Consultation on Costs under the *Family Law Rules*

Submitted to: Justice Benotto, Chair, Family Rules Committee

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to make a submission to the Family Rules Committee as it considers r. 24 on costs under the *Family Law Rules*. The consultation materials provided seek input on a series of questions, including whether there should be an entirely new costs regime, whether or not the civil scales should be applied to family law proceedings, how such scales should be defined, and whether there should be any presumptive scales in family law.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in the province, representing approximately 16,000 lawyers, judges, law professor and law students in Ontario. In addition to providing legal education for its members, the OBA is pleased to analyze and assist government with many policy and legislative initiatives each year – both in the interest of the profession and in the interest of the public. This submission was prepared by a Working Group of the OBA's Family Law Section, which is comprised of over 350 lawyers who are leading experts in family law.

Comments

I. Overview

The purpose of these submissions is to highlight our objective to have Family Law Rules relating to costs that:

1. Create uniformity amongst judges so as to better inform the expectations of both lawyers and clients in terms of costs;

2. Promote access to justice for, and in dealing with, self-represented litigants by providing more thorough guidelines for costs. This will also assist represented clients concerned about the costs of litigation, which is an increasing concern amongst the public;

3. Promote efficiency and rational behaviour; and

4. Promote settlement (and relieve some of the burden caused by litigation on costs) by promoting the exchange of reasonable offers to settle.

The current family law costs regime focuses on a presumption that a successful party is entitled to costs. This focus should continue, as we believe that maintaining this presumption supports the abovementioned objectives. However, for this to occur, the *Rules* must be applied consistently and predictably throughout the Courts. In this regard, any modifications to the *Rules* should avoid

leaving too much discretion to judges except in certain specific circumstances. As elaborated in our comments at Section IV below, it is critical for clients and counsel to have a confident and clear understanding of when costs will be awarded. We suggest that predictable and consistent enforcement of the *Rules* (both as they are currently drafted and as amended) would enable family lawyers to (i) better inform and advise clients; (ii) promote amicable settlement as an alternative to litigation; and (iii) use the risk of costs more effectively as a means of negotiating with other counsel.

II. Question 1 – Adoption of a New Costs Regime

The first, and primary question asked by the Family Rules Committee is: "Should the *Family Law Rules* adopt an entirely new costs regime?" In our view, the answer is "no". Instead, we respectfully submit that the *Family Law Rules* should be modified, but it is neither necessary nor desirable to adopt an entirely new regime. However, if the Family Rules Committee pursues the adoption of a wholly new costs regime, we provide the following comments in response to the more detailed questions posed:

a. Should there be a tariff or costs grid under the Family Law Rules?

We do not believe that there should be a tariff or costs grid under the *Family Law Rules*, which we suggest would not assist a family law litigant. Family law is distinct from civil law in many respects. For example: the parties are always individuals, and the issues they are facing are always personal, especially with respect to disputes around parenting. The disputes being addressed are the result of complicated family dynamics and personal circumstances that often have a range of possible solutions.

While we recognize the concern that without a tariff or costs grid, opposing litigants do not know what costs the other side has incurred or what hourly rate opposing counsel charges out at, we suggest that a better remedy is to encourage sharing such information in advance of a conference, motion or trial. Providing this information and/or an estimate of what costs are being incurred can be a factor for a judge to ultimately award a higher scale of costs, just as failing to provide this information can be a reason for a judge to award a lower scale of costs.

The only helpful tariff to identify would be one to assist in determining appropriate costs for a successful self-represented litigant. Such a tariff or costs grid would provide certainty for both (i) the self-represented litigant, in order to know what they can and should ask for by way of costs; and (ii) would ensure that the opposing litigant can be certain about what costs they may need to pay if they are unsuccessful.

b. Should there be no fee shifting regime (i.e., each party pays only his or her own costs, unless certain exceptions, such as bad faith, apply)?

With the exception of novel areas of law, we do not think that the *Family Law Rules* should become a no fee shifting regime. We suggest that adopting such a regime would promote litigation and prompt litigants to wage a battle of attrition. This approach becomes especially problematic when one party is represented (and thus incurring substantial costs) while the other is self-represented,

and therefore usually incurring minimal costs. However a no fee shifting presumption should apply to novel legal claims/issues, which is important given the ever evolving nature of family law.

c. Should there be a hybrid model for costs, and if so what would the hybrid model look like?

There should not be a hybrid model for costs. Such an approach would be too confusing for self-represented litigants, represented litigants, and even counsel. It would also not be necessary if the costs scales are better defined, as detailed below.

III. Question 2 – Scales of Costs

a. Should the three civil scales of partial indemnity, substantial indemnity, and full indemnity be adopted under the Family Law Rules, in addition to full recovery?

We believe that there can only be a nuanced answer to this question, with an answer of both "yes and no". As noted in the materials provided by the Family Rules Committee, there is confusion in the case law and amongst counsel about whether and how the civil scales impact costs in family law. Formally adopting the civil scales as part of the *Family Law Rules* would clear this confusion. However, this approach would not be enough to alleviate confusion altogether. As but an example, it remains unclear as to the difference between "full indemnity" and "full recovery". Adopting the three civil scales "in addition to full recovery," without providing clarity as to the distinction between the latter two types of recovery would lead to continued confusion.

In support of the goal of consistency and predictability, we believe that there should be cost scales in family law. Any scales adopted in the *Family Law Rules* (whether they be an adoption of the civil scales or not) should be clearly defined within the *Family Law Rules*. The clearer the definition of these scales, the better – even to the extent of providing particular percentages, as outlined further below. Such clarity would ensure that counsel and self-represented litigants in family law matters know the exact *Rules* applicable to their matter, and correspondingly would support judges hearing a family law matters in knowing exactly which rules to apply.

Even if the ultimate decision of the Family Rules Committee is to eschew the civil scales, the *Family Law Rules* should still be revised to make the distinction between the two scales clear so that there is no more uncertainty about this issue.

b. How can the scale(s) be better defined under the Family Law Rules?

In order to better define the scales that we believe should be incorporated into the *Family Law Rules* in one form or another, there are two aspects that should be included: (1) clear ranges; and (2) concise exceptions of when deviation is appropriate. The overarching idea is that everyone – counsel, clients and self-represented litigants alike, will be able to understand and calculate costs in all cases as well as assess their risks when it comes to costs. This will also provide clear parameters for judges in awarding costs.

The following is an example of a clearly defined and easy to calculate set of cost scales (with the "labels" being interchangeable with other terms that may be adopted):

1. "Full indemnity," calculated at 75% - 100% of the total bill of cost;

2. "Substantial indemnity," calculated at 50-74% of the total bill of cost;

3. "Partial indemnity," calculated at 25-49% of the total bill of cost; and

4. "Notional indemnity," calculated at 1-24% of the total bill of cost.

It is extremely important to note that while this provides predictability and consistency, it still to a large extent provides judges with flexibility within the ranges to satisfy both the requirements of the family law bar and the reality that some discretion will always be required given the fact-specific circumstances of family law matters.

The circumstances in which each particular cost scale is to be applied should also be clearly defined in the *Family Law Rules*. We have considered several proposals that we would welcome exploring further with the Family Rules Committee as it proceeds in the development of any amendments in this regard. The following are NOT examples of suggested specific wording, but instead highlight the type of clarity that we suggest would be necessary:

i. Full indemnity shall be awarded in cases where the party has been entirely successful on all issues and has served an Offer to Settle as required by the *Rules*;

ii. Substantial indemnity shall be awarded in cases where the party has been entirely successful on all issues but has not served an Offer to Settle as required by the *Rules*.

With regards to exceptions referred to in this response, we acknowledge that the current *Rules* already provide for an exception with regards to "bad faith" and a party behaving "unreasonably". It is our opinion that this results in counsel alleging bad faith and unreasonable behaviour in cost submissions even when such allegations are unwarranted. This unnecessarily creates conflict in what are often already high conflict situations. Counsel and self-represented litigants should not be invited to outline a laundry list of complaints about the other party in cost submissions. It is therefore our view that any exceptions to the cost scale should be defined to the fullest extent possible. Doing so would promote the objectives outlined at the outset of these submissions and minimizes inflammatory arguments in cost submissions. As examples only, instead of language such as "bad faith" and "behaved unreasonably" the *Family Law Rules* could instead state:

i. A party who has failed to serve an Offer to Settle pursuant to the *Rules* shall not entitled to full indemnity costs;

ii. A party who is in non –compliance with a court order is not permitted to ask for costs.

As above, we reiterate that these are not necessarily the specific wording to be adopted by the Family Rules Committee, but rather serves as an example only in order to demonstrate a necessary level of clarity.

Last, we note that certain sub-rules relating to offers to settle may require modification in order to conform with the creation of such a scale and exceptions to the scale.

c. Should there be a presumptive scale of costs in family matters?

If the recommendations above are adopted (i.e. there is a scale of costs that is clearly defined and the exceptions to the scale of costs is clearly defined), then in our view, a presumptive scale of costs would not be required. In other words, consistency and predictability will exist with regards to costs generally which is a more important overarching principle in family law.

IV. Other Comments

Though not specifically addressed by way of the questions posed, there is a clear consensus amongst our members that predictability is required in terms of when costs will be awarded. Subrule (10) requires that costs will be awarded at each step. It is, however, too commonly our experience that this subrule is not applied in family law matters. Too often, no costs will be awarded at a case conference or a motion. Too often, the decision with regards to costs is "in the cause" or "to be determined by the trial judge". This often negates the fundamental tenet of family law to promote settlement. We suggest that family law lawyers must have the ability to:

a. Use the risk of costs to inform and advise their clients, including as a means of promoting an amicable settlement as an alternative to litigation; and

b. Use the risk of costs in negotiating with other counsel.

If family law lawyers have no confidence that costs will be awarded at each step, or even worse, if clients and self-represented litigants have no confidence that costs will be awarded at each step, this defeats the risk of costs being one of the primary tools to promote settlement in family law. Our overall concern and desire is to promote *Family Law Rules* that will result in a more consistent and predictable costs regime. In this regard, there should be clear definitions of:

a. When it is appropriate not to award costs at any particular step;

b. When costs should be awarded "in the cause"; and

c. When costs should be left to the trial judge to determine.

The more guidance that is provided on these issues, the better.

Conclusion

Costs are a very sensitive matter to the family law bar for a variety of reasons, and solutions are not clear-cut. The ultimate goal should be to establish as much guidance to judges, lawyers, clients and self-represented litigants as possible. If done effectively, that guidance should result in a reduction in litigation, the promotion of settlement and the creation of a better and more predictable family law litigation experience for everyone.

As referenced in our comments, the OBA's Family Law Section has not drafted specific recommendations with regards to the wording of revisions to particular *Rules* that would reflect the answers provided above. However we would be pleased to discuss or provide further feedback on any proposed drafting. We would also welcome an opportunity to meet with you further about our submission. Thank you for considering our input.