

THE NEW COST GRID – How Will It Impact On The Recovery Of Party & Party Costs?

Adam K. Wagman
Howie, Sacks & Henry

OTLA 2001 Fall Conference
October 27, 2001

On January 1, 2002, the world of costs will likely change dramatically. The significance of these changes will depend upon whether or not judges across the Province treat the new cost grid as the “cost revolution” that it is intended to be. One thing is for certain: The days of party & party costs are gone.

Before you begin to panic, please read on. Fortunately, you will still be able to get costs from the insurance company that needlessly dragged your client through two years of litigation, when the matter could have been settled with the adjuster for the same amount of money. You will no longer be able to get party & party costs because the name has changed. As of January 1, 2002, party & party costs will be awarded on the “partial indemnity scale”. It is important to note that this is not exclusively a change in name. The new cost grid setting out the partial indemnity scale is accompanied by a number of substantial changes to the *Rules of Civil Procedure* that will affect both the quantum of costs available to the successful litigant, and the manner in which those costs are determined. In order to understand the changes, it is necessary to briefly review the current situation.

The Way We Were (or still are)

The general rule today is that, following a hearing, a judge can either fix costs or order that the costs be assessed by an assessment officer, in accordance with the Tariffs. The

judge can fix costs with or without reference to the Tariffs (Rule 57.01(3)). These Tariffs, with some amendments, have been in place since 1985.

The general rule in recent years has been that a judge disposing of an interlocutory motion would fix costs and order them to be paid “forthwith” (see *Axton v. Kent* (1991), 2 O.R. (3d) 797 (Div. Ct.)). However, if the hearing finally disposes of the matter (trial, summary judgment motion, etc.), judges are still very reluctant to fix costs. Judges have been directed to not fix costs on their own motion (see *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 223 (C.A.)), and they should only fix costs over the objection of one of the parties under very specific circumstances (see *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (1999), 31 C.P.C. (4th) 260 (Ont. Ct. Gen. Div.)). The unsuccessful litigant would rarely agree to have the costs fixed, since the judge would invariably award costs at a higher rate than would an assessment officer. As a result, most of the time judges simply order that the successful party is entitled to his or her party & party costs, to be assessed (although in recent years, judges have started to fix costs following a successful summary judgement motion). This practice has created several problems for successful litigants.

First and foremost, the amounts generally awarded on party & party assessments by an assessment officer are simply too low. Experience would dictate that, in Toronto, a lawyer with 10 years of experience might be awarded up to \$150.00 per hour. Often the figure is even less than that. Senior counsel would be hard pressed to get more than \$200.00 per hour. Further, the assessment officer regularly disallows many of the hours claimed based simply on the time being “excessive”. The assessment officer may have never handled a personal injury case, and certainly would have little sense of the

complexity of the trial and the issues in question. In fact, the assessment officer may never have practiced law.

The Tariffs currently offer “suggested” amounts for each litigation step. These amounts are not in keeping with reality. For example, the suggested rate for an Offer to Settle and a Request to Admit is \$35.00. Often, the assessment officers will not go beyond the suggested amount, regardless of the time actually spent by counsel. In a complicated case, these steps can take a significant amount of time and \$35.00 is not adequate compensation. In Toronto, we must attend Trial Scheduling Court. The maximum amount available for this step (without any discretion to increase) is \$50.00, notwithstanding that the discussion with counsel in advance of, the preparation for, and the attendance at the Trial Scheduling Court could easily take several hours. Affidavits of Documents in a complicated case generally take many hours to prepare and several more hours to review when received from opposing counsel. Under this heading, the general award is \$100.00-\$300.00. In short, notwithstanding the discretion of the assessment officers under most headings, successful litigants subject to a party & party assessment are awarded only a small fraction of the time actually spent by their lawyer.

Assessments are time consuming. Often, one must wait several months to get an appointment, and then spend the better part of a day at the assessment. Memories may have faded, and it becomes more difficult to defend your Bill of Costs in front of someone who knows almost nothing about your case, several months after the fact.

Due to the problems with these assessments, plaintiffs’ lawyers have generally tried to avoid submitting a Rule 49 offer with a term that “costs are to be agreed upon or assessed”. They (rightly) fear that such an offer might actually be accepted, forcing an

assessment under these very unsatisfactory terms. Suggestions have been made in the past to get around this problem (including at the last OTLA conference). Unfortunately, most of the case law concludes that an offer including a fixed sum for costs, or some other “uncertain” term, could render a Rule 49 offer ineffective.

All in all, a party & party assessment is very unsatisfactory, both procedurally and the substantively.

The Times They are a Changin'

Given the unsatisfactory nature of party & party assessments, the Civil Rules Committee undertook a review of this procedure. On February 18, 1999, the Costs Subcommittee (chaired by Mr. Justice Ferrier) submitted a report to the Civil Rules Committee, suggesting that a system should be put in place whereby judges would fix costs within a grid system. A similar system had already been in place in Ottawa for some time.

As a result of these recommendations, a Consultation Paper was circulated to the profession, requesting comments from the bar and other interested parties. Many organizations (including OTLA) made submissions, the majority of which strongly suggested that the rates set out in the proposed cost grid were too low. As a result, the Civil Rules Committee made some significant changes to the proposed grid, and the amendments to the *Rules of Civil Procedure* have now been finalized. These amendments will come into force on January 1, 2002. A complete copy of the Regulation has been appended to this paper.

The New Cost Grid – What's in it for us?

As you will see from the Regulation, it is more than just a new cost grid. There are several amendments to the *Rules of Civil Procedure* that will change the whole process for calculating costs.

The first major change is semantic. Party & party costs are now “partial indemnity”. Solicitor and client costs are now “substantial indemnity”. Although lawyers generally understood the concepts, the new labels will likely be easier for our clients to comprehend.

Rule 57 has been substantially amended. Under the amended Rule 57.01(3), when a court awards costs, they **shall** be fixed in accordance with the new Tariff (i.e. the cost grid). The overall discretion of the judge is still maintained under Rule 57.01(1). The court should only order an assessment in **exceptional** cases (Rule 57.01(3.1)).

Following a contested motion, the court **shall** fix costs or order them to be assessed in **exceptional** cases, and in any event the costs **shall** be payable within 30 days (the new definition of “forthwith”).

The cost grid itself has been markedly changed from the original proposed grid. The hourly rates have been increased dramatically (to rates that, by all accounts, have never been awarded previously on a party & party assessment). There are only three experience categories of lawyers (less than 10 years, 10 or more but less than 20 years, and 20 years and over) instead of the original five categories, and the two categories of motions (simple and complex) have been collapsed into one motions category.

The entire concept underlying the assessment process has changed. There is no longer a step by step breakdown of the fees that should be awarded for each step of the litigation. Instead, the judge or assessment officer (in exceptional circumstances) is to consider the total time spent on the various litigation steps, and then apply an hourly rate to the total hours. The suggested maximum hourly rates certainly will not be awarded in every case, but at least the bar has been raised to an acceptable level. Further, there is discretion to increase the hourly rate beyond the suggested maximums, as consideration is to be given to the “special expertise” of counsel. However, since it is the “hourly rate classification” that may be varied based on expertise, query whether the top category can be increased beyond \$350.00 per hour?

In addition to the hourly rates to be applied to the litigation steps, counsel fees have also been set out for motions, applications, trials and appeals. These rates depend upon the length of the hearing.

It is important to note that there have been no changes to Part II of the Tariff, dealing with disbursements.

Overall, this new system is much better than the old Tariff. Costs will generally be fixed by the judge hearing the matter, who should be intimately familiar with the complexity of the issues. The costs awarded should greatly exceed what would have been available under a party & party assessment, given the substantial increase in the hourly rates. The procedure should be much less time consuming, as a judge is unlikely to delve into the minutia of the case and the hours spent on each step as was done so often at an assessment.

The New Cost Grid – What's missing?

Despite the general approval for the cost grid, it is far from perfect. Several of the original proposals have been omitted, and many suggestions from the bar were ignored.

The original recommendation from the Ferrier Committee was to have various regional cost grids across Ontario. While the cost of litigation around the province does differ from place to place, the concept of a regional cost grid was rejected for a number of reasons. Most importantly, there was a concern that regional cost grids would encourage “region shopping”, a conscious decision by counsel to commence litigation in a particular region to maximize the cost award. This would obviously have a detrimental effect on the resources of that region. There was also a concern that regional grids would be difficult to use where several regions were involved in one action (for example, an action

commenced in one region but tried in another). As a result, the cost grid was created with the most expensive jurisdiction in mind (Toronto), with the expectation that judges will award rates appropriate for the lawyers who practice before them.

It was strongly suggested that the cost grid include a cost of living adjustment. Since, generally speaking, litigation becomes more expensive every year, the cost grid ideally should reflect this reality. Instead of implementing this suggestion, the Civil Rules Committee has adopted a two-year review process.

One amended version of the cost grid specifically included a reference to “waiting time”. For some unknown reason, this reference was deleted in the final version. An attendance at assignment court or Trial Scheduling Court might involve 10 minutes of actual argument, but 2 hours of attendance. A one-hour motion may be accompanied by several hours of waiting time. It is now unclear how a judge should deal with waiting time, although the discretion certainly exists to make such an award.

On a similar point, there was a suggestion that “preparation time” be specifically included in the Tariff. Instead of explicitly including preparation time, the Tariff was amended to include, “any other procedure or service authorized by the *Rules*”. Whether or not this catchall phrase will be interpreted to include preparation time remains to be seen.

The reference to “indemnity” may cause problems when the retainer agreement involves Legal Aid or, hopefully in the very near future, true contingent fees. If the intention is to indemnify the client for costs, arguably the costs awarded cannot exceed the costs for which the client is actually responsible. Should the unsuccessful party get the benefit of the lower Legal Aid rates? What about a situation where the contingent fee is, due to the value of the case, less than what might otherwise be assessed under the cost grid? This

issue was not dealt with in the Regulation, and therefore lawyers must be very careful to draft retainer agreements to avoid this potential problem.

Using the Cost Grid to Get Paid

Finally, we have a cost system that should not strike fear into the heart of every litigator. In fact, under certain circumstances, lawyers may want to insist upon a hearing to fix costs instead of accepting the rates generally offered by defence counsel as part of a settlement. In addition to the above noted concerns, lawyers proceeding with a hearing to fix costs ought to consider the following issues.

Counsel should be careful to classify ancillary procedures such as correspondence and telephone calls as preparation for the various litigation steps referred to in the cost grid. Under the old (current) system, the common practice is to add up all of the letters and then multiply by some factor (usually \$8.00 - \$12.00 per letter). Under the new system, it is doubtful that this practice will continue and therefore they must be put forward as preparation for some litigation event. It is also important to similarly classify all pre-litigation steps. Given the new case management system under Rule 77, a significant amount of work is done before the litigation is even commenced (at least in Toronto and Ottawa). Under the old system, it is difficult to collect costs for the work done pre-litigation. However, as long as this work is classified as preparation for one of the various litigation steps contemplated by the cost grid, it should be recoverable.

Know your judge. If the judge is notoriously cheap, try your luck with an assessment officer. There may be occasions where you get a good result (perhaps from a jury), but the judge was obviously displeased with how the case was conducted. You may be better off with an assessment officer under those conditions. Of course, you will have to

convince the judge that your circumstances are “exceptional”, thereby warranting an assessment.

Finally, keep careful dockets. It used to be possible to estimate the time spent on the various steps, in anticipation that the assessment officer would disallow some of the time in any event. Under the new system, it is hoped that a judge will give consideration to the actual time that it takes to complete the various litigation steps and one can assume that a judge would be unlikely to accept a large number of hours without docket evidence.

It was intended that the partial indemnity scale would represent 60-70% indemnity in most cases. If you consider the issues set out in this paper, you will be able to recover more for costs from the defendant than ever before.

Adam K. Wagman



Howie, Sacks & Henry LLP
OTLA 2001 Fall Conference
October 27, 2001