TAB 11

Costs Awards: Are There Any Limits

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The Judge: Why are you here, counsel?

The Lawyer: For justice and costs, my lord - and not necessarily in that order.[1]

Pursuant to the Family Law Rules, costs are awarded on the following terms:

(a) The successful party is presumed to be entitled to costs (Rule 24(1));

(b) In the event a successful party has behaved unreasonably, he or she may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs (Rule 24(4)).

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[1] Killeen, The Honourable Mr. Justice Gordon and Morton James, A Guide to Costs in Ontario, 2002 CCH Canadian Limited at p iii.

(c) The Court is left with discretion in determining "reasonabl eness". The Court will use its discretion to determine whether or not a person has behaved "reason ably" or "un reasonably" and examine that party's behavior in relation to the issues from the time they arose, including whether the party made an offer to settle, the reasonableness of any offer the party has made and any offer the party withdrew or failed to accept (Rule 24(5)).

(d) In the event a party is absent or ill prepared, the Court may order costs in the "interest s of justice" (Rule 24(7)).

(e) Bad faith can be determinative. In the event an individual has acted in "bad faith", the Court is mandated to decide costs on a full recovery basis and the party must pay the costs immediately (Rule 24(8)).

(f) In the event costs are caused by the fault of a lawyer or his or her agent, and the costs have "been run up without reasonable cause or has wasted costs", the Court may, on Motion, or on its own initiative, after giving the lawyer and/or agent an opportunity to be heard, order that that person not charge the client fees; or disbursements for the work or repay the client any costs the client has actually been ordered to pay by another party; or order that person to personally pay the costs of that party and order that a copy of the order under the sub rule be given to the client (Rule 24(9)).

(g) Importantly, the Court must decide costs at each "step" in a summary manner. Therefore, after every "step" the Court must ascertain the costs. If costs are not ordered, as will be analyzed

below, that person cannot return to request costs for a previous or former "step". (Rule 24(10))

(h) The factors in determining costs are several, including the importance, complexity or difficulty of the issue, the reasonableness or unreasonableness of each party's behavior in the case, the lawyer's rates, the time properly spent on the case, expenses properly paid or payable and any other relative matter. (Rule 24(11))

(i) Rule 24 also provides the statutory basis for interim disbursements and legal fees in Rule 24(12) and a process for an order for security for costs as in Rule 24(13). These two sections are outside the ambit of this paper.

One must always consider that Rule 18 (Offers) is tied to the costs remedies in Rule 24. Counsel should frequently review the terms of all offers to settle at specific times during any proceeding. As will be seen below, the absence of an offer at any step in the proceeding can be interpreted in a negative manner by the Court.

Failure to accept an offer can result in costs consequences (Rule 18(14)). There are specific time limitations in the Rules that should be carefully reviewed, including but not limited to an offer for a Motion (which must be provided at least one day before the Motion) and an offer for Trial (which must be made at least seven days prior to the Trial or Hearing date). However, Rule 18(16) allows the Court to have discretion in varying from subrule (14) in certain circumstances and this subsection has been judicially interpreted very liberally.

The historic leading case in regard to costs is the *Andrews* v. *Andrews*, a 1980 decision of the Court of Appeal which was accepted in the *Tauber* decision [48 O.R.(3d)(577)] in the Court of Appeal whereby the Court reviewed a trial order for costs. The Court of Appeal reviewed the objectives of the Child Support Guidelines in the context of a costs order. The *Tauber* decision was a Child Support Guidelines decision where an individual earned over $150,000.00 – in this case between two and one-half and five million dollars annually. After reviewing the Guidelines objectives, the Court reviewed the list of factors the Court should consider in awarding costs in family law matters as determined as in *Andrews*, including, but not limited to the success of the parties, the parties conduct – not necessarily fault or blame, but whether or not the parties actions increased the difficulty in completing the litigation, the conduct of the parties during the litigation and the income and assets of each party, the relative means of each party to bear his or her

own costs and the effect of the award on the ability of the party to meet the obligations imposed on him or her by the judgment. (see Andrews)

Secondly, the Court accepted the costs reasons of Himel, J, in the *Reynolds v. Schmuck* decision ((2000), 46 O.R. (3d)(702)(Ont. SCJ)) at 705, where her Honour stated "unlik e other civil litigation, in family cases, the ability to pay a costs order or the effect of a costs order is taken into account as part of the financial arrangement or judgment".

In *Tauber*, the Court further found that in Child Support Guidelines cases, where a custodial parent is required to pursue litigation to obtain the child support to which he or she is entitled, the custodial parent should not bear the costs of litigation which is for the benefit of the child. The Court further found that in Child Support Guidelines cases, the interests of the wealthy, non-custodial parent who has resources to litigate may result in

unconscionable circumstances. Therefore, the custodial (recipient) parent should not be discouraged in pursuing their rightful entitlement for the benefit of the child. The Court found that in these types of cases a costs order may discourage such litigation.

Lastly, the Court of Appeal found that as recent Supreme Court of Canada decisions in Child Support Guidelines cases held that the presumptive quantum of support is the Guideline amount, "if the paying spouse wishes to challenge that presumptive assessment, ordinarily he or she should be required to pay for that exercise".

On an overall basis, the present interpretation of law has emerged to show several principals.

1. When Are Costs Ordered:

At first blush, one might consider that because one cannot bring a Motion before a Case Conference, the Case Conference and the Motion should be merged in an argument for costs at the Motion. However, this is not the case. Two decisions of Justice Perkins have analyzed these circumstances; the most recent decision of Justice Perkins being: *Biant v. Sagoo* 20 RFL (5th) 284 (Ont SCJ). and *Davis v. Davis* (2004) CarswellOnt. 2186.

In the *Biant v. Sagoo* matter, Justice Perkins after two highly contested and lengthy trials, indicated that as costs were to be decided at each "step", he did not have jurisdiction to address costs for previously heard Motions and/or other "steps" in the proceeding after the commencement of the Family Law Rules on December 13, 1999.

The Court went on to analyze the substantive costs issues, including the wife producing an Exhibit at Trial that ended up in a mistrial, the husband providing a valuation with a gross arithmatic error and other unreasonable actions by both parties. The Court analyzed the costs of a second Trial by firstly reviewing the success of the parties then looking at the reasonableness or unreasonableness of a party and whether or not the actions of one or the other of the parties was so unreasonable as to "des erve a costs sanction" or a "bad faith" finding. His Honour found that "As between the spouses, the unreasonableness or bad faith factor is even enough that I will not disturb the initial conclusion I reached. There will be no costs of the second Trial as between the husband and the wife". (Paragraph 30).

For those individuals who represent children, the Court reviewed the reasonableness of the Children's Lawyer' s Agent in addressing costs and the

Children's Lawyer was awarded significant costs, being $32,500.00. The Court went on to determine which party was responsible for their respective portion of the costs, as ordered (Paragraph 39).

It is arguable that costs cannot be determined at each step of the way because one cannot have a Motion without a Case Conference. Therefore these two issues are intrinsically tied together. This was part of the argument by counsel before Justice Perkins in the 2004 decision of *Davis v. Davis* (supra). Counsel argued that preparation and review for a case conference and Motion were required to further the Application and therefore the whole process was linked. However, His Honour found that costs must be determined at each "step" of the proceeding. A Case Conference is defined as a "step" and therefore a Motion resulting from any Case Conference can only have costs awarded for the Motion in and of itself, and one cannot

backtrack to the case conference or its preparation time leading to and required for the Motion.

This author finds the premise procedurally impractical. Although a strict interpretation of the Rules follows the reasoning of Justice Perkins, it is also argued that if one is not allowed a Motion without a case conference the case conference is tied to the Motion <u>together</u> the two "steps" form one "step". At the time of the Case Conference, the usual process is one of collaboration, conciliation and judicial mediation. Costs are not routinely ordered at Case Conferences unless someone has acted unreasonably by not attending or being ill-prepared. Otherwise, the usual process is that the Judge attempts to avoid a Motion by indicating the consequences of the Motion. To then ask for costs at the Case Conference when no relief has actually been found or ordered is contrary to the conciliatory nature of the Case Conference and the

overall objective of the Rules to avoid long complicated Motions with accusatory Affidavits (see Rule 2 – the "pri mary objective").

There is no Court of Appeal determination of this issue.

A second finding in the *Davis v. Davis* matter was whether or not costs should be awarded when there is no finding of unreasonableness or bad faith on either party. Given the fact that the husband delayed in providing disclosure, which was not found to be unreasonable or in bad faith, Justice Perkins reviewed Rule 24(11)(e) wherein the Court has the discretion to review " any other relevant matter". This includes a consideration of the relative means of the parties "at least to the extent that the party can reasonably be expected to absorb costs either of the other party or of their own" (again – see *Andrews* and *Reynolds v. Schmuck*). Therefore, in the *Davis* decision the husband was responsible for a portion of the costs despite

the parties divided success. His Honour found that the costs as requested on a partial recovery basis of $37,307.00 was not totally eligible by virtue of being in some part related to "steps such as conferences and Motions". His Honour then went to breakdown the portion of costs that were not used in the "steps" for which no order was made and fixed costs.

The last important part of this case is the fact that his Honour determined that "su bstantial indemnity" would mean approximately 80% of the total amount of costs.

2. How Much Should Be Awarded:

The recent decision of *Heuss* v. *Sukos* (2004) CarswellOnt 3317 reviewed several issues in regard to the quantum of costs awarded and the method of calculating same.

Justice Spence reviewed the interrelation between Rule 18 and Rule 24 in regard to costs and offers. The Court looked at the procedural requirements for an offer. The Court found that according to subparagraph 5 of Rule 18(14) (offers) that the mother was not more successful in her offer than what she received at Trial. The Court, however, held that the "catch- all" or "basket" clause, being Rule 18(16) allowed the Court to review any written offer to settle, even if the procedural requirements in 18(14) were not followed.

The Court followed the decision of *Scott v. Scott* (2002, 113 A.C.W.S. (3d)(849) at paragraph 53 wherein Justice Quinn stated, " success was divided in this Trial, although it may correctly be said that the wife was more successful than her husband. I might have been inclined to award some costs to the wife, but I think that she forfeited such relief because she did not serve an offer to settle. A matrimonial litigant who does not serve an offer to settle

either does not know the case or is engaged in hard ball tactics; the former is inexcusable and the latter is expensive, where the tactics fail". His Honour went on to state at paragraph 54, "The husband served an offer, but it did not match or better the results at Trial. As so often happens, his offer was not severable as to the various issues. An all-or-nothing offer can be difficult to compare to a judgment and that was the situation here".

The facts in regard to this case were not clear in the decision, but it would appear that Justice Quinn was not content with the conduct of counsel or the parties wherein he stated at paragraph 57 "As a final comment, may I say that, Family Court in my experience, has a way of truncating traditions, dress, decorum and sadly, advocacy. I urge counsel for the good of all, to assiduously maintain the standards of the profession no matter what the forum". This may temper his Honour's earlier statements in paragraphs 53 and 54.

3. The Grid

The Court has recently relied on the Civil Rules costs grid tariff as a means of assessing costs. At page three of the decision of *Heuss v. Surkos*, Spence, J. indicated that there was "c onsiderable merit in incorporating the grid, at least as a reference tool when dealing with the issue of costs..." "the primary advantage of the grid is the level of predictability and consistency that it affords in the courts dealing with costs at each step of the proceeding, or, as in this case, the conclusion of a trial. The grid although clearly not binding on a court, can nonetheless provide judges with a useful frame of reference when assessing hourly rates... [the use of the grid] would enable lawyers to advise their client of the likely range of outcomes in the matter of costs. In turn, one could expect, as the range of costs become more predictable, as parties are able to see their potential liability for costs continuing to mount,

and, most significantly, as they are able to quantify that liability, reasonable settlements will become more prevalent" (see paragraph 28).

His Honour utilized Rule 1(7) of the Family Law Rules in order to utilize the grid as he held that the use of the grid, although not sanctioned or noted by the Family Law Rules, was referable as the Court can give directions by analogy to the Courts of Justice Act and the Civil Rules: "If the court considers is appropriate, by reference to the Rules of Civil Procedure". His Honour stated at paragraph 27 of the judgment, "in other words, a judge... may refer to the Rules of Civil Procedure (and hence the grid) if the judge is satisfied that the matter is not otherwise covered "ad equately" by the Family Law Rules and if the judge considers it appropriate to do so". Therefore as an analogy to the Civil Rules, courts have the overall discretion provided in section 131 of the Courts of Justice Act in regard to costs.

Previously, there were tariffs available to calculate costs. However, the old tariff is somewhat outdated in so far as it provides minimal amounts for the preparation of documentation such as a fee of $75.00 for a pretrial conference, including preparation.

The new tariff, being a grid, allows for hourly rates depending on experience of counsel. The benefits of the grid and the amendments to Rule 57 of the Rules of Civil Procedure (costs of proceedings) requires the court to fix costs at every stage – similar to each "step" as required by the Family Law Rules. The rule requires fees to be set by reference to the grid. There are two new scales of costs, being partial indemnity which replaces the old "party and party scale" (partial recovery) and substantial indemnity which replaces "soli citor/client scale" (full recovery).

It depends on the proceeding as to what evidence is necessarily required for a cost argument. For example, at a "step" or "stage" of the proceeding costs can be fixed after oral argument. A bill of costs is required at the end of a Trial (see Civil Rules Form 57A). In civil matters it will only be on rare occasions when costs will not be fixed at a stage in the proceeding. However, the significant difference, as noted above, is the ability of the parties to pay. The judge can use his or her discretion in order to limit the costs given those circumstances. It is argued that this may occur even if parties have been reasonable in their actions, before, during and at the time of trial. However, when a party has acted unreasonably, it is argued that the judge will not give much weight to the party's subjecti ve circumstances.

Higher costs awards will likely result in the use of the grid (Tariff "A" of the Rules of Civil Procedure). However, one cannot receive more than actually billed, so counsel should provide the court with their actual hourly rate and the number of hours used to prepare for the Motion, Application or

Trial. There will be a speedier resolution of costs issues with the grid. A full hearing in regard to costs will likely be the exception rather than the rule. Success will matter more as a result is conduct. And, lastly, there will be greater certainty.[2]

As counsel, one may wish to reconsider one's hourly rate. If the grid allows "up to" a certain amount for your experience and if the market will bear an increased hourly rate, one should consider utilizing same. It should also be noted that specific "c hores" also have their own "up to" amounts – for example; Motions, Applications and Trials, broken down to portions a day.

[2] The author wishes to thank D. Kevin Carroll, QC, LSM and Roger Chown for the use of their paper, *The New Costs System Effective January 1, 2002, a Presentation to C.I.C.M.A. September 4, 2002.*

4. Practice Tips

1. Always provide an Offer to Settle. Review with your client whether the offer to settle should be severable or not. There are benefits to both types of offers. Ensure you document and memo your instructions from your client if the offer is severable or non-severable and the reasons for doing so and copy your client with this memo;

2. Ensure you are prepared to make a costs argument at every "step" of the proceeding. If you snooze, you lose. According to the present state of the law, if you have not asked for costs for a lengthy Case Conference and even if you are successful on the Motion, you will not be able to recoup the fees for the Case Conference if costs have not been ordered or otherwise addressed at that time. In keeping with the spirit of the Case Conference, one may simply request an

order made by the Case Conference Judge, that the issue and quantum of costs be determined by the Motion judge including the Case Conference;

3. Always be prepared to argue costs. Most counsel maintain a separate file for bills and disbursements. In these days of automatically computed generated programs it should be easy to at least determine your costs to and including the hearing date. Ensure your disbursements are also included. Do not forget to include G.S.T. as well.