Costs in Personal Injury Actions

Presentation for The Advocates' Society

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I. Introduction

The cost of litigation is a fundamental barrier to those who wish to access the legal system. A major financial burden on the parties involved in litigation is the cost of legal representation. The two common options that a legal system has to deal with legal costs incurred are: 1) permit costs to lie where they fall, leaving litigants to pay their own costs regardless of the outcome of the litigation, or 2) order that costs follow the event, requiring the unsuccessful party to pay the costs of the successful party.

The Canadian legal system has adopted the general rule that in the ordinary case, costs follow the event, meaning that successful parties may recover any costs that have been reasonably incurred in the litigation provided that their conduct is not of a kind that should result in no entitlement. There are theoretically three levels of costs award available to the court: [1]

a) Partial indemnity costs: an amount to be awarded by application of s.131 of the *Courts of Justice Act*[2] and Rule 57.01 of the *Rules of Civil Procedure*[3], reflecting approximately 55% to 60% of the actual costs incurred by the party or the "full indemnity" amount;[4]
b) Substantial indemnity costs: an amount defined as 1.5 times the amount that would ordinarily be awarded on a "partial indemnity" basis; and
c) Full indemnity costs, which are virtually unattainable.

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[1] *Spiteri Estate v. Canada (Attorney General)*, 2014 ONSC 6167, [2014] O.J. No. 4953, at paras. 51-53.
[2] R.S.O. 1990, c. C.43.
[3] R.R.O. 1990, Reg. 194.
[4] *Moore v. Getahun*, 2014 ONSC 3931, [2014] O.J. No. 2117, at para. 20, *Spiteri Estate v. Canada (Attorney General)*, *supra* note 1, at paras. 53 and 64.

The starting point in the calculation of costs is a determination of partial indemnity costs. Despite the general rule providing for partial indemnity costs, the courts have the discretion to award costs against the successful party[5] or to award no costs in a proper case.

II. The Court's Discretion to Award Costs

Section 131 of the *Courts of Justice Act* provides that the court has a discretion to determine by whom and to what extent the costs of and incidental to a proceeding or a step in the proceeding shall be paid. Rule 57.01(1) provides the factors that a court may consider in determining the quantum of a costs award,

> 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,
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> (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;
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> (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;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
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> (f) whether any step in the proceeding was,
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> (i) improper, vexatious or unnecessary, or
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> (ii) taken through negligence, mistake or excessive caution;
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> (g) a party's denial of or refusal to admit anything that should have been admitted;
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> (h) whether it is appropriate to award any costs or more than one set of costs where a party,

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

(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.

While the degree of indemnification intended by an award of partial indemnity has never been precisely defined, the jurisprudence is clear in that the courts must exercise their discretion in fixing costs, taking into account the factors under Rule 57.01(1), in order to arrive at a just result. Using a mathematical formula tied to actual costs or applying the same percentage discount in every case where partial indemnity costs are sought would be inappropriate.[6]

The court has stated that it is appropriate to use "other methods of measurement, such as time multiplied by hourly rate, or a multiplier, or the result, as a check against the reasonableness of the fees claimed." However, "courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple - of the mathematical calculation of hours docketed times the hourly rate."[7]

Modern costs rules are based on three objectives: 1) to partially indemnify successful litigants for the cost of litigation, 2) to encourage settlement, and 3) to discourage and sanction inappropriate behaviour by litigants.[8] The Court of Appeal in the leading case of *Boucher v. Public Accountants Council for the Province of Ontario*[9] has emphasized that at the end of the day, costs awards should reflect "what the court views as fair and reasonable amount that should

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[6] *Wasserman, Arsenault Ltd. v. Stone*, [2002] O.J. No. 3772 (C.A.), at para. 5, *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2013 ONSC 1041, [2013] O.J. No. 717, at para. 14.
[7] *Osmun v. Cadbury Adams Canada Inc.,* 2010 ONSC 2752, at para. 22.
[8] *Serra v. Serra*, 2009 ONCA 395, [2009] O.J. No. 1905, at para. 8.
[9] *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.), at para. 24.

be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."[10] The court is not obliged to perform a line-by-line analysis of docket entries, but the court must be satisfied that the work performed by the party seeking costs was reasonable on the basis of the factors under Rule 57.01(1).

A judge of first instance in the exercise of his or her discretion is entitled to a high degree of deference. The determination as to which party should bear costs and on what scale is a matter clearly within the discretion of a trial judge.[11] As stated by the Supreme Court of Canada, "[a] court should set aside a costs award on appeal only if the trial judge made an error in principle or if the costs award is plainly wrong."[12]

III. Approaches to Fixing Costs in Ontario

The courts in Ontario have used three common approaches for awarding costs, as discussed below. However, regardless of the approach adopted by a court, the amount of fees that parties pay to their counsel is a relevant factor for the court to consider.[13]

1) Applying the Information for the Profession

Rule 57.01(3) provides that the court shall fix cost in accordance with subrule (1) and the Tariffs. Rule 1.03 defines "partial indemnity costs" as costs awarded in accordance with Part I of

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[10] *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 (C.A.), at para. 4.
[11] *Duong v. NN Life Insurance Company of Canada*, [2001] O.J. No. 641 (C.A.), at para. 14.
[12] *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2003] S.C.J. No. 72, at para. 27.
[13] Ravi Amarnath and Louise James, "Cost and consequence: Assessing the divergent cost streams in Ontario's loser-pays regime" in *The Advocates' Journal* (Toronto: The Advocates' Society, 2017), at 40.

Tariff A, and "substantial indemnity costs" as costs awarded in an amount that is 1.5 times the "partial indemnity" amount.

The *Information for the Profession* ("IFP") in Rule 57, published by the Costs Subcommittee of the Civil Rules Committee and implemented on July 1, 2005, sets out the maximum rates when fixing partial indemnity costs as follows:

Legal Professional	**Maximum Rate**
Law Clerks	$80 / hour
Students-at-law (Articling students)	$60 / hour
Lawyers (less than 10 years from date of call)	$225 / hour
Lawyers (10-20 years from date of call)	$300 / hour
Lawyers (20 years or more from date of call)	$350 / hour

The main difficulty with using the IFP is that the rates have not been updated since 2005. The Court of Appeal has acknowledged that the rates set out in the IFP are out of date,[14] as they fail to account for inflation and the fact that legal fees have risen significantly over the past decade. The courts have on numerous occasions recognized that the hourly rates in the IFP are not realistic, and have been described as "woefully inadequate,"[15] "completely outdated and unrealistic for an action fought by two major downtown Toronto law firms,"[16] and "plainly far too low and unrealistic" with respect to Toronto law firms.[17]

The court has also rejected the strict application of the IFP due to the fact that the IFP is not binding on the court, since it is not a regulation, it is not included in the Rules of Civil

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[14] *Inter-Leasing, Inc. v. Ontario (Revenue),* 2014 ONCA 683, 245 A.C.W.S. (3d) 539, at para. 5.
[15] *Epoch's Garage v. Upper Grand District School Board,* 2013 ONSC 6667, at para. 13.
[16] *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc.,* 2013 ONSC 5213, [2013] O.J. No. 3702, at para. 22.
[17] *Re Ghana Gold Corporation,* 2013 ONSC 5720, at para. 5.

Procedure nor was it issued pursuant to s.66 of the *Courts of Justice Act.*[18] Rather, the hourly rates in the IFP are intended to provide guidance, and are not mandatory.[19] There is also no requirement that counsel must follow the IFP rates in preparing a costs outline or bill of costs.

Importantly, the courts have recognized that "[f]ixing costs is not a mathematical exercise of multiplying hours spent by an hourly rate."[20] The fixing of costs does not begin and end with a calculation of hours times rates, as the introduction of the IFP rates was to signal that the rates are one factor to consider in the assessment process, together with the other factors in Rule 57.01.[21]

2) Applying Inflation-Adjusted IFP Rates

Some courts have adjusted the amounts in the IFP to account for inflation.[22] This approach allows for some certainty for counsel in advising clients on costs, but also permits the rates to be adjusted for inflation to better reflect the actual costs incurred.[23] In this way, rates adjusted for inflation since 2005 are employed, rather than the actual hourly rates charged to the

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[18] *Construction Distribution & Supply Co. v. King Packaged Materials,* 2016 ONSC 7397, at para. 11; *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc., supra* note 16, at para. 23. Section 66 of the *Courts of Justice Act* provides that "the Civil Rules Committee may make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings…"

[19] *First Capital (Canholdings) Corporation v. North American Property Group*, 2012 ONSC 1359, 40 C.P.C. (7th) 46, at para. 14.

[20] *1508270 Ontario Ltd. (c.o.b. Arya Kitchens) v. Prusky,* 2010 ONSC 4484, [2010] O.J. No. 3515, at para. 12.

[21] *Boucher v. Public Accountants Council for the Province of Ontario, supra* note 9, at para. 26.

[22] See *First Capital (Canholdings) Corporation v. North American Property Group*, *supra* note 19, at para. 13.

[23] Ravi Amarnath and Louise James, "Cost and consequence: Assessing the divergent cost streams in Ontario's loser-pays regime," *supra* note 13, at 40.

client. As such, the actual rates charged are only relevant in limiting the costs awarded and preventing them from exceeding the actual amounts charged.[24]

In *First Capital (Canholdings) Corporation v. North American Property Group*,[25] the court had approved partial indemnity hourly rates higher than the maximum hourly rates established in the IFP for several reasons. In addition to acknowledging that the hourly rates in the IFP should be increased for inflation and are intended to provide guidance only, Justice R. Smith recognized that the amount involved was substantial (being about $31 million). Justice R. Smith also stated that it was appropriate to award a higher rate because the lawyers from both parties were from well-respected Toronto firms where hourly rates and office overhead costs are higher than the provincial average. Further, the court inferred that "both parties would be incurring similar full indemnity costs and their reasonable expectations of the unsuccessful party would be to pay partial indemnity costs in excess of the maximum in the Information Notice in these circumstances."[26]

Many cases have followed the approach taken by *First Capital (Canholdings) Corporation v. North American Property Group*, and often, the Bank of Canada Inflation Calculator has been used by the courts to produce inflation-adjusted hourly rates.

3) Awarding Costs as a Percentage of Reasonable Actual Rates

A third approach that has been used by some judges is to assess costs as a percentage of actual rates charged. For example, the court in *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada*

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[24] *Miletic v. Jaksic et al.*, 2015 ONSC 1400, at para. 19.
[25] *First Capital (Canholdings) Corporation v. North American Property Group*, *supra* note 19.
[26] *Ibid*, at para. 14.

Inc. calculated a partial indemnity award as 60% of actual legal costs, and a substantial indemnity award as 90% of actual legal costs.[27]

Likewise, in recognizing that the rates in the IFP are out of date, the Court of Appeal has suggested that "amounts calculated at 55% to 60% of a reasonable actual rate may more appropriately reflect partial indemnity, particularly in the context of two sophisticated litigants well aware of the stakes."[28]

IV. Special Fee Arrangements

Special fee arrangements may be agreed upon by a lawyer and his or her client where the actual fee charged to the client is not based on an hourly rate. The court has considered whether "partial indemnity" should take into account special fee arrangements. The court stated that in making costs submissions, the actual cost to the client, including a special fee arrangement, must be disclosed to the court because indemnity and the level of indemnity is a factor to be considered to ensure a just outcome and the amount awarded in costs cannot exceed the actual amount the client is being charged by the lawyer. However, the actual fee arrangement should not be a governing factor in the court's determination of costs.[29]

The court has also considered whether "partial indemnity" should take into account the actual hourly rates charged to the client if they happen to be higher or lower than the local norm. The court has stated that as a general rule, "neither the benefit of a reduced fee nor the burden of

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[27] *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc*., *supra* note 16, at para. 25.
[28] *Inter-Leasing, Inc. v. Ontario (Revenue), supra* note 14, at para. 5.
[29] *Spiteri Estate v. Canada (Attorney General)*, *supra* note 1, at paras. 60 and 64.

a risk premium should be passed to the other party."[30] The party liable to pay costs should not benefit from a reduced fee negotiated between the opposing counsel and his or her client. The defendant should not be able to reap a windfall because a lawyer had agreed to charge no fee or a reduced fee to assist his client.[31] The court has also stated that "[t]here is no reference anywhere in the Rules to any required relationship between partial indemnity and actual costs."[32]

The general principle that the party liable to pay costs should not benefit from a reduced legal fee is subject to the caveat that partial indemnity costs cannot exceed a party's actual costs, as the party should not gain a windfall as a result of a costs award.[33] The court has explained this principle in the leading decision of *Mantella v. Mantella,* [2006] O.J. No. 2085 (S.C.), at para. 7,

> …The actual fees charged by counsel are not the starting point of a costs analysis. Costs are an indemnity, and thus may not exceed the client's total liability to her solicitor; the client may not gain a windfall as a result of a costs award. However, in fixing partial indemnity costs, the court does not look at the actual fee arrangement between solicitor and client and discount that arrangement to ensure that recovery is "partial". Rather, the court considers the pertinent factors laid down in the rules in fixing the amount of recovery appropriate on a partial indemnity basis. So long as the amount is equal to or less than the actual fees and disbursements charged, then the amount arrived at by reference to the factors listed in the rules will be the amount of the award - whether that represents 50% of actual fees, 75% of actual fees, or even 100% of actual fees. If counsel is prepared to work at rates approximating partial recovery costs, that is counsel's choice. There is no reason why the client's fee recovery ought to be reduced because she has negotiated a favourable rate with counsel, so long as the total of the indemnity does not exceed the fees actually charged.

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[30] *Ibid*, at para. 60.
[31] *Ibid*, at paras. 60-64.
[32] *Geographic Resources Integrated Data Solutions Ltd. v. Peterson*, 2013 ONSC 1041, [2013] O.J. No. 717, at para. 13.
[33] *Ibid*, at para. 14.

However, a number of cases have shown that the court has also ordered costs in a way that maintains the proportion of recovery, as determined by the normal award of partial or substantial indemnity costs. In other words, if the actual costs to the successful party would have resulted in a recovery of a greater proportion, then the costs allowed would be marked down to reflect the lower rate of actual costs. One court has stated that "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…, particularly when the judge rejected a claim for a substantial indemnity award."[34]

In a case where the successful party had negotiated a low hourly rate with their solicitors, which is less than the maximum hourly rate allowable under the partial indemnity rate under the old costs grid, the Court of Appeal agreed that the respondents should only be entitled to only partial indemnity costs, not full indemnity costs. The Court of Appeal explained as follows,[35]

> …Partial indemnity means just that - indemnification for only a part, or a proportion, of the expense of the litigation. In *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.*, [2002] O.J. No. 921 (S.C.J.), Nordheimer J. wrote at para. 16:
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> > 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.

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[34] *Boucher v. Public Accountants Council for the Province of Ontario, supra* note 9, at para. 36.
[35] *Wasserman, Arsenault Ltd. v. Stone,* [2002] O.J. No. 3772 (C.A.), at paras. 3-4.

V. Contingency Fee Arrangements

Fees for litigation may be payable without regard to the results of the case or may be contingent on the results obtained. A contingency fee arrangement ("CFA") is typically used where there is a prospect of receiving a damages award, often in personal injury actions, in which case the lawyer receives a pre-determined percentage of the damages award or a fixed fee. The court has recognized that due to the risks assumed by a lawyer under a CFA, a contingency fee will typically be higher than that which would have been payable had counsel billed the client irrespective of the outcome.[36]

CFAs have only been allowed in Canada since October 1, 2004, when the *Solicitors Act*[37] was amended to allow for CFAs. The concern in allowing for CFAs was that they are believed by some to encourage lawsuits and that it was undesirable for lawyers to have a pecuniary interest in the outcome of their clients' litigation. The change in attitude was based on the objectives of access to justice and the aim to make court proceedings available to people with meritorious claims who cannot afford to access the court system unless they are successful in the litigation.[38] In the seminal case of *McIntyre Estate v. Ontario (Attorney General)*, [2002] O.J. No. 3417 (C.A.), the Court of Appeal concluded that "contingency fees should no longer be considered *per se* champertous" as to be prohibited by the *Champerty Act*, R.S.O. 1897, c. 327.[39]

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[36] *Walker v. Ritchie*, 2006 SCC 45, [2006] S.C.J. No. 45, at para. 11.
[37] R.S.O. 1990, c. S.15.
[38] *McIntyre Estate v. Ontario (Attorney General)*, [2002] O.J. No. 3417 (C.A.), at para. 55.
[39] *Ibid*, at para. 75.

a) Requirements of the Solicitors Act and its Regulations

In order for an agreement to constitute a CFA, it must comply with the requirements of s.28.1 of the *Solicitors Act* and the regulations under the Act. Where the legislature has intended to allow the requirements for a CFA to be waived by the court, the *Solicitors Act* expressly gives such authority in those specific circumstances.[40] Non-compliance with the *Solicitors Act* or the regulations does not automatically make the CFA void or unenforceable.[41]

The court may find that a purported CFA is void for not complying with the *Solicitors Act* and its regulations. In one case, a purported CFA was found to be void because the agreement did not state that the client was advised that hourly rates may vary among solicitors and that the client can speak with other solicitors to compare rates (as required under s.2.3(ii) of O. Reg. 195/04 (Contingency Fee Agreements)), and the agreement did not provide an example that shows how the contingency fee is calculated (as required by s.2.6 of O. Reg. 195/04). The court stated that there is nothing in the *Solicitors Act* or O. Reg. 195/04 that permits the court to waive compliance with these requirements.[42]

b) "Fair and Reasonable" Requirement of CFAs

If the purported CFA does not violate the requirements in the *Solicitors Act* or its regulations, the next step in the analysis is to consider whether the agreement is "fair and

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[40] *Edwards v. Camp Kennebec (Frontenac) (1979) Inc*., 2016 ONSC 2501, at paras. 27 and 29.
[41] *Hodge v. Neinstein,* 2014 ONSC 6366, at para. 81 [*Hodge v. Neinstein (Sup. Ct. J.)*].
[42] *Edwards v. Camp Kennebec (Frontenac) (1979) Inc*., *supra* note 40, at para. 28.

reasonable." A CFA can be declared void, or be cancelled and disregarded, where the court determines that it is either unfair or unreasonable.[43] Section 24 of the *Solicitors Act* provides,

> 24. Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be assessed in the ordinary manner.

When an agreement is challenged, the solicitor bears the onus of satisfying the court that the way in which the agreement was obtained was fair and that the terms of the agreement are reasonable.[44] The fairness of a CFA is assessed as of the date that the agreement was entered into, while the reasonableness of the agreement is assessed as of the date of the hearing.[45]

Fairness to clients must always be a paramount consideration.[46] The fairness requirement under s.24 focuses on the circumstances surrounding the making of the agreement and whether the client fully understands and appreciates the nature of the agreement. The "entire course of dealings between the parties concerning the solicitors' remuneration" must be considered.[47] Where an examination of the full circumstances surrounding the negotiation of the fee agreement reveals that the client understood and appreciated the nature of the fee agreement, and it is clear

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[43] *Henricks-Hunter v. 814888 Ontario Inc. (Phoenix Concert Theatre*), 2012 ONCA 496, [2012] O.J. No. 3207, at para. 13.
[44] *Raphael Partners v. Lam*, [2002] O.J. No. 3605 (C.A.), at para. 37.
[45] *Henricks-Hunter v. 814888 Ontario Inc. (Phoenix Concert Theatre)*, *supra* note 43, at para. 13.
[46] *McIntyre Estate v. Ontario (Attorney General), supra* note 38, at para. 84.
[47] *Raphael Partners v. Lam*, *supra* note 44, at para. 37-38.

that "it was a bargain freely made, understood and accepted by" the client, the court has found that there was no unfairness to the client.[48]

The factors to consider in determining whether the fees charged by a lawyer are reasonable, or whether a particular CFA is champertous, are well established. The court must consider the particular circumstances and consider the conduct of the parties involved, together with the propriety of the motive of the lawyer. The court should consider the nature and the amount of fees to be paid to the lawyer in the event of success. A CFA that overcompensates a lawyer to such an extent that it is unreasonable or unfair to the client is considered to have an improper purpose as it takes advantage of the client.[49] In assessing the lawyer's motive, a court should also consider the reasonableness and fairness of the fee structure in the CFA.[50]

A number of considerations must be considered by an assessment officer in conducting a fee assessment, including the following factors enumerated by the Court of Appeal in the case of *Cohen v. Kealey & Blaney*:[51]

a) the time expended by the solicitor;
b) the legal complexity of the matters to be dealt with;
c) the degree of responsibility assumed by the solicitor;
d) the monetary value of the matters in issue;
e) the importance of the matter to the client;
f) the degree of skill and competence demonstrated by the solicitor;
g) the results achieved;[52]
h) the ability of the client to pay; and

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[48] *Ibid*, at paras. 37-49.
[49] *McIntyre Estate v. Ontario (Attorney General)*, *supra* note 38, at paras. 75 and 76.
[50] *Ibid*, at para. 3.
[51] *Cohen v. Kealey & Blaney*, [1985] O.J. No. 160 (C.A.).
[52] The degree of success includes the early achievement of a beneficial settlement. See *Raphael Partners v. Lam*, *supra* note 44, at para. 56.

i) the client's expectation as to the amount of the fee.

In deciding what is fair and reasonable, the expectation of the parties concerning the quantum of a costs award is relevant.[53] The court has suggested that hourly rates are also relevant in assessing the reasonableness of a CFA, as "information about the actual hourly rates is an important litmus test in assessing the reasonableness of a claim for cost."[54] The achievement of the social objective of providing access to justice for injured parties may also be considered.[55]

Contingency fees are particularly important for very complex cases that involve lengthy and costly preparation.[56] However, the court has stated that the legal complexity was not a factor to consider where there is "no particular legal complexity in respect of the liability and damages issues raised by this action that any lawyer who specializes in the field of personal injury law could not have navigated."[57]

c) Double-Dipping in the Context of CFAs

Double-dipping can be described as the practice of a lawyer taking any costs award in addition to a percentage of the damages award in a successful action. Section 28.1(8) of the *Solicitors Act* provides,

> (8) A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless,

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[53] *Boucher v. Public Accountants Council for the Province of Ontario, supra* note 9, at para. 38.
[54] *Billings (Litigation guardian of) v. Lanark Mutual Insurance Co*., 2011 ONSC 2564, [2011] O.J. No. 1981, at para. 49.
[55] *Hodge v. Neinstein (Sup. Ct. J.), supra* note 41, at para. 80.
[56] *Cogan v. M.F.,* [2007] O.J. No. 4539 (Sup. Ct. J.), at paras. 37 and 68.
[57] *Edwards v. Camp Kennebec (Frontenac) (1979) Inc*., *supra* note 40, at para. 48.

> (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
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> (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

The policy concern underlying s.28.1(8) is that lawyers' fees should not be excessive and that there should be no "double-dipping." However, s.28.1(8) does authorize the court to allow a lawyer to obtain both a contingency fee and to recover the costs awarded to the client in "exceptional circumstances," indicating that the *Solicitors Act* recognizes that there may be cases where a contingency fee alone would not fairly compensate the lawyer.[58] The *Solicitors Act* creates a separate mechanism whereby such provisions could be included in a CFA, if approved by a judge upon a joint application by the lawyer and the client. The *Solicitors Act* specifies that in the absence of judicial approval of any purported fee agreement that permits the taking of costs in addition to a percentage fee, the agreement is unenforceable.[59]

The *Solicitors Act* is silent as to when approval of double-dipping clauses must be obtained. However, the court has suggested that "it cannot be the case that such applications can be delayed by solicitors until after the case is over and all of the funds disbursed, and only then if the client brings an application under ss. 23-25. Such an interpretation would render s. 28.1(9) redundant, and would give no effect to s. 28.1(8)."[60]

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[58] *Oakley & Oakley Professional Corporation v. Aitken,* 2011 ONSC 5613, at paras. 16-17.
[59] *Solicitors Act,* R.S.O. 1990, c. S.15, s.28.1(9), *Hodge v. Neinstein,* 2015 ONSC 7345 (Div. Ct.), at para. 45 [*Hodge v. Neinstein (Div. Ct.)*].
[60] *Hodge v. Neinstein (Div. Ct.), supra* note 59, at para. 49.

There are strong reasons for why a CFA containing a double-dipping clause must be judicially approved, as explained by the Divisional Court in *Hodge v. Neinstein,*[61]

> 50 … First, when cases settle prior to trial, such clauses will frequently put the solicitor in a direct conflict of interest with his own client. It is the solicitor who negotiates the settlement. Defendants typically have no particular interest in how much of a settlement payment is allocated to damages and how much is allocated to costs. What a defendant is interested in is the bottom line – how much in total the defendant is prepared to pay to settle the case. Often, the settlement amount is an all-in figure. If the plaintiff's lawyer is taking a flat percentage, there is no issue. However, if the plaintiff's lawyer takes a percentage of the damages in addition to all of the costs, it is in the interests of the lawyer to maximize the amount allocated to costs and in the interests of the client to maximize the amount allocated to damages. … Since it is often the plaintiff's lawyer who negotiates the allocation of costs, or, even worse, allocates the costs/damages himself, the conflict of interest is obvious.
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> 51 The second danger is that permitting a lawyer to double-dip without prior approval can result in the lawyer circumventing s. 28.1(6) (approval of a percentage more than 50%) without obtaining the approval required under that section within 90 days of the execution of the agreement. … This would enable lawyers to circumvent the strict requirements of s. 28.1(6), which is inconsistent with the purpose and intent of the legislation.

In *Hodge v. Neinstein,* the plaintiff brought a class action against her former lawyer and his law firm, Neinstein & Associates ("Neinstein"), a Toronto law firm specializing in personal injury litigation and working almost exclusively under contingency fee agreements with its clients. The plaintiff alleged that Neinstein acted under improper contingency fee agreements with their clients, took unauthorized fees, failed to obtain court approval when required by law, and charged illegal interest rates on disbursements.[62] Justice Perell dismissed the plaintiff's

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[61] *Ibid*.
[62] *Ibid,* at para. 1.

application to certify her action as a class proceeding.[63] The plaintiff appealed to the Divisional Court, which reversed the decision of first instance and certified the class proceeding.

In *Hodge v. Neinstein,* the contingency fee arrangement signed by the plaintiff with Neinstein is one of the firm's standard form agreements, although individual lawyers may negotiate different terms with individual clients. The norm for contingency agreements at Neinstein is to include the recovery of costs plus a percentage of the damages as fees. None of the agreements contained a clause advising the client that a judge's order was required before the lawyer was entitled to take the costs portion of the amounts recovered for the client pursuant to s.28.1(8) of the *Solicitors Act.*[64]

With respect to the issue of costs being paid as part of the lawyers' fees, the Divisional Court stated that the issue is whether entering into such an agreement without getting approval of the court, in and of itself, renders the agreement unenforceable.[65] Further, if there is a declaration that any such agreement is unenforceable, the next issue is what other remedy may flow from that declaration. If the contingency fee agreements are unenforceable due to their breaches of the *Solicitors Act,* it does not necessarily mean that Neinstein would be disentitled to recover any fees. The Divisional Court suggested two ways of allowing Neinstein to recover its fees:[66]

> One would be for Neinstein & Associates to be entitled to a fee based on a *quantum meruit* basis. This could be raised as a defence or counterclaim by Neinstein & Associates, and assessments could be directed. Such claims would need to be disposed of individually. However, that is not an impediment to certifying a common issue for the

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[63] *Ibid,* at para. 2. Reasons for Perell J. in 2014 ONSC 4501, [2014] O.J. No. 3572.
[64] *Ibid,* at para. 29.
[65] *Ibid,* at para. 78.
[66] *Ibid,* at para. 81.

> plaintiff's claim. A second alternative would be to permit Neinstein & Associates to retain the fee portion based on the percentage of damages, but not anything attributable to costs. This has the advantage of simplicity, but involves a complicating factor when it was Neinstein & Associates itself who determined what portion of an all-in settlement was attributable to costs and what was for damages. Also, it may not be fair compensation for the lawyer in all cases, particularly where the percentage fee taken was low in relation to the amount of costs taken.

Neinstein has appealed the Divisional Court's decision to the Court of Appeal. The appeal was recently heard in March, 2017, however, the reasons have not been published as of the date of this article.

d) Cost Premiums

A risk premium, also known as a cost premium, reflects the probability that the case will go against a party, with the result that the lawyer for that party will be unable to collect payment or will not be entitled to recover payment from his or her client. The Supreme Court of Canada in *Walker v. Ritchie*, 2006 SCC 45, [2006] S.C.J. No. 45 has held that a cost premium cannot be awarded based solely upon risk. While a premium is allowed in order to recognize factors under Rule 57.01, risk does not fall within Rule 57.01.[67]

The court has approved the award of substantial premiums on top of solicitor and client costs. For example, in *Roberts v. Morana.*[68] the Court of Appeal upheld the trial judge's decision to award a premium of $150,000.00. The cost premium awarded was justified by the

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[67] *Pate v. Galway-Cavendish and Harvey (Township)*, 2010 ONSC 809, [2010] O.J. No. 580, at paras. 2 and 3, *Berendsen v. Ontario*, [2008] O.J. No. 2760 (Sup. Ct. J.), at paras. 22-24.
[68] *Roberts v. Morana,* [2000] O.J. No. 2688 (C.A.).

"meticulous, ingenious preparation and presentation of the case" and "the financial risk incurred by the plaintiff's counsel and the extraordinary result" achieved.[69]

However, courts have noted that a premium cannot be awarded against an unsuccessful defendant based solely upon risk. In *Walker v. Ritchie, supra,* the Supreme Court of Canada considered the issue of whether a successful plaintiff's costs award, payable by an unsuccessful defendant, should be increased to take into account the risk premium reflecting the risk of non-payment to the plaintiff's counsel. The propriety of a risk premium between a lawyer and a client was not challenged. The Court held that the risk of non-payment of a lawyer's fees is not a relevant factor for a court to consider under Rule 57.01, which guides a court's determination of the quantum of a costs award. The risk of non-payment to a plaintiff's counsel is not an enumerated factor nor does it fall under paragraph (i) providing for "any other matter relevant to the question of costs." While the words are broad, they are not unlimited.[70]

In determining that a risk premium cannot be awarded as part of a costs award in the circumstances of *Walker v. Ritchie,* the Court recognized that the enumerated factors were generally neutral as between the parties. The factors dealt with the nature of the case or the conduct of the parties, rather than the parties' financial circumstances or fee arrangements with counsel. A risk premium can only be awarded against a defendant, and hence, is not a neutral factor.[71]

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[69] *Ibid*, at para. 10.
[70] *Walker v. Ritchie*, *supra* note 36, at paras. 24-28.
[71] *Ibid*, at para. 26, *Chandi (Guardian ad litem of) v. Atwell*, 2014 BCCA 446, [2014] B.C.J. No. 2793, at para. 85.

The Court also stated that a defendant has no knowledge of the private arrangements between a plaintiff and his or her lawyer, and hence has no means of measuring the risk of engaging in litigation. The defendants would not be able to gauge their exposure to costs as exposure would depend, partly, on the financial means of the plaintiff and unknown financial arrangements with his or her lawyer. Hence, the general principle underlying the decision in *Walker v. Ritchie, supra* was that "[u]nsuccessful 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."[72]

The Court also recognized that the factors under Rule 57.01(1) already include the risk of taking forward a difficult but legitimate case. Complexity of the legal and factual issues in a particular case, the length of the case, and the increased likelihood of an unfavourable result in a case where it is difficult for plaintiff to prove his or her case are enumerated factors under Rule 57.01(1). Compensating for these factors again through the addition of a risk premium may constitute a double count in the costs award against an unsuccessful defendant.[73]

For example, in *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, the Court of Appeal found that the trial judge's main reason for awarding the premium was risk, and reduced the premium from the $350,000.00 awarded by the trial judge to $50,000.00. The Court stated that there was no power to award a risk premium over and above partial or substantial indemnity costs. However, the Court acknowledged that the premium award awarded by the trial

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[72] *Walker v. Ritchie*, *supra* note 36, at paras. 28 and 29.
[73] *Ibid*, at para. 36; *Moss v. Hutchinson*, [2007] O.J. No. 2795 (Sup. Ct. J.), at para. 16.

judge was only awarded partially on the basis of risk, and that other factors justified a cost premium. Hence, the $50,000.00 awarded was to recognize permissible Rule 57.01 factors, such as the outstanding result achieved, the complexity of the matter, and the importance of the issue.[74]

VI. Conclusion

It is imperative for counsel to be mindful of the various approaches available to the courts in determining costs following a hearing. It is particularly important when making costs submissions to be aware of the methods a court can take as each approach may lead to significantly different costs amounts. However, regardless of the approach taken, the courts are bound by the overriding principle of reasonableness, taking into account the circumstances of each case. Counsel are encouraged to have the principle of reasonableness in mind as they consider the steps and approach in their litigation strategy.

Counsel are also encouraged to ensure that parties involved in litigation are aware that despite the "loser pays" system in Ontario, it is highly unlikely that a successful party will recover all of the fees and expenses incurred as a result of the litigation. A number of factors must be considered by the court in determining the amount an unsuccessful defendant should pay the successful party, and it is best for counsel to communicate the factors and risks associated with costs issues throughout the solicitor-client relationship.

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[74] *Sandhu (Litigation guardian of) v. Wellington Place Apartments,* 2008 ONCA 215, [2008] O.J. No. 1148, at paras. 112-123, *Berendsen v. Ontario*, [2008] O.J. No. 2760 (Sup. Ct. J.), at para. 23.