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OPENING STATEMENT

New costs grid: still unpredictable

By Brett Harrison

When Ontario's Civil Rules Committee decided to open the Pandora's box of cost awards in the late 1990s, one of the goals, in addition to increasing the quantum of awards to be more realistic, was to bring about greater predictability. After much consultation with the legal community, the new cost grid was born and rolled out in January 2002 in conjunction with changes to the cost rules.

Now, nearly two years later, it is clear that although there have been benefits from these changes there is still little predictability in the system as the new rules are not being uniformly applied.

Among the major changes brought about by the new rules is that judges, not assessment officers, would fix costs in most cases. Another major change was that in addition to the factors in rule 57.01(1), judges would utilize a new cost grid based on a formula of counsel's hourly rates multiplied by the time spent.

Although it would appear that the judiciary has by and large accepted its new role as arbiter of costs, it is not clear whether the new cost grid has been similarly embraced. The discretion to award costs seems to have remained as broad, and unpredictable, as ever.

Even after almost two years of use there is uncertainty in the legal community as to how the new cost grid will be applied by the courts. The uncertainty was aptly captured in a report released by The Advocates' Society in early 2003, based on a survey it had conducted, which stated that "[i]t was apparent from some of the responses to the survey that there is still confusion among some of the membership, and quite probably on the bench as well, with respect to the operation and application of the costs grid."

A few recent decisions have indicated that some judges are willing to apply the cost grid in a rigorous manner. In *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2003] O.J. No. 990, Justice Warren Winkler noted that the role of the court on a costs disposition is not to second-guess successful counsel on the amount of time spent or the allocation of counsel to the tasks at hand.

Likewise, in *Dybongco-Rimando Estate v. Lee,* [2003] O.J. No. 534, Justice Joseph W. Quinn ordered a cost award of $809,000, over $100,000 more than the damage award. He said it "is not the function of the court to act as arbiter of what the fees charged by counsel and solicitors in that marketplace should be or to impose a different and lower rate."

These judges though, appear to be a small minority. The vast majority of judges have instead decided to take a similar approach to that of the Ontario Court of Appeal in *Zesta Engineering Ltd. v. Cloutier,* [2002] O.J. No. 4495, where the Court stated that the costs award "should reflect more what a court views as a fair and reasonable amount that should be paid by unsuccessful parties than any exact measure of the actual costs to the successful litigant."

In *Toronto v. First Ontario Realty Corp,* [2002] O.J. No. 2519, a leading case on costs under the new grid, Justice Ted Matlow conceded that costs awards remain highly discretionary and the factors enumerated under rule 57.01(1) are still to be considered in fixing costs.

There are many problems with this position. As many judges are not explicitly referring to the factors listed under rule 57.01(1) when awarding costs, there is little guidance as to how these factors should affect the cost grid formula. By and large, judges have simply been applying the "reasonable expectations test" as a form of smell test in which they pick a number which they believe is reasonable in the circumstances. Often awards will be granted without any more explanation than "the hours spent were excessive" or "the file was over-lawyered."

Some rule 57.01(1) factors, such as the size of the case, clearly go to the amount of time spent, but it remains unclear whether the other factors will affect hours, rates, or both. This makes it very difficult for

lawyers to provide estimates to their clients or even an explanation once costs have been awarded.

The reason for this confusion may be that fixing costs is still relatively new for many judges. It may also be attributed to the fact that costs are often considered an afterthought, not worthy of lengthy reasons. The problem is that unless the courts provide guidance to lawyers as to how these factors will affect cost awards, the system will never become more predictable.

That is not to say that the current system is fundamentally flawed and needs to be overhauled, as recommended by the Power Committee's recent report. It is clear from surveys done by The Advocates' Society and the Ontario Trial Lawyers Association that the majority of lawyers believe the effect of the new cost grid has been positive.

Although numerous recommendations have been made to improve the cost grid, such as reducing the ranges for year of call, the effectiveness of system could be greatly improved by simply increasing the judicial resources dedicated to the issue of costs. If judges were provided with the time and the informational resources necessary to fully consider the issue of costs in each case, they would likely produce more fulsome reasons regarding costs. These reasons could provide the roadmap necessary to give lawyers the predictability they have been craving for so long.

Brett Harrison is an associate at McMillan Binch LLP, in the litigation and corporate restructuring groups.