

# **Recent Developments in Costs Recovery Following Trial**

**Edwin G. Upenieks**

**and**

**Tejdeep S. Chattha**

**Lawrence, Lawrence, Stevenson LLP**

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### Schedules

Schedule "A" Rule 57.01

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## INTRODUCTION

The majority of cases in Ontario settle before trial. If you are involved in a case that actually goes to trial, how do you deal with costs? What scale of costs should you seek? What quantum should you ask for? What factors come in to play? Can you seek costs if you are unsuccessful? This paper will attempt to answer these questions and provide insight into Ontario's cost regime.

### COSTS ARE DISCRETIONARY

There is typically an expectation that some measure of costs will be awarded to compensate a successful litigant for fees expended. Despite this reasonable expectation, an award for costs is not automatic. Cost awards are subject to the discretion of the court and the applicable rules of the court<sup>1</sup>. Section 131(1) of the *Courts of Justice Act* states: "Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid."

Cost awards do not necessarily have to be awarded to the successful litigant. The court has the discretion to refuse or limit the amount of costs that would normally be recoverable upon the conclusion of a successful law suit. Since there is a general expectation that a successful litigant will be awarded costs, the successful party will only be deprived of costs in rare cases.<sup>2</sup> These are cases in which there is fault to be found.

Rule 57.01(2) of the *Rules of Civil Procedure* allows the court to award costs against a successful party where it is warranted to do so. In *King v. Gulf Canada Ltd.*, the appellant brought an appeal before the court. The appellant did not succeed on the appeal, however the court found that the respondent had conducted itself reprehensibly prior to litigation.

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<sup>1</sup> Orkin, *Costs*, looseleaf (Canada Law Book, 2005) at 1-1 and 2-8.

<sup>2</sup> Orkin, *supra* note 2 at 2-35

The court also found that it was reasonable for the appellant to have brought the action<sup>3</sup>. In consideration of these circumstances, the court awarded costs to the appellant at trial and on appeal.

## **PARTIAL INDEMNITY COSTS**

The basic rule is that a successful party in a proceeding is usually entitled to costs on a partial indemnity basis<sup>4</sup>. This scale of costs is intended to partially indemnify or compensate a successful party for a portion of the legal costs incurred in bringing the action.<sup>5</sup> Orkin puts forward four characteristics of costs on this scale:

- 1) they are made in favour of a successful or deserving litigant, payable by the loser;
- 2) the award must await the conclusion of the proceedings, as success or entitlement cannot be determined until that time;
- 3) they are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceedings;
- 4) they are not payable for the purpose of assuring participation in the proceedings.<sup>6</sup>

On January 1, 2002 a new costs regime was enacted and a cost grid came into place. This cost grid was later revoked in July of 2005. The Costs Subcommittee of the Civil Rules Committee recommended a new set of guidelines based on the costs grid. These guidelines were not included in O. Reg. 42/05, which enacted new costs amendments to the *Rules*, so these guidelines have no statutory validity<sup>7</sup>. However Justice N.J. Spies has suggested, “the Cost Guideline does not bind this court. It is a guideline only but does assist judges in ensuring some consistency in costs awards, which is important”<sup>8</sup>.

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<sup>3</sup> 45 C.C.E.L. 238 (C.A.)[King].

<sup>4</sup> *Joncas v. Spruce Falls Power Company*, [2001] O.J. No. 1939 (C.A.) [*Joncas*], Kenneth J. Peacocke, *The Judicial Fixing of Costs* (The Litigation Resource Centre, January 2005) at 3-13.

<sup>5</sup> Peacocke, *supra* note 20 at 3-4.

<sup>6</sup> Orkin, *supra* note 2 at 2-2.

<sup>7</sup> Orkin, *supra* note 6 at 1-8.

<sup>8</sup> *Resch v. Canadian Tire Corp.* (2006), 2006 WL 2006399 (S.C.J.) at para 36 [Resch].

|  |                              |
|--|------------------------------|
| Law Clerk                                  | Maximum of \$80.00 per hour  |
| Student-at-law                             | Maximum of \$60.00 per hour  |
| Lawyer (less than 10 years experience)     | Maximum of \$225.00 per hour |
| Lawyer (10 or more but less than 20 years) | Maximum of \$300.00 per hour |
| Lawyer (20 years and over)                 | Maximum of \$350.00 per hour |

Since there are so many variations in fee arrangements between lawyer and client, it is possible that, in strictly applying the costs grid, costs awarded on a partial indemnity basis could exceed the amount actually paid to the lawyer. The courts have ruled that it is inappropriate to grant costs in an amount that is equivalent to or exceeds what counsel bills the client for costs on a partial indemnity basis. Therefore, in making a determination of costs at this scale, the courts will consider the hourly billing rates charged and the fees actually billed to the successful litigant in order to disallow counsel from claiming more than the amount actually charged<sup>9</sup>.

### **SUBSTANTIAL INDEMNITY COSTS**

An award of costs on this scale may be considered an exception to the general rule that holds that the losing party pay partial indemnity costs<sup>10</sup>. According to its literal meaning, the term “substantial indemnity” is an apportionment of costs that approximates most of the fees expended by the successful litigant. Subrule 1.03(1) has effectively fixed “substantial indemnity” costs as 1.5 times the partial indemnity costs<sup>11</sup>.

The British Columbia Court of Appeal has stated that, with respect to special costs, “The award must go beyond mere indemnity and enters the realm of punishment<sup>12</sup>” An Ontario court has suggested that as well as to punish, the court may use substantial indemnity costs to make a statement of disapproval towards the parties’ conduct<sup>13</sup>. Further, the

<sup>9</sup> *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*, [2004] O.J. No. 2102 (C.A.) at para. 98 [Stellarbridge].

<sup>10</sup> Peacocke, *supra* note 20 3-13.

<sup>11</sup> *Rules*, r.1.03(1).

<sup>12</sup> *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311, 12 C.P.C. (3d) 319 at 318 (B.C.C.A.).

<sup>13</sup> *Beaver Lumber Co. v. 222044 Ontario Ltd.* (1996), 5 C.P.C. (4<sup>th</sup>) 253 (Ont. Gen. Div.) at para 8.

Supreme Court in regards to solicitor client costs, (which were essentially substantial indemnity in the previous costs regime), has said that these costs are generally only to be awarded where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties<sup>14</sup>.

### **BASIS ON WHICH TO AWARD SUBSTANTIAL INDEMNITY COSTS**

According to Kenneth J. Peacocke, there are three specific circumstances in which substantial indemnity costs are commonly requested and/or warranted:

- 1) the rejection of a favourable settlement offer by the unsuccessful party;
- 2) an unproven allegation of fraud, bad faith or misconduct against another party;  
and
- 3) improper conduct by a party during the course of litigation.<sup>15</sup>

#### **1) The Rejection of a Favourable Settlement Offer by the Unsuccessful Party**

Under Rule 49.10 of the *Rules of Civil Procedure*, adverse cost consequences are to be imposed upon a litigant who does not accept a reasonable, qualifying offer to settle<sup>16</sup>.

Rule 49.10(1) states:

Where an offer to settle,

- (a) is made by a plaintiff at least seven days before the commencement of the hearing;
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the defendant,

and the plaintiff obtains judgement as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the

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<sup>14</sup> *Young v. Young*, [1993] 4 S.C.R. 3 at para 66.

<sup>15</sup> Peacocke, *supra* at 1-2

<sup>16</sup> Peacocke, *supra* at 4-1

date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise<sup>17</sup>.

If a plaintiff makes an offer, which is rejected by the defendant, and then the plaintiff subsequently obtains a less favourable result at trial, the normal course is for the plaintiff to be awarded partial indemnity costs throughout<sup>18</sup>.

In regards to a defendant's offer, rule 49.10(2) states:

Where an offer to settle,

- (a) is made by a defendant at least seven days before the commencement of the hearing;
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the plaintiff,

and the plaintiff obtains a judgement as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise<sup>19</sup>.

If the defendant makes an offer, which is rejected by the plaintiff, and the plaintiff's case is subsequently dismissed, the prima facie entitlement is for the defendant to receive partial indemnity costs throughout. In some circumstances, however, the defendant may be entitled to substantial indemnity costs from the date of the offer<sup>20</sup>. This principle has been suggested to apply only where: a) the defendant has offered to settle; b) the plaintiff reduces its claim following the defendant's offer; and c) the plaintiff's claim is dismissed<sup>21</sup>. However, even where these circumstances are present, it remains within the court's discretion to determine the scale of costs.

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<sup>17</sup> Rules, r.49.10(1).

<sup>18</sup> Peacocke, *supra* at 4-7 and 4-8

<sup>19</sup> Rules, r.49.10(2).

<sup>20</sup> *S & A Strasser Ltd. V. Richmond Hill* (1990), 29 C.P.C. (2d) 234 (Ont. C.A.) [*Strasser*].

<sup>21</sup> *Radley v. Ogden* (2001), 2001 CarswellOnt 4484 (Ont S.C.J.) [*Radley*] at para 9, Peacocke, *supra* note 20 at 4-10

## **2) An Unproven Allegation of Fraud, Bad Faith or Misconduct Against Another Party**

Substantial indemnity costs have been awarded where a plaintiff has made baseless allegations of fraud or other serious wrongdoing or impropriety that has serious repercussions for the integrity and reputation of the defendant<sup>22</sup>.

Further, if a party prolongs the duration of the proceeding, uses the proceeding to harass the other party, or conducts themselves in a manner that constitutes an abuse of process, substantial indemnity costs may be awarded<sup>23</sup>.

Dubin J.A. has stated that a defendant is entitled to defend an action and to put a plaintiff to the proof of his case. However, where a defendant's acts are a deliberate attempt to frustrate the proceedings by fraud or deception, where the conduct of the defendant is calculated to harm the plaintiff, or where the unreasonable conduct of the defendant compounds the complexity of the proceedings, they are all proper grounds to order substantial indemnity costs<sup>24</sup>.

## **3) Improper Conduct by a Party During the Course of Litigation**

There are two schools of thought on whether misconduct can lead to concurrent awards of substantial indemnity costs and punitive damages, or whether the two are mutually exclusive.

On one hand, in *Plester v. Wawanesa Mutual Insurance Co.*<sup>25</sup> the court of Appeal for Ontario declined to award substantial indemnity costs to the Plesters even though they had been deprived of their entitlement under their insurance and they had been

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<sup>22</sup> See *Apotex*, *supra* note 34.

<sup>23</sup> *Peacocke*, *supra* at 3-13.

<sup>24</sup> *Peacocke*, *supra* at 3-14.

<sup>25</sup> (2006), 2006 CarswellOnt 3241, 39 C.C.L.I. (4<sup>th</sup>) 44 (eC) [*Plester*]

improperly accused of arson. The Court of Appeal said that although the actions of Wawanesa were wrong, they should not be punished a second time, since they already had punitive damages awarded against them.

On the other hand, in *Keays v. Honda Canada Inc.*<sup>26</sup> the Court of Appeal for Ontario refused to reverse the trial judges' award of substantial indemnity costs as well as a premium, based on the finding that Honda's treatment of Keays was outrageous and highhanded. The court stated:

“Awarding costs is a paradigmatic exercise of judicial discretion. In light of the appellant's bad faith and outrageous conduct as found by the trial judge, I can find no error in his choice of the substantial indemnity scale. This is not a duplication of the award of damages, but rather, it compensates the respondent for the legal costs he incurred.”<sup>27</sup>

The fact that the Court of Appeal for Ontario found that costs at this level were warranted in one instance but not the other demonstrates that costs can seem arbitrary and unpredictable. This demonstrates the need to persuade the court of the reasonableness and necessity of such a costs award to compensate the successful party for legal costs incurred. As per *Keays*, the argument to be made is that the wronged party should be compensated for costs on a substantial indemnity basis, in addition to obtaining punitive damages, because the party should be indemnified for costs related to needless litigation.

## **FULL INDEMNITY COSTS**

Rule 57.01(4)(d) of the *Rules of Civil Procedure* allows the court to “award costs in an amount that represents full indemnity”. In *Candelaria v. Candelaria* the court awarded costs on a full indemnity basis as an expression of displeasure towards “procedural gamesmanship”. The court said:

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<sup>26</sup> 2006 CarswellOnt 5885 [*Keays*].

<sup>27</sup> *Ibid.*, para 78

“There was procedural gamesmanship here, not the least of which was wasting ¾ of a day of court time on nonsense objections... Moral of the story: don’t waste the court’s time with procedural games.”<sup>28</sup>”

## FACTORS AFFECTING COSTS AWARDS

The overriding principle in determining cost awards, as suggested by the Court of Appeal for Ontario, is that costs should be fixed at an amount that is fair and reasonable<sup>29</sup>.

Further, Rule 57.01 sets out factors to which a court may have regard in assessing costs (see Schedule “A”). The factors are not closed, as subrule 57.01(i) states: “any other matter relevant to the question of costs<sup>30</sup>.” This allows the court to use broad discretion when it comes to costs, the court can place emphasis on particular considerations as it sees fit.

Two new factors have been added to the list. First, (0.a) states, “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.”<sup>31</sup> Second, (0.b) states, “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.”<sup>32</sup>

Time spent by counsel will presumably be the starting point in fixing costs and the court will then apply the various Rule 57 factors. According to Heighington, there are many arguments to be made against relying upon time as a significant factor, because it rewards inefficiency and the generation of time then becomes a goal in itself<sup>33</sup>.

<sup>28</sup> *Candelaria v. Candelaria*, unreported decision of the Ontario Superior Court of Justice, Costs Endorsement, October 16, 2006, para. 5 [*Candelaria*].

<sup>29</sup> Orkin, *Supra* at 1-21 and 1-22, *Zesta Engineering Ltd. V. Cloutier* (2002) 22 C.C.E.L. (3d) 161, O.J. No. 4495 (C.A.) at para. 4., *Moon v. Sher* (2004) 246 D.L.R. (4<sup>th</sup>) 440, 192 O.A.C. 222, *Boucher v. Public Accountants Council (Ontario)* (2004) 48 C.P.C. (5<sup>th</sup>) 56, 188 O.A.C. 201, 71 O.R. (3d) 291

<sup>30</sup> Orkin, at 1-19.

<sup>31</sup> *Rules*, r.57.01(0.a).

<sup>32</sup> *Rules*, r.57.01(0.b).

<sup>33</sup> S. Heighington, “Is Everything Fixed Now? In *After the Cost Grid What’s Next?*, (Continuing Legal Education, November 2005) at 3-6.

## PROCEDURE TO ASSESS COSTS

Many courts have emphasized that they undertake a “critical examination” in order to arrive at their decision. Morden, A.C.J.O., for the Ontario Court of Appeal affirmed the following statement made by Justice Haines:

“... I believe the fixing of costs still requires a critical examination of the work undertaken in order to determine that the costs claimed have been reasonably incurred and reflect what the court considers to be proper and appropriate in the circumstances given the complexity and significance of the proceedings held up against the backdrop of full indemnification.<sup>34</sup>”

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*<sup>35</sup>.

## BILL OF COSTS

Form 57A is the form used for Bill of Costs. The Bill of Costs should be supported by time dockets. The time dockets should be categorized by item (ie. pleading, discovery, motion), not by date.

## MAXIMIZING COSTS RECOVERY

In order to maximize recovery, counsel should opt to have costs fixed by the Court rather than assessed by an assessment officer. Judges have broader discretion than assessment officers who are bound by the tariff. The difference in awards can be substantial, especially for expert’s fees. If the judge is not willing to fix the costs, it would be necessary to at least obtain special directions.

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<sup>34</sup> *Worley v. Lichong*, [1994] O.J. No. 614 (Gen Div.) at para 5, as quoted in *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222, [1998] O.J. No. 2897 (C.A.) [*Murano*].

<sup>35</sup> *Murano v. Zesta Engineering Ltd.*, *Moon v. Sher and Boucher*, *Supra*.

It is important to follow any direction from the Court. For example, to follow any restriction in the length of the submissions.

The Bill of Costs should be supported by detailed dockets with full and proper descriptions of the time spent. Phone calls and correspondence should be referenced to the work actually performed that day, as should preparation for trial. Be specific in your dockets, do not simply list “preparation for trial – 8.0 hours.” Review and redact the dockets before they are passed on to ensure that any confidential information is not disclosed.

It is important to not overreach, but to be reasonable in the request. You should request the other side’s dockets or submissions as an indication of the amount they suggest to be fair and reasonable, and you should always try to agree on either a global amount or an hourly rate, or at least amounts for some of the tariff items.

## **STEPS IN A CRITICAL REVIEW**

It is the author’s view that the process requiring critical review suggests that the following steps emerge.

- 1) Review the bill of costs and delete items for which there is no costs award<sup>36</sup>;
- 2) Start with the dockets and closely examine the individual dockets and the hourly rates, looking in particular for duplication and excessive time;
- 3) Step back and consider if the total amount sought is fair and reasonable;
- 4) Consider the reasonable expectations of costs of the losing side.

## **PREMIUMS**

The Supreme Court of Canada in *Walker v. Ritchie*<sup>37</sup> has affectively blocked premiums from being awarded against losing parties to compensate for increased risk taken in

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<sup>36</sup> *Delrina Corp v. Triolet Systems Inc.* [2002] 165 O.A.C. 160, 22 C.P.R. (4<sup>th</sup>) 332. You do not get costs where the court has ordered no costs, or where the court is silent as to costs.

<sup>37</sup> *Walker v. Ritchie* (2006), 2006 SCC 45, J.E. 2006-1997 at para. 17 [*Walker*].

litigation. As the Court stated, “Unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation involving similar conduct and counsel, regardless of what arrangements the particular plaintiff may have concluded with counsel.”<sup>38</sup>

## **ADVISING YOUR CLIENTS ABOUT COSTS**

It is important to advise your client about cost considerations. Heighington states, “It will be essential to explain the cost concepts to your client in detail at an early stage, and to keep reminding the client as the matter progresses, of the underlying strategy and the increasing consequences of costs at each state, as well as the practical limitations on what might be recovered even in the most successful outcome”.<sup>39</sup> The prudent course would be to advise the client to make an offer to settle and to advise, in writing, of the risks and of the potential for recovery.

## **CONCLUSION**

As the above discussion makes clear, courts are exercising and striving to award costs that are fair and reasonable having regard to the expectations of the losing party and other relevant factors listed in Rule 57. In appropriate circumstances, the courts are awarding costs on substantial indemnity and even full indemnity scales. It is up to counsel to put forward their best and most convincing case, relying on factors that are pertinent in relation to their specific situation that work toward increasing the quantum or scale of costs.

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<sup>38</sup> *Walker, supra* at para. 28.

<sup>39</sup> S. Heighington, *supra*

## SCHEDULE "A"

### 57.01 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 solicitor; and

(i) any other matter relevant to the question of costs.

## SCHEDULE "B"

FORM 57A

*Courts of Justice Act*

BILL OF COSTS

*(General heading)*

BILL OF COSTS

AMOUNTS CLAIMED FOR FEES AND DISBURSEMENTS

*(Following the items set out in Tariff A, itemize the claim for fees and disbursements. Indicate the names of the lawyers, students-at-law and law clerks who provided services in connection with each item.*

*In support of the claim for fees, attach copies of the dockets or other evidence.*

*In support of the claim for disbursements, attach copies of invoices or other evidence.)*

STATEMENT OF EXPERIENCE

A claim for fees is being made with respect to the following lawyers:

Name of lawyer

Years of experience

TO: *(name and address of lawyer or party)*

RCP-E 57A (November 1, 2005)

### **Edwin G. Upenieks**

**Ed is a partner in the Brampton law firm 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. Certified as a Specialist in Civil Litigation, he has extensive trial and appellate experience before the courts and specialized administrative tribunals. He has lectured on costs to the Ontario Bar Association, the Law Society of Upper Canada, The Advocates Society, the Ontario Trial Lawyers Association, the Peel Law Association, and the Institute of Law Clerks of Ontario. He co-authored *Enforcing Judgements and Orders*, a standard textbook that includes a section on costs awards, solicitor liens, and charging orders, and is working on a practical costs textbook. Called to the Ontario Bar in 1983, he is a graduate of Osgoode Hall Law School**

### **Tejdeep S. Chattha**

**Tejdeep is a Student-at-Law in the Brampton law firm Lawrence Lawrence, Stevenson LLP. He graduated from law school in April, 2007 from the University of Ottawa.**