

The New Costs Grid – Docketing for Clerks

How to Make Sure that the Fix is In

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The Costs Grid (the “Grid”) was introduced on January 1, 2002 as the new "Tariff A" governing allowable fees that can be recovered from the opposite party. The introduction of the Grid, as well as the contemporaneous changes to Rule 57 of the *Rules of Civil Procedure*, have significantly altered the way in which the Court considers awards of costs following a hearing. This paper will briefly review this new process, make suggestions about docketing generally and review some of the case law dealing with law clerks under the Grid. The goal of this paper is to offer some helpful tips on maximizing an award of costs, especially as it relates to the work of law clerks.

The Grid

Before the introduction of the Grid and the changes to Rule 57, the determination of a party’s entitlement to costs was complicated, time consuming and very uncertain. Costs were rarely fixed following an interlocutory motion, as Judges usually preferred to reserve the quantum of costs to the Judge hearing the trial. This result was very unsatisfying, as the Judge hearing the motion was inevitably in a better position to determine the value of the legal services performed than the trial Judge.

Over time, this practice changed. Judges became more willing to fix the amount of costs following interlocutory motions, and costs payable forthwith became more the rule than the exception. However, the judiciary was still reluctant to fix costs following a trial. These matters were routinely referred to an assessment officer to be taxed in accordance with the old Tariffs. Again, this result was unsatisfactory. The trial Judge was usually in a much better position to evaluate the positions of the parties on costs following the trial than was any assessment officer. The assessment process involved significant delays and then a lengthy hearing, which would inevitably rehash many of the issues raised at the trial. The procedure was very costly for the parties, and often resulted in an award that was out of keeping with the current costs of litigation.

The introduction of the Grid, along with the changes to the *Rules*, have significantly altered the way in which the parties, and the Court, approach the issue of costs.

Under the Grid, costs are not calculated on a rigid, step by step basis as was the case under the old Tariffs. The Grid suggests that hourly rates should be applied to the reasonable number of hours expended by lawyers, law clerks and students-at-law on the various steps in the litigation. The maximum hourly rates suggested by the Grid are well in excess of the usual awards that had previously been made by assessment officers. Finally, the changes to the *Rules* made it clear that, following a trial, Judges are to fix costs in all but “exceptional” circumstances. Following a trial or a motion that disposes of the action, the party seeking costs must prepare a Bill of Costs, listing the various lawyers, clerks and students, the time spent by each individual on the various tasks and

the hourly rate that should be applied to the time of each individual. The party paying costs will be given an opportunity to critique the Bill of Costs, usually claiming that too much time was spent and the proposed hourly rates are too high. In rare cases the parties are given an opportunity to make oral submissions to the Court.

Docketing

Many personal injury firms do not keep good, or any, dockets. While this may not turn out to be a problem in the majority of cases, it can be very costly to the law firm and to the client under the wrong circumstances. Solicitor-client assessments, a subject beyond the scope of this paper, are almost impossible for the law firm without time dockets.

Given the *Rules* and the procedure that has developed in the Courts, a Judge is not likely to look favourably upon a law firm that does not have adequate time dockets when attempting to fix costs.

Docketing requires good organization and some attention to detail. Many firms have computer based docketing systems which make the process easier and less time consuming. Regardless of whether the docketing system is computer or paper based, a number of simple rules should be followed:

1. Record dockets contemporaneously with the work performed. Countless hours are lost by lawyers and clerks who wait to record their time later in the day. It only takes a few seconds to enter a docket, and it is time well spent. Make sure that there is a time record of all work that was performed. It will help the firm in the event of an assessment or in preparing a Bill of Costs to

assist a Judge in fixing the costs. It will help your personal “statistics” within the firm. It will also help if there are questions raised by the client about the work performed. In the immortal words of Nike, “Just do it”.

2. Give sufficient detail. It is not enough to record that documents were reviewed, or instructions were taken from the lawyer. Add the name of the documents, or the nature of the instructions. When recording time spent on phone calls, make a quick note of the other person on the call and the nature of the call (usually three words or less). Make sure that all documents that are related to the docket (pink phone messages, hand written notes, etc.) make their way into the file for support. If possible, make sure that the time recorded fits into one of the categories listed in the Grid or is related to some other procedure authorized by the *Rules of Civil Procedure*.
3. DO NOT UNDERESTIMATE OR WRITE DOWN YOUR TIME. Junior lawyers and clerks have a tendency to underestimate the time that they spent on a task. They may believe that the task should not have taken so long, or that the file cannot support the amount of time that was actually spent. This is not helpful to the clerk, the lawyer, the firm, the client or the Court. It is relatively easy for the lawyer to decide to write down or write off time later in the process. It is much more difficult to add back the time at a later date.
4. Be accurate. Use a clock or a watch to keep track of time. Try to work on one project at a time, without interruption. Return your phone calls all at once, at a designated time during the day. This will help you to follow the previous 3 rules.

5. Have a well documented hourly rate that applies to your work. The client should be aware of the hourly rates of everyone who might work on the file, including law clerks, even if the client will eventually be charged a contingency fee. The Grid allows maximum amounts of \$80 per hour (partial indemnity) and \$125 per hour (substantial indemnity) for law clerks, although this does not set a cap on the amount that can be charged to a client.

Consider these tips when reviewing the following case law. I suggest that, had these tips been followed in the following cases, the result may well have been different.

The Case Law

While most of the case law under the Grid focuses on the time spent by lawyers, there are several important cases that deal with the time dockets of law clerks.

In *Mosey v. Lally Group Ltd*, [2002] O.J. No. 2161, Justice Brockenshire was required to fix the Plaintiff's costs following a successful wrongful dismissal action. The time expended by law clerks was a significant issue in this process. The Judge had three main comments about the dockets of the law clerks. First, the onus is on the party claiming costs to show that the work was genuine "law clerk" work, and not secretarial duties. Typing letters and photocopying documents is generally considered secretarial work. A party is not reimbursed for services performed by a legal secretary, and secretarial duties are not recoverable just because they are performed by a qualified law clerk. Second, the work done should have some relation the items listed in the Grid. Third, the proposed

hourly rate must be based upon principals of “indemnity”. Plaintiff’s counsel suggested \$60 per hour for each clerk, well within the range suggested by the Grid. However, there was no evidence about the rates that were actually charged to the client. As a result, Justice Brockenshire disallowed **all** of the claim for the law clerks' fees.

MacRae v. Simpson, [2003] O.J. No. 407 (G. Campbell J.) was a straightforward ½ day family law motion. The successful party (Mr. Simpson) was entitled to his costs. However, he put forward a Bill of Costs that, according to the Judge, was excessive in relation to the complexity of the matter. When it came to dealing with the time of the law clerk, Justice Campbell reviewed the docket entries and found that much of the time was related to taking instructions and writing memos. There was not enough detail for the Judge to find that these were recoverable clerking duties, as opposed to work of a secretarial nature. The Judge also commented that, while the proposed rates may have been appropriate in Toronto, they were well above what would be permitted in London. In the end, the entire claim was disallowed.

Similar comments were made by Justice Aitken in *IT/NET Ottawa Inc. v. Berthiaume*, [2003] O.J. No. 149. The Judge disallowed such things as phone calls to schedule discoveries and cross-examinations, calling a process server, copying documents and reviewing courier receipts. These items were found to be secretarial work and therefore not recoverable.

In determining the reasonable hourly rate to be applied to the time of a law clerk, the experience and training of the law clerk should be disclosed. A helpful indicator is the amount that is actually being paid to the law clerk (it is unclear whether this refers to the amount paid by the client, or the clerk's salary paid by the firm). See *Christensen v. McDougall*, [2001] O.J. No. 4761 (Kurisko J.).

Finally, in *Leenan v. Canadian Broadcasting Corp.*, [2000] O.J. No. 3435, Justice Cunningham was asked to fix the costs following a complicated and lengthy defamation action. The final amount awarded for costs and disbursements was in excess of \$800,000.00. This decision is a very helpful guide to the process of fixing costs. His Honour examined the individual components of the Bill of Costs, and then gave "global consideration to the amount claimed to ensure that the elements of reasonableness, necessity and fairness have been achieved". With respect to the fees of the law clerks, he had no difficulty in awarding an average of \$72.35 per hour, for the full 76 hours proposed by Plaintiff's counsel. This shows that, when presented properly and reasonably, the Court will award reasonable fees for the work performed by law clerks.

If you combine good docketing habits with an understanding of the process and the case law under the Grid, the result should be a reasonable award of costs for the work performed by law clerks. The client and the firm will thank you.

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