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Winning Isn’t Everything: What to Expect from Costs Awards on the Commercial List

The successful party in litigation is presumptively entitled to costs. However, the Court retains the discretion to determine the amount, guided by fairness, proportionality, and reasonable expectations. Partial indemnity costs remain the default on the Commercial List, although the Court will often award only a portion of what a party claims as partial indemnity. Elevated costs awards, including full indemnity costs, are reserved for misconduct or egregious behaviour. Recent decisions of the Court underscore important practical considerations in determining appropriate costs awards, including the importance of settlement offers, the need to reveal your own dockets before attacking your opponent’s dockets, and careful division of work between junior and senior counsel.

The Legal Framework: Discretion Anchored in Fairness & Proportionality

Costs awards are governed by section 131 of the *Courts of Justice Act* and Rule 57 of the *Rules of Civil Procedure*. While there is a presumption that the successful party receives costs, the Court retains broad discretion to determine who pays and how much. In exercising that discretion, the Court will consider the result, the complexity and importance of the case, the amounts claimed and recovered, the parties’ conduct, the reasonableness of rates charged, and what the unsuccessful party could reasonably have expected to pay.

Commonly cited cases include the Court of Appeal decision in *Boucher v Public Accountants Council for the Province of Ontario*, which held that costs must be fair, reasonable, proportionate, and within the parties’ reasonable expectations in the circumstances. In *Apotex Inc v Eli Lilly Canada Inc*, the Court reaffirmed that costs should reflect what is reasonably predictable and warranted for the work actually required, not simply the hours counsel is prepared to invest. The Commercial List, where efficiency and proportionality are the hallmarks of practice, applies these principles with discipline.

Understanding the Scales: Partial versus Full Indemnity

Partial indemnity remains the standard scale for costs of a successful party. There is no rigid rule for the percentage used

to translate actual fees into partial indemnity, but the Court frequently cites ranges around 50–60% of a reasonable fee base. Recent Commercial List decisions suggest the Court may fix partial indemnity costs at roughly half of full indemnity.

Substantial indemnity costs (often synonymous with solicitor-client-costs) are exceptional. To claim substantial indemnity, the successful party should be able to point to allegations that were extremely serious and entirely unsupported (e.g., allegations of fraud or relating to a party's professional reputation), a reasonable offer to settle, or ideally both.

Where conduct is strategic, intentional, and in defiance of the Court's authority, courts have emphasized that even full indemnity costs can be appropriate. The Court has awarded full indemnity costs in the civil contempt context, reflecting the Court's desire to denounce flagrant and willful non-compliance, and to ensure the innocent party is not out of pocket for enforcing compliance.

Overarching Themes from Recent Commercial List Decisions on Costs

- **Proportionality and predictability are central to costs awards.** The Court continues to fix costs by reference to what was reasonably necessary, with reference to the total judgment amount. The Court is willing to make percentage-based reductions to award costs that represent a relatively modest slice of the judgment value if it views the case as having been over-lawyered.
- **Evidence matters.** Parties who criticize the other side's dockets or rates must come prepared with their own time records and costs information. Courts are reluctant to entertain attacks on another party's costs absent a transparent demonstration of the challenger's own spend and staffing choices.
- **Not all "bad conduct" is equal.** The Court is careful not to escalate to full indemnity costs solely because of allegations of misconduct. Proven, material litigation misconduct can justify an uptick in costs, but those cases are rare and require egregious conduct.
- **The Court scrutinizes staffing and efficiency.** The division of labour between junior and senior lawyers is a relevant factor in assessing the reasonableness of a party's claimed costs. The Court will discount inefficiencies or duplication of efforts.
- **Offers to settle matter.** If you want to claim substantial indemnity costs, consider making a reasonable and early

offer to settle. Recent decisions from the Commercial List confirm that refusing to take a reasonable settlement offer can attract substantial indemnity costs, even if the offer is not fully compliant with Rule 49 requirements.

- **Reasonable expectations drive outcomes.** The reasonable expectations of the paying party operate as a meaningful ceiling on costs awards. The Court will ask what a losing party could reasonably have expected to pay given the issues, stakes, and complexity, and fix costs accordingly.

Key Takeaways

The Commercial List continues to apply a pragmatic approach to costs. Success typically yields a favourable costs award, but not full fee recovery. To maximize outcomes and manage risk, parties should budget with partial indemnity in mind, document staffing choices and efficiencies, and make timely, realistic offers to settle. Where the other side's conduct crosses the line, especially in defiance of Court orders, the Court may be prepared to slide the scale upward. That said, allegations alone will not justify enhanced costs. Proof and proportionality remain decisive.

It is important to treat costs as a controllable risk. Plan for partial indemnity recovery if you win and similar exposure if you lose. It is equally important to build an evidentiary record of efficient resourcing. Allocate work to the right level, avoid duplication, and track time carefully, as these details can materially influence the Court's costs assessment. Finally, remember that proportionality governs. Costs that are predictable and reasonable for the case are the baseline. Calibrate litigation strategies, budgets, and settlement positions with these principles in mind to minimize risk and enhance the likelihood of a meaningful costs recovery.