

JOURNAL ARTICLE NO. 4  
IMPORTANT AMENDMENTS TO  
THE LAW OF COSTS

Costs have always been an important factor when considering whether or not to commence or defend litigation. During a special lecture to The Law Society of Upper Canada exactly fifty years ago,<sup>1</sup> Jack Weir stated “before you issue a writ or put in an appearance you will no doubt wish to discuss the question of your costs with your client and take from him a simple retainer”.<sup>2</sup>

This advice is almost certainly more important today than it was in 1952 when recommended by Mr. Weir.<sup>3</sup> Important changes have been made to The Rules of Civil Procedure during the past decade to recognize and address the rising costs of litigation. Earlier in this course we examined Rule 76 and the extension of this Rule to actions of \$50,000.00 and less.<sup>4</sup>

A very significant change to The Rules of Civil Procedure has recently been made in the area of costs. Historically, costs have been awarded by a Court to require an unsuccessful party to pay a portion of the legal costs of the successful party.<sup>5</sup> Costs have generally been awarded on either a party and party or solicitor and client scale. The concepts of party and party and solicitor and client costs have always been difficult to explain to clients, who seek to compare these terms to something they understand such as the bills received from their solicitors.<sup>6</sup>

Costs often were only awarded at the end of an action and were frequently not fixed until they were considered by an Assessment Officer, usually a substantial time after the action had been completed. This practice resulted in additional expense and delay to the parties to the litigation.

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<sup>1</sup> *Special Lectures of the Law Society of Upper Canada 1952*, Richard DeBoo Limited, Toronto, 1952.

<sup>2</sup> J.T. Weir, “Costs and Their Taxation”, (1952) *Special Lectures of L.S.U.C.* at p.67.

<sup>3</sup> In Mr. Weir’s paper delivered at the Special Lectures of the Law Society, he reviewed the taxation of costs under the tariff in place at that time. Of particular interest is Mr. Weir’s discussion of the junior counsel fee at trial which, under a recent amendment to the tariff, had been raised from \$50.00 to \$75.00 per day.

<sup>4</sup> Effective January, 2002, Ontario Regulation 284/01 amended Rule 76 of the Rules of Civil Procedure.

<sup>5</sup> For an overview of the classification of costs, and the historical basis of this classification, See Chapter 1 of Mark M. Orkin, *The Law of Costs*, Canada Law Book, Aurora, Ontario, 2001.

<sup>6</sup> Edwin G. Upenieks and Robert J. Van Kessel, *Enforcing Judgments and Orders*, Butterworths Canada Ltd., Markham, Ontario, 2002 at p.1.

Following the decision of the Ontario Court of Appeal in *Murano*,<sup>7</sup> which directed that the Court should only fix costs if it could do procedural and substantive justice, after conducting an appropriate hearing with respect to costs, the Courts rarely fixed costs following trials and substantial motions.

#### JANUARY 1, 2002 AMENDMENT:

The amendments in Ontario Regulation 284/01 which came into effect on January 1, 2002, have made a number of important changes with respect to costs in litigation proceedings. The most significant change is that the costs of a motion, application or trial are to be fixed by the Court, absent exceptional circumstances.<sup>8</sup>

Rule 57.01 has now been amended to require a Court when awarding costs to fix the costs in accordance with the tariffs. It is only in exceptional cases under the amended Rule 57 where a Court may refer costs for assessment under Rule 58.

Rule 57.01(5) now requires that after a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who was awarded costs shall serve and file a bill of costs in the prescribed form.

On the hearing of a motion, unless the Court is satisfied that a different order would be more just, the Court shall fix the costs of the motion and order them to be paid within thirty days.

The classifications of “party and party costs” and “solicitor and client costs” have now been replaced with the terms “partial indemnity costs” and “substantial indemnity costs”. These new terms may be of assistance to counsel in explaining to clients the classifications of costs and the purposes of these classifications. It is anticipated that the Courts shall continue to rely upon the existing case law to determine which classification of costs to impose when fixing costs.

#### AMENDMENT OF TARIFF - IMPOSITION OF COSTS GRID:

Effective January 1, 2002, Part I of Tariff A was revoked and replaced by a costs grid that reflects more current hourly rates, depending upon years of practice. This costs grid is province-wide and sets an upper limit to be applied for each scale of costs. As hourly rates vary considerably in different regions of the province, it shall be interesting to see how the costs grid is applied in each region.

As discussed previously, historically costs have been awarded to require an unsuccessful party to make a contribution to the legal costs of the successful party. Traditionally, there existed a

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<sup>7</sup> *Murano v. Bank of Montreal* (1998) 41 O.R. (3d) 222 (C.A.).

<sup>8</sup> *Supra*, footnote 6, at p.2.

significant discrepancy between the most commonly awarded party and party costs and the order of solicitor and client costs.

The new costs grid has served to substantially reduce the discrepancy between partial indemnity and substantial indemnity hourly rates for all fees other than the counsel fee awarded on a trial, or reference, or on an appeal. For example, for fees other than counsel fee, under the new costs grid a lawyer with less than ten years experience shall be awarded up to \$225.00 per hour on the partial indemnity scale and up to \$300.00 per hour on the substantial indemnity scale. A lawyer with ten or more years of experience, but less than twenty years, shall be entitled to receive up to \$300.00 per hour on the partial indemnity scale and up to \$400.00 per hour on the substantial indemnity scale. Accordingly, for these matters other than counsel fee, the partial indemnity scale compensates these lawyers for an amount equal to 75% of the amount which could be awarded under the substantial indemnity scale.

It is imperative that all counsel become familiar with the new costs grid. Once this has been accomplished, counsel should review Form 57A for a bill of costs which came into effect on January 1, 2002.

It is anticipated that Judges shall expect counsel on the hearing of a motion to provide a draft bill of costs, together with an up-to-date computer print-out which describes the services rendered<sup>9</sup> In more substantial matters, the Court may require additional materials and may request written submissions from counsel.

It is important that counsel take the necessary steps to become familiar with the costs grid and carefully prepare the bill of costs to be submitted to the Court.<sup>10</sup> The time invested in this exercise shall be rewarded when a more favourable cost award is obtained from the Judge fixing costs.

#### CONCLUSION:

In my view, the amendments to the Rules which require costs to be fixed, except in extraordinary circumstances, and the amendments to the Tariff, signify a clear recognition of the important role which costs play in litigation. Courts are now required to fix costs, except in exceptional circumstances, and the costs grid provides the Court with wide jurisdiction to award costs to a

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<sup>9</sup> *Supra*, footnote 6 at p.7.

<sup>10</sup> For a helpful discussion on the preparation of a bill of costs, and a clear statement of the importance of keeping accurate and complete dockets, see *Enforcing Judgments and Orders*, *supra*, footnote 6 at pp.10-11.

successful party up to an amount of \$4,000.00 per day for a counsel fee on a substantial indemnity scale.

I anticipate that the new costs grid will assist Judges and Assessment Officers in creating a more uniform standard of costs in contrast to the previous experience which tended to vary depending upon the jurisdiction and the Judge or Assessment Officer awarding the costs. This greater level of certainty shall assist all of us in advising our clients with respect to the cost award or cost liability which may be expected at the end of the day.