

Tip Sheets for Representing Yourself in the Superior Court

## COSTS OF PROCEEDINGS

*Prepared by Law Help Ontario, Pro Bono Law Ontario*

*This publication contains general information intended to assist the public at large. It is not legal advice about your situation. You should consult a lawyer for advice on your particular situation. This publication is not a substitute for you or your lawyer's own research, analysis and judgment.*

### INTRODUCTION

It is very important that you be aware that there financial risks in going to court. Before you start a civil proceeding, such as a motion, action, application or appeal, you must decide whether to risk having to pay the other party's legal expenses, also known as "costs." This can be a significant amount of money and could be tens of thousands of dollars. You may wish to talk to a lawyer about the strength of your case and your chances of success before bringing a civil proceeding at the Superior Court.

### WHAT ARE COSTS?

The side that loses the civil proceeding usually has to pay the costs of the side that wins. This payment is called a "cost award." Costs are generally intended to reimburse or compensate a party for the expenses paid out to have their case heard by the court. These expenses include fees payable to the court office, amounts paid to a lawyer (if any), and other costs, such as photocopying fees and fees paid to witnesses.

**TIP:** *The Rules of Civil Procedure explains when costs might be ordered. Rule 57 sets out the factors to be considered by the courts. Rule 58 applies to trials and Rule 61 applies to appeals. You can find these Rules in a law library or on e-laws, by following these steps:*

1. Go to [www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca)
2. Choose your preferred language
3. Click on "Search or Brows Current Consolidated Law"
4. Under "Browse Current Consolidated Law", click on "C"
5. Scroll down to "Courts of Justice Act"
6. Click on the "plus sign to the left of "Courts of Justice Act"
7. Click on "Rules of Civil Procedure"

### HOW DOES THE COURT DECIDE TO AWARD COSTS?

The cost of a lawsuit will vary from case to case. The court can choose who should pay and how much that person should pay. The court has a broad discretion to order a

party to pay costs. In making this decision, the court examines a number of factors. These factors are found in Rule 57.01(1) of the *Rules of Civil Procedure*. They include:

1. The amount claimed and the amount recovered in the proceeding;
2. The relative success of each party;
3. How complicated the proceeding was;
4. If the proceeding raises important issues;
5. The conduct of a party that increased or decreased, unnecessarily, the time to hear the proceeding;
6. If a step in the proceeding was taken out of spite, unnecessarily, improperly, negligently or by mistake;
7. If a party denied or refused to admit anything that should have been admitted;
8. If a party started two proceedings when one would have worked or increased costs by refusing to help parties on the same side;
9. The experience, rates and hours spent by the lawyer for the party entitled to the costs on the case;
10. The amount that an unsuccessful party could reasonably expect to pay; and
11. Any other matter relevant to the question of costs.

No single factor determines whether costs will be awarded by the court. However, the court normally places a lot of emphasis on the result of the proceeding and any written offers to settle.

Sometimes, no costs will be ordered. A court does not have to order the losing party to pay the winning party's costs. This is rare and usually happens when a new legal issue is argued for the first time and the result of the case could not really be predicted with any certainty. Also, sometimes the winning party may have to pay the losing party's costs. For example, costs can be awarded against a winning party who did not comply with the *Rules of Civil Procedure*.

### **WHAT IF I TRIED TO SETTLE MY CASE?**

There can be cost consequences where someone fails to accept an offer to settle. There are special rules for costs when there is an offer to settle a case (see Rules 49.10 to 49.14). These rules impose cost consequences on parties who fail to accept offers to settle. Generally, how these rules will be applied in any given case will depend on who makes the offer, when the offer is made and the result of the proceeding.

**TIP:** *The rules regarding settlements and costs are complicated. You should speak with a lawyer before making or refusing an offer to settle, particularly where a lot of money is at stake.*

### **WHAT IF I SHOULD HAVE USED THE SIMPLIFIED PROCEDURE UNDER RULE 76 BUT I DID NOT DO SO?**

Rule 76 creates a simplified procedure for cases that concern an amount of money that is more than \$10,000 but is not more than \$50,000.

Where, after trial, it is shown that the action met the criteria for simplified procedure, a plaintiff who wins the case will not be able to recover any costs unless the action was under the simplified procedure at the start of the trial or the court is satisfied that it was reasonable for the plaintiff to not have started or continued the action under Rule 76.

In such a case, cost consequences for the plaintiff can be severe, as they may be ordered to pay all or part of the defendant's costs (Rule 76.13).

**TIP:** *The Rule 76 simplified procedure is not available for all actions. Rule 76 should be reviewed in its entirety before a proceeding is commenced under this rule.*

### **HOW MUCH OF MY LEGAL EXPENSES WILL BE COVERED IF I WIN MY CASE?**

Even if you win your case, you will have to pay for some of your own legal expenses. It is very rare for a cost award to cover all of your legal expenses. For someone who has a lawyer, there are three (3) different scales of costs – *partial indemnity*, *substantial indemnity* and *full indemnity*.

#### a) the ***partial indemnity*** scale

This means some of your costs are awarded. Courts usually order partial indemnity costs. Partial indemnity costs usually cover about half of the total cost of a lawyer. This includes some of the lawyer's fees and disbursements, such as travel expenses, long-distance calls, and secretarial work.

#### b) the ***substantial indemnity*** scale

This means most of your costs are awarded. Substantial indemnity costs cover almost all of a party's legal expenses. They are costs awarded in an amount that is 1.5 times what would otherwise be awarded on a partial indemnity basis and cover more expenses than partial indemnity costs. However, they are generally awarded only in exceptional circumstances, such as when the court thinks that one party conducted the litigation in an abusive manner. This does not mean that one party was rude. It means that the party did not follow or abused the *Rules of Civil Procedure*.

**TIP:** *You should be careful to obey every court order and all of the court registrar's instructions to avoid having substantial indemnity costs ordered against you. You should not bring a motion just to get more time or to harass the other side. Do not refuse reasonable requests made by the other side.*

c) the **full indemnity** scale

This means all of your costs that have been reasonably incurred are awarded. Courts always have the power to award full indemnity costs, but they are typically only awarded in exceptional situations. The case law does not draw a clear distinction between when an award for substantial indemnity versus full indemnity costs will be made.

**CAN I STILL GET COSTS IF I DO NOT HAVE A LAWYER AND I AM REPRESENTING MYSELF?**

The court has the power to award costs to a party who does not have a lawyer [Rule 57.01(4)(e)]. As with an award of costs where a party is represented, there is no automatic right to costs for self-represented litigants and the decision remains fully within the discretion of the court.

But self-represented litigants are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. The self-represented litigant is not entitled to recover costs for the time and effort that any litigant would have to devote to the case, like coming to court, since all litigants suffer a loss of time through their involvement in the proceedings.

Costs are only awarded to those self-represented persons who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and therefore incurred a cost by foregoing other remunerative activity, such as missing work. A self-represented person must provide receipts that prove that he or she lost money as a result of doing work that a lawyer would normally do. This could include travel expenses, photocopying, transcripts, and time off work or child-care expenses.

Remember to keep the receipts that will help you prove your out of pocket expenses that you incur as a result of doing work that a lawyer would normally do. If you have to miss work and lose wages for this reason, keep a log of these dates.

**TIP:** *If you are representing yourself and you have requested costs from the other side, you should read the case of the Ontario Court of Appeal in Fong v. Chan (1999), 46 O.R. (3d) 330 (C.A.), which explains everything summarized above. You will be able to find this case in any law library or at you can find it online at: [www.ontariocourts.on.ca/decisions/1999/December/fong.htm](http://www.ontariocourts.on.ca/decisions/1999/December/fong.htm) .*

**HOW DO I REQUEST COSTS?**

You should request your costs in your pleadings so that the court is aware that you want costs. You can also request costs at the end of your hearing and, in most cases, the court will ask both parties at that time for their submission on whether costs should be awarded and how much should be awarded.

If you are awarded costs after your trial, motion (that finally disposes of a proceeding) or application is completed, you will need to serve a *bill of costs* (Form 57A) on all of the other parties and file it, with proof of service with the court registrar [Rule 57.01(5)].

If you wish to seek costs in a step in a proceeding (such as a motion that does not finally dispose of a proceeding), unless there is an agreement as to the costs that it would be appropriate to award, you will have to serve on every other party involved in the same step with a *costs outline* (Form 57B) and bring it to the hearing. Your costs outline cannot exceed three (3) pages in length [Rule 57.01(6)].

### **IF I HAVE A COURT FEE WAIVER CERTIFICATE, DO I STILL HAVE TO PAY COSTS?**

Yes, if the court orders costs. A fee waiver certificate does not protect you from having a cost award imposed against you.

### **CAN A COSTS ORDER BE APPEALED?**

Appealing a costs order means that you want the court to change the costs order from trial.

You can appeal a cost order alone without appealing the case or you can appeal the cost order at the same time that you appeal the trial decision. Even if you lose the appeal of the trial decision, the court may reduce the costs order.

Make sure you are in the right court. Review sections 6 and 19 of the *Courts of Justice Act*. Also refer to subsection 133(b) of the *Courts of Justice Act*, which provides that a discretionary order as to costs cannot be appealed without leave (or permission) to appeal. The *Courts of Justice Act* is in the law library and is available through e-laws at [www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca)

**TIP:** *Appealing any court order, including a costs order, is time consuming, expensive and complicated. You should seek legal advice before commencing an appeal. If you lose your appeal you will probably have to pay even more costs to the other side. For more information about appealing costs orders, please review the guidebook called "Court of Appeal Handbook," available at: [www.lawhelpontario.org/appeals](http://www.lawhelpontario.org/appeals)*

### **WHERE CAN I GET MORE INFORMATION?**

The Ministry of the Attorney General has a series of guides that are available at court offices and at the Ministry of the Attorney General website. The site also has general information on civil cases: [www.attorneygeneral.jus.gov.on.ca](http://www.attorneygeneral.jus.gov.on.ca)

Choose your preferred language, click on "Court Services" at the left side of the page, and scroll down to "Civil Cases."

Legal research resources are accessible to the public through CanLII available through the following: <http://www.canlii.ca>

To obtain forms under the *Rules of Civil Procedure*, visit the Ontario Court Forms website at: <http://www.ontariocourtforms.on.ca>. Choose your preferred language and click on “Rules of Civil Procedure Forms”.

The “Guide to Ontario Courts” is available through: <http://www.ontariocourts.on.ca/>

The *Rules of Civil Procedure* are available through the e-laws website. Go to [www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca) and follow these steps:

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