COURT OF QUEEN'S BENCH
COSTS MANUAL

COSTS BETWEEN PARTIES

The **Costs Manual - Costs Between Parties** is a resource prepared for clerks of the Court of Queen's Bench. It is intended to serve as a *guide* for court clerks who tax bills of costs. It is not meant to fetter a clerk's exercise of his or her *discretion*.

In response to requests from the public for access to the **Manual** it is made available on the Internet.

Note the **Disclaimer** at the bottom of this page.

Note too that changes in the law of costs are frequent and numerous. No manual or paper, regardless of diligent efforts to keep it current, can ever take the place of *legal research* into the present state of the law of any particular issue.

To accommodate the PDF format the **Costs Manual - Costs Between Parties** has been broken down into four (4) sub-documents. Each may be viewed or printed as a separate document. They are:

Introduction to Costs

Taxation of Costs

Schedule C

Disbursements

Each sub-document is available in PDF format only. You must have Adobe's *Acrobat Reader* in order to read them in PDF format. If you do not have Adobe's *Acrobat Reader* you can download it from the Court Services - Taxation Office website located at "www.albertacourts.ab.ca/cs/taxoffice/".

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Introduction to Costs

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What Are "Costs"?

Parties to any Court proceeding incur **expenses** in prosecuting or defending a legal dispute: filing fees, travel expenses, lawyer fees and expenses, witness expenses and charges, etc. The Court – or, in the absence of a direction from the Court, the default provisions in the ***Alberta Rules of Court*** – may require that one party pay all or part of the other party's expenses: these are referred to as **"costs"**.

In *McCullough Estate v. Ayer* [1998] A.J. No. 111; 212 A.R. 74; 22 E.T.R. (2d) 29 the Court of Appeal identified **two reasons** for the existence of "costs". At paragraph 29:

> "Costs exist primarily for two reasons. First, to take some of the burden off victors, ensure that not all victories are pyrrhic [won at excessive cost], and so to encourage those who are right to persevere. And, second, to deter those who are wrong."

Indemnification is a fundamental principle of costs. That is, a party may *not* recover more in costs than he/she/it actually incurred in expenses, unless otherwise ordered by the Court. So, if a party's expenses total $4,000, the party cannot recover $4,500 in costs. The level of indemnification is subject to the Court's discretion but is most commonly for only a portion of what a party may have actually paid. In unique circumstances the court may award costs which fully indemnify or compensate a party for all expenses incurred. On rare occasion the Court may deviate from the principle of indemnification and use costs as a means of punishment or deterrence. Such a departure must be specifically ordered by the Court. A more detailed explanation is provided below in "What is the Principle of Indemnification?", at page IC-2.

Costs Are in the Discretion of the Court as explained by Mark M. Orkin, ***The Law of Costs*** (2nd e., 16th rel. 2001) 101:

> "A successful litigant has . . . a reasonable expectation of receiving an award of costs, but this is subject to the court's absolute and unfettered discretion to award or withhold costs, as well as to applicable rules of court."

Rule 601(1) affirms the Court's broad discretion to award costs. As explained below in "Who Possesses the Authority to Award Costs?" the Court's discretion is subject to (a) some generally accepted principles and practices, and (b) some specific provisions of the Rules of Court (see page IC-6).

When the Court Does Not Exercise its Discretion and is silent as to costs of *interlocutory proceedings* **Rule 607**, by default, awards them against the unsuccessful party. When the Court is silent as to costs of an *action* **Rule 601(3)** states that "the costs follow the event". In either circumstance the clerk / taxing officer looks to **Rule 600(1)(a)** for direction regarding the costs to be allowed.

Rule 600(1)(a) defines "costs" as "all the reasonable and proper expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceeding . . .." In Stevenson & Côté, ***Alberta Civil Procedure Handbook 2003***, at page 478, the "very wide scope" of permissible costs is described:

> "About the only thing which costs cannot cover is the expenses of the court or tribunal (beyond Rr. 585 to 589), or of applications by the parties to other tribunals or regulatory agencies."

Subject to directions by the Court to the contrary, there are some **limitations** to the costs permitted by **Rule 600(1)(a)**:

1/ The charges of barristers and solicitors are limited to the amounts prescribed by **Rule 605** (see sub-document "Schedule C - Rule 605").

2/ The charges of experts for attending to give evidence are limited to the amounts mandated by "**Schedule E, Number 3**". The Court almost invariably waives this limitation by pronouncing that "all reasonable disbursements are to be allowed".

3/ The charges of experts for "investigations and inquiries or assisting in the conduct of trial" are not permitted unless "the court so directs". Similarly, the Court almost invariably waives this prohibition by pronouncing that "all reasonable disbursements are to be allowed".

4/ Charges which are actually for the performance of legal services (see sub-document "Disbursements - Agent's Charges"). A litigant cannot recover as a disbursement the charges of barristers and solicitors, even when hired as agents, as those charges are already addressed and limited to the amounts prescribed in Schedule C.

5/ Charges / costs which precede the commencement of the "proceeding" (see sub-document "Disbursements - Incurred Prior to the Action").

For a more detailed discussion of costs which may not be recoverable without the direction of the Court or the consent of the opposing party see sub-document "The Taxation of Costs - Issues to be Resolved Prior to a Taxation Hearing".

Rule 600(1)(a) must be considered together with **Rule 635** which states:

> "(1) The taxing officer may refuse to allow costs which are excessive having regard to the circumstances of the matter, including its nature and the interests and amounts involved.
>
> "(2) The taxing officer may refuse to allow the costs of all or any part of proceedings that were
> (a) improper, vexatious, prolix or unnecessary, or
> (b) taken through over-caution, negligence or mistake."

The term "proceeding" – utilized in **Rule 600(1)(a)** – is not defined by the ***Rules of Court***. However, the term has been ruled to apply not only to steps taken in the action itself, but also to the steps taken to enforce the judgment.

See *Alberta (Attorney General) v. Brewka* [1985] A.J. No. 145; 36 Alta.L.R. (2d) 89; 59 A.R. 393 and *McLeod & Co. v. Jackpot Junction Ltd.* [1997] A.J. No. 273; 48 Alta.L.R. (3d) 170; 199 A.R. 314; at para. 11.

What is the Principle of Indemnification?

The Traditional Definition of party-and-party costs has been that found in *Harold v. Smith* (1860) 5 H. & N. 381 at 385, 157 E.R. 1229 at 1231, Bramwell B. – it is premised upon the principle that one cannot recover in costs more than one has incurred in expense:

> "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained."

As noted by Mark M. Orkin, ***The Law of Costs*** (2nd e., 15th rel. 2000) at 204 the courts have recently started to treat costs with somewhat different objectives in mind:

> "Traditionally, the fundamental principle of costs as between party and party has been that they are given by the court as an indemnity to the person entitled to them; they are not imposed as punishment on the person who must pay them. The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called 'outdated' since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexatious litigation and to discourage unnecessary steps."

In *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81, 203 D.L.R. (4th) 157, [2001] 5 W.W.R. 448, 89 Alta. L.R. (3d) 289, 277 A.R. 333 our Court of Appeal, at para. 8, validates this shift in the ends to which costs are awarded and notes that it was for this purpose that our **Rule 601** was amended in 1998:

> "The various principles underlying costs set out in r. 601(1) also support Ms. Dechant's argument that indemnity is not the only rationale for a costs order. An ability to award costs serves many objectives. Costs provide partial indemnity for legal fees incurred, encourage settlement, and discourage frivolous actions as well as improper and unnecessary steps in litigation."

NEW
Stevenson & Côté, in their ***Alberta Civil Procedure Handbook (2003)*** at p. 480, nicely summarize the status of the principle of indemnification in Alberta:

> "Despite earlier cases, now it seems settled that an award of costs is not limited to disbursements, and may include fees, even if the party getting costs did not hire a lawyer, and represented himself or herself, whether or not he or she is trained in law or belongs to the Bar. That can be based on a number of factors, including lost salary or opportunity costs, degree of complexity, quality of work, lost time, undue consumption of other's time, and reasonableness of conduct. But if the party had a lawyer and did not do the work personally, costs are limited to what the lawyer charges; the party cannot make a profit on them."

When Has the Court Exercised its Discretion? The dilemma for a taxing officer is knowing *when* the Court has *exercised its discretion* to permit costs which exceed the expenses incurred by a litigant. To the end of resolving this predicament a **Rule 634** reference was made to the Court seeking its direction. The result is found in *Shillingford v. Dalbridge Group Inc.* [2000] A.J. No. 63, 2000 ABQB 28, [2000] 5 W.W.R. 103, 76 Alta. L.R. (3d) 361, 268 A.R. 324, 42 C.P.C. (4th) 214. The following is a summary of the Court's directions, some of the case law relied on by it, and the judicial consideration of the decision itself (numbers in square brackets "[14]" are references to paragraph numbers):

General Principles

1. Unless otherwise ordered, a litigant's entitlement to costs is dependent upon the recipient having *actually incurred costs* [19 & 29].

See *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81, 203 D.L.R. (4th) 157, [2001] 5 W.W.R. 448, 89 Alta. L.R. (3d) 289, 277 A.R. 333 (C.A.) - "In our view, costs under the *Rules* are still primarily concerned with reimbursement for costs expended and a partial indemnification for legal fees, having regard to value for work." [20] And, *Vysek v. Nova Gas International Ltd.* 2001 CarswellAlta 1148, 2001 ABQB 750, 11 C.C.E.L. (3d) 63 (Q.B) [285] NEW

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2. The principle of indemnification may be *exceeded if costs flow from the application of the compromise rules* – **Rule 174** [20 & 29];[1] that is,

(a) *Payment In* (**Rule 166**) – if a plaintiff fails to beat a defendant's Payment In to court,
(b) *Offer of Judgment* (**Rule 169**) – if a plaintiff does not recover a judgment greater than a defendant's Offer of Judgment, or
(c) *Offer to Settle* (**Rule 170**) – if a plaintiff recovers a judgment equal to or greater than its Offer to Settle.

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[1] See *Forster v. MacDonald* [1995] A.J. No. 1063 (C.A.), NEW *Larson v. Garneau Lofts Inc.* 2000 CarswellAlta 1379, 2000 ABQB 857, 275 A.R. 165, 5 C.P.C. (5th) 382 (Q.B.), *Greep v. Josephson* [2001] A.J. No. 388 (Q.B.), & NEW *Hillside Investments Ltd. v. Boychuk* 2002 CarswellAlta 6, 2002 ABQB 26 (Q.B.) in support of this conclusion.

Over indemnification is permitted because the costs associated with **Rule 174** are intended to promote settlement and to punish those who fail to compromise [24].

This exception to the principle of indemnification applies whether the costs recipient is (a) represented by a lawyer working pro bono, for a partial fee or under a Legal Aid certificate, or (b) is self-represented [25-26).[1]

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[1] *Huet v. Lynch* [2001] A.J. No. 145, 2001 ABCA 37, [2001] 6 W.W.R. 441, 91 Alta. L.R. (3d) 1, 277 A.R. 104 (C.A.) and *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81, 203 D.L.R. (4th) 157, [2001] 5 W.W.R. 448, 89 Alta. L.R. (3d) 289, 277 A.R. 333 (C.A.) considered the *Shillingford* decision as it related to self-represented litigants generally. Though they did not address a **Rule 174** exception to the principle of indemnification, the decisions would suggest that even when a self-represented litigant has succeeded in obtaining a **Rule 174** award of costs the litigant cannot rely on

Schedule C unless the Court has so specified; that is, the Court must exercise its discretion to allow more than out-of-pocket expenses.

Observation: Notwithstanding **Rule 174** costs are mandatory, save for "special reason", the costs which flow from the application of **Rule 174** are not allowable by a taxing officer unless specifically ordered by the Court, or acknowledged by the parties. **Rule 600(2)** permits parties to appear before a Judge to obtain such a direction where an action settles or discontinues.

3. The principle of indemnification may be *exceeded if the court so directs* [29 & 35]. However, the decision clarifies that the court's direction must provide an "express statement" that costs are to over indemnify (brief reasons for so ordering should be included) [34-35].[1] NEW

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[1] In *O'Leary v. MacLeod* 2001 CarswellAlta 386, 2001 ABQB 239, 287 A.R. 43 (Q.B. Master) the Master provided such an "express statement".

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4. In recognition of

(a) the time and effort expended by a self-represented litigant [55],
(b) the injustice of holding "an unrepresented litigant liable for costs while not offering the benefit of costs" [49], and
(c) the intent of the Rules of Court to "promote settlement and deter frivolous actions" [48],

it is "in keeping with the general spirit and intent of the Rules of Court that the taxation officer should allow *unrepresented litigants the benefits of Schedule C costs* where the judge has directed costs or where they follow success at trial pursuant to the Rules of Court [**Rule 601(3)**]" [52].[1]

However, to avoid overcompensation (unless permitted by the costs provisions of **Rule 174** or the "express statement" of the court) the taxing officer should allow a self-represented litigant costs at *two-thirds* what would have been allowed a represented litigant under Schedule C [53-56].[2]

[1 & 2] *Huet v. Lynch* (above) and *Dechant v. Law Society of Alberta* (above) considered the *Shillingford* decision as it related to self-represented litigants. Both concur that a self-represented litigant should probably receive something more than mere out-of-pocket expenses, but both, especially *Dechant*, state that Schedule C is not to be applied automatically and that costs to a self-represented litigant should be left to the discretion of the Court. Therefore, if the Court is silent on costs the self-represented litigant may only recover out-of-pocket expenses.

NEW

Also, see Mark M. Orkin, ***The Law of Costs*** (2nd e., 16th rel. 2001) 209.15 - Party in Person.

Taxing Officers

1. "In Alberta it is within the power of the taxing officer, under **Rule 635**, to reduce the party/party costs awarded under Schedule C to assure that an over indemnification does not occur [18]."

See **Rule 635**, above at IC-2.

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2. In determining whether a bill of costs over indemnifies a party, the taxing officer is to look at the *"final total"* of the bill of costs, not at whether any particular Item in Schedule C over indemnifies [16].

With rare exception, the *taxing officer does not initiate inquiries* into the issue of over indemnification, preferring to

defer that prerogative to the party obliged to pay the costs.

What of Solicitor and Client Privilege? Another dilemma for taxing officers is how to deal with *solicitor and client privilege* in the context of the taxation of a bill of costs. A classic example occurs when Party A is awarded "solicitor and client costs" as against Party B. Party B is usually interested in knowing not only the extent of Party A's actual costs in prosecuting or defending the action, but, too, whether the expenses incurred were necessary, etc. (**Rule 635**) to the proceeding, and whether they were reasonable or excessive. In *Shillingford* (above) the court directed that a taxing officer has the authority under **Rule 635** to make such inquiries.

For those interested in other courts' positions on the issue consider the following:

Pro: Mark M. Orkin, ***The Law of Costs*** (2nd e., 15th rel. 2000) 602.3(2); *Harold v. Smith* (1860) 5 H. & N. 381 at 385, 157 E.R. 1229 at 1231 (quoted above); *Clark v. Nash* [1990] B.C.J. No. 727 (B.C.C.A.) at para. 9; *Denovan v. Lee* [1991] B.C.J. No. 3460; 62 B.C.L.R. (2d) 213 (S.C.) at para. 8-10; *Coronation Insurance Co. v. Florence (Guardian ad litem of)* [1992] B.C.J. No. 2095; 12 C.P.C. (3d) 340, (B.C.C.A.) at para. 5 & 6; *Bradshaw Construction Ltd. v. Bank of Nova Scotia* [1993] B.C.J. No. 2020; 43 A.C.W.S. (3d) 197 (S.C.) at para. 12 & 13; *Turner v. Rhodes* [1998] B.C.J. No. 1224; 54 B.C.L.R. (3d) 195 (B.C.S.C.) at para. 5; *Byers Transport Ltd. v. Kosanovich* [1996] F.C.J. No. 760 (T/O) at para. 24; *Harwood v. Harwood* (1998) 61 Alta. L.R. (3d) 56.

Con: *Huff v. Price* [1993] B.C.J. No. 186; 23 B.C.A.C. 76; 76 B.C.L.R. (2d) 212 (B.C.C.A., Chambers) at para. 24; *Azanza v. Alexander* [1996] B.C.J. No. 2828 at para. 2 & 3; *Letraset Canada Limited v. W.H. Brady* [1990] F.C.J. No. 1148; [1991] 2 F.C. 226 (FCA), at para. 4 & 5.

?: *Larson v. Curvin Holdings Ltd.* [1999] A.J. No. 112 (Q.B.) at para. 26; *Bunnell v. Lutz* [1994] B.C.J. No. 2300; 31 C.P.C. (3d) 73 (B.C.S.C.).

In *155569 Canada Ltd. v. 248524 Alberta Ltd.*, unreported, Edmonton Action No. 8703-00674 and related actions (Q.B.) June 7, 1996 the court, in a **Rule 634** reference from a taxation hearing, concluded that in circumstances identical to this example, "Privilege is, . . ., something that still is preserved and has to be preserved." Speaking to the sensitive issue of how to preserve solicitor and client privilege and still be fair to the party obliged to pay the costs, the Court quoted from and issued instructions to the taxing officer to follow the procedure outlined in *Mintz v. Mintz* (1983) 43 O.R. (2d) 789 at 793, 794 & 795:

> "Ordinarily, a solicitor cannot be compelled to disclose communications, whether written or oral, passing directly or indirectly, between him and his client, or between him and a person who is communicating with him professionally with a view to becoming his client, for the purpose of giving or receiving legal, professional advice, if they are legitimate communications in the sense they are not made in furtherance of fraud or crime.
>
> "A substantial part of the taxation does not involve solicitor and client privilege. Trial time, the complexities of the issues before the trial court, the law involved, the number and complexity of motions, the success achieved, the amount of the award and other important considerations will be before the taxing officer other than by way of privileged documents or conversations.
>
> "The master [taxing officer] is to inspect the documents and determine whether any of them, or any parts of them, fall within the solicitor and client privilege. The master is to withhold those documents found to be privileged from production. Any documents that are in part privileged are to be dealt with by covering the privileged part or parts in a convenient manner. The documents in the altered form, together with documents not privileged, are to be produced by the petitioner for inspection by the respondent. Any documents ordered by the master to be produced may be inspected by the respondent and photocopied."**

NEW For a comprehensive analysis of the "Law of Privilege" see *Guarantee Co. of North America v. Beasse* 1991 CarswellAlta 577, 150 A.R. 241 (Q.B. / Rooke, J.) at para. 14 - 65. See too Stevenson & Côté, ***Civil Procedure Guide*** (1996) 45 - 91, "Professional Privilege".

Who Possesses the Authority to Award Costs?

Judges – Court of Appeal and Queen's Bench:

The Court of Appeal Act, RSA 1980, C-28, as am., s. 11 and the Court of Queen's Bench Act, RSA 1980, C-29, as am., s. 19, are worded identically, and each gives a judge of the respective Court almost **unfettered** discretion to make any order as to costs:

> "Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the discretion of the Court or judge and the Court or judge may make any order relating to costs that is appropriate in the circumstances."

Further, **Rule 601(1)** of the ***Alberta Rules of Court*** provides:

> "Notwithstanding anything in Rules 602 to 612, but subject to any Rule expressly requiring costs to be ordered, the costs of all parties to any proceedings (including third parties), the amount of costs and the party by whom or the fund or estate or portion of an estate (if any) out of which they are to be paid are in the discretion of the Court, and when deciding on costs the Court may consider the result in the proceeding and . . ."

Examples of some Rules which "require" costs to be ordered: (1) *Compromise* – **Rule 174**, (2) *Experts* – **Rules 218.11**, **.15**, **.5**, **.7**, **.91**, (3) *Admissions* – **Rule 230(4)**, and (4) *Streamlined Procedure* – **Rule 670(1)**. Even these Rules make allowance for the Court to take into consideration "special reasons" for not awarding costs.

In *Reese v. Alberta* (1993) 5 A.L.R. (3rd) 40 McDonald J. sets out the **general principles** applicable to awarding costs, at page 44:

> "While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. It is traditionally accepted in Canada's common law provinces that as a general rule the successful party recovers its costs from the unsuccessful party. However, such recovery is normally on a party-and-party basis. That is, the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees (Schedule C in Alberta's Rules of Court), plus reasonable disbursements. It is not intended that the successful party receive full indemnification of those fees and disbursements which it would be charged by its counsel. In England the degree of indemnification appears to be considerable higher than is normal in Canada. In almost all jurisdictions of the United States of America the rule is that no costs are recoverable by the successful party.
>
> "The Canadian practice reflects an attempt to balance two conflicting interests. On the one hand, it is argued that if a party is successful and there are no circumstances constituting blameworthiness in the conduct of the litigation by that party, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.
>
> "When the case is of considerable magnitude and complexity, the practice in Alberta contemplates that the court may order the unsuccessful party to pay a multiple of the fees that are fixed by Schedule C. But even then it is not intended that there be full indemnity, except in extraordinary circumstances."

As explained by the authors of the ***Civil Procedure Handbook 2001*** at 479,

"Many . . . Rules and tariffs appear to set costs, but they do not bind judges or masters; they only bind the taxing officer. Those Rules are a default mode which only applies where the judge or master setting costs has been silent on a topic. . . The trial judge need not use the Schedule, and can award higher amounts, or award costs on a totally different basis."

See too *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81, 203 D.L.R. (4th) 157, [2001] 5 W.W.R. 448, 89 Alta. L.R. (3d) 289, 277 A.R. 333 (C.A.) at para. 6: "Costs are always discretionary based on the matters set out in r. 601(1). While there is a tendency to automatically order Schedule C costs, these costs are not and should not be treated as automatic."

Nonetheless, courts most frequently defer the quantum of costs to Schedule C fees, plus reasonable and proper disbursements. Mason, J., in *Pharand Ski Corporation v. Alberta* (1991) 122 A.R. 395, at page 399, considered circumstances under which the Court might choose to depart from the scale of costs set by the ***Alberta Rules of Court*** (many of which were codified in the 1998 revision of **Rule 601(1)**):

"[19] Costs on a party and party scale can, in theory, totally indemnify the successful party. See **N.P.P. and M.E.P. v. Regional Children's Guardian (Calgary)** (1989), 98 A.R. 77; 68 Alta. L.R. (2d) 394 and 398. However, in principle, costs on a party and party scale are awarded on the basis of a reasonable apportioning of the litigation expenses incurred by the successful party, having regard to such factors as:

(a) the difficulty and complexity of the issues;

(b) the importance of the case between the parties and/or the community at large;

(c) the length of the trial;

(d) the position and relationship of the parties and their conduct prior to and during the course of the trial; and

(e) other factors which may affect the fairness of an award of costs."

Summary: Judges of the Court of Appeal or Court of Queen's Bench have broad discretionary power to allow costs,

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See Court of Queen's Bench Act, R.S.A. 1980, c. C-29, s. 19; Mark M. Orkin, ***The Law of Costs*** (2nd e., 13th rel. 1998) 202.1, .2; Stevenson & Côté, ***Civil Procedure Guide*** (1996) 1953 & ***Handbook 2000***, at p. 454; *Jackson v. Trimac Industries Ltd.* [1993] A.J. No. 218 (Q.B.), at para. 11; *Parkridge Homes Ltd. v. Anglin* [1996] A.J. No. 768 (Q.B.), at para. 8; *Sidorsky v. CFCN Communications Ltd.* [1997] A.J. No. 880 (C.A.), at para. 28.

(a) on a partial indemnity basis,

See *McCarthy v. Calgary Roman Catholic Separate School Board District No. 1* [1980] A.J. No. 55, Sinclair C.J.Q.B, at para. 3 & 5.

(b) where appropriate, on a full indemnity basis, or,

See Mark M. Orkin, ***The Law of Costs*** (2nd e., 13th rel. 1998) 201, 204 & 219.1.2; Stevenson & Côté, ***Civil Procedure Guide*** (1996) 1978 & ***Handbook 2000***, at p. 459; *McCarthy* (above), at para. 5 to 8; *Wenden v. Trikha* [1992] A.J. No. 217 (Q.B.), at para. 21; *Jackson* (above), whole decision, but especially para. 24; *Sidorsky* (above), at para.

28 to 34.

(c) where appropriate, on a punitive or deterrence basis which exceeds indemnification.

See Mark M. Orkin, ***The Law of Costs*** (2nd e., 13th rel. 1998) 204 at p. 2-19 & 219.1.2; Stevenson & Côté, ***Civil Procedure Guide*** (1996) 1938 ("E. Indemnity), but note p. 1941 ("C. Indemnity Ceiling); *Collins v. Collins* [1999] A.J. No. 1075 (Q.B.), at para. 12; *Shillingford v. Dalbridge Group Inc.* [2000] A.J. No. 63 (Q.B.).

However, as previously noted, where the Court is silent as to *costs of an interlocutory proceeding* **Rule 607**, by default, awards them against the unsuccessful party. Where the Court is silent as to *costs of an action*, **Rule 601(3)** states that "the costs follow the event". In either circumstance the clerk / taxing officer looks to **Rule 600(1)(a)** for direction regarding the costs to be allowed.

Masters – Queen's Bench:

S. 9 of the same Court of Queen's Bench Act gives masters the same authority as judges relative to costs.

Taxing Officers – Court of Appeal and Court of Queen's Bench:

Rule 629 gives the taxing officer limited authority to award costs only of proceedings before him/her:

> "The taxing officer has the power to allow or disallow costs of proceedings before him, and to fix the amount thereof, . . ."

Taxation without Appointment: There is no fee for taxation of a Party/Party Bill of Costs by the Clerk on a Default Judgment, Consented to Bill of Costs, or any other taxation not requiring Notice to any party.

Taxation by Appointment: Where a taxation necessarily proceeds by way of Appointment for Taxation **Items 6(1)** or **7(1)** of Schedule C would apply, unless otherwise directed by the taxing officer.

Other Courts or Tribunals:

Provincial Court judges, arbitrators, mediators, etc. have the authority to award costs as allowed by the legislation and rules of their enabling legislation, or their contracts of engagement, or both, as the case may be.

What Assortment of Costs May the Court Award?

As described in **Rule 601(2)** the Court has great flexibility in how it may award costs:

"In awarding costs, the Court may
- (a) fix all or part of the costs with or without reference to Schedule C;
- (b) award or refuse costs in respect of a particular issue or part of a proceeding;
- (c) award a percentage of taxed costs, or award taxed costs up to or from a particular stage of a proceeding;
- (d) award all or part of the costs
  - (i) to be taxed as a multiple or a proportion of any column of Schedule C, or
  - (ii) on a solicitor and client basis, or as proportion of those costs;
- (e) award a gross lump sum instead of, or in addition to, any taxed costs;

(f) award costs to one or more parties on one scale, and to another party or other parties on the same or another scale;
(g) direct whether or not any costs are to be set off."

Usually awards of costs fall within one of two categories:

Full Indemnity Costs:

Often referred to as "costs on an indemnity basis", "party/party costs on a solicitor and client basis" or as "solicitor and own client costs". With some exceptions, full indemnity costs are intended to reimburse the party 100% of its reasonable legal expenses. An award for "full indemnity" or "solicitor and client" costs is to be interpreted as being "what a solicitor could tax against a resisting client,"[1] subject to the requirement that the costs be "necessary for the proper presentation of the case."[2]

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[1] See *Sidorsky v. CFCN Communications Ltd.* [1995] 5 W.W.R. 190, 27 Alta. L.R. (3d) 296, 167 A.R. 181, 35 C.P.C. (3d) 239, McMahon, J., reversed on other issues (1997) 206 A.R. 382; and, *McCarthy v. Board of Trustees of Calgary Roman Catholic Separate School District #1* [1980] 5 W.W.R. 524.

[2] See *Magee v. Trustees R.C.S.S. Ottawa* (1962) D.L.R. (2d) 162, (Ont. H.C.), at p. 165, where McRuer, C.J.H.C., stated:

> "The distinction that is to be drawn between a case where the costs taxed on a solicitor and client basis are to be paid by an opposite party and one where they are to be paid by the client is this: if the client instructs the solicitor to do certain things or to take certain action, which is unnecessary for the proper presentation of the case, the client is liable to pay, providing the solicitor has properly safeguarded himself with full and fair advice. On the other hand, where the costs are to be paid by a third party, only those costs that are necessary for the proper presentation of the case must be recovered."

For a discussion of the finer distinctions within this "full indemnity" category of costs refer to *Max Sonnenberg Inc. v. Stewart, Smith (Can.) Ltd.* (1986) 48 Alta. L.R. (2d) 367, [1987] 2 W.W.R. 75 (Q.B.).

Partial Indemnity Costs:

An award of partial indemnity costs is intended to reimburse the party only a portion of its legal expenses.[1]

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[1] See *McCarthy v. Calgary Roman Catholic Separate School Board District No. 1* [1980] A.J. No. 55, Sinclair C.J.Q.B, at para. 3 & 5.

Costs of this nature usually fall into the following sub-categories:

Solicitor & Client A Court award of "solicitor and client" costs will usually result in "full indemnification" of the party's legal expenses. For reasons that are best explained in a paper of more depth than this one, such an award of costs may result instead in only "partial indemnification".[1]

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[1] See *Guarantee Co of North America v. Beasse* [1993] A.J. No. 1073; 139 A.R. 241; 14 C.P.C. (3d) 182 (Q.B.).

Lump Sum The Court grants the party a lump sum award of costs, which is not subject to taxation, does not require the filing of a Bill of Costs, and forms part of the judgment granted.

Schedule C The Court specifies that the party is entitled to costs under **Schedule C** or under a particular column of **Schedule C**.

Default No order as to costs is an order for costs. The ***Rules of Court*** contain default provisions which apply to every legal proceeding, unless otherwise ordered by the Court (discussed below under "What Directions or Expressions . . . Silent about Costs", at IC-13).

Punitive or Deterrence Costs:

A less frequently utilized category of costs, the Court does have the discretion to make an award of costs which will actually exceed indemnification.

See Mark M. Orkin, ***The Law of Costs*** (2nd e., 13th rel. 1998) 204 at p. 2-19 & 219.1.2; Stevenson & Côté, ***Civil Procedure Guide*** (1996) 1938 ("E. Indemnity), but note p. 1941 ("C. Indemnity Ceiling); *Shillingford v. Dalbridge Group inc.* [2000] A.J. No. 63 (Q.B.), [2000] 5 W.W.R. 103, 76 Alta. L.R. (3d) 361

Most frequently this occurs when a party becomes entitled to augmented costs pursuant to the provisions of **Rule 174**, the so called "Compromise Rules" – see *Shillingford* (above).

What Directions or Expressions Might Be Used in Awarding Costs?

The following are the more common directions or expressions used in awarding costs. For a more comprehensive list refer to Mark M. Orkin, ***The Law of Costs*** (2nd ed., 145th rel. 2000) 105, "Directions as to Costs" and note the summary of common phrases in Stevenson & Côté, ***Alberta Civil Procedure Handbook***, at **Rule 601**.

"Costs in the Cause" **a.k.a.** **"costs in the action",**
"costs follow the event",
"costs to the successful party in the cause"

"Costs in the Cause" is interpreted differently in different jurisdictions. In England the phrase means that costs of, for example, an interlocutory proceeding are to go to whichever party is ultimately successful in the action, and the trial judge has no jurisdiction to vary the award of costs. In Ontario the phrase "does not finally dispose of the costs but merely puts them in the same position as any other costs of the action: that is, they are left to the discretion of the trial judge".[1] In Alberta it is suggested that the phrase means that costs of a proceeding go to the party ultimately successful in the action, but, unlike England, trial judges have been known to exercise their jurisdiction to revisit an award of "costs in the cause".[2]

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[1] See ***Law of Costs*** (above) 404 - Discretion of Trial Judge.

[2] In *Centrac Industries Ltd. v. Vollan Enterprises Ltd.* [1989] A.J. No. 1050; 70 Alta.L.R. (2d) 396; 100 A.R. 301; 39 C.P.C. (2d) 136 (C.A.) the Panel addressed the meaning of this phrase:

> "Costs in the cause" means that the costs go to the party entitled to tax costs in the action. . . . We acknowledge that if the case went to trial, the trial judge exercising his plenary authority under Rule 601, might deal with those costs as

he might deal with any other costs."

Prior to January 1st, 1998, if the Court did not address itself to the costs of an interlocutory proceeding, **Rule 607** stipulated that the costs of the application were automatically "in the cause", to either be addressed by the Court at the resolution of the action or to go to the party ultimately successful in the action (**Rule 601(3)**). The 1998 changes to **Rule 607** completely reverse this default position such that the costs of an interlocutory proceeding now automatically go to the successful interlocutory party, unless otherwise ordered by the Court (see "Costs in Any Event of the Cause" below).

The following illustrates the diverse consequences an award of "costs in the cause" can produce if counsel is not on top of costs issues at the time that costs are addressed before the trial judge or appeal panel:

> A Defendant successfully applies to the Court for an order compelling the Plaintiff to answer its undertakings given at discoveries, but the Court rules that "costs will be in the cause". The Plaintiff is successful at trial, resulting in one of the following awards of costs:
>
> > 1/ The Court grants the Plaintiff costs of the action, but chooses to intervene and specifically awards the Defendant its costs of the application to compel.
> >
> > 2/ The Court grants the Plaintiff costs of the action, but chooses to intervene and specifically denies the Plaintiff its costs of the application to compel, but does not allow the Defendant its costs of the application.
> >
> > 3/ The Court grants the Plaintiff costs of the action but is silent with respect to costs of the application to compel. Costs of the application automatically go to the Plaintiff.
> >
> > 4/ The Court is silent as to costs of the action. The Plaintiff is entitled to its costs of the action (**Rule 601(3)**) and of the application to compel.
>
> If the Chambers Judge or Master had been silent as to costs of the application to compel, the new **Rule 607** would have entitled the Defendant to its costs of the application in scenarios #3 and #4. Inasmuch as **Rule 607** costs are taxable and payable forthwith, one wonders what discretion the trial judge has to override the consequences of the interlocutory adjudicator's silence?

> See Stevenson & Côté, ***Alberta Civil Procedure Handbook*** at **Rule 607** for a discussion of costs of interlocutory applications, especially relative to procedural defaults.

"Costs to One Party in the Cause"

Both Mark M. Orkin, ***The Law of Costs*** (above) and Stevenson & Côté, ***Alberta Civil Procedure Handbooks*** (above) suggest this phrase means that only the "One Party" will be entitled to costs of the proceeding, but only if the party is awarded costs of the action. If the party is not awarded costs of the suit no one recovers costs of the proceeding in question.

"Costs Reserved to the Trial Judge (Appeal Panel)"

The ***Civil Procedure Handbook*** (above), interprets this direction to mean that "the trial judge (or panel) at the end of the suit will decide who (if anyone) gets costs of the present step."

"Costs in any Event of the Cause"

"Costs in any Event of the Cause" entitles the party named in the order to costs of that particular proceeding regardless the final outcome of the action. Therefore, in the foregoing illustration ("Costs in the Cause"), if the Defendant had been awarded costs of the application to compel undertakings "in any event of the cause" the Plaintiff would not be entitled to any costs of that application even if it should win the action. And, the Defendant would be entitled to recover its costs of that application even if the Plaintiff should win the action; even if the action should settle "without costs".[1]

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[1] See Orkin's, ***The Law of Costs*** (above) at 105.3.

As of January 1st, 1998, **Rule 607** did a non-retroactive about-face to read as follows:

> "Notwithstanding the final determination of an action, the costs of any interlocutory proceeding in that action, whether ex parte or otherwise, shall, unless otherwise ordered, be paid [forthwith] by the party who was unsuccessful on the interlocutory proceeding."

To clarify the intent and purpose of the Rule change, "forthwith" was inserted into the wording effective August 1st, 2000.

In other words, *when the court is silent* as to the costs of an interlocutory application/proceeding the costs of the application/proceedings are now "costs in any event of the cause", taxable and payable forthwith by the unsuccessful party.

Since **Rule 607** costs are taxable and payable forthwith, one cannot help but wonder if such costs can be "otherwise ordered" once they have been taxed or, better yet, paid.

Until recently a Plaintiff awarded costs of an interlocutory application "in any event of the cause" (specifically or by the default application of **Rule 607**) was faced with a dilemma if it wanted to file its Bill of Costs "forthwith". Because the appropriate Column to be applied to a Bill of Costs is determined as against the Defendant "by the amount of the judgment" obtained by the Plaintiff (**Rule 605(5)**) the clerk has, in the past, been stymied as to the appropriate Column to apply to a Plaintiff. In the recent decision *Wagner v. Petryga Estate* [2001] A.J. No. 1057, 2001 CarswellAlta 991, 2001 ABQB 690 (Q.B.) the court concluded that so far as **Rule 605(5)** is concerned a Plaintiff is to be treated the same as a Defendant until such time as judgment is obtained or denied, whereupon the costs recoverable by a Defendant are determined by the amount claimed by the unsuccessful Plaintiff, and the costs recoverable by a Plaintiff are determined by the amount of the judgment. To cite Justice Watson,

> "31 In my view, Rule 605(5) generally contemplates a connection between the costs Column and the Plaintiff's claim until judgment is reached in which case it may be associated against the Defendant with the judgment.
>
> " . . .
>
> "36 I also find some analogy in Wadsworth [*Wadsworth, et al. v. Hayes* (April 11, 1996) 184 A.R. 66, 122 W.A.C. 66 (Alta. C.A. No. 9403-0362-AC; Côté J.A.)]. There the Court of Appeal had reversed a decision and sent the matter back for trial. The Defendant urged that the Column that should apply was Column 2 because the Defendant, though unsuccessful on appeal, had not been found against by judgment. Côté J.A. held against that view, saying
>
> > [5] Counsel for the defendant respondent says that no amount has been recovered (yet), obviously referring to rule 605(5). But I cannot find the word "recovered" in that rule. Subrules 605(1) and 605(5) speak of "the amount involved". Subrule 605(5) speaks of determining the amount involved against the plaintiff by the amount claimed, and against the defendant by the amount of the judgment. At first glance, there might seem to be a gap here, because the plaintiff won, and no damages have been assessed yet. But that appearance comes from the fact of the appeal, and rule 608 plugs that gap. It says that if the Court of Appeal does not fix the column, it will be the same as that

applicable under the order or judgment appealed from. In the present case, that was stated expressly in the formal judgment dismissing the action by the chambers judge. So under rule 605(5) it would have been based on the amount claimed. That obviously means column 6. It would not be fair that the costs of the appeal be one size if one party won, but small if the other party won."

See too sub-document "Schedule C - Rule 605(5)".

Issue: are interlocutory costs awarded "in any event of the cause" taxable and payable forthwith? See *Justik v. Brosseau* (1979) 9 C.P.C. 97 (Alta. C.A.) and a review of authorities in *Woldemichael v. Gallant* [2000] A.J. No. 1233 (Q.B. / T.O.).

"Costs of this Hearing" a.k.a. "Costs of this Application"

Includes costs of preparing for the hearing - examinations on affidavit, written submissions, fiats, etc. - unless the Court clearly limits the award of costs to just the hearing or application itself.

"No Order as to Costs"

Unlike silence as to costs which invokes the default provisions, a direction by the Court that there be "no order as to costs" or "no costs of these proceedings" or that "each party bear their own costs" means that *neither* party is to pay or collect costs.

Silent about Costs?

If the Court says nothing about costs a number of default provisions of the ***Rules of Court*** take effect. They should be considered in the following order:

1/ **Who pays?**

The answer depends on the stage of the proceedings:

Interlocutory Proceeding: If the court is silent about costs of an interlocutory proceeding, **Rule 607** says that the unsuccessful party must pay the costs of the proceeding. As previously noted, these costs are taxable and payable forthwith.

Conclusion of Action: If the Court is silent about costs at the conclusion of the action Rule **601(3)** provides, "Where no order is made, the costs follow the event . . ." The successful party is thereby entitled

(a) to be paid its costs of the action by the unsuccessful party,
(b) even of interlocutory proceedings where the court ordered "costs in the cause", and
(c) most especially of interlocutory proceedings for which the successful party was awarded costs "in any event of the cause", but
(d) not of interlocutory proceedings where, by order of the court or by function of **Rule 607**, costs are to be paid to the unsuccessful party.

2/ **How much?**

Rule 600 directs the taxing officer to allow the party entitled to costs "all the reasonable and proper expenses which [it] has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceeding . . ." (For a more detailed review of this **Rule** and particular items of costs, see sub-document "Disbursements").

The taxing officer is to apply this broad discretion to any Bill of Costs (save for a **Rule 629.1** "consented to"

Bill of Costs), subject to the following restrictions:

(i) charges of barristers & solicitors - legal fees are restricted by **Rule 605** (for more information regarding **Rule 605** and its sub-rules, see sub-document "Schedule C - Rule 605").

Rule 605

(1) limits the party's recovery for legal fees to the amounts found in Schedule C.

(3) each **Item** in the "**Schedule**" includes everything necessary to completing that particular step and if only part of a step is taken the fee should be adjusted accordingly.

(4) permits the Court to allow for services not covered in Schedule C.

(5) the appropriate column in Schedule C is to be determined for the Plaintiff by the amount of the *judgment obtained* by it, or, for the Defendant by the *amount claimed* in the Plaintiff's pleadings.

(6) if the proceedings did not concern a claim for the payment of money Column 1 automatically applies (eg. divorce proceedings).

(7) **(a)** a Q.B. action which makes a claim for or recovers less than $7,500 is only entitled to 75% of Column 1 for steps taken up to and including judgment.

(b) however, post judgment matters are taxed at 100% of Column 1.

(8) sub-rule **(7)** only applies to matters which are within the jurisdiction of the Provincial Court (for an itemization of what is and is not within the jurisdiction of the Provincial Court see sub-document "Schedule C - Rule 605(8)").

Rule 608 if a matter has gone to appeal and the Appeal Court is silent as to costs the "scale of costs" to be applied to the successful party is the same as that applicable at the lower level of court, regardless which party wins the appeal.[1]

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[1] See *Wadsworth v. Hayes* [1996] A.J. No. 340; 184 A.R. 66, (C.A.), quoted above.

(ii) charges of experts to give evidence - unless otherwise ordered by the Court the taxing officer may only allow the experts the amounts permitted by "**Schedule E**". Since these are paltry amounts relative to what experts charge the party who hired them most parties are careful to get the Court's direction to allow the experts "reasonable charges" for attending to give evidence.

(ii) charges of experts for investigations and inquiries or assisting in the conduct of the trial - the taxing officer cannot allow the party any of its costs for its experts' participation in any of these activities and care should be taken to obtain the Court's direction to allow experts' "reasonable charges" for such.

(vi) witness fees & conduct money - unless otherwise ordered by the Court the taxing officer may only allow compensation for witness fees and expenses as per "**Schedule E**".

"Subsequent Costs"

Referred to in the September 1, 1998, Schedule C as "post-judgment" costs — are a default 'award' of costs by the ***Rules of Court*** to *any* Judgment Creditor for steps taken after or "subsequent" to judgment and for the purpose of enforcing or realizing on the judgment. Examples would be garnishment proceedings, seizure proceedings, etc.

"Thrown Away Costs"

Are those that a party would not have incurred save for the actions of another party. The most common would be the costs awarded a Plaintiff upon the successful setting aside of his/her default judgment. Consider the following:

Item #	Description	Thrown Away Cost?
1	Pleadings (drafting, filing & serving Statement of Claim)	no
6(2)	Ex Parte Application for a Substitutional Service Order	no
1	Noting in Default (a component of Item 1 - get a proportion of the Item)	yes
2	Uncontested Assessment Application	yes
5	Examination on Affidavit re: application to set aside default judgment	yes
7(1)	Defence of Application to Set Aside Default Judgment	yes