Breakfast for Business

Costs in Litigation

June 14, 2017

Presenter:
Christopher A.L. Caruana

Wilson Vukelich LLP
Lawyers

1. General Concepts for Costs

- The losing party pays the winning party all or part of his/her/its costs of the litigation
  - Unlike in the United States where each party only has to pay its own costs regardless of the result of the lawsuit
- Therefore, two main realities before you even start the lawsuit are:
  1) When it comes to costs, there is no "win"

     Because only part of the costs are repaid, even the "winner" still loses something – in terms of the costs paid to get the win

  2) If you lose the lawsuit, then it is a "double" loss in the sense that you also have to pay not only <u>your</u> legal fees but also part of the other side(s) legal fees

1. General Concepts continued

- What are the purposes for costs awards?

  To encourage settlement

  - Over 95% of all cases settle
  - Courts are overburdened with only less than 5% of cases going to trial
  - Costs provide an “incentive” towards settlement

- To discourage lawsuits lacking in merit
  - Lawsuits cannot be started and stopped with impunity – there are costs consequences

- Punishment where not otherwise permitted
  - Eg. fraud allegations in lawsuits cannot result in defamation awards, so costs awarded as compensation

1. General Concepts continued

- Costs are discretionary, they are not definite
  - Rule 57.01(1): factors to consider
    - a) the principle of indemnity
    - b) the amount of costs that could be reasonably expected to be incurred
    - c) the amount claimed and recovered in the proceeding
    - d) the apportionment of liability
    - e) the complexity of the proceeding
    - f) the importance of the issues
    - g) the conduct of the parties to shorten / lengthen the proceeding
    - h) whether any steps were improper / vexatious / unnecessary
    - i) whether a party denied / refused to admit something that should have been admitted
    - j) “any other matter relevant to the question of costs”

1. General Concepts continued

- Primary lesson to remember from the fact that costs are discretionary: Do not tick off the judge!
  - Even if the law and facts are clearly on your side so you will win the case, the judge will show his/her displeasure in the costs award

- Partial exception to the discretionary nature of costs: Small Claims Court
  - Section 29 of the Courts of Justice Act – costs not to exceed 15% of the amount claimed (so if sued for $1,000, costs up to $150)
  - BUT, exception to the exception – "unless the court considers it necessary in the interests of justice to penalize a party for unreasonable behaviour in the proceeding."

1. General Concepts continued

- The reality of costs – Judicial "amnesia"
  - Day #1: Lawyer argues that his client should be awarded $250,000 in costs where client actually spent $500,000 in fees and disbursements
  - Day #2: Lawyer is appointed to the bench
  - Day #3: Judge (the former lawyer) hears a case where the winning lawyer argues for $200,000 in costs for his client who spent $500,000 in fees and disbursements
  - Day #4: Judge gives ruling on costs and awards only $100,000 and says that lawyers fees were unreasonably high

  - The Court of Appeal is particularly bad in this regard

1. General Concepts continued

- Costs = Legal Fees + disbursements
  - Easy way to think of them is “soft costs” are legal fees and “hard costs” (ie. out of pocket expenses) are disbursements
  - Legal fees are not fully compensated – only a percentage is awarded, not the entirety
  - Disbursements will be fully compensated – but only if they are reasonable
    - Eg. $1.00 per page for photocopies is not reasonable, $0.25 is often the upper limit (and, yet, the court charges $0.50 or more per page)

1. General Concepts continued

- Partial indemnity vs. Substantial indemnity
  - Both provide for a percentage of actual legal fees – not full amount
  - These apply to legal fees, not to disbursements
  - Terminology (still see in some Ontario agreements or out-of-province agreements)
    - "Party and party costs" = partial indemnity costs
    - "Solicitor-client costs" = substantial indemnity costs
    - "Solicitor-and-his-own-client costs" – no longer exists in Ontario and will be treated as substantial indemnity costs

1. General Concepts continued

- Partial indemnity costs
  - Rough rule of thumb – 40% to 50% of actual legal fees spent
    - But, again, this is based on “reasonable” legal fees
  - Substantial indemnity costs – this is simpler
    - Determine partial indemnity costs and multiply by 1.5
      - Again, rough rule of thumb – 75% of actual legal fees (if reasonable)

2. How Are Costs Determined?

- Official answer: The Rule 57.01(1) factors are considered
- Unofficial answer: The judges use several shortcuts
- Shortcut #1: Cost Outlines – No Reserved Decision
  - Provided at end of hearing of motion / application / trial
  - Judge asks losing party why costs should not be awarded as requested by winning party
    - If not convinced, costs awarded as requested by winning party
    - If convinced, costs reduced to reflect (to some extent at least) the arguments of losing party on costs

2. How Are Costs Determined? continued

- Shortcut #2: Costs Outlines – Reserved Decision
  - Provided at the end of a hearing on a motion / application / trial
  - If similar amounts for both, winning party usually gets what it seeks
  - If different amounts, and winning party has lower numbers, winning party usually gets what it seeks
  - If different amounts, and winning party has higher numbers, then court awards somewhere between the numbers

- Shortcut #3: The “Going Rate”
  - Judges / Masters will know that certain motions “typically” get costs awards up to $X, so they will use that as the basis for the award

2. How Are Costs Determined? continued

- Shortcut #4: The Civil Rules Committee grid

  - The Civil Rules Committee has come out with the following list as a guideline for the maximum hourly rates to be awarded for partial indemnity costs:
  - i. Law clerks — Maximum $80/hour
  - ii. Articling students — Maximum $60/hour
  - iii. Lawyer < 10 years out — Maximum $225/hour
  - iv. Lawyer – 10 to 20 years out — Maximum $300/hour
  - v. Lawyer > 20 years out — Maximum $350/hour

3. Security for Costs

- This normally arises where there is serious doubt that a plaintiff will be able to pay any costs awarded at the end of the hearing (either because the plaintiff has no assets or because the plaintiff is in a precarious financial position)
- The defendant faces the risk of having to spend a lot of money for, ultimately, nothing at the end of the day
- In those cases, a motion for security for costs is likely warranted
- Security for costs can be sought at any point in the lawsuit

3. Security for Costs continued

- Impecuniosity, *per se*, is not enough
- Instances where security for costs may be ordered:
  - i. Where the plaintiff is ordinarily resident outside of Ontario
  - ii. Where this lawsuit is the second (third, etc.) lawsuit pending in Ontario or elsewhere seeking the same relief;
  - iii. Where the plaintiff already has an order for costs made against him/her/it that hasn't been completely paid
  - iv. Where the plaintiff is an insolvent corporation and there is good reason to believe that it wouldn't be able to pay any costs award
  - v. Where there is good reason to believe that the lawsuit is frivolous or vexatious **AND** the plaintiff has insufficient assets in Ontario to pay a costs award

3. Security for Costs continued

- vi. Where a statute entitles a defendant to security for costs
  - Example: Section 12(1) of the Libel and Slander Act for claims against publishers or broadcasters
  - Example: Section 10 of the Public Authorities Protection Act for claims against public officials
- Most orders for security for costs provide for "staggered" payments
  - $X upon exchange of affidavits of documents
  - $Y prior to start of examinations for discovery
  - $Z prior to the pre-trial hearing
- The failure to pay security for costs can lead to dismissal of the lawsuit – and courts will do this

4. Offers to Settle

- Recall that one of the purposes of costs is to encourage settlement
- Offers to Settle under Rule 49 give even further "encouragement" for settlements
- There are certain formalities required:
  - Must be in writing and served on the other party
  - Must be made at least 7 days before the hearing commences
  - Must remain open for acceptance until after the hearing starts
- The **key phrase** "meet or beat" the offer to settle

4. Offers to Settle continued

- Example: A plaintiff offers to settle a lawsuit for $50,000 and the defendant makes no offer to settle.
  - If plaintiff completely loses lawsuit, then defendant gets costs as if plaintiff never made an offer
  - If plaintiff obtains judgment for $49,999.99 or less, the plaintiff will get costs as if the offer had never been made
  - If plaintiff obtains judgment for $50,000.00 or more:
    - The plaintiff will normally receive partial indemnity costs up to the date the offer was made; and
    - Substantial indemnity costs from the date the offer was made until the hearing of the motion / application / trial

4. Offers to Settle continued

- Example: A plaintiff offers to settle a lawsuit for $50,000 and the defendants makes an offer to pay only $30,000 to settle
  - Same situation as before for the three scenarios previously mentioned
  - But what if the plaintiff obtains judgment that is $30,000.00 or less? In that case:
    - The plaintiff will get partial indemnity costs up to the date of the defendant's offer; and
    - The defendant will get partial indemnity costs from the date of the defendant's offer until the hearing of the motion / application / trial

4. Offers to Settle continued

- Rule 49 offers can significantly affect settlements since it can shift costs consequences
- Making Rule 49 offers to settle at, or very near, the beginning of a lawsuit is therefore highly recommended
- It is possible to make multiple offers to settle
  - For example, a defendant could offer to settle for $30,000 on January 1 and then make a further offer to settle for $40,000 on October 1 – with both offers open for acceptance by the plaintiff
- Offers to settle can be made to settle motions – although these are not frequent.

4. Offers to Settle continued

- Offers to Settle also apply in the Small Claims Court
- Rule 14
  - A party may obtain double his/her/its costs if
    - (i) the party makes an offer to settle 7 days before trial;
    - (ii) the offer remains open for acceptance until the trial starts; and
    - (iii) the party gets a result that is as, or more, favourable than the offer
- While costs in Small Claims Court are not large, doubling the amount may not be a huge consideration
  - But if Section 29 *Courts of Justice Act* requests are made, then this could be more significant

5. Costs of Appeals

- The same principles apply for appeals
  - The practical reality, as mentioned above, is that judicial “amnesia” is even worse in the Court of Appeal

- Practical considerations for appeals:
  - On an appeal, the costs will include not only convincing the C.A. of the merits of your side, but also upholding or attacking the lower court’s decision
  - The Court is affectionately known as the “Court of No Appeal” because the success rate on appeals is pretty low
    - “Palpable and overriding error” is the usual test for review and it is hard to meet that threshold in many cases

6. Costs in an Arbitration Context

- The general rule is more simple, in theory:
  - The losing party pays the winning party 100% of his/her/its costs of the entire arbitration, unless the arbitrator / panel orders otherwise
  - Note that this will include the costs of the arbitrators, the hearing rooms, etc. and not just the lawyers fees and disbursements.
- In almost all circumstances, the losing party will not be able to appeal a "bad" or "wrong" costs award unless the arbitration agreement itself permitted such an appeal (Section 45, *Arbitration Act, 1991*)
  - Therefore, you can appeal a judge on costs, but not always an arbitrator

7. Costs on Simple Motions

- For “simpler” motions (compelling affidavits of documents, answers to undertakings, etc.), assume that you will often receive $5,000 or less for costs.
  - Which often will have you question whether a motion is really required

- Types of cost awards on motions:
  - Costs fixed at $X
  - Costs in the cause
  - Costs in any event of the cause to a party
  - No costs to any party

8. Costs on Important Motions / Applications

- Applications vs. Motions
  - Applications are free-standing proceedings that will result in a final determination
  - Motions are interim proceedings that help to eventually reach a final determination later on (usually after the trial)
  - An application can be like the closing arguments of a trial without having any witnesses heard
  - Motions are often short-term procedural squabbles – like who gets to question whom first
    - However, some motions, such as for summary judgment, can result in a final determination
    - Others, such as injunctions to stop a former employee from soliciting customers, can have the same practical result

8. Costs on Important Motions / Applications

- Applications are often as expensive as a trial
- Significant motions, especially injunctions, can also cost as much as a trial
- Personal rule of thumb: if the motion is for an injunction, the starting point for legal fees is $25,000 and it can easily go to $100,000
- Do not expect only $5,000 or less for costs of significant motions

9. Assessment of Costs

- Costs are determined two ways by the Court:
  - (i) The costs can be fixed by the judge him/herself (whether based on the agreement of the parties or not)
    - Judges will do this if the determinations are not overly burdensome
      - As such, costs following trials would often go to an assessment
  - (ii) The judge sends the matter for an assessment of costs by an Assessment Officer
- *Gilbert's LLP* v. *Dixon* – April 2017 decision of the Divisional Court
  - Noted that the average wait time to obtain an assessment hearing in Toronto is up to 3 years

9. Assessment of Costs

- If you are the winning party, try to get the judge to fix costs or agree on costs with the other side

- If you are the losing party, you may be quite content to let the issue of costs languish for several years
  - Although the continued accrual of interest on the costs award will be a disincentive to some extent

QUESTIONS?

The best litigation is the one that is avoided – but sometimes this cannot (and should not) occur. Wilson Vukelich LLP can help you to assess the merits and risks of your business litigation issues. If you have any questions or require further information, please contact:

Christopher A.L. Caruana
Wilson Vukelich LLP
905-940-0526
ccaruana@wvllp.ca

or our Litigation and Dispute Resolution group: https://www.wvllp.ca/areas-of-expertise/litigation-dispute-resolution/

Wilson Vukelich LLP
Lawyers