ARTICLE

THE PRIVATIZATION OF JUSTICE IN QUÉBEC'S *DRAFT BILL TO ENACT THE NEW CODE OF CIVIL PROCEDURE:* A CRITICAL EVALUATION

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> *[I]l est quelquefois nécessaire de changer certaines loix ; mais le cas est rare, & lorsqu'il arrive, il n'y faut toucher que d'une main tremblante.*
> *—Montesquieu*[1]

INTRODUCTION

Access to justice poses a difficult challenge to society as well as an ethical problem for the legal profession. High costs, long delays, and unequal representation deter many people from having recourse to the courts. The Right Honourable Beverley McLachlin, PC, recently drew attention to the question of access to justice, "an issue dear to [her] heart."[2] While laying the responsibility for ensuring this "fundamental right"[3] on the shoulders of lawyers, whose monopoly over legal services entails a duty "to provide [them] for everybody,"[4] she also called upon the legislature and the judiciary to make court procedures simpler, more accessible, and more efficient.[5]

With the cost of even a two-day civil trial running well into five figures,[6] litigation has become unaffordable to most people. Skyrocketing costs have contributed greatly to the decline in litigation: the number of lawsuits initiated in Québec declined by 55 percent between 1977 and 2007 even though Québec's population during that period increased by 19.6 percent.[7] Yet while lawsuits decline in number, they increase in length.[8] More and more, civil litigation is becoming the province of governments and corporations.[9]

Most litigants, be they plaintiffs or defendants, must pay their own expenses. Owing to the high cost of counsel, many people choose to represent themselves in court or

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1 "Sometimes it is necessary to modify certain laws; but such cases are rare, and when they occur, they must be addressed with a trembling hand." De M[ontesquieu], *Lettres persanes*, t 2 (Cologne: no publisher, 1755) at 19 [translated by author].

2 Lucianna Ciccocioppo, "There is no justice without access to justice: Chief Justice Beverley McLachlin" (14 February 2011), online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/news/there-no-justice-without-access-justice-chief-justice-beverley-mclachlin>.

3 *Ibid*.

4 Kirk Makin, "And Justice for All, If You Can Afford It," *The Globe and Mail* (11 February 2011) A4.

5 Ciccocioppo, *supra* note 2.

6 See Robert Todd, "The Going Rate," *Canadian Lawyer* (June 2011) 32, online: Canadian Lawyer <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2011/legalfeessurvey.pdf> (Canadian survey for 2011 found that the average fees for counsel in a two-day civil lawsuit were $24,318 and that the average hourly rate for a lawyer of ten years' standing was $326 at 34, 37).

7 See Me Hubert Reid, "Rapport d'évaluation de la loi portant réforme de la *Code de procédure civile*" (31 January 2008), online: Wilson & Lafleur Ltée <http://www.wilsonlafleur.com/wilsonlafleur/wl-images/cat/Memoire.pdf>.

8 See e.g. "Ministry of Attorney General Green Paper: The Foundations of Civil Justice Reform" (2005) 63:2 The Advocate (Law Society of British Columbia) 221 at 222; Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1:3 J Empirical Legal Stud 459 at 477-78.

9 See e.g. Gillian K Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98:4 Mich L Rev 953 at 962; Galanter, *supra* note 8 at 517.

abandon viable claims. Legal aid is available to few; the threshold of eligibility for a single person with multiple children falls below the income of a full-time worker at the minimum wage.[10] *Pro bono* services cannot possibly meet demand. Legal insurance, which is more common in Québec than in the rest of Canada, covers only a small part of the cost of litigation.[11] Even prevailing in court may be a Pyrrhic victory if enforcing the judgment proves to be difficult or impossible.[12] For these reasons, many litigants are reluctant to take the great financial risk of suing.

Besides being too expensive, adjudication is perceived as taking too much time. Delays of a year and a half or more are usual in small-claims court and some administrative tribunals, such as the Régie du logement (which hears disputes over residential leases);[13] the Court of Québec and the Superior Court can take even longer. By the time a dispute proceeds to a hearing, the lawyers will likely have forgotten the details and will have to spend more time reviewing the file.[14] This requirement to "hurry up and wait" not only delays resolution of the dispute but also costs the litigants more money and increases the risk that crucial witnesses or evidence will no longer be available at trial.

Access to justice is a quasi-constitutional right in Québec, whose *Charter of Human Rights and Freedoms* guarantees "a full and equal, public and fair hearing by an independent and impartial tribunal."[15] Yet the formidable practical obstacles of time, expense, and representation stand in the way of securing this right for all.

In response to the growing concerns about access to justice, Québec's Ministry of Justice has prepared its *Draft Bill to Enact the New Code of Civil Procedure* ("*Draft Bill*"),[16] which is "intended to modernize and simplify procedure, and also to promote amicable dispute resolution methods and collaboration between the parties."[17] The proposed code "is designed to enable, in the public interest, the resolution of interpersonal, collective or societal disputes through appropriate, efficient and fair-minded processes of civil justice that encourage the parties to participate in preventing and resolving disputes."[18] It "is also intended to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules, the

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10 See *Regulation Respecting Legal Aid*, RRQ, c A-14, r 2, s 18(1) (threshold of eligibility for a single adult with two or more children is $17,727); *Regulation Respecting Labour Standards*, RRQ, c N-1.1, r 3, s 3 (minimum wage for most workers is $9.90 per hour, which comes to approximately $20,000 per year for full-time employment at forty hours per week).

11 A typical policy pays no more than $5,000 per lawsuit, with maximum coverage of $15,000 per year. See Barreau du Québec, "Assurance juridique," online: Barreau du Québec <http://www.barreau.qc.ca/public/acces-justice/assurance-juridique/index.html>.

12 See e.g. *2332-4197 Québec inc c Galipeau*, 2011 QCCS 2332, JE 2011-1094 [*Galipeau*] (judgment for damages, including punitive damages, and costs against wound-up corporation would evidently prove to be dry at para 108).

13 See e.g. Louise Plante, "La Régie du lentement!," *Le Nouvelliste* (10 February 2010) online: La Presse <http://www.lapresse.ca/le-nouvelliste/actualites/201002/10/01-948118-la-regie-du-lentement.php>. At the time of this writing, the office of the Régie du logement at Montréal–Village olympique announced delays of eighteen months or more for a hearing—except in cases of alleged non-payment of rent, which are heard in about six weeks (personal communication).

14 Proceedings ordinarily must be inscribed within 180 days of service of the initiating motion, or 1 year in the case of family matters (art 110.1, para 1 CCP). The action, however, may not proceed to a hearing for 2 years or more.

15 RSQ c C-12, s 23, para 1 [Québec *Charter*].

16 2nd Sess, 39th Leg, Quebec, 2011 [*Draft Bill*]. (French title: *Avant-projet de loi instituant le nouveau Code de procédure civile*.)

17 Justice Québec, "New Code of Civil Procedure: Quicker, Cheaper Access to Justice" (Québec: Gouvernement du Québec, September 2011) at 2, online: <http://www.justice.gouv.qc.ca/english/themes/cpc/pdf/ncpc-en.pdf>.

18 *Draft Bill, supra* note 16, Preliminary Procedure, para 2.

exercise of the parties' rights in a spirit of cooperation and balance, and respect for all participants in the justice system."[19] To these ends, the *Draft Bill* proposes a number of changes: promotion of alternative dispute resolution, greater curial responsibility for case management, expanded jurisdiction for the Small Claims Division, restrictions on pre-trial examinations and expert evidence, oral rather than written argument in simple proceedings, abolition of cost shifting, and simpler language for greater accessibility to the lay reader.

The *Draft Bill* has attracted much criticism within the legal profession: for instance, the Barreau du Québec,[20] the Canadian Bar Association,[21] the Institut de médiation et d'arbitrage du Québec,[22] and the Association du jeune Barreau de Montréal[23] have all published detailed responses, some running to hundreds of pages. Many of the criticisms strike at the very core provisions of the proposed changes and warn of adverse consequences for the administration of justice in Québec.

This article shall examine the shift towards "[p]rivate civil justice"[24] under the *Draft Bill* and its implications for access to justice in Québec. The analysis will focus on two key elements of the proposal: the reallocation of the costs of litigation and the promotion of alternative dispute resolution. A few of the proposed changes would improve access to justice by reducing costs, streamlining procedure, fostering conciliation, and possibly accelerating dispute resolution. Other changes, however, would impede access to justice by increasing costs, encouraging unnecessary lawsuits, facilitating abuse of process, exacerbating imbalances of power, removing curial oversight, or hindering the development of the law. Some provisions that are positive in the main would introduce problems that the authors of the *Draft Bill* appear not to have anticipated. Consequently, the *Draft Bill* will require extensive revision in order to achieve its stated goals.

I. COSTS AND FEES OF LITIGATION

A. Current Allocation in Québec

The general rule for an action in Québec is that "[t]he losing party must pay all costs,"[25] in the absence of a specific decision to the contrary. Thus Québec observes the rule of "loser pays" (*le principe de la succombance*) that prevails in most jurisdictions around the world.

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19 *Ibid*, Preliminary Procedure, para 3.

20 Barreau du Québec, "Mémoire du Barreau du Québec sur l'avant-projet de loi instituant le nouveau Code de procédure civile" (Legislative Comment presented to the Committee on Institutions, National Assembly of Québec, 19 December 2011), online: <http://www.barreau.qc.ca/pdf/medias/positions/2012/20120202-memoire-code-procedure-civile.pdf> ["Mémoire du Barreau"].

21 Canadian Bar Association, "Mémoire relatif à l'Avant-projet de loi instituant le nouveau Code de procédure civile" (Legislative Comment presented to the Committee on Institutions, National Assembly of Québec, 16 December 2011), online: <http://www.cba.org/quebec/docpdf/pdf/ABCQuebec_MApl_CPC.pdf>.

22 Institut de médiation et d'arbitrage du Québec, "Mémoire de l'Institut de médiation et d'arbitrage du Québec sur l'Avant-projet de loi instituant le nouveau Code de procédure civile" (Legislative Comment presented to parliamentary committee, 13 December 2011), online: <http://www.imaq.org/wp-content/uploads/2012/01/MEMOIRE.pdf>.

23 Association du jeune Barreau de Montréal, "Mémoire de l'Association du jeune Barreau de Montréal sur l'Avant-projet de loi instituant le nouveau Code de procédure civile" (Legislative Comment presented to the Committee on Institutions, National Assembly of Québec, 16 December 2011), online: <http://www.ajbm.qc.ca/documents/file/memoires/memoire-ajbm-avant-projet-de-loi-instituant-le-c_p_c_-dec_-2011.pdf>.

24 *Draft Bill, supra* note 16, art 1.

25 Art 477 CCP.

Costs, however, are defined by "the tariffs in force."[26] The disbursements listed in the *Tariff of Court Costs in Civil Matters and Court Office Fees*[27] can be recovered in full: they cover such matters as filing suits, photocopying documents, and executing judgments. Of lawyers' fees, however, generally only the portion characterized as judicial fees (*honoraires judiciaires*) can be awarded. Judicial fees are limited to the amounts in the *Tariff of Judicial Fees of Advocates*,[28] which was last updated in 1976.[29] Currently the highest amount that can be awarded is $1,000 for a civil case worth $50,000 or more that is carried through a full trial at first instance.[30] Smaller amounts are available for marital disputes; slightly higher ones are available for appeals. Judicial fees are in any event limited to the amount of the judgment.[31]

When the value of the dispute exceeds $100,000, an additional fee of one percent of the excess over $100,000 is also awarded,[32] irrespective of the winning party's actual legal costs. However high this additional fee may be, the winner is entitled to it unless the court specifically denies it as a matter of discretion.[33]

The *Tariff of Judicial Fees* also gives the court discretion to "grant a special fee […] in an important case."[34] Very few cases—those of great public significance that call for an uncommonly large commitment of legal resources—qualify as "important" according to the twenty-three "[f]acteurs objectifs et critères d'appréciation de l'importance d'une cause"[35] enumerated in *Banque canadienne impériale de commerce c Aztec Iron Corp*,[36] which the courts have consistently upheld.[37] In addition, the courts of Québec have the power to make a discretionary award of costs in the interest of justice, notably to address abuse of process.[38]

A non-resident plaintiff must post security for costs in an amount determined by the court.[39] This provision serves to ensure that a successful defendant will collect an award of costs, which might otherwise be infeasible against a non-resident judgment-debtor, especially one with no assets or income subject to seizure within the court's jurisdiction.

The remaining portion of lawyers' fees, known as extrajudicial fees (*honoraires extrajudiciaires*), ordinarily is not granted in an award of costs. Exceptionally, extrajudicial

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26 Art 480 CCP. Note that an award of costs bears interest, which begins to accrue on the date of the order (art 481 CCP).

27 RRQ, c T-16, r 9 [*Tariff of Court Costs*].

28 RRQ, c B-1, r 22 [*Tariff of Judicial Fees*].

29 See Comité de révision de la procédure civile, *Une nouvelle culture judiciaire* (Québec: Ministère de la Justice, 2001) at 13, online: <http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crpc-rap2.pdf>.

30 *Supra* note 28, s 25.

31 Art 477, para 3 CCP; *Tariff of Judicial Fees, supra* note 28, s 18.

32 *Tariff of Judicial Fees, supra* note 28, s 42.

33 *Industries Leader inc c Canadian Pension Equity Corp*, JE 96-1740, 1996 CarswellQue 1564 (WL Can) at para 27 (Qc Sup Ct) [*Industries Leader*].

34 *Tariff of Judicial Fees, supra* note 28, s 15.

35 "Objective factors and criteria for assessing the importance of a case" [translated by author].

36 [1978] CS 266 at 284, JE 78-94 (Qc).

37 See e.g. *Widdrington Estate v Wightman*, 2011 QCCS 1788 at para 3636, 83 CCLT (3d) 1; *Nguyen v Quebec (Education, Recreation and Sports),* 2009 SCC 47 at para 48, [2009] 3 SCR 208; *JTI MacDonald Corp c Canada (PG)*, 2009 QCCA 110 at para 60, [2009] RJQ 261.

38 Art 46 CCP.

39 Arts 65, 152-53 CCP. Under a provincial agreement with France, however, plaintiffs of French nationality are exempt from security. See *An Act to Secure the Carrying Out of the Entente between France and Québec Respecting Mutual Aid in Judicial Matters*, RSQ c A-20.1, s IV.3.

fees are granted by statute in disputes over obligations of support,[40] certain appeals pertaining to provincial taxes,[41] and a few other matters. They may also be awarded in response to an "improper" use of procedure: the court enjoys the discretion to award "damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party, and, if justified by the circumstances, […] punitive damages."[42] The standard for impropriety, however, is high. According to *Viel c Entreprises immobilières du terroir ltée*, the leading case on this issue, extrajudicial fees can be awarded for abuse of the right to sue (*l'abus du droit d'ester en justice*) but generally not for the abusive acts that form the subject of the lawsuit (*l'abus sur le fond du litige*).[43] Abuse of the right to sue is characterized by bad faith; examples include vexatious behaviour, dilatory actions, and plainly groundless claims.[44] Lengthy examinations and pleadings at trial are not of themselves abusive,[45] nor is the initiation of proceedings that have a poor chance of success.[46] Even negligence or breach of undertakings by a party's lawyers does not by itself engage the additional liability for improper proceedings, despite the harm to the opposing side.[47]

B. Proposal in *Draft Bill*

The *Draft Bill* would generally eliminate awards for costs: it provides that "[l]egal costs are borne by the parties, each paying its own."[48] "Legal costs" include court costs, costs for service of documents, the cost of transcription, and fees payable to witnesses, experts, and interpreters.[49] Each party would also be responsible for its own lawyers' fees; the judicial fees that can be awarded under the tariff pursuant to the current *Code* do not exist in the *Draft Bill*.

Legal costs could be awarded against a party only for such uncooperative or obstructive behaviour as abuses of procedure, violations of the principle of proportionality, breaches of undertakings, rejections of genuine offers in settlement,[50] failure of a defendant to answer a summons,[51] violations of the case protocol,[52] and excessive or unnecessary examinations.[53] In addition, a plaintiff could be ordered to pay costs for suing in a court that lacked subject-matter jurisdiction.[54] Even though lawyers' fees are not included in the definition of legal costs, the court could also award, "as legal costs, an amount that it

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40 Art 588, para 2 CCQ; *Rules of Practice of the Superior Court of Québec in Family Matters*, RRQ, c C-25, r 13, s 20; D (S) c G (Sy), EYB 2005-94517, 2005 CanLII 31528 (Qc Sup Ct) (provision for costs includes extrajudicial fees at paras 141-45).

41 *Tax Administration Act*, RSQ c A-6.002, s 93.1.23, para 3.

42 Art 54.4, para 1 CCP.

43 [2002] RJQ 1262 at para 83, [2002] RDI 241 (CA) [*Viel*]. *Contra Société Radio-Canada c Gilles E Néron Communication Marketing Inc,* [2002] RJQ 2639, [2002] RRA 1130 (CA), Otis JA [*Néron*] (deliberately destroying a person's reputation, thereby forcing him to sue, constitutes an abuse of rights under art 7 CCQ and justifies an award of extrajudicial fees at paras 360-63), aff'd on other grounds 2004 SCC 53, [2004] 3 SCR 95; *Coopérative d'habitation Jeanne-Mance c Choueke*, [2001] RJQ 1441, [2001] RRA 629 (CA) [*Choueke*] (to compel someone to incur hefty legal bills in order to defend his interests would be to deny him access to justice at para 106).

44 See *Viel, supra* note 43 at para 75.

45 See *Royal Lepage Commercial inc c 109650 Canada Ltd*, 2007 QCCA 915 at paras 57-59, JE 2007-1325.

46 *Simard Vincent c Conseil de la nation huronne-wendat*, 2010 QCCA 178 at para 63, [2010] RDI 283.

47 *Cosoltec inc c Structure Laferté inc*, 2010 QCCA 1600 at para 69, JE 2010-1659.

48 *Draft Bill, supra* note 16, art 337.

49 *Ibid*, art 336, para 1.

50 *Ibid*, arts 338-39. See also *ibid*, arts 51-56.

51 *Ibid*, art 141, para 2.

52 *Ibid*, art 146.

53 *Ibid*, art 224.

54 *Ibid*, art 162, para 2.

considers fair and reasonable to cover the professional fee of the other party's lawyer or, if the other party is not represented by a lawyer, to compensate the other party for the time spent on the case and the work involved."[55] Appeals from judgments pertaining to legal costs would be allowed only by leave,[56] which could be granted only for such reasons as "a question of principle, a new issue or a question of law that has given rise to conflicting judicial decisions."[57] A plaintiff not resident or domiciled in Québec could be required to post security for costs,[58] except in family proceedings.[59]

C. Comparison to Other Jurisdictions

i. The Rest of Canada

Currently, Québec differs sharply from the rest of Canada in allocating the costs of litigation. The common law provinces and territories observe the rule that the losing party must pay the winning party's costs ("costs follow the event").[60] Although no such right exists at common law,[61] the thirteenth-century *Statute of Gloucester*[62] established awards of court costs. Subsequent statutes in many jurisdictions have provided for awards of lawyers' fees as well.[63]

In Canada's common law jurisdictions, the winning party's reasonably necessary court costs are ordinarily awarded in full. Lawyers' fees, however, are awarded according to three scales. The usual award is a partial indemnity,[64] on the so-called 'party-and-party' basis; typically it represents about half of the lawyers' bill.[65] The amount is usually determined by the taxing officer, but sometimes the judge will state a percentage in the order for costs. In order to punish "reprehensible, scandalous or outrageous conduct"[66] and compensate for some of the unnecessary expenses that the opposing party has incurred as a consequence thereof, a court may award lawyers' fees on the higher 'solicitor-and-

55 *Ibid*, art 339.

56 *Ibid*, art 30(3).

57 *Ibid*, art 30 *in fine*.

58 *Ibid*, art 491, para 1.

59 *Ibid*, art 492, para 1.

60 See e.g. *R v Justices of Surrey* (1846), 9 QB 37 at 39, 115 ER 1189.

61 See 2 Coke's Inst 288. Coke explained that before the *Statute of Gloucester* (*infra* note 62), "at the common law no man recovered any costs of sute either in plea real, personall, or mixt: by this it may be collected that justice was good cheap of auncient times, for in king Alfreds time there were no writs of grace, but all writs remedialls were graunted freely, and Fleta saith, [lest the clerks demand excessive fees for drafting, it was established that the clerks of the justiciar and the chancellor alike must be satisfied with a single penny for writing one writ]. This statute was the first that gave costs" [translated by author].

62 1278 (Eng), 6 Edw I, c 1 ("[w]hereas formerly damages were not assessed, except those for the value of the fruits of the land, it is hereby provided that the plaintiff can recover from the defendant the costs of the purchased writ, together with the aforementioned damages" [translated by author]). Subsequent statutes expanded court costs and extended the right of recovery to defendants. See e.g. *An Act to Give Costs to the Defendant upon a Nonsuit of the Plaintiff, or a Verdict against Him*, 1606 (Eng), 4 Jac I, c 3.

63 See Parts I.c.i-ii, below, for examples.

64 In British Columbia, the partial indemnity is known as "ordinary costs." See Erik Knutsen, "Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36:1 Queen's LJ 113 at 122, n 30.

65 See e.g. *Riddell v Conservative Party of Canada*, 2007 CarswellOnt 4202 (WL Can) (Ont Sup Ct J) (stating as a "rule of thumb" that "[f]ull indemnity represents 100% of the claim, partial indemnity represents 60% of the claim, and substantial indemnity (one and one-half times the partial indemnity scale) represents 90% of the claim" at para 38).

66 *Young v Young*, [1993] 4 SCR 3 at 134, 108 DLR (4th) 193.

client' basis, known as substantial indemnity.[67] In Ontario, the substantial indemnity is half again as much as the partial indemnity.[68] Exceptionally, a court may even award a full indemnity, on the 'solicitor-and-own-client' basis, representing one hundred percent of lawyers' fees.[69] Although one court has contemplated an indemnity "in excess of 100% of […] actual costs,"[70] an award generally may not exceed actual costs billed and paid.[71]

Some Canadian jurisdictions use awards of costs to encourage the parties to settle as soon as possible, thereby avoiding unnecessary litigation. Ontario, for instance, imposes a financial penalty for refusing an offer in settlement that proves to be no less favourable than the judgment obtained: if the offer was made at least seven days before the start of the hearing, the offering party receives costs from that date forward.[72] British Columbia has a similar provision that benefits only the defendant.[73] In Nova Scotia, rejection of an offer in settlement is a factor taken into account during taxation.[74] These provisions create a beneficial incentive both to make and to consider serious offers at an early point in the proceedings.[75]

ii. Other Common Law Jurisdictions

Like their Canadian counterparts, most of the world's other common law jurisdictions observe the rule that "costs follow the event." In England and Wales, this rule originated at common law but continues today in statute.[76] Australia employs this rule for civil disputes but leaves each party to bear its own costs (as in the *Draft Bill*) in family proceedings.[77] In New Zealand, the loser pays costs, including lawyers' fees generally assessed at roughly two-thirds of a reasonable rate for counsel.[78] In India, costs follow the event unless the court directs otherwise, with reasons.[79] Costs in Belize include necessary lawyers' fees in a "reasonable" amount, subject to the courts' discretion to award only a

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67 In British Columbia, the substantial indemnity is known as "special costs." See Knutsen, *supra* note 64 at 122, n 31.

68 *Rules of Civil Procedure*, RRO 1990, Reg 194, s 1.03(1).

69 See e.g. *Mintz v Mintz* (1984), 46 CPC 234, 1984 CarswellOnt 471 (WL Can) (Ont SC); *Re Seitz* (1974), 6 OR (2d) 460, 53 DLR (3d) 223 (Ont H Ct J).

70 *Foundation Co of Canada Ltd v United Grain Growers Ltd* (1996), 8 CPC (4th) 354 at para 29, 25 CLR (2d) 1 (BCSC).

71 See *Stellarbridge Management Inc v Magna International (Canada) Inc* (2004), 187 OAC 78 at para 97, 71 OR (3d) 263.

72 *Rules of Civil Procedure, supra* note 68, s 49.10(1-2). For a rejected offer, the plaintiff receives costs at a substantial indemnity; the defendant, at a partial indemnity. Oddly enough, s 49.10(2) appears not to provide for the eventuality of a "defendant" winning a judgment despite having offered to settle; however, a court could exercise its discretion to award the defendant costs at a partial or greater indemnity.

73 *Supreme Court Civil Rules*, BC Reg 168/2009, s 9-1(5)(d).

74 *Nova Scotia Civil Procedure Rules*, s 10.03.

75 The *Draft Bill* includes a much weaker provision, which allows the court to order legal costs "if a party […] refused, without valid cause, to accept genuine offers" (*supra* note 16, art 338, para 2). The order would be discretionary rather than obligatory and would invite a subjective defence of "valid cause."

76 *The Civil Procedure Rules 1998*, SI 1998/3132, ss 43-48. Note that these rules also apply in Gibraltar. The Isle of Man, however, now has its own civil procedure, with rules on costs that are largely copied from the English rules: see generally *Rules of the High Court of Justice 2009* (Isle of Man), s 11.1. Guernsey and Jersey also each have distinct rules of civil procedure that are derived from the English ones.

77 Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation* (Canberra: Commonwealth of Australia, 1995), online: Australian Law Reform Commission <http://www.austlii.edu.au/au/ other/alrc/publications/reports/75/ALRC75.pdf> at Overview.

78 *High Court Rules*, s 14.2, being Schedule 2 of the *Judicature Act 1908* (NZ), 1908/89.

79 *Civil Procedure Code 1908* (India), s 35(1-2).

portion of costs.[80] While these practices vary in their details, they all generally require the losing party to pay costs, including lawyers' fees, in whole or in large part.

In the United States, both the federal government and most states observe the "American rule," according to which the losing party pays for court costs but each party pays for its own lawyers.[81] China,[82] Japan,[83] and the Philippines[84] also observe the American rule, although their legal systems are based on civil law. The few strongholds of the American rule, however, have been moving away from it. Various state and federal statutes in the United States now provide for cost shifting, usually to punish and deter abuse of process but sometimes to support suits brought in the public interest or even to correct a financial imbalance between the parties.[85] In conjunction with a draft bill to revise China's civil procedure, China's national association of lawyers recently submitted to the National People's Congress a set of recommendations under which the lawyer's fees would be borne by the losing party.[86] Thus the American rule is gradually yielding to the international practice of shifting costs.

iii. Other Civil Law Jurisdictions

In the civil law tradition, the rule of "loser pays" has a continuous history of more than one and a half millennia. The Byzantine emperor Zeno first proclaimed, in 487, that a judgment had to include the costs of litigation.[87] The Justinian Code famously expresses this rule as *"in expensarum causa victum victori esse condemnandum"*:[88] the losing party shall be ordered to pay to the winning party the costs of the action.

Today, most civil law jurisdictions other than Québec award the victor full indemnity for costs, including lawyers' fees.[89] Some jurisdictions, however, cap the amount that can be awarded for lawyers' fees: in Spain, this limit is one-third of the value of the lawsuit.[90] Some jurisdictions award court costs in full but apply a tariff to lawyers' fees.

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80 *Civil Procedure Rules 2005* (Belize), ss 63.2(1), 63.6, 64.2(1)(a).

81 Alaska is the notable exception: it has long shifted a portion of attorneys' fees to the losing party. See *Alaska Rules of Civil Procedure*, Rule 82.

82 Except in Macau, which uses civil law because of the Portuguese colonial legacy. See Art 376 Código de processo civil.

83 Art 61 Minzi Sosyou Hou [Code of Civil Procedure] (loser pays court costs; no provision for shifting lawyers' fees).

84 Arts 142.1, 142.6 Rules of Court.

85 See e.g. Issachar Rosen-Zvi, "Just Fee Shifting" (2010) 37:3 Fla St UL Rev 717 at 731-32; Jonathan Fischbach & Michael Fischbach, "Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting" (2005) 19:2 BYUJ Pub L 317 at 332-35; John F Vargo, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice" (1993) 42:4 Am U L Rev 1567 at 1587-90; "State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?" (1984) 47:1 Law & Contemp Probs 321 at 327-28.

86 Rújūn Wēn, "Lüshī fèiyòng yóu bàisù dāngshìrén chéngdān" [Let the Losing Party Bear the Lawyers' Fees], *Fǎzhì Wǎnbào* [Legal Evening News] (28 November 2011), online: Fǎzhì Wǎnbào <http:// www.fawan.com/Article/bs/ss/2011/11/28/145252137892.html>.

87 Cod 7.51.5. Costs could include a ten-percent surcharge, payable to the state, to punish truculence. A judge who neglected to award costs was personally liable for them (Cod 7.51.5.2).

88 Cod 3.1.13.6 [translated by author].

89 Examples: Argentina: Art 68 Código procesal civil y comercial de la nación. Brazil: Art 20 Código de processo civil. Bulgaria: Art 78 Grazhdanski procesualen kodeks. Finland: C 21, ss 1, 8(1) Oikeudenkäymiskaari. France: Art 696 NC proc civ. Germany: § 91(1-2) Zivilprozeßordnung. Iceland: Art 130 Lög um meðferð einkamála. Italy: Art 91 Codice di procedura civile. Macau: Art 376 Código de processo civil. Morocco: Art 124 Code de procédure civile. Portugal: Arts 446(1), 447D(2)(d) Código de processo civil. Russia: Art 100(1) Grazhdanskij Processual'nyj Kodeks (for non-commercial disputes); Art 110(2) Arbitrazhnyj Processual'nyj Kodeks (for commercial disputes).

90 Art 394(3) Ley de enjuiciamiento civil.

In Germany, for example, lawyers' fees are set by statute.[91] Although a German lawyer may negotiate higher fees with the client,[92] the amount that can be granted for the costs of litigation is limited to the "necessary" (*notwendig*) amounts—i.e., the rates given in the tariff.[93] The civil codes of Austria[94] and Chile[95] similarly limit the recovery of lawyers' fees to the rates in a tariff set by the professional order of lawyers. Unlike the rates in Québec's *Tariff of Judicial Fees*, however, these statutory rates are realistic amounts in line with the market for legal services; for example, they serve as the basis for the payment of court-appointed lawyers.

iv. Comparison to Québec

In allocating the costs of litigation, Québec differs markedly from the rest of Canada and even from most other civil law and common law jurisdictions. It is perhaps most similar to the jurisdictions that follow the American rule, since the "derisory fees"[96] available in the *Tariff of Judicial Fees* are little better than no award for lawyers' fees at all.

The allocation of costs proposed in the *Draft Bill* appears to lack parallels anywhere in the world. Almost all other jurisdictions award at least court costs to the successful party; most award all or part of lawyers' fees as well. By leaving costs to fall where they may, the scheme of the *Draft Bill* goes even further than the American rule, which is being tempered or abandoned by the few jurisdictions that still observe it. Thus Québec's proposed move to a régime in which costs are shifted only exceptionally, at the court's discretion, goes against the global trend towards substantial awards of costs.

D. Advantages and Disadvantages of the *Draft Bill's* Proposal

The *Draft Bill* would improve predictability and access to justice by eliminating the litigant's risk of liability for the opposing party's legal fees, which typically are difficult to assess in advance. Under the proposed regime, litigants could manage their own costs, and make decisions accordingly, without the risk of an adverse judgment in an amount that is indeterminate at the outset. In particular, self-represented litigants could effectively estimate and control their expenses. These considerations are especially important for public-interest litigation, which often seeks injunctive relief rather than a monetary remedy. Few people are so civic-minded as to accept a substantial risk of financial ruin solely for the benefit of the public. The removal of awards for costs could thus greatly expand the scope of public-interest litigation, an important vehicle for progressive social change.

In addition, the elimination of cost shifting would offer administrative advantages. Freed of the burden of awarding costs, taxing bills, adjudicating disputes over the allocation of costs, assessing interest, and enforcing orders for costs, the courts could devote more resources to their case load and other responsibilities. The amounts currently provided in the *Tariff of Court Costs* may indeed be too small to warrant the administrative overhead that they entail.

On the other hand, the *Draft Bill's* proposal would have the unsavoury consequence

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91 § 2(2) Rechtsanwaltsvergütungsgesetz; Anlage 1 Rechtsanwaltsvergütungsgesetz.

92 § 2(1), 3a(1) Rechtsanwaltsvergütungsgesetz.

93 § 91(1) Zivilprozeßordnung (Germany).

94 § 41(2) Zivilprozeßordnung (Austria).

95 Arts 138-40 Código de procedimiento civil.

96 Jean-Louis Baudouin & Patrice Deslauriers, *La Responsabilité civile*, vol 1, 7th ed (Cowansville, Que: Yvon Blais, 2007) at 345 [translated by author].

of punishing the victor. While denying an award for costs may be appropriate in some cases, it seems fundamentally unfair for a genuinely virtuous party to have to pay quite substantial sums for the privilege of vindicating its position. Costs can run high enough to yield the Dickensian nightmare of a monetary award fully absorbed or even turned into a net loss;[97] for instance, a victim of defamation in Québec won some $164,000 in damages but incurred $540,000 in unrecoverable lawyers' fees.[98] Although the jurisprudence on this question is inconsistent,[99] cost shifting is arguably justifiable as a means of making the winning party whole (*restitutio in integrum*),[100] since reasonable costs of litigation can be seen as damages or losses caused by the opposing side.[101] Denying awards for these costs would render the pursuit of some well-founded claims impracticably expensive.

The proposal would also do little to improve access to justice for a plaintiff who is much weaker than the defendant. By itself, an imbalance of power constitutes a strong deterrent to suing. The amounts awardable for costs under the current tariffs are too small to increase the deterrent effect substantially; only in the very large cases that are subject to the additional one-percent fee would the *Draft Bill* greatly reduce the amount of an adverse judgment for costs. Thus the proposed change would not significantly facilitate the pursuit of a meritorious case against a more powerful opponent.

The change would, however, discourage much meritorious litigation, especially when gains net of expenses would likely be small or negative. Potential plaintiffs might abandon strong claims or accept inadequate settlements; potential defendants might make unnecessary concessions just to avoid irrecoverable expenses. Parties might take the risk of representing themselves in court rather than incurring high costs for counsel. Although large corporations, government entities, and wealthy individuals can often afford the costs of litigation, ordinary people may be disinclined to spend large amounts of money on lawsuits that they cannot be assured of winning. Litigants with greater means and better legal resources would therefore enjoy an unwarranted procedural advantage.

In addition, this change could undermine the *Draft Bill's* objectives by discouraging recourse to private means of dispute resolution. The risk of an adverse award for costs serves as an incentive to try negotiation and other extrajudicial means before resorting to litigation. Rather than fostering access to justice, eliminating this risk could well encourage ill-founded and unnecessary lawsuits, thereby saddling virtuous parties with expenses that they should not have to incur. Thus the proposal sits oddly with the promotion of private civil justice.

Indeed, the abolition of cost shifting could lead to more vexatious litigation and other abuses of process. Although the *Draft Bill* grants the court discretion to award costs in cases of abusive proceedings and other acts or omissions that are unreasonably prejudicial to the opposing party,[102] Québec's courts have rarely made such awards. Mere failure to prove a claim does not justify a discretionary award of costs;[103] even recourse to repetitive

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97 See especially *Jarndyce v Jarndyce* (*c* 1825), London, UK (Ch), adjourned *sine die* (costs in a twenty-year lawsuit over the validity of a will consumed the entire estate). Unofficially and informally reported in Charles Dickens, *Bleak House* (Oxford: Oxford University Press, 2008). It was the best of times for the lawyers; it was the worst of times for poor Richard Carstone.

98 See *Société Radio-Canada c Guitouni*, 2005 QCCA 155 at para 83, [2002] RJQ 2691.

99 See e.g. *Néron, supra* note 43 at paras 360-63; *Choueke, supra* note 43 at para 106. *Contra Viel, supra* note 43 (fees generally available only for abuse of the right to sue at para 83).

100 See e.g. arts 1457, 1607, 1611 CCQ.

101 Baudouin & Deslauriers, *supra* note 96 at 350.

102 *Draft Bill, supra* note 16, arts 338-39.

103 See *Harper c Gewurz* (1976), [1976] CA 411 at 412, AZ-76011117 (Azimut) (Qc).

or needlessly costly proceedings may not suffice.[104] Just as self-represented litigants, safe in the knowledge that any order for costs will be dry, take advantage of their judgment-proof status to harass others with vexatious and frivolous litigation,[105] vexatious litigants in general would only be emboldened by the *Draft Bill's* policy.

Similarly, the *Draft Bill's* costs scheme would create an incentive for non-payment of debts. The creditor of an undisputed debt would have to incur substantial costs to obtain a court order for what was uncontroversially due. Unless the amount was large, the creditor might well abandon the claim rather than pursuing it without being able to recover the costs of litigation. The debtor would have little to lose, but much to gain, by exploiting what in this case would amount to a perverse rule of "winner pays." Although the *Draft Bill* provides for a discretionary award of costs for failure to answer a summons,[106] a defendant debtor who appeared and presented a pleading that was not "clearly unfounded" might avoid liability for the creditor's costs.[107]

The *Draft Bill* would not greatly change the allocation of costs, since awards of lawyers' fees today are nominal, and court costs are minor in comparison to lawyers' fees. Eliminating the additional one-percent fee for disputes in excess of $100,000 would make no difference at all in small cases and only a minor difference in any but the largest ones. It is therefore difficult to see how the proposed changes to the allocation of costs would improve access to justice or contribute significantly to the achievement of the *Draft Bill's* other stated objectives. Their adverse consequences would outweigh the meagre benefits.

E. Other Implications for Costs

i. Small Claims

Under the current *Code of Civil Procedure*, claims for $7,000 or less must be referred to the Small Claims Division.[108] The *Draft Bill* would raise the threshold to $10,000 immediately,[109] and to $15,000 three years after the new *Code* came into effect.[110] This progressive change would promote access to justice by assigning more disputes to the Small Claims Division, which offers faster and cheaper adjudication. In addition, since litigants in small-claims court cannot be represented by lawyers,[111] the parties are more evenly situated, and there are no lawyers' fees to allocate. The simplified procedures and the severe limitations on rights of appeal also help to keep costs low.

At $7,000, Québec's current limit for small claims is lower than that of every other Canadian jurisdiction but the Yukon. Most provinces and territories set the limit at

104 See e.g. *G (S) c J (D)* (2000), [2000] RL 601 at 613, AZ-00026149 (Azimut) (Qc Sup Ct); *Leblanc c Lavoie*, [1960] BR 153 at 159-60 (WL Can) (Qc).

105 See e.g. *Galipeau, supra* note 12.

106 *Draft Bill, supra* note 16, art 141, para 2.

107 *Ibid*, art 51.

108 Art 953 CCP. Note that art 954 CCP makes exceptions for claims pertaining to leases, payment of support, class actions, slander, and recovery of assigned claims.

109 *Draft Bill, supra* note 16, art 799(4).

110 *Ibid*, art 539.

111 Art 959 CCP. See also *Draft Bill, supra* note 16, art 545, para 1.

or above $25,000.[112] The higher limit of $15,000 provided in the *Draft Bill*, though still relatively low, would therefore bring Québec closer to those of other Canadian jurisdictions. This expansion of the jurisdiction of the Small Claims Division is long overdue: the ceiling on small claims has not been raised since 1 January 2003. The Barreau du Québec has unreservedly endorsed this proposed change.[113]

ii. Restrictions on Pre-Trial Examinations

The *Code of Civil Procedure* allows pre-trial examinations, except in cases worth less than $25,000.[114] The number and duration of these examinations are decided by the parties themselves, or by the court if the parties cannot agree.[115] Although there is no prescribed limit on examinations, the principle of proportionality constrains them in both cost and time.[116] Upon request, the court may halt an examination that it deems abusive or unnecessary and issue an order for the associated costs.[117]

The *Draft Bill* would limit the scope of a pre-trial examination to five hours in general, and to only two hours "in family matters or cases where the value in dispute is less than $100,000";[118] in suits worth less than $30,000, pre-trial examinations would be barred altogether.[119] Only by leave of a judge could these limits be exceeded.[120] The courts would retain their power to halt unnecessary examinations and issue orders for costs.[121]

The proposed restrictions find parallels in other Canadian jurisdictions. British Columbia and Ontario, for example, generally limit oral examinations for discovery to seven hours in all;[122] Nova Scotia limits them to three hours in an action for less than $100,000.[123] These restrictions are stronger than those of the *Draft Bill*, which would limit the duration of each individual examination, not the total for each side.

These constraints on pre-trial examinations would help both to reduce the costs and delays of litigation and to discourage intrusive, irrelevant inquiries. The Barreau du Québec supports the proposal but would increase the limit from five hours to seven, and from two hours to three for disputes worth less than $100,000.[124] Although these details

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112 Alberta ($25,000): *Provincial Court Civil Division Regulation*, Alta Reg 329/1989, s 1.1. British Columbia ($25,000): BC Reg 179/2005, s 1. Manitoba ($10,000): *Court of Queen's Bench Small Claims Practices Act*, CCSM c C285, s 3(1). New Brunswick ($30,000): *Rules of Court*, Reg 1982-73, s 80.02(1). Newfoundland and Labrador ($25,000): NLR 69/04, s 2. Nova Scotia ($25,000): *Small Claims Court Act*, RSNS 1989, c 430, s 9. Northwest Territories ($35,000): *Territorial Court Act*, RSNWT 1988, c T-2, s 16(1). Nunavut ($20,000): *Small Claims Rules of the Nunavut Court of Justice*, Nu Reg 023-2007, s 3.1(2). Ontario ($25'000): *Small Claims Court Jurisdiction*, O Reg 626/00, s 1(1). Prince Edward Island ($8,000): *Small Claims Regulations*, PEI Reg EC741-08, s 2. Québec ($7,000): Art 953 CCP. Saskatchewan ($20,000): *Small Claims Regulations*, RRS, c S-50.11, Reg 1, s 3. Yukon ($5,000): *Small Claims Court Act*, RSY 2002, c 204, s 2(1).

113 "Mémoire du Barreau," *supra* note 20 at 17.

114 Art 396.1 CCP.

115 Art 396.2 CCP.

116 Art 4.2 CCP.

117 Art 396.4 CCP.

118 *Draft Bill, supra* note 16, art 223, para 2.

119 *Ibid*, para 1.

120 *Ibid*, para 2.

121 *Ibid*, art 224.

122 British Columbia: *Supreme Court Civil Rules, supra* note 73, s 7-2(2). Ontario: *Rules of Civil Procedure, supra* note 68, s 31.05.1(1).

123 *Nova Scotia Civil Procedure Rules, supra* note 74, s 57.10.

124 "Mémoire du Barreau," *supra* note 20 at 24. The Barreau also objects to the special limit applied to disputes at family law, which sometimes involve large sums of money and may require more extensive examinations.

may be subject to reasonable disagreement, the policy of limiting the duration and scope of pre-trial examinations gives concrete expression to the principle of proportionality and offers a prudent and workable way to improve access to justice. Nevertheless, the text of the *Draft Bill* does not clearly limit the *total* duration, only the duration of each examination. If the legislator's intent is to limit the total, as several other provinces do, the text should so state explicitly.

iii. Case Management

Currently "the parties to a proceeding have control of their case," but "[t]he court sees to the orderly progress of the proceeding and intervenes to ensure proper management of the case."[125] Special case management is available for family matters and long or complex cases, either at the initiative of the presiding judge or upon request of a party.[126]

The *Draft Bill* would explicitly make it "part of the mission of the courts to ensure proper case management"[127] and would subordinate the parties' control of their case to this "duty of the courts […]."[128] Measures taken for the purpose of case management would not be subject to appeal, except by leave of a judge of the Court of Appeal if they seemed "unreasonable in light of the guiding principles of procedure."[129] Thus the *Draft Bill* would expand the ambit of case management as well as the courts' role in controlling and reducing the costs and delays of litigation. Rather than interceding only to correct excesses and inefficiencies, the courts would assume primary responsibility for case management, setting the bounds within which the parties would conduct their case. These provisions have the potential to yield economies, and therefore enhance access to justice, if the courts exercise their authority consistently and effectively.

iv. Limits on Expert Evidence

Currently the several parties may decide on the amount of expert evidence that they will adduce. They must state their decision in the case protocol.[130] The leading of expert evidence remains adversarial, although the court may require the parties' experts to "reconcile their opinions."[131]

Under the *Draft Bill*, "[t]he purpose of expert evidence" would be "to enlighten the court and assist it in assessing evidence."[132] This duty to the court would "override[] the parties' interests."[133] The parties would be encouraged to seek joint expert evidence[134] and would have to justify in the case protocol any decision not to do so.[135] A judge could order joint expert evidence notwithstanding the parties' decision.[136] The parties would be limited to "one expert opinion, whether joint or not, per area or matter," unless a court allowed more.[137]

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125 Art 4.1 CCP.
126 Art 151.11 CCP.
127 *Supra* note 16, art 9, para 3.
128 *Ibid*, art 19, para 1.
129 *Ibid*, art 32.
130 Art 151.1, para 3 CCP.
131 Art 413.1 CCP.
132 *Draft Bill, supra* note 16, art 225, para 1.
133 *Ibid*, art 229.
134 *Ibid*, arts 226-27.
135 *Ibid*, art 144, para 2.
136 *Ibid*, art 155(2).
137 *Ibid*, art 226, para 2.

If successful, these limitations would tend to lower costs by reducing the number of experts hired and the amount of time spent obtaining, presenting, and contesting their testimony; they would also foster a spirit of cooperation and collaboration, at least over the factual questions in dispute. They stand in tension, however, with the adversarial nature of court proceedings in Québec. Both current procedure and the *Draft Bill* place the parties in control of the case.[138] As a result, each party will attempt to lead evidence, including expert evidence, that supports the party's own position. A party would be unlikely to agree to present expert evidence that was not known beforehand to favour that party's side of the dispute; indeed, parties in adversarial disputes sometimes consult numerous experts before selecting one to present in court.[139] It may therefore be unrealistic to expect joint expert evidence, especially in a case that turns on questions of technical knowledge or opinion. The expectation of joint evidence could also exacerbate an imbalance of power in highly subjective disputes, such as those involving family law.

One option that is more harmonious with the aims of the *Draft Bill* is the use of court-appointed experts. Jurisdictions with an investigative procedure employ them as a matter of course. France, for instance, has a statutory registry of court-recognized experts (*experts judiciaires*), who are called in by the courts as needed.[140] In Germany, "the court takes the initiative in nominating and selecting the expert" unless the parties agree upon a choice.[141] Unlike experts chosen by the parties, whose evidence tends to be discounted as presumptively biased in favour of the party that commissioned it, those appointed by the court itself are generally taken to be neutral and trustworthy.[142] Even some adversarial jurisdictions, such as Texas, have experimented profitably with court appointment of experts,[143] a practice facilitated by case management.[144] Indeed, because court-appointed experts reduce partisan bias and help to achieve more accurate findings of fact,[145] they are likely to be used more and more in North America for such complex fact-specific matters as toxic torts and product liability.[146] This successful approach to obtaining expert evidence dovetails with the *Draft Bill's* objective of saving money and time for the sake of increased access to justice; it is also more realistic and more practical than requiring the parties to adduce joint expert evidence.

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138 Art 4.1, para 1 CCP; *Draft Bill, supra* note 16, art 19, para 1.

139 See *Thorn v Worthing Skating Rink* (1877), 6 Ch D 415 at 416, CA (Eng) [*Thorn*]. Jessel MR observed that "[a] man may go, and does sometimes, to half-a-dozen experts. […] He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, Will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one."

140 *Loi n° 71-498 du 29 juin 1971 relative aux experts judiciaires*, JO, 30 June 1971, 6300.

141 John H Langbein, "The German Advantage in Civil Procedure" (1985) 52:4 U Chicago L Rev 823 at 837.

142 *Ibid* at 836-37.

143 See Anthony Champagne et al, "Are Court-Appointed Experts the Solution to the Problems of Expert Testimony?" (2001) 84:4 Judicature 178.

144 Langbein, *supra* note 141 at 841.

145 See "Confronting the New Challenges of Scientific Evidence" (1995) 108:7 Harv L Rev 1481 at 1590.

146 See Karen Butler Reisinger, "Court-Appointed Expert Panels: A Comparison of Two Models" (1998) 32:1 Ind L Rev 225 (the use of court-appointed experts is widely expected to increase at 233-34); Tahirih V Lee, "Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence" (1988) 6:2 Yale L & Pol'y Rev 480 (court-appointed experts show particular advantage in criminal matters, toxic torts, complex litigation, and child placement at 488-92).

v. Focus on Oral Proceedings

The *Draft Bill* would favour oral over written proceedings by requiring oral pleadings "in all instances where the case [did] not present a high level of complexity or it [was] desirable that the case be decided promptly,"[147] unless the parties agreed to use written pleadings.[148] This change would streamline litigation by eliminating the time and expense that the preparation, filing, and service of written pleadings entails. Yet these benefits could come at the unacceptable cost of injustice. Written pleadings set out the arguments to be raised at trial. By contrast, the exclusive use of oral pleadings can facilitate "trial by ambush,"[149] in which issues and arguments are raised for the first time at trial so as to deprive the opposing party of the opportunity to prepare an effective response. A self-represented litigant with no legal training would be at a disadvantage against competent opposing counsel. Judges should therefore have the discretionary power to allow written pleadings whenever they are necessary to ensure just proceedings.

F. Critical Assessment

Although Québec, like the rest of the world, generally requires the loser to pay the winner's costs, the definition of "costs" in Québec is so circumscribed that only a minor portion of expenditures is recoverable. This is especially true of lawyers' bills, as the *Tariff of Judicial Fees* stipulates a "ridiculously low percentage for the reimbursement of extrajudicial fees."[150] Realistically speaking, the amount available as "judicial fees" is likewise unrelated to the costs of litigation: the current maximum of $1,000 in a contested action for $50,000 or more would cover, at the average Canadian rate, only three hours of a lawyer's time,[151] which would not suffice for preparing and pleading even the simplest lawsuit.

One peculiar consequence of Québec's allocation of costs is the possibility of a windfall in the largest cases. For a claim in excess of $100,000, the additional one percent of the value of the dispute that is provided in the *Tariff of Judicial Fees*[152] will be awarded even if it exceeds the legal costs of the suit.[153] In *Aéroports de Montréal c Société en commandite Adamax immobilier*, a claim for some $30 million that was dismissed after only three hours of hearings resulted in an order for $300,000 in costs, almost all of which represented this additional one-percent fee.[154] Most likely this amount greatly exceeded the respondent's expenditures. Calling the order "unfair and disproportionate under the circumstances," the judgment-debtor brought an appeal that proved unsuccessful.[155] Indeed, "unfair and disproportionate" accurately characterizes Québec's whole scheme of allocating costs, which so richly indemnifies the winners of lawsuits over amounts in the tens of millions of dollars while capping the judicial fees for more modest lawsuits

147 *Draft Bill, supra* note 16, art 167, para 1. By way of illustration, the text specifies oral pleading "in all instances where the purpose of the proceeding is to obtain support or a right relating to the custody of a child, to obtain the surrender of property, an authorization, a designation, a homologation or the recognition of a decision, or where its subject matter is the manner in which an office is to be performed or the sole determination of a sum of money due under a contract or as reparation for proven prejudice."

148 *Ibid*, art 144, para 2. The parties would have to justify this decision in the case protocol, and the court would have the power to order oral pleadings instead (*ibid*, art 155(6)).

149 "Mémoire du Barreau," *supra* note 20 at 19.

150 *Larose c Fleury*, 2006 QCCA 1050 at para 77, [2006] RJQ 1799 [translated by author].

151 The average hourly rate for a Canadian lawyer is $326. See Todd, *supra* note 6 at 37.

152 *Supra* note 28, art 42.

153 *Industries Leader, supra* note 33.

154 2012 QCCA 293, JE 2012-465.

155 *Ibid* at para 10 [translated by author].

at a nominal amount that cannot make up for fees paid. Wittingly or not, the legislator has set up a scheme that favours the corporations and government bodies that bring the largest lawsuits over the ordinary people and small companies involved in litigation for lesser sums.

The tax treatment of legal expenses also distinctly privileges corporations, which, unlike natural persons, can deduct all of their legal expenditures from their taxable income.[156] Thus the cost of counsel itself is higher for individuals, for whom only legal expenses related to income are generally deductible.[157] Far from correcting this inequality, the *Draft Bill* would exacerbate it by depriving individuals of the chance to recover the legal bills that they usually must pay with after-tax dollars.

The Ministry of Justice proposes to correct the current unjust allocation by letting costs fall where they may. This drastic proposal has no precedent elsewhere in the world that could provide experience or data with which to evaluate its merits. It lacks an empirical basis; indeed, very few empirical studies have been conducted on the effect of different regimes for allocating the costs of litigation, and most of them have been simulations rather than comparisons of conditions in real jurisdictions.[158] Both its theoretical and its practical motivation are insufficient in view of its potential to exacerbate the very inequalities that the Ministry of Justice proposes to address.[159]

Vexatious litigants, already a scourge, would only be emboldened by the provisions of the *Draft Bill*. Those who represent themselves in court might well consider it a bargain to be able to harass their enemies for a few hundred dollars in filing fees and related court costs. Already many vexatious litigants fail to satisfy orders for costs.[160] Rather than making it cheaper for people to harass others with abusive process, the legislator should take measures to discourage and prevent vexatious litigation. Ultimately a persistent vexatious litigant must be stopped from continuing or initiating actions;[161] however, to protect opposing parties from unnecessary expenses, the legislator might require a litigant with unpaid adverse judgments or a history of abusing process to put up security against costs.

By adopting an allocation of costs so far removed from those of other jurisdictions, Québec could inadvertently encourage forum shopping. Prospective plaintiffs with the possibility of suing in Québec would tend to prefer Québec if its rules on costs favoured them and to seek another forum otherwise. Just as large differences in remedies can motivate a strategic choice of forum, so could large differences in awards for costs. Québec might thus attract a disproportionate number of speculative or even frivolous lawsuits. The risk of forum shopping, although uncertain in the absence of empirical data, may therefore provide another reason not to deviate markedly from international

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156 See Canada Revenue Agency, Interpretation Bulletin IT-99R5, "Income Tax Act Legal and Accounting Fees" (5 December 2000) at paras 1-4.

157 See *ibid* at para 1; *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 18(1)(a).

158 See Laura Inglis et al, "Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims" (2005-06) 33:1 Fla St UL Rev 89 at 92.

159 See *supra* note 17 and accompanying text.

160 See e.g. *Brousseau c Drouin*, 2012 QCCS 977 (CanLII); *Re Lang Michener and Fabian* (1987), 59 OR (2d) 353, 37 DLR (4th) 685 (Ont H Ct J); *Wong v Giannacopoulos*, 2011 ABCA 206, [2011] AWLD 3133; *Landmark Vehicle Leasing v Marino*, 2011 ONSC 1671 (available at CanLII); *Lukezic v Royal Bank*, 2011 ONSC 5263, 206 ACWS (3d) 735.

161 See Yves-Marie Morissette, "Abus de droit, quérulence et parties non représentées" (2003) 49 McGill LJ 23 at 51-54. See also *Attorney-General v Ebert*, [2001] EWHC Admin 695, [2002] 2 All ER 789 (HJC QBD) (vexatious litigant who had brought at least 151 actions in the same matter, made scandalous accusations and threats against judges, and purported to effect a citizen's arrest of one judge was finally barred from initiating lawsuits and even from attending at the courthouse).

practices, especially the practices of those jurisdictions for which Québec is likely to be an alternate choice of forum in many lawsuits.

The simplicity of administration that the *Draft Bill's* allocation of costs promises could prove to be illusory if it led to more discretionary awards and contestations thereof. Exercise of judicial discretion could also result in inconsistent awards, especially if judges felt the need to correct the harshness of the *Draft Bill's* scheme through their discretionary powers. Numerous jurists already insist that reconciling awards for costs with the principle of *restitutio in integrum* will require "a legislative reform";[162] some go so far as to advocate that the courts circumvent the current tariffs by awarding extrajudicial fees as compensatory damages, costs, or even punitive damages.[163] Yet the "legislative reform" offered by the *Draft Bill* runs counter to these proposals.

The new scope of the principle of proportionality would also leave room for inconsistency. The *Draft Bill* would set objective limits on examinations and expert evidence while leaving other matters uncertain. The resulting subjectivity would allow for proportionality to be used as a sword rather than as a shield: pre-emptive challenges made tactically on the grounds of proportionality could compromise justice, especially when the parties were unequally matched in power and resources. Although judges could use their discretionary powers to address abusive challenges, the principle of proportionality could operate inconsistently with the stated objectives of the *Draft Bill*.

Awards of costs are designed to achieve such worthy goals as fairness to the winning party, deterrence of vexatious and other unnecessary litigation, encouragement to keep costs down, and facilitation of access to justice. Since these objectives stand in tension, the legislator must endeavour to find the golden mean. The allocation of costs in the *Draft Bill*, however, advances none of these objectives other than cost control; it even detracts from some of them.

Until there is sound justification, preferably empirical, for abandoning the rule of "loser pays," the legislator should maintain that rule—and keep the *Tariff of Judicial Fees* current, either by indexing it to inflation or through regular updates, to reflect the fees that prevail in the market for legal services. Indeed, a more generous allocation of costs, such as those of the other Canadian jurisdictions, deserves serious consideration. At the same time, the courts should be granted discretion to reduce or eliminate costs in the interest of justice, as in cases in which each party wins on some issues or a wide disparity between the parties' respective financial resources would make an award of costs oppressive.[164] This grant of discretion would be consonant with the greater responsibility for case management that the *Draft Bill* places on the courts. The legislator should also provide guidance for the exercise of this discretion so as to achieve the worthy social goals of promoting access to justice and ensuring procedural equity.

Contrary to the *Draft Bill's* proposal, the starting point should be that the losing party must pay the winning party's reasonably necessary costs, including lawyers' fees, unless a court orders otherwise in the interest of justice. The quantum of costs, however, should be kept within limits, as in all other jurisdictions. The Australian Law Reform Commission has recommended the practical and sensible approach of fixing the maximum risk in advance with a ceiling on awards for costs (perhaps a percentage of the value of the dispute, as in Spain[165]), and also adjusting the amount to account for wasteful or abusive

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162 Baudouin & Deslauriers, *supra* note 96 at 350 [translated by author].

163 *Ibid* at 346, 350-51.

164 See "Mémoire du Barreau," *supra* note 20 at 17.

165 See *supra* note 90 and accompanying text.

actions by either party.[166] This allocation of costs achieves the goals listed above while reasonably balancing the interests of the opposing parties and also embodying the principle of proportionality that is central to both the current *Code of Civil Procedure*[167] and the *Draft Bill*.[168]

II. ALTERNATIVE DISPUTE RESOLUTION

A. Current Status in Québec

Since 1997, Québec has required pre-hearing mediation for most disputes pertaining to family law, if the interests of children are involved.[169] Parents seeking separation, divorce, or annulment of their marriage must attend one seventy-five-minute session and may receive as many as six at the state's expense.[170] This progressive programme reflects sensitivity to the welfare of the children, who are deeply affected despite being non-parties to the dispute between their parents.[171]

Mediation is more effective than contentious court proceedings at fostering the communication and collaboration that are essential to an arrangement made in the best interests of the children;[172] it replaces "the logic of the adversarial system" with a human approach that creates "an atmosphere conducive to envisioning the future."[173] In addition, successful mediation leaves available for the children money that would otherwise have gone to pay legal bills—a consideration of especial importance in families of modest means. A study commissioned by the Ministry of Justice found that the great majority of participants were highly satisfied with pre-hearing mediation and felt that they were the authors of their own resolution.[174]

In addition, small claims are subject to alternative dispute resolution under the ægis of a private mediator, a judge, or both. The Small Claims Division of the Court of Québec arranges mediation, at the request of the parties, for no expense beyond that already incurred to initiate the action.[175] If the dispute proceeds to court, "the judge attempts to reconcile the parties,"[176] whether or not they have tried mediation. These exceptions aside, Québec's courts do not require alternative dispute resolution for civil matters, although they may "invite the parties to a settlement conference or […] recommend mediation."[177]

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166 *Supra* note 77 at s 2.

167 Art 4.2 CCP.

168 See e.g. *Draft Bill*, *supra* note 16, Preliminary Provision, para 3; *ibid*, art 2, para 2; *ibid*, art 18, para 1.

169 Arts 814.3-14 CCP.

170 *Regulation Respecting Family Mediation*, RSQ, c C-25, r 9, ss 10-11. The parties may also receive three sessions in order to have a judgment reviewed, for purposes such as varying the amount of support or the arrangements for custody of the children.

171 Feminists, however, have pointed out that any scheme of mandatory mediation for family-related disputes must take into account such important gender-linked issues as power imbalances and domestic violence. See Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24 CJWL 207.

172 See Marie-Claire Belleau & Guillaume Talbot-Lachance, "La Valeur juridique des ententes issues de la médiation familiale : présentation des mésententes doctrinales et jurisprudentielles" (2008) 49 C de D 607 at 614.

173 *Ibid* at 615 [translated by author].

174 Québec, Ministère de la Justice, *Troisième Rapport d'étape du Comité de suivi sur l'implantation de la médiation familiale* (Québec: Gouvernement du Québec, 2008) at 95.

175 Art 973 CCP.

176 Art 978, para 1 CCP.

177 Art 151.6(5) CCP.

For arbitration, the *Code of Civil Procedure* establishes procedural rules that apply unless the parties have stipulated otherwise.[178] A dispute must be heard by three arbitrators,[179] who are endowed with *Kompetenz-Kompetenz* (the authority to determine their own competence)[180] and the power to conduct inspections and gather evidence.[181] Unlike court proceedings, arbitral proceedings are kept confidential.[182] The arbitrators' decision is binding upon the parties[183] and is not subject to appeal or judicial review; "[t]he only possible recourse against [it] is an application for its annulment,"[184] which can be entertained only on the grounds enumerated in the *Code of Civil Procedure*.[185]

B. Proposal in *Draft Bill*

Under the *Draft Bill*, the parties to a dispute would be required to "consider the private modes of prevention and resolution"[186] before resorting to adjudication.[187] The *Draft Bill* specifically identifies negotiation, mediation, and arbitration as "[t]he principal such modes" but would allow disputants to select another process.[188] It also defines "the procedure applicable to private modes of dispute prevention and resolution when it is not otherwise determined by the parties."[189] In general, participants in private dispute prevention or resolution would "undertake to preserve the confidentiality of anything said, written or done during the process."[190]

The *Draft Bill* would retain the requirement of a mediation information session for family-related disputes involving the interests of children[191] but would also allow the courts to refer other disputes to mediation at any time.[192] Unless a court ordered otherwise, the costs of mediation would be borne equally by the parties.[193]

For arbitration, the number of required arbitrators would be reduced from three to one,[194] unless the parties agreed to appoint more than one arbitrator.[195] The arbitrators would be required to uphold both "the adversarial principle and the principle of proportionality"[196] but would retain their authority to conduct inspections and gather evidence.[197] *Kompetenz-Kompetenz* would be subject to judicial review, without right of

178 Art 940 CCP.
179 Art 941 CCP.
180 Art 943 CCP.
181 Art 944.4 CCP.
182 Art 945 CCP.
183 Art 945.4 CCP.
184 Art 947 CCP.
185 Art 946.4-5 CCP.
186 *Draft Bill*, *supra* note 16, art 1, para 3.
187 *Ibid*, arts 2, 7.
188 *Ibid*, art 1, para 2.
189 *Ibid*, Preliminary Provision, para 1. The *Draft Bill* does not, however, specify whether the parties could contractually define the procedure in advance. In arbitration, the choice of procedure is left to the arbitrator (*ibid*, art 633, para 1).
190 *Ibid*, art 4.
191 *Ibid*, art 414, para 1.
192 *Ibid*, art 418, para 1.
193 *Ibid*, art 620, para 1.
194 *Ibid*, art 625, para 1. In international commercial disputes, however, three arbitrators would be used (*ibid*, art 647, para 1).
195 *Ibid*, art 625, para 1. The text speaks of "more than one arbitrator, in which case each party appoints one arbitrator, and the two so appointed appoint the third." This poorly drafted passage suggests that "more than one" means precisely three.
196 *Ibid*, art 633, para 1.
197 *Ibid*, art 634, para 3.

appeal.[198] The arbitrators would have to issue their decision "in writing within three months after the matter is taken under advisement."[199]

C. Alternatives

Although the *Draft Bill* provides some support for alternative dispute resolution, it could go further in this direction. Rather than merely requiring the parties to "consider"[200] alternative dispute resolution, the legislator could expand the judiciary's existing programmes to encompass a broader class of civil disputes, starting with those types of cases that are most conducive to a mediated settlement. The success of mediation in the context of family law bodes well for disputes of other kinds.

The legislator could also make mediation obligatory, as do a number of other North American jurisdictions. Since 1999, Ontario has imposed mandatory private mediation, at the parties' expense, for cases subject to case management in three of the province's largest cities.[201] In British Columbia, the judge managing the case can "requir[e] the parties of record to attend one or more of a mediation, a settlement conference or any other dispute resolution process";[202] in addition, legislative provisions allow any party to require mediation in a claim for an accident involving motor vehicles,[203] a family-law proceeding,[204] a dispute over residential construction,[205] or another matter that is not specifically excluded.[206] Alberta,[207] Newfoundland and Labrador,[208] Saskatchewan,[209] and several states in the United States[210] have also instituted mandatory alternative dispute resolution for many civil matters.

Instead of always requiring consideration of non-adjudicative approaches, the legislator could leave more discretion to the judge. The nature of the dispute and the condition of the disputants could inform the decision to recommend private civil justice. Judiciously applied, this approach could improve efficiency by referring only suitable cases to alternative dispute resolution.

D. Advantages and Disadvantages of the *Draft Bill's* Approach

Alternative dispute resolution can contribute to the goals that undergird the *Draft Bill*. It has the potential of settling disputes more quickly and less expensively than the courts. Court-connected civil mediation in Québec and the other provinces where it has been instituted has succeeded in this respect: most disputes are settled before or during mediation, on average in about half the time of disputes taken to litigation.[211] Lawyers surveyed have

198 *Ibid*, paras 2-3.
199 *Ibid*, art 638, para 1.
200 *Ibid*, art 1, para 3.
201 *Rules of Civil Procedure, supra* note 68, ss 24.1, 75.1. The rules list a few exceptions.
202 *Supreme Court Civil Rules, supra* note 73, s 5-3(1)(o).
203 *Notice to Mediate Regulation*, BC Reg 127/98, s 2.
204 *Notice to Mediate (Family) Regulation*, BC Reg 296/2007, s 2.
205 *Notice to Mediate (Residential Construction) Regulation*, BC Reg 152/99, s 2.
206 *Notice to Mediate (General) Regulation*, BC Reg 4/2001, s 3.
207 *Alberta Rules of Court*, Alta Reg 124/2010, s 4.16.
208 *Rules of the Supreme Court*, SNL 1986, c 42, Schedule D, s 37A.
209 *Queen's Bench Act*, SS 1998, c Q-1.01, s 42.
210 See e.g. Holly A Streeter-Schaefer, "A Look at Court Mandated Civil Mediation" (2000-01) 49 Drake L Rev 367 (discussing mandatory mediation of civil disputes in Alabama, Delaware, Indiana, Louisiana, Maine, Montana, Nevada, and North Carolina).
211 See Michaela Keet & Teresa B Salamone, "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001) 64 Sask L Rev 57 at 66-67.

estimated substantial cost savings for clients whose disputes were mediated.[212]

Alternative dispute resolution also encourages conciliation rather than contention and empowers the parties by giving them the leading roles in their own settlement; it even indirectly benefits society by training the public in the autonomous resolution of disputes. Empirical research suggests that users of mediation are more likely than users of adjudication to be satisfied with the fairness of the process and to emerge with less enmity and anger,[213] perhaps because each party to a mediated dispute can come away with the feeling of having won. Indeed, most disputants who have resorted to mediation have been satisfied with the process.[214] Disputants who are wary of litigation, owing to its high costs and risks as well as its confrontational, winner-take-all character, may be more willing to pursue their interests through alternative means.

Even for a dispute that ultimately proceeds to litigation, an attempt at alternative dispute resolution can beneficially settle some issues and clarify or narrow the scope of the conflict. In a dispute marked by technical complexity in a specialized field, arbitrators or mediators with the required expertise may be preferable to a judge.

In addition, alternative dispute resolution relieves the burden on the courts. Even when alternative approaches fail to achieve a resolution, they can helpfully simplify the dispute by disposing of some issues and clarifying the remaining ones. They also free the trial courts up for disputes that truly require their costly and time-consuming formal procedures. Since opportunities to contest non-adjudicated settlements are limited, alternative approaches indirectly lighten the workload of the appellate courts as well.

While recognizing these advantages, however, the *Draft Bill* only weakly promotes alternative dispute resolution. It stops short of making non-adjudicative approaches obligatory, requiring only that the parties "consider"[215] them. The requirement would prove hollow if a party bent on adjudication could satisfy it through a mere avowal of having "considered" alternative approaches.

Yet some forms of alternative dispute resolution could result in unjust outcomes. Mediation, being subject to judicial approval, receives curial oversight and is thus less risky, despite the confidentiality of its proceedings. Moreover, either party can end mediation at any time and take the dispute to the courts. These safeguards help to ensure the fairness of mediated resolutions. By contrast, arbitration results in a binding decision that forecloses appeals and the option of litigation. The danger of an unfair arbitral outcome looms especially large when an imbalance of power exists between the parties. Courts should therefore hesitate to refer unevenly matched parties to arbitration.

Although alternative dispute resolution is sometimes thought to save money, it tends to be more expensive than adjudication. In Ontario, for instance, the parties must pay for mandatory mediation on top of the court costs that they have already incurred. For a case involving only two parties, a mandatory session of mediation can cost as much as $600, plus GST.[216] These fees cover three hours; additional time is billed at "the mediator's

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212 See *ibid* at 82, n 79. Compare Jean Guibault, "Les Moyens alternatifs de résolution de conflits en matière civile et commerciale dans une perspective de réforme du *Code de procédure civile*" (1999) 40:1 C de D 75 at 86; Jean Marquis, "Médiation, conciliation : les tribunaux, agents de changements" (2001) 42:3 C de D 783 at 788.

213 See Roselle L Wissler, "The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts" (1997) 33 Willamette L Rev 565 at 568-69.

214 See Keet & Salamone, *supra* note 211 at 67-68.

215 *Draft Bill*, supra note 16, art 1, para 3.

216 *Mediators' Fees (Rule 24.1, Rules of Civil Procedure)*, O Reg 451/98, s 4(1).

fees or hourly rate," which ordinarily will be much higher than the statutory amount.[217] Arbitration can be even more expensive, especially if, as in Québec today, multiple arbitrators are required. Ancillary expenses, such as travel, increase the cost of these means of resolving disputes. The courts, by contrast, charge a flat fee that is relatively low, typically no more than a few hours of an arbitrator's time at standard rates. The fee may depend on the amount in dispute[218] but not on the duration of the proceedings: the same fee applies whether the lawsuit be dismissed immediately or extend to hundreds of days of hearings.

Because of its private nature, alternative dispute resolution could also have adverse implications for the development of the law. Our legal system depends on the publication of decisions: judges and lawyers invoke them as precedent; scholars criticize them; students learn the law from them. For that reason, we expect judgments to be available to the public. Yet decisions reached through arbitration, mediation, or negotiation ordinarily are not published; consequently, they cannot contribute to the law's evolution. If alternative dispute resolution kept pivotal legal questions out of the courts, it could lead to the relative stagnation of the law. Indeed, some parties may prefer alternative dispute resolution precisely because it eliminates the risk of establishing adverse precedent. Furthermore, arbitrators and mediators contribute little to jurisprudence. Unlike judges, they do not ordinarily explain their decisions with written opinions on questions of law.[219]

Likewise, the privacy of arbitration and mediation could result in inconsistent resolutions of disputes. Since the facts, arguments, and decisions are kept confidential, similar questions could be resolved differently by different arbitrators and mediators.[220] In addition, arbitrators can select the rules of law to apply to the dispute.[221] Their choices may vary inconsistently across cases.

The private nature of mediation could also lead to duplication of proceedings after a failed attempt at mediation. Since "[n]o information given or statement made during the mediation process [could] be admitted in evidence in arbitration, administrative or judicial proceedings, whether or not they [were] related to the dispute,"[222] examinations and hearings might have to be conducted afresh in a dispute that moved from mediation to arbitration or adjudication.[223] Such wasteful repetition would conflict with the *Draft Bill's* objective of economy and could discourage attempts at mediation.

There is a risk that arbitration, and to a lesser extent mediation, could become formalized and institutionalized to the point of constituting a new judiciary. The requirement of adversarial and proportional proceedings would reduce arbitrators' authority over procedure and recast arbitration in a judicial mould. In addition, heavy reliance on arbitrators or mediators with expertise in the subject matter of the dispute could eventually divide the law into specialized sectors, each with its own legal rules, thereby compromising the law's uniformity and generality.

The *Draft Bill* does not indicate how arbitrators could be held to their obligation to

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217 *Ibid*, s 4(3).

218 See e.g. *Tariff of Court Costs, supra* note 27, ss 1, 4.

219 The clients of arbitrators and mediators generally do not wish to pay hundreds of dollars per hour for this service.

220 See e.g. Judge Craig Smith & Judge Eric V Moyé, "Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts" (2012) 44 Tex Tech L Rev 281 at 297-98.

221 *Draft Bill, supra* note 16, art 626.

222 *Ibid*, art 611, para 1.

223 See e.g. Denise Wilson, "Alternative Dispute Resolution" (1993) 7:2 Auckland UL Rev 362 at 376-77.

uphold the adversarial principle and the principle of proportionality. Also unclear is the point at which the parties could determine the procedure for private dispute resolution. For example, the text does not state whether a contract could stipulate the procedure prospectively, or whether a court could set such stipulations aside and substitute the default procedure in the case of a consumer contract or a contract of adhesion. Lacunae such as these in the *Draft Bill* could themselves become sources of litigation.

Another issue is that the risk that prescription would extinguish the claim could discourage recourse to alternative dispute resolution. A plaintiff pursuing a non-adjudicative approach in good faith might have to file suit just to preserve the right of action, thereby wasting time and money while also potentially antagonizing the opposing party. The defendant could otherwise take unjust advantage of the plaintiff's carelessness or ignorance by deliberately prolonging the non-adjudicative proceedings until prescription had run. The *Draft Bill* makes only weak provision for this problem: it merely allows parties in mediation to agree to waive the benefit of prescription,[224] without similarly accommodating negotiation or other informal attempts at alternative dispute resolution. The legislator could easily fill this lacuna either by suspending prescription during attempts at alternative dispute resolution (provided that the court be seized of them) or by extending the time to institute proceedings after the failure of such attempts, similar to the three-month extension that is currently available for proceedings that were timely filed in the wrong forum.[225]

E. Critical Assessment

Despite presenting a number of problems that require prudent management, alternative dispute resolution offers many advantages that promote the *Draft Bill's* stated goals. Unfortunately, the *Draft Bill's* timid approach to alternative dispute resolution stands in sharp contrast to its bold reallocation of the costs of litigation. The mere requirement that the parties consider alternative dispute resolution is a hollow recital. Meaningful promotion of alternative dispute resolution calls for imperative measures. For example, the court personnel could be required to ensure, through an interview or other procedure, that the parties had given serious consideration to alternative approaches. A party that refused to attempt negotiation or mediation in good faith could be punished with the costs of the ensuing legal proceedings. Although mandatory arbitration would probably violate the Québec *Charter* by depriving disputants of a public hearing in court[226] (since arbitral decisions are generally not subject to judicial review[227]), mediation could properly be required, as indeed it already is in various provinces.[228]

Perhaps the choice not to insist on mandatory mediation stems from sensitivity to the fact that some disputes are not amenable to approaches that foster communication and collaboration.[229] For instance, mediation may simply be a waste of time if the conflict has become so rancorous that the parties will no longer accept reconciliation. Such cases, however, could be released from mandatory mediation at the discretion of the court upon application by the parties, along the lines of the exemptions available upon motion in Ontario.[230] The mediator could also quickly refer a case back to the court rather than

224 *Ibid*, art 613, para 1.

225 Art 2895, para 1 CCQ.

226 *Supra* note 15.

227 Art 947 CCP; *Draft Bill, supra* note 16, art 648, para 1.

228 See Keet & Salamone, *supra* note 211 at 61-65 (describing mandatory mediation in British Columbia, Ontario, and Saskatchewan).

229 See *ibid* at 68.

230 *Rules of Civil Procedure, supra* note 68, s 24.1.05.

continuing futile mediation. The exceptional cases that do not lend themselves to non-adjudicative resolution need not prevent the institution of mandatory mediation.

Some curial oversight of recourse to alternative dispute resolution may be appropriate, especially when there is a great imbalance of power between the parties. The courts should ensure, for example, that a party does not agree to arbitration without understanding that the arbitral decision will be final, with no possibility of appeal. The courts' administrative obligations to protect the rights of parties entering into alternative dispute resolution should be made explicit in the *Draft Bill*.

CONCLUSION

As its very first words indicate, the code proposed in the *Draft Bill* privileges "[p]rivate civil justice."[231] Its innovations reflect an ideology of privatization. To be sure, private approaches to dispute prevention and resolution can usefully complement their public counterparts and help to make justice more accessible to all. Civil procedure, however, must strike a balance between the public and private modalities so that each can be employed to best advantage. Unfortunately, the *Draft Bill* moves so far in the direction of privatization, especially in its allocation of costs, that it even appears to have been designed in the image of corporations. Although it purports to improve access to justice, it might have just the opposite effect for ordinary people. While its allocation of the costs of litigation goes too far, its promotion of alternative dispute resolution does not go far enough.

Allocation of costs requires sensitive consideration of circumstances. A bright-line rule—awarding full costs or none at all—cannot effectively balance the contending social objectives that inform cost-shifting policies. For precisely that reason, every jurisdiction tempers its policy by limiting awards of costs in view of the circumstances of each case. The allocation proposed in the *Draft Bill*, however, lacks both balance and nuance. Rather than parting ways with all other jurisdictions, the legislator should develop a principled rule for allocating costs and some guidelines for the appropriate exercise of judicial discretion.

With its mere hortatory requirement to "consider" alternative dispute resolution, the *Draft Bill* too meekly promotes an important means of facilitating access to justice. The legislator could instead profit from the experiences of other provinces and impose mandatory mediation for a large class of civil matters, at either public or private expense. The success of Québec's programme of mediation in the context of family law bodes well for expansion to other types of disputes.

The *Draft Bill* unfortunately leaves a number of important questions unanswered. What is the significance of the requirement that the parties to a dispute "consider" alternative dispute resolution? Would the caps on pre-trial examinations apply to each examination or to the full set for each side? Could the terms of a contract prospectively establish the procedure for mediation? If so, could they be challenged in court as unfair if a dispute arose? What could a party do, short of filing suit, to protect its rights from prescription during a *bona fide* attempt at alternative dispute resolution? If a party sought a discretionary award of legal costs for the opponent's rejection of a fair offer in settlement, would the confidentiality of the offer be maintained under privilege? How would the requirement that arbitrators uphold the adversarial principle and the principle of proportionality be enforced? These uncertainties point to the need for revision of the *Draft Bill*, and even reconsideration of key issues and principles.

231 *Draft Bill, supra* note 16, art 1.

Fundamental change to an instrument as important as the *Code of Civil Procedure* must be approached with caution. The public would suffer from the obsolescence of such important popular sources of free legal information as Éducaloi,[232] which might not be updated for some time. The transition to the new code would also be difficult for judges and lawyers. Disputes over the interpretation of the new *Code* would give rise to more litigation and would endure until they were resolved in case law. Vulnerable parties might not be adequately protected in the interim. Furthermore, a reform that proved unsuccessful would necessitate remedial legislation—possibly even the enactment of a new *Code*, which would result in even more disruptions and inconvenience.

Québec bills itself as a leader in progressive social change, but in both the allocation of costs and the adoption of alternative dispute resolution it is decidedly behind the rest of Canada and indeed most of the world. Unfortunately, a number of changes proposed in the *Draft Bill* run counter to the legislator's social objectives. To its credit, the *Draft Bill* includes some much-needed reforms, such as limits on pre-trial examinations and a higher ceiling on small claims. It will, however, require fundamental revision, with due attention to the experience of other jurisdictions and to empirical findings that indicate superior procedural practices, in order to achieve its laudable goal of improving access to justice.

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232 Online: <http://www.educaloi.qc.ca>.