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October 31, 2016

The Honourable Justice M.L. Benotto
Chair, Family Law Rules Committee
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5

RE: Consultation on costs under the *Family Law Rules*

The County of Carleton Law Association (CCLA), after consulting with members of the Ottawa Family Law Bar, provides the following submission in response to a request from Madame Justice Benotto of the Ontario Court of Appeal and the Family Rules Committee on whether Rule 24 (Costs) of the *Family Law Rules* should be amended.

In her request for consultation, Justice Benotto points out that Ontario is the only common law province in Canada that does not adopt some form of cost grid or tariff. She further notes that most of the United States adopts a no fee shifting regime.

Justice Benotto opines that currently, costs decisions can be both confusing and conflicting and she asks for input as to:

1. Whether there should be an entirely new costs regime, such as one of the following:

   (i) a costs grid/tariff;
   (ii) no fee shifting at all (i.e. each party pays only his/her own costs);
   (iii) a hybrid of the above two models.

2. Whether the civil scales apply to family law proceedings;

3. What is the definition of the scales, and

4. Whether there should be presumptive scales in family law.

In assessing whether a new regime should be imposed, it is important to remember that costs awarded in family law have evolved from a tool used to mitigate economic inequality to a regime that seeks to encourage settlement. From the 1970s through to the 1990s, the general rule in matrimonial litigation was that there should be no order as to costs. Since the 1990s, costs are generally thought to follow the event, and to be awarded to the successful party in the litigation, so long as that party has behaved reasonably. Indeed, under the *Family Law Rules*, there is a presumption that a successful party is entitled to his/her costs. (Rule 24(1))

While there is a cost grid in civil matters (albeit seldom referred to or actually used), it was never specifically incorporated into the *Family Law Rules*. In general, the goal of a costs

award is to fix an amount that is fair and reasonable for the unsuccessful party to pay in that proceeding. Also, Rule 24(10) of the *Family Law Rules* requires costs to be assessed and awarded at each step in a proceeding.

Currently, there are two scales of costs in civil law matters: costs on a partial indemnity scale and costs on a substantial indemnity scale. The *Family Law Rules* have added a new term to the costs lexicon, namely costs on a full recovery basis.

After consulting with family law practitioners in Ottawa, the CCLA submits that:

1. Should the *Family Law Rules* adopt an entirely new costs regime?

   No. While there should be refinements to the existing costs regime, Counsel are familiar with addressing costs under the existing regime, regardless of nomenclature, and costs are a useful tool in encouraging settlement and reasonable behaviour in all litigants. However, the predictability of a cost grid or tariff would be a welcome addition so that clients could be properly advised of the monetary risk they face in pursuing or responding to litigation. Although there will always be an element of judicial discretion, the consistency that a grid or tariff will provide will likely result in more predictable cost awards in much the same way that the Spousal Support Advisory Guidelines has in terms of spousal support.

   Consideration must be given to ensure that the cost grid or tariff accurately reflects the reasonable legal costs of a client and should also reflect the experience level of Counsel, as well as the complexity of the legal issues dealt with in the litigation. Obviously, both Counsel and the Judiciary should also not lose sight of the issue of proportionality when dealing with costs.

   Consultation with local bars in Ontario as to the hourly rates charged and what constitutes a simple or complex issue would help to facilitate a useful and effective grid or tariff for that region. For instance, motions or trials that deal with issues surrounding the imputation of income are normally more complex than those that deal simply with what constitutes a section 7 expense. Issues of custody are different from financial issues that necessitate expert valuations and, therefore, additional counsel time for instruction of an expert. A tariff could be developed with suggested ranges of recovery for these issues, with judicial discretion to vary the tariff depending on the complexity of the issue itself, as established by evidence (such as the need for expert evidence of the time spent addressing the issue at trial or by affidavit).

   Considering the usefulness of costs in encouraging settlement and discouraging unreasonable behaviour, the *Rules* should not adopt a no fee shifting regime and parties should continue to expect that costs will be awarded at each step in the litigation.

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However, to this end, defining the scale of costs in Rule 18(14) (Costs consequences of failure to accept offer) would be helpful. The rule now refers to costs to the date the offer was served and full recovery of costs from that date. What is unclear is what amount of costs will be paid up to the date of the offer.

In terms of a hybrid model, considering judicial discretion, there is no need for a hybrid model as an individual case-by-case assessment can be made and no costs may be awarded, if appropriate.

2. Should the civil scales apply to family law proceedings?

The civil scales of partial indemnity and substantial indemnity should be formally adopted under the *Family Law Rules* as it appears that most Judges award costs on this basis in any case. Full recovery can also remain as a scale for special situations such as in cases of bad faith or conduct intended to delay or drive up the opponent's costs.

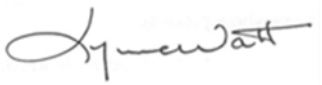
3. What should be the definition of scales?

The scales can be better defined by the utilization of an actual percentage, rather than merely a suggested range. For instance, partial indemnity could be defined to be 50% of the successful party's costs, substantial indemnity 75%, and full recovery 100% of the successful party's costs, subject always to judicial discretion to vary, as required in the interests of justice.

4. Should there be presumptive scales in family law?

A presumptive scale of costs will effectively be in place if the tariff/grid as suggested above is adopted.

The CCLA is grateful for the opportunity to file these submission. We would also like to acknowledge and thank Jennifer Jolly, a senior family law practitioner and CCLA member, for her leadership in consulting with the family law Bar in Ottawa and preparing these submissions.



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