The Costs of Civil Litigation

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One of the most poignant lessons I recall from law school is that "civil litigation will cost much more, and take much longer, than your client ever expects." That advice, which came from an experienced civil litigation lawyer, is very true. The purpose of this paper is to convey to you the same advice. With a better understanding of the civil litigation process and the timeframes and costs associated with it, it is intended that you will be in a better position to make decisions relating to advancing (or defending) your civil claim.

Civil Litigation

You are entitled to seek recourse from the courts when you find yourself subject to an injustice, such as an injury to yourself or your property at the hands of someone else. The courts have powers intended to correct such injustice, and the process of pursuing redress is known as "civil" litigation.[2] In most cases, however, civil courts only have the power to provide monetary compensation for your losses, even when those losses relate to something that is not readily reduced into dollars and cents (such as cases involving losses of life, limb, or unique and irreplaceable property). This means that civil claims almost always end up being about money – the "bottom line" is almost invariably measured in dollars and cents. In reaching the bottom line the rules followed and formulas used by the civil courts to assess and calculate the compensation that is due to you are often complicated. This is inevitable given that the courts are bound to operate in accordance with the volumes of complex rules, regulations and procedures inherent in our legal system.

The foundations of our laws stretch back over two thousand years and the rules, regulations and procedures that now bind our courts easily run into the millions of printed pages. This makes recourse in the civil courts a potentially daunting process. It must be remembered that although you are fully entitled to seek the court's assistance to remedy an injustice against you, the courts themselves only provide the forum for advancing a claim. Unlike criminal matters (where the police and the provincial or federal governments are involved), it is up to you alone to bring your claim before the courts, and it is up to you to properly prepare and advance your case in accordance with the law so that the court can render its decision. It is for this reason that most parties seeking recourse to the courts also seek the assistance of learned practitioners of the law to advocate cases on their behalf. Such practitioners must undertake years of formal education and practical

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[2] Civil litigation differs from "criminal" matters in that it is private (or "civil") parties who have a dispute with one another, as opposed to criminal matters where there is a claim made by the state (the "Crown") against an individual for what is considered an offence against society. In other words, civil litigation involves private disputes where criminal litigation involves public ones.

experience, and are subject to the very strict regulation of independent Law Societies in order to act on your behalf before the courts. As might be expected, there are costs associated with retaining these services. Given that civil claims, ultimately, usually involve a "bottom line" measured in dollars and cents, a cost-benefit analysis comes into play – *is it ultimately worth pursuing (or defending) a claim given the costs that are involved*?

The Civil Litigation Process

While the court system for civil litigation can be complex, it is important to observe that one reason this is the case is because the courts go to great lengths to ensure fundamental principles of fairness apply to all that come before it. For example, anyone who is the subject of an accusation made in court is entitled to themselves give a full and complete response. The parties to a civil action are entitled to understand the case that is raised against them, and the court itself is entitled to review all relevant and material information relating to a case. In this way, the court (as the disputes arbiter) is able to make a complete and impartial decision based on the best evidence available. Such principles define the civil litigation process.

While there are many different ways to sub-divide civil litigation, the process can generally be described as consisting of nine different steps. These are:

- **Step ❶**: **Initial Investigation**. While not a part of the court-process *per se*, any prudent party advancing or defending a civil lawsuit will first complete an investigation so that they are aware of all of their rights and obligations with respect the matter at hand. This step normally consists of discussing the matter with legal counsel and, in some case, obtaining a formal "legal opinion" with respect to available claims or defences. Sometimes it is necessary to obtain additional information through research or outside investigators or claims adjusters. Depending on the complexity of a matter, initial investigations can take very little time (such as for claims of a routine nature), or they can take months to complete (such as for claims requiring complex analysis by professionals such as engineers or physicians).

- **Step ❷**: **Drafting, Filing and Serving Pleadings**. Once a party has a good understanding of their claim, court proceedings can be commenced (or a defence can be filed) at the appropriate court. This consists of filing a "pleading" or "originating document" that lays out the allegations of a "plaintiff" against another party or parties (who are known as the "defendants"). Responding parties then have an opportunity to provide their own pleading documents and may advance additional claims of their own if desired.[3] These pleading document must be in a very specific form and can consist of a few pages (for simple claims) to dozens of pages (for complex matters). Once a pleading is filed at the court, it must then be served upon the other parties named in a the lawsuit. It is not the responsibility of the court to

[3] This is known as a "counterclaim".

serve these documents, but rather it is up the individual parties to do so. Very often specialised service providers known as “process servers” are used to assist with this step. Depending on the complexity of the pleadings and the known location of the parties to a lawsuit, this civil litigation step can take anywhere from several weeks to several months to complete.

- **Step ❸**: **Settlement Negotiations**. Approximately 95% of all civil claims settle prior to trial. In many cases civil claims settle shortly after pleadings are filed with the court and in many other cases claims settle when parties have had the benefit of the “discovery” steps (see ❺ and ❻, below) in an action. For most parties involved in a lawsuit, the time and money required to reach trial are often an impetus to reaching a negotiated settlement prior to trial. As such, settlement negotiations take place frequently throughout the life of a civil claim and are normally facilitated through informal discussions between the lawyers acting for the parties to a claim. When a settlement agreement has been reached, a formal “Release and Settlement Agreement” can be drafted as a legally-binding conclusion to the lawsuit which is itself legally enforceable in court if necessary.

- **Step ❹**: **Interlocutory Applications**. After a lawsuit is commenced, any party can make an interlocutory (interim) application for various types of relief that might be desired prior to trial. Such applications include requests for the court to order particular records to be divulged by a party, or requests for a judicial determination on some or all aspects of a claim (which is known as “summary” judgment). Interlocutory applications can be brought before the court for strategic purposes, or they can be necessary to obtain a certain type of result. In practice interlocutory applications can be seen as “mini-trials” because they involve an appearance before a Master or Justice of the court in a courtroom. At the outset of a civil claim it can be very difficult to predict how many interlocutory applications will be required as the circumstances, strategies and styles of litigants can vary dramatically. It is reasonable, however, to expect that a typical claim will involve at least one or two interlocutory applications, and exceedingly long and complex court actions can involve dozens of such applications. Except for very simple appearances, interlocutory applications generally require a half-day of court time (including waiting time) and at least double that amount of time for preparations. Some interlocutory applications can involve multiple court appearances and the exchange of written legal arguments and supporting materials sworn by way of affidavit. The overall timeframe for completing an interlocutory application can run from a few days to weeks or months, and can depend on the scheduling constraints of the parties, and of the court itself.

- **Step ❺**: **Discovery Part I – Production of Records**. One of the fundamental principles of a civil court action is that all of the parties to a claim are required to divulge all relevant and material information in their possession that relates to a case. In other words, all parties, and the court, are entitled to the “discover” the case that is

being advanced. This is an obligation that no party can ignore and there are significant consequences for doing so – the lawyers acting for parties actually have a primary duty to the court[4] to ensure that all relevant and material information related to a civil claim is produced before the court. This can be a time-consuming and laborious process, especially where a matter may involve hundreds (or thousands) of pages of electronic and paper documents. In recent years, however, lawyers have become adept at processing volumes of records by scanning or otherwise processing documents electronically. Outside service providers are very often used to assist with the most time-consuming and monotonous aspects of this process, however all records must be vetted by legal counsel (for issues of relevance, materiality and privilege) prior to being disclosed to other parties involved in litigation. Depending on the volume of records to be produced and the manner in which it is provided for review, the production of records portion of discovery can take from weeks to months to complete.

- **Step ❻**: **Discovery Part II – Questioning of Parties**. The second key aspect of "discovery" is that all parties to litigation are entitled to question the other parties involved in a claim, under oath. This process allows all parties to learn more about the evidence that may be presented by the parties at trial. Although a party is not required to question another party, if requested a party may not refuse to be questioned under oath. Questionings of parties do not normally take place in court, but are rather held in a suitable boardroom (which is usually provided by one of the lawyers involved in an action). The questionings are normally relatively informal but a court-appointed reporter is present to ensure that a detailed transcript of everything that is said is taken down. A party being questioned normally has their lawyer present to object to invalid questions from being asked, and parties are usually questioned by one or more of the opposing parties' lawyers. A typical questioning lasts for about one day, and a lawyer will generally prepare for two hours for each hour of questioning to be complete. Depending on the complexity of a matter, parties can be questioned for many days. During questionings, "undertakings" are normally given by the party being questioned so that additional documents and records or answers are provided. Depending on these undertaking responses, further questionings may arise. It can sometimes be difficult to schedule times for all parties to a matter to be available for questioning, and as a result the questioning process can easily take several months to complete, especially if interlocutory applications are required to force parties to appear to give answers.

- **Step ❼**: **Alternative Dispute Resolution**. Because of the high costs associated with civil litigation, many courts now require parties to litigation to engage in some form of "alternative" dispute resolution prior to the trial of an action. In some cases this can

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[4] Lawyers are – first and foremost – officers of the court and are accordingly sworn to uphold the interests of justice and must therefore ensure that disclosure of all relevant and material information is provided in court actions.

be in the form of a mediation before a court official, or in other cases this can be a private mediation or arbitration between the parties and an outside adjudicator. Very often these processes can allow parties to reach a conclusion of a claim without reaching trial. In other cases these processes can yield no significant results. Depending on the particular process used, the alternative dispute resolution step can consist of a single or multi-day process with or without counsel and with our without preparation of materials beforehand. As with other steps in civil litigation, scheduling alternative dispute resolution sessions can take weeks or months, especially when the court's own resources (such as Justices or mediation rooms) are being used.

- **Step ❽**: **The Trial**. Trials occur in less than 5% of all civil claims commenced before the courts, but in some exceedingly complex or acrimonious cases it may not be possible to avoid trial. In such cases trials involve the presentation of all of the evidence (including oral evidence from witnesses) that parties wish to adduce before a judge. This process can take anywhere from a few days to weeks to complete, and as with other steps in litigation scheduling issues and limited resources can mean trial dates are scheduled many months in the future. Lawyers will generally prepare quite extensively for trial, including re-interviewing witnesses, reviewing evidence, and preparing for oral examinations (and cross-examinations) of witnesses. The preparation of opening and closing remarks is also very important in leading up to trial. Trials are extremely expensive, but they do result in a binding decision made by the court upon the parties to a civil claim. Such decisions are enforceable through the court and are generally not reviewable except in very narrow circumstances.

- **Step ❾**: **Enforcement**. When a matter is finally decided (either at trial or through an interlocutory application, and in some cases as a result of a Settlement Agreement), it becomes enforceable through the court. As such, some of the courts' powers and resources can be used to collect upon the judgment that is made in a party's favour, such as by garnishing bank accounts, seizing property and setting it at auction, and other similar remedies. A court judgment is a very valuable tool in gaining recovery from a party, but it does not guarantee payment – a defendant liable for a judgment that does not have any assets to meet that judgment may well end up not paying. While some defendants who are liable on judgments may simply pay without requiring enforcement steps, others may attempt to evade paying a judgment such that enforcement steps are required. Such steps can take from weeks to months (or years) depending on the enforcement methods used, and all involve costs payable to the courts or outside enforcement agencies.

The Costs of Civil Litigation

All of the above steps involve costs which generally fall into two categories – legal fees and disbursements. Legal fees are simply those fees (and sometimes related costs) paid to lawyers and law firms for the work they complete advocating on behalf of a party to

litigation. Disbursements are those costs attributable to "outside" charges for court filing fees or charges relating to some third-party service providers. Although it is not usually possible to definitively predict the costs associated with civil litigation applications, past experience gives a reasonable estimate of a relative range of costs that can be incurred in typical lawsuits. For example, *Canadian Lawyer* magazine regularly publishes a review of costs relating to various legal services based on a survey of many lawyers and firms from across the country. With respect to civil litigation, its July 2010 edition indicates a national range of between $18,000 and $165,000 (with an average of $52,000) for a two-day trial, which is a relatively simple matter. While the size of this range is quite large, breaking a matter down into specific steps provides some useful insight into what timeframes and costs can be expected in civil litigation:[5]

Step	Timeframe	Legal Fees	Disbursements
Step ❶: Initial Investigation	Days to Months	$1,000 to $2,000	$0 to $2,000
Step ❷: Drafting, Filing and Serving Pleadings	Days to Months	$1,000 to $2,000	$0 to $1,000
Step ❸: Settlement Negotiations	Occurs Throughout	$1,000 to $15,000	$0 to $500
Step ❹: Interlocutory Applications	Days to Weeks, Court Scheduling Issues	$1,000 to $5,000 (per application)	$0 to $500 (per application)
Step ❺: Discovery Part 1 – Production of Records	Weeks to Months	$1,500 to $3,000	$1,000 to $2,000
Step ❻: Discovery Part 2 – Questioning of Parties	Weeks to Months, Witness Scheduling Issues	$5,000 to $8,000 (per witness)	$0 to $500 (per witness)
Step ❼: Alternative Dispute Resolution	Days, Court Scheduling Issues	$5,000 to $8,000 (per day)	$0 to $500 (per day)
Step ❽: The Trial	Days to Weeks, Court Scheduling Issues	$5,000 to $8,000 (per day)	$5,000 to $10,000
Step ❾: Enforcement	Weeks to Months	$1,000 to $5,000	$500 to $5,000
TOTALS:	**Approximately 1-2 Years**	**$37,500 to $85,000**	**$6,500 to $23,500**

[5] Note that these totals are approximate estimates only; fees and disbursements may exceed the higher limits (and sometimes may be lower than the lower limits) specified. The overall totals here are based on a hypothetical matter with two interlocutory applications, questionings for three witnesses, one day of ADR, two days of trial, and all of the other steps listed. Note that many matters go to trial because they involves issues that are too complex to be dealt with outside of court. Complex trials taking many days or weeks can easily involve cumulative costs of $250,000 or more.

Thus, all inclusive (as they are broken down above) all steps in the civil litigation process can reasonably be expected to cost in the range of **$44,000** to **$108,500**. While these totals may be daunting, it should be emphasised that most civil claims do not involve all steps, and many only involve a few. It is typical, for example, for civil claims to reach settlement after steps ❶, ❷ and ❸, or after steps ❶, ❷, ❸, ❹, ❺ and ❻. In such cases, the total for fees and disbursements in a civil claim are somewhat less, as noted below:[6]

- **Steps ❶, ❷ and ❸ (only): $3,000** to **$22,500**.
- **Steps ❶, ❷, ❸, ❹, ❺ and ❻ (only): $11,500** to **$30,500**.

The Relative Cost and Benefit

The practical effect is that for the smallest claims (for example, those that are worth $50,000 or less),[7] the benefit of pursuing the claim must be very carefully weighed against the costs that will be incurred in doing so. In a best-case scenario, costs of as little as $3,000 (ie. steps ❶, ❷ and ❸ only) might be incurred in order to recover a claim of $50,000. But equally so, even if litigation does not proceed to trial, a claim for $30,000 could easily cost the same amount to pursue (for example, if steps ❶, ❷, ❸, ❹, ❺ and ❻ are required). In only the rarest of situations will spending $30,000 to recover $30,000 be advisable. As such, if a party to litigation wants to delay the process, or push a matter out toward a trial (as is sometimes the strategy of opposing litigants), a $50,000 claim could easily cost at least double that amount to pursue.

For larger claims (such as, for example, those in the $50,000 to $200,000 range), a cost-benefit analysis must also take place. The difficulty with such matters, however, is that advancing a claim is almost a necessity (for who, after all, would prefer to walk-away from a $100,000 claim?) while the costs of proceeding all the way to trial could still very easily cost $100,000 or more. As such, a litigant will *hope* that only steps ❶, ❷ and ❸ (or even ❶, ❷, ❸, ❹, ❺ and ❻) are necessary, even though it is not straightforward to predict whether a full trial will take place or not. Although a claim will likely be advanced in circumstances where a $100,000 or more is at stake, a review of the costs and benefits of each step in the proceedings should be completed throughout.

For even larger claims (those above $200,000), cost is less of a concern as even when a claim advances all of the way to trial, the costs may not exceed the value of the claim. That said, taking a claim to trial does not guarantee success at trial – and spending $100,000 at

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[6] Note that these figures are based on a single interlocutory application and a single day of witness questioning.

[7] For very small claims (those less than $25,000 for example), some jurisdictions offer courts with a monetary jurisdiction of up to $25,000. Those courts, such as Provincial Court (Civil) in Alberta or Small Claims in British Columbia, do not typically require representation by lawyers, thus reducing costs dramatically. The summary nature of small claims proceedings, however, can sometimes be difficult, confusing or stressful for inexperienced parties. Despite this, for claims of $25,000 or less, most lawyers will simply refer parties to a small claims court to handle the matter themselves as representation by a lawyer in such circumstances is almost always not cost-effective.

trial to recover a claim of $200,000 is not particularly cost-effective. As such, a review of costs and benefits in pursuing a matter should also be taken with large claims.

Recovering Costs

If you are successful in winning your claim in civil court, you will generally be entitled to some degree of compensation for your legal fees and other costs incurred in advancing the claim. Conversely, if you are unsuccessful, you are generally liable for some of the other parties' costs. The court has much discretion to award "costs" for or against litigants involved in actions and therefore, it is possible for a successful litigant to recover from the losing parties all of the fees they have paid with respect to a civil claim. In practice, however, this is extremely rare. Instead, the court usually awards costs to a successful party on the basis of a set schedule that corresponds to steps taken in a lawsuit – this only partially compensates parties for what they actually paid in taking litigation steps.

For example, on a $50,000 claim, the applicable schedule in Alberta specifies a costs award of $1,000 for the "pleadings" step (inclusive of drafting, filing and service) even though the actual costs incurred will likely range between $1,000 and $3,000. Likewise, for a two-day trial in a $50,000 claim, the Alberta schedule specifies a costs award of $4,500 where actual costs will likely be in the range of $15,000 to $26,000. All things considered, the likely costs awards in any civil action will normally be, at best, approximately one-third the amount actually spent on legal fees and disbursements. It is therefore important that parties to an action be aware that it is extremely unlikely that they will recover all of their monies spent on legal fees, even when they are successful. Unfortunately some parties are under a misconception that they will easily recover full costs, and the reality of the situation can be disappointing. As such, care must be taken when evaluating and advancing claims.

Conclusion

Quite simply, civil litigation will cost much more, and take much longer, than you expect. Although you are entitled to seek recourse from the courts when you are the subject of an injustice, you must be aware that doing so can be expensive. As such, it is important to consider the potential costs of an action. It is prudent to keep in mind the "worst-case" scenario as your civil matter proceeds toward trial. That being said, the vast majority of civil actions do not involve a trial as parties generally settle claims so as to avoid incurring significant costs. Therefore in making (or reviewing) your decision to pursue a civil claim, be sure to carefully consider the costs and benefits of pursuing your claim at points throughout the litigation. As you yourself are the only person with an in-depth understanding of your finances and tolerances for risk, only you can ultimately make the decision to advance or continue your civil litigation claim. That being said, do feel free to discuss the costs of your matter with your lawyer on an ongoing basis, and it is appropriate for you to ask for revised litigation budgets on an ongoing basis. Armed with a better understanding of the costs likely to be associated with your claim, you will be in the best position to make an appropriate cost-benefit decision in civil litigation.