Guide to Understanding the Various Costs Rules Applicable to Litigation Within the Small Claims Court

Generally speaking, when a case goes through a full trial and the successful party obtains a substantial vindication of their claim or defence, the successful party is normally entitled to the full measure of allowable representation costs; ***2106449 Ontario Inc (Pioneer 1 Steel Building) v. Fulford***, 2014 CanLII 17796 at paragraph 14. Despite normally being entitled to "full measure", the costs award for representative fees in a Small Claims Court matter is limited to fifteen (15%) percent of the amount claimed within the case as per the ***Courts of Justice Act***, R.S.O. 1990, c. C.43, s. 29. Accordingly, with a limit of twenty five thousand ($25,000) dollars, per Plaintiff, for legal actions brought in the Small Claims Court, the limit for recovery of representation fees is three thousand seven hundred fifty ($3,750) dollars - being fifteen (15%) percent. Typically, in addition to disbursements (eg. court fees, postage, stationary, etc.), the succeeding party in a Small Claims matter will receive an Order allowing a 'costs award' for some or most, but rarely all, of the fees the party paid for representation (lawyer or paralegal).

As recently stated by Deputy Justice Pikkov in ***2106449 Ontario Inc. v. Fulford***, 2014 CanLII 17796 at paragraph 5:

> Under the Small Claims Court Rules there are three broad heads of costs when judgment is granted:
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> 1. "Disbursement Costs" governed by Rule 19.01;
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> 2. "Representation Costs" governed by Rule 19.04 (or 19.05 if the party is self-represented); and
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> 3. "Punitive Costs" governed by Rule 19.06.
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> Each head should be addressed separately.

Of course, as is usual of most rules, the ***Rules of the Small Claims Court***, O. Reg. 258/98 provide for some exceptions to the fifteen (15%) percent limit. These exceptions include Rule 14.07, being the 'double costs penalty' for failure to accept a reasonable offer to settle, as well as Rule 19.06, being the 'general penalty' for unduly complicating or prolonging the litigation. An exception to the usual limit as prescribed by s. 29 of the ***Courts of Justice Act*** also arises for "unreasonable behaviour" as is stated within s. 29 itself.

Rule 14.07 says:

> (1) When a plaintiff makes an offer to settle that is not accepted by the defendant, the court may award the plaintiff an amount not exceeding twice the costs of the action, if the following conditions are met:
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> 1. The plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer.
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> 2. The offer was made at least seven days before the trial.
>
> 3. The offer was not withdrawn and did not expire before the trial.
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> (2) When a defendant makes an offer to settle that is not accepted by the plaintiff, the court may award the defendant an amount not exceeding twice the costs awardable to a successful party, from the date the offer was served, if the following conditions are met:
>
> 1. The plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer.
>
> 2. The offer was made at least seven days before the trial.
>
> 3. The offer was not withdrawn and did not expire before the trial.
>
> (3) If an amount is awarded under subrule (1) or (2) to a self-represented party, the court may also award the party an amount not exceeding $500 as compensation for inconvenience and expense.

Essentially, in a represented matter, where a party to the litigation made an Offer-to-Settle, at least seven (7) days prior to the trial, and the outcome of the trial is such that the unsuccessful party to the litigation should have accepted the Offer-to-Settle, the trial Judge may award up to double the usual costs award limit. Simply stated, this *Rule* doubles the limit from fifteen (15%) percent to thirty (30%) percent. Of course, while the Judge will have the power to award the 'double costs penalty' doing so remains within the discretion of the Judge. This being said, in almost all circumstances, the trial Judge will impose a significant penalty where an Offer-to-Settle, that was better than the trial outcome, was declined or otherwise was without acceptance, thereby pushing the litigation unnecessarily to trial. Such a penalty was imposed in the case of ***Wilkinson v. Sneddon Insurance Brokers Limited*** 2014 CanLII 78267 . In the case of ***Doerr v. Sterling Paralegal***, 2014 CanLII 46013, the Judge applied the double costs penalty where the Plaintiff failed to prove the case and an offer compliant with Rule 14.07 was previously made by the Defendant. When doubling the costs award, the Judge stated that, "proceeding to trial on claims without some merit will attract costs consequences."

Rule 19.06 says:

> If the court is satisfied that a party has unduly complicated or prolonged an action or has otherwise acted unreasonably, the court may order the party to pay an amount as compensation to another party.

Section 29 of the *Courts of Justice Act* says:

> An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding.

Examples of "unreasonable behaviour" within a proceeding include the proceeding to trial with a plain and obvious lack of evidence; ***Legris v. Mudge***, 2014 CanLII 22141; the Rule 14.07 failure to accept a reasonable Offer-to-Settle; ***Wilkinson v. Sneddon Insurance Brokers Limited***, 2014 CanLII 78267.

Cases on Costs

Additionally, courts at various levels have found unreasonable behaviour to include, among other things:

- The uncivil conduct of a self-represented party; ***Schaer v. Barrie Yacht Club***, 2003 CanLII 38484;
- The failure to communicate by the parties or representatives; ***Hirtle v. Earl***, 2009 CanLII 14043;
- The failure of an "open mind" at a Settlement Conference; ***Kovac v. Royal Botanical Gardens***, 2019 ONSC 4151;
- The pre-trial disclosure of falsified evidence; ***Complete Access v. Marissa Riggi, et al***, 2010 CanLII 100649;
- The failure to admit allegations which should be admitted; ***Craig v. Toronto (City)***, 2008 CanLII 19497;
- The failure to admit resulting in a prolonging of trial; ***Lionheart v. Bigbo Properties***, 2015 CanLII 77719;
- The excessive unproductive examination of a witness; ***Coffey v. Horizon Utilities Corporation***, 2012 ONSC 2870
- The presenting of a case unsupportable in, "fact, law, and equity"; ***Propane Inc. v. Macauley***, 2011 ONSC 293;
- The "proceeding to trial on claims without some merit"; ***Doerr v. Sterling Paralegal***, 2014 CanLII 46013; and
- The unproven allegation of fraud; ***Hay v. Platinum Securities Inc.***, 2012 ABQB 204.

Includes Unrepresentated Parties

It is also important to recognize that the usual costs risks remain applicable to a self-represented person. Whereas a self-represented person may be unsuccessful in court, and seek to excuse the failing by pleading lack of knowledge or experience of the law, such an excuse should be disregarded by the courts. Such was clearly stated in ***Hinschberger v. Welsh***, 2012 CanLII 98283:

> 44. The defendants made an offer to settle both claims by payment to Mr. Hinschberger of $3,500, which offer qualifies for cost consequences under rule 14.07(1) and/or (2). The court may award double the costs which would otherwise be awarded to the defendants based on their success at trial. That cost consequence rule should be reliably applied by the court if it is to have the effect of encouraging settlements that it is intended to have.

> 45. Mr. Hinschberger is self-represented. On the one hand the court can sympathize with him for his failure to analyze the case properly from a legal perspective for the simple reason that he is a layperson. On the other hand if he had invested in legal representation the matter might not have come this far and cost so much for the defendants to litigate.

> 46. Based on a full-day trial with junior counsel representing the successful parties and the amount claimed being a combined total of $47,708, I fix a representation fee at $1,250 and double that amount under rule 14.07, to $2,500. For the costs of the settlement conference in Orillia which were reserved to the trial judge I award $500 since the matter should have been commenced in Cambridge under rule 6.01 and the plaintiff's decision to proceed in Orillia imposed unnecessary cost on the defendants which constitute special circumstances. I allow disbursements fixed at $250.

Fees for Time, dispute of charges

Interestingly, courts rarely question the billings of a lawyer (or paralegal) for the time charged on a case; ***Watton v. Home Depot of Canada Inc.***, 2018 ONSC 2094 whereas it was said:

> [50] Generally, the court ought not to second guess the time spent by counsel. As the court held in ***Basdeo (Litigation Guardian of) v. University Health Network***, [2002] O.J. No. 597 (S.C.) at para. 7, it is not the court's role to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been "over-lawyered".