LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON CIVIL PROCEDURE

(Project No. 13)

PART I COSTS OF SUCCESSFUL UNASSISTED LAY LITIGANTS

LRC 20

1975

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

Leon Getz, Chairman
Ronald C. Bray
Paul D.K. Fraser
Peter Fraser
Allen A. Zysblat

Keith B. Farquhar is Director of Research to the Commission.
Arthur L. Close is Counsel to the Commission.
Edward E. Rowes is Legal Research Officer to the Commission.
Patricia Thorpe is Secretary to the Commission.

The Commission offices are located on the 10th Floor, 1055 West Hastings Street, Vancouver, B.C.

TABLE OF CONTENTS

TO THE HONOURABLE ALEX B. MACDONALD, Q.C.,
ATTORNEYGENERAL FOR BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON CIVIL PROCEDURE
(Project No. 13)
Part I Costs of Successful Unassisted Lay Litigants

This Report has been prepared in the Commission's Project on Civil Procedure, which is Project No. 13 in the Commission's Approved Programme.

In this Report, the Commission examines the law governing the recoverability of costs by a litigant who successfully conducts his own case in court. It comes to the conclusion that, though the impact of the present law is not great, it is in principle discriminatory, and should be changed, and recommends a mechanism for accomplishing that change.

INTRODUCTION

In 1970, in the case of *Buckland* v. *Watts*,

2. (1884) 13 Q.B.D. 872 (C.A.), affirming (1884) 12 Q.B.D. 452.

3. *Willing* v. *Hollobone*, [1972] 3 S.A.S.R. 532 (So. Austr. F.C.).

4. Cf. *Lysnar* v. *National Bank of New Zealand, Ltd. (No. 2)*, [1935] N.Z.L.R. 557 (C.A.).

5. Law Reform Committee of South Australia, 29th Report: The Award of Costs to a Litigant Appearing in Person (1974). Buckland, who was not a lawyer, had successfully conducted his own litigation. He then sought to recover from his unsuccessful adversary by way of costs, an amount of money, calculated at an hourly rate, for the time he had spent in looking up the law, preparing documents, and attending court. It was held that Mr. Buckland could recover outofpocket expenses, but he was not entitled to any compensation for time spent in preparation. The English Court of Appeal considered itself compelled to come to this conclusion by a decision in 1984, in the case of *London Scottish Benefit Society* v. *Chorley*.

A similar view has been taken in both Australia and New Zealand and it is likely, though the point is not entirely free from doubt, that *Buckland* v. *Watts* reflects the law in British Columbia as well. it is certainly reflected in the practice of those court officials in British Columbia who have the responsibility of deciding what amounts are payable by the loser to the winner in our courts. The decision has been strongly criticised in England, and the law reform body of at least one common law jurisdiction, South Australia, has recommended changes in the law.

The effect of the present law is not great. With the expansion of civil legal aid services in the past few years, the appearance in court of litigants who prefer to represent themselves is relatively infrequent. The impact of any change in the present law will not, therefore, in the opinion of the Commission, result in any exclusive increase in this phenomenon. On the other hand, there has been growing concern over the issue of citizen access to the courts. For reasons that are explained elsewhere in this Report, it seams to the Commission wrong in principle to force those who, for whatever reasons, prefer to do their own litigation, instead to use the services of a lawyer and to penalize them if they do not. Yet this may be the result of the present condition of the law, and the changes we recommend, though small, will eliminate this anomaly.

We wish to make it clear that in this Report we assume the continued existence of the represent system of allocating the costs of litigation. Our recommendation must be read in that light.

CHAPTER I THE SYSTEM OF LITIGATION COSTS

A litigant who is represented by a lawyer will be charged by that lawyer for the services he has rendered in connection with the litigation. The costs thus incurred by the client are known as "solicitor and client" costs and have two component elements. First, there are *disbursements*, that is, money actually paid out by the lawyer to others, such as for transcripts of evidence, and fees to witnesses, consultants, court registries and so forth. Second, there are fees for such services as consulting with the client, interviewing witnesses, preparing documents, preparation for trial, conduct of the case in court and other activities calling for the exercise of professional skill and judgment.

The relationship between a lawyer and his own client with respect to the payment of the lawyer's bill may be organized in two ways. By far the less common of these two ways is that no specific advance arrangement is made between them, but from time to time during the course of the lawyer's handling of the client's affairs, or at the conclusion of those affairs, the lawyer will present the client with a bill of costs. This bill may be in one of two forms. In rare cases, it will consist of a detailed specification of disbursements made and services performed, with itemized

charges in respect of each. More commonly, however, it will be in what is known as "lumpsum" form. A lumpsum bill contains "a reasonably descriptive statement of the services with a lumpsum charge, and a detailed statement of disbursements," and this procedure is sanctioned by the *Legal Professions Act*.

Upon receipt of a bill, whether in itemized or lump sum form, the client will have two alternatives. He can pay the bill as presented, or he may have it taxed. Taxation is a process whereby a client may have his lawyer's bill reviewed by a court official with a view to determining whether, in all the circumstances, the charges made are reasonable and proper. If the taxing officer finds that the charges made are excessive, he may reduce the amount payable by the client.

The second way in which the relationship between lawyer and client with respect to payment for the lawyer's services may be organized, is for them to make agreements as to the remuneration payable for the services, generally fixing an hourly rate designed to take account of the lawyer's costs, and providing for a fair reward for his professional skill and experience. These agreements are made pursuant to another section of the *Legal Professions Act*, section 108(1), which provides:

> Notwithstanding any law or usage to the contrary, any members of the [Law] Society may contract, in writing, with any person as to the remuneration to be paid him for services rendered or to be rendered to such person in lieu of or in addition to the costs which are allowed to such member.

A lawyer's bill rendered pursuant to an agreement of this kind will not be exempt from review, though the process of review is somewhat different. Section 108(2) of the *Legal Professions Act* empowers the client in these circumstances to apply to a Judge of the Supreme Court, and "if the Judge does not consider the contract fair and reasonable, he may either modify the contract or order the contract to be cancelled, and the costs, fees, charges and disbursements in respect of the business done to be taxed in the same manner as if no such contract had been made." In fact, however, bills rendered by lawyers pursuant to contracts with their clients, are rarely reviewed.

If a litigant is successful in the litigation, the court will normally, but not invariably, order that his successful adversary indemnify him for the costs that he has incurred. The principle upon which this order is based is compendiously stated in the Supreme Court Rules by the provision that "the costs of and incidental to all proceedings in the Court ... shall follow the event." The “event” is success in the litigation. 6. *Harold* v. *Smith*, (1860) 5 H. & N. 381, 385. And *see Ryan* v. *McGregor*, [1926] 1 D.L.R. 476 (Ont. C.A.). The theory of an order that costs shall follow the event is that the unsuccessful party is somehow at fault in commencing or defending proceedings which, having regard to the judgment, ought not to have been necessary, and to that extent must indemnify the successful party for the expense to which he has been put. The costs thus payable by the loser to the winner are known as "party and party" costs.

The terms "indemnity" and "indemnification" as used to describe the system of party and party costs of litigation, are somewhat misleading, and call for a brief explanation. They are used to indicate that party and party costs are payable by the losing side by way of compensation, not as a form of penalty. "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them." The use of these indicates that the successful party may not recover from his adversary more than he has paid out.

9. [1974] 1 W.W.R 13, 18 (Alta.). It does not mean that he will recover all that he has paid out.

The probability is, in fact, that the winner will recover a good deal less than he has paid out. To this extent, then, the word "indemnity" is quite misleading. The indemnity is at best a partial one. The *Bouck-Roberts Report on Reform of the Supreme Court Rules*, for example, analyses a hypothetical case in which the plaintiff claimed, and recovered, $5,000 after a twoday trial. It is suggested in that Report that the client would have to pay his lawyer $1,800, and would recover from his adversary approximately $750.

There are two reasons for this disparity. First, and most important, a review of the extent of the loser's liability to indemnify the winner is accomplished through the process of taxation, already referred to, in accordance with a tariff set out as Appendix N to the Rules of Court. As Justice Clement pointed out in his dissenting judgment in *Paskivski* v. *Canadian Pacific Ltd. and Paskivski*, the tariff "arbitrarily establishes the amount of indemnity that may be recovered in respect of specified items ... without attempting to determine the amount of real or full indemnity." Second, the loser is only required to compensate for those costs "necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them." So, the Rules of the Supreme Court provide that:

> On every taxation the taxing officer shall allow all such disbursements or expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no disbursements or expenses shall be allowed which appear to the taxing master to have been incurred or increased through overcaution, negligence, or mistake, or by payment of special charges or expenses of witnesses or other persons, or by other unusual expenses.

Almost invariably, then, there will be a difference between what the winning party must pay his lawyer in the form of solicitor and client costs, and what he will recover from his adversary in the form of taxed party and party costs, and that difference will represent an outofpocket expense for the victor. in cases where the unsuccessful party is a plaintiff who has claimed damages, this will not be too serious a disparity since the damage award will ordinarily, but not necessarily, be large enough to cover the difference. Where the successful party is a plaintiff claiming nonmonetary relief, however, or a defendant, the matter may be more serious.

The tariff of party and party costs set out in Appendix N to the Rules of Court, is included as an appendix to this Report. It is now under review. It is important that the purpose and effect of the tariff be fully understood. The *BouckRoberts Report*, to which we have already referred, states that:

12. *Supra* n. 8, at 2829.

> ... a system of litigation costs should strike a fair balance between the two concerns or interests of awarding indemnity to a successful litigant, and, on the other hand, keeping costs at a level that permits the average litigant to prosecute a claim.

The tariff seeks to do this to provide some compensation to the winner, without exposing the loser to an unlimited liability. It seeks to do so by specifying the costs which may be recovered, and the rate of recovery, subject to certain overall maximum figures for different kinds of cases. The effect is lucidly explained by Mr. Justice Clement in the *Paskivski* case, to which reference has already been made. The question there was whether the fact that the successful party was a company which was throughout represented by a salaried solicitor, in its employ, affected the amount of costs it could recover. The majority of the Court held that no award of costs could behade for his service. Mr. Justice Clement dissented, saying

> ... costs are taxed on a block tariff. In any view of the matter a block tariff affords only a partial indemnity to the litigant. Solicitorclient costs will usually exceed, and in cases of difficulty may greatly exceed, the costs recoverable under a block tariff. In addition to that, the litigant himself and his employees may well have spent a good deal of time on the case at the expense of his business interests, quite aside from attendances on discoveries and at trial for which the block tariff makes some provision. Such a tariff does not contemplate an inquiry into all of the costs of a litigant in order to provide a full indemnity; it provides a recognition that costs are involved and arbitrarily establishes the amount of indemnity that may be recovered in respect of specified items. I am of opinion that a block tariff recognizes the principle of indemnity without discrimination as between persons and corporations, or as between corporations who engage solicitors and counsel, and those who have them on their staff. There can be no doubt that litigation costs the litigant money either way, and the block tariff measures the indemnity that may be recovered from the losing side, without attempting to determine the amount of a real or full indemnity. I think we should recognize these principles. This leads me to differ from Stuart J. *[Stephens* v.

> *Calgary* (1909), 2 Alta. L.R. 331, 12 W.L.R. 379] in giving the party against whom the taxation proceeds an opportunity to show that the tariff provides more than indemnity. As he points out, it would be impossible to show this in the ordinary case if there is taken into account all of the time and overhead and other matters that would be involved ... as it stands is far from an adequate measure of indemnity to the litigant from any point of view, and I do not think that a corporation should be deprived of its allowances merely because it has a solicitor or counsel in fulltime service ...

Many have expressed severe reservations about both the principle and the mechanics of the socalled "indemnity" system of cost allocation as between party and party and have urged that alternatives he considered. Such a consideration would take us far beyond the terms of reference of this Report, however, and we wish to make it clear beyond doubt that we are concerned here with a limited problem only, and that the continued operation of the "indemnity" principle is assumed throughout.

CHAPTER II COSTS AND THE LITIGANT IN PERSON

Suppose that a litigant acts on his own behalf and is successful. He will clearly have had to make disbursements. He will also have had to spend some time in preparation, whether by way of making factual inquiries or equipping himself to argue such legal questions as may be involved. In other words, he will have had to spend time performing himself tasks that otherwise would have been performed for him by a lawyer tasks in respect of which, had they been performed by a lawyer, he would have been charged for at a rate determined as described in Chapter I. To what extent is party and party indemnity obtainable in these circumstances?

The matter seems first to have arisen in the case of *London Scottish Benefit Society* v. *Chorley*. In that case the defendants, who were solicitors, had acted on their own behalf and were successful. The question arose

> ... whether, where a solicitor sues or defends in person, he is entitled only to such *costs as any other defendant in person would be entitled to viz, the costs outofpocket*, or whether he is entitled to such costs as a successful defendant would be entitled to who does employ a solicitor, saving only such costs as are in the nature of things not chargeable by reason of their being instructions to himself, or matters of a like nature.

In the *Chorley* case, it was argued in particular that since costs are payable by way of *indemnity*, they are only payable in respect of "costs ... incurred or for which they (i.e., the successful party) have become liable." The point was, of course, that no claim to indemnity can arise where no expenses have been incurred. The Queen's Bench Division rejected the argument, Mr. Justice Denman saying:

> Treating the costs as being in a reasonable sense of the word equivalent to an indemnity, I am not aware of any principle which ought to prevent a successful party who is a solicitor, and who does a solicitor's work, from being indemnified not merely for the time he must necessarily expend as a witness in his own case, but also for the pains, trouble and skill which he has to incur and to exercise in order to bring it to a successful conclusion ... The solicitor's time is valuable: he applies his skill to a suit or action in which he is obliged to spend his time and exercise his skill in consequence of the wrongful act of his opponent; and therefore it is not an unreasonable view that the word "costs", in the sense of an "indemnity", should be held fairly to include a reasonable professional remuneration for that work which, if he did not do it himself, would have had to be done by another solicitor and paid for by his unsuccessful opponent.

It will be noticed at once that the premise of this judgment is the proposition that a successful litigant in person who is not a lawyer is entitled only to disbursements. The position of the lawyerlitigant in person was seen as an exception to the normal rule. That this was the assumption is made abundantly clear in the following extract from the judgment of Mr. Justice Manisty:

> The reason why costs are allowed to a solicitor being a party, and not to another person who is not a solicitor, is simply this, that the one is a solicitor and the other is not. For instance, what a strange thing it would be that a person who is not a solicitor should be allowed solicitors' charges. When a party to an action, be he plaintiff or be he defendant, conducts it itself, and is a solicitor, if he is entitled to his costs he is entitled to them as solicitors' costs; and why should he not be ... justice seems to require it. Time is money to a solicitor, and why should he not be as much entitled to his proper costs if he affords the time and skill which he brings to bear upon the business where he is a party to the action as he is where he is not a party.

The decision of the Queen's Bench Division was affirmed on appeal and in the course of his judgment, Lord justice Bowen made some observations about the position of the litigant in person that are worth reproducing:

> > There is a passage in Lord Coke's Commentary, 2 inst. 288, which it is worthwhile to examine, as it affords a key to the true view of the law of costs. That passage is as follows: "Here is express mention made but of the costs of his writ, but it extendeth to all the legal cost of the suit, but not to the costs and expenses of his travel and loss of time, and therefore 'costages' cometh of the verb 'conster,' and that again of the verb 'constare,' for these 'costages' must 'constare' to the court to he legal costs and expenses." What does Lord Coke mean by these words? His meaning seems to be that only legal costs which the court can measure are to he allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course which he takes. Professional skill and labour are recognized and can he measured by law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs; and it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk.

It was the decision in the *Chorley* case that formed the foundation of the later decision in *Buckland* v. *Watts*. *Buckland* v. *Watts* involved a lay litigant in person, with respect to whose position all the statements in *Chorley* were *obiter dicta*, since Mr. Chorley was not a lay litigant. Moreover, the basic rule to which the case of the solicitorlitigant was treated in Chorley as an exception, was in that case assumed. It was one which, so far as appears, had never been directly litigated, although it was no doubt reflected in the practice of the courts. Indeed, *Buckland* v. *Watts* was the first case in which the point had been squarely presented. Nevertheless, the English Court of Appeal in the later case somewhat strangely concluded that it was bound by the earlier decision. As one English commentator observed of the decision in *Buckland* v. *Watts*, "to be bound by precedent is one thing; to be bound by nonprecedent is another."

The judgments delivered in *Buckland* v. Watts *added* little to the reasoning by way of dictum put forward in the *Chorley* case. Lord Justice Danckwerts contented himself with quoting extensively from the judgment of Lord Justice Bowen in the earlier case, and Sir Gordon Willmer added only that:

> > It is because there has been an exercise of professional legal skill that a solicitor conducting his own case successfully is treated differently from any other successful litigant conducting his own case in person. We are not concerned with the exercise of other professional skills. Other professional people, who become involved in litigation and conduct their own case, may recover something in respect of their own professional skill, in so far as they qualify as witnesses and are called as such. But nobody else, except a solicitor, has ever been held as entitled to make any charge, as I understand it, in respect of the exercise of professional legal skills; and it is that which the plaintiff has sought to do in the present case.

The decisions of the Full Court of South Australia in *Willing* v. *Hollobone* and of the New Zealand Court of Appeal in *Lysnar* v. *The National Bank of New Zealand Ltd. (No. 2)*, reaffirm the Chorley decision, but add little, and do not call for any extended discussion.

The only Canadian authority that appears to be directly in point is the early decision in *Millar* v. *Macdonald*, where it was held that while a lay defendant appearing in person was not entitled to anything under the tariff for per-

sonally conducting his oiqm litigation, he should be permitted disbursements, and some allowance, "*but of moderate description*," for his time and trouble on argument. The Court was careful to add, however, that:

> ... this must not be taken as any affirmation that a litigant is entitled to remuneration for personal attendance in Court. This case is exceptional where liberty of the subject is involved and a setoff is available.

The case was "exceptional" because the proceedings related to an unsuccessful attempt to commit the litigant in person to prison for failure to give satisfactory answers on examination as a judgment debtor. As was pointed out by a later Ontario judge,

14. Grant J. in *Midmer* v. *Cunningham & Smith*, (1927) 31 O.W.N. 387, 388.

15. British Columbia Supreme Court Rules, 0. 65, r. 27, M.R. 1002(29). *And see Dassiuk* v. *Waugh*, B.C.S.C. (unreported), Vancouver Registry 2503/1959, *per* Ruttan J. (July 9, 1962). however, the words quoted were *obiter*, and the circumstances of the case were "very peculiar." it should be added, also, that an allowance is made to a litigant who appears as a witness, including in certain circumstances, lost wages as a result of the necessity to prepare to testify. And, in *Lalancette* v. *Walford*, a case which concerned a lawyerlitigant, grudging approval appears to have been given to the *Chorley* case. Moreover, as was pointed out in the introduction to this Report, the principle that a litigant in person is only entitled to disbursements is in fact acted upon by taxing officers in British Columbia.

CHAPTER III THE MERITS OF THE CASE

The effect of the decision in *Buckland* v. *Watts*, has been aptly summarized by one English commentator as being to subject lay litigants in person "to the wellknown equitable doctrine, 'heads I lose, tails you win.'" Thus, if a litigant in person loses, he must pay the other side's taxed costs in full; but if he wins he will be deprived on taxation of the costs that would otherwise have been allowed in respect of time and labour spent in the preparation of the case. On the face of it, this seems to the Commission to be unjust and indefensible. We have come to this conclusion on a number of grounds.

First, as Mr. Justice Rae observed in *Re Dennis and Minister of Rehabilitation and Social Improvement*,

> Access to the Courts should not be interfered with except for the most compelling reasons. If it is sought to deny to a subject the longstanding right of access to Her Majesty's Courts or to deny access except upon payment of a tax, which an intended litigant who is a poor person may be unable to pay, in my view it must be done clearly and unmistakably.

The circumstances of the *Dennis* case were, to be sure, radically different from those under consideration in this Report, but the principle expressed by Mr. Justice Rae seems to us one that must be comprehensive in application. "Every litigant has the absolute right, which ought in no circumstances to be taken from him, of appearing in person, and he ought not to be penalized or discriminated against by reason of exercising that right."

Second, there does not on the face of it seem to be any basis for discriminating between the position of the lawyerlitigant who represents himself and the laymanlitigant who does so. Yet that is the present condition of the law. One justification for this discrimination is that, as it was put in argument in the *Chorley* case,

> ... if solicitors who are themselves parties to an action, are to be disallowed ordinary costs when they act on their own behalf, the practice will render litigation more expensive, for a solicitor will not conduct his own case, but will employ another solicitor, and costs will be incurred which otherwise will be avoided.

This argument was explicitly accepted by two of the judges in *Chorley*, and, in so far as it reflects general concern at keeping costs down, is obviously wellfounded. If the lawyerlitigant feels himself competent to prepare and present his own case, it is obviously a mere convenience, a luxury within the principles governing party and party liability, to force him to employ a second lawyer.

But the argument assumes that the lawyerlitigant in person is competent, and the laymanlitigant is not. It is perhaps gratuitous to observe that not all lawyers are equally competent in all phases of the practice of law; it is no less gratuitous to remark that not every layman is incompetent to represent himself in court. *Buckland* v. *Watts* is itself an illustration of a skillful lay litigant. It is no less an extravagance to force a competent laymanlitigant to employ a lawyer by disallowing him anything other than disbursements, than it is to force a lawyerlitigant to do likewise. The argument applies with equal force to both.

It is no doubt true that there is a greater likelihood of incompetence and inefficiency on the part of lay litigants than lawyers acting on their own behalf in preparing for and presenting a case. It might be claimed therefore, that this justifies the position taken in *Buckland* v. *Watts*, and the practice of the taxing officer in British Columbia. In the opinion of the Commission, however, this is a consideration which goes not to the principle of equality of treatment of litigants, with respect to time and labour expended in preparation for litigation, but rather to the extent of the indemnity that should be allowable to a litigant in particular circumstances.

A further argument against the principle of equal treatment is contained in a passage, quoted earlier, from the judgment of Manisty J. in the *Chorley* case:

> The reason why costs are allowed to a solicitor being a party, and not to another person who is not a solicitory is simply this, that the one is a solicitor and the other is not. For instance, what a strange thing it would be that a person who is not a solicitor should be allowed solicitor's charges ... Time is money to a solicitor ...

Yet, as Mr. Justice Donaldson said of this argument in *Buckland* v. *Watts*,

> This reasoning seems to me, with respect, to be perfectly sound in so far as it justifies the claims of a solicitor litigant, but it also applies, subject to slight modification, to lay litigants. Time is also money to them, and they are entitled to be compensated for having their time wasted. The modification is that their time, being unskilled *visavis* the law, is not, in relation to solicitors' work, worth as much as that of a solicitor, and, accordingly, should be charged at a lower rate. In addition, or alternatively, they should not be allowed to charge actual time spent if and in so far as it took them longer to do the work than it would have done had they been skilled. In any event, the successful party's liability in costs should not be increased by virtue of the fact that the successful party failed to employ solicitors.

Once again, in the Commission's view, the argument goes to the *quantum* of the indemnity, not to the principle of the successful litigant's entitlement to it.

Finally, in *Chorley*, it was suggested by Lord Justice Bowen, in a passage also quoted earlier in this working paper:

> ... only legal costs which the Court can measure are to be allowed ... Professional skill and labour are recognized and can be measured by the law; private expenditure of labour and trouble by a layman cannot he measured. It depends on the zeal, the assiduity or the nervousness of the individual ...

It is not immediately clear why considerations such as "zeal, assiduity, and nervousness" are assumed in this passage to be irrelevant to the position of the lawyerlitigant in person, and relevant to that of the layman. Even if the assumption be accepted, however, the argument seems to go, once again, to the quantum, or level of compensation, and not to the question of principle. But the argument is in any event unsound, since it proceeds from the premise

that the purpose of party and party compensation is to value lawyers' services. That, as we have tried to indicate in Chapter II of this Report, is a misapprehension of the position.

Only one other argument for the present position has been offered. In *Buckland* v. *Watts*, Sir Gordon Willaner claimed in a passage already quoted that lawyers are treated differently with respect to costs, precisely because they have, and exercise, professional skill, whereas nonlawyers do not.

In the opinion of the Commission, this argument is both defective and disturbing in its implication. Its defects are obvious. The New Zealand case of *Lysnar v. National Bank of New Zealand Ltd*. illustrates one of them. Mr. Lysnar was a barrister and solicitor who had successfully conducted his case in person, but had not for some six years prior to the litigation held a practising certificate. He was not entitled to, and did not appear as a solicitor, but as a layman. Mr. Chorley, had no right of audience in the High Court in England as a solicitor. He did as a layman-litigant, and it was in that capacity that he appeared. The rule as formulated discriminates in favour of someone who, though not having practised law in British Columbia for many years, is nevertheless in possession of a current practising certificate in this Province. It may well penalize an experienced and competent trial lawyer from British Columbia, recently retired from active practice, who successfully conducts his own litigation. These results seem to us capricious and illogical.

In any event, as we have already indicated, we consider it a misconception to assert that party and party costs represent charges "in respect of the exercise of professional legal skill," as suggested by Sir Gordon Willaner.

Moreover, the Commission is disturbed at the implications of Sir Gordon Willaner's argument in support of the law as set out in *Buckland* v. *Watts*. Section 72 of the *Legal Professions Act* provides, *inter alia*, that

> ... no corporation and no person other than a member of the [Law]Society in good standing shall, subject to the *Inferior Courts Practitioners Act*, engage in the practice of Law, except that
>
> (a) a person may act on his own behalf in a proceeding to which he is a party ...

The term "Practice of law" is defined by section 111 of the Act to include "(a) appearing as counsel or advocate ... but ... not ... if not done for or in expectation of any fee, gain, or reward, direct or indirect, from any other person." So far as the practice of law is concerned, therefore, no distinction is drawn between the lawyerlitigant in person, and the lay litigant in person. Each is free to practise law on his own behalf.

The principle of *Buckland* v. *Watts*, however, seems to effect an indirect limitation of the freedom reserved to citizens in the *Legal Professions Act* to do their own legal business in person. It does so by employing the sanction of costs to discourage lay litigants from conducting their own cases, thereby providing an incentive to the employment of lawyers.

It might be argued that lay litigants should be encouraged to employ professional legal advisers, or even that they should be forced to do so. There is, indeed, much to be said for this view. The "Justice" *Report on Litigants in Person* offers some of the arguments. Litigants in person

> ... present a problem. They are frequently unable to do justice to themselves and the cause for which they are fighting, getting lost in the procedural maze or missing the points which would carry weight with the court. On the other hand they often unfairly embarrass their opponents or waste valuable time of courts and court officials, either because of their incompetence or because of their overpersistence.

The "Justice" Report catalogues some of the disadvantages and difficulties that the litigant in person presents, both to an adversary who is professionally represented, and to the court system. Their ignorance of procedures often

causes unnecessary expense and delay; they may, by reason of that ignorance, be shown indulgences that leave the represented party with a sense of unfairness; they present difficult problems of professional ethics for counsel acting on the other side. Moreover, they may place the Judge in a compromising position out of his concern to ensure that both sides of a case are properly presented; and Court officials may frequently find themselves being importuned for legal and other advice in circumstances in which they are not permitted to give such advice, or can only do so at some cost to the efficient performance of their duties. Some of these arguments were also made to the Commission by some of those who responded to our working paper.

The Commission concedes all of this. At the same time, we agree with the conclusion of the "Justice" Committee, that to bar the litigant in person would be

> ... wholly unacceptable. To compel a litigant to be professionally represented even if he was provided with a lawyer free of charge. would be too drastic a denial of his right to bring his case before the court and to present it in his way. As we have already pointed out, some litigants in person have succeeded when their lawyers prophesied failure. Some would rather fail than have their pleadings and arguments emasculated, or be forced into an acceptable settlement. We should therefore use all possible means to make legal representation available to those who want it but not make it compulsory for those who do not.

And, the Commission would add, we should not discriminate against these who decline to take advantage of any legal representation available.

For all of these reasons, we consider the law concerning the costs recoverable by a successful lay litigant to be in an unsatisfactory state, and we have concluded that it should be changed.

CHAPTER IV THE COMMISSION'S PROPOSALS

A. The Principles

The Commission has considered a number of approaches to the problem of eliminating the anomalous treatment of the successful lay litigant in person. All of these, it should be emphasized, assure the continued existence of the present system of cost allocation.

1. It might be provided that "a litigant appearing in person who has lost money in having to take time off from work to obtain statements from witnesses, subpoena witnesses and otherwise get up his case should be entitled to reimbursement for the money actually lost, upon satisfactory proof of that matter to a taxing officer." This would result in the litigant in person receiving full compensation from his unsuccessful adversary. The Commission has rejected this approach on two grounds. First, it may well result in the unsuccessful party having to bear a larger burden of party and party costs where his successful adversary is unrepresented than where he is represented, and we consider this to be undesirable. Second, even if this were not the case, in view of the tariff of costs provided for in the Rules of Court, such a change could quite possibly result in a successful lay litigant appearing in person being treated more generously than a successful represented party. In our opinion, this would also be undesirable.

2. It might be provided that successful lay litigants appearing in person should be entitled to be indemnified at a reasonable rate for time necessarily spent in the conduct of their litigation. This would be at some rate less than that charged by a lawyer, since "their time, being unskilled *visavis* the law, is not,

in relation to solicitors' work, worth as much as that of a solicitor." The difficulty with this approach is that some determination would have to be made, first, as to how much less than the time of a solicitor, that of the lay litigant is worth, and second, arguably, whether the time of all nonlawyers is to be valued at the same rate, or at differential rates, and if so, how the differentials are to be established. In the opinion of the Commission, such determinations, in the present context, would be invidious, even if it were possible to make them. In any event and more fundamentally since party and party costs do not, in fact, reflect an economic measurement of lawyers' time, we do not consider this an appropriate standard from which to work.

3. A third approach is that proposed by the South Australia Law Reform Committee:

> Where a successful lay litigant, appearing in person, has lost money in taking time off from work in the necessary preparation of his case, he should be entitled to reimbursement for that loss so far as it is proved to the satisfaction of the taxing officer, provided however that the total cost involved does not exceed the alternative expense of employing a solicitor to act in the matter.

Although superficially attractive, it is the present view of the Commission that the South Australia approach should not be adopted in British Columbia. If it were to be adopted, the result would be irrationally discriminatory. An unemployed litigant in person or an employed litigant who did his preparation outside working hours, would be entitled to no party and party recovery, whereas an employed litigant who took time off from work, would be so entitled. The extent of the recovery of a higher paid person who took time off would be higher than that of a relatively lowerpaid person. In our view, these enquiries should not be necessary, are undesirable, and will prove administratively ponderous and unworkable. A litigant in person should be free to organize the conduct of his legal business in whatever way seems most convenient to him. That, after all, was the essential argument of Mr. Justice Clement's dissent in the *Paskivski* case, to which reference was made in Chapter II of this Report, and it is an argument that the Commission finds fully persuasive.

The principle embodied in that argument is in fact the operative principle now, in relation to party and party taxation of represented litigants. Every litigant, whether represented or not, must perforce spend some time in the preparation of his own litigation. The actual distribution of that preparatory work between the litigant and his lawyer is ordinarily completely irrelevant to his party and party recovery should he be successful.

An illustration will make the point clear. Item 19 of Appendix N to the Rules of the Supreme Court provides for basic recovery by the successful party of $100 for "precaration for trial or hearing with witnesses to be allowed only if actions or proceeding set down, inclusive of taking minutes of evidence of witnesses." That amount is recoverable even if the client interviewed five witnesses and the lawyer only one, or, indeed in the unlikely event that the lawyer was content to accept the client's record of interviews with all witnesses. The fact is that the lawyer spent some time, whether ten minutes or ten days, preparing for trial, and this is sufficient to justify recovery for that preparation under the tariff. The fact that the client did some of the work that might have been done by the lawyer, or that the lawyer did all of it, is simply irrelevant to the recoverability of the $100.

There are other reasons for not adopting the South Australian approach. Lawyers are conditioned to think about the costs of litigation from the very earliest stages of a dispute. Their operations are properly organized and provide for routine recording of time spent and work done. Laymen are not ordinarily similarly wellorganized. The result is that the problem of proof before the taxing office contemplated by the South Australian approach is likely to be a difficult one, not only for the litigant, but also for the taxing officer.

In our view, then, an unrepresented litigant should be as free as one who is represented, to make his own arrangements for the conduct of his legal affairs. The only qualifications to this proposition are that the litigant in per-

son should not be able to claim for activities not covered by the tariff, nor at a higher rate than provided for, in the case of activities that are covered.

In the working paper that preceded this Report the Commission proposed that on a party and party taxation, the successful unrepresented lay litigant should be awarded whatever the tariff allows for those activities covered by it, upon proof that the activities were actually undertaken. We invited comment on this proposal.

The responses to our proposal fell into two categories. First, there were those who argued that adoption of this approach would encourage litigation by vexatious litigants, by gamblers who see litigation as perhaps a risky, but nevertheless, if successful, a worthwhile speculation.

One particular formulation of this argument was that one of the present safeguards against a vexatious *plaintiff* is that a lawyer retained by such a person is potentially liable personally for costs if the matter is vexatious, "and this discourages what no doubt might be a flood of such matters brought before the Courts." The argument is that that risk of personal liability for costs, together with the professional obligation imposed upon lawyers by their Code of Ethics to advise against incautious or hopeless litigation, act as a partial screen. The argument seems to proceed that the knowledge that only disbursements will be recovered operates in the same way as a screen against the cantankerous person contemplating litigating on his own. On this basis, it was suggested that a distinction should be drawn between the entitlement of lay plaintiffs and of lay defendants in person, and that the Commission's proposals should apply only to defendants.

In few of the cases in which the costs issue has ariser has the successful litigant in person been the plaintiff, and it is not possible, therefore, to determine just how important a concern the deterrence of vexatious litigants has been. In those cases which did involve a plaintiff litigant in person, there was no explicit mention of the vexatiousness issue.

In our view, however, the apprehended danger is minimal. For one thing, there exist ample protections against vexatious or speculative litigation, not the least of which is a potential liability in costs as the penalty of failure. Quite apart from this, however, there can be few who would regard litigation as an entertainment, and who fail to recognize the psychological costs involved. If these costs are ignored, and the lay litigant in person is successful, his motives for litigating should be, as they now are, largely irrelevant. If he loses, the concern is irrelevant.

The second category of responses came from those who argued that the proposal made in the working paper went too far. The essence of this view is that, as one respondent put it, since "costs are based on cost," an unrepresented litigant should not be able to recover more than his costs, that is, compensation for the total detriment he has suffered, whether in the form of disbursements, or loss of income, and the like. It was suggested to us that a situation could well occur in which, on an application of the principle proposed by the Commission, a lay litigant might recover more than the total detriment suffered by him. If, for example, he is earning $5 an hour, and gives up one day of work to prepare for trial, his detriment would be some $40, yet, under the tariff, he would recover $100. This would violate the compensation principle. It was accordingly suggested to us that our proposed principle should be qualified by the condition that “the tariff item does not exceed reasonable compensation for the pecuniary cost and other detriment incurred by the litigant in the activities" in respect of which he takes his claim for costs.

We agree that a violation of the compensation principle is possible under our proposal. For the reasons that we have given for rejecting the South Australian approach, however, we think that this is a situation in which purity of principle should give way to administrative convenience and practicality. We would also add that adoption of our proposal would place the unsuccessful litigant in no worse position that he would have been had his successful adversary been legally represented.

In the circumstances, we remain of the opinion exuressed in the working paper, and accordingly recommend that the law be changed to reflect the principle that

> a successful unrepresented lay litigant should, on a carty and party taxation, be awarded whatever the tariff allows for those activities covered by the tariff upon proof that the activities were actually undertaken.

Some apprehension was evident in some of the responses to our working paper, that adoption of our proposed principle might result in the losing party being forced to hear the costs of an outrageously inefficient successful lay adversary. We consider this risk to be minimal. First, as we have already noted, the Registrar has the power to disallow disbursements or expenses he considers to have been incurred improperly. Second, the Court has a general power to disallow unreasonable costs. In any event, the schedule of fees set out in Appendix N is for the most part based upon activities undertaken, not time spent, so that the increased amount of time spent by an inefficient litigant will not impose any significantly larger burden of costs upon his adversary. Our recommendation will not affect any of this.

B. The Mechanics of Change

In *Buckland* v. *Watts*, Mr. Justice Donaldson, speaking of the English rules concerning party and party costs, commented:

> I can see nothing in these sub rules which would disentitle [Mr. Buckland] to some compensation for his loss of time, but, equally, I do not think that this rule was intended to revise the law and practice which thereto had applied in relation to the taxation of the costs of lay litigants in person.

In the opinion of the Commission, this is an accurate reflection of the position in British Columbia. The result is that any change must take the form of a change in the substantive law of costs, and cannot be effected through alterations in the Rules of Court.

If this view is right, it seems to us that the appropriate place to make the change is in the *Court Rules of Practice Act*. Section 4(7) of that Act provides:

> Notwithstanding anything contained in the *Supreme Court Act* or in this Act, the taxation of costs as between party and party, or solicitor and client, shall be governed by, and the Registrar in any taxation of costs shall allow, all such costs, fees, charges, and disbursements as are described in the said *Supreme Court Rules*, *1943*, and the appendices thereto, including Schedules No. 4, 5, and 6 of Appendix M, and Appendix N, to the said Rules, and in the rules, appendices, and tariffs in amendment thereof or substitution therefor in force from ti7e ta time; and Schedules No. 4, 5, and 6 of Appendix M, and Appendix N, of the said *Supreme Court Rules, 1943*, may be altered, added to, varied, amended, or repealed, and other tariffs may he substituted therefor from time to time by Judges of the Supreme Court.

The addition to the *Court Rules of Practice Act* of a further section embodying the principle we have pronosed will effect the appropriate change in connection with proceedings in the Supreme Court of British Columbia, and, by reason of section 42 of the *Court of Appeal Act,* in the British Columbia Court of Appeal. In the case of proceedings in the County Courts, the appropriate place to make the change is in section 161 of the *County Courts Act*.

LEON GETZ, Chairman
RONALD C. BRAY
PAUL D. K. FRASER
PETER FRASER
ALLEN A. ZYSBLAT