b) Partial indemnity costs

“Partial indemnity costs” means a partial reimbursement of costs.

c) Substantial indemnity costs

Substantial indemnity costs are defined by sub. 1.03 (1) of the *Rules of Civil Procedure* as costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A. Such reimbursement of costs has to be ordered explicitly by the court.

d) Full indemnity costs

In addition to substantial indemnity costs, a court can grant full indemnity costs.³¹ Only a court is entitled to grant this kind of reimbursement; an assessment officer has no such authority.

3. The court’s decision on costs

By whom and to what extent costs shall be paid is in the overall discretion of the court. The fact that a party is successful in a proceeding, or a part of a proceeding, does not imply that there will be a successful claim to a refund of all costs.³²

The court has to apply an objective approach while making its decision.³³ According to the *Rules of Civil Procedure*, R.R.O 1990, R. 57.01(1), the court has to consider *inter alia* the hours spent by the lawyer, his hourly rates, the amount claimed, the complexity, the meaning and necessity of the particular actions during the proceedings as well as the attitude of the parties in the procedure, especially the readiness to make a compromise.³⁴

Therefore, in Ontario, the steps taken in a proceeding can influence the decision on costs

³¹ Rules of Civil Procedure, subrule 57.01(4)(d).

³² Rules of Civil Procedure, R.R.O., 1990, Rule 57.01(2).

³³ *Bouche v. Public Accounts Council for the Province of Ontario* (2004).

³⁴ Rules of Civil Procedure, R.R.O., 1990, Rule 49.10.

substantially. For instance, the successful party has to bear the costs of the procedure if the party was responsible for taking wrong decisions in relation to the proceedings and litigation or for any inappropriate behavior.

The costs fixed by the parties shall also be taken into consideration,³⁵ but, nevertheless, the judge is free to decide which party has to bear which costs.³⁶ In calculating costs, the court does not follow any mathematical rule by means of which it multiplies the given hours with a particular hourly rate.³⁷ Rather, the panel applies the basic principle of a fair and reasonable decision on costs. According to subsection 57(3) of the *Rules of Civil Procedure*, R.R.O. 1990, the court shall make its decision on costs in compliance with Part I of Tariff A.

In exceptional cases, the court can order an assessment by an assessment officer.³⁸ Such an exception is permitted if the decision on costs needs a more specific investigation or if the procedure for the assessment of costs is long and time-consuming. Nevertheless, the assessment officer is bound by the instructions of the court.³⁹

The proceeding before the assessment officer is set out in section 58 of the *Rules of Civil Procedure*, R.R.O. 1990. When filing a bill of costs under Form 58A with all necessary appendices with the responsible assessment officer, an appointment for the assessment is fixed as well. The assessment officer has to serve all parties interested in the assessment at least seven days prior to the fixed appointment. If the successful party files the bill of costs within a reasonable time, any party liable to pay the costs can obtain a notice to deliver a bill of costs for the assessment (Form 58B). The notice has to be served on all parties 21 days prior to the assessment conference. The party required to deliver a bill of costs must file and serve a copy of the bill seven days before the date fixed for assessment. If the party fails to fulfil this requirement in the requisite time, the assessment officer can fix the costs at an appropriate sum to prevent prejudice to the other party. The assessment officer is only allowed to assign a lawyer's fees and disbursements in terms of the rates; the assessment officer has no right to grant a full reimbursement in terms of full indemnity costs.

4. Procedural reimbursement of costs

After the proceeding, the party who is awarded costs has to deliver a bill of costs (Form 57 A) to the other party and file it with proof of service. If Form 57 A is not used, the court will employ

³⁵ Murano v. Bank of Montreal (1998).

³⁶ Court of Justice Act, sec. 131, Rules of Civil Procedure, R.R.O, 1990, Rule 57.01(4).

³⁷ West v. Workplace Safety and Insurance Board (2005).

³⁸ Rules of Civil Procedure, R.R.O, 1990, Rule 57.01 (3.1).

³⁹ Rules of Civil Procedure, R.R.O, 1990, Rule 57.02.

reasonable estimates of the hours spent on the case.

The bill of costs should be filed in a timely fashion. For instance, in *Klein v. Zagdanski* (2004) the court declined an application, which was filed almost four years after the hearing.

5. Reimbursable costs in detail

a) Court fees

As stated earlier, court fees must be paid by the losing party. However, it should be mentioned that in Ontario, the court fees are not influenced by the value of the litigation. A flat rate is charged.⁴⁰ For instance, the filing of a statement of claim costs \$181, irrespective of the amount claimed. Accordingly, court fees constitute only a minor part of the litigation costs.

b) Lawyer's fees

Generally, each party bears its own legal fees. Fees billed by a lawyer will seldom be reimbursed completely. The reimbursement of costs depends very much on the individual case and is always subject to the estimation and the discretion of the court. Especially in family law cases, each party bears its own costs in so far as there are no extraordinary circumstances.

If the lawyer's fees are to be reimbursed, the successful party receives the disbursements as well as fees incurred. If a contingency fee was agreed, only costs and expenses mentioned in the agreement are refundable – even if (according to Part I of Tariff A) a higher reimbursement would have been possible. To act otherwise would contradict the principle that the reimbursement of costs is in fact no remedy for damages and that the parties are not allowed to take any economic advantage of it.

c) Disbursements

In order to be chargeable, disbursements have to have a fundamental effect on the advancement of the proceedings. This is determined from an *ex ante* point of view, i.e., the disbursements were deemed indispensable before and during the process.

d) Harmonized Sales Tax (HST)

The reimbursement of costs between the litigants also covers the claim of HST⁴¹. However, only

⁴⁰ Rules of Civil Procedure, R.R.O, 1990, Schedules of Fees.

⁴¹ Tarif A, item 36.

a court – and not an assessment officer – can ascertain eligibility for compensation of HST. HST is thirteen per cent of the overall costs. Special provisions apply to parties not resident in Canada.

e) Criminal law

In criminal proceedings, the defendant is not entitled to any refund of costs from the Crown. Exceptions to this rule apply in cases in which the defendant's rights guaranteed by the Canadian *Charter of Rights and Freedoms* were infringed upon by the proceeding.

6. Mediation

When mediation is mandatory, the law requires each party to share the mediator's fees.⁴² In a matter with up to two plaintiffs and two defendants, the mediator's fees must not exceed CAN \$ 600 plus HST. Those fees have to be paid even in cases in which both parties miss the date fixed for the mediation to take place.

In contrast to the general remuneration system in Ontario – and in keeping with rules on the reimbursement of costs for mediation in Germany – costs are governed by a table for mediator's fees. If a party fails to attend a mediation session within the first 30 minutes of the time fixed or fails to attend at all, the mediator can cancel the session and a master or judge may then order the absent party to pay the costs as set out in the table of mediator's fees. A party's failure to pay its share does not increase the share of the other party.

C. CONCLUSION

German law enables the client to get relatively accurate information about the expected costs before actually engaging a lawyer, because of the strict rules laid down in the German fees law. Although there is no equivalently precise set of rules in Ontario, and a lawyer's fees are normally based on an hourly rate, the client is not hindered from asking the lawyer for an estimate of the expected costs. Also, agreement on a flat rate is possible in Ontario (for simple legal matters) in order to have predictable costs.

⁴² Ontario Regulation 451/98.