October 27, 2016

VIA EMAIL: gillian.wright@ontario.ca

Gillian Wright
Counsel, Family Rules Committee
c/o Court of Appeal for Ontario
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5

Dear Ms. Wright:

RE: Consultation on *Family Law Rules* on Costs

The Advocates' Society (the "Society"), founded in 1963, is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, the Society's members have a keen interest in the effective judicial resolution of legal disputes. Our membership includes family lawyers who work in both the domestic and child protection bar.

The Society was invited by Madam Justice Benotto, Chair of the Family Law Rules Committee (the "Committee") to provide input with respect to the Committee's consideration of Rule 24 of the *Family Law Rules*. The Consultation Document provided by the Committee in June 2016 asked stakeholders to address three (3) questions:

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 a 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 is 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*?

The Society's Family Law Practice Group has examined these questions and consulted with our membership. After considering feedback from our membership (obtained via survey) and discussion at the Family Law Practice Group Executive level, the Society makes the following submissions with respect to the questions above.

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

The Society supports the considerations in Rule 24 as they apply to costs. Specifically, the Society submits that the following elements of Rule 24 should remain unchanged save for our submissions with respect to each element:

(a) With regard to the presumption that a successful party should be entitled to costs, we would add that costs should be fixed and paid at each step,[1] and **only in the rarest of cases**, be reserved to the next step or to the trial judge. This would mean a proposed change to the language in Rule 24(1) of the *Family Law Rules*. In practice, when costs are reserved, they are often forgotten about at the next step or the successful party is asked to waive their claim for costs in the interests of settling. Fixing costs at each step will ensure that there is accountability for choices in the litigation.

(b) There should be no presumption of a cost entitlement in child protection case or if a party is a government agency, subject to the court's discretion.

(c) With regard to a consideration of unreasonable behaviour or an unprepared party, we would add that unreasonable behaviour should include the failure to abide by the basic obligation in family law of automatic, immediate and ongoing financial disclosure. Failure to abide by this fundamental principle impedes the progress of the action, causes delay and generally acts to the disadvantage of the opposite party. It impacts the administration of justice with the final adjudication being stalled and unnecessary judicial time spent on repeating the obligation to disclose that already exists within the *Divorce Act,* the *Child Support Guidelines* and the *Family Law Rules*[2]. The Rules should **include a specific reference to not having completed disclosure** in Rules 24(4)-(7) of the *Family Law Rules*, especially where a party has had to bring a motion for disclosure, has had to appear at a conference without all disclosure being produced from the other party, or is at trial without all disclosure being produced from the other party. Each instance of non-disclosure/inadequate disclosure wastes the Court's time and adds costs to a party who is prepared to move matters forward but who cannot because the other party is unwilling to meet their disclosure obligations.

[1] See *Islam v. Rahman*, 2007 OCA 622.
[2] *Roberts* v. *Roberts*, 2015 ONCA 450 at paras. 11-13.

(d) With respect to bad faith, we would add a specific reference that early, voluntary and complete disclosure of financial information is essential to family law proceedings. A party who does not make early, voluntary and complete financial disclosure is not participating in the process. He or she is not fulfilling the primary duty to help promote a just outcome. Without enforcement of the primary objective, a party can frustrate the civil justice's system's goals of efficiency, affordability, proportionality and fairness by making the process slow, expensive and distressful[3] and should be considered bad faith pursuant to Rule 24(8) of the *Family Law Rules*.

(e) With respect to factors in costs, as set out above, we would specifically add **a consideration with respect to outstanding or inadequate disclosure or non-compliance with an order for disclosure** as one of the factors the Court must consider pursuant to Rule 24(11) of the *Family Law Rules*.

There was no support among our members who provided survey responses for a no fee shifting regime.

Tariff

The Society urges the Committee to provide stakeholders with an opportunity for further consultation if and when a draft tariff is formulated, and before it is finalized. The Society cannot support a fixed tariff at this time as more information is required to make this determination. The Society surveyed our members who practise family law regarding a fixed tariff and determined, based on survey responses, that support for a fixed tariff is roughly equal to opposition to a tariff. The Society reviewed the benefits and disadvantages of a tariff, and identified the following considerations:

Disadvantages:

- a tariff has the potential to quickly become outdated, both with respect to counsel fees and actual costs spent by litigants;
- a tariff may not take into account regional differences between counsel rates and the costs of litigation;
- a tariff may not take into account different hourly rates and experience of counsel;
- not all claims are created equal, and a tariff would be unlikely to cover the real costs of litigants depending on the complexity of the file; and
- tariffs are often lower than the real costs of litigation and an award of costs based on a grid is unlikely to reflect the costs of the step and/or litigation.

[3] *Manchanda* v. *Thethi* [2016] O.J. No. 3006 at paras. 18-20.

Advantages

- a defined tariff would allow lawyers to give their clients better estimates as to the costs of each step and how much they are likely to recover if they are successful, and would encourage Offers to Settle at each step as a means to maximizing recovery; and

- a tariff, along with a costs grid, may permit parties to have predictability regarding the recoverability with respect to costs of litigation.

Costs Grid / Scales of Costs

The Society proposes that further investigation should be made into other Canadian jurisdictions using various tariffs (i.e. British Columbia, Alberta, Saskatchewan, Manitoba) including the strengths and weaknesses of various costs grid/scales of costs models. In particular, the tariff employed under the *Federal Courts Rules*[4] provides for flexible ranges of costs awards and incorporates the use of "units" adjusted periodically on the basis of the Consumer Price Index to attempt to reflect economic realities.

The Society considered the appropriate scales for a costs grid/scales of costs if one were to be implemented. The consensus among the consulted members of our Family Law Practice Group was that the civil scales are confusing, and that "full recovery" was too broad to have any meaning. The Society also considered the issue of judicial discretion and the fettering of same. As such we submit that the Committee may wish to implement the following grid:

- *Partial indemnity:* 50 to 60 per cent of the total legal bill, subject to fixed hourly rates the committee may wish to implement. To that end, we may support different hourly rates based on year of call, and we would expect a premium for a Certified Specialist. We recognize that hourly rates for lawyers practising in large centres such as Toronto would be significantly higher than those of our colleagues practising in smaller centres, and we struggled with how the Committee would determine what hourly rates would be appropriate and how quickly these rates may become dated for the purposes of fixing hourly rates for costs recovery purposes. The Society's rationale for fixing the bottom of the scale at 50 per cent reflects both the high costs of litigating, and the importance of making good decisions at each step.

- *Full indemnity:* 85 to 100 per cent of the total legal bill. We anticipate that full indemnity would be appropriate where a party is as or more successful than their Offer to Settle, where there has been bad faith or unreasonable behaviour, or where disclosure (and failure to produce or comply with an order for same) has been a significant issue at that step.

As an additional important consideration, the Society urges the Committee to consider whether there ought to be costs considerations that are different for conferences than for motions or trials. The Society considered the objectives of each type of conference in Rule 17 of the *Family Law Rules* and the discretion afforded to the Court to fix costs pursuant to Rule 17. In practice, it is rare that costs are awarded at a conference. There may be very good reasons for this: to

[4] SOR/98-106.

promote settlement; to reflect the mandatory nature of each conference (case conference, settlement conference, trial management conference); or because there is no "record" or transcript of a conference for purposes of possible appellate review. In keeping with our experience that inadequate disclosure or non-compliance with disclosure and all of the resources this consumes in family law, we submit that costs should be ordered at conferences if disclosure is at issue. We leave it to the Committee to determine whether Rules 17 and 24 should be amended accordingly.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,

Bradley E. Berg
President

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