

**MAXIMIZING COSTS RECOVERY
FOLLOWING A MOTION OR APPLICATION**

Presentation for the Peel Law Association

June 23, 2009

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Biography

Edwin G. Upenieks

Ed Upenieks is a partner in the Brampton law firm of Lawrence, Lawrence, Stevenson LLP. He has been involved as counsel in some of Ontario's leading costs cases, having represented over 40 law firms on costs matters. He is certified as a Specialist in Civil Litigation and has extensive trial and appellate experience before the courts and specialized administrative tribunals.

Ed has lectured on costs to the Ontario Bar Association, LawPro, the Law Society of Upper Canada, The Advocates Society, the Ontario Trial Lawyers Association, the Peel Law Association, the Simcoe Law Association, the Young Lawyers' Division East - Ottawa, and the Institute of Law Clerks of Ontario.

Ed co-authored *Enforcing Judgments and Orders*, a standard textbook that includes a section on costs awards, solicitors' liens and charging orders, and is working on a practical costs textbook.

Ed was called to the Ontario Bar in 1983 and is a graduate of Osgoode Hall Law School.

Ed may be reached by phone at 905-452-6873 or by e-mail at eupenieks@lawrences.com.

COSTS ON MOTIONS AND APPLICATIONS

Rule 57.03 requires the judge or master to fix the costs of a motion at the time of the hearing of the motion, unless it is an “exceptional case”. In that situation, costs are to be assessed by an assessment officer. Rule 57.01(7) provides that the Court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs.

Rule 57.01(6) requires that a costs outline (Form 57B) be prepared for a motion or application.

A Bill of Costs (Form 57A) is not required except on:

- trials
- a motion that disposes of a proceeding (for example a successful summary judgment motion or a successful motion to dismiss the action) and
- applications

This means that you are always required to prepare a costs outline for a motion, but for an application, you must prepare both a bill of costs and a costs outline.

Although the forms are similar in substance, one important difference is that counsel are required to serve and file the Bill of Costs but are not required to file the costs outline, although the costs outline should be provided to opposing counsel.

You may find that if you don't prepare a costs outline, your request to fix costs will be rejected.¹

¹ *Beneficial Investment, (1990) Inc. v. Hong Kong Bank of Canada* [2006] J. No. 1428 (S.C.J.)

In one case, Justice Ducharme stated as follows:

“There is no excuse for a party’s failure to file costs submissions in the proper form as required by the *Rules*. Where a party fails to do so, a court can disallow some or all of the costs claimed based on the lack of specificity of the claim or the inadequacy of the supporting material.”²

It is also important to follow any direction from the court regarding the length of any submissions. In one decision, Justice Flinn had specifically ordered that the costs submissions were not to exceed 3 pages in length. Counsel for one of the parties submitted a much longer volume containing 13 different tabbed documents. Justice Flinn ordered costs against that party and their solicitor personally for violating his order.³

As noted above there is no formal service required under the Rules, but counsel are to provide copies of the costs outline to all parties prior to the beginning of the proceeding.

On the flip side, if you are successful following a motion, I would caution you to not overreach. Don’t charge for all of the time spent since the opening of the file and expressly indicate that in your costs submissions. Before providing any dockets, make sure that anything privileged, sensitive or embarrassing is deleted from the dockets.

² *Sherman v. 21 Degrees Heating & Air Conditioning Inc.* (2006), 2006 CarswellOnt 4587, 2006 WL 2065506 (S.C.J.)(eC) at para. 9 [*Sherman*].

³ *Re Van Spengen Estate*, (2006), 80 O.R. 3rd 317 (S.C.J.)

THE THREE STEP PROCESS TO ASSESS COSTS

There has emerged a three step process to assess or fix costs. The starting point is a critical analysis of the dockets and the hourly rates. The second step is to step back and to determine what is fair and reasonable. The third step is to determine the reasonable expectations of the losing party.

In *Murano v. Bank of Montreal* ⁴ the Court of Appeal indicated that the fixing of costs requires a critical examination of the work performed.

A critical examination should include a responsible analysis of the work done, a review of the elements of the work, a testing of the dockets and an overall weighing of the value of the work, taking into account the factors enumerated in the Rules. ⁵

One approach to critical examination, which is endorsed by various cases,⁶ is that put forward by Justice Nordheimer in *Pearson v. Inco Ltd.*:⁷

“First, I will review the amounts sought in the bills of costs and set amounts which appear appropriate in light of the provisions of the cost grid. I will then address whether the resulting amounts are reasonable to fix as the costs in light of the factors in rule 57.01(1) as well as a consideration of what is a reasonable amount for costs in the overall context. This latter consideration must play a role in fixing costs.”⁸

As the Court of Appeal states in the leading case of *Boucher v. Public Accountants Council (Ontario)*, the fixing of costs does not begin and end with a calculation of hours times rates.⁹

⁴ (1998), 41 O.R. 3rd 222, [1998] O.J. No. 2897 C.A.

⁵ *BNY Financial Corp. Canada v. National Automotive Warehousing Inc.*, [1999] O.J. No. 1273 (Ont.Gen.Div. [Commercial List], at para. 7.

⁶ See, for instance, *Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band*, 2004 CarswellOnt 2106 [Anishnabe].

⁷ [2002] O.J. No. 3532 (S.C.J.).

⁸ *Anishnabe*, *supra* note 38 at para 5.

⁹ 71 O.R. (3d) 291 [Boucher].

Perhaps Justice Farley put it best in one of his decisions:

“I have been on record for a long time counselling against the prevalence of legal accounts being the product of a mindless multiplicand of an hourly rate times docketed hours. It may look precise – but it is not functionally accurate. It rewards inefficient work. It tolerates diversionary work. It presumes there is no wheel-spinning. It does not recognize that there should be a premium in certain cases where there is a beneficial and timely (early) resolution of matters (beneficial not only in the sense of the narrow limits of the legal case, but also something which allows the party to get on with its (personal or business) life without the uncertainty and frustration of a lawsuit overhead. Rather essentially the question to be considered is what is the case reasonably worth in the circumstances.”¹⁰

DOCKETS

- dockets should not be lump sums – each task should have a separate entry
- dockets should be descriptive
- dockets should be detailed
- dockets as provided should not contain privileged, sensitive or embarrassing information

COSTS OUTLINES

- the approach by Power, J.: time less 10% \times 2/3 = partial indemnity costs
- where appropriate, seek substantial / full indemnity costs
- don't overreach
 - don't seek every last penny
 - getting it could be grounds for an appeal
 - round down
 - always consider what would happen if matter was overturned on appeal

¹⁰ *BNY*, *supra* note 37 at para. 5.

- fees claimed cannot exceed actual rates
 - institutional discounts must be passed on
- exchange prior to attendance in court (ie. the morning of, outside the courtroom)
- seek agreement - win, lose or draw
 - ie. this may be subject to more disbursements for the moving party
- opposing party's outline can be a yardstick
 - but is not determinative

PENALIZING BAD CONDUCT

- by parties
- by counsel
- courts hammer those who act inappropriately

COSTS AS A LEVELLING GROUND

- in an all or nothing dispute
- "the great equalizer"

LEAVE TO APPEAL COSTS

- the test is an error in principle, or that the decision is plainly wrong, emphasizing the importance of helping the judge get it right the first time

KEEPING YOUR CLIENT INFORMED

- get a retainer agreement
- bill regularly or at least advise of your work-in-progress
- manage their expectations regarding recovery/ payment
- ensure they understand increasing costs consequences at each stage
- use offers to settle
- put it in writing

SAMPLE COSTS OUTLINES

Full Indemnity **Appendix "A"**

Substantial Indemnity **Appendix "B"**

Partial Indemnity **Appendix "C"**

THREE COST CASES YOU SHOULD KNOW

1. Carpenter et al. v. Malcolm (1985), 6 C.P.C. (2d) 176 **Appendix "D"**
(Ont. H.C.J. Catzman, J.)

2. BNY Financial Corp.-Canada v. National Automotive **Appendix "E"**
Warehousing Inc., [1999] O.J. No. 1273 (Ont.C.J. Gen.Div.;
Farley, J.)

3. Boucher v. Public Accountants Council (Ontario) (2004), **Appendix "F"**
48 C.P.C. (5th) 56, (Ont.C.A. Abella, Armstrong, Cronk JJ.A.)

RULE 57 - COSTS OF PROCEEDINGS **Appendix "G"**

APPENDIX "A"

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Plaintiff

- and -

Defendants

COSTS OUTLINE

Full Indemnity Basis

The Plaintiff provides the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

Fees (as detailed below)	\$	7,770.50
Estimated lawyer's fee for appearance	\$	612.50
Disbursements (as detailed below)	\$	1,009.31
G.S.T. on Fees		388.54
Total	\$	9,780.85

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

- the Plaintiff obtained an excellent result – has obtained judgment to transfer title of property to a judgment debtor and will secure payment to her for monies owed to her by the Defendant
--

- the complexity of the proceeding

- of average complexity

- the importance of the issues

- extremely important to the Plaintiff as this is quite likely the only way to ultimately obtain payment on the judgment obtained against the Defendant

- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

n/a

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

n/a

- a party's denial of or refusal to admit anything that should have been admitted

n/a

- the experience of the party's lawyer

- most of the time expended was by a senior clerk and the actual hearing was attended to by a lawyer recently called to the bar

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEM <i>(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc)</i>	PERSONS <i>(identify the lawyers, students and law clerks who provided services in connection with each item together with their year of call, if applicable)</i>	HOURS <i>(specify the hours claimed for each person identified in column 2)</i>	FULL INDEMNITY RATE <i>(specify the rate being sought for each person identified in column 2)</i>	ACTUAL RATE*
preparation of statement of claim; prepare affidavit of documents	E. Upenieks (1983 call)	2.3	350.00	350.00
	Laura Desroches Senior Law Clerk	6.0	140.00	140.00
preparation of motion for Certificate of pending litigation; preparation and attendance on motion for certificate of pending litigation; preparation of certificate of pending litigation; registration of certificate of pending litigation	E. Upenieks (1983 call)	.3	350.00	350.00
	Robert Ryan (2008 call)	5.1	175.00	175.00
	Laura Desroches Senior Law Clerk	2.5	140.00	140.00
	Fatima Pavao Law Clerk	.5	140.00	140.00
preparation of motion form and supporting affidavit; research; preparation of factum and authorities; confirmation of motion; prepare order; prepare costs outline	Laura Desroches Senior Law Clerk	5.2	140.00	140.00
	E. Upenieks (1983 call)	.6	350.00	350.00
	K. Hood (1982 call)	4.5	350.00	350.00
	Miel McGerrigle (2004 call)	1.1	200.00	200.00
	Student-at-Law	11.6	125.00	125.00
preparation for hearing	R. Ryan (2008 call)	3.0	175.00	175.00

* Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

- any other matter relevant to the question of costs

- this action and motion was necessitated by the fraudulent conduct of the Defendants and the Plaintiff should not be penalized by receiving less than full indemnity for her legal costs

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: _____

LAWRENCE, LAWRENCE, STEVENSON LLP
Barristers & Solicitors
43 Queen Street West
Brampton ON L6Y 1L9

Edwin G. Upenieks
Tel : 905-451-3040
Fax: 905-451-5058

Lawyers for the Applicant.

RCP-E 57B (July 1, 2007)

Disbursements:

Issue Statement of Claim	\$181.00
Notice of Motion x 2	254.00
Photocopies incl. GST (591)	200.81
Issue CPL	22.00
Land registry registrations	60.00
Process Server Fee incl. GST	<u>291.50</u>
	\$1,009.31

APPENDIX “B”

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Plaintiff

and

Defendants

COSTS OUTLINE

Substantial Indemnity Basis

The Defendants provide the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

Fees (as detailed below) on a substantial indemnity rate	\$33,422.50
Counsel fee for appearance	\$2,000.00
Disbursements (as detailed in the attached appendix)	\$994.50
Total	\$38,417.00
GST @ 5%	\$1,920.85
Total including GST	\$40,337.85
Total Claimed	\$36,000.00

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

-the amount claimed and the amount recovered in the proceeding

\$258,873.71, plus interest and costs claimed, being a substantial amount, and nothing recovered

-the complexity of the proceeding

-Plaintiff raised numerous complex legal issues that had to be responded to

-the importance of the issues

- very important for Defendants to resist summary judgment motion and to have the matter proceed to trial so as to be successful on counterclaim for damages

-the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding

N/A

-whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution.

N/A

-a party's denial or refusal to admit anything that should have been admitted.

N/A

-the experience of the party's lawyer

Kenneth G. Hood: 1982 Call, Certified Specialist in Civil Litigation
Edwin G. Upenieks: 1983 Call, Certified Specialist in Civil Litigation

-the hours spent, the rates sought for costs and the rate actually charged to the party's lawyer

FEE ITEMS <i>(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc.)</i>	PERSONS <i>(identify the lawyers, students and law clerks who provided services in connection with each item together with their year of call, if applicable)</i>	HOURS <i>(specify the hours claimed for each person identified in column 2)</i>	SUBSTANTIAL INDEMNITY RATE <i>(specify the rate being sought for each person in column 2)</i>	ACTUAL RATE*
Receipt and review of motion material, obtaining instructions	K. Hood (1982 Call)	5.1 hours	\$350.00	\$350.00
	E. Upenieks (1983 Call)	0.3 hours	\$350.00	\$350.00
Research and preparation of responding material	K. Hood	14.1 hours	\$350.00	\$350.00
	E. Upenieks	0.8 hours	\$350.00	\$350.00
Examinations, preparation, arrangement, attendance and undertakings	K. Hood	21.9 hours	\$350.00	\$350.00
Issues with respect to third party's examination	K. Hood	1.4 hours	\$350.00	\$350.00

Drafting Factum, review transcripts, review Plaintiff's material and factum and preparation of authorities	K. Hood	23.1 hours	\$350.00	\$350.00
	E. Upenieks	2.7 hours	\$350.00	\$350.00
Preparation for motion (to Nov 19, 2006)	K. Hood	20.5 hours	\$350.00	\$350.00
Drafting costs submissions including preparation of costs outline	K. Hood	4.7 hours	\$350.00	\$350.00
	L. Desroches, Law Clerk	2.5	\$125.00	\$125.00

*Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

-any other matter relevant to the question of costs

<p>- if motion dismissed Respondents to have costs fixed on a substantial indemnity basis pursuant to rule 20.06</p> <p>- hourly rate being sought must be within reasonable expectation of the Plaintiff as his own counsel charges \$450/hour on substantial indemnity basis and \$350/hour on partial indemnity basis</p> <p>- hours spent and total amount of fees sought must be within reasonable expectation of the Plaintiff based upon Bill of Costs submitted by own counsel on prior motion</p>
--

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date _____

Kenneth G. Hood

Disbursements

Process server fees – filing Responding Motion Record	\$ 60.30
Process server fees – filing Supplementary Motion Materials	\$ 88.30
Transcripts	\$545.90
Photocopies (estimated)	\$300.00

APPENDIX “C”

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Plaintiff

and

Defendants

COSTS OUTLINE

Partial Indemnity Basis

The Defendants provide the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

Fees (as detailed below) on a partial indemnity rate	\$21,485.00
Counsel fee for appearance	\$1,350.00
Disbursements (as detailed in the attached appendix)	\$994.50
Total	\$23,829.50
GST @ 5%	\$1,191.48
Total including GST	\$25,020.98
Total Claimed	\$22,000.00

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

-the amount claimed and the amount recovered in the proceeding

\$258,873.71, plus interest and costs claimed, being a substantial amount, and nothing recovered

-the complexity of the proceeding

-Plaintiff raised numerous complex legal issues that had to be responded to

-the importance of the issues

- very important for Defendants to resist summary judgment motion and to have the matter proceed to trial so as to be successful on counterclaim for damages

-the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding

N/A

-whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution.

N/A

-a party's denial or refusal to admit anything that should have been admitted.

N/A

-the experience of the party's lawyer

Kenneth G. Hood: 1982 Call, Certified Specialist in Civil Litigation
Edwin G. Upenieks: 1983 Call, Certified Specialist in Civil Litigation

-the hours spent, the rates sought for costs and the rate actually charged to the party's lawyer

FEE ITEMS <i>(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc.)</i>	PERSONS <i>(identify the lawyers, students and law clerks who provided services in connection with each item together with their year of call, if applicable)</i>	HOURS <i>(specify the hours claimed for each person identified in column 2)</i>	PARTIAL INDEMNITY RATE <i>(specify the rate being sought for each person in column 2)</i>	ACTUAL RATE*
Receipt and review of motion material, obtaining instructions	K. Hood (1982 Call)	5.1 hours	\$225.00	\$350.00
	E. Upenieks (1983 Call)	0.3 hours	\$225.00	\$350.00
Research and preparation of responding material	K. Hood	14.1 hours	\$225.00	\$350.00
	E. Upenieks	0.8 hours	\$225.00	\$350.00
Examinations, preparation, arrangement, attendance and undertakings	K. Hood	21.9 hours	\$225.00	\$350.00
Issues with respect to third party's examination	K. Hood	1.4 hours	\$225.00	\$350.00

Drafting Factum, review transcripts, review Plaintiff's material and factum and preparation of authorities	K. Hood	23.1 hours	\$225.00	\$350.00
	E. Upenieks	2.7 hours	\$225.00	\$350.00
Preparation for motion (to Nov 19, 2006)	K. Hood	20.5 hours	\$225.00	\$350.00
Drafting costs submissions including preparation of costs outline	K. Hood	4.7 hours	\$225.00	\$350.00
	L. Desroches, Law Clerk	2.5	\$80.00	\$125.00

*Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

-any other matter relevant to the question of costs

<ul style="list-style-type: none"> - if motion dismissed Respondents to have costs fixed on a partial indemnity basis pursuant to rule 20.06 - hourly rate being sought must be within reasonable expectation of the Plaintiff as his own counsel charges \$450/hour on substantial indemnity basis and \$350/hour on partial indemnity basis - hours spent and total amount of fees sought must be within reasonable expectation of the Plaintiff based upon Bill of Costs submitted by own counsel on prior motion

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date _____

Kenneth G. Hood

Disbursements

Process server fees – filing Responding Motion Record	\$ 60.30
Process server fees – filing Supplementary Motion Materials	\$ 88.30
Transcripts	\$545.90
Photocopies (estimated)	\$300.00

APPENDIX "D"

■1985 CarswellOnt 631

Carpenter v. Malcolm

CARPENTER et al. v. MALCOLM

Ontario Supreme Court, High Court of Justice

Catzman J.

Judgment: November 26, 1985

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Counsel: R.L. Waxman, for plaintiffs.

M.D. Parayeski, for defendant.

Subject: Civil Practice and Procedure

Practice --- Costs -- Particular items of costs -- Preparation for trial -- General.

Costs -- Party-and-party costs -- Preparation for trial -- Counsel fee for preparation for trial including all time legitimately expended and not to be subject to arbitrary diminution.

The plaintiff was successful in a motor vehicle action involving about \$24,000 and was awarded party-and-party costs. On the assessment of costs, the plaintiff claimed for preparation for trial 17.5 hours for senior counsel at \$90 per hour, 10.4 hours for junior counsel at \$70 per hour and 4.5 hours for students at \$40 per hour. The Assessment Officer concluded that too much time had been spent in preparation for trial and allowed only 20 hours at \$70 per hour. The plaintiff appealed.

Held:

The appeal was allowed.

If counsel are to discharge the functions expected by the Courts, they must be able to have their clients' party-and-party costs assessed in a manner that acknowledges the efforts legitimately expended in that connection. The Assessment Officer committed a reversible error in reducing the counsel fee for preparation for trial.

APPEAL from an assessment of costs, reported at 6 C.P.C. (2d) 176 at 177.

Catzman J.:

1 With respect to the appellants' appeal regarding the Assessment Officer's allowance for examinations for discovery, I do not consider that allowance to reflect reversible error as defined in the authorities. With deference, however, to an Assessment Officer of considerable ability and experience, I do consider that his assessment of counsel fee -- and, in particular, of the fee for preparation for trial -- reflects such error. There is no suggestion that the hours claimed were not spent in preparation for what was, until the eve of trial, expected to be a contested assessment of damages; nor is the figure of \$70 per hour applied to the full number of hours so spent, an inappropriate figure. If counsel are to discharge the functions which the Courts expect them to discharge, and on occasion fault them for not discharging, they ought to be able, in my view, to expect that their clients' party-and-party costs will be assessed in a manner that reasonably and without arbitrary diminution acknowledges the efforts legitimately expended in that connection.

2 The appeal is allowed to the extent that the figure for counsel fee is increased by the sum of \$875, representing a further 12.5 hours calculated at \$70 per hour, together with costs fixed in the sum of \$350.

Appeal allowed.

APPENDIX “E”

C1999 CarswellOnt 995

BNY Financial Corp.-Canada v. National Automotive Warehousing Inc.

In the Matter of Section 47.1 of the Bankruptcy and Insolvency Act, R.S.C.
1985, c. B-3, as amended

In the Matter of the Courts of Justice Act, R.S.O. 1990, c. C-43, as amended

In the Matter of National Automotive Warehousing Inc.

BNY Financial Corporation -- Canada, Applicant and National Automotive
Warehousing Inc., Respondent

Ontario Court of Justice (General Division) [Commercial List]

Farley J.

Judgment: April 2, 1999

Heard: April 1, 1999

Docket: 99-CL-3269

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Counsel: David Ward, for BNY Financial.

Mat Halpin, for Max Auto.

Frank McLaughlin, for ICI.

Subject: Civil Practice and Procedure

Injunctions --- Procedure on application -- Costs -- General.

Cases considered by Farley J.:

Bargman v. Rooney ([December 31, 1998](#)), [Doc. 98-CL-2909, 98-CV-142584CM](#) (Ont. Gen. Div. [Commercial List]) -- considered

Equitable Life Insurance Co. of Canada v. Hofer ([1993](#)), [51 C.P.R. \(3d\) 506](#) (Ont. Gen. Div.) -- considered

Murano v. Bank of Montreal ([1998](#)), [111 O.A.C. 242](#), [163 D.L.R. \(4th\) 21](#), [22 C.P.C. \(4th\) 235](#), [41 B.L.R. \(2d\) 10](#), [41 O.R. \(3d\) 222](#), [5 C.B.R. \(4th\) 57](#) (Ont. C.A.) -- distinguished

Yang v. Mao ([1995](#)), [23 O.R. \(3d\) 466](#), [39 C.P.C. \(3d\) 10](#) (Ont. Gen. Div.) -- considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 37.09(3) -- considered

PROCEEDINGS to determine cost award for motion not proceeded with.

Farley J.:

1 The applicant BNY indicated that it was not proceeding with its motion (which in essence was for injunctive relief). I was advised that it wished to characterize the situation as "not proceeding with its motion" since it did not wish to incur the automatic costs consequences of R. 37.09(3) of abandoning its motion. I think this is a distinction without a difference -- it has abandoned its motion and I deem it to have done so. The respondents are entitled to their (reasonable) costs.

2 Since it was in essence a motion for injunctive relief, it would seem to me that the respondents are entitled to solicitor client costs. While it is true that in *Equitable Life Insurance Co. of Canada v. Hofer* (1993), 51 C.P.R. (3d) 506 (Ont. Gen. Div.), the basis for giving solicitor client costs on an injunction motion was the undertaking in damages and here the BNY did not give any such undertaking, I do not see this omission as justifying a lower scale of costs. BNY was reminded several times about the necessity of an undertaking. It did not provide same and did not really justify its failure to do so on any legally valid ground. Rather, it would seem that it may not have had all that much confidence in its affiant, Mr. Nourse, the principal of the company, National Automotive, which it had just put into receivership and with whom it had not enjoyed a warm relationship -- but rather a heated one -- until then. While not as clear a case as *Yang v. Mao* (1995), 23 O.R. (3d) 466 (Ont. Gen. Div.), it shows great similarities with that case. The motion was hurriedly brought, brought on and adjourned several times because it was said there was an emergency and then the parties engaged in resolution discussions. See also *Bargman v. Rooney* (December 31, 1998, Doc. 98-CL-2909, 98-CV-142584CM (Ont. Gen. Div. [Commercial List]), a decision of Blair J. released December 31, 1998 which discussed allegations of fraud and dishonesty not being established in court. Here while fraud and dishonesty were not specifically alleged, there was a strong allegation of bad faith and a breach of the stay order by ICI. However, while these elements are supportive of the larger scale of costs, I am of the view that the determining factor is that there ought reasonably to have been an undertaking in damages and there was no valid explanation as to why there was not. The proper scale is solicitor client.

3 While initially resisting the proposal that I fix costs, counsel for BNY, I think quite reasonably determined that it would be less expensive and more convenient for everyone to have me fix costs. Certainly I am the judge who has had complete familiarity with all stages of this proceeding -- dating back to the inception of the receivership motion, and well before the present motion in question. Thus the concerns of the Court of Appeal in *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (Ont. C.A.) as to the judge fixing costs (specifically the trial judge) not having knowledge of matters before the trial is not a problem here.

4 That being said, the Court of Appeal in [Murano](#) stated at p. 248 that:

In this regard, I think that the approach of Harris J. in *Worsley v. Lichong*, [\[1994\] O.J. No. 614](#) (Gen. Div.) is the correct one. In para 5, he said:

... I believe the fixing of costs still requires a critical examination of the work undertaken in order to determine that the costs could have been reasonably incurred and reflect what the court considers to be proper and appropriate with the circumstances given the complexity and significance of the proceedings held up against the backdrop of full indemnification.

Morden ACJO for the Court went on to state at p. 249:

In my view, this contains correct observation that, in the circumstances of that case, to reach a just result of the process would have to be "something akin to an assessment, with the Judge reserving the factors an assessment officer would review". The value of the trial judge's knowledge of the case would become part of the assessment process through directions to the assessment officer, as provided for in rule 57.02.

5 The aspect of costs being for reimbursement of legal work *reasonably* incurred has always been a watch word with me. I have been on record for a long time counselling against the prevalence of legal accounts being the product of a mindless multiplicand of an hourly rate times docketed hours. It may look precise -- but it is not functionally accurate. It rewards inefficient work. It tolerates diversionary work. It presumes there is no wheelspinning. It does not recognize that there should be a premium in certain cases where there is a beneficial and timely (early) resolution of matters (beneficial not only in the sense of the narrow limits of the legal case, but also something which allows the party to get on with its (personal or business) life without the uncertainty and frustration of a lawsuit overhead. Rather essentially the question to be considered is what is the case reasonably worth in the circumstances.

6 To my mind the best way, once the above is fully understood, of proceeding is for counsel to sit down together and discuss the question of costs reasonably and intelligently. This often happens but not often enough! Perhaps there should be a requirement that counsel certify that they have reasonably attempted to do this before a case goes off to a judge or assessment officer for the fixing or assessing of costs. If it is thereafter determined that one party has not co-operated or has taken an unreasonably extreme position, then perhaps that counsel should be severely sanctioned.

7 Does the critical examination of the work undertaken require that each docket entry be scrutinized with the aid of an electron microscope. I think not for that implies that one would be in danger of not seeing the forest for the trees. However, depending on the circumstances, the critical examination requires a responsible analysis of the work done. It is not a green eyeshade bookkeeper adding up the columns but rather a review of the elements of the work, a testing of the dockets and an overall weighing of the value of the work, taking into account the factors enumerated in the Rules.

8 In the instant case, counsel did supply draft accounts setting out dockets including time that related to the motion. Mr. McLaughlin, counsel for ICI, had the opportunity himself to review the accounts and pared a further \$3,000 from the total. Mr. McLaughlin's hourly rate is \$315; his colleague, Ms. Boake, an insolvency specialist, is at \$380/hr. Mr. Halpin for Max Auto has a \$285 hourly rate. No quarrel was taken with the rate level and I do not find the rates inappropriate regarding their specialities. See below however as to Ms. Boake's rate outside her speciality.

9 Mr. Ward for BNY did not take much issue with Mr. Halpin's account which totalled \$12,211.91 including disbursements & GST (and included yesterday's work). Rather he quite strategically used it to contrast the ICI bill which now totalled approximately \$44,000 including disbursements and GST once the \$3,000 adjustment above had been made. He acknowledged that ICI had been in the fight 4 days earlier than Max Auto and this would account for some of the discrepancy leaving on an apple to apple basis \$30,000 vs. \$12,000. The higher hourly rate would also have to be taken into account as to the remaining discrepancy -- which would if the ICI lawyers were billing at Mr. Halpin's \$285 rate result in a difference of \$25,000 (vs. \$30,000) compared with \$12,000. In other words, the ICI account was approximately twice as large as the Max Auto account if everything were equalized. Mr. Ward submitted that this was easily explained as there was a substantial, almost overwhelming overlap of work done by Mr. McLaughlin and Ms. Boake.

10 Two affidavits were filed by ICI. There were no cross-examinations of any affiant on any side. No factums were prepared.

11 One must remember that the reviewer should not operate with the 20-20 vision of hindsight. This was emergency litigation thrust on the respondents ICI and Max Auto with serious allegations -- and serious implications for their ongoing business operations. I would not be fair and reasonable to compare the response here with what it might well have been in more leisurely ordinary litigation.

12 That being said, I have reviewed the work done by the ICI lawyers as reflected on their dockets. There is a substantial amount of overlap and above that which is inevitable and reasonable where there is more than one lawyer working on the matter since there will have to be some degree of direction, reporting and consultation. Part of the work done by Ms. Boake would be explained by her assisting (collegially) Mr. McLaughlin with litigation work since she was on the scene as to respect to her giving advice otherwise to ICI regarding the insolvency aspects of this file. However, in that regard, she should not be allowed the \$380 to \$315 differential since she would not be within her specialist field. However, outside this assistance work there does appear to be some overlap for which BNY cannot reasonably be held accountable.

13 In the end result, I would award (i) Max Auto costs of \$11,500 (inclusive of disbursements, GST and yesterday's attendance) and (ii) ICI costs of \$34,000 (inclusive of disbursements, GST and yesterday's attendance).

Order accordingly.

APPENDIX “F”

▶2004 CarswellOnt 2521

Boucher v. Public Accountants Council (Ontario)

SALLY ANNE BOUCHER, RANDOLPH BROWN, PAUL TURNER, DAVID VENN
(Applicants /
Appellants) and PUBLIC ACCOUNTANTS COUNCIL FOR THE PROVINCE OF ONTARIO,
DOUGLAS
J. WHYTE, ALASTAIR SKINNER, GILBERT H. RIOU, RALPH T. NEVILLE, RONALD W.
MIKULA, BARRY G. BLAY, DAVID H. ATKINS, JENNIFER L. FISHER, JERALD D.
WHELAN,
PRISCILLA M. RANDOLPH, BRYAN D. MEYER, THOMAS A. HARDS and THE
INSTITUTE OF
CHARTERED ACCOUNTANTS OF ONTARIO (Respondents / Respondents in Appeal)

Ontario Court of Appeal

Abella, Armstrong, Cronk JJ.A.

Heard: December 15, 2003

Judgment: June 22, 2004

Docket: CA C40044

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Proceedings: varying *Boucher v. Public Accountants Council (Ontario)* ([2002](#)), [2002 CarswellOnt 4142](#), [166 O.A.C. 281](#), [28 C.P.C. \(5th\) 25](#) (Ont. Div. Ct.)

Counsel: David E. Wires for Appellants

Michael D. Lipton, Q.C. for Public Accountants Council for the Province of Ontario

Cynthia Amsterdam for Douglas J. Whyte, Alastair Skinner, Gilbert H. Riou, Ralph T. Neville, Ronald W. Mikula, Barry G. Blay, David H. Atkins, Jennifer L. Fisher, Jerald D. Whelan, Priscilla M. Randolph, Bryan D. Meyer, Thomas A. Hards

Robert D. Peck for Institute of Chartered Accountants of Ontario

Subject: Civil Practice and Procedure; Family

Civil practice and procedure --- Costs -- Taxation or assessment of costs -- Right to -- General principles

Applicants were certified general accountants who challenged licensing scheme for public accountants -- Proceedings included application for judicial review of licensing scheme itself -- Before application was heard, it was abandoned -- Respondents sought costs of judicial review proceeding fixed on substantial indemnity basis -- Costs fixed on partial indemnity basis -- Applicants appealed -- Appeal allowed on other grounds -- Rule 57.01(3.1) of Rules of Civil Procedure is discretionary such that in exceptional case, trial judge may, but is not required to, refer costs for assessment -- Presumption is that costs shall be fixed by court unless court is satisfied that case is exceptional -- Motions judge did not err in determining that this was not exceptional case -- If judge is able to effect procedural and substantive justice in fixing costs, then he/she ought to do so.

Civil practice and procedure --- Costs -- Particular orders as to costs -- Costs on solicitor and client basis -- Grounds for awarding -- Unfounded allegations

Applicants were certified general accountants who challenged licensing scheme for public accountants -- Proceedings included application for judicial review of licensing scheme itself -- Applicants' materials expressed concern about make-up and operation of licensing system -- Before application was heard, it was abandoned -- Respondents sought costs of judicial review proceeding on substantial indemnity basis due to unfounded allegations -- Costs fixed on partial indemnity basis -- Applicants did not allege fraud or improper conduct that was seriously prejudicial to character of party -- Allegations did not amount to attack on integrity of professionals in course of duties -- Criticisms were levelled at people who happened to be part of system and not individuals themselves -- Applicants appealed -- Appeal allowed on other grounds -- Costs awarded were reduced from \$187,682.51 inclusive of disbursements and GST to \$63,000 -- Costs awarded were so excessive as to warrant appellate interference -- Motions judge erred in principle in exercise of discretion when granting award of costs on partial indemnity basis that was virtually same as award on substantial indemnity basis after having rejected claim for substantial indemnity award.

Civil practice and procedure --- Costs -- Costs of particular proceedings -- Abortive proceedings

Applicants were certified general accountants who challenged licensing scheme for public accountants -- Proceedings included application for judicial review of licensing scheme itself -- Respondents put applicants on notice about motion to quash application as premature -- Applicants eventually abandoned judicial review proceeding after respondents prepared for motion to quash -- Respondents sought costs of judicial review proceeding on substantial indemnity basis -- Costs fixed on partial indemnity basis -- Applicants appealed -- Appeal allowed -- Costs awarded were reduced from \$187,682.51 inclusive of disbursements and GST to \$63,000 -- Costs awarded were so excessive as to warrant appellate interference -- Motions judge erred in principle in exercise of discretion when granting award of costs on partial indemnity basis that was virtually same as award on substantial indemnity basis after having rejected claim for substantial indemnity award -- Total amounts claimed in bills of costs were not justifiable -- Record in this application was same record filed in earlier proceedings, respondents filed no evidence and conducted no cross-examinations, respondents' notices of motion to stay were substantially same, and arguments to be advanced on return of motions to quash were substantially same.

Civil practice and procedure --- Costs -- Particular orders as to costs -- Costs on solicitor and client basis -- Grounds for awarding -- General principles

Applicants were certified general accountants who challenged licensing scheme for public accountants -- Proceedings included application for judicial review of licensing scheme itself -- Applicants had not yet applied for licences -- Applicants also failed to seek judicial review of decision of Public Accountants Council dismissing as premature applicants' motion to disqualify members -- Before it was heard, application was abandoned -- Respondents sought costs of judicial review proceeding on substantial indemnity basis but were awarded costs fixed on partial indemnity basis at \$187,682.51 inclusive of disbursements and GST -- Applicants appealed -- Appeal allowed -- Costs were reduced to \$63,000, inclusive of disbursements and GST -- Costs awarded were so excessive as to warrant appellate interference -- Introduction of costs grid in R. 57.01(3) of Rules of Civil Procedure is signal that calculating hours times rates is merely one factor in assessment process, along with other factors in R. 57.01 -- Objective is to fix fair and reasonable amount rather than amount fixed by actual costs incurred by successful litigant -- Total amounts claimed in bills of costs were not justifiable -- Record in this application was same record filed in earlier proceedings, respondents filed no evidence and conducted no cross-examinations, respondents' notices of motion to stay were substantially same, and arguments to be advanced on return of motions to quash were substantially same -- Motions judge erred in principle in exercise of discretion when granting award of costs on partial indemnity basis that was virtually same as award on substantial indemnity basis after having rejected claim for substantial indemnity award -- Failure to refer to overriding principle of reasonableness when assessing costs can produce result contrary to fundamental objective of access to justice -- Chilling effect of costs award exceeded any fair and reasonable expectation of parties.

Cases considered by *Armstrong J.A.*:

Boucher v. Public Accountants Council (Ontario) (2000), 2000 CarswellOnt 2951 (Ont. S.C.J.) -- referred to

Canadian Pacific Ltd. v. Matsqui Indian Band (1995), 26 Admin. L.R. (2d) 1, (sub nom. *Matsqui Indian Band v. Canadian Pacific Ltd.*) [1995] 2 C.N.L.R. 92, 122 D.L.R. (4th) 129, 85 F.T.R. 79 (note), [1995] 1 S.C.R. 3, 177 N.R. 325, 1995 CarswellNat 264, 1995 CarswellNat 700 (S.C.C.) -- considered

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 316 N.R. 265, 184 O.A.C. 209, 2004 C.L.L.C. 210- 025, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193 (S.C.C.) -- considered

Lawyers' Professional Indemnity Co. v. Geto Investments Ltd. (2002), 2002 CarswellOnt 769, 17 C.P.C. (5th) 334 (Ont. S.C.J.) -- considered

Murano v. Bank of Montreal (1998), 111 O.A.C. 242, 163 D.L.R. (4th) 21, 1998 CarswellOnt 2841, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.) -- followed

Stellarbridge Management Inc. v. Magna International Inc. [\(2004\), 2004 CarswellOnt 2065](#) (Ont. C.A.) -- followed

Toronto (City) v. First Ontario Realty Corp. [\(2002\), 59 O.R. \(3d\) 568](#) (Ont. S.C.J.) -- referred to

Wasserman, Arsenault Ltd. v. Sone [\(2002\), 2002 CarswellOnt 3230, 164 O.A.C. 195, 38 C.B.R. \(4th\) 119](#) (Ont. C.A.) -- referred to

Zesta Engineering Ltd. v. Cloutier [\(2002\), 2002 CarswellOnt 4020, 21 C.C.E.L. \(3d\) 161](#) (Ont. C.A.) -- considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131 -- referred to

Public Accountancy Act, R.S.O. 1990, c. P.37

Generally -- referred to

Public Officers Act, R.S.O. 1990, c. P.45

Generally -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally -- referred to

R. 37.09(3) -- considered

R. 57.01 -- referred to

R. 57.01(1) -- referred to

R. 57.01(3) -- referred to

R. 57.01(3.1) [en. O. Reg. 284/01] -- referred to

R. 58 -- referred to

APPEAL from judgment reported at *Boucher v. Public Accountants Council (Ontario)* (2002), 2002 CarswellOnt 4142, 166 O.A.C. 281, 28 C.P.C. (5th) 25 (Ont. Div. Ct.), awarding costs of abandoned application for judicial review.

Armstrong J.A.:

1 This case is another chapter in the long simmering dispute between the Certified General Accountants and the Chartered Accountants concerning the practice of public accounting in Ontario. At issue in this litigation was the control of the licensing granting authority, the Public Accountants Council for the Province of Ontario, by a majority of members who were Chartered Accountants.

2 The appellants, who are Certified General Accountants, brought an application for judicial review against the Public Accountants Council. The appellants alleged reasonable apprehension of bias against the Council in its review of applications for licences to practise public accounting by members of the Certified General Accountants Association of Ontario.

3 Before the appellants' application was heard it was abandoned. The respondents then moved to have their costs fixed by a judge of the Divisional Court on a substantial indemnity basis. After a two-day hearing, Epstein J. fixed the respondents' costs, on a partial indemnity basis, at \$187,682.51 inclusive of disbursements and Goods and Services Tax. The appellants now appeal from this costs order pursuant to leave granted by this court on May 22, 2003.

Background of the Proceedings

4 The judicial review application had its genesis in the prior proceeding of *Boucher v. Public Accountants Council (Ontario)*, [2000] O.J. No. 3126 (Ont. S.C.J.) before Lax J. of the Superior Court. In the earlier proceeding, the appellants and two other parties sought to have the court appoint disinterested persons to hear the appellants' applications for public accounting licences. The appellants claimed that the court could do so under the *Public Officers Act*, R.S.O. 1990, c. P.45. The proceeding was stayed by Lax J. on the basis that the court lacked jurisdiction under the *Public Officers Act* to make the order requested.

5 In granting the stay, Lax J. said in *obiter dicta*:

The particulars of bias described by the applicants are sympathetic, compelling and disturbing. They are offensive to fundamental notions of fairness. They invoke a primordial judicial instinct to intervene and second-guess what appears to be a flawed legislative scheme and what is a flawed process.

Professional discipline is not in issue here, but professional licensure by an apparently biased tribunal is. Although the Court lacks jurisdiction to grant the proposed remedy under section 16 of the *Public Officers Act*, there may be other creative ways for the applicants to have their concerns addressed.

6 Lax J. suggested that the appellants had other specific courses of action available to them which they could pursue.

7 The appellants then commenced their judicial review application, naming as parties the same respondents with the addition of the Institute of Chartered Accountants of Ontario who had been an intervenor before Lax J. In their application, the appellants sought a broad range of remedies, including a declaration that the Public Accountants Council is institutionally biased in its granting of licences to practise public accounting. Central to the appellant's allegations of reasonable apprehension of bias is the fact that the *Public Accountancy Act*, R.S.O. 1990, c. P. 37 authorizes the Institute of Chartered Accountants of Ontario to appoint 12 of the 15 members of Council.

8 At the request of the appellants, Lax J. made an order that the materials used in the application before her should be filed in the judicial review application in the Divisional Court. However, this judicial review application was not one of the courses of action suggested by Lax J.

9 The respondents moved to quash or stay the judicial review application as being premature on the basis that the appellants' applications for licence before the Public Accountants Council had not yet been adjudicated on the merits.

10 The appellants then brought a motion to consolidate the motions to quash with two pending statutory appeals arising from the Council's refusal to grant licences. The consolidation motion was dismissed.

11 The motions to quash were scheduled to be heard on May 27, 28 and 29, 2002. On May 8, 2002, counsel for the appellants advised by letter that they had received instructions to withdraw the application for judicial review and agree to the dismissal of the motions to quash on a without costs basis. The respondents insisted on the payment of their costs of the application and the motions to quash and advised that they would continue to prepare for the motions to quash pending resolution of the matter. The appellants served their notice of abandonment on May 17, 2002. The respondents then brought their motion to have their costs fixed.

12 The motions judge fixed the costs of the application for judicial review and the motions to quash on a partial indemnity basis including disbursements and GST as follows:

Public Accountants Council of Ontario	\$ 88,896.45
Individual Respondents	\$ 60,033.96
Institute of Chartered Accountants of Ontario	\$ 38,752.10
Total	\$187,682.51

Grounds of Appeal

13 The appellants raise the following grounds of appeal:

- (i) the motions judge erred in fixing the costs of the abandoned application rather than referring them for assessment; and
- (ii) the costs awarded are excessive in that they are approximately 178% of the costs awarded in the proceedings before Lax J. that involved substantially the same parties and issues without deduction for any amount claimed.

Did the motions judge err in fixing costs?

14 The appellants accept that the respondents are entitled to their costs of the abandoned application pursuant to rule 37.09(3) of the *Rules of Civil Procedure* which provides:

37.09(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

However, the appellants submit that those costs ought not to be fixed by a judge in accordance with the costs grid established by rule 57.01(3). The appellants rely upon rule 57.01(3.1) which states:

Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Rule 58 sets out a code of procedure for the assessment of costs by an assessment officer.

15 The motions judge concluded, correctly in my view, that there is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. The appellants submitted to the motions court and to this court that the case at bar is such a case. The motions judge, in deciding that this was not an exceptional case, said:

Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type of scrutinizing analysis is required, then perhaps, the matter would fall within the exception and be referred to assessment: *BNY Financial corp.-Canada v. National Automotive Warehousing Inc.*, [1999] O.J. No. 1273 (Commercial List, Gen. Div.) (*BNY Financial*).

16 I agree with the motions judge that if a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so. See *Murano v. Bank of Montreal* ([1998](#)), [41 O.R. \(3d\) 222](#) (Ont. C.A.), at 245 *per Morden A.C.J.O.*

17 The appellants argued before us that an abandoned motion falls into the category of an exceptional case because the judge fixing the costs does not have the benefit of a hearing involving the presentation of evidence and legal argument. While there is no doubt that the judge who has heard a case is in the best position to determine a just costs award, it does not follow, that in the circumstances which exist here, the motions judge was obliged to decline the task.

18 I also observe that rule 57.01(3.1) is discretionary. It provides that in an exceptional case, the trial judge *may* refer costs for assessment. It is not required that she do so. This is a somewhat complex case with several parties and a number of counsel, including one party with two senior counsel. Although another judge might have exercised his or her discretion under rule 57.01(3.1) differently, I see no basis upon which to interfere with the motions judge's discretion not to refer the costs for assessment.

Was the costs award excessive?

19 The motions judge's decision is entitled to a high degree of deference. The standard of review for interfering with the exercise of the discretion by a judge of first instance was articulated by Lamer, C.J.C. in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995 CarswellNat 264](#) (S.C.C.) at p. 32:

This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [\[1982\] 1 All E.R. 1042](#), at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

20 In a more recent case, Arbour J. said in *Hamilton v. Open Window Bakery Ltd.* ([2003](#)), [2004 SCC 9](#) (S.C.C.) at para. 27:

A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (*Duong v. NN Life Insurance Company of Canada* ([2001](#)), [141 O.A.C. 307](#), at para. 14).

21 The appellants point out that the costs awarded in these proceedings are approximately 178% of the costs awarded in the proceedings before Lax J. that involved the same parties and similar issues. The respondents, on the other hand, argue that the proceedings before Lax J. were significantly different from the abandoned judicial review application. However, it is to be noted that the same record was used in the judicial review application. When pressed in argument,

counsel for the respondents had some difficulty in explaining the extent to which the factual substrata of the two applications differed. At the heart of both applications is the assertion that the Public Accountants Council of Ontario is effectively controlled by the Institute of Chartered Accountants of Ontario.

22 Counsel for the appellants submitted that there was much duplication of the work done by the three sets of counsel for the respondents. They also drew attention to the fact that the Public Accountants Council retained another senior counsel to prepare their factum, resulting in a duplication of services. We were assured by counsel for the respondents that the bills of costs submitted to the motions judge were appropriately adjusted to take into account such duplication.

23 The respondents also submitted that the appellants were the authors of their own misfortune. The appellants said that they abandoned their application for judicial review because the Ontario Red Tape Commission recommended changes to the *Public Accountancy Act*; and a panel appointed under the Agreement on Internal Trade found that the Act offended provisions of the Agreement. The appellants claimed that the reports of these two bodies addressed the issues of concern to them, causing them to abandon their application for judicial review. However, the respondents observed that the report of the panel appointed under the Agreement on Internal Trade was released on October 5, 2001 and the Red Tape Commission report was released on December 10, 2001. It was several months later that the appellants abandoned their application. The respondents submit that the lion's share of the costs were generated in this period of delay, and particularly after February 2002 when the dates for the motion to quash were fixed for May 2002. Although this delay caused some concern to the motions judge, she concluded that:

In the circumstances of this case I do not find that the timing of the events that took place in the spring of 2002 leading up to the abandonment of the application was in bad faith or amounted to an abuse of the process of the court.

24 The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 where it said:

In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

See also *Stellarbridge Management Inc. v. Magna International Inc.*, [2004] O.J. No. 2102 (Ont. C.A.) para. 97.

25 [Zesta Engineering Ltd.](#) and [Stellarbridge Management Inc.](#) simply confirmed a well settled approach to the fixing of costs prior to the establishment of the costs grid as articulated by Morden A.C.J.O. in [Murano v. Bank of Montreal](#) at p. 249:

The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprised the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

26 It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

27 In considering whether the amounts claimed in the bills of costs were appropriate, the motions judge said:

Here there is another point of departure between the applicants and the respondents. The respondents take the position that they are entitled to claim reimbursement for all the time spent and disbursements incurred in responding to the application for judicial review and in preparing the motion to quash. Conversely, the applicants contend that the factual background and the issues raised in the judicial review and the motion to quash are the same, or at least nearly the same, as those fully argued before Lax J. As a result, the time necessary for the respondents to respond to the judicial review application and to prepare for the motion to quash was, [or] should have been, minimal. It follows that the costs fixed should similarly be minimal.

While it is apparent that the various proceedings have centred on the same complaints about the same licensing regime, the issues in each proceeding have differed. For example, the relief claimed in the matter before Lax J. was different than that claimed in the judicial review application. This different perspective requires a different analysis and different research. In addition, the various proceedings were spread over time and each new matter necessitated new preparation even in respect to issues that were the same or similar as those raised in earlier challenges to the licensing system. In these

circumstances I do not consider it appropriate effectively to give the applicants a credit for costs ordered and paid in earlier proceedings .

I agree with what Nordheimer J. said in *Basedo v. University Health Network*, [2002] O.J. No. 597 (Sup. Ct.) that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." As mentioned earlier, counsel for the respondents filed substantial material in support of the detailed bills of costs. In addition, they took me through the various entries, in a general fashion, to explain the nature of the work done and why it was necessary. I have conducted my own detailed review of the functions performed, time spent and amounts claimed. In my view, the amounts for fees and disbursements, on a partial indemnity basis, are appropriate.

28 With respect, I disagree with the motions judge. The total amount of \$187,682.51 was not a fair and reasonable sum to award in the circumstances of this case, even given the respondents' separate bills of costs, which produced totals of \$88,896.45, \$60,033.96, and \$38,752.10. It is my view that the costs awards in this case are so excessive as to call for appellate interference.

29 While I accept that the bills of costs accurately reflect the time spent by all of the lawyers in this matter, it is inconceivable to me that the total amounts claimed are justifiable. In this regard, I accept the submission of the appellants that:

- (a) the record in this application was the same record filed in the earlier proceedings;
- (b) the respondents filed no evidence;
- (c) the respondents conducted no cross-examination of any witness;
- (d) the notices of motion to stay filed by the respondents were substantially the same; and
- (e) the arguments to be advanced on the return of the motions to quash were substantially the same.

30 In addition, I note that the amount claimed on a substantial indemnity scale, including disbursements and Goods and Services Tax, was in total only \$14,528.86 more than the total partial indemnity award. In the result, the respondents received an award which is tantamount to a substantial indemnity award. This is significant in view of the fact that the motions judge expressly rejected the respondents' submission that they be awarded their costs on a substantial indemnity basis.

31 The similarity of the amounts claimed on a substantial indemnity basis and on a partial indemnity basis appears to arise because the hourly rates applied were not significantly different on either scale.

32 The Public Accountants Council employed four lawyers. One of the two senior counsel on the file charged three different hourly rates on a substantial indemnity basis - \$350, \$385 and \$425. On a partial indemnity basis, he claimed \$350 per hour. The time spent by the other senior counsel was listed at a rate of \$300 per hour on both a substantial indemnity scale and on a partial indemnity scale. In addition, one of the two junior counsel charged the same rate on both a substantial indemnity basis and on a partial indemnity basis. The second junior counsel docketed only 17 hours and the difference between the two rates produced a total differential of only \$295.

33 Counsel for the Institute of Chartered Accountants charged his time on the substantial indemnity scale at \$400 per hour and at \$350 per hour on the partial indemnity scale.

34 There were three counsel for the individual respondents. The senior counsel charged hourly rates on a substantial indemnity basis of \$330 and \$350. Her partial indemnity rate was \$300. For the first junior, the substantial indemnity rate was \$230 and the partial indemnity rate was \$225. The second junior had minimal time on the file and her time was claimed at rates of \$85 on a substantial indemnity basis and \$60 on a partial indemnity basis.

35 In *Wasserman, Arsenault Ltd. v. Sone* (2002), 164 O.A.C. 195 (Ont. C.A.) at para. 4, this court referred to a judgment of the Superior Court in *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* (2002), 17 C.P.C. (5th) 334 (Ont. S.C.J.), where Nordheimer J. observed at paragraph 16:

As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

36 In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in *Stellarbridge Management Inc.* at para. 96.

37 The failure to refer, in assessing costs, to the overriding principle of reason-ableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

38 In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See *Toronto (City) v. First Ontario Realty Corp.* (2002), 59 O.R. (3d) 568 (Ont. S.C.J.), at 574. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

39 Turning to what the quantum should be in this case, I would give consideration to the fact that the costs in the earlier proceeding were fixed in the amount of \$97,563 by Lax J. While I accept, as the motions judge did, that there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the Public Accountants Council of Ontario by the Chartered Accountants. The fact that all parties were satisfied to have the same evidentiary record in both cases suggests that there was much in common between the two applications.

40 No doubt there was much more work to be done in respect of the second application. However, having expended partial indemnity costs of nearly \$100,000 in response to the first application, I am confident that counsel were not starting *tabula rasa* when served with the application for judicial review. They would have been fully informed of the licensing application procedure, the make up and operation of the Public Accountants Council, the statutory regime and the issues that divided the Institute of Chartered Accountants for Ontario and the Certified General Accountants of Ontario. I simply cannot accept that counsel for the respondents did not take advantage of the work already done on the first application to better inform themselves in their approach to the second.

41 I also take into account the other factors referred to in paragraph 29 above, i.e. the respondents filed no evidence; conducted no cross-examination; and advanced substantially the same arguments in support of the motions to quash.

42 Finally, I consider that there is no proportionality between the costs claimed on a substantial indemnity scale and a partial indemnity scale.

43 These factors suggest that the amounts claimed on a partial indemnity basis call for a significant reduction. The appellants submitted that the award to each of the three groupings of respondents should be \$2,500 for a total of \$7,500. I do not accept that submission.

44 In my view, a fair and reasonable award, taking into consideration all the factors discussed above, would be:

Public Accountants Council of Ontario	\$ 30,000.00
Individual Respondents	\$ 20,000.00
Institute of Chartered Accountants of Ontario	\$ 13,000.00
Total	\$ 63,000.00

These figures are inclusive of disbursements and Goods and Services Tax.

Disposition

45 In the result, I would allow the appeal, set aside the costs award of the motions judge and in its place substitute the award set out in paragraph 44 above.

46 I would also order that the appellants are entitled to their costs of the motion for leave to appeal and the appeal, fixed on a partial indemnity basis in the total amount of \$12,000, including disbursements and Goods and Services Tax.

Abella J.A.:

I agree.

Cronk J.A.:

I agree.

Appeal allowed; amount awarded varied.

APPENDIX “G”

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
 - (a) the amount claimed and the amount recovered in the proceeding;
 - (b) the apportionment of liability;
 - (c) the complexity of the proceeding;
 - (d) the importance of the issues;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
 - (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
 - (g) a party’s denial of or refusal to admit anything that should have been admitted;
 - (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
 - (i) any other matter relevant to the question of costs.

R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

- (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
- (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
- (c) to award all or part of the costs on a substantial indemnity basis;
- (d) to award costs in an amount that represents full indemnity; or
- (e) to award costs to a party acting in person.

R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service.

O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length.

O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties.

O. Reg. 42/05, s. 4 (3).