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PREJUDGMENT INTEREST: THE LAW, THE THEORY, AND IMPLICATIONS FOR PRACTICE

Zachary Huxley, CPA, CBV, MBA
Guillaume Lafrance, CPA, CBV, CFF, MBA

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INTRODUCTION

This paper addresses prejudgment interest – an issue that is often overlooked by courts, lawyers, and financial experts alike. Such interest is applied to the damage amount (which is already discounted to reflect the risks of the underlying cashflows) in order to compensate the plaintiff for the passage of time between the date of the damages and the date of the court order. The longer this period, the more economically significant the interest award becomes. Despite prejudgment interest's seemingly simple nature, we identify several points of contention regarding its current application. This paper aims to address these issues and provide recommendations for practice. It is structured as follows. First, we explain the research methodology. Next, the relevant aspects of law in Ontario and Quebec are summarized[1], followed by the theoretical literature. We then empirically study certain informative judgments that implicated CBVs as expert witnesses and conclude by discussing the implications for current practice.[2]

METHOD

The groundwork for this paper was established by exhaustively reviewing the pertinent literature. In addition to relevant books, we consulted articles published in academic journals as well as in law- and valuation-focused practitioner journals. This allowed us to deepen our understanding of the theoretical implications of prejudgment interest and to provide better informed recommendations for practice.

We then surveyed the provisions of law on prejudgment interest in Ontario and Quebec, consulted lawyers' blog posts on the matter, and read the judgments highlighted in these posts. We limited our analysis to the jurisdictions of Ontario and Quebec for several reasons. First, these are the largest jurisdictions in Canada. Second, their approach to prejudgment interest contrasts heavily. Therefore, practitioners in other jurisdictions can use one or the other – based on the similarity to their own jurisdiction – to draw conclusions on their own practice. Third, a review of all jurisdictions in Canada would have been needlessly complex for this introductory paper and is therefore left to future research.

Lastly, we collected data from published judgments across Canada that refer to the work of CBVs as expert witnesses over the period January 2000 to October 2021. Relevant judgments were collected through CanLII by using keywords including CBV, EEE, Chartered Business Valuator, and prejudgment interest. Family law judgments were excluded, as prejudgment interest is rarely an issue in these matters. This initial search yielded 81 judgments. The 20 cases for which no damages were awarded – and therefore no interest was calculated – were omitted. After consideration, we also excluded the 12 expropriation cases from Quebec, for which prejudgment interest laws are slightly different. 49 judgments remained, which we read and analysed thoroughly by considering the following questions:

- Was prejudgment interest awarded?
- Was prejudgment interest discussed?
- What rate was applied, and for what reason?
- Was prejudgment interest compounded?
- At what date did the prejudgment interest period start?
- For Quebec cases, was the additional indemnity applied?

Before discussing these empirics, we must first provide context by summarizing the relevant aspects of law.

1 Neither author is a lawyer and nothing in this paper should be construed as legal advice. By summarizing relevant law, we aim only to provide context for the subsequent discussion on the valuation implications of prejudgment interest.

2 The issue of prejudgment interest is a component of the larger debate on ex-ante versus ex-post damage calculations, which has been the subject of recent discussion (e.g., Cohen & Frederick, 2019; Evans & Weil, 2017; Neelands & Ryman, 2019). This paper aims to complement these works by focusing solely and in depth on prejudgment interest.

THE LAW

ONTARIO

In Ontario, the *Courts of Justice Act* (CJA) includes the following provisions:

> 128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order. […]
>
> 128 (4) Interest shall not be awarded under subsection (1) […]
> (b) on interest accruing under this section…

The prejudgment interest rate is published online.[3] It is to be calculated as simple – rather than compounded – interest from the date the cause of action arose. However, Ontario law allows courts to diverge from the pre-established interest rates and periods of application, thereby providing them with considerable discretion:

> 130 (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
>
> (a) disallow interest under either section;
> (b) allow interest at a rate higher or lower than that provided in either section;
> (c) allow interest for a period other than that provided in either section.

This discretion has been affirmed by case law. In *Stellarbridge Management Inc. v. Magna International (Canada) Inc.* (2004 CanLII 9852 (ON CA)), for instance, Cronk, MacPherson, and Armstrong JJ.A. write:

> [85] Trial judges enjoy a wide discretion under s. 130 of the CJA to allow pre- or post-judgment interest at a rate higher or lower than the rate of interest prescribed by the CJA where they consider it just to do so.

What appears to be more contentious, however, is using such discretion to apply interest in a compounded (rather than simple) manner.[4] The hallmark case regarding this issue is *Bank of America Canada v. Mutual Trust Co.* (2002 SCC 43). In its ruling, the Supreme Court of Canada argues that:

> [44] Compound interest is no longer commonly thought to be, in the language quoted in *Costello, supra,* at pp. 492-93, usurious or to involve prohibitively complex calculations. Compound interest is now commonplace. […] The restrictions of the past should not be used today to separate the legal system from the world at large.

The Supreme Court warns, however, that compound interest is not applicable by default and in all cases:

> [55] An award of compound pre- and post-judgment interest will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest as damages. It may be awarded as consequential damages in other cases but there would be the usual requirement of proving that damage component.

The latter scenario is clearly illustrated in *Eli Lilly and Company v. Apotex Inc.*[5] In the initial ruling (2014 FC 1254), Zinn J. allowed for a compound interest award of $75 M on damages totalling $31 M, claiming that "in today's world there is a presumption that a plaintiff would have generated compound interest on the funds

3 https://www.ontario.ca/page/prejudgment-and-postjudgment-interest-rates

4 The simplified argument in favour of such discretion is that section 128(4)(g) of the CJA allows courts to award interest other than as otherwise set out in section 128 if it is payable by another right.

5 This claim, despite being based on the Federal Courts Act (FCA), is pertinent because the provisions on prejudgment interest in the FCA are similar to those in the CJA (see 2014 FC 1254).

otherwise owed to it and also that the defendant did so during the period in which it withheld the funds." This was condemned by the Federal Court of Appeal (2018 FCA 217), which ruled that no such presumption exists in the current state of law: "...loss of interest must be proved in the same way as any other form of loss or damage."[6] The matter was thus returned for reconsideration. In his reconsideration (2019 FC 1463), Zinn J. summarized the proof supporting the loss of interest as damage and maintained his initial ruling. Apotex attempted a final appeal, which was dismissed (2021 FCA 149).[7]

To summarize, in Ontario, the statutory prejudgment interest rate is not final. Courts may allow prejudgment interest at a different rate or for a different period. Moreover, under certain circumstances, courts have the possibility of applying compound interest rather than simple interest as required by 128(4)(b) of the CJA.

QUEBEC

In contrast, the law in Quebec allows for little discretion. The Civil Code of Quebec (CCQ) stipulates that:

> 1618. Damages other than those resulting from delay in the performance of an obligation to pay a sum of money bear interest at the rate agreed by the parties, or, in the absence of agreement, at the legal rate, from the date of default or from any other later date which the court considers appropriate, having regard to the nature of the injury and the circumstances.
>
> 1619. An indemnity may be added to the amount of damages awarded for any reason, which is fixed by applying to the amount of the damages, from either of the dates used in computing the interest on them, a percentage equal to the excess of the rate of interest fixed for claims of the State under section 28 of the Tax Administration Act (chapter A-6.002) over the rate of interest agreed by the parties or, in the absence of agreement, over the legal rate.

No discretion on the base interest rate appears to be allowed: the legal rate of 5% applies in all circumstances in which a rate is not agreed to by the parties. However, courts have discretion in applying an *additional indemnity,* which is then added to the legal rate. This indemnity is revised every quarter and has varied between 0% and 5% over the past two decades, meaning that prejudgment interest is of either 5% (legal rate) or 5-10% (legal rate plus additional indemnity). Moreover, courts may establish the *period* of interest as deemed appropriate.

On the issue of simple versus compound interest, the CCQ states:

> 1620. Interest accrued on principal does not itself bear interest except where that is provided by agreement or by law or where additional interest is expressly demanded in a suit.

In *Agence du revenu du Québec c. Provencher (Succession de)* (2012 QCCA 240), the Court of Appeal of Quebec stressed that the general rule under Quebec civil law is simple interest. Interest on past damages may be capitalized only once, at the date of introduction of the action, after which simple interest at the legal rate (and additional indemnity, if granted) is applied. As Dugré J.C.S wrote in *Grignon c. Major* (2016 QCCS 1416):

> ...simple interest is the rule and compound interest is the exception. It is therefore up to the parties or the legislator to clearly express themselves to create an obligation involving anatocism of interest or a compound return. (our translation)

Overall, the CCQ allows for little variability regarding prejudgment interest: discretion is largely limited to the interest period as well as to the application of the additional indemnity.

6 In the period between the initial judgment and the appeal, however, other judges quoted Zinn J. and awarded compound interest on the same basis (see Davies & Ross, 2018).

7 For another insightful and recent case awarding compound interest, see MDS Inc. v. Factory Mutual Insurance Company (2020 ONSC 1924).

LITERATURE REVIEW

Prejudgment interest, despite its rather clerical appearance, is of vital importance in making plaintiffs whole and may, as exemplified in *Eli Lilly and Company v. Apotex Inc.,* make up a significant component of damage awards. Yet the issue remains largely neglected, including by the plaintiffs who may benefit most from raising the topic (Sénéchal & Gotanda, 2009). In line with others (Bowles & Lewis, 1999; Colón & Knoll, 2017), we believe that financial experts should attempt to assist courts in moving away from legislated rates: courts should instead employ rational methods and assumptions that are relevant to the situation at hand. Though it is up to the judge to determine what is fair in a given situation, it is our belief that applying prejudgment interest in a theoretically informed manner increases the fairness of judicial outcomes. We recognize, however, that CBVs are constrained to employing the methods that are permitted by law (Ault & Rutman, 1999) – hence the value of the previous section.

As we have seen, applicable legislation recognizes that prejudgment interest is required to make a plaintiff whole. Eschewing such interest would fail to consider the time value of money and create the equivalent of an unrequited loan to the defendant. This would not only unjustly enrich the defendant (Sénéchal & Gotanda, 2009), but also exacerbate the defendant's bargaining power relative to the plaintiff, and thereby unfairly increase the plaintiff's pressure to settle (Ault & Rutman, 1999). Thus, despite the potential criticism that prejudgment interest makes defendants liable for interest on debts of which they may be unaware, the benefits far outweigh the inconveniences.

While the courts readily accept prejudgment interest as fair, the same cannot be said for compounding this interest. Contrary to the courts, the literature agrees that the theoretically correct way of calculating prejudgment interest is to apply the selected interest rate in a compound manner (Bowles & Lewis, 1999; Dolgoff & Duarte-Silva, 2016; Sénéchal, 2007). We concur; compound rates reflect modern economic obligations much more accurately than simple interest rates.

What provides considerably more debate in the literature, however, is perhaps the most important question: *What rate should be selected for calculating prejudgment interest?* Here it is important to note that prejudgment interest should not be confused with the discount rate that is applied in determining the damage amount. Damage amounts are first discounted with a rate that encapsulates the risks of their associated lost cashflows, and then prejudgment interest is applied to this amount to account for the passage of time between the damages and the date of the judgment. The remainder of this section is devoted to discussing the relevant options for establishing an appropriate prejudgment interest rate.

Plaintiff's opportunity cost

The first possibility to consider is the plaintiff's opportunity cost. The rationale supporting this choice is that had the damage not occurred, the plaintiff could have invested the funds elsewhere. For instance, the amount may have been invested in the plaintiff's underlying business; in this case, the appropriate rate could be the cost of capital. If the business already held excess liquidity invested in securities, the return on such securities could be an adequate interest rate, or a weighted average that also considers the cost of capital (Bowles & Lewis, 1999).

Thierry Sénéchal is one advocate of the opportunity cost approach (Sénéchal, 2007; Sénéchal & Gotanda, 2009). To him, the plaintiff must be compensated for the lost opportunity of investing the resources. However, he is wary of leaving too much space to subjectivity in setting appropriate interest rates and seeks to avoid "speculation and judgmental calculations" (Sénéchal, 2007, p. 9) as well as "unnecessary battle[s]" (Sénéchal & Gotanda, 2009, p. 529) between experts. He thus concludes that for private enterprises – for which WACC calculations are more subjective than publicly traded companies – the best approximation of a correct interest rate is the sum of the risk-free rate and a market risk premium. This premium, which is calculated by a variety of financial publications, represents the excess of the market return over the risk-free rate for a given period.[8]

8 CBVs will recognize the market risk premium as one of the components of the CAPM calculation.

Unfortunately, this suggestion falls short of being conceptually sound. Sénéchal and Gotanda (2009) argue that their method is better than using a simple risk-free rate because it results in a higher rate that better reflects the plaintiff's opportunity cost. While that may be the case, there is no conceptual support for using market risk as a proxy for the opportunity cost of private enterprises. The method may be objective, but it fails to represent anything that is tied to the case at hand.[9]

Moreover, opportunity cost approaches in general, erroneously assume that the damage amount is submitted to the same business or market risks as the rest of the plaintiff's assets (Evans & Weil, 2017). The substance of the matter is that the plaintiff can not and does not take such risks with the damage amount: "In depriving the plaintiff of an asset worth Y at time 0, the defendant also relieve[s] it of the risks associated with investment in that asset."(Fisher & Romaine, 1990, p. 146). By virtue of a simple risk-return analysis, it appears that rates derived from opportunity cost overcompensate the plaintiff and therefore should be rejected.[10] Indeed, the damage award is subject to only one significant risk, as we will see in the following subsection.

Defendant's borrowing rate

The approach for which there is most consensus in the literature is the "coerced loan" theory, which is based on the premise that damages create an involuntary lender-debtor relationship between the plaintiff and the defendant (e.g., Bowles, 2008; Losey, Mass, & Li, 2002). The rationale, first established in the seminal work of Patell, Weil, and Wolfson (1982), is that damages imply that the defendant owes money to the plaintiff in much the same way as if the former had issued a promissory note to the latter. Under this conceptual understanding, the only real risk to which plaintiffs are exposed in the prejudgment period is the defendant's default risk (Evans & Weil, 2017). The prejudgment interest rate that best captures this default risk is the defendant's unsecured borrowing rate (Colón & Knoll, 2017; Evans & Weil, 2017).

The prior reasoning holds under the assumptions that the parties have ready access to capital markets and that the parties' investors possess diversified holdings (i.e., not solely in the litigating entities). But what of privately held corporations and individuals? In such cases, the capital foregone on account of the damages is not easily replaceable through capital markets and may have been fruitfully invested had it been available. Recall that the loan to the defendant is *imposed*. If the plaintiff's wealth is involuntarily tied up in the defendant's "promissory note", the plaintiff now bears unsystematic risk which is not accounted for in the defendant's borrowing rate (Colón & Knoll, 2017). In such cases, we concur with Colón and Knoll's recommendation:

> Although adjusting the prejudgment interest rate to reflect the affected individuals' diminished utility has theoretical merit, the mechanics of making such an adjustment are unclear because it depends on subjective information from the individual. We thus recommend that plaintiffs seeking to argue for a higher interest rate on the grounds that they would be undercompensated by the use of the defendant's cost of unsecured borrowing be prepared to show that they have a large portion of their wealth tied up in the litigation and cannot readily diversify their risk of the defendant defaulting; practitioners representing the defendant should be ready to rebut these arguments. (p. 16)

The coerced loan approach also has its critics. Dolgoff and Duarte-Silva (2016), for instance, claim that because the award is given on an ex-post basis, there is no default risk to be accounted for: either the defendant has already defaulted and therefore nothing is paid anyway, or there is no negative realization of the default risk and therefore it should not be considered:

> It is a basic principle of valuation that sunk costs are irrelevant in determining the value of an asset. Likewise, "sunk" default risk is irrelevant to determining the present value of a claim against a borrower. (p. 105)

9 See also the subsection on statutory rates on page 8.

10 In the rare event that the plaintiff's opportunity cost is less than the defendant's cost of debt (e.g., for a defendant facing bankruptcy – see subsection Defendant's borrowing rate), the plaintiff would be undercompensated by using a rate derived from opportunity cost.

From this perspective, the appropriate prejudgment interest rate would thus be the risk-free rate. The issue with this line of argumentation is that it disregards the prejudgment period and focuses exclusively on the present. Recall that the entire *raison d'être* of prejudgment interest is to compensate plaintiffs for the delay between the date of the damages and restitution at judgment date. We have argued in the previous subsection that during this period, plaintiffs are relieved of the risks associated with investing the damage award. However, plaintiffs *do* take on default risk, albeit involuntarily. That the amount is awarded at the end of the period does not mean that no risk is borne by the plaintiff: it only means that the materialization of the risk – or lack thereof – has become known. In the prejudgment period, nothing is "sunk": the default risk exists and should be compensated.[11]

Statutory rate

Another option to consider is a statutory rate set by legislation. As we have seen, such a rate exists both in Quebec and in Ontario. Predefined rates have the advantage of simplifying matters, but there is little (if any) conceptual support for them. As Colón and Knoll (2017) argue, by virtue of being dissociated from the defendant's underlying business, rates established with a fixed method (either legislation-determined or by other means such as market risk premiums) fail to reflect the defendant's actual default risk. If the statutory rate is higher than the defendant's debt rate, the plaintiff will be overcompensated and consequently incentivized to delay proceedings. In the opposite case, it is the defendant who is incentivized to delay as a means of obtaining inexpensive financing, though certain provisions of civil procedure may prevent such tactics.

Risk-free rate

The final option is a risk-free rate, for which treasury bill yields are generally used as proxy. This is the position taken by Dolgoff and Duarte-Silva (2016) as well as Fisher and Romaine (1990). Though the latter agree with the conceptual understanding of the damage award as an involuntary debt "owed" by the defendant to the plaintiff, they consider that the defendant's default risk is part of the risks of litigation and therefore should not be compensated. As we have mentioned in the subsection on the defendant's borrowing rate, in our view there is no valid conceptual reason to exclude the consideration of default risk, and therefore the risk-free rate fails to adequately compensate the plaintiff.

Analysis

The previous literature review has allowed us to identify the most appropriate prejudgment interest rate, i.e., one that is based on the defendant's cost of borrowing. It has also shed light on the chasm between what is theoretically sound and what courts in Quebec and Ontario are currently applying. Statutory rates – from which Quebec courts are notably forbidden to diverge – fail to reflect the real risk undertaken by plaintiffs and therefore over- or under-compensate them, unless the statutory rate fortuitously corresponds to the defendant's cost of borrowing. Moreover, prejudgment interest rates are usually not compounded, although there is no economic reason not to do so. We therefore advocate for a paradigm shift in which CBVs actively pursue more economically reasoned outcomes by suggesting prejudgment interest rates that differ from those provided by law. In the following section, we review select cases in which CBVs were implicated and in which prejudgment interest was, or could have been, a relevant issue (see Appendix A for a list of consulted judgments).

11 To illustrate, suppose that a defendant really does write a promissory note to a plaintiff on date X (date of the damages) to pay back $100 on date Y (judgment date). The interest rate that the parties agree to undeniably takes the defendant's default risk into account. Suppose one were to value the promissory note at date Y: no one would reasonably claim that the note is worth only $100 because it is known at date Y that the defendant did not end up defaulting. The plaintiff is owed $100 plus the interest to compensate for the default risk incurred during the period.

CASES IMPLICATING CBVs

Ontario

The first case we consider is *Eli Lilly Canada Inc. v. Teva Canada Limited* (2017 FC 88), in which the plaintiff sought compensation "for having been prevented from coming to market in 2006-2007 with a generic version of a medicine called olanzapine". The plaintiff further sought prejudgment interest at 4.5%, which is the rate provided by the CJA for the start of the damage period. Damages were awarded. However, the CBV employed by the defendant successfully convinced the court to consider the decrease in interest rates between the start of the damage period and the date of judgment, and thus to ignore the presumptive rate. Prejudgment interest was awarded at a variable (lesser) rate.

Though the court ultimately selected a prejudgment interest rate that was presumably much lower than the defendant's cost of borrowing – thereby undercompensating the plaintiff – the case demonstrates that CBVs have the opportunity as well as the required expertise to assist courts in selecting prejudgment rates that differ from those that are pre-established.

This is not to say, however, that courts are naïve on this matter. In *Jones Feed Mills Ltd. V. Maxwell Raivio* (2014 ONSC 4298), the plaintiff sought the payment of unpaid invoices and the defendant counterclaimed for damages caused by contaminated rabbit feed. The counterclaimant's CBV calculated the lost gross margin and then applied an interest rate of 15.1%, arguing that the counterclaimant had to use his credit cards to manage the negative cashflow incurred. This was rightfully disputed as irrelevant by the plaintiff's CBV. The court indicated its preference for the prescribed rate in this case before ultimately rejecting the counterclaim.

Such cases, in which valuation experts debate on prejudgment interest considerations, are notable exceptions. In most of the consulted judgments, no mention is made as to any debate regarding the appropriate rate of interest. Consider, for instance, *2287913 Ontario Inc. v. ERSP International Enterprises Ltd.* (2021 ONSC 6756). In this case, the claim was for lost profits that resulted from a hot tub manufacturer's failure to provide reasonable notice for termination of a business agreement with one of its dealers. Two CBVs provided expert testimony as to the quantum of damages. One concluded that $832,324 in profits were lost, while the other limited damages to $205,976. The court adjudicated that $565,365 was the appropriate amount.

Prejudgment interest was awarded "in accordance with ss. 128 and 129 of the Courts of Justice Act", despite the discretion available to Ontario courts on this matter. The published judgment contains no mention of any debate regarding the appropriateness of the statutory interest rate by either the plaintiff's expert or the defendant's. Yet the damages were incurred ten years before the judgment date, which implies that prejudgment interest was an economically significant issue. Since 2011, statutory rates in Ontario have varied between 0.5% and 2.0%, which is well below the expected cost of unsecured debt for private entities over the same period.[12] This means that the plaintiff was undercompensated, having "lent" $565,365 to the defendant over ten years with no reward for the incurred default risk. Cases like this one illustrate the relevance of debating prejudgment interest at trial in an effort to provide more economically justified judicial outcomes.

12 Especially given that the default option in the CJA is simple interest.

Quebec

As previously mentioned, the law in Quebec allows for considerably less discretion on the matter of prejudgment interest. Nevertheless, we conducted an analysis of 33 court judgments from the last two decades in which CBVs were called upon as expert witnesses. This analysis reveals the following insights:

1) Prejudgment interest (which is fixed at a base rate of 5%[13]) is granted in nearly every case (32/33). Interest was denied in a single case (2002 CanLII 3990), despite the valuation date being two years prior to the judgment date. The published judgment makes no mention of the reasons underlying the decision nor of any debate on the appropriateness of neglecting interest.
2) The additional indemnity (which has varied between 0 and 5% over the studied period) is also granted in nearly every case (29/32). It was refused in *Dion c. Dion* (2019 QCCS 3074) because the court deemed that tax advantages offset the damage caused by delay of proceedings, and in *Cuscuna c. Ferrarelli* (2017 QCCS 2475) because the court felt that it would be unfair to grant it in a period of low inflation. In *Wart c. Beauchemin* (2018 QCCS 2277), the judge made no mention of additional indemnity.
3) Interest accrues either from the date of the initial notice letter (4/32), the date of service of the action (18/32), the valuation date of the damage calculations (5/32), or another date (5/32).

The overall conclusion is, as expected, that there is considerably less potential debate and variability of outcomes in Quebec than in Ontario. The only issue for which courts appear to consistently apply discretion is the starting date for the calculation of prejudgment interest. For instance, in *Experts-conseils RB inc. c. Ste-Marthe-sur-le-Lac (Ville de)* (2015 QCCS 3824), the defendant claimed that because the plaintiff was slow in preparing his case, prejudgment interest should start later than the date of service of the action. The judge agreed. In *Bois Américana inc. c. Corporation Polystar inc.* (2016 QCCS 6255), the defendant made the same claim, but the judge felt that the fault regarding delays was shared and thus maintained the date of the initial notice letter as the start of the interest period.

DISCUSSION AND CONCLUSION

On the matter of prejudgment interest, we have thus far summarized the relevant legal aspects, reviewed and discussed the theoretical literature, and highlighted pertinent judgments that implicated the work of CBVs. Taken together, this analysis leads us to conclude that the current situation is rather problematic. In clear incongruity with theoretically sound alternatives, courts fail to compound prejudgment interest and to apply rates that reflect the underlying cases' economic considerations. Moreover, the differences between jurisdictions are notable, meaning that litigants may be adversely or positively affected depending on the province in which the trial takes place.

Consider once more the case of the hot tub manufacturer and its dealer (2021 ONSC 6756). Given that no discussion on prejudgment interest occurred, the judge ordered simple interest at the CJA-defined rate. According to our calculations, this led to $73,860 in prejudgment interest on a $565,365 damage award. Had the action taken place in Quebec, the interest award (5%, simple) would have been $283,844. Including additional indemnity, which is nearly always granted, the interest award would have been $344,683, more than 4.5 times the Ontario amount![14]

13 Unless a contractual rate is agreed to between parties (see, for instance, 2016 QCCS 3555 and 2019 QCCS 762).

14 Date of judgment is October 12, 2021, date of damages is September 27, 2011, and applicable interest in Ontario is 1.3%. Quebec interest amounts were calculated with the Barreau du Québec's online calculator.

But which jurisdiction is correct? In our opinion, the answer is neither. To account for the default risk incurred by the withholding of the damage award, the court should have considered the defendant's cost of unsecured debt, which is impossible when applying legislated rates that are independent of the case at hand. Moreover, the plaintiff's unsystematic risk, if any, should have been considered, and the interest should have been compounded.

We encourage CBVs in Ontario and other jurisdictions that allow judicial discretion on prejudgment interest rates[15] to raise the issue of interest when providing expert testimony to the courts, and when appropriate to favour rates that are congruent with the coerced loan theory. As we have seen, the resulting amounts are material relative to the damage award. We believe that augmenting the conceptual soundness of damage awards concurrently enhances their fairness, and thus CBVs should assist courts in applying judicial discretion where possible.

For jurisdictions like Quebec, this paper contributes by demonstrating the issues created by prohibiting judicial discretion. Thankfully, in Quebec the prescribed rate of 5% plus additional indemnity may be a reasonable proxy for the average entity's contemporary unsecured cost of borrowing. For instance, in the aforementioned example, applying the legal rate plus additional indemnity would lead to an implied compound interest rate of 4.9%, which may be a reasonable estimate in the circumstances. However, market conditions change rapidly, and predetermined rates can never fully capture the nuances of particular situations. CBVs in Quebec must be aware that courts have little say in the matter and therefore concentrate their efforts on determining if the additional indemnity should be granted or denied as well as establishing the relevant date for the start of the interest period. These questions should be discussed with counsel as early as possible in the engagement.

15 A cursory glance at relevant statutes indicates that this includes all Canadian provinces save Quebec and Prince Edward Island.

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APPENDIX A. CONSULTED JUDGMENTS

REFERENCE	JURISDICTION	DATE	AWARD BASIS	SELECTED RATE	DATE
2012 ABQB 334	Alberta	2012-05-18	Business value	None	N/A
2014 ABQB 498	Alberta	2014-08-13	Business value	Legal	Damage calculation
2016 ABQB 492	Alberta	2016-09-06	Business value	Unspecified	Unspecified
2004 BCSC 222	B. Columbia	2004-02-18	Personal injury	Legal	Unspecified
2007 BCSC 1780	B. Columbia	2007-12-11	Business value	Unspecified	Unspecified
2017 FC 88	Federal	2017-04-04	Lost profit	Court-established	Damage calculation
2018 CF 1302	Federal	2018-12-21	Lost profit	Legal	Unspecified
2002 MBQB 230	Manitoba	2002-08-15	Business value	Legal	Unspecified
2004 MBQB 202	Manitoba	2004-06-29	Business value	None	N/A
2008 NSSC 10	Nova Scotia	2008-01-14	Lost profit	Left to parties	Damage calculation
2009 NSSC 280	Nova Scotia	2009-09-21	Lost profit	Left to parties	Damage calculation
2017 NSUARB 124	Nova Scotia	2017-07-26	Lost profit	Court-established	Damage calculation
2013 ONCS 7504	Ontario	2013-12-05	Business value	None	N/A
2014 ONSC 4298	Ontario	2014-07-21	Lost profit	Legal	Damage calculation
2021 ONSC 6756	Ontario	2021-10-12	Lost profit	Legal	Unspecified
2003 SKQB 533	Saskatchewan	2003-12-12	Personal injury	Unspecified	Damage calculation
2000 CanLII 19200	Quebec	2000-07-14	Business value	Legal + AI*	Service of the action
2001 CanLII 39766	Quebec	2001-09-06	Business value	Legal + AI	Other
2002 CanLII 11294	Quebec	2002-06-27	Lost profit	Legal + AI	Other
2002 CanLII 3990	Quebec	2002-08-05	Business value	None	N/A
2004 CanLII 14237	Quebec	2004-05-28	Business value	Legal + AI	Service of the action
2004 CanLII 7546	Quebec	2004-08-25	Personal injury	Legal + AI	Damage calculation
2004 CanLII 50026	Quebec	2004-12-10	Business value	Legal + AI	Service of the action
2007 QCCS 2451	Quebec	2007-05-25	Lost profit	Legal + AI	Service of the action
2008 QCCS 2950	Quebec	2008-06-30	Business value	Legal + AI	Service of the action
2008 QCCS 3725	Quebec	2008-09-09	Business value	Legal + AI	Other
2009 QCCS 5109	Quebec	2009-10-23	Lost profit	Legal + AI	Service of the action
2010 QCCS 794	Quebec	2010-02-24	Business value	Legal + AI	Service of the action
2011 QCCS 7084	Quebec	2011-12-21	Business value	Legal + AI	Service of the action
2012 QCCS 3492	Quebec	2012-07-23	Lost profit	Legal + AI	Damage calculation
2013 QCCS 6540	Quebec	2013-12-19	Business value	Legal + AI	Service of the action

REFERENCE	JURISDICTION	DATE	AWARD BASIS	SELECTED RATE	DATE
2014 QCCS 5831	Quebec	2014-11-25	Business value	Legal + AI	Damage calculation
2015 QCCS 1209	Quebec	2015-03-30	Business value	Legal + AI	Damage calculation
2015 QCCS 138	Quebec	2015-01-20	Lost profit	Legal + AI	Service of the action
2015 QCCS 3824	Quebec	2015-08-14	Business value	Legal + AI	Other
2016 QCCS 3555	Quebec	2016-07-27	Business value	Legal + AI**	Service of the action
2016 QCCS 4912	Quebec	2016-09-28	Lost profit	Legal + AI	Other
2016 QCCS 5092	Quebec	2016-10-24	Lost profit	Legal + AI	Notice letter
2016 QCCS 6255	Quebec	2016-11-29	Business value	Legal + AI	Notice letter
2017 QCCS 2122	Quebec	2017-05-24	Lost profit	Legal + AI	Notice letter
2017 QCCS 2475	Quebec	2017-06-06	Business value	Legal	Service of the action
2017 QCCS 5058	Quebec	2017-11-22	Lost profit	Legal + AI	Service of the action
2018 QCCS 1051	Quebec	2018-03-06	Lost profit	Legal + AI	Service of the action
2018 QCCS 2277	Quebec	2018-04-18	Business value	Legal	Service of the action
2018 QCCS 3538	Quebec	2018-09-05	Contentious	Legal + AI	Service of the action
2019 QCCS 762	Quebec	2019-03-07	Unpaid debt	Legal + AI**	Service of the action
2019 QCCS 1440	Quebec	2019-04-18	Lost profit	Legal + AI	Notice letter
2019 QCCS 3074	Quebec	2019-06-27	Business value	Legal	Damage calculation
2020 QCCS 1794	Quebec	2020-06-11	Lost profit	Legal + AI	Service of the action

* AI = additional indemnity

** These judgments have a debt component in which the contractual rate between parties is also applied.