

Re: COSTS IN LITIGATION

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Background

Costs are the concept of one party having to pay part (partial indemnity) or almost all (substantial indemnity) of the costs incurred by the other side. There is also an award that can be given for “full indemnity” which may be even greater than substantial indemnity. Full indemnity is all reasonable costs incurred and billed to the client, along with all disbursements plus GST for that step or for that proceeding.

Substantial indemnity is all necessary and usual steps for going forward with that motion or in that proceeding, including disbursements that were necessary.

Partial indemnity is usually approximately one half to two thirds of the substantial award that one would receive for fees incurred, plus usually most of the disbursements or expenses incurred in taking those steps.

Deciding Who Should Receive Costs

1. Costs are usually awarded to the winner of that motion or trial, and usually partial indemnity, unless there has been offers to settle that the losing party should have accepted, or the losing party did not disclose information or acted in some way improperly during the proceeding or in the presentation of the case.

Offers to Settle

It would be appropriate prior to a motion, or a trial, for both sides to present reasonable offers to settle. That way each side has a benchmark in that if they can get the court to make a ruling, which is as favorable to them, or more favorable to them than their offer, then they may be entitled to substantial indemnity.

Costs Awarded For Other Factors Than Winning/Losing

If a party does not comply with the *Rules*, provide full disclosure or follow court orders, they may be deprived of costs even though in theory they are deserving of them, or may receive an award of costs against them even if they are a successful party on a motion or proceeding. Thus it is essential that the party protect its position with respect to costs by following the advice of the lawyers, and getting all documents filed, completed and appropriately presented to the other side and to the court.

Time that Costs are Awarded

Costs are usually awarded by the judge that hears or deals with the motion, case conference, pretrial or trial. In order to protect a position that a later judge, or trial judge, should award costs for a pretrial or case conference, it would be necessary for a judge to make an indication at that time that the cost of that proceeding is reserved for the judge later on dealing with the issue of costs. Otherwise the costs of that step in a proceeding may be lost forever. However if it is said that it is to be reserved, and ultimately costs are awarded against that party, it could turn out to be to that party's detriment.

Costs Outline

A Costs Outline (up to 3 pages), should be presented for each step in the proceeding in which costs may be requested or a court may consider them. It should contain basic information as set out in the *Rules of Civil Procedure*, including time spent in the process, hourly rates of the lawyers or staff involved, the particulars of any warnings or indications given to the other side about costs being sought or amount of legal cost being incurred in the step, a list of the assessable disbursements, and may be broken down into topics of substantial and partial indemnity. There may be a need to have some of the backup material, including full dockets, copies of accounts for disbursements for external expenses or other specific items, which could be referenced when the costs issues are being discussed.

Losing Costs

Parties may, by their behaviour during the proceeding, or positions taken with respect to various issues, be responsible for negative costs awards that occur to them. It was well said by a most experienced specialist and Queen's Counsel, about clients, that, "jerks lose, jerks lose big." It was also stated, "If you don't give full disclosure you will pay...in many ways."

The costs scheme is designed to encourage both sides to quickly and efficiently go into the "reasonable range" for resolution and makes those who do not show a willingness to go there pay if they require the case to continue through the court system.