Civil Procedure
Winter Term 2023

LECTURE NOTES NO. 2

Introduction to the 'Costs Rules'

- **Costs** = money paid by the unsuccessful party to the successful party in litigation, adjusted for offers to settle, bad behaviour, and proportionality.

- Aim: compensation for the costs of litigation.

- 'Partial indemnity' is the norm (expect 60% of reasonable costs at best), 'substantial indemnity' (90% of reasonable costs) are exceptional and usually based on offers to settle, and 'full indemnity costs' are rare.

- ***These are discretionary awards and very hard to predict.***

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

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.

See Rules 49 (Settlement Offers), 57 (Costs)

Plaintiff's Offer

49.10 (1) 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(b) is not withdrawn and does not expire before the commencement of the hearing; and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 a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

(2) 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(b) is not withdrawn and does not expire before the commencement of the hearing; and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 judgment 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.

...

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

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

Barlow v Citadel General Assurance Co.
2008 CanLII 3215 (Ont. S.C.J.)

Here the plaintiff was awarded $100,000 in damages and sought $250,000 in costs; costs in the amount of $90,000 were awarded (the trial judge held that the claim was 'outlandish' and seemed to have been made under the assumption that the defendant insurer should be punished for vigorously defending the claim).

Aside from illustrating the general method by which costs are assessed, this case considers whether a lawyer may seek a premium from the losing party to assure that the lawyer's bill is paid fully (that is; that the shortfall between actual costs and the costs ordered are paid by the losing party where the winning party has insufficient funds).

Lalonde J.:

4 **Counsel for the plaintiff seeks a $50,000.00 premium on the basis that he took on the plaintiff's case on the basis that he would not recover any fees or disbursement unless the plaintiff was successful in a settlement or at trial. He states that his client had no financial ability to retain his services.**

...

10 It is not my role in fixing costs to engage in another piece of litigation. I find that the argumentative supplementary costs submissions of plaintiff's counsel were not helpful. Counsel can find any number of costs decisions that, if improperly applied, can support outlandish positions.

11 The plaintiff claimed a premium of $50,000.00 basically because she did not have the financial means to retain counsel (paragraph 3 of the plaintiff's submissions on costs)... In.. Ward v. Manufacturers Life Insurance Co., [2007] O.J. No. 4882 (Ont. C.A.)... In that case, Manufacturers Life froze Mr. Ward's vested commission account. Weiler J.A... states at paras. 69-71 that:

¶ 69 The concerns underlying the decision in Walker apply equally to the new language of Rule 57.01. **First, the new factors, like the old ones, are neutral in character and can apply equally to plaintiffs or defendants. Second, although the new factors do not specifically relate to the nature of the case or the conduct of the parties, they serve to uphold the principles of transparency and predictability that should govern costs awards. The two new factors merely make explicit the fact that, in the absence of a costs grid, there should be fairness and consistency in the amount that can be charged for lawyers' time across similar pieces of litigation involving similar conduct and counsel.**

¶ 70 I would note that the phrase "the principle of indemnity" in the new legislation is qualified. The listed considerations are the experience of the lawyer, the rates charged, and the hours spent. While the clause is phrased inclusively, a risk premium is not of like kind to these considerations.

¶ 71 **Clause (0.b) confirms this interpretation by insisting that costs be what the unsuccessful party could "reasonably expect to pay." This engages the other concern about risk premiums explicit in Walker: that the defendant is not aware of his potential cost exposure because the premium is a private agreement between the plaintiff and his counsel.** As noted in Walker, this is particularly important where, as here, a Rule 49 offer to settle has been made, and the defendant must be aware of the risk of refusing the plaintiff's offer.

12 Weiler J.A. cancelled the $50,000.00 premium award. For the same reasons, I dismiss the plaintiff's claim for a $50,000.00 costs premium in this case.

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Clarington (Municipality) v. Blue Circle Canada Inc.
2009 ONCA 722 (Ont. C.A.)

Epstein J.A. held:

> [30] The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p.23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to *Orkin* at para. 219.
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> **An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:**
>
> **[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.**
>
> [31] The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H. & W. Sales Co.* (2002), 59 O.R. (3d) 97 where, at para. 39, she said:
>
> Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were **specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.**
>
> …
>
> [45] Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex v. Egis Pharmaceuticals* substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation...particularly where a party has conducted itself improperly in the view of this court." For other examples of abuses of process leading to elevated costs, see *Dyer* at pp.184 - 85.

> [46] Here, there is no finding or evidence in the record of "harassment…by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. **In the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court.** In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court.

Clarington is difficult in that the Court does not provide much insight into the level of fault that is required other than to repeat certain traditional characterizations of conduct (such as 'reprehensibility') that are not related to values, except for one: abuse of process. and the administration of justice is prejudiced by vexatious or oppressive conduct.

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Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology
(November 24, 2022, unreported, Ont. S.C.J. – costs)

This is an interesting case that deals with the availability of costs to be ordered against an advocacy group litigating through a private individual, and brings into focus the use / abuse of the costs rules in respect of litigation that is said to be in the "public interest".

Here two students challenged the Covid-19 protocol instituted by Seneca College, particularly the requirement that students be fully vaccinated to take part in classes on campus and in person. They sought an injunction which was before the Court on a motion. The students argued that their individual programs required in-person instruction to complete the program, but that the students were unwilling to be vaccinated. The principal grounds advanced were constitutional; that is, that Seneca's policy violated the students' rights to freedom of conscience, life, liberty, security of the person, privacy and equality under Sections 2(a), 7, 8 and 15 of the *Charter*. The motion was dismissed; 2022 ONSC 5111 (Ont. S.C.J.).

The matter then proceeded to the determination of costs.

In its submissions, Seneca College argued that the students were impecunious but that their litigation was really brought by, and paid for, by an organization called the Judicial Centre for Constitutional Freedoms. Justice W.D. Black held:

> Details About the JCCF and Its Role in the Motion

[5] The JCCF is the Judicial Centre for Constitutional Freedoms, the organization that acted as counsel for the applicants on the motion.

[6] In an article attached to Seneca's costs submissions, the mandate of the JCCF is described by its interim president as follows:

"The Justice Centre's mandate is to defend Canadians' constitutional freedoms through litigation and education."

[7] That sounds laudable. On the other hand the same article describes the JCCF as taking part in a legal challenge against gay-straight alliances in Alberta schools, representing Maxime Bernier over his arrest in Manitoba for breaking public health orders, and notes that its past president compared the 2SLGBTQ rainbow Pride flag to a swastika.

[8] The article notes that the JCCF is described by The Atlas Network, a Washington-based organization that generally makes donations to right-wing-think-tanks, as one of its "Global Partners".

[9] The article also points out that recently the JCCF was in the news for hiring a private investigator to follow the Chief Justice of Manitoba in an effort to gather evidence of him breaking public health orders.

[10] While "putting a tail" on a judge is troubling, and while the article suggests that the JCCF's defence of constitutional freedoms is relative only to freedoms sought by groups with particular political or ideological leanings, in my view it is a slippery slope to examine too closely the affiliations and activities of groups with charitable status, like the JCCF, and to risk allowing subjective views to colour decisions about such groups.

[11] In my opinion, the better approach is instead to look at the specific case at issue, to consider the steps taken in that case and the state of relevant jurisprudence applicable to the case, and to the steps taken, to see if a costs award is warranted.

[12] If it is, then the Court should look to the origins of the claim to determine whether the organization's encouragement, if any, of the claim, and its participation in the claim, warrants ordering it to pay or contribute to costs.

[13] After all, novel cases serving to delineate and clarify constitutional and human rights ought generally to be encouraged, and organizations funding and undertaking such challenges ought not to be deterred.

[14] In this case, as Seneca points out, JCCF has "advertised it extensively on its website" and has "fundraised to support this case". In the latter regard, as confirmed by its financial statements, also filed with Seneca's materials, JCCF has gone from having assets of $133,271 as of 2014 to having raised donations upwards of $2.6 million in the last couple of years, and net assets as of 2020 of $1,742,314, almost $1.7 million of which was held as cash. In 2020, according to its income statement, it had an excess of revenue over expenses in that year of almost $500,000.

[15] In its materials, Seneca provides links to various pronouncements on the JCCF website relative to this case. A posting on August 24, 2021 is representative. It trumpets various tenets of what ultimately formed the applicants' case before me (many of which I rejected in my decision on the injunction motion). The post announces that:

"The Justice Centre is preparing a lawsuit against Seneca on behalf of these students, and intends to aggressively defend their Charter rights. Seneca's policy is not only unconstitutional, but also not science or evidence-based..."

[16] It is apparent based on these materials that the JCCF actively and continuously promoted this case on its website, and inserted itself in the "cause" being litigated, rather than maintaining the posture of dispassionate advocate.

[17] Seneca notes all of this in its costs submissions, and, as set out above, makes it clear that it seeks its costs from the well-funded JCCF rather than from the individual applicants.

JCCF Liable for Costs

[18] In my view, that is the appropriate approach and, notwithstanding the JCCF's status as a charity and its stated goal of defending important constitutional rights, it is riding, in this case, the twin horses of advocate and interested party.

Discussion of Rule 57.03 Factors

[19] In terms of the rationale for and quantification of costs, Seneca points to the various factors identified in Rule 57.01(1) for consideration by the Court.

[20] First, it notes that as a general proposition pursuant to Rule 57.03(1)(a), costs of interlocutory matters should be ordered payable within 30 days.

[21] The applicants, in part of their alternative costs submissions (their initial submission is that no costs should be payable at all given that this is public interest litigation), argue that if costs are to be paid by them, it should be in the cause (again on the basis that this is public interest litigation), or should await the outcome of the applicants' pending motion for leave to appeal, and should be stayed if that leave is granted.

[22] In responding to this latter proposition, Seneca says, fairly in my view, that waiting for the outcome of a leave motion to impose a costs Order would create unfortunate encouragement for vexatious appeals (launched with a view to delaying or avoiding costs Orders). I expect that the applicants can and will roll any adverse costs award into the pending leave motion, and so the practical result may be the same, but I see no reason for the Court to facilitate and encourage delay in unsuccessful parties being held to account.

…

Applicants' Responses to Seneca's Claimed Costs

[30] The applicants' response to Seneca's stated bases for the costs claimed is multifold.

[31] After articulating their primary position that no costs should be payable in public interest litigation like (they maintain) this case, the applicants first note what appears to be an arithmetic error in Seneca's calculation of costs. That is, whereas Seneca's calculated number for partial indemnity costs totals $177,176.59, the figures itemized only add up to $126,944.75.

[thereafter the Court considered the details of Seneca's "Bill of Costs", ultimately awarding Seneca costs on a partial indemnity basis in the amount of $110,000.00 plus disbursements of $46,461.99.]