COSTS UPDATE

CURRENT ISSUES IN COMMERCIAL LITIGATION SEMINAR

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Michael Winward received his LL.B. from the University of Western Ontario in 1983. He was called to the Bar of Ontario in 1985 and immediately commenced employment with Mackesy Smye LLP, becoming a partner in 1990. Michael restricts his practice to civil litigation with an emphasis on personal injury and insurance litigation. Michael has enjoyed being a trustee of the Hamilton Law Association and has sat on a number of its committees. Michael is also a member of the Advocates' Society, The Association of Trial Lawyers of America and the Ontario Trial Lawyer's Association. Michael has presented papers on various topics to the Ontario Trial Lawyers Association, the Advocates' Society and the Hamilton Law Association.

Over the past two or three years, there have been a number of developments relative to the law of costs. This paper will highlight and comment upon the amendments in the *Rules of Civil Procedure* relating to costs and some of the more interesting and important cases that have been decided by the Courts.

AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

Effective July 1st, 2005, there were a number of important amendments to the *Rules of Civil Procedure*. Those amendments include:

(i) The costs grid, which was introduced on January 1st, 2002, was abolished. In its place, the Costs Subcommittee of the *Rules of Civil Procedure* published a guideline setting out maximum rates when fixing partial indemnity costs. These were the same maximum rates that were available under the former costs grid. The guideline states that it was the anticipation of the Subcommittee that the maximum rates "Would apply only to the more complicated matters and to the more experienced counsel within each category". The maximum rates set by the guideline are:

Law Clerks	maximum of $80.00 per hour
Student-At-Law	maximum of $60.00 per hour
Lawyer (less than 10 years)	maximum of $225.00 per hour
Lawyer (10 or more but less than 20 years)	maximum of $300.00 per hour
Lawyer (20 years or over)	maximum of $350.00 per hour

There are a number of noteworthy omissions in the guideline published by the Costs Subcommittee as compared to the former costs grid. First, there are no guidelines for counsel fee for motions, applications, trials, references or appeal. Under the former costs grid, maximum amounts were specified for counsel fee for matters ranging in time between .25 hours for a motion to a weekly amount for trial. This is a noteworthy omission. The Courts had interpreted the counsel fee for a proceeding under the costs grid to be the maximum for all counsel involved in the proceeding. For example, under the costs grid, the maximum weekly counsel fee for trial was $9,500.00. The Court of Appeal has held that although a second counsel could be claimed under the costs grid, the aggregate of counsel fees could not exceed the maximum amount set by the grid of $9,500.00 per week. (see *Celanese Canada v. Canadian National Railway Company* [2005] O.J. No. 1121 (C.A.) and *Walker v. Ritchie* [2005] O.J. No. 1600 (C.A.)).

Prior to the introduction of the costs grid, there was no set maximum for counsel fee, particularly where it was appropriate that there be more than one counsel involved in a proceeding. See for example *Dybongco-Rimando Estate v. Lee* [2003] O.J. No. 534 where two counsel, one with 30 years experience and one with 17 years experience, were both entitled to claim their full time in preparation and conduct of a difficult medical negligence action. In that case, Mr. Justice Quinn held that given the circumstances of the action, a collaborative approach between counsel was warranted. Mr. Justice Quinn concluded:

> "I think it is probably correct to say that the collaboration of two senior counsel, more often than not, will produce a better result than the collaboration of one senior and one junior counsel. Certainly the

> plaintiffs in this case received good value from that collaboration. If the collaboration was reasonable, and if it was beneficial to the plaintiffs, I do not think it can be dismissed as a "luxury the defendant should not be required to bear..."

With the elimination of the maximum counsel fee for motions, applications, trial, references and appeals, it would seem that, in appropriate cases, it is open for more than one counsel fee to be allowed without restriction on the quantum of the aggregate fee.

Another noteworthy omission from the guideline published by the Costs Subcommittee is the elimination of the maximums under the substantial indemnity scale. The former costs grid included substantial indemnity scale maximums. There are no such maximums provided by the guidelines published by the Costs Subcommittee. This is no doubt due to the fact that substantial indemnity is now defined under Rule 1.03 to be 1.5 times that which would be awarded on a partial indemnity scale.

By mathematical definition, because substantial indemnity is something less than full indemnity, it would be improper for counsel to claim a partial indemnity rate that is two thirds or more of their actual hourly rate. For example, if counsel's actual hourly rate billed to the client is $300.00 per hour, it would be improper for counsel to claim a partial indemnity rate of $200.00 per hour which would be the equivalent of a substantial indemnity rate of $300.00 per hour (1.5 x $200.00). In that case, counsel's substantial indemnity rate would match the actual rate which would be improper. Based on the definition of "substantial indemnity", counsel's partial indemnity rate

should likely be something in the area of 60% of counsel's actual rate charged to the client. In the scenario of a counsel whose actual hourly rate is $300.00 per hour, counsel's partial indemnity rate should be something in the order of $180.00 per hour, making counsel's substantial indemnity rate at $270.00 per hour.

ii) Rule 57.01(1)(0.a)

Rule 57.01(1) has been amended to expand the factors the Court may consider in exercising its discretion to award costs under Section 131 of the *Courts of Justice Act.* Effective July 1st, 2005, Rule 57.01(1) was amended to include:

> "(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."

This amendment quite clearly sets the founding principle of indemnity in the Court's discretion in awarding costs. Fundamental to the indemnity principle is the hourly rates counsel is charging to the client and the hours spent by the lawyer. In this regard, in assessing costs before the Court, counsel should be prepared to disclose the retainer terms to the Court.

(iii) Rule 57.01(1) has also been amended to allow the Court to consider the expectations of the unsuccessful party. Specifically, the Court may consider

> "(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 fixed."

The expectation of the unsuccessful party is an interesting inclusion in that it raises the potential for the unsuccessful party to disclose its retainer terms and its counsels' time dockets as evidence as to its expectation as to what a reasonable amount would be to pay for a step in the proceeding. In *Canadian National Railway Corporation et al v. Royal and Sunalliance Insurance Company of Canada et al* (2005) 77 O.R. (3d), 612, Justice Ground considered the plaintiff's bill of costs in the amount of $1,261,364.00 plus G.S.T. and disbursements. The defendants complained that they could not reasonably expect the plaintiff to spend approximately four times more than what they spent on the litigation. In considering the time spent and amount charged by the unsuccessful defendant to its client in assessing the bill of costs submitted by the plaintiff, Justice Ground stated

> "Although one would normally expect more time to be spent by the plaintiffs than by the defendants in pre-trial proceedings and preparation for trial, the comparison of fees charged to the defendants and the costs being claimed by the plaintiffs is persuasive in determining the reasonable expectations of the losing party."

In the end, Justice Ground substantially reduced the plaintiff's claim for fees to $800,000.00 to bring the fees closer in line with the defendant's reasonable expectation of what it would have to pay in costs.

(iv) Rule 57.01(d) provides that the Court has the discretion to award an amount of costs that represents full indemnity. Unlike substantial indemnity, full indemnity is not defined within the *Rules of Civil Procedure.* Quite clearly, full indemnity is more than 1.5 times partial indemnity.

Full indemnity costs could be likened to the former scale of costs known as the costs between the client and its own solicitor. Typically, full indemnity costs are awarded to express the Court's intention to punish as well as to deter others from engaging in similar conduct to that of the unsuccessful litigant. Conduct such as unproven allegations of fraud, breach of trust, conspiracy, misrepresentation or breach of fiduciary duty may attract an award of costs on a full indemnity scale. These types of costs sanctions are imposed because such unproven allegations made by the unsuccessful party are rooted in assertions of dishonesty and deceit that go to the heart of a person's integrity. (*Manning v. Epp* [2006] O.J. No. 4239)

(v) Pursuant to Rule 57.01(4)(e), the Court may award costs to an unrepresented party. The cases have held that a self represented litigant should not recover costs for the time and effort that any litigant would have to spend on a proceeding. Rather, costs should only be awarded to a self represented litigant who can demonstrate that they devoted time and effort to do the work that would ordinarily be done by a lawyer retained to conduct the litigation and as a result incurred an opportunity cost by foregoing other remunerative activity (*Fong v. Chan* (1999) 47 O.R. (3d), 330 (C.A.)).

(vi) Rule 57.01(1) has been amended to include a mandatory Costs Outline for a step in a proceeding unless the parties have agreed on the costs that would be appropriate. Specifically, the Rule states:

> "(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step and bring to the hearing, a Costs Outline (Form 57B) not exceeding three pages in length." (Emphasis added).

The inclusion of subrule 6 to Rule 57.01 would appear to be for the purposes of assisting the Court in assessing costs of "a step in a proceeding" such as an interlocutory motion. By comparison, Rule 57.01(5) refers to a Bill of Costs under Form 57A to be served after a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application. In contrast, Rule 57.01(6) is meant to address costs following a "step in a proceeding".

The mandatory wording under Rule 57.01(6) is noteworthy. Unless the parties have agreed on the costs that would be appropriate, it is mandatory on every party who intends to seek costs to bring a Costs Outline to the hearing. There have been a number of cases where costs have been reduced or not ordered at all to a successful party who did not bring a Costs Outline to the hearing. In *Sauve v. Gordon* [2006] O.J. No. 5214, Justice Roy awarded costs to the successful defendant but reduced them by 25% because the defendant did not bring a Costs Outline to the proceeding. In *Flory v. Black* [2006] O.J. No. 5272, Master Hawkins awarded $727.00 in costs to the successful party on a motion stating that he would have awarded "substantially more" if counsel had brought a Costs Outline to the hearing. In *Cango Inc. v. D & S Equipment Limited* [2006] O.J. No. 3046 and *Royal Bank v. Carreia* [2006] O.J. No. 3206, Masters Polika and Dash respectively refused to award the successful party any costs for their failure to bring a Costs Outline to the hearing.

Needless to say, when counsel is attending on a "step in a proceeding", counsel should bring a Costs Outline to the hearing. Counsel may well consider demanding production of the Costs Outline of the opposite party prior to the commencement of the hearing. Obtaining a copy of the opposing counsel's Costs Outline in advance of the hearing could be advantageous in a number of ways including:

(a) if the opposing counsel's Costs Outline approximates or exceeds your own, and if you are successful at the hearing, it is going to be extremely difficult for the opposing counsel to argue that your Costs Outline is excessive;

(b) if opposing counsel's Costs Outline substantially exceeds your own, and if you are unsuccessful at the hearing, you can use your own Costs Outline to argue that your client could not reasonably expect to pay that amount in accordance with Rule 57.01(1)(0.b).

Of course, the opposite is also true in that opposing counsel can use your Costs Outline in the same manner should he or she be successful or unsuccessful at the hearing. Some discretion will have to be exercised, depending on what you know about opposing counsel. Generally, it would be recommended that prior to the actual hearing, counsel exchange their Costs Outlines.

(vii) Rule 57.01 has also been amended to specifically state the process the Court is to follow

in fixing costs:

> "(7) The Court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties."

Needless to say, the Court is not going to go through a Bill of Costs or a Costs Outline in a line by line manner as may be done by an assessment officer. The Court is far more likely to consider all of the factors enumerated in Rule 57.01 to come up with what is considered to be a fair and reasonable quantum for costs.

PREMIUMS ON COSTS AWARDS

When thinking of premiums on costs awards, one may typically think of the example of a difficult personal injury action where plaintiff's counsel takes on considerable risk in not being paid for his or her services and then achieves an extraordinary result. The typical case for a premium award on costs has the combination of risk of non-payment and excellent result. For this reason, premiums are often referred to as "risk premiums".

While premiums on costs awards are more often awarded in personal injury litigation, they have also been awarded in cases other than in personal injury. See for example:

- *108202 Ontario Limited et al v. Hamilton Township Farmer's Mutual* [2004] O.J. No. 3335 where the defendant refused to pay on an insurance policy. (New trial ordered based on an improper jury charge.)

- *Amterek Inc. v. Canadian Commercial Corp.* [2003] O.J. No. 5246 (Trial judgment later reversed by Court of Appeal.)
- *Hodgson v. Canadian Newspaper* [2003] O.J. No. 2760 (Premium on costs award ordered in a defamation action.)
- *Keays v. Honda Canada Inc.* (2006) 82 O.R. (3d), 161 (C.A.) (Court of Appeal reduced a premium in a wrongful dismissal action to $77,500.00.)

The entitlement of a costs premium to any litigant in Ontario has now come under considerable question in light of the October, 2006 decision of the Supreme Court in Canada in *Walker v. Ritchie* [2006] S.C.J. No. 45.

Stephanie Walker was catastrophically injured in a motor vehicle accident. Liability was contested. The action was tried before a jury in 2002. The plaintiff was successful. The plaintiff's costs were then assessed by the trial judge, Mr. Justice Brockenshire. Justice Brokenshire assessed the plaintiff's costs prior to the July 1st, 2005 amendments to the Rules of Civil Procedure. The plaintiff requested a risk premium in the amount of $200,000.00. Justice Brockenshire allowed the premium as claimed. The defendant appealed to the Court of Appeal ((2005) 12 C.P.C. 651). A unanimous panel upheld the payment of the premium. The Court of Appeal held that risk premiums should be awarded rarely and can be justified only when there was both risk of non-payment and an outstanding result. The

defendant appealed further to the Supreme Court of Canada.

The issue before the Supreme Court of Canada was whether Rule 57.01, as it then was, provided the Court with the authority to award a risk premium. In considering the issue, Justice Rothstein, writing for the majority, noted that at the time the costs were assessed, the scheme in place provided for the costs to be fixed at a partial indemnity or substantial indemnity scale as opposed to a full indemnity scale. The Court also took note of the factors that a Court could consider in exercising its discretion to award costs as enumerated in the former Rule 57.01. These factors included such things as the amount claimed and received in the proceeding, the complexity of the proceeding, the conduct of any party that tended to shorten or lengthen the duration of the proceeding, etc. None of the enumerated factors in Rule 57.01(1) referred to the risk of non-payment to the plaintiff's counsel. However, Rule 57.01(1)(i) allowed the Court to consider "any other matter relevant to the question of costs". The Court therefore considered whether risk of non-payment fell within the meaning of Rule 57.01(1)(i). In considering the issue, Justice Rothstein stated:

> "Application of the *esjudem generis* rule would suggest that it was not the intention of its framers that paragraph (i) would include the risk of non-payment to plaintiff's counsel as a relevant factor to consider in an award of costs against an unsuccessful defendant. Unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation involving similar conduct in counsel, regardless of what arrangements the particular plaintiff may have concluded with counsel."

Although the Supreme Court of Canada concluded that a risk premium could not be awarded under the former Rule 57, it opened the door for such claims in light of the amendments which

took effect July 1st, 2005. Specifically, the Court stated:

> "These reasons apply to the costs scheme in place in Ontario at the time costs were fixed in this case. Since that time, the costs scheme has been modified in a number of ways. Whether or not the reasoning in this judgment applies to the costs scheme currently in place will be an issue for the courts as the occasion arises."

The ink was barely dry on the *Walker v. Ritchie* decision before the costs premium under the amended Rule 57.01 was considered. In *Ward v. Manulife Financial* [2007] O.J. No. 37, Justice Power considered plaintiff counsel's request for a costs premium in an action by a life insurance agent for payment of outstanding commissions. In his Reasons for Judgment ([2006] O.J. No. 2284), Justice Power found for the plaintiff, describing the defendant's conduct as "reprehensible" and amounting to a breach of fiduciary duty. Justice Power, in addition to ordering that the defendant pay compensatory damages, also ordered that the defendant pay punitive damages in the amount of $250,000.00. Justice Power then fixed costs at the substantial indemnity scale. Counsel for the plaintiff requested total legal fees of just over $745,000.00 plus a 15% premium of $111,786.64. Justice Power was obliged to consider the request for a premium in light of the post-July1st, 2005 Rule amendments and in the context of the Supreme Court of Canada decision in *Walker v. Ritchie.* Justice Power reviewed both the Rule amendments and the Supreme Court of Canada decision and concluded that in light of the 2005 changes to Rule 57.01, he was permitted to consider and allow a claim for a risk premium. Referring to the Rule changes, Justice Power stated: "These changes, taken as a whole, lead me to the inescapable conclusion that the Supreme Court of Canada's reasoning in *Walker* is not applicable to the present Rule". Although Justice Power did not allow the premium to the extent claimed by the plaintiffs, he did

allow a premium in the amount of $50,000.00. Defence counsel for Manulife Financial advises that the case is under appeal. For anyone interested in the law of risk premiums, it will be worthwhile to follow the history of this case through to the Court of Appeal and perhaps beyond.

Virtually all cases where a premium has been awarded to the successful party describe the premium as a "risk premium". As earlier stated, with the combination of risk of non-payment assumed by counsel together with an excellent or extraordinary result, the risk premium may be payable by the unsuccessful party. However, there would appear to be a second type of premium that has received little attention by the Courts. The second type of premium may be described as a "carrying costs premium". In *Banihashem-Bakhtiari et al v. Axes Investments Inc. et al* (2003) 66 O.R. (3d), 284, Justice Lane heard the case of a plaintiff who was catastrophically injured as a result of smoke inhalation when she was trapped in a stairwell in her apartment building while attempting to escape a fire. She was awarded damages of nearly $2.8 million. When it came for the costs to be fixed, plaintiff's counsel sought a premium of $350,000.00. This premium was not sought because the plaintiff's counsel was at risk for non-payment. Indeed, Mr. Justice Lane noted that the apartment owner could not escape liability without a contribution to damages. He described the owner's chances of escaping liability as "a known impossibility" (pg. 293). Therefore, plaintiff counsel was not in a position to argue for a risk premium since there was no real risk of non-payment. Rather, plaintiff counsel argued for a premium based on the fact that he bore the carrying costs of the trial and, potentially, an appeal if one was launched. In their written submissions, plaintiff's counsel described the situation as follows:

"The plaintiff's counsel's fees remain unpaid to date from 1995 to

> the present. The work in process has therefore been carried for over eight years with substantial amounts expended for disbursements by counsel. The plaintiff's law firm in effect has been the direct lender to the defendants. The work in process has a value in excess of $1,000,000.00. The actual cost to the plaintiff's law firm in its costs of carrying that value is in excess of $350,000.00. It is submitted that the defendant should pay a premium of $350,000.00 for this burden of the plaintiffs and their counsel and for the privilege of conducting the litigation in the manner they did." (at pg. 297)

Justice Lane considered the plaintiff's argument and concluded:

> "In my view, the delay in payment for eight years with possibly two or more years to come as the appeal process continues, is a risk that was assumed by counsel for the plaintiffs in fulfillment of the duty to provide access to justice for the legitimate claims of impecunious parties. Combined with the uncertainty so long as liability was not admitted, it is a basis for a premium to recognize the very real cost of carrying the plaintiffs for that time. I am therefore of the view that a premium is called for. The plaintiffs seek $350,000.00 as an estimate of the real value of the service carrying the plaintiffs for so long." (at pg. 299)

Justice Lane then allowed the premium as claimed in the amount of $350,000.00.

Defence counsel appealed Justice Lane's ruling to the Court of Appeal ([2004] O.J. No. 306). The Court of Appeal declined to interfere with the judge's assessment of the $350,000.00 premium. The defendant then sought leave to appeal from the Supreme Court of Canada ([2004] S.C.C.A. No. 145). On September 16th, 2004, the Supreme Court of Canada refused leave to appeal without reasons.

It is difficult to reconcile the *Banihashem-Bakhtiari* case with *Walker v. Ritchie*. If risk

of non-payment was not a relevant consideration to the former Rule 57.01 scheme, how is counsel's costs in carrying the action a relevant consideration under the same Rule? It would appear that the Supreme Court of Canada did not consider *Banihashem-Bakhtiari* when it decided *Walker v. Ritchie*. However, counsel should be aware that there is appellate authority approving of a carrying costs premium under the former Rule 57.01 costs regime. In the context of a commercial action where an impecunious party has a meritorious claim or defence, and if that party's counsel carries a substantial amount of fees and disbursements until an ultimate successful judgment, that counsel may be entitled to a carrying costs premium to represent the value of that work in process.

DISBURSEMENTS UNDER TARIFF ITEM 35

Part 2 of Tariff A relates to allowable disbursements. Tariff item 35 states:

> "Where ordered by the presiding judge or officer, for any other disbursement reasonably necessary for the conduct of the proceeding, a reasonable amount in the discretion of the assessment officer."

The following are some of the items the Courts have allowed counsel to claim under Tariff item 35:

· faxes, long distance phone calls, Quick-Law research, courier services, stationery costs and postage may be recoverable so long as they are reasonably necessary for the conduct of the proceeding and are not simply part of standard office overhead.

Banihashem-Bakhtiari, supra
Monks v. ING Insurance Company of Canada (2005) 80 O.R. (3d), 609

Moon v. Sher et al (2004) 246 D.L.R. (4th), 440 (Ont. C.A.)

- The cost to interview and prepare an expert witness to testify may be awarded under Tariff item 35.

  Monks v. ING Insurance Company of Canada, supra

- Charges for experts who did not prepare a report or testify at trial may be allowed under Tariff item 35 if the Court finds that the expert's time and advice were reasonable to assist and advise counsel in the conduct of the action.

  Monks v. ING Insurance Company of Canada, supra
  Carleton Condo Corp. No. 21 v. Minto Construction Limited [2002] O.J. No. 2044

- Travel costs may be claimable under Tariff item no. 35.

  McDonald v. Anishinabek Police Services [2007] O.J. No. 424

Counsel would be well advised to reference Tariff item 35 for just about any disbursement that is not otherwise enumerated within Part II of Tariff A.