

December 9, 2015

Mr. Andrew Baumberg
Acting Secretary
Federal Court of Appeal and Federal Court Rules Committee
Federal Court
Ottawa, ON K1A 0H9

Dear Mr. Baumberg,

RE: Federal Courts Rules on Costs

As you know, The Advocates' Society (the "Society") is a not-for-profit association of over 5,000 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.

The Society has formed a Task Force of its members who practise before the Federal Court and the Federal Court of Appeal in a variety of areas of law. This Task Force has reviewed the Federal Court of Appeal and Federal Court Rules Committee's paper entitled "Review of the Rules on Costs: Discussion Paper, October 5, 2015" (the "Discussion Paper"). The following submissions are made in response to the questions and issues raised in the Discussion Paper.

Purposes of Costs Awards

The Society makes the following general comments with regard to the purposes of costs awards. While costs do indeed serve the purposes of providing indemnification, discouraging improper, vexatious and unnecessary litigation, and encouraging settlement, the Society's members are of different views as to whether costs orders significantly facilitate access to justice. Under the current costs regime, the costs awards that are granted in most cases will not compensate a party adequately for the legal expenses he or she has incurred. This is a problem that is exacerbated by Tariff B, which will be discussed further below. In this light, costs do not always provide a significant incentive for parties to move their cases forward.

While the purpose of costs awards is not to facilitate access to justice *per se*, the Society believes that the prospect of recovering some costs does provide encouragement to some plaintiffs to bring forward meritorious claims. The prospect of costs awards for successful claimants may make some plaintiffs feel that the barrier to entering the court system is not as high as they may have otherwise expected.

As this letter will outline further below, a costs regime cannot be a “one-size-fits-all” approach. It must be nuanced with regard to the nature of the litigation and the nature of the litigants.

General Approach and Differentiation

The Discussion Paper notes that the Committee is considering applying different costs rules for different types of litigation and one-way fee shifting or “no costs” approaches in certain types of cases. The Society believes that the current system of two-way cost shifting, which is applied in actions and applications relating to private parties, works effectively and, generally speaking, should not be departed from in that context. The Society recognizes that litigants in this context (for example, intellectual property) are typically well-resourced.

In other areas of law, a “no costs” regime is appropriate – different considerations will apply based on the nature of the litigation. Under the current regime, as the Discussion Paper notes, a “no costs” rule applies in immigration matters. The Society believes this is appropriate, as the nature of the litigants in immigration matters will generally mitigate against an award of costs.

The Society also believes that in cases where human rights are in issue, there should be a presumption against any award of costs against an individual litigant where an issue of public interest is raised, in order to not discourage applicants in public interest cases.

It will of course be important to identify the test by which the public interest is to be ascertained. The Society is of the view that the reasoning of Mr. Justice Perell in *McCracken v Canadian National Railway Company*, 2012 ONSC 6838 (CanLII), an excerpt of which is set out below, may assist:

[78] Public interest litigation and whether a matter is a matter of public interest are difficult and uncertain concepts. See *Incredible Electronics Inc. v Canada (Attorney General)*, (2006), 80 O.R. (3d) 723 (S.C.J.); C. Tollefson, “Costs in Public Interest Litigation Revisited” (2011), 39 Adv. Q. 197; and C. Tollefson, “Costs in Public Interest Litigation: Recent Developments and Future Directions” (2009) 35 Advocates’ Q. 181. A matter of public interest is something more than a matter that might interest the public, and it may not be possible for a court to provide a precise and comprehensive definition of the concept: *Vennell v. Barnado’s* (2004), 73 O.R. (3d) 13 (S.C.J.) at paras. 28-29; *McLaine v. London Life Insurance Co.*, [2008] O.J. No. 2360 (Div. Ct.) at paras. 14-17.

[79] To be a “matter of public interest,” the class action must have some specific, special significance for, or interest to, the community at large beyond the members of the proposed class: *Williams v. Mutual Life Assurance Co. of Canada*, [2001] O.J. No. 445 (S.C.J.) at paras. 24-26; *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 3495 (S.C.J.); *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 (S.C.J.) at para. 36; *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427 (C.A.); *Smith v. Inco Ltd.*, 2012 ONSC 5094 (CanLII).

As noted above, the discussion paper also speaks of the use of one-way fee shifting in certain cases. The Society does not believe that a one-way fee shifting approach is appropriate in most circumstances. The Society is concerned that, in the Federal Court context, a one-way fee shifting approach would nearly invariably be applied against the Federal government, which would likely be viewed as unwarranted from the perspective of the Attorney General. In this regard, a “no costs” rule would be preferable to a one-way shifting approach.

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

The Society believes that the current system of judicial discretion should be maintained in determining whether to award costs for improper, vexatious and unnecessary litigation. A more precise definition of “vexatious, improper and unnecessary litigation” is not desirable under the Rules, as the contours of this type of litigation can vary depending on the type of case. In our view a sufficient definition has already been developed through the caselaw. A discretionary regime also provides the court with appropriate discretion to determine whether the costs should be awarded at a particular stage of the proceedings.

The Society raises the concern, however, that the court should consider the exercise of its discretion carefully in the context of litigants with mental illnesses. The Society believes that costs awarded on a punitive basis could exacerbate the negative stigma associated with litigants with mental illness and set a dangerous precedent. Instead of having such costs available as an award, a motion to strike or vexatious litigant motion could be brought with costs in the ordinary course.

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

The Society’s Task Force looked closely at this matter and expressed concern that the values under Tariff B and the resulting costs awarded under Tariff B are out of step with the current realities of the legal fees and disbursements associated with proceedings before the Court. Costs awarded under Tariff B do not achieve an adequate level of partial indemnity. The Task Force recognizes, however, that the Court retains the discretion to depart from Tariff B to award higher costs in certain circumstances, to reflect a higher level of partial indemnity or, in exceptional and appropriate cases, substantial or full indemnity. Still, even where costs are awarded on a discretionary basis, the Tariff B scale tends to be in the background of the exercise

of the judicial discretion, so costs awards tend to be lower than what may otherwise be expected for partial indemnity. Anecdotally, it appears that costs awards in the Federal Court often provide an indemnity of around 20-30% for commercial cases.

Members of the Task Force were of the view that while the awards calculated in accordance with Tariff B are in general too low, when combined with a discretionary element, such a tariff, if adjusted upwards, would provide a good baseline for the awarding of costs.

As such, the Society recommends that the individual line items in Tariff B be closely reviewed to increase their values to more accurately reflect the expenses associated with bringing proceedings before the Federal Court and the Federal Court of Appeal. This change would be in combination with a retention of judicial discretion to award costs. The Society expects that enhanced values under Tariff B would increase the value of discretionary costs awards.

Costs and *Pro Bono* Counsel

The Society agrees that further clarity may be of assistance in the context of costs awards in *pro bono* proceedings. The Society supports a rule whereby costs awards may be paid directly to *pro bono* counsel, as this is often the only way *pro bono* counsel are compensated for disbursement expenses. Organized service providers which provide *pro bono* representation may also receive the benefit of costs awards in order to continue funding their *pro bono* counsel programs.

Members of the Society expressed differing views as to the need to disclose any part of a *pro bono* retainer, with some noting that disclosure of the mere fact that a retainer is *pro bono* represents a violation of solicitor-client privilege. Others felt that such disclosure, on a basis that is limited to information that is necessary for an application for costs and that otherwise maintains privilege, would be relevant to the determination of whether costs should properly be awarded.

I hope these submissions are helpful. We would be pleased to discuss them with you further at your convenience.

Yours sincerely,



Martha A. McCarthy
President