

THE LAW SOCIETY OF UPPER CANADA

8TH ANNUAL CIVIL LITIGATION FOR LAW CLERKS

COSTS:

MAKING CLAIMS AND MAXIMIZING RECOVERY

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I. INTRODUCTION

Costs are an often overlooked aspect of civil litigation until the time comes to negotiate settlement. However, there are many occasions during the course of litigation, from the time the lawsuit is commenced to the motions stage and during trial preparation, where it is important for the parties to consider the various costs provisions and their impact on the decisions made during the litigation process.

It is not an understatement to state that the majority of the steps taken in a lawsuit can have costs consequences. The factors a court may take into consideration in awarding costs are broad and wide-ranging. Rule 57 of the *Rules of Civil Procedure*, in particular, grants the court broad discretion to consider the parties' conduct in any of the steps of the litigation and to award or withhold costs based on whether the conduct of a party was, for example, frivolous, vexatious or had the effect of shortening or lengthening the proceeding. It is for this reason that it is essential to consider, at every stage of the litigation, your client's exposure to costs when conceiving a litigation strategy.

This paper will deal with costs generally and how they can be claimed, as well as certain specific situations in which there are costs consequences to a particular course of action. Although the *Rules of Civil Procedure* establish a framework for costs, it should always be kept in mind that ultimately, the discretion of the court is paramount.

II. GENERAL PRINCIPLES

As a law clerk, you are likely primarily responsible for the preparation of bills of costs and lists of assessable disbursements, which can often seem like daunting task. In order to make the process easier, it is essential that you familiarize yourself with the *Rules of Civil Procedure*; in particular, Rules 57 and 58 and Tariff A, which provides a guideline for the fees and disbursements which may be claimed in the course of an action.

The first principle applicable to the assessment of costs is found in s. 131 of the *Courts of Justice Act*, which reads as follows:

s. 131(1) 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.

This provision sets out the basic principle which must always be kept in mind with respect to any claim for costs of a motion, application, action or other proceeding: that any award of costs is entirely subject to the discretion of the judge or master hearing the matter, unless there is a specific rule or tariff which applies. Therefore, in preparing a bill of costs or a list of disbursements, specific reference should first be made to the *Rules* and Tariff A, which provide guidelines as to how to formulate such claims and which also set out the factors a court may consider in awarding costs.

There are two types of costs which may be awarded, depending on the situation. The two types of costs are differentiated by the scale on which they are awarded (i.e., the amounts which the parties are entitled to claim). The lesser of the two is known as “partial indemnity costs”.

Rule 1.03(1) defines partial indemnity costs as “costs awarded in accordance with Part I of Tariff A”, which means that in preparing a bill of costs claimed on a partial indemnity basis, you must refer directly to the Tariff as a starting point.

Costs may also (although less frequently) be awarded on a substantial indemnity basis. Substantial indemnity costs are defined in Rule 1.03(1) as “costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A”. In other words, substantial indemnity costs are simply **one and one-half times the amount** of partial indemnity costs. Knowing when to claim either partial or substantial indemnity costs is therefore essential and will be discussed further below.

III. THE RULES OF CIVIL PROCEDURE

A. How Costs are Calculated

Rule 57, “Costs of Proceedings”, deals specifically with costs awarded for and against parties to a lawsuit, while Rule 58, “Assessment of Costs”, governs the court’s discretion in determining the amount of costs payable in a particular situation.

As stated above, the court has tremendous discretion in awarding costs. However, the preamble to Rule 57, entitled “Information for the Profession”, sets out maximum rates for various legal professionals, which are generally considered by the court and which are considered to be applicable to claims for **partial indemnity costs**:

Law Clerks	Maximum of \$80.00 per hour
Students-at-law (articling students)	Maximum of \$60.00 per hour
Lawyers (less than 10 years from date of call)	Maximum of \$225.00 per hour
Lawyers (10-20 years from date of call)	Maximum of \$300.00 per hour
Lawyers (more than 20 years from date of call)	Maximum of \$350.00 per hour

Substantial indemnity costs are calculated by multiplying these maximum hourly rates by 1.5.

B. Factors Considered in Awarding Costs

Rule 57.01(1) consists of a list of factors which the court *may* consider in awarding costs. The list includes the amount of time actually spent, the amounts claimed and recovered, and the complexity of the proceeding. Perhaps most importantly, the court may also consider the actions of the parties to the litigation; in particular, whether the parties acted improperly, whether their actions prolonged or shortened the proceeding, and the parties’ refusal to admit matters that should have been admitted.

In addition to the discretion provided under s. 131 of the *Courts of Justice Act*, Rule 57.01(1)(i) also permits the court to consider “any other matter relevant to the question of costs”.

From the law clerk’s perspective, many of the discretionary factors considered by the court will not be considered when formulating a bill of costs. However, the clerk should be diligent in recording the actual time spent by the various individuals involved in the proceeding and should also consult with the lawyer handling the matter to ensure that the claim made is in proportion to the type of proceeding (its complexity and length) and also bears some reasonable relationship to the amounts claimed in the proceeding itself.

C. Procedures for Claiming Costs

Rule 57.01(6) requires every party to a proceeding who intends to make a claim for costs to give to every other involved party and bring to the hearing a **costs outline** (Form 57B, a copy of which is attached). It is important to note that the costs outline **may not exceed three pages in length**.

A review of Form 57B clearly sets out the court’s expectations in terms of what information is required to make a claim for costs. The factors for the court’s consideration set out in Rule 57.01(1) must be clearly addressed and should be completed in consultation with the lawyer handling the matter. It is also notable that claims for fees must be clearly described in terms of the type of work done: drafting material, legal research, preparation time, hearing time, etc., and the clerk assisting with the matter should be careful to review the lawyer’s dockets with them to ensure that the claims made are accurate. Finally, the form also requires that a list of disbursements claimed be attached as an appendix, a task that requires the law clerk to make specific reference to Tariff A to determine which disbursements may be properly claimed.

In addition to the costs outline, Rule 57.01(5) set out a specific procedure following a trial, the hearing of an application, or the hearing of a motion that disposes of a proceeding (such as a

successful summary judgment motion). The rule requires a successful party who is awarded costs to serve a **bill of costs** (Form 57A, a copy of which is attached) on all other parties and to file the bill with the court.

Unlike Form 57B, Form 57A does not require that the successful party address the factors to be considered by the court in awarding costs, as this form is used only when costs have been awarded (but presumably when the quantum of the costs has not yet been determined). The form also deals with both fees and disbursements, and requires that supporting evidence be provided.

In completing the form, you must follow Tariff A, which means that the amounts claimed for fees should be set out as in Form 57B. In addition, **dockets or other supporting evidence of fees claimed must be attached**. Similarly, when quantifying disbursements, Tariff A must be followed and each disbursement claimed must be placed under the appropriate category of permitted disbursements. **Supporting invoices are also required**. The form concludes with a “Statement of Experience”, which is simply a table containing the name of the lawyer(s) for whom a claim for fees is being made and their year of call.

D. Other Matters

Under Rule 57.03(1), when costs are ordered on a contested motion, the court is required to fix costs and order them to be paid within **30 days**, “unless the court is satisfied that a different order would be more just”. Therefore, it is reasonable to expect that on a motion, the unsuccessful party will be required to pay costs ordered within **30 days**. **This deadline should be carefully adhered to, as the failure to pay costs within the applicable timelines carries with it severe sanctions, including the dismissal or stay of the proceeding or the striking of the party’s statement of defence** (Rule 57.03(2)).

On a motion made without notice, the general rule is that there will be no costs ordered (Rule 57.03(3)).

IV. TARIFF A

In reading this paper, it becomes apparent that Tariff A (attached) bears primary importance in preparing bills of costs and disbursements. Part I of the Tariff deals with fees and instructs the drafter to refer to Rule 57 (discussed above).

Part II of the Tariff governs disbursements and contains an exhaustive list of permissible disbursements, including witness fees, court fees, fees for transcripts, the costs of expert reports and other items. **Disbursements may not be claimed if they do not appear in the Tariff.** However, s. 35 of Tariff A allows the court the discretion to order payment of “any other disbursement reasonably necessary for the conduct of the proceeding”, which permits the successful party to claim additional disbursements not specifically provided for in the Tariff, if the expenses can be justified.

V. COSTS CONSEQUENCES IN SPECIFIC CASES

In certain cases, there are specific rules which govern the manner in which costs are calculated. These cases generally arise when a party has failed to comply with the rules of court or when an offer to settle has been made.

A. Costs Consequences of the Choice of Court

Rule 57.05(1) provides that where a plaintiff brings an action in Superior Court and is awarded an amount which is within the monetary jurisdiction of the Small Claims Court (\$10,000.00), the plaintiff may be barred from recovering costs, even if (s)he is successful in the proceeding.

Similarly, there are costs consequences when a plaintiff fails to bring an action within the Simplified Rules (Rule 76) and is awarded an amount which is less than or equal to the \$50,000.00 limit (not including interest and costs) for such cases. In the event that a party (plaintiff or defendant) commences an action in the by the ordinary procedure and subsequently chooses to transfer the case

into simplified procedure, the transferring party is liable to pay the costs of the opposing party on a **substantial indemnity basis** for all costs, up to the date of the transfer, which would not have been incurred had the action been commenced under simplified procedure (Rule 76.13(1)).

Similarly, a plaintiff may be denied costs unless the action was either commenced under the simplified rules or “the court is satisfied that it was reasonable for the plaintiff” to have commenced or continued the action under the ordinary procedure (Rule 76.13(3)).

B. Costs Consequences of the Failure to make Admissions

Rule 51.04 provides that where a party has been served with a Request to Admit (under Rule 51.02) and has refused to admit the truth of a fact or the authenticity of a document and that fact or document is subsequently proved at the hearing, the court may consider this in awarding costs. The same rule applies to any refusal to admit “anything that should have been admitted”, even if no Request to Admit is delivered (see Rule 57.01(1)(g)).

C. Rule 49 Offers to Settle

Rule 49 of the *Rules of Civil Procedure* governs offers to settle made in relation to any court proceeding. The importance of a Rule 49 offer is that it positions the parties in relation to costs and creates an element of risk for both sides. The impact of a Rule 49 offer is as follows (Rule 49.10):

1. If a Plaintiff makes a Rule 49 offer and is awarded a sum which is **equal to or greater than the amount offered**, the Plaintiff is entitled to costs on a **partial indemnity basis** up to the date of the offer and on a **substantial indemnity basis** from the date of the offer.
2. If a Defendant makes an offer and the Plaintiff is awarded a sum which is **equal to or less than the amount offered**, the Plaintiff is entitled to costs on a **partial indemnity basis** up to the date of the offer and the Defendant is entitled to costs on a **partial indemnity basis** from the date the offer was made.

In order to make a valid Rule 49 offer, the following requirements must be met (Rule 49.10):

1. The offer must be made at least seven days before the commencement of the hearing;
2. The offer must not be withdrawn or expire prior to the commencement of the hearing; and
3. The offer must not be accepted by the opposing party.

For these reasons, a Rule 49 offer to settle is an important tactical tool in maximizing the recovery of costs.

VI. CONCLUSION

It is important that law clerks not underestimate the importance of being well-versed in the *Rules* and associated Tariffs, which must be used as the first points of reference at any time Bills of Costs are prepared in relation to any court proceeding. Similarly, it is essential to keep costs consequences in mind when making any decisions as to how to proceed with an action.