Response to the consultation on costs under the *Family Law Rules*

Justice Benotto, Chair, Family Rules Committee

Submitted to the attention of Gillian Wright, Committee Counsel

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Please accept this submission on behalf of the Federation of Ontario Law Associations, (FOLA).

Our Federation is made up of the members of the 46 local law associations spread across Ontario. In total, we represent approximately 12,000 lawyers who are, by-in-large, practicing in private practice in firms of all sizes across Ontario. Many of our members practice in small communities or service neighbourhoods in larger centres where they are pillars of their community. Our members are on the front-lines of the justice system and see its triumphs and shortcomings every day.

FOLA is an advocate, on behalf of practising lawyers, for a better justice system that recognizes the crucial role competent and professional lawyers play in our system of justice. Many of our members practice family law either exclusively or as part of a broader general practice, but regardless of area of practice, this topic and the potential to change the *Rules* regarding costs is of great interest – and concern – to nearly all our members.

The Family Law Rules Committee is considering *r. 24* on costs under the *Family Law Rules* and Justice Benotto, Chair of the Family Law Rules Committee is asking for input on this matter. While we agree that this is a very important area of law; we question the presumptions upon which this consultation seems to be based. We do not agree that simply creating a "new regime" that includes a "costs grid or tariff" or "no fee shifting at all" will provide all the benefits and simplicity that is listed in the Consultation Memorandum dated June 2016 (hereinafter referred to as "Memo"). In addition, this issue is one in which there is no completely "correct" answer. The opinions of the judiciary, the lawyers, the academics and the litigants vary greatly. Therefore, any change that is made must be considered as interim or temporary as part of a test that can be evaluated over time. We believe that any changes to Rule 24, should have a termination/review date that will allow for the results to be evaluated as to the effectiveness of the changes and allow for possible revisions, or, if the effects have been completely negative, we can terminate the "experiment" and return to the current status quo.

Our Position in Brief:

It is the very complex and emotional nature of family law that makes costs confusing and conflicting, however, we submit that generally, the Family Judges are using Rule 24 very well and when they apply the three civil cost scales, they are doing so appropriately. There are many examples of the court in family law matters employing the *Rules of Civil Procedure* and in the application of rules governing costs where the *Rules of Civil Procedure* provide a more specific approach: see *Himel v. Greenberg*, 2010 ONSC 4084, 93 R.F.L. (6th) 384. "The *Family Law Rules* and the *Rules of Civil Procedure* have specific rules that govern costs to parties who are unsuccessful and one of their functions is to encourage parties to be reasonable in conducting lawsuits."[1] The outcomes of most family law cases are by no means certain. It is unfair to "effectively insulate" any litigant "from

[1] C.M.M. v. D.G.C., 2014 ONSC 567, Date: 20140124, Court File No. FS-13-18928, Endorsement of Madam Justice Darla A. Wilson, at pg 8.

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payment of a costs award."[2] We would argue that under *Rule 24*, the jurisprudence has developed a balanced amount of predictability and flexibility and the Judges continue to need discretion to award costs on a case by case basis because this area of law has so many factors motivating the litigation.

At the same time, if the Rules Committee determines it necessary to develop and use a "costs grid or tariff" we would argue that significant research will be required to ensure that the grid/tariff is based on current and realistic information about the costs of litigation and also properly reflect the variation of legal fees for the many different and complex family law issues. In addition, it will need to allow for variations according to geography, experience and proportionality. The creation of a costs grid is an inevitably imperfect "line drawing exercise." No matter where the lines are drawn, reasonable litigants will never recoup all their costs; and unreasonable or high conflict litigants will continue to abuse the process and increase the costs for all litigants and the entire family law justice system. Both of these effects are of concern and Judges are still going to require discretion to deal appropriately with the reasonable or unreasonable behavior of litigants in a family law matter. Finally, to create some more clarity, if the Rules Committee supports the formal adoption of the civil scales of partial indemnity, substantial indemnity, and full indemnity under the *Family Law Rules*, in addition to full recovery, all participants in the process would benefit by the scales being better defined or "narrowing" the ranges.

CHALLENGING THE UNDERLYING ASSUMPTIONS

Underlying this consultation are four assumptions which, to varying degrees, we believe need to be challenged and questioned. We believe further careful study is needed to fully appreciate the scope of the problem and define what is driving the development of a policy that seems to inevitably conclude that imposing a costs grid or tariff will be the answer to the "complexity and confusion" in costs decisions.

The four underlying assumptions are:

1. That costs decisions are confusing and conflicting;
2. That grids increase the likelihood of settlement on a principled basis and/or at least reduce the costs of litigation about costs;
3. That grids provide predictability about rates; and,
4. That grids make it easier for counsel to advise clients about the approximate "all in" risks of litigation and that a grid makes the costs amount easier to anticipate.

We acknowledge that on the surface, there may be some logic in all of these assumptions, but even if there is some grain of truth in these assumptions, we object to the degree and scale of how these assumptions are being represented and used to justify policy decisions that will have a profound

[2] Ibid.

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impact on the family law system, on family law practitioners and on the litigants themselves. As mentioned above, setting a costs grid is a "line drawing" exercise.

Statements that "grids increase the likelihood of settlement on a principled basis and/or at least reduce the costs of litigation about costs" are wonderful goals. However, the members of FOLA would like to see evidence of the "principled" settlements and "reduction" in the "costs of litigation" that can be directly linked to the implementation of costs grids or tariffs. In what jurisdictions has this been done and what was the true impact or harm? If a grid/tariff was introduced, how is the so called "predictability" helpful to a high conflict custody and access case? How would unrepresented parties be held to a similar standard as represented parties?

We do not agree that grids provide the predictability; or increase the likelihood of settlement; or reduce costs of litigation; or even make costs easier to anticipate. Even if a costs grid did all the things that these presumptions seem to indicate, a costs grid will not "promote access of justice" or create more "transparency in the costs system."

In consulting with our members across Ontario, we received the following comments about costs grids under the *Family Law Rules*:

> *The Civil Law costs grid that was attempted between 2002 and 2005 was a "disaster" and it was repealed. Although it provided some "uniformity," in the end, it was "too rigid" and took away all the Judge's discretion (especially to punish bad or unreasonable behavior).*
>
> *The Civil costs grid had no effect whatsoever on predictability of the rates and costs of any entire legal case.*
>
> *Costs grids do not increase the likelihood of settlement and it especially has no effect on increasing "principled settlements."*
>
> *In the case of both partial and substantial indemnity costs, the underlying principle of indemnification must be balanced against general principles of reasonableness and fairness.*
>
> *Ontario has abandoned its costs grid system for an approach that is, in the words of Justice Howden, (in what is still considered a leading costs decision, Moss v. Hutchinson) "a more flexible, principled one targeted at fair value for the work reasonably required and the legitimate expectations of the losing party."*
>
> *It is very important that we NOT go to a 'no fee shifting' regime. Costs play an important role in resolution and in making sure that multiple frivolous claims/motions are not rewarded.*

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Regarding the Consultation Questions:

When surveying the members of FOLA, the responses received from across the province of Ontario were somewhat varied, however the majority answered "NO" to the first question of whether the Family Law Rules should "adopt an entirely new costs regime." Our members had the following to say:

FLR Committee Consultation Question:

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

FOLA Answer:

NO. We do not need a new costs regime under the *Family Law Rules*.

FLR Committee Consultation Question:

If you answer to question 1 is "no", then

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?

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

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

FOLA Answer:

2. (a) Yes. The three civil scales of partial indemnity, substantial indemnity, and full indemnity should be adopted under the *Family Law Rules*, in addition to full recovery. In fact, many of us have normally operated (and we think most judges do as well) under the assumption that there are three scales of recovery. We believe that the scales of recovery are being used well. In addition, there should be a presumption in the Rules that a successful party is entitled to his or her costs of the particular proceeding. However, the use of the civil scales and full recovery should not take away or reduce the discretion of the Motions / Conference / Trial Judge. For example, in cases involving issues of custody / access / shared parenting, it may be that each party's position is reasonable, but requires judicial resolution. The Judge hearing the Motion or Trial should have the discretion to not award costs to either party in those cases.

   (b) The scales could be better defined under the *Family Law Rules*. One suggestion could be that partial indemnity is 50-75% and substantial indemnity is 75-100%. Many of us have

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understood that to be the case in any event. Some members have suggested that partial indemnity could be lowered to 25-75%, (with the discretion left up to the Judge).

(c) No. There should not be a presumptive scale of costs in family matters. Family law is complicated because no two cases are the same – we cannot see how a "presumptive" scale is helpful.

Additional Comments on costs under the *Family Law Rules*:

(a) The default under the *Rules* should be that parties can pursue costs for conferences at a trial or motion without the need to specifically request this. It often occurs that a conference takes forever and people are rushed out at the end. A party shouldn't be required to ask that costs be reserved in order to secure them.

(b) Costs shouldn't just be a matter of crunching numbers. For example, if a party has a parent who can pay for expensive counsel, Judges do (and should) have the discretion not to award full costs to that party if the other party simply doesn't have the funds to pay costs.

(c) The apportioning of costs should occur at the conclusion of a case and require judgement based on all of the factors listed in the *Family Law Rules* and *Rules of Civil Procedure*.

(d) To move to a "no fee shifting" model i.e.: each party pays his or her own costs regardless of the outcome or the patent obvious unreasonableness of one party:

- invites one or both parties to engage in unreasonable litigation without fear of any cost consequences;
- negates the consequences and purposes of Offers to Settle;
- runs contrary to the practice and logical premise contained in the *Rules of Civil Procedure*; and
- encourages parties with "deep pockets" to bring unnecessary, frivolous frequent motions, not with a view to being successful but with the intent to financially destroy the party with less funds and take away that party's ability to engage in meritorious litigation.

The *Family Law Rules* should be changed to provide for costs to be awarded, at the discretion of the Motions / Trial / Conference Judge, proportional to the issues and the results, on a partial, substantial or full indemnity basis with those terms being defined in the Rules.

The civil scales of partial, substantial and full indemnity should be adopted by the *Family Law Rules* and the ranges should be more defined and narrowed. This will assist in making the family law system more affordable and effective for the public we all serve.

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This consultation has been viewed by some as a "solution in search of a problem." Our members are not hearing any protest or cries demanding change from our clients…who is actually demanding this consultation or review?

Any changes to the Costs *Rules* will not affect the cases that settle or the amount of ADR that occurs outside of court. Since the majority of family law cases are already negotiated settlements using ADR, how can a change to the Rules on costs (that is supposed to make it easier to litigate) encourage settlement at the same time?

Proportionality: No discussion of costs is complete without addressing the issue of proportionality. It should be in the *Rules* that the winner should be entitled to full recovery subject to proportionality and the issues. The Rules Committee will need to address the issue of "proportionality" in family law cases and how it affects costs awards.

We appreciate the opportunity to provide these comments and would be happy to participate in any further discussion on this or related topics. We are committed to making the family law justice system work better for all parties, and in particular the citizens of Ontario who are unfortunate to find themselves in need of its services.

Respectfully submitted,

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Chair
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