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BAR ASSOCIATION  

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L'ASSOCIATION DU  
BARREAU CANADIEN

## **Federal Courts Costs Discussion Paper**

**CANADIAN BAR ASSOCIATION  
FEDERAL COURTS BENCH AND BAR LIAISON COMMITTEE**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Federal Courts Bench and Bar Liaison Committee, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Federal Courts Bench and Bar Liaison Committee.

# TABLE OF CONTENTS

## Federal Courts Costs Discussion Paper

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II.</b>	<b>COMMODITY TAX, CUSTOMS AND TRADE SECTION COMMENTS .....</b>	<b>1</b>
	A. Part 1: Purposes of Costs Awards.....	1
	B. Part 11: Issues Under Consideration.....	2
<b>III.</b>	<b>INTELLECTUAL PROPERTY SECTION COMMENTS.....</b>	<b>5</b>
	A. Part 11: Issues Under Consideration.....	5
<b>IV.</b>	<b>MARITIME LAW SECTION COMMENTS .....</b>	<b>14</b>
	A. Part 11 – Issues Under Consideration.....	14
<b>V.</b>	<b>CONCLUSION .....</b>	<b>14</b>



# Federal Courts Costs Discussion Paper

## I. INTRODUCTION

The Canadian Bar Association's Federal Courts Bench and Bar Liaison Committee (Committee) appreciates the opportunity to provide input on the important issues raised in the Federal Court of Appeal and Federal Court Rules Committee discussion paper on *Review of the Rules on Costs* (discussion paper). The CBA is a national association of over 36,000 members, including lawyers, notaries, law students and academics, and our mandate includes the improvement of the law and the administration of justice. The Committee consists of representatives from several CBA Sections that appear before the Federal Court and Federal Court of Appeal.

The discussion paper was broadly circulated to CBA Sections (groups of CBA members) who practise before the Federal Courts, and we received feedback from three groups, the Commodity Tax, Customs and Trade, Intellectual Property and Maritime Law Sections. Their responses are summarized below (the three CBA Sections did not all respond to each question in the discussion paper).

## II. COMMODITY TAX, CUSTOMS AND TRADE SECTION COMMENTS

### A. Part 1: Purposes of Costs Awards

The CBA's Commodity Tax, Customs and Trade Section agrees with the purposes of costs as articulated in the discussion paper, namely, indemnification, discouraging abuse of the court system, encouraging settlement and facilitating access to justice. In our view, discouraging abusive litigation should be a lower priority than the other considerations. Threshold considerations should be what motivates abusive litigation and whether economic disincentives are a deterrent.

Volatile and unreasonable parties may use litigation as a tactic for harassment. These parties are unlikely to conduct dispassionate and reasonable risk analyses; so rule changes may not advance the goal of deterring bad behaviour.

There are other current or potential tools to deal with abusive litigation, such as motions to strike abusive pleadings. Further, the Federal Courts have certain controls to deal with known abusive litigants, including requiring an application before the courts accept an originating process.

It is difficult to prioritize the other purposes because there are inherent tensions between them. For example, indemnification is an important purpose, but may conflict with advancing access to justice.

### **B. Part 11: Issues Under Consideration**

A workable system would recognize that litigants in different types of litigation, with or without representation, are not all in the same position. The Federal Court system has a somewhat fractured jurisdiction dealing with widely varying and important rights. Citizenship, immigration and refugee matters and human rights affect potentially vulnerable individuals who often do not have significant resources. Patent litigation is well funded and involves substantial and arguably artificially created economic rights granted by the state. Actions under some statutes like the *Marine Liability Act* include those for personal injury and death. A vulnerable person with limited resources and significant personal challenges is in an entirely different position to do battle with the Government of Canada compared to another case involving two opposing global pharmaceutical companies. A more forgiving costs regime in the former case is obviously desirable.

The Federal Courts deal with matters involving claims against the Crown. As the Crown has substantial resources and support from the largest law firm in Canada (Justice Canada), an asymmetrical approach to costs may be justified, particularly in cases involving unrepresented individuals.

Any situation involving private parties against the Crown may require different treatment. The Federal Courts hear widely varying cases. Some involve fundamental human rights and other issues of national importance. Others involve economic issues between private parties. Distinguishing between litigation involving the Crown and litigation between private parties, and litigation concerning vulnerable individuals' fates and economic disputes may be appropriate.

Actions and applications for judicial review should also arguably be treated differently, for the same reasons above.

In terms of models, the advantage of one-way fee shifting is in promoting access to justice, particularly where the cost of litigation is significantly more onerous for one party than the other, or where there is a significant power imbalance between parties. Again, good examples are cases involving individuals against the Crown. If an individual's case is meritorious and engages important or fundamental rights, then both democratic values and access to justice suggest that person should not be discouraged by economic risk – a risk easily borne by the Crown. The disadvantage of this model might be a risk of more frivolous actions or applications, but there are other mechanisms to deal with frivolous litigation. Judicial discretion could also be engaged to award costs in a one-way costs regime against an otherwise “immune” party if that party is clearly abusing the system.

A “no costs” approach is where any costs are determined by a tariff. The Courts' tariff hasn't been revised in a long time, and litigants operate in a *de facto* no costs environment. Costs only become a consideration where they represent some significant proportion of legal fees. A no costs approach may facilitate access to justice by decreasing financial risk, but that then goes against goals of indemnification and encouraging settlement.

In our experience, the Crown may be intransigent until late stages of litigation, but then offer to settle on a without costs basis. This problem would be exacerbated by a no costs regime.

A no costs approach may be inappropriate in cases involving fundamental rights where one side is the Crown or where there is a financial and power imbalance between parties. It may be preferable where parties have fairly equal financial strength and bargaining power, for example, in private disputes between similarly situated parties.

Again, the threshold questions are around the motivation for abusive litigation and whether financial risk would deter this motivation. Until these dynamics are well-understood, it is unclear whether specific rules will resolve any problems. As noted above, there are other means to dispose or discourage abusive litigation.

The existing tariff is confusing as a method for calculating costs and Tariff B amounts are so inconsequential as to be a non-consideration for any party other than an impecunious litigant. In that way, the Courts already have a no costs system. These costs are not enough to deter parties from pursuing unmeritorious litigation or disproportionate or abusive steps within a proceeding, and to induce them to consider settlement. It is commendable that the tariff unit value appears to track inflation and helpful that the Courts provide the unit value calculation result. However, the base amount of \$100 set 17 years ago, multiplied by even the largest

number of units still represents a small fraction of true cost. The base amount and the number of possible units should be dramatically increased.

The spread between the columns should also be increased. The difference between the columns when dollar values are calculated does not appear material unless, again, the litigant has limited financial resources. The tariff does not lack columns, but rather lacks material differences between existing columns and unit value. The services listed seemed appropriate.

If the presumption will be that certain categories of cases are assessed according to a column other than column III and have not already been established by trends in the case law, then presumptions may be helpful. A more general increase in the amount of costs would have negative impacts on access to justice for parties with limited resources.

### **Pro Bono Cases**

For cases where pro bono counsel is involved, costs are already discretionary and judges are attuned to the values underlying the costs system. In our view, asking a party and its pro bono counsel to enter into an agreement so counsel is *entitled* to the benefit of any cost award undermines the spirit of acting pro bono. On the other hand, access to justice may be enhanced if pro bono counsel has a chance of being compensated for a successful result as they may be more likely to act pro bono. If costs are awarded in a matter and the party is not expecting to pay legal fees, the party should not receive a windfall while counsel is uncompensated.

Direct payment of costs by a party to pro bono counsel would avoid counsel having to enforce an agreement with the client. It is an open question whether requiring a party to disclose the terms of an agreement might affect the quantum of an award and whether any effect on the quantum is desirable. There may be a bias against a substantial award if it is known that it will go to pro bono counsel, but the opposite may also be true. We question then whether that bias would facilitate access to justice, and whether costs should be assessed on the usual discretionary factors without being influenced by this further factor.

We suggest that costs in pro bono cases be paid into an access to justice fund, rather than to a party (who did not actually pay legal fees) or counsel (who agreed to work for no fees). Building a “war chest” of accrued cost awards could be used to support pro bono organizations, fund projects that help inform unrepresented litigants or pay administrative costs of a duty counsel program.



### **III. INTELLECTUAL PROPERTY SECTION COMMENTS**

#### **A. Part 11: Issues Under Consideration**

In general, we believe an approach to costs should be applied uniformly, although consideration should be given to whether a no costs approach or a one-way costs approach might be beneficial and would encourage access to justice for unrepresented litigants or smaller entities. We comment only on intellectual property law cases, and believe those cases should not have separate cost rules.

We see no reason for distinguishing between actions and applications.

Fee shifting would be advantageous if it improves access to justice in certain situations. For example, a party with a meritorious case that would abandon its case unless it was protected from an adverse costs judgment would have better access to justice under a one-way fee-shifting regime. Further, an opportunity to demonstrate a meritorious case early on may encourage early settlement.

On the other hand, requiring a party to demonstrate a meritorious case at an early stage of litigation to benefit from one-way fee shifting may be difficult and costly. One-way fee shifting may result in denial of compensation for costs for an ultimately successful but unprotected party, which could be unfair if the merits of the other (protected) party's case were weak from the outset or significantly undermined by the time of trial. For intellectual property cases, one-way fee shifting could also distort behaviours. For example, a party protected or shielded from any adverse costs judgments may take an approach that it would otherwise not have pursued (like unnecessarily prolonging the litigation, pursuing fruitless avenues of discovery, or bringing frivolous motions) if two-way fee shifting was in place.

One-way fee shifting may be appropriate in limited types of cases. In the intellectual property context, it may be appropriate where an impecunious plaintiff has a meritorious case. However, in the context of the requirement to post security for costs, the Rules already provide that impecunious plaintiffs with meritorious cases are not required to post security. If one-way fee shifting were adopted, the same impecunious plaintiffs with meritorious cases should arguably be protected or shielded from an adverse costs judgment in any event.

In summary, one-way fee shifting is likely inappropriate for most intellectual property cases, particularly since most involve two commercial entities or competitors involved in a business dispute (as opposed to unrepresented or impecunious parties).

A no costs approach might encourage access to justice on smaller trademark or copyright cases where parties might be hesitant to litigate for fear of a costs award against them and can reasonably resolve the proceedings early on to limit their own costs. It would be most appropriate for non-complex litigation by smaller entities and unrepresented litigants. A no costs approach on motions might encourage smaller entities not to take unnecessary interim steps and avoid being subject to payment for those steps. Similarly, a no costs approach could help streamline proceedings and promote more summary trial proceedings. However, it would not deter frivolous, vexatious or otherwise abusive litigation, or pre-litigation steps, for those who could afford to pay. The US experience has shown that the approach can promote non-practicing entity (NPE) litigation as there is no deterrent for initiating such litigation. Further, a no costs approach could discourage small and medium enterprises from initiating patent litigation as such proceedings are often long and expensive, if no indemnification is available. With patent litigation there would be less opportunity to curtail the litigation and limit costs to a “pay for what you can” approach. It would also not be appropriate for complex IP litigation involving large entities.

The discussion paper notes that jurisdictions in Canada take different approaches. We summarize the approach taken in Ontario, Quebec and British Columbia below.

### **Ontario**

The Ontario Rules are more explicit than the Federal Courts Rules in how they address and sanction some forms of vexatious litigation. Unlike the Federal Courts Rules, the presumption is for an award of costs on a motion to be paid (Rule 57.03 (1)).

Ontario Rule 20.06 permits the court to award substantial indemnity costs for summary judgment motions brought unreasonably or in bad faith. In *Smyth v. Waterfall*<sup>1</sup>, the court awarded substantial indemnity costs under Rule 20.06 because it "should have been obvious to the respondent when he brought the motion that it stood virtually no chance of success."

Rule 37.16 provides for an order, on motion, to prohibit another party from making further motions in the proceeding without leave, where the judge or master is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions. Beyond these specific rules, the general principles relating to the award of costs provide that a court may consider

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<sup>1</sup> 2000 CanLII 16880 (ON CA).

“the conduct of any party that tended to short or lengthen unnecessarily the duration of the proceeding” and “whether any step in the proceeding was, (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution”.<sup>2</sup>

### **Quebec**

The discussion paper indicates that Quebec Rules provide a process to sanction through costs any conduct that is an abuse of procedure. Under both the current and incoming systems, the court may order costs on a solicitor-client basis or even punitive damages in cases of “abuse of procedure,” defined as “a judicial demand or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome” or “a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person’s freedom of expression in public debate.” While the new *Code of Civil Procedure* excludes lawyers’ fees from the costs that may normally be shifted to the other party, article 342 allows the court to order solicitor-client costs for “substantial breach of procedure,” a threshold lower than “abuse of procedure.”

The new *Civil Code of Procedure* came into effect on January 1, 2016. Under both the new and old rules, costs are left to the discretion of the judge hearing the matter. There are no prescribed amounts to be awarded or defined specific instances of what conduct is considered to be abusive or vexatious and jurisprudence in this area varies widely.

### **British Columbia**

The general approach to costs in the BC courts follows a tariff in an appendix to the *BC Supreme Court Rules*. Where there has been reprehensible conduct in the action, the court may order special costs. Beyond that, however, the rules specifically provide for costs awards for anything done or omitted “improperly or unnecessary” or the disallowance of costs that would otherwise have been awarded (Rule 14-1(14)).

### **Federal Courts**

For the Federal Court, the current approach to awarding costs for vexatious, improper and unnecessary litigation is wholly within the discretion of the court (rules 400-401). This mirrors the approach in Ontario.

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<sup>2</sup> (Rule 57.01(1)(f))

Rule 400 enumerates factors the court may consider in the exercise of its discretion, including: conduct of a party that tended to shorten or lengthen the duration of the proceeding; failure to admit a thing that should have been admitted; and whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution.

Rule 401 allows the court to award costs of a motion in an amount fixed by the court and only directs that those costs be payable forthwith if the court is satisfied that the motion ought not to have been brought or opposed. It leaves open the possibility of arguing that, a given step in a proceeding was improper, vexatious, unnecessary or taken through negligence, mistake or excessive caution such that the motion ought not to have been brought and costs should be awarded to the successful litigant, payable forthwith.

The Federal Courts Rules have no express definition about what constitutes improper, vexatious and unnecessary litigation, and case law governs this point.

Beyond imposing cost consequences, Ontario, British Columbia and the Federal Court can address vexatious litigants by designating a party as such, which limits the litigant from beginning further proceedings without leave of the court. Ontario goes further than the Federal Court and British Columbia with Rule 2.1, aimed at streamlined procedure for disposing of vexatious litigation. It provides a summary process for a hearing in writing to determine if an individual motion or pleading ought to be dismissed where it appears “on its face” to be “frivolous, vexatious or otherwise an abuse of process”.

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While the court should be concerned about vexatious, improper and unnecessary litigation, codifying additional rules will not necessarily achieve these objectives.

A significant concern with a rule and a fixed definition of “vexatious, improper and unnecessary litigation” is that it be unintentionally inclusive or inflexible to encompass conduct that more properly falls in the spectrum of zealous litigation or litigation that seeks to evolve or alter current jurisprudence. Further, consequences for truly abusive litigation are already addressed by the Rules and legislation. A jurisprudential and discretionary approach affords the court the requisite flexibility to appropriately address each case and preserves counsels’ ability to fully advance their clients’ interest without fear of punitive cost awards.

The discussion paper proposes rules to focus on the time that costs become payable, but Rule 401 already grants the court discretion to award costs payable forthwith. It does not appear

that the rules contemplate the court requiring that these costs be paid prior to permitting a vexatious litigant from taking further steps in the proceeding. If courts are not already able to do this under the Rules, expanding the power of the court to make such a rule would be useful to manage vexatious yet impecunious litigants.

As a result, the answer to the discussion questions is straightforward, as the subsequent questions address establishing a rule. However, if the court is inclined to adopt specific rules addressing vexatious, improper and unnecessary litigation, our concerns would be best addressed by language that clarifies a high threshold of objective unreasonableness or a finding of improper or collateral intent. This is particularly important if the rules provide for more than some form of partial cost recovery for the vexatious, improper and unnecessary litigation (i.e. a doubling or multiplication of costs or punitive damages).

A tariff is an appropriate method for calculating costs if it is clear and consistently applied. The primary advantage over awarding a percentage of actual costs incurred is predictability that allows lawyers to advise their clients in advance of the costs they might expect if unsuccessful, or might collect if they are successful.

The disadvantage to a tariff is that it becomes more difficult to keep in step with legal costs, and more difficult to apply to different types of cases. The column system in the existing tariff helps alleviate this latter disadvantage. However as presently constituted, columns I and II are rarely used. It may be useful to reduce the five columns to three columns as done recently in BC.

Overall, the advantages outweigh the disadvantages and we recommend keeping the tariff method of calculation.

In general, the costs under Tariff B are too low and do not reflect the current practice in intellectual property cases. The middle range should be increased somewhat and the higher range should be increased substantially.

The tariff for various steps and procedures needs to be adjusted. For example:

- (a) Discovery of documents – The range should refer to and depend on the number of documents produced, as recently done in BC. There, Appendix B tariff item 11 splits the range between 0 to 999 documents, 1000 to 5000 documents, and over 5000 documents.
- (b) Motions – These could be broken up by category: simple; moderately contentious; complex.

- (c) Second counsel – Rarely in intellectual property cases is a single counsel present for motions, discoveries, hearing preparation and hearings.
- (d) Requests to Admit – Currently the tariff provides for one fee per notice.

The tariff should not be used to deter parties from pursuing unmeritorious litigation, or disproportionate or abusive steps in a proceeding. Rather, the rules should be clarified to better encourage the court to address disproportionate or abusive steps in a proceeding by higher costs awards including solicitor-client costs or at least awards at the highest column.

Currently, Tariff B does not clearly identify which tariff items can be claimed multiple times or only once. This should be clarified to increase predictability.

We describe, for reference, relevant developments of the law in intellectual property cases:

*Item 2: Preparation and filing of all defences, replies, counterclaims or respondents' records and materials.*

Only one claim allowed. The key words in fee item 2 are "Preparation ... of all ... respondent's records of materials". "All" would embrace the expert's affidavits and other such documents.

*Item 5: Preparation and filing of a contested motion, including materials and responses thereto.*

Multiple claims were accepted without discussion (challenged on basis that work related to a counterclaim).

*Item 6: Appearance on a motion, per hour.*

Multiple claims were accepted without discussion (challenged on basis that work related to a counterclaim).

*Item 7: Discovery of documents, including listing affidavits and inspection.*

Separate claims are allowed for separate discoveries including one for plaintiffs and one for defendants. In one case, an application was made for 72 separate claimed items. The court accepted the multiple entries, but reduced the overall award in this section by half.

The ability to make multiple Item 7 claims depends on the circumstances of the case. Where there are multiple plaintiffs, claims can be made on behalf of each. The court noted that lower allowances should be given for second and subsequent claims under item 7, such as to limit the award to half the applicable units for preparation and inspection of supplementary affidavits of documents.

*Item 8: Preparation for an examination for discovery.*

This is ordinarily allowed multiple times. In some cases, an individual may claim a second fee item 8 for the same affiant if the circumstances require it, these could include an adjournment of more than a few days.

*Item 9: Attending on examinations, per hour.*

Multiple entries allowed. However each service may only be claimed by one lawyer, unlike Item 14, Item 9 allowance is intended to be a global fee regardless of the number of counsel engaged.

*Item 10: Preparing for conference, including memorandum.*

Allowed multiple item claims.

*Item 12: Notice to admit facts or admission of facts; notice for production at hearing or trial or reply thereto.*

Court allowed six item 12s claimed. Despite an argument that item 12 is framed as singular as opposed to the plural.

*Item 13(a): Counsel fee: (a) preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff.*

Multiple items allowed if they arise from specific and separate categories of recovery.

*Item 15: Preparation and filing of written argument where requested or permitted by the Court.*

Multiple claims can be made despite singular language. The claimed items under Item 15 should be reviewed. It appears that *Meyer* is claims under Item 15 for services which may fall under a different Item number.

*Item 26: Assessment of costs.*

An individual claim for preparation of the assessment record and the actual appearance to argue the assessment.

*Item 27: Such other services as may be allowed by the assessment officer or ordered by the Court. Allowed more than once for any a service not covered by items 1-26 inclusively.*

We agree that the upper end of the range between the columns, or within the columns, should be increased. The columns should be simplified, preferably reduced to three rather than five (by possibly eliminating columns I and II which are rarely used). The upper range should be significantly increased.

The Rules should specify that the middle column is the norm, the lower column is for matters of little difficulty, and the upper column is for matters of extraordinary difficulty or importance. The Rules should also specify that the upper column should be used for proceedings, or steps within a proceeding, that are disproportionate or abusive in that they should not have been brought. Currently, Rule 400(5) provides flexibility in this respect, but not direction. The direction is implied in Rule 400(3) but it may be useful to reemphasize these points in particular in Rule 400(5).

Even in intellectual property cases that tend to be more complex, there are matters of ordinary difficulty between small businesses or individuals. In this sense, a general increase will have a negative impact on access to justice. However, given the complexity of intellectual property disputes it will likely have less of an impact than in other areas of practice.

#### **Data comparing actual legal costs and magnitude of costs award**

(a) In *Target Event Production Ltd. v. Cheung*, 2011 FC 83, the plaintiff was successful against the defendants for copyright infringement and passing off. The plaintiff asked for costs at an amount higher than that assessed at the high end of Tariff B, Column V, totaling \$96,555 before tax. The plaintiff stated that its solicitor and client fees totaled \$221,111.95 before tax. The trial spanned nine days, and involved 12 witnesses. As a factor suggesting a somewhat increased award, the court took into account that many of the documents were in Chinese. Despite the amount claimed by the plaintiff, the court awarded party and party costs of \$47,000, plus \$14,517.54 for disbursements plus tax.

(b) In *Novartis Pharmaceuticals Canada Inc. v. Teva Canada Limited*, 2015 FC 1123, a Patented Medicines (Notice of Compliance) Regulations proceeding, the court was presented with the following data:

- Applicant's full costs: \$950,468.40 in fees; \$242,642.55 in disbursements
- Column IV costs: \$102,512 (which would include upgrades for two counsel)
- Respondent argued for a lump sum of \$31,670

The court awarded the applicant \$102,512 plus \$215,727.57 in disbursements. (The disbursements were reduced by discounting expert fees and photocopying charges.)

(c) In *I.C. Medical Inc. U.S. et al v. Linvatec Canada ULD*, unreported decision of Aalto P. in Federal Court file T-1284-12, the court considered a motion brought by a defendant/plaintiff by counterclaim for costs thrown away following the dedication to the public of the patent in suit and a discontinuance of the patent infringement action. The court was presented with the following data:

- Defendant's full costs: \$299,270 fees and \$37,118.41 disbursements
- Tariff amount calculated at high end of Column V: \$62,905
- Plaintiff argued for fixed fee in the 10 to 15% range

The court awarded costs based on stages of the proceeding:

(i) Stage One. Fixed fee of 12% of full indemnity fees of \$277,239 (less 25% for perceived excess: \$25,000 (representing an award of 9%).

(ii) Stage Two. Fixed fee of 30% on full indemnity fees of \$126,222 (less 65% for work that was not conducted under the Tariff (document review)): \$25,000 (representing an award of 20%)

(iii) Disbursements: \$19,500 (representing a 50% discount).

This cost award represents a 20% recovery overall.



### **Pro Bono cases**

The *Federal Courts Rules* currently give the court significant discretion in fixing costs. Still, Rule 400(3) might be amended to include a new penultimate paragraph: “whether a party was represented by pro bono counsel”. The court to decline to award costs against an unsuccessful party if its solicitor was working on a pro bono basis; it would also allow the court to award costs to a party represented by pro bono counsel, or to the pro bono counsel personally.

We support an agreement between a party and pro bono counsel stating that counsel is entitled to the benefit of any cost award. If not, there may be no basis for an award of costs to the party as they are not incurring any legal costs. This would unfairly shield the adverse party from potential cost consequences in the proceeding.

A party represented by pro bono counsel is at liberty to compensate counsel on receipt of a costs award and nothing in the Rules prevents this. However, one way of considering the proposed amendment to Rule 400(7) is that a disagreement has arisen between the client and pro bono counsel and the client has refused to pass on the costs award to counsel. Our resulting concern arises from the likelihood that evidence of the pro bono relationship may be required to justify a direct costs payment to the solicitor. This could weaken the party’s position in litigation; as such, informed consent must be obtained to adduce that evidence. The result is as follows: if the client and pro bono counsel agree on the legal representation, a payment directly to counsel is unnecessary. If, however, the client and counsel do not agree, so that a direct payment to counsel is desirable, the likely evidence necessary to support the pro bono relationship should not be produced in view of the disagreement. We do not agree with the proposed amendment in question 24.

Parties should disclose the terms of an agreement with pro bono counsel only if the party seeks to rely on that agreement to its advantage in any costs award. For further clarity, the agreements should not be producible in the ordinary course of litigation.

#### **IV. MARITIME LAW SECTION COMMENTS**

##### **A. Part 11 – Issues Under Consideration**

Our comments only deal with whether the method of costs calculation should be revised, including Tariff B.

While we are not tied to using Tariff B as a scheme for dealing with costs, we believe that it works fairly well. We also generally believe that fee shifting should be maintained as a purpose of the costs regime. However, the quantum of indemnification provided by the Tariff has not kept up with the pace of legal costs generally.

We have no preference as to how the indemnity may be increased. However, increasing the number of units and the unit values assigned may be appropriate, particularly for the pleadings, productions and discovery phases of actions. In addition, we agree that adding certain assessable services to the list that are not currently present is raised in the discussion paper is advisable. The costs related to correspondence with counsel and clients (which can be a significant component of costs depending on the counsel and issues involved), along with legal research and electronic document management are examples.

#### **V. CONCLUSION**

The Federal Courts Bench and Bar Liaison Committee hopes that these comments from three CBA Sections will be helpful to the Rules Committee's deliberations. We are happy to provide further clarification or feedback as needed.