



COURT OF APPEAL FOR ONTARIO
COUR D'APPEL DE L'ONTARIO

MEMORANDUM

DATE: June 2016

FROM: Justice Benotto, Chair, Family Rules Committee

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

BACKGROUND

The Family Rules Committee is considering r. 24 on costs under the *Family Law Rules*. I am requesting your input on this important matter.

Costs decisions in courts can be both confusing and conflicting. The main areas are as follows:

1. Whether there should be an entirely new costs regime, such as one of the following:
 - a. A costs grid/tariff
 - b. No fee shifting at all (i.e., each party pays only his or her own costs)
 - c. A hybrid model
2. Whether or not the civil scales apply to family law proceedings
3. Definitions of the scales
4. Presumptive scales in family law.

A New Regime

Ontario is the only common law province in Canada that does not adopt some form of cost grid or tariff. Some academics and courts recommend a cost grid for the following reasons:

- Grids provide predictability about rates.
- Grids increase the likelihood of settlement on a principled basis, or at least reduce the costs of litigation about costs.
- Grids make it easier for counsel to advise clients about the approximate “all in” risks of litigation because the amount of costs are easier to anticipate.

In the alternative, most of the United States adopts a “no fee shifting” regime. Parties are neither liable nor entitled to costs. However, judges retain discretion to award costs in order to punish bad behaviour. Costs are simplified and more predictable. Some argue that the regime also promotes access to justice and more transparency in the costs system.

Whether or Not the Civil Scales Apply to Family Law

The *Family Law Rules* refer to “full recovery” costs only. There are two conflicting lines of jurisprudence on whether the three cost scales from the *Rules of Civil Procedure* (“partial indemnity,” “substantial indemnity,” and “full indemnity”) belong in the family law context. On

the one hand, judges continue to use the civil scales in family law. On the other hand, there is a line of cases, beginning with *Sims-Howarth v. Bilcliffe* (2000), 6 R.F.L. (5th) 430 (Ont. S.C.J.), where judges have said that the civil scales have no place in family law, and that there is only one scale of costs in family law matters, being somewhere between zero and full recovery.

Definitions of the Scales

The *Family Law Rules* do not define what is meant by “full recovery.” Lower courts have held that “full recovery” represents anywhere from 80% to 100% of the total legal bill. Courts have adopted a large range for the partial indemnity scale, between 50% to 75% of the legal bill. Substantial indemnity has generally been held to represent 70% to 85% of the total legal bill.

Presumptive Scales in Family Law

There is no presumptive cost scale for successful parties. The matter was intentionally left to judicial discretion subject to a number of factors to be considered. In *Berta v. Berta*, 2015 ONCA 918, at para. 92, the Court of Appeal cites Justice Perkins in *Biant v. Sagoo* (2001), 20 R.F.L. (5th) 284 (Ont. S.C.), which states at para. 20, “[T]he preferable approach in family law cases is to have costs recovery generally approach full recovery, so long as the successful party has behaved reasonably and the costs claimed are proportional to the issues and the result. “

CONSULTATION QUESTIONS

In considering the issue of costs under the *Family Law Rules*, the following questions arise:

1. Should the Family Law Rules adopt an entirely new costs regime? If yes, then
 - a. Should there be a tariff or costs grid under the *Family Law Rules*?
 - 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)?
 - c. Should there be a hybrid model for costs, and if so what would the hybrid model look like?
2. If your answer to question 1 is “no”, then
 - 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?
 - b. How can the scale(s) be better defined under the *Family Law Rules*?
 - c. Should there be a presumptive scale of costs in family matters?
3. Are there any other comments you wish to provide on costs under the *Family Law Rules*?

CONSULTATION PROCESS

I would be very grateful if you would consult with your constituents and provide the Committee with written comments by **November 1, 2016**.

Written comments should be submitted to Committee counsel, Gillian Wright, at gillian.wright@ontario.ca.