**The Unfortunate Rigours of Roguery**

**or**

**Costs and Bad Faith behaviour**

**by Cheryl Goldhart**

The costs award in family law has evolved from a tool used to mitigate economic inequality, to a regime that seeks to encourage settlement. In Mark Orkin and Marie Gordon's 2002 article entitled *Costs in Family Law Issues*[1] the authors identify three distinct phases in the history of costs in family law cases. The authors state that these phases "correspond to important developments in economic equality between husbands and wives, the evolution of matrimonial property and support law, and a gradual acceptance of family law as a legitimate and important part of general civil litigation".[2] The authors identify the three phases of the evolution of costs as follows:

> Wives get costs (from the earliest recorded cases until the 1970's);
>
> "No order as to costs" or "the normal matrimonial rule" (from the 1970's to the 1990's); and
>
> Costs follow the event (the 1990's to the present).

Currently, the *Family Law Rules*[3] encourage settlement by imposing a costs penalty for an unaccepted offer that would have yielded the same or better result in that litigation. *The Family Law Rules* have gone so far as to exact economic punishment for what is considered "bad faith behaviour", and thereby to encourage litigants to act in a way that is most likely to lead to settlement.

---

[1] 20 CFLQ 363 pg 2.
[2] *ibid*.
[3] O. Reg. 114/99. as amended.

## ***Brief Review of Costs in Family Law***

The statutory provision governing the costs of a case is section 131 of the *Courts of Justice Act*[4]:

> **Costs**
>
> 131.(1) Subject to the provisions of an Act or the rules of court, the cost of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Following from the *Courts* of *Justice Act*, the *Family Law Rules* determine and direct the discretion of the Court when deciding on the issue of costs in a family law matter.

Rule 24 of the *Family Law Rules* provides as follows:

> SUCCESSFUL PARTY PRESUMED ENTITLED TO COSTS
>
> 24. (1) There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.
>
> NO PRESUMPTION IN CHILD PROTECTION CASE OR IF PARTY IS GOVERNMENT AGENCY
>
> (2) The presumption does not apply in a child protection case or to a party that is a government agency.
>
> COURT'S DISCRETION — COSTS FOR OR AGAINST GOVERNMENT AGENCY
>
> (3) The court has discretion to award costs to or against a party that is a government agency, whether it is successful or unsuccessful.
>
> SUCCESSFUL PARTY WHO HAS BEHAVED UNREASONABLY
>
> (4) Despite subrule (1), a successful party who has behaved unreasonably during a case 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.
>
> DECISION ON REASONABLENESS
>
> (5) In deciding whether a party has behaved reasonably or unreasonably, the court shall examine,
>
> (a) the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle;
>
> (b) the reasonableness of any offer the party made; and

[4] R.S.O. 1990, c. C. 43, as amended.

(c) any offer the party withdrew or failed to accept.

DIVIDED SUCCESS

If success in a step in a case is divided, the court may apportion costs as appropriate.

ABSENT OR UNPREPARED PARTY

(7) If a party does not appear at a step in the case, or appears but is not properly prepared to deal with the issues at that step, the court shall award costs against the party unless the court orders otherwise in the interests of justice.

BAD FAITH

(8) If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately.

COSTS CAUSED BY FAULT OF LAWYER OR AGENT

(9) If a party's lawyer or agent has run up costs without reasonable cause or has wasted costs, the court may, on motion or on its own initiative, after giving the lawyer or agent an opportunity to be heard,

(a) order that the lawyer or agent shall not charge the client fees or disbursements for work specified in the order, and order the lawyer or agent to repay money that the client has already paid toward costs;

(b) order the lawyer or agent to repay the client any costs that the client has been ordered to pay another party;

(c) order the lawyer or agent personally to pay the costs of any party; and

(d) order that a copy of an order under this subrule be given to the client.

COSTS TO BE DECIDED AT EACH STEP

(10) Promptly after each step in the case, the judge or other person who dealt with that step shall decide in a summary manner who, if anyone, is entitled to costs, and set the amount of costs.

FACTORS IN COSTS

(11) A person setting the amount of costs shall consider,

(a) the importance, complexity or difficulty of the issues;

(b) the reasonableness or unreasonableness of each party's behaviour in the case;

(c) the lawyer's rates;

(d) the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of the order;

(e) expenses properly paid or payable; and

(f) any other relevant matter.

…….

…….

The *Family Law Rules* provide a complete code for addressing the issue of costs. Rule 24 (1) indicates that the successful party is presumed to be entitled to costs, and Rule 24(11) indicates the factors to be considered in awarding costs.

***Cases that commenced before the Family Law Rules***

Although steps in a case may have preceded the application of the *Family Law* Rules*,* the *Family Law Rules* apply with respect to an order for costs made after the coming into force of the *Family Law Rules*.

In *Debora v. Debora*[5], Justice Backhouse determined that procedural matters addressed by *Family Law Rules* are to be applied retrospectively. In determining whether costs are a procedural or substantive issue, Justice Backhouse referred to the Ontario Court of Appeal decision in *Somers v. Fournier*[6] in which the court held that costs were procedural.

***Costs Grid***

Although the cost grid has been applied in some family law cases, it was never specifically incorporated into the *Family Law Rules.* The goal of a cost award is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular

[5] *Debora v. Debora* [2005] O.J. No. 1055 (Ont. Sup. Crt.); *Somers et al. v Fournier et al.* [2002] O.J. No. 2543. (O.C.A.); *Biant v. Sagoo* [2001] O.J. No. 3693 (Ont. Sup. Crt.).
[6] *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (Ont. C.A.).

proceeding".[7] Currently, there are two scales of costs, the "partial indemnity scale" and the "full indemnity scale". The *Family Law Rules* has added a new term to the costs lexicon, namely "costs on a full recovery basis"[8].

***Successful Party Entitled to Costs***

Under the *Family Law Rules,* there is a presumption that a successful party is entitled to costs. The previous line of thinking, confirmed in *Talsky v. Talsky*[9], *that* costs in custody cases should not follow the event, no longer applies. In *Talsky*, which was decided in 1973, the Court of Appeal held that in custody and access cases, except in "very exceptional cases, costs should not follow the event".

More recently, that line of thinking has been revised. In *Kappler v. Beaudoin*[10] in 2000, Justice Rutherford affirmed Jennifer MacKinnon's (now Justice MacKinnon) views on costs in her paper entitled "Costs and Offers" in which she wrote:

> Whereas prior to these *Family Law Rules*, some judges still held the view that costs should not be awarded in matrimonial proceedings, particularly in custody cases, such will no longer be the case. [emphasis of Justice Rutherford].

Justice Rutherford further held that the presumption in favour of costs to the successful party laid down in Rule 24 is the starting point, even in child custody litigation, and the preference against costs in such cases has been reversed by the new rule.

***Offers to Settle***

In every Canadian jurisdiction, Rules of Court have incorporated Offers to Settle.[11] Notwithstanding the presumption in favour of awarding a successful party his or her

[7] *Children's Aid Society of Ottawa v. K.* [2005] O.J. No. 2573(Ont. Sup. Crt.).
[8] *Supra* at 1, pg 11.
[9] *Talsky v. Talsky* 1973 CarswellOnt 126 (O.C.A.) [hereinafter "*Talsky*"].
[10] *Kappler v. Beaudoin* [2000] O.J. NO.4121( Ont. Sup. Crt.).
[11] *Tweel v. Tweel* (1995), 18 R.F.L. (4th) 222.

costs, often the apparently successful party is not entirely successful. His or her litigation conduct or poor offer to settle may adversely affect his or her costs. Parties should make the best offer they can or risk costs which may total more than the amount at sake on the merits of a case.[12]

The *Family Law Rules* provide cost consequences for a failure to accept an offer to settle. The case law has held that offers to settle are not only "a yardstick by which to measure success, but also become a prime consideration in determining the quantification of costs."[13] The consequences of ignoring a reasonable offer to settle, and thereby causing unnecessary and/or lengthy litigation, are to pay the other party's costs.[14]

If there is an outstanding offer to settle the entire case, at any particular step, that offer should be duly noted so that if the costs of the step are not dealt with immediately, they can be dealt with at the "end of the day".

The offer to settle does not have to be identical to the award made at trial to have positive cost consequences. In *O'Connor v. Kenney*[15] the wife made on offer to settle one year prior to the trial, which was comparable to the judgment. The court held that "favourability requires only comparability, not equivalence and not correspondence".

Subrule 18(14) provides that an offer to settle made by a party must meet the following conditions if it is to be considered when the court determines whether that party is to be entitled to costs:

> If the offer relates to a motion, it is made at least one day before the motion date;
>
> If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date;
>
> The offer must not expire and is not withdrawn before the hearing starts;

[12] McLeod and Mamo, Annual Review of Family Law, 2006 ANREVFAML 2.
[13] *Sims-Howarth v. Bilcliffe* [2000] O.J. No. 330 (Ont. Sup. Crt.).
[14] *Dababneh v. Dababneh* [2004] O.J. No. 575 (Ont. Sup. Crt.).
[15] *O'Connor v. Kenney* 2000 CarswellOnt 3695 (Ont. Sup. Crt.).

> The offer is not accepted; and
>
> The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

The policy behind this sub rule is clear. It is intended to encourage the parties to settle. To further that encouragement, offers to settle will often include language which states that if the offer is accepted by a certain date, there will be no cost consequences to either party, but if accepted by a later date, the costs rules will apply.

Subrule 18(16) of the *Family Law Rules* allows the court to take into account any written offer to settle. Courts have held that a party is entitled to full indemnity costs even when the offer to settle has not entirely complied with Rule 18(4). In *Deelstra v. Van Osch*, the court held as follows:

> Rule 18(16) allows the court to take into account any written offer to settle when exercising its discretion over costs and, in the circumstances of this case, at least with respect to the offers, I consider Ms. Deelstra to be entitled to full indemnity costs…Mr. Van Osch was clearly the loser in the lawsuit when one considers the offers made. [16]

In *Cotter v. Wasmund*[17], since the wife was successful at trial, she was presumptively entitled to costs under the *Family Law Rules*. Unfortunately, she had accepted an offer to settle on some issues which included a clause that insulated the father from costs on all issues, not just the settled issues. The mother claimed that this was a mistake. Justice Perkins agreed that this clause was a mistake and that the wife was entitled to her costs. Justice Perkins held that even if there had been no mistake, the courts still retained the discretion to override a clause providing costs immunity on issues which was undertaken with no apparent merit. [18]

---

[16] *Deelstra v. Van Osch* [2003] O.J. No. 273 (Ont. Sup. Crt.).
[17] *Cotter v. Wasmund*, 2005 CarswellOnt 533 (On. Sup. Crt.).
[18] *Supra* note 13.

In *Dhanji v. Dhanji*[19], the court held that the court has the discretion, to deny costs even if the successful party betters their offer to settle.

Thus, it is apparent that the court retains the discretion to decide whether to award costs, even in the face of an agreement between the parties with regard to costs, and even if a party has bettered their offer to settle.

***Costs for Each Step***

The *Family Law Rules* established, at sub rule 24(10) that "promptly after each step in a case, the judge or master is **required** to decide in a summary manner who, if anyone, is entitled to costs, and to set the amount of costs. (emphasis added).

The policy behind awarding costs at each step is to ensure that litigants are aware of the seriousness and potential financial consequences of failing to settle.

The difficulty that some members of the judiciary have with awarding costs at each step, however, is the potential effect of that a costs award may have on the parties. A costs award can often encourage parties to become more positional. Once costs have been awarded to a party, he or she may feel "empowered" and become less tractable. The party develops a sense of invincibility and is less likely to seek settlement. In order to avoid this consequence, judges frequently defer making a costs order to the next step in the case.

The problem for counsel then becomes obtaining a costs award after the fact. The best time to argue for costs is immediately following the step to which the costs award would apply.

***What is a "Step"?***

The meaning of a "step" in a matter, for the purposes of costs, as set out in Rule 24 (10) was considered in *Husein v. Chatoor*[20]. The court concluded that a step was a "discrete stage…as described in the rules", such as a case conference, motion or settlement

[19] *Dhanji v. Dhanji*, 2004 CarswellOnt 3807 (Ont. Sup. Crt.).
[20] *Husein v. Chatoor* [2005] O.J. NOo. 5715 (Ont. C.J.).

conference, but that "a simple appearance…. for example, a request for an adjournment" was not.

In *S.(C.) v. S.(M.)*[21], however, Justice Perkins, when referring to *Husein*, stated the following:

> Of course, an adjournment request is a request to adjourn some event or step, usually a conference, motion or a trial, and I would have thought that the adjournment of a step was part of the step, if only that because that particular step has not been completed. Certainly it is common for a judge adjourning, say, a motion, to consider that the costs of the adjournment of the motion fall within the costs of the motion.

Therefore, there is no definitive case law on the narrow issue of awarding costs on an adjournment. It is wise, however, to obtain a ruling on costs at each step of the case.

In *Islam v. Rahman*[22], a 2007 Ontario Court of Appeal case, the court would not uphold an entire trial costs award, citing unaddressed costs at various steps in the matter as the reason for the small decrease in the costs award. In *Islam*, the court held the following:

> Rule 24(10) of the *Family Law Rules* provides that the judge who deals with a step in a case shall decide who, if anyone is entitled to costs. If a party who has served an offer to settle a case as a whole wishes that fact taken into consideration in relation to a particular step, it is incumbent on that party to raise that issue with the judge who deals with that step. In this case, various steps were taken (i.e;. motions, case conferences) in relation to which either there was an endorsement that there be no order as to costs or the issue of costs was not addressed. In the absence of a

[21] *S.(C.) v. S.(M.)* 2007 CarswellOnt 3485 (Ont. Sup. Crt.)
[22] *Islam v. Rahman* 41 R.F.L. (6th) 10 [hereinafter "*Islam*"].

> specific order for costs in favour of the respondent, the trial judge should have disallowed costs claimed by the respondent in relation to such steps.

Therefore, it is incumbent upon counsel at each step of a case to ensure that the presiding judge addresses the issue of costs and makes a decision regarding costs at the time the step is concluding, including simply endorsing that costs will be awarded in the cause, which will leave the costs of that step to be dealt with at a later time.

***Bad Faith and Costs***

Although the traditional view is that costs are to be awarded as an indemnity to the person entitled to them and were not imposed as a punishment on the party who must pay them, in practice, courts have never hesitated to use costs to specifically reprove or punish improper behaviour by a litigant[23]. Now, the punitive aspect of costs is codified in the *Family Law Rules*.

Once the courts make a finding of bad faith behaviour, according to rule 24(8), the court is ***obliged*** to make an order for costs against the party acting in bad faith. This rule is not discretionary, but imperative. Bad faith had been described as "not simply bad judgment or negligence, but rather it implies the conscious doing of wrong because of a dishonest purpose or moral obliquity...it contemplates a state of mind affirmatively operating with a furtive design or ill will[24].

In *Islam*[25], the Court of Appeal found that the trial judge, in making her costs award, rightly "relied on her findings relating to the appellant's serious misconduct in the litigation". Thus, although the trial judge did not specifically state that the appellant acted in bad faith, she was entitled to rely upon her findings regarding his behaviour to make a costs award, without being required to delve into an analysis of whether his behaviour met the criteria of "bad faith" under the *Family Law Rules*. This decision is important, in that it establishes that poor behaviour by a litigant does not have to be specifically

[23] Supra at 1, pg 11.
[24] *Biddle v. Biddle*, [2005] O.J. NO. 1056 (Ont. S.C.J.)[hereinafter "*Biddle*"].
[25] *Supra* at 17.

defined by a trial judge as “bad faith behaviour” to provide a basis for awarding costs against that litigant.

Some examples of behaviour that have been held by the courts to be in bad faith are as follows:

Not obeying court orders; waging a campaign alienating children from a parent; over-holding the children after an access visit; removing the children from the local municipality and starting a custody proceeding in the new location; actively and intentionally hiding or misrepresenting the value or existence of an asset; mean-spirited attacks against a vulnerable spouse designed to operate as a debilitating tactic; failure to provide timely disclosure or abide by disclosure orders coupled with an unreasonable and unilateral refusal to make support payments pending the hearing; filing an ex-parte motion when the party knew that both sides were represented by counsel who might have negotiated a reasonable temporary arrangement without escalating an already volatile situation.[26]

In *S.(C.) v. S.(M.)*, which also refers to *Biddle*, supra, Justice Perkins describes bad faith as follows:

> The definition of “bad faith” in The Concise Oxford Dictionary of Current English (5th Edition, 1964, edited by H. W. Fowler and F.G. Fowler) is simply “intent to deceive”. The essence of bad faith is the representation that one’s actions are directed toward a particular goal while one’s secret, actual goal is something else, something that is harmful to other persons affected or at least something they would not have willingly have supported or tolerated if they had known. However, not all bad faith involves intent to deceive. It is rare, but not unknown in family law cases, for bad faith to be overt- an action carried out with intent to inflict harm on another party or a person affected by the case without an

[26] *McLeod’s Ontario Family Law Rules Annotated 2007*; Aston, Vogelsang, Siegel & McSorley; Thomson Carswell at pgs 275-276.

attempt to conceal the intent.

In order to come within the meaning of bad faith in rule 24(8), behaviour must be shown to be carried out with intent to inflict financial or emotional harm on the other party or other persons affected by the behaviour, to conceal information relevant to the issues or to deceive the other party or the court.

Interestingly, the court does not distinguish between bad faith behaviour that affects the parties to a case from bad faith behaviour that affects third persons. While it may be difficult to imagine bad faith behavior on the part of one litigant in the course of litigation that would not affect the other party to the case, but would affect a non- party, it is possible. This behaviour can, in fact, become the basis for a costs award, even in the face of a win, where ordinarily the winning party would be entitled to costs.

In *S.(C.) v. S.(M.)* Justice Perkins further held that in construing rule 24(8), there is an implication in the provision that the bad faith behaviour must relate to the issues at stake in the case or to the conduct of the case, not behaviour outside the issues of the case or in a separate (even if related) case- in order to justify a costs penalty.

Once a finding of bad faith is made, what will be the impact of that behaviour on the costs award? Justice Perkins, who assisted in the authoring of the Rule, states that the rule leaves some unanswered questions. In *S.(C.) v. S.(M.)* Justice Perkins states the following:

> If a party has acted in bad faith on one occasion, are the costs of the whole case to be awarded against the party on a full recovery basis? What if it was a small act of bad faith? What if it was only in relation to one issue, and on the other issues the party behaved properly? What impact do the factors and the discretion in Rule 24(11) have on the full recovery mandated by Rule 24(8)? My tentative conclusion is that full recovery costs should be awarded in relation to the issues affected by the bad faith and then the whole picture should be looked at again in light of the

> considerations in rule 24 (11) and the discretion in the provision should be used and necessary to produce the correct overall result.

Justice Perkins therefore modifies rule 24(8) and makes it more onerous to the person complaining of the bad faith behaviour. Now, the rule is only imperative in relation to bad faith behaviour as it relates to each individual issue. It is possible therefore, for the court to find bad faith behaviour, and not make a costs award on a full recovery basis.

This seems to contradict rule 24(8) itself, as the rule militates full recovery of costs for bad faith behaviour. We must then question what is meant by "full recovery". Rule 24(8), read without Justice Perkins' interpretation, stands as a severe penalty for bad faith behaviour, and may be a form of deterrence, if brought to a client's attention by his or her solicitor.

Using *S.(C.) v. S.(M.),* one might argue that his or her client should not be forced to pay costs on a full recovery basis for bad faith behavior, if one can successfully parse the behaviour and the issues.

### *Costs and Lawyers' Bad behaviour*

Kordic v. Bernachi[27] is a cautionary tale for counsel who see fit to produce correspondence and pleadings that are insulting, inflammatory and unsubstantiated.

In *Kordic*, Justice Fergusun held that costs cannot be awarded personally against counsel whose behaviour, while rude and uncivil to opposing counsel has not contributed to the increase in costs spent on the proceedings, and that this matter would be better dealt with by the Law Society.

However, the court also held that counsel was unprofessional in his conduct and submissions to the court and that he had wasted his client's money and the court's time. There can be no doubt as well that the letters to opposing counsel submitted to the court laid the foundation for the decision of the court to award costs on a full indemnity

[27] *Kordic v. Bernachi* 2007 CarswellOnt 6369 [hereinafter "Kordic"].

basis.

The court found that the conduct of counsel for the Respondent had aggravated the costs created by the Respondent's delay and failure to comply with court orders. On this basis the court held that sub rule 24(9) of the *Family Law Rules* was triggered, and that the bad faith behaviour of both the Respondent and his counsel should result in costs being awarded against the Respondent on a full recovery basis.

Justice Fergusun also recommended to the Respondent that he seek an assessment of his counsel's account.

## ***Conclusion***

The costs rules can be potent tools in the hands of knowledgeable and intrepid counsel. As always, the statutory provisions, or in this case the rules, are the first place to start. Counsel must know the rules regarding costs well, and be prepared to argue for their costs at each step of a case, or the costs for that step will be lost.