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COSTS IN THE SMALL CLAIMS COURT



www.fergusonbarristers.ca

Ferguson Barristers LLP Midland Office

531 King Street Midland, ON L4R 3N6

Telephone: (705) 526-1471

Toll-free telephone: 1-800-563-6348

Fax: (705) 526-1067

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W. Patrick Sloan, B.A. LL.B.
Ferguson Barristers LLP

Introduction

The small claims court is designed to allow quicker and more cost efficient access to justice. Coupled with the historical benefits of pursuing a matter in small claims—less onerous discovery rules, lower cost exposure, more streamlined procedural process, and quicker trial dates—the monetary increase to \$25,000 will draw more interest to the court as a viable forum within which to pursue claims.

Several factors should be considered when deciding to pursue a claim in small claims court. One important factor, which will be discussed in this paper, is costs.

Rule 19 of the *Small Claims Court Rules*¹ governs costs awards for successful parties. While the *Rules* provide for entitlement to claim costs, it is important to remember that costs are discretionary.

What can a lawyer get for costs in the small claims court?

A successful party is entitled to recover their “reasonable disbursements” and, if represented, a “reasonable representation fee”, subject to the *Rules*.²

a) Disbursements:

Rule 19.01(1) states:

A successful party is entitled to have the party’s reasonable disbursements, including any costs of effecting service and expenses for travel, accommodation, photocopying and experts’ reports paid by the unsuccessful party.³

Disbursements incurred for effecting service are capped at \$20 for each person served “unless the court is of the opinion that there are special circumstances that justify assessing a greater amount.”⁴ The amount of disbursements for preparing a claim or defence is capped at \$100. Otherwise, any “reasonable disbursements” incurred are claimable. Rule 19.01(1) lists a non-exhaustive list of claimable disbursements, including expenses for travel, accommodation,

¹ R. 19, *Rules of the Small Claims Court*, O. Reg. 258/98 [*Rules*].

² R. 19.01 and 19.04, *Rules*, *supra*.

³ R. 19.01 (1) *Rules*, *supra*.

⁴ R. 19.01 (3), *Rules of the Small Claims Court*, *supra*.

photocopying and experts' reports. Other examples of allowable disbursements include such things witness attendance fees and postage.

Whenever possible, ask the trial judge to fix costs and disbursements at the conclusion of the hearing. In preparation for the hearing, prepare submissions and provide supporting documentation for claimable disbursements, such as ledger printouts, receipts and invoices.

b) Reasonable representation fee:

Rule 19.04 states:

If the amount claimed in an action exceeds \$500, exclusive of interest and cost, and the successful party is represented by a lawyer, student-at-law or agent, the court may award the party a reasonable representation fee at trial or at an assessment hearing.⁵

The amount claimable by a represented party is limited by s. 29 of the *Courts of Justice Act*:

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.⁶

By virtue of s. 131 (1) of the *CJA* (and subject to s. 29), "costs of and incidental to a proceeding or step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid."⁷

As a general rule, therefore, the maximum amount awardable for representation fees in the small claims court is **\$3,750** (15% of \$25,000), subject to the discretion of the court.

Unrepresented parties cannot rely on Rule 19.04 to claim costs for their time and effort. They may, however, rely on Rule 19.05 to request a maximum of \$500 for their "inconvenience and expense."⁸

What factors apply to get an increased cost award?

While Rule 19.04 sets the general rule with respect to entitlement to a representation fee, the *Rules* and the *CJA*, provide for the opportunity to claim additional and/or increased cost awards.

⁵ R. 19.04, *Rules, supra*.

⁶ s. 29, *Courts of Justice Act*, R.S.O. 1990 c C. 43 [*CJA*]

⁷ s. 131 (1) s. 29, *CJA, supra*.

⁸ R. 19.05, *Rules, supra*.

The relevant provisions are as follows:

a) Settlement conference costs:

Rule 13.10 allows a party to seek costs, exclusive of disbursements and not exceeding \$100, for attendance at a settlement conference.⁹ Cost sanctions can be imposed where a party does not attend the settlement conference.¹⁰ In practice, costs are rarely awarded at a settlement conference.

b) Motion costs:

Rule 15.07 allows a party to seek costs not exceeding \$100, exclusive of disbursements, after being successful on a motion. The amount may be increased where “there are special circumstances” to warrant an increased cost award.¹¹

c) Offer to settle:

As with Rule 49 of the *Rules of Civil Procedure*, offers to settle may be considered by the small claims court in awarding costs at the disposition of a trial. Subject to the court’s discretion, a successful party may be awarded a representation fee of twice the costs of the action—thereby increasing to total potential recovery to **\$7, 500** (30% of \$25,000).¹²

Under Rule 14.07, failure to accept an offer to settle may trigger the cost consequence where, in the case of a plaintiff:

1. The plaintiff obtains a judgement as favourable as or more 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.¹³

In the case of a defendant:

1. The plaintiff obtains a judgement 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.¹⁴

d) Penalty:

⁹ R. 13.10, *Rules, supra*.

¹⁰ R. 13.01(5)(a), *Rules, supra*.

¹¹ R. 15.07 *Rules, supra*.

¹² *Barrie Trim & Mouldings Inc. v. Country Cottage Living Inc.*, 2010 ONSC 2598.

¹³ R. 14.07 (1), *Rules, supra*.

¹⁴ R. 14.07 (2), *Rules, supra*.

The court may penalize a party under Rule 19.06:

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.¹⁵

Section 29 of the *CJA* also allows for an increased award where “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.”¹⁶ The penalty available under s. 29 is considered an exception to the general rule.

Justice Swinton stated in *West End Tree Service Inc. v. Stabryla* that the court “must determine that there has been unreasonable behaviour in the proceeding on the part of the party or a party’s representative that is deserving of sanction. The sanction that can be imposed is higher award of costs to the other party...[an increased costs award] should logically bear some relationship to the costs incurred by the recipient party as a result of the unreasonable behaviour of the party ordered to pay costs.”¹⁷

Bills of costs and submissions

Always be prepared to address the issue of costs, whether you’ve been successful or unsuccessful. Where a judge has reserved on the issue of costs, or if costs are to be spoken to at a later date, lawyers should consider asking direction from the court with respect to submissions on costs and what supporting material is required.

Bills of costs are not always requested, but should be prepared in advance. Attached at Appendix 1 and 2 are examples of bills of costs prepared by Carol McNair of McNair Paralegal Services, Bracebridge, Ontario (mcnairservices@muskoka.com).

Submissions, subject to the court’s direction, should be brief and presented with supporting documentation. Have sufficient copies of the client ledger and/or receipts for incurred disbursements and dockets as well as copies of any offers to settle.

Submissions may address the complexity of the proceedings, the amount claimed, the amount recovered, the importance of the issue, the conduct of any party, and whether the steps taken in the proceeding were necessary or unnecessary.

Appeal rights

¹⁵ R. 14.06, *Rules, supra*.

¹⁶ s. 29, *CJA, supra*.

¹⁷ *West End Tree Services Inc. v. Stabryla*, 2010 ONSC 68 at paras. 22 and 25.

If the appeal is only that of costs then the appeal is governed by s. 133 of *CJA*. Leave to appeal is required.¹⁸

If the appeal on costs is to be joined with an appeal as to right (an appeal on a claimed amount in excess of \$2,500¹⁹) the appeal is governed by Rule 61.03 (7) of the *Rules of Civil Procedure*. Leave to appeal is required and must be included in the notice of appeal or in a supplementary notice of appeal.²⁰

Leave to appeal is not lightly granted, however. Leave is in the discretion of the court. While the tests set out under Rule 62.02(4) of the *Rules of Civil Procedure* are not binding, consideration for the tests can be considered in exercising discretion in determining the issue of leave.²¹

Tips and tactics for getting an award of costs

- Be reasonable in your requests
- Be respectful and courteous throughout the litigation process
- Do not resist reasonable request from the other side
- Consider serving an offer to settle and ensure that it meets the requirements under Rule 14
- Have your *Rules* readily available during submissions
- Be prepared with:
 - A bill of costs
 - Copies of the client ledger and receipts for incurred disbursements
 - Copies of the process server's invoice and with applicable affidavits
 - Oral submissions on costs, but be flexible in your delivery
 - Relevant authorities with sufficient copies

¹⁸ s. 133 *CJA*, *supra*.

¹⁹ *Action Auto Leasing v. Robillard and Payne*, 2011 ONSC 3264.

²⁰ Rule 61.03(7), *Rules of Civil Procedure*, R.R.O 1990 Reg. 194 see *Walford v. Stone & Webster Canada LP* 2006 CarswellOnt 6873, 217 O.A.C. 166.

²¹ *Walford*, *supra*, at para. 26-28.