

**REFORMING THE COST RULES FOR CIVIL JUSTICE: GETTING THE  
PARTIES INVOLVED**

By

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**INTRODUCTION:**

Most litigation lawyers in Ontario know that they could not afford to be a litigant in their own justice system. Recently, Mr. Justice Lane expressed the same view to the Law Society. In pleading to the Law Society to do something about the costs of litigation, he said that he could not afford to go to court as a litigant in his own court.

Its not just at the end of a trial that the costs can be prohibitive in Ontario. As Mr. Justice Campbell recently remarked, the costs of a strenuously contested motion could shut down many litigants. He also noted that, very often at the settlement conferences he attends, the costs are already larger than the amount in dispute.

Most litigation lawyers also know that the economic disconnect of the justice system is most obvious for claims “in the middle”. Those litigants with small disputes can go to Small Claims Court. Those with really large claims don’t worry about the costs, because the costs pale in comparison to the amount in issue. Its those with claims between \$50,000 to \$1 million, or with non-monetary claims, who face the prospect of disproportionately large legal costs.

For most ordinary individual or small business litigants, costs are the biggest barrier to justice. Faced with costs which overwhelm the amount in dispute, they are not inclined to use the civil justice system. And its not the actual amount of the costs they may pay their own lawyer that is the problem. The real impediment is the uncertainty of the total costs of the action. When told that “this lawsuit may cost you between \$20,000 and \$100,000, and I can’t give you a more precise estimate, and then there are the costs that may be awarded against you if you lose”, most people don’t think that the justice system offers a good solution to their problem.

Whenever I have discussed the “loser pay” cost rule of the common law system with lawyers in Latin America or other civil law countries, the response I get is amazement. People in those countries say to me: That’s a huge barrier to justice. It would never be permitted in our country.

On the other hand, those brought up in the common law system see the “loser pay” rule as increasing access to justice, by providing a potential source of funding for the

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meritorious litigant.<sup>2</sup> Indeed, the “loser pay” rule in an interlocutory proceeding is intended to dissuade litigants from bringing or defending motions on frivolous grounds by penalizing that party through costs. The problem with this rationale for the “loser pay” rule is that it is most often the lawyer, and not the litigant, who makes the informed decision as to whether a motion should be brought or defended, but it is the litigant who pays the costs.

In Canada, the rising cost of litigation has been recognized for at least ten years. The Systems of Civil Justice Task Force of the Canadian Bar Association sought to address it. The Civil Justice Reform project in Ontario in the 1990's tried to identify solutions. These projects looked to Alternative Dispute Resolution, early mediation and technology to decrease costs. But there is little evidence that they have done so. That is because the recommendations of those reports required government funding: funding for more judges and mediators, and funding for technology. Governments have been unwilling to make those investments in the justice system.

Costs have also increased because of the greater complexity of the business world. In addition, the greater use of electronic documents and email by businesses has turned discovery into a lengthy and expensive process. No substantial litigation can now be undertaken without a document system such as Concordance or Summation, which again increases the costs.

In addition, our Rules of Civil Procedure are designed to deliver the maximum possible procedural justice, not economic sense. We have adopted Rules which were designed by and work for the lawyers, not to deliver a cost-effective result for the parties. If the system were examined by an economist, surely he or she would say that it makes sense to design a system in which the costs of participating predictable and in proportion to what is in issue.

So what is to be done? Do we simply throw up our hands in despair because governments will not fund the system we have designed so that it works better? I think not. Let's instead “return the power to the people” and in this case, the people are the clients.

We should re-design the Rules so that the parties can select options to litigate their dispute on a more informed and cost effective basis. They can do so in an arbitration, so why not in court? At the very least, they should know more clearly the economic consequences if they don't do so.

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<sup>2</sup> Report of the Legal Costs Working Group-December 2005, at paras. 5.15 and 5.16 (Irish Department of Justice, Equality and Reform) published by the Stationery Office, Sun Alliance House, Molesworth Street, Dublin, Ireland; See <http://www.justice.ie/80256E010039C5AF/vWeb/pcJUSQ6KRJQJ-en>.

To accomplish these objectives I will propose several Rules. These are not Rules that would necessarily become part of the Rules of Civil Procedure. Some might go into the Rules of Professional Conduct. Others might be 'best practices' to be adopted by the Advocates' Society or other professional associations, or by judges in deciding on the consequences of overly expensive actions. I present them here not as final answers to the problem but rather to develop a discussion about designing the Rules of litigation with a view to allowing the parties to reduce the uncertainties of the costs of litigation.

## **PROPOSED NEW RULES FOR A COST-EFFECTIVE JUSTICE SYSTEM**

**Rule 1: [Unless the party expressly waives the necessity to do so,] before a Statement of Claim is issued or a Statement of Defence is delivered, a solicitor of record shall give a budget for the conduct of the action to the party for whom he or she acts. The budget shall set forth the estimated costs of the proceeding, and shall separately detail the estimated cost of pleadings, motions, discovery and trial. The lawyer shall suggest to the client alternative steps in the action to ensure that the client has a choice in the selection of proceedings and in particular a choice of proceedings which would result in the costs bearing a reasonable relationship to the amount in issue. If the lawyer subsequently believes that the costs of the action will exceed the original budget, he or she shall deliver a new budget.**

The purpose of this rule is to ensure that the client understands the true costs of the action. While the delivery of a budget may already be within the professional obligation of a trial or appellate lawyer, a clear statement of this obligation, and the resultant budget, would bring home to the lawyer and the party the economic consequences of bringing or defending the action. The bracketed portion of the rule could be included or excluded depending on the Court's willingness to allow some clients, and particularly those involved in actions with very large amounts in issue, to waive the requirement of a budget.

In fulfilling his or her responsibility under this rule, the lawyer would be required to tell the client that there are various ways of proceeding with the action. The lawyer should point out that the use of Notices to Admit, Agreed Statements of Fact, restricted lengths of discovery, written witness statements and limited cross-examination could result in a less costly proceeding and one in which the projected costs bear a reasonable relationship to the amount in issue. If the client wished to adopt a more expensive choice, then at least he or she would do so with full information about the range of proceedings available.

**Rule 2: With a Statement of Claim or Statement of Defence, the solicitor of record shall serve a Suggested Plan of Proceeding. This Plan shall reflect the budget referred to in Rule 4. The parties shall take reasonable steps to agree upon a Plan of Proceeding [failing which a judge shall settle the Plan of Proceeding].**

This Rule would take the budgeting exercise one step further and incorporate it into the proceedings themselves. If adopted, this Rule would ensure that the proceedings were actually conducted on the basis which met the clients' budgetary expectation and within

a costs that would, according to the clients' choices, ensure that the action was conducted on a costs effective basis.

If the bracketed words at the end of Rule 2 were adopted, then a judge would be empowered to adopt that Plan of Proceeding which appeared most reasonable. If satisfied that the interest of justice required more or lengthier steps in the proceeding then the least expensive Plan suggested, he would be empowered to do so. Absent a judge adopting one of the Plans, a party's Plan could be utilized at the end of proceeding in relation to costs.

By integrating the delivery of a budget into the litigation process, a number of consequences could be built into the system. All these consequences would be designed to reduce the uncertainties and escalation of cost awards. Thus, the budget or Proposed Plan of Proceeding could be utilized at the end of the action for the court to realistically assess costs. The rule could provide that the winning party is obliged to produce the original budget when costs are to be assessed at the end of the action, and the losing party could request the court to assess costs based on no more than that budget. The rule could also allow a party to seek a reduction of the costs claimed by its own solicitor in the event that the final costs greatly exceed the costs originally budgeted or in a Proposed Plan of Proceedings.<sup>3</sup>

**Rule 3: Absent an order to the contrary, the court shall not award more than [thirty] percent of the amount of the judgment by way of costs in an action.**

The adoption of this Rule would require the Courts making a policy decision that there has to be some economic relationship between costs and the amount in issue. In my view, the time has long since come where that policy decision has to be made.

The justice system is losing customers because the costs are too unpredictable and are potentially out of proportion to the amount in issue. Judges and masters are recognizing this fact and rendering cost award in proportion to the real disputed amount. Nevertheless, a litigant still faces the potential uncertainty of a very sizeable adverse cost award and has no way to protect itself against such an award. As a result, the justice system should consider enunciating a general rule that will relate the economics of using the system to what is in issue.

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<sup>3</sup> *Ibid*, paras. 6.2-6.15 which refers to the requirement of Irish solicitors to send a "Section 68 letter" (reference to Section 68 of the *Solicitors' (Amendment) Act*, 1994 to the client providing written particulars of the fees that will be charged for the requested legal services. The Report recommends the expanded use of Section 68 letters including a requirement that they be updated and that the letters form part of the assessment process and that the paying party should have access to the other party's Section 68 letters.

An objection to this Rule may be raised on the ground that many actions are not for a specific amount of money, and even when they are, the amount of the final judgment or the total amount in issue may differ radically from the amount claimed. However, there should be ways to overcome these issues if a real effort is made to relate the amount of costs to the amount in issue. Thus, the parties could be required to service a notice stating what they believe to be the amount in issue and can then be held to this notice when the time comes to award costs. If the real issue, and therefore the amount in issue, goes far beyond the claim in the particular action, then the parties should so state and they should not then complain about the costs being larger than the amount claimed in the specific action. And the same goes for non-monetary claims.

I can see no good reasons why the Courts cannot, or should not, state a maximum percentage of the amount in issue for the recovery of costs. Other businesses and institutions tell their customers the cost of using them, so why shouldn't the justice system? With sufficient input from lawyers, economists and other advisors, surely a general principle could be developed.

Could we justify 100% of the real amount in issue? Surely not. 50%? Again, surely not. Lawyers, judges and legislators need to have the debate over what that percentage should be. Whatever the percentage is selected, it would surely be better to have some rule than no rule at all. The rule might only be applied to those actions "in the middle" where the economics of costs in relation to the amount in dispute are problematic. Thus the percentage might only apply to actions in which the recovery is less than \$1 million.

**Rule 4.: A party may serve a Notice ( a "No Costs Notice") offering to have the action tried without any costs being awarded against the opposing party. If the No Costs Notice is accepted, then no costs shall be awarded in the action.**

The purpose of allowing a No Costs Notice is to give the parties a choice. In this case, the choice is to have no costs awarded for or against either party during the litigation.

To my knowledge, no-one has done a comprehensive study of why we have a "loser pay" rule. We know that the rule may be a barrier to justice because it is intended to be. The whole idea behind the rule is to discourage unmeritorious litigation and compensate the victor for being forced to participate in it. Indeed, as has already been noted, some observers see the "loser pay" rule as providing access to justice to the meritorious litigant.

But, to what extent do litigants really factor in the recovery of costs as a large ingredient in their decision to bring or defend litigation? Instead, do they really see the recovery of costs as providing an additional uncertainty? And what should we do if, after an

economic analysis, it was demonstrated that the “loser pay” rule is a disproportionate, ineffective and real barrier to justice for some kinds of action, or to some substantial part of the population? Would we be willing to abandon the rule, or allow it to be discarded in some circumstances? In doing so, could we not develop other rules, such as a more aggressive use of summary judgment or pleadings motion who more directly eliminate or limit a unmeritorious litigation?

Recently the Irish undertook a study of the costs of litigation. The Committee decided not to re-visit the “loser pay” rule because of the paucity of research on the issue.<sup>4</sup> Surely this rule deserves closer scrutiny than that. As a starter, why not at least give the parties the option to have a “no cost” rule apply to their action?

In my view, a significant number of parties would adopt this choice. Any party who made his or her own deal with a lawyer could choose this route and then know that that is the limit of its costs. Thus, plaintiffs who hire a lawyer on contingency, or class action plaintiffs might well do so. As would defendants who can fix their costs, or make alternative in-kind fee arrangements, with their own lawyer. Those defendants might not want the risk of the plaintiff running up a huge bill and seeking payment of it at the end. At the very least, there is no good reason why the parties should not be given this option.

There are two issues for the No Costs Notice. First, what happens if it is not accepted? And second, what happens if it is accepted and one party then acts abusively and causes huge costs to be run up?

On the first issue, the No Costs Notice could be taken as an Offer to Settle. If the party delivering the notice succeeds in the action (or the motion or proceeding in which it is served), and is entitled to costs, then that party could be held entitled to Full Indemnity Costs. In effect, the party serving the Notice has done better than its Notice. In this way, the Court might encourage the parties to litigate without the court’s involvement in inter-party costs. If each party is entirely responsible for its own costs, and not looking to recover a portion of them from the other party, they may be more inclined to keep proceedings to a minimum. In addition, they would avoid all the expense of assessing inter-party costs. On the other hand, while a Court might take a No Costs Notice into account in assessing costs, it may be unwise to have an automatic entitlement to full indemnity costs because of a party’s *prima facie* entitlement to proceed with the action based upon existing costs rules.

On the second issue, the court could be given a residual discretion to impose costs in a motion or other proceeding if a party’s conduct is egregious. In addition, the court could cancel the No Costs Notice if it was satisfied that the conduct of one party was abusive.

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<sup>4</sup> *Ibid*, paras. 2.1, 5.17.

In this way, the court would retain a residual role and intercede if the conduct of one of the parties abused the vacuum created by the elimination of the court's role in assessing inter-party costs.

**Rule 5: A party may serve a Notice ( a "Costs Ceiling Notice") stating that the costs of the proceeding shall not exceed a specific amount, or a specific percentage of a specific amount in issue. If the Costs Ceiling Notice is accepted, then the costs to be awarded in the action shall not exceed the Costs Ceiling.**

The idea behind the Costs Ceiling Notice is, again, to make the costs of litigation more predictable. In addition, the decision to send or respond to a Costs Ceiling Notice would bring home to the clients the very serious costs which will be incurred in the litigation and the consequences of the "loser pay" rule.

Under this system, a party would discuss with its lawyer the sending of a Costs Ceiling Notice. The Notice might state, for instance, that \$50,000 was to be the Costs Ceiling for recovery of inter-party costs. That discussion would necessarily require the lawyer to tell the client the cost consequences of losing the litigation. By putting a specific number on those consequences, the reality of them would be brought home more clearly to the client than is presently the case. If the Costs Ceiling Notice was accepted, then the limit of the costs recoverable by either party would be set at that ceiling.

One variant of a Costs Ceiling Notice could involve a percentage of the amount recovered at trial. Thus, in the Notice, the party could state that the inter-party costs are to be thirty percent, or a maximum of thirty percent, of the amount recovered at trial. If accepted, the parties would be limited to that percentage of whatever was recovered at trial. A defendant might have no incentive to make or accept such a Notice, as the less the recovery and therefore the greater its success, the less it would recover.

Another variant of the Costs Ceiling Notice could involve a statement of the amount in issue. In this case, the Notice could state that the amount in issue is \$200,000 and that the Costs Ceiling is, say, thirty three percent of that amount. The bargain that the party would make is that, if the Notice is accepted, that party would pay no less (if the defendant) or recover no more (if the plaintiff) than the stated amount in issue no matter what the amount of the judgment, and would only recover or pay the stated percentage of that amount by way of costs no matter what the outcome may be. In effect, the parties would enter into a bargain to limit their exposure to costs by surrendering some up-side or down-side of the recovery of the amount in issue.

A further variant of this sort of Notice could state that the party offers to have costs be "in the cause", rather than assessed on each step in the action. The purpose of this "In

the Cause Notice” would be avoid the assessment of costs on interlocutory motions and let the final outcome of the action determine all costs. Before the new cost Rules were introduced, the costs on most motions were awarded “in the cause” or to the a particular party “in the cause”. As a result, those cost awards did not place an impediment on proceeding to trial.

Under the present system, the costs of interlocutory proceedings may be prohibitive for some litigants. For others, the assessment of costs on motions is a time-consuming exercise which exacerbates the relations between the parties in a long and hotly contested action.

What should be the cost consequences of not accepting a Costs Ceiling Notice? As in Rule 4, the Notice could be considered as an Offer to Settle the costs of the action. A successful party could , by having “bettered” its offer, rely on that offer in requesting full indemnity costs, or costs on a higher scale than partial indemnity costs. A party delivering an “In the Cause Notice” could be entitled to costs on such higher scales of successfully bringing or defending interlocutory motions, and the Notice might be a disincentive to the other party bringing such motions. At the very least, the Notice would be taken into account in assessing costs at the end of the action.

**Rule 6: The Courts, Law Societies and other legal associations should ensure that lists are publicly maintained of competent counsel, their experience and their hourly rates or other billing arrangements.**

Information is value, and ignorance is costly. The less that litigants know about the available choice of competent counsel, the less likely it is that they will find a counsel willing to take on their case at a price point that makes economic sense. Conversely, the more information that is made public, the wider the choices that the litigants will have, both as to hourly cost and the variety of payment arrangements.

Not every trial or appellate lawyer has the same work load or overhead. A litigant may be totally unaware of the general availability of good counsel. There may be trial lawyer other than the one first contacted, who would be willing to take on the case at a better price point. Most importantly, some lawyers may be willing to take on the case on a different billing arrangement than a traditional hourly rate. With more publicity, lawyers will become more creative in developing a range of possible retainer relationships. As a result, there will be institutional and professional solutions to the “information gap” which clients now face in selecting counsel.

The Courts, Law Societies, le Barreau and institutions such as the Advocates’ Society in Ontario should encourage the dissemination of this sort of information about trial and

appellate lawyers. That information should include lists of available counsel. Those lists should include, to the extent that a lawyer wishes to do so, the lawyer's experience and hourly rates or other billing arrangements. It may be difficult for the courts to become directly involved in this process, but if judges encourage the process, then lawyers' associations should find no difficulty in taking up the challenge. While the public can now go "googling" for lawyers on the internet or on the web facilities of law societies, Canadian legal associations should be using similar electronic facilities to demonstrate the variety of good counsel competent to undertake litigation on a variety of economic relationships.

## **CONCLUSION:**

The purpose of this paper is to start a journey, not to end it. If lawyers, judges, legislators, civil servants and economists spend as much time searching for rules for the cost-effective conduct of litigation as they have on rules for procedural fairness, the Rules will be different than they presently are.

Some might ask: why concern ourselves about the costs of litigation “in the middle”? Isn't that litigation inherently uneconomic? My answer is: If the justice system does not work for individuals and small businesses, it will not retain the support of governments and the people. In time, it will be discarded as a public institution. The consequences of that situation for our legal and democratic institutions are obvious.

The Rules which I have proposed are not the best starting point for the journey toward a cost-effective justice system. The best starting point would be a thorough analysis of the impact of the present costs rules. Right now, each of us just has our own hunch about that impact. Economists and other experts should advise us whether and to what degree our present cost system is impeding access to justice. It is just this sort of analysis that I hope emerges from the study which the Canadian Forum on Civil Justice intends to undertake this spring.

Apart from that analysis, and absent further investment in technology and other resources that the justice system requires, three changes can be made to the present system. First, give the parties the tools to lower the uncertainty of costs. Second, have the Courts expressly limit the normal outside exposure to costs. And third, require lawyers to advise their clients more clearly about the cost consequences of litigation. The above Rules are intended to start the debate about how those changes might look.