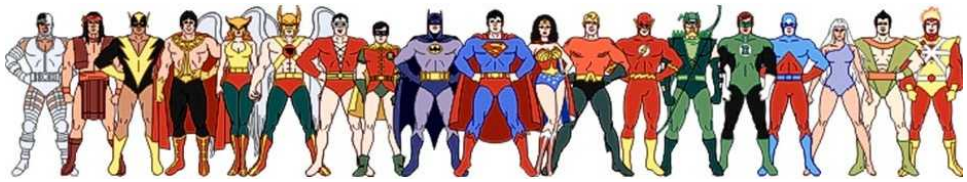

YOU CAN'T SAVE THE WORLD ALONE

The LAT: Costs and the new LAT Rules

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Costs at FSCO and ADR

Prior to April 1, 2016, under s. 282 (11) of the *Insurance Act*, an arbitrator's jurisdiction and discretion to award expenses at FSCO or ADR Chambers was broad. Rule 75 of the *Dispute Resolution Practice Code* outlined the seven criteria for a cost award based on the following seven criteria:

1. Each party's degree of success in the outcome of the proceeding;
2. Any written offers to settle made in writing in accordance with Rule 76;
3. Whether there were novel issues raised in the proceeding;
4. The conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings or orders;
5. Whether any aspect of the proceeding was improper, vexatious or unnecessary;

6. Whether the insured person refused to failed to submit to an examination as required under s.44 or failed or refused to provide material required to be provided under s.44 of the *Schedule*;

7. Whether the person refused to or failed to submit to an examination as required under s.44 of the *Schedule* or refused to failed to provide any material required to be provided under s.44 of the *Schedule*.

Costs at the LAT between April 1, 2016 and October 1, 2017

The LAT operates under the *Statutory Powers Procedure Act.* Therefore, the scope for awarding costs is narrow. The LAT's authority to award costs is found in s.17.1 of the *Statutory Powers and Procedure Act* ("*SPPA"*) and Rule 19 of the LAT Rules of Procedure ("the *Rules*").

Section 17.1(1) of the *SPPA* empowers the Tribunal to order a party to pay another party's costs in a proceeding if the conduct of the party has been unreasonable, frivolous or vexatious, or has acted in bad faith.

Rule 19.1 of the *Rules* mirrors the language of s. 17.1(2) of the *SPPA* in that it states "a party may make a request to the LAT for its costs where it believe that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.

1. Who is a party?

In ***16-000546 v Primmum Insurance Company*****,** 2017 CanLII 46355 (ON LAT) [hereinafter "*M.S.*"], Adjudicator Chris Sewrattan made a distinction between the conduct of the applicant and the conduct of their counsel as it relates to costs.

In *M.S.*, the applicant submitted an Application to the LAT in which he claimed entitlement to a single OCF-18 Treatment Plan. At the Case Conference, the applicant asked to withdraw this OCF-18 Treatment Plan and to have a different OCF-18 Treatment Plan added to the existing LAT Application

("the substitute OCF-18 Treatment Plan"). There was no reference to the substitute OCF-18 Treatment Plan in the Case Conference Order and the matter proceeded to a written hearing on the original OCF-18 Treatment Plan with a timetable for the parties' materials.

The applicant submitted only 1.5 pages of written materials on the substitute OCF-18 Treatment Plan, not the original one that was the sole issue in dispute at the writing hearing. The materials did not include any supporting evidence either.

The applicant also failed to submit any reply submissions or evidence despite the LAT's request for additional materials. The applicant further failed to make any submissions on whether he should be able to submit any materials after the deadline found in the Case Conference timetable. Of note, by the date of the written hearing, the applicant's paralegal was no longer on record.

Due to the lack of any evidence or submissions on the sole issue in dispute, counsel for the Insurer brought a motion for costs. Adjudicator Sewrattan held that,

> "Costs are not intended to compensate parties for the cost of bringing or defending claims, or to punish. It is through this lens that one must eye the granting of costs."

He went on to clarify that,

> "The applicant and his counsel are generally considered one party. The exceptional facts in this case require a distinction between the two. <u>The applicant did not display unreasonable conduct. The applicant's counsel did.</u> Rule 19.1 only allows for costs against the parties – and the applicant's counsel is not a party to the proceeding. As a result, I decline to award costs."

Adjudicator Sewrattan went further when he declined to award costs personally against the applicant. Instead he held that,

> "Looking at things from the applicant's perspective, it is clear that [the applicant] has suffered enough. [He] was involved in a motor vehicle accident. He was injured. He came to the

> Tribunal for benefits. He never engaged in unreasonable conduct personally. His legal representation did. And the unreasonable conduct for which he is now blamed caused his claim for benefits to be dismissed. It would be unfair to make the applicant pay for conduct that has already prejudiced him so severely."

Adjudicator Sewrattan did acknowledge that "Primmum [had] been prejudiced by the unreasonable conduct." He went on to state that that "Rule 19.1 costs do not issue to compensate an insurer for frustration or, significantly, to punish an unreasonable applicant." Adjudicator Sewrattan did appear to leave the door open to possible cost awards "if the unreasonable conduct was not caused solely by the applicant's legal representation."

2. At what point in a LAT proceeding can costs be awarded?

In ***16-000041 v. Intact Insurance***, 2016, CanLII 60729 (ON LAT) ["Thompson"], Adjudicator Nicole Treksler and Vice Chair J.R. Richards presided over a preliminary issue hearing which addressed the LAT's jurisdiction over costs when the issue in dispute settled prior to the Case Conference.

In advance of the Case Conference, Intact agreed to fund an OCF-18 Treatment plan for psychological services that it had previously denied. After accepting Intact's offer, the applicant raised the issue of costs.

The LAT ruled that it had jurisdiction to consider costs despite the fact that the original issue in dispute was settled before the case conference. The LAT did this by ruling that costs were not a "stand-alone issue" and were instead related to the main issue in dispute.

3. Decisions where costs were denied

In general, the LAT has granted applicants significant leeway for missing procedural timeline such as filing dates. Throughout the course of the past year, parties have made numerous requests for costs that have been consistently denied by the LAT. The following are two examples of common situations which, while frustrating, have not led to a cost award.

In ***16-001243 v. Aviva Insurance*****,** 2016 CanLII 104569 (ON LAT), Adjudicator Joseph Nemet did not award any costs despite Aviva's list of examples of the applicant's behavior which included:

1. Withdrawing the entire IRB claim with the exception of one week of entitlement when notice of the alleged disability was not provided to the insurer until after the expiry of the 104 week mark;
2. Failing to provide any supporting evidence to support the claim for IRBs for 2.5 years after the accident occurred;
3. Maintaining a claim for IRBs when evidence such as the family physician records did not support the Applicant's position on the issues in dispute; and,
4. Confirming on the record at the Case Conference that the matter was "premature."

In *16-003555 v. Travellers Insurance Company* CanLII 39739 (ON LAT), Adjudicator Sandeep Johal did not award costs when the applicant failed to attend the 1st Case Conference because he reportedly left the country to attend his ill mother who lived overseas. The applicant also failed to attend a 2nd Case Conference which he and his counsel had agreed to because he had to extend his time overseas to care for his mother. The applicant also failed to attend the 3rd Case Conference that he and his counsel agreed to. This time, however, the applicant's legal representatives were unable to contact him or the members of his family whose contact information they had on file despite numerous attempts to contact them.

4. Decision where costs were awarded

To date, there have been a total of 3 cases in which costs have been awarded. It is noteworthy, however, that two of them were overturned on reconsideration.

In ***17-000043 v Unifund Assurance Company***, 2017 CanLII 35317 (ON LAT) ["M.O."], Adjudicator Anna Truong did award $500.00 in costs based on the conduct of the applicant.

M.O. commenced an Application to the LAT in which entitlement to an OCF-18 Treatment Plan for physiotherapy was claimed. At the Case Conference, the Insurer raised the issue of the applicant's non-attendance at a s.44 insurer's examination. The applicant agreed to attend a s.44 IE examination and she withdrew her Application.

Within a few hours after the conclusion of the Case Conference, the applicant submitted a second Application to the LAT on the same issue. Meanwhile, the s.44 insurer examination that the applicant had agreed to attend at the first Case Conference was rescheduled but she failed to attend same.

At the Case Conference for the 2nd Application on the identical OCF-18 Treatment Plan for physiotherapy, the applicant once again agreed to withdraw her Application and to attend a s.44 insurer's examination when the Insurer raised the issue of her non-attendance at the rescheduled IE.

Adjudicator Truong held that,

> "The purpose of Rule 19.1 is to deter conduct by parties that is unreasonable, frivolous, vexatious, or in bad faith. This is a high bar for conduct to attract a cost award, and an exceptional remedy. In this case, that bar has been met. The applicant's second application to the Tribunal was frivolous, vexatious and unreasonable. Nothing had changed in the few hours between the applicant withdrawing the first application and submitting the second application.

> This is an abuse of process and it undermines the Tribunal's purpose, which is to provide efficient and effective dispute resolution."

Interestingly, while Adjudicator Truong went on to comment that,

> "When an applicant makes an application to the Tribunal, it utilizes a great amount of resources and should not be made lightly. Parties should not apply to the Tribunal until their file is ready to proceed. Not only did the applicant abuse the Tribunal's process, she undermined the accident benefits process by not attending the rescheduled IE."

While the Applicant's failure to attend the rescheduled IE did not factor into Adjudicator Truong's determination of costs, she held that,

> "the applicant should have known that non-attendance at an IE would bar her from making an application to the Tribunal as this was the same reason she withdrew her application at the first CC. Knowing that, the applicant should not have made her second application."

Amendments to the LAT Rules of Procedure

Effective October 2, 2017, these Common Rules of Practice and Procedure apply generally to all adjudicative proceedings conducted by the LAT, the Animal Care Review Board (ACRB), and the Fire Safety Commission (FSC).

These Rules apply to all new appeals filed with the Tribunal on or after October 2, 2017. Matters filed with the Tribunal prior to the implementation of these Rules shall be dealt with in accordance with the *Rules* existing at the time.

Under the "new *Rules,*" Rule 19 provides some additional guidance on the procedure and criteria that will be used when costs are sought by a party. The entirety of Rule 19 is reproduced at the end of this paper. The key amendments, however, are found in Rules 19.5 and 19.6.

Rule 19.5 which is entitled "Powers of the Tribunal" sets out the relevant factors that the Tribunal will consider when costs are sought by a party which include:

- the seriousness of the misconduct;
- whether the conduct was in breach of a direction or order issued by the Tribunal;
- whether or not a party's behaviour interfered with the Tribunal's ability to carry out a fair, efficient, and effective process;
- prejudice to other parties; and,
- the potential impact an order for costs would have on individuals accessing the Tribunal system.

The second paragraph of rule 19.5 is also noteworthy because it speaks to the quantum of costs that can be awarded. The amendments specifically state that "the Tribunal may deny or grant the request for costs or award a different amount than requested."

Rule 19.6 is entitled the "amount of costs" and it outlines that **"**costs shall not exceed $1,000.00 for each full day of attendance at a motion, case conference or hearing."

As of the date of this paper, there are no posted decisions which have addressed the new Rule 19 on costs so the LAT's application of this new Rule and the new criteria for costs remains to be seen. Stay tuned for an update next year!

Common Rules of Practice & Procedure

19 COSTS

19.1 COST REQUESTS

Where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs.

19.2 HOW COST REQUESTS ARE TO BE MADE

A request for costs may be made to the Tribunal in writing or orally at a case conference or hearing, at any time before the decision or order is released.

19.3 SUBMISSIONS ON COSTS

The Tribunal may order that a party making a request orally under Rule 19.2 shall provide written submissions to the Tribunal and all other parties within 7 days of that oral request. A submission on costs shall set out the amount being requested.

19.4 CONTENT OF SUBMISSIONS ON COSTS

A submission on costs shall set out the reasons for the request and the particulars of the other party's conduct that are alleged to be unreasonable, frivolous, vexatious, or in bad faith.

19.5 POWERS OF THE TRIBUNAL

In deciding whether to order costs and the amount of costs to be ordered, the Tribunal shall consider all relevant factors including: the seriousness of the misconduct; whether the conduct was in breach of a direction or order issued by the Tribunal, whether or not a party's behaviour interfered with the Tribunal's ability to carry out a fair, efficient, and effective process; prejudice to other parties; and the potential impact an order for costs would have on individuals accessing the Tribunal system.

The Tribunal may deny or grant the request for costs or award a different amount than requested.

19.6 AMOUNT OF COSTS

The amount of costs shall not exceed $1000 for each full day of attendance at a motion, case conference or hearing.