



Federal Court of Appeal and Federal Court Rules Committee



Review of the Rules on Costs Discussion Paper October 5, 2015

Background

In October 2012, the Report of the Subcommittee on Global Review of the Federal Courts Rules was released.¹ Among other things, the Report recommended that new regulatory tools “be introduced to curb certain abuses and to ensure that parties take proportionate steps in conducting their litigation” (Recommendation 2).

In addition, the Report recommended that the provisions in the *Federal Courts Rules* relating to costs “should be amended in order to make it more likely that a higher quantum of costs will be awarded when warranted, to provide a greater incentive for pre-trial resolution” (Recommendation 4(b)).

The Report further recommended that a principle of proportionality should be introduced into Rule 3, and that this principle should, among other things, prohibit the abusive use of the Rules (Recommendation 7). To reinforce this principle, the Report also recommended that the principle of proportionality should be introduced concretely into particular rules so that those rules are consistent with Rule 3 (Recommendation 10).

The Report also recommended that all existing rules be assessed from the standpoint of access to justice, particularly by self-represented parties, with a view to seeing if any simplification or clarification is warranted.

In November 2014, the Federal Courts Rules Committee struck a Sub-Committee to specifically address the issue of costs at the Federal Court and Federal Court of Appeal. Having regard to the above-mentioned Report, this Sub-Committee’s mandate was to examine the Courts’ current approach, survey other jurisdictions and, ultimately, make recommendations to the Committee.

The Committee is now looking to the community for feedback on the research presented by the Sub-Committee. Submissions should be sent by November 23, 2015, to Andrew Baumberg, acting secretary of the Rules Committee, at: andrew.baumberg@cas-satj.gc.ca

¹ http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/ENG_Global%20review%20report%20FINAL.pdf

The Committee welcomes comments on any aspect of the costs regime, especially the issues raised in the discussion document below.

Overview

Part I of this paper sets out the four principal purposes that costs awards seek to achieve:

1. indemnification ;
2. discouraging improper, vexatious and unnecessary litigation;
3. encouraging settlement; and
4. facilitating access to justice.

It then explains how various cost regimes seek to achieve these purposes, distinguishing between what are commonly known as the “two-way fee shifting,” the “one-way fee shifting” and the “no costs” approaches.

Part II of this paper then outlines the four key issues currently under review by the Committee, highlighting several questions for discussion:

1. the implementation of different approaches to costs based on type of litigation;
2. the establishment of cost consequences for improper, vexatious and unnecessary litigation;
3. the adequacy of the method of calculating costs, including Tariff B; and
4. the award of costs when a party is represented by *pro bono* counsel.

Part I: Purposes of Costs Awards

1. Indemnification

Indemnification is the traditional justification for costs awards. According to this idea, the expense incurred by successful litigants in defending their legal rights is a form of prejudice caused by unsuccessful litigants and which should be compensated by them. As explained by the Supreme Court in *Bell Canada v Consumers' Association of Canada*, the notion of costs is intricately tied to indemnification and “the word ‘costs’ must carry the general connotation of being for the purpose of indemnification or compensation.”ⁱ

2. Discouraging Improper, Vexatious and Unnecessary Litigation

Another common justification for costs is the discouragement of improper, vexatious and unnecessary litigation. Fundamental to this notion is the understanding that judicial resources are scarce and that the clogging of the system by abusive and frivolous parties or unmeritorious litigation causes delays, creates expense and prevents more deserving litigants from accessing the Courts in a timely manner. In this context, the prospect of having to pay costs to the other party forces litigants to undertake a risk analysis that takes into account their chances of success and the other party's costs. It is hoped that, faced with the financial consequences, litigants will themselves make the decision not to bring a case or a motion with little merit, thus ensuring that the courts' time is better used and that defendants are relieved from the expense of having to defend unmeritorious claims. The same is true of conduct during the discovery process that gives rise to expenses that are disproportionate to what is at stake in the dispute, or that is otherwise abusive of the Courts' processes.

3. Encouraging Settlement

A third, related purpose is the encouragement to settle. Costs ensure that litigants seriously consider negotiating with the opposing party rather than continuing on to trial without good reason or simply in the hopes of achieving a slightly better result. Costs therefore help reduce the burden on courts and, more importantly, increase the possibility of amicable resolutions, with both parties satisfied with the outcome.

4. Facilitating Access to Justice

The fourth purpose of costs is the facilitation of access to justice. The possibility of recouping expenses at the end of a successful hearing can allow litigants with limited resources but strong claims to avail themselves of an often prohibitively expensive system. In the words of one author, “the litigant with a good case can rest assured that he/she will be vindicated and indemnified for at least some of the legal costs incurred.”ⁱⁱ Access to justice, however, may also require that litigants, especially those who might have limited resources, not be deterred from vindicating their rights simply out of fear of losing and becoming subject to a costs order.ⁱⁱⁱ In a recent decision, the Supreme Court held that access to justice is protected by the Constitution, so that court fees cannot be set at a level that discourages individuals from vindicating their rights in the Courts;^{iv} the same rationale might apply to costs.

The extent to which a costs regime is able to achieve the foregoing purposes may depend on a variety of factors that may be difficult to assess and that may not be within the court's control. In particular, the idea that awarding costs encourages settlement or facilitates access to justice heavily depends on the parties' ability to gauge accurately their chances of success. However, the outcome of a lawsuit is inherently uncertain, and not all parties are in a good position to predict such outcomes, especially if they lack legal advice. Litigants do not all have the same capacity to bear the risk of paying a large costs award, which may be easily absorbed by large corporations or the government or ignored by impecunious individuals. Indeed, even a modest award might have serious consequences for a middle-income individual litigant or a small business. As a result, the incentives that a costs regime seeks to create may actually operate to discourage access to justice for certain categories of litigants. This outcome may even be compounded by the discretionary nature of costs awards.

Discussion Questions

1. In your view, what are the purposes served by costs awards?
2. Do you agree that indemnification, discouraging disproportionate or otherwise abusive litigation behaviour, encouraging settlement and ensuring access to justice are proper purposes?
3. Should any of those purposes be prioritized?

General Approach to Costs

In conceptual terms, costs regimes may be roughly classified into the following categories: (a) two-way fee shifting, whereby the losing party pays the costs of the successful party, often described by the phrase "costs follow the event"; (b) one-way fee shifting, whereby the successful plaintiff may recover costs from the defendant, but the successful defendant must bear its own costs; and (c) a "no-costs" system, whereby each party assumes its own costs irrespective of the outcome of the case. Any given jurisdiction typically employs a combination of those basic rules, with variations with respect to the method of calculating the amount of the costs.

Currently, with some exceptions (see below), the Federal Court and Federal Court of Appeal follow a two-way fee shifting, partial indemnity approach to costs aimed at compensating some, but not all, of a successful party's litigation expenses. Many jurisdictions within Canada and elsewhere in the world share this model.

Another approach, seen in the United States, is a no costs rule where each party is entirely responsible for his or her own expenses. The Federal Court and Federal Court of Appeal already follow this model with respect to immigration, refugee, and now citizenship law matters under the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* (s. 22; unless there are "special reasons"). This approach provides no indemnification and, since it creates no financial risk, it neither encourages settlement nor deters improper, vexatious or unnecessary litigation. However, it can facilitate access to justice. Indeed, while it does not provide litigants with the chance to recoup their costs, it does allow them to pay only what they are willing and able to afford. The possibility of

predicting and controlling costs in this manner helps ensure that deserving litigants, especially risk-averse ones, access the system when needed.

Under its new *Code of Civil Procedure*, Québec will soon implement a combination of the fee-shifting and the “no costs” approaches. While costs will still follow the event, they will no longer include any amount related to lawyer’s fees. Experts’ fees, filing fees and disbursements are the main categories of costs that will be shifted. As described below, it is only where litigation conduct is reprehensible that courts will be empowered to order the payment of compensation for lawyer’s fees. Moreover, a “no costs” approach is adopted in family matters.

Certain jurisdictions employ a one-way fee shifting approach for certain categories of cases which typically involve an individual plaintiff seeking to enforce fundamental rights, often, but not always, against a much more powerful defendant. Thus, in the United States, successful plaintiffs in certain human rights cases are entitled to recover their costs, as are plaintiffs in personal injury and fatal accident cases in the United Kingdom. Arguably, Federal Court judges are exercising their discretion in a way that approximates a one-way system in correctional law cases, where applicants are usually awarded costs where they are successful, but are frequently dispensed from paying costs to the respondent when they lose.

Furthermore, different methods are employed to calculate costs. For example, certain jurisdictions, like Ontario, use the successful party’s actual expenses to determine indemnification whereas others, such as the United Kingdom, will consider only costs that are reasonable or proportionate. Meanwhile, many jurisdictions, like the Federal Court and Federal Court of Appeal, employ a tariff, which sets out all possible assessable costs. Evidently, the more costs reflect parties’ actual expenses, the greater the indemnification. On the other hand, where costs are pre-determined, they will also be predictable and reduce further litigation about what should be included and what is “reasonable.” Moreover, they help prevent unsuccessful parties from unfairly bearing the burden of the successful party’s choice of retaining expensive legal counsel.

Part II: Issues Under Consideration

1. General Approach and Differentiation

Although this is not made explicit in the *Federal Courts Rules*, the practice of the Federal Court and Federal Court of Appeal is to the effect that two-way fee shifting with partial indemnity is the default rule in all cases, regardless of type. The only explicit exceptions, as noted above, are class actions (Rule 334.39) and proceedings under the *Citizenship, Immigration and Refugee Protection Rules*, where, as a general rule, no costs are awarded.

Yet, the court frequently exercises its discretion not to order the payment of costs. There do not appear to be any clear principles as to the classes of cases in which a “no costs” approach is appropriate. For example, as noted above, there is a frequent practice of not

ordering costs against unsuccessful applicants in correctional law cases, but this is not entirely consistent. As a result, litigants may not be able to predict whether they will be subject to a costs order. The incentives that are supposed to flow from awards of costs may not work effectively. The Committee is considering whether the Rules should incorporate presumptions that no costs are to be ordered, or “one-way” costs are to be ordered, in certain classes of cases.

Courts in other jurisdictions will also sometimes adapt their approach to costs based on the type of litigation. For instance, in the United Kingdom, an automatic, one-way fee-shifting model applies to claimants in proceedings related to fatal accidents, deaths and personal injuries. Under this approach, only one party can recover costs in the event of success. In the United States, certain jurisdictions have adopted this same model in cases involving civil rights claims.

Applying different cost approaches to different types of litigation has both advantages and disadvantages. On the one hand, it can better reflect the types of parties usually involved in certain areas of law. Where one-way fee-shifting is applied, for example, it can ensure greater access to justice for litigants who tend to be vulnerable or impecunious and usually face significantly better resourced opponents, such as governments or large employers. When made automatic, one-way fee-shifting can promote predictability and, moreover, can advance the development of areas of law that are in the public interest but generally associated with low private benefit, such as human rights and constitutional matters. On the other hand, however, litigants may perceive this differential treatment as unfair, especially where they are subject to one-way fee-shifting. Indeed, in such cases, the principle of indemnification will apply only asymmetrically, as will the encouragement to settle and the discouragement of improper, vexatious and unnecessary litigation.

Discussion questions

The Committee is considering whether the *Federal Courts Rules* should explicitly provide different costs rules for different types of litigation and whether to adopt one-way fee shifting, or a “no costs” approach, in certain classes of cases.

4. Do you think the Courts’ approach to costs should be applied uniformly or be adapted based on litigation type or whether the unsuccessful party is a self-represented litigant?
5. What areas of law should be treated differently (examples might include: labour law, human rights law or prisoners’ rights)?
6. Should actions and applications for judicial review be treated differently?
7. What are the advantages and disadvantages of one-way fee-shifting? In what classes of cases would it be appropriate or not?
8. What are the advantages and disadvantages of a “no costs” approach?
9. In what classes of cases would it be appropriate or not?

2. The Establishment of Cost Consequences for Improper, Vexatious and Unnecessary Litigation

Currently, the Federal Court and Federal Court of Appeal can impose cost consequences for improper, vexatious and unnecessary litigation on a discretionary basis, using various provisions of the *Federal Court Rules*. Nevertheless, there are no specific sections describing what qualifies as “improper, vexatious and unnecessary litigation,” what type of penalty can or must be ordered and when such decisions should be made.

Certain other jurisdictions have taken a more direct and comprehensive approach to such litigation. For instance, in Québec, under both the current and incoming systems, the court may order the payment of costs on a solicitor-client basis, or even punitive damages, in cases of “abuse of procedure,” which is defined as “a judicial demand or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome” or “a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person’s freedom of expression in public debate.”^v While the new *Code of Civil Procedure* excludes lawyers’ fees from the costs that may normally be shifted to the other party, article 342 allows the court to order the payment of solicitor-client costs in cases of “substantial breach of procedure,” a threshold lower than “abuse of procedure.” In addition, in British Columbia, the rules foresee an entirely separate assessment of costs specifically directed at addressing parties who put other parties to unnecessary proceedings or expense.

Another possible approach is to focus on the time at which costs become payable, and the consequences of non-payment. The current approach defers the assessment and payment of costs until the end of the proceeding, at which time a vexatious but impecunious litigant may have accumulated a significant liability for costs which will never be paid. Consideration could be given to a regime in which a person who makes inappropriate litigation choices could be required to pay the costs associated with those choices as a condition of being allowed to take further steps in their action or application. This may bring home to certain litigants the cost of abusive procedures and may encourage a more judicious use of interlocutory procedures.

Maintaining a discretionary approach to this issue has advantages. Most notably, courts can retain the ability to easily adapt to the circumstances of each case, not being limited by any pre-determined definitions or cost consequences. However, establishing rules also comes with benefits. The Rules would be able to send a strong, clear message condemning this type of litigation and would provide parties with a sense of certainty as to what behaviour leads to what result.

Discussion questions

The Committee is currently considering whether to establish specific rules and cost consequences related to vexatious, improper and unnecessary litigation.

10. Is establishing such rules desirable?

11. If so, how should the Committee define “vexatious, improper and unnecessary litigation” and what should the cost consequences be (e.g., solicitor and client costs, a

doubling or multiplication of regular costs, a lump sum penalty or punitive damages, etc.)?)

12. Should this type of behaviour be addressed separately from other costs, both in terms of amount of costs and in terms of the time at which such costs are payable ?
13. And, if so, at what stage of the proceedings?

3. The adequacy of the method of calculating costs, including Tariff B

It is likely that fee shifting will be retained at least in certain categories of cases. On that assumption, we must also inquire into the adequacy of the present method of assessing costs. The *Federal Courts Rules* currently employ a tariff system, as opposed to indemnification based on the actual expenses incurred by the party entitled to costs. Recourse to a tariff ensures that all parties are treated equally, irrespective of the fact that the other party may have chosen to hire a lawyer who charges higher rates. Moreover, the tariff system is thought to provide more predictability and to reduce litigation concerning costs.

Thus, while Rule 400 enshrines the full discretion of the court with respect to costs, Rule 407 nevertheless states the default rule to the effect that costs are assessed according to column III of Tariff B. In light of the complexity of the case, the court may order that costs be assessed according to any of the five columns of that Tariff, which reflect an increasing degree of complexity, or, more precisely, according to the “low end,” the “mid-range” or the “high end” of one column. However, it appears that the use of column V of Tariff B is exceptional. For instance, there are indications that patent disputes between pharmaceutical companies, despite their inherent complexity, are usually assessed according to column IV.^{vi}

As mentioned earlier, this method is not intended to provide full compensation for the successful party’s costs, but only partial indemnity. Rather, as the Federal Court of Appeal once observed, “Tariff B is a compromise between awarding full compensation to the successful party and imposing a crushing burden on the unsuccessful party.”^{vii} Tariff B breaks down a case into a number of discrete acts. A range of units is ascribed to each act, which translate in a monetary value by multiplying the number of units by the nominal value of a unit. However, many costly items of modern litigation practice are not mentioned in Tariff B (e.g., document management systems; extensive document discovery; legal research; written submissions at trial) and others appear to be grossly undercompensated (e.g., preparation of originating documents; memorandum of fact and law in the Federal Court of Appeal). Moreover, while the nominal amount of a unit has been adjusted to reflect inflation since the adoption of the *Federal Courts Rules*, it may not fully reflect the increase in the cost of legal services.

Discussion questions

The Committee is considering whether the manner of calculating costs should be changed and whether Tariff B should be revised.

14. Is a tariff an appropriate method for calculating costs?

15. Do costs calculated according to Tariff B provide a sufficient degree of indemnity to the successful party?
16. Are these costs sufficient to deter parties from pursuing unmeritorious litigation, or disproportionate or abusive steps within a proceeding, and to induce them to consider settlement?
17. If not, what changes should be made to Tariff B?
18. Should the spread between the columns, or within the columns, be increased?
19. Should there be additional columns reflecting an even greater degree of complexity? Should there be assessable services beyond those mentioned in Tariff B?
20. Should the Rules establish presumptions that certain categories of cases will be assessed according to a column other than column III?
21. Would a general increase in the amount of costs have negative impacts on access to justice?

The Committee would also welcome data that would allow for a comparison between the actual legal costs of a party and the magnitude of a costs award, in various areas within the jurisdiction of the Federal Courts.

4. Costs and Pro Bono Counsel

Courts have increasingly recognized that it is appropriate to order the payment of costs in favour of a party represented by *pro bono* counsel, even though, strictly speaking, that party cannot be indemnified for an expense that was never made.^{viii} However, an award of costs in such circumstances may raise additional questions. Moreover, uncertainty in this regard may deter parties from bringing meritorious lawsuits and counsel from accepting to act *pro bono*.

Discussion questions

The Committee is currently considering whether to adopt specific rules governing the award of costs represented by *pro bono* counsel.

22. Should there be specific rules in this regard?
23. May a party and its *pro bono* counsel enter into an agreement whereby counsel is entitled to the benefit of any cost award?
24. Should an exception be made to Rule 400(7), whereby costs would be payable directly to *pro bono* counsel?
25. Should parties be required to disclose the terms of their agreement with *pro bono* counsel?
26. Are there other aspects of the issue that should be addressed in the Rules?

This paper aims to spark debate and discussion about costs at the Federal Court and Federal Court of Appeal. The Committee welcomes input on the questions raised above as well as on any other aspect of this issue.

Federal Court of Appeal and Federal Court Rules Committee, October 5, 2015

ⁱ *Bell Canada v. Consumers' Association of Canada*, [1986] 1 S.C.R. 190 at p 207; see also *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71

ⁱⁱ Sacha R. Paul, "Costs and Access to Justice: Are Party and Party Costs a Barrier to the Courts?" (presented at The Manitoba Bar Association 2011 Mid-Winter Meeting, January 20-22, 2011, Winnipeg Manitoba), available online:

<http://www.tdslaw.com/files/tds_post/publications/Costs_and_Access_to_Justice.pdf> at p 8

ⁱⁱⁱ Erik S. Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010), 36 Queen's LJ 113

^{iv} *Trial Lawyers Association of British Columbia v. British Columbia (A.G.)*, [2014] 3 S.C.R. 31

^v *An Act to establish the new Code of Civil Procedure*, SQ 2014, c 1, art 51. The current *Code of Civil Procedure*, CQLR c C-25, uses the term "procedural impropriety," which it defines in the same manner.

^{vi} *Sanofi-Aventis Canada Inc. v. Novopharm Limited*, 2009 FC 1139 at para 13, aff'd 2012 FCA 265.

^{vii} *Air Canada v. Thibodeau*, 2007 FCA 115 at para 21

^{viii} *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 OR (3d) 757 (CA); *Roby v. Canada (AG)*, 2013 FCA 251; *Hinse v. Canada (AG)*, 2015 SCC 35 at paras 171-178