

Rules of Court Committee
Request for Comments 2013-1
Schedule C – Tariff of Recoverable Fees

The new Rules which came into effect on November 1, 2010 did not make any changes to the amounts of the assessable costs in Schedule C – the Tariff of Recoverable Fees. The Alberta Law Reform Institute, which was instrumental in drafting the new Rules, viewed the appropriate amounts as being beyond the scope of the project. As a result of inquiries received, the Rules of Court Committee has decided to re-examine the Schedule.

The Rules of Court Committee is now requesting comments from the Bar on the Tariff of Recoverable Fees, and on a related issue with respect to charging contingency fees on disbursements. Submissions are requested by September 30, 2013, and should be sent to: RCC@albertacourts.ca, or Barb Turner, Q.C., Secretary, Rules of Court Committee, 9833 109 Street, Edmonton, AB T5K 2E8. The Bar is invited to comment on any aspect of the Schedule, although the following discussion document is intended to highlight some of the issues identified to date.

1. Background

Subject to the overall discretion of the Court, assessable court costs in Alberta are generally set by reference to the Tariff of Recoverable Fees set out in Schedule C to the Rules of Court (R. 10.31(3), Sch. C, R. 1(1)). That schedule specifies the quantum of assessable fees for particular steps. The assessable amounts vary depending on the amount in dispute in the litigation. The Schedule contains five columns, each column giving a dollar amount range for the purpose of determining the assessable fees. In addition to assessable fees, R. 10.31 allows the recovery of reasonable and proper costs incurred to bring an action, generally known as “disbursements”.

Schedule C was last substantially modified in 1998. At that time the list of steps, the ranges covered by each column, and the quantum of the assessable fees were substantially changed.

2. Basic Principles Underlying Costs Awards

In 2005 ALRI issued *Consultation Memorandum No. 12.17 Costs and Sanctions* (www.law.ualberta.ca/alri/docs/cm01217.pdf). It identified the following basic principles underlying costs:

- They should strike a balance between the interests of plaintiffs and defendants;
- They should provide an incentive to settle early in the action and at different stages of the action;
- They should facilitate access to justice;
- Their calculation should be a simple, workable process; and

- They should be predictable at each stage of an action.

The primary purpose of a costs award is to partly indemnify the successful litigant for some of the expenses of pursuing the litigation: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paras. 21, 26, [2003] 3 SCR 371. Costs awards also serve other purposes: they can be used to encourage settlement, or to prevent frivolous, vexatious or harassing litigation, and they can also be used to encourage economy and efficiency during litigation.

Costs awards are not designed to fully indemnify the successful litigant. While the winning party is entitled to some compensation for legal costs incurred, full indemnity would significantly hamper access to justice, and might promote excessive and oppressive litigation strategies. The Alberta rules have generally aimed for recovery of 30 to 50% of actual legal fees.

3. The Overall Quantum of Recoverable Fees

The first issue is whether the overall amount of recoverable fees should be increased. Inflation since the last major amendments in 1998 has been about 35%.

Some litigants argue that they should be entitled to recover a greater proportion of their expenses. Other litigants argue that the existing tariff is already generous, and any further increase would hamper access to justice. As the *Consultation Memorandum* reported:

[12] . . . Generally, plaintiffs' lawyers viewed present costs as too high and expressed concerns about the "chilling effect" that significant costs could have on meritorious claims. Conversely, defence lawyers suggested that costs were not high enough and should be increased to defeat frivolous claims. . . .

Increased attention has recently been directed at access to justice issues, and particularly the impact that the high cost of litigation is having on litigants. Rural practitioners argue that the scale of costs is insensitive to the legal fees charged in smaller centers. Would any increase in the Scheduled amounts be a further barrier to access?

While legal fees (like most expenses) have likely increased with inflation, the recoverable costs may still be within the 30 to 50% range. Of course, the actual percentage recovered in any case depends on what steps were required, and any tariff of costs might well give results outside that range in any particular litigation.

Further, attempting to set recovery within a given range (such as 30 to 50%) is only meaningful where the client is being billed on an hourly or tariff basis. Where fees are payable on a contingency basis, the fee is disconnected from any steps actually taken in the litigation. A very large fee might be generated by a small number of assessable steps, and *vice versa*. Contingency agreements commonly give the lawyer a percentage

of the recovered costs, as well as a percentage of the recovered damages, further disconnecting the costs award from the client's recovery of litigation expenses.

The Consultation Memorandum considered recommending a mechanism to adjust Schedule C for inflation (e.g. by tying it to the *Judgment Interest Act*, amending it annually to reflect inflation, or setting an inflationary factor by regulation) but was unable to reach a consensus. Some Queen's Bench Judges have used their discretion to award an inflation factor, in a variety of ways - by applying the Bank of Canada inflation rate, using a multiplier, or awarding a lump sum that includes some value for inflation.

The Rules of Court Committee invites input on:

- (a) the proper proportion of actual fees that a winning litigant should be entitled to recover.
- (b) whether the present amounts in Schedule C are adequate and fair, or whether they should be varied, because of inflation or otherwise.
- (c) any other issues relating to the overall quantum of recoverable fees.

The Committee particularly invites commentators to relate their recommendations to the principles of costs awards identified above.

4. Assessable Steps

The present Schedule C identifies a number of steps in litigation that generate assessable fees. Not all possible steps are included. The steps that are identified tend to be ones that are readily and discretely measured, and that arise in all different kinds of litigation.

Should any particular steps be added or removed from the Schedule? Are the assessable fees for any particular step out of proportion to the fees recoverable for other steps?

For example, R. 10.31(2)(c) excludes the recovery of costs for dispute resolution processes, except in the case of misconduct, as was recommended in the *Consultation Memorandum* at para. 73. Costs generally are awarded to the successful party, and it is perceived that no one "wins or loses" a dispute resolution process. Dispute resolution is undertaken for the benefit of both parties, regardless of which ends up being successful. Further, one of the purposes of costs awards is to promote early settlement, and imposing costs on dispute resolution might arguably be contrary to that objective and discourage settlement efforts.

5. Limiting Rules

At one time the Rules of Court contained a "limiting rule" (old R. 609), which limited the amount of assessable costs to a percentage of the eventual recovery in the litigation. New R. 1.2(4) adopts the "proportionality" principle, which means that the quantity and intensity of litigation should be proportional to the amounts in issue. Is it appropriate to re-introduce some kind of limiting rule, as a way of recognizing the proportionality principle?

For example:

- (a) Should the amount of assessable costs be capped at a percentage of the recovery in the litigation? Should there only be a limit on certain kinds of litigation, for example debt recovery, or proceedings that go to judgment by default? (Some provinces have different schedules for default judgments and actions that settle.)
- (b) Should there be a cap on the quantum of costs for particular steps, for example (unless otherwise ordered) should costs for questioning be limited for smaller claims? (E.g., claims under \$100,000 could be limited to one day of questioning.)
- (c) Should there be a cap on disbursements, to ensure that they are proportional to the amounts in issue? Should disbursements (for example, for expert reports) be limited to a percentage of the eventual recovery? Should there be a limit on disbursements that is tied to the recovery for the particular head of damages (for example, loss of income) addressed by the disbursement?
- (d) The present rules do not allow a full recovery of legal expenses by the winning party, but rather are aimed at recovery in the 30 to 50% range. It is felt desirable to leave some of the expense on the winning party, in order to discourage frivolous litigation, and to promote economy in the prosecution of litigation. Do the same arguments apply to disbursements? Should recovery of disbursements be limited, for example to a percentage of disbursements only (e.g., 75% of actual expenses)?
- (e) Are there any other limits on costs that would promote efficiency in litigation, early settlement, and access to justice?

6. Contingency Fees on Disbursements

An issue has arisen as to whether it is permissible or appropriate for a lawyer to charge a contingency fee on a recoverable disbursement. If a disbursement is incurred during the litigation, and the litigant subsequently recovers costs that include that

disbursements, should the lawyer be entitled to charge the contingency fee against the disbursement?

The Rules of Court Committee would be interested to know whether it is the practice of the Bar to charge a contingency fee on disbursements.

The following points have been made:

- (a) If the contingency fee applies to all the recovery, including costs, it would on the face of it cover the disbursements as well. It is suggested that the marketplace is competitive enough that this practice should not be prohibited. On the other hand, it is suggested that many clients are not sophisticated enough to understand the implications of having the fee apply to disbursements.
- (b) If a lawyer funds the disbursements during the litigation, there is a risk that the litigation will be unsuccessful, and the lawyer will be out of pocket for the disbursements. This justifies a contingency fee to reflect the risk. Alternatively, it is suggested that where liability is not really in dispute, there is no real risk.
- (c) If a lawyer funds the disbursements during litigation, he or she is at least entitled to interest. As an alternative to allowing a contingency fee on disbursements, the rules should permit interest at some rate. This would be more fair than allowing a contingency fee on a recovered disbursement where the client is funding the disbursements, the disbursements are paid along the way by the defendant, or the lawyer has only funded the disbursements for a short period of time.
- (d) Allowing a contingency fee on disbursements provides an incentive to incur disbursements that are disproportionate to the issues. It is arguably contrary to the public interest to encourage unnecessary or excessive disbursements (for example, for expert reports that are ordered prematurely, or from multiple experts, or which may never serve a purpose). The tariff of recoverable fees does not provide for full indemnity of fees in order to moderate the intensity of litigation, and for that same reason contingency fees on disbursements should not be allowed.

This consultation document is designed to generate discussion on assessable costs and the Tariff of Recoverable Fees, without limiting the topics that might be considered at this time. The Rules of Court Committee encourages input on all aspects of the issue.

Rules of Court Committee,
May 23, 2013