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/".

COURT OF QUEEN'S BENCH COSTS MANUAL

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Introduction

Rule 601 of the ***Alberta Rules of Court*** governs the awarding of costs as between parties. It provides:

1/ that, almost without fetter, the awarding of costs is in the discretion of the Court, and

2/ that if the Court does not exercise its discretion - makes no order as to costs - "costs follow the event."

To be sure, **Rule 607** clarifies that if the Court is silent as to the awarding of costs of an interlocutory proceeding, costs "shall . . . be paid forthwith by the party who was unsuccessful on the interlocutory proceeding."

In the absence of direction from the Court as to the awarding of costs the ***Alberta Rules of Court*** provide what might be referred to as *default provisions* for costs, thereby ensuring that costs between parties to legal proceedings will always flow unless the Court should order that there be no costs. These default provisions are summarized as follows:

1/ **Rule 601(3)** - when the Court makes no order as to costs, costs "follow the event."

2/ **Rule 607** - when the Court makes no order as to costs of an interlocutory proceeding the "unsuccessful" party pays for the proceeding "forthwith."

3/ **Rule 600(1)(a)** - defines "costs" as including "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 a party to any proceeding, including, . . . the charges of barristers and solicitors, ..."

4/ **Rule 605(1)** - limits the amount recoverable for "the charges of barristers and solicitors" to, at a maximum, the "amounts set out in the columns of Schedule C, depending upon the amount involved."

5/ **Rule 635** - authorizes the taxing officer to refuse costs which are "excessive" or "improper."

Hence this document's discussion of **Schedule C**.

To be sure, **Schedule C** is binding upon a taxing officer, but not the Court, which may make most any award of costs it sees fit.[1] The schedule becomes relevant to the issue of costs in the absence of a direction of the Court to the contrary. That is, **Schedule C** and the ***Rules of Court*** related to it, become germane to costs only if:

1/ The Court is silent about costs,

2/ The Court awards costs without saying anything more,

3/ The Court directs costs "in Schedule C",

4/ The Court directs costs in a particular column or a multiple of a particular column "in Schedule C"

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[1] See Stevenson & Côté, ***Civil Procedure Handbook 2003*** at 483 and at 494, especially its reference to **Caterpillar Tractor Co. v. Ed Miller Sales & Rentals (#2)** [1998] A.J. No. 404, 1998 ABCA 118, [1998] 10 W.W.R. 736, 61 Alta. L.R. (3d) 256, 216 A.R. 304 which concludes that,

> "[6] Schedule C is addressed to taxing officers, not judges . . .
>
> "[8] Schedule C is a series of rubber stamps which a judge may approve for a bill of costs . . ."

For a more detailed discussion of the relationship between the Court's broad discretion relative to costs and **Schedule C** see "Introduction to Costs - What are Costs? & Who Possesses the Authority to Award Costs?".

Relevant Rules

Rule 600(1)(a)(i) allows a party to recover as costs "**the charges of barristers and solicitors**", meaning the legal fees and expenses charged to the party by her/his/its lawyer. Unless the Court otherwise orders, there are two restrictions to the quantum of "charges" recoverable by the party:

(a) The principle of **indemnification**, and

(b) **Rule 605(1)** (see below).

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 (partial vs. full) 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 all expenses incurred. With increasing frequency 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 above in "Costs Manual - Costs Between Parties - Introduction to Costs - What is the Principle of Indemnification?".

Rule 601.1 states:

> "Schedule C and Rule 605(6), (7) and (8) are effective on and after September 1, 1998 and apply whether the services described in Schedule C were performed before, on or after September 1, 1998."

This differs from the transitional provisions which accompanied the September 1, 1984 amendment of **Schedule C** and which applied the pre-1984 **Schedule C** to any steps taken up to the date of amendment, and only applied the new-1984 **Schedule C** to steps taken on or after the date of amendment.

Court Rulings: Since September 1, 1998 the following decisions have confirmed that Rule 601.1 is indeed retroactive, *unless otherwise ordered*:[1]

Broumas v. Broumas [1998] A.J. No. 1044, September 28, 1998, Veit, J. - Variance application concluded before September 1, 1998, except for determination of costs, which was heard on September 23, 1998. Concludes that "where costs are determined on or after September 1, 1998, all legal services will be charged at the new, higher, rate including those performed prior to September 1, 1998."

R.H.J. (Re) [1998] A.J. No. 1043, September 28, 1998, Veit, J. - All work completed before September 1, 1998, except for determination of costs. Concludes that "there is no special circumstance here that allows the court to invoke its discretion to avoid all or part of the effect of the clear wording of the new Rule . . .."

Khamo v. Daved [1998] A.J. No. 1096, Lee J., October 14, 1998.

Cador [Chichak] v. Chichak [1998] A.J. No. 1188, Wilson J., November 3, 1998 - Followed *Broumas* (above).

Century Services Inc. v. ZI Corp. [1998] A.J. No. 1356, (C.A.) Côté, O'Leary and Sulatycky JJ.A., December 9, 1998 - New Schedule to apply, there being no special circumstances to do otherwise.

Beenham v. Rigel Oil & Gas Ltd. [1998] A.J. No. 1451, McMahon, J., December 21, 1998 - Action began in 1994, trial late June 1998, Judgment October 1998. "Nevertheless, Rule 601.1 is plain. the right to claim costs arose with the delivery of judgment on October 30, 1998. the new Schedule C was then in effect and applies to all steps in the action."

Berube v. Bobier [1999] A.J. No. 22, Lee J., January 8, 1999 - Statement of Claim in April 1994, Examination for Discovery in 1995 & 1996, Special Chamber's Appearance in 1997, Notice of Acceptance of Offer in October 1998. "The Court has overriding discretion in the matter of costs. Rule 601.1 states that the new Schedule C is retroactive. Since costs are always in the discretion of the Court, there will be deviations from the general proposition that the new Schedule C is retroactive, as outlined in my case of Bruneau v. Caseley [ibid] . . .. "However, in the circumstances of this rather unusual and complicated

1 Please do not rely on this list as being comprehensive. We stopped keeping track as of **November 2001**.

case, I exercise my discretion in favour of the Plaintiffs and award costs under the new Schedule C, both before and after September 1, 1998 to the date of Judgment which will be pronounced as part of these Reasons."

26561 Alberta Ltd. v. King [1999] A.J. No. 35 (C.A.), January 14, 1999, O'Leary, Russell & Sulatycky, JJ.A. - "The application of the new Schedule C to ongoing litigation is governed by Rule 601.1. . . . Application of this transitional provision is subject to the overriding discretion of the Court to set costs in individual cases. . . . In our view, the costs of the appeal should be taxed in favour of the successful respondents in accordance with the new Schedule C. The tariff set out in the new Schedule C is retroactive and applies to all services performed in connection with the appeal whether rendered before or after September 1, 1998. Accordingly, the respondents are entitled to tax a fee for all services performed in connection with the appeal under the new tariff."

Noel v. Dawson [1999] A.J. No. 176, March 1, 1999, Hutchinson, J.

Reid v. Stein [1999] A.J. No. 533, May 4, 1999, Johnstone, J. - Affirmed the retroactivity of Rule 601.1, but under the circumstances did some tailoring of the costs.

Edmonton Structures (1984) Ltd. v. Maier [2000] A.J. No. 1006, 2000 ABQB 562 (Q.B.), August 1, 2000, Funduk, M, - Eleven (11) year lawsuit "put out of its misery" by a Rule 244.1 application. Rule 601.1 to apply notwithstanding nothing had been done on the action for over five (5) years.

Foothills Decorating Ltd. v. Amigo Construction Ltd [2000] A.J. No. 1451, 2000 ABQB 993 (Q.B.), Novmeber 28, 2000, Hutchinson J. - Granted new Schedule C costs even though costs were more than double the judgment.

Huet v. Lynch [2001] A.J. No. 145, 2001 ABCA 37 (C.A.), February 6, 2001 - noted that lower court had awarded costs under the old Schedule C, but that all of the appeal proceedings post-dated September 1, 1998, hence the new Schedule C would apply.

NEW *Ward v. Aboriginal Multi-Media Society of Alberta* 2001 ABQB 498, additional reasons at 2001 ABQB 539, June 11, 2001 - Dismissal of action for want of prosecution, Plaintiff "had seven years to discontinue action with costs taxable under the old schedule C", Rule 601.1 to apply.

In *Broumas* The Honourable Madam Justice went on to clarify that "the court, which has overriding discretion in the matter of costs, could relieve against any unfairness in the application of this new rule." For examples on this latter point see:[2]

Penner v. Penner [1998] A.J. No. 1022 (Q.B.), September 22, 1998.

Professional Sign Crafter (1988) Ltd. v. Seitanidis [1998] A.J. No. 1055 (C.A.), September 24, 1998.

Laube v. Juchli [1998] A.J. No. 1083 (C.A.), October 9, 1998.

Bruneau v. Caseley [1998] A.J. No. 1271, November 25, 1998.

V.A.H. v. Lynch [1998] A.J. No. 1298, November 27, 1998.

Alberta v. Alberta (Labour Relations Board) [1998] A.J. No. 1310, December 2, 1998.

Faulkner v. Faulkner [1998] A.J. No. 1319 (C.A.), December 2, 1998.

St. Pierre v. Renick [1998] A.J. No. 1335 (Q.B.), December 7, 1998.

Northland Bank v. Willson [1998] A.J. No. 1432 (C.A.), December 17, 1998.

Sprung Instant Structures Ltd. v. Caswan Environmental Services Inc. (Trustee of) [1999] A.J. No. 37, (C.A.), January 18, 1999.

"Schedule C Specific" Directions by the Court, made prior to September 1, 1998, are deemed to limit costs to the pre-September 1 (old) **Schedule C**. A direction by the Court that costs will be "in the appropriate column", or that costs will be in a specified column (say, "Column 4"), or that costs will be a multiple of a specified column (say, "double Column 5") constitutes an exercise by the Court of its **Rule 601** jurisdiction and overrides the retroactive application of **Rule 601.1**.

2 Please do not rely on this list as being comprehensive.

For example, a February 1998 special chambers application costs award to the defendant "in any event of the cause, in Column 6" would entitle the defendant to Column 6 costs of the special chambers application in accordance with the pre-September 1 (old) **Schedule C**.

A similar opinion was expressed to taxing officer Morin (Calgary) by The Honourable Chief Justice Moore, after consultation with Madam Justice Veit, in a letter dated November 2, 1998.

Scale of Costs on Appeal - Note that in *26561 Alberta Ltd. v. King* (above) the Court of Appeal ruled that though the trial judge awarded costs to the respondents under Column 6 of the old **Schedule C** ($150,00 and up) the appropriate scale of costs on appeal would be Column 3 of the new **Schedule C** ($150,000 to $500,000). Suggesting that on appeal the scale of costs (Rule 608) adjusts to the new Schedule: see too *Huet v. Lynch* (above).

Consented to Bills of Costs submitted after September 1, 1998, but based on the pre-September 1 Schedule C will be allowed without question, in keeping with the letter and spirit of Rule 629.1.

Default or Ex Parte Bills of Costs submitted after September 1, 1998, but based on the pre-September 1 **Schedule C** will be allowed if accompanied by a letter from the submitting solicitor which acknowledges that to be his/her intention.

Rule 605(1) clearly states that the amounts set out in **Schedule C** represent the maximums a taxing officer may allow, otherwise the appropriateness of the charges are in the discretion of the taxing officer:

> "Unless otherwise ordered the charges of barristers and solicitors provided by Rule 600 shall be determined by the taxing officer, but shall not exceed the amounts set out in the columns of Schedule C, depending upon the amount involved."
>
> [Underlining added]

UPDATED

The wording of **sub-rule (1)** makes it clear that the "charges of barristers and solicitors" are in the discretion of the taxing officer subject to the one limitation that the taxing officer may not allow more than the amounts prescribed in **Schedule C**. **Schedule C** amounts are maximums, not minimums, and the taxing officer has an obligation to reduce from the maximum amounts where appropriate.

See *Procinsky v. Biel* [1999] A.J. No. 692 & [1999] A.W.L.D. 566 for a comprehensive review of this and related topics.

Note *McArdle & Davidson v. Howard* (1915) 8 W.W.R. 1056 (Alta. S.C.) – Stuart J. states at p. 1058:

> "The sums allowed in the schedule are not fixed arbitrarily, but are maximum amounts and the taxing officer is always at liberty, and indeed it is his duty, to reduce them if in his opinion the sum named should not be allowed."

Note too *Garvie v. Coleman* (1919) 2 W.W.R. 511 (Alta. C.A.) where Harvey C.J.A. responds to a taxing officer's failure to exercise the discretion mandated by (now) **Rule 605(1)**, at p. 513:

> "It also shows that the taxing officer paid absolutely no regard to the provisions of Rule 21 [now Rule 605(1)] of the Rules of Court, which provides that the costs shall be in his discretion up to the limit of the column applicable, for in every single instance he has allowed the maximum. I fear that there are other taxing officers who similarly fail to discharge the responsibility which the Rule places upon them of themselves deciding whether each particular item of charge in a bill of costs is entitled to the maximum or something less. Whether this is through misunderstanding of the meaning of the Rule, or through a desire to be complaisant and generous, or a disinclination to investigate, **the result is that the Rule is not given effect to and an injustice is done to the party who has to pay the costs**....I merely call attention to it here with the hope of causing some more regard to be paid to the Rule than in some cases has been the case heretofore." [Emphasis added]

More recent decisions on point include the following:

> *First City Trust Co. v. Triple Five Corp.* [1990] A.J. No. 597, 74 Alta. L.R. (2d) 272 (Alta. C.A.), McClung, Foisy and Cote JJ.A.:

> ". . . two sets of costs to the Respondent for that appeal hearing do not seem undue. If the taxing officer feels that some earlier motion or appearance was brief, he or she is not obliged to award the full relevant amount in Schedule C on each appeal. Schedule C gives the taxing officer a maximum, not a minimum."

Nova, an Alberta Corp. v. Guelph Engineering Co. (1988) 60 Alta.L.R. (2d) 366, (1988) 89 A.R. 363 (Q.B.) Brennan J.:

> "Pursuant to Rule 605.(1), unless otherwise ordered, the charges of barristers and solicitors (taxable fees) shall be determined by the taxing officer but shall not exceed the amount set out in the columns of Schedules "C" depending upon the amount involved."

Jake's Northern Pride Potato Wholesale Ltd. v. 24346 Alberta Limited [1982] A.U.D. 1072, Alta. Decisions 3599-01 (Q.B.), Crossley J.:

> "Rule 605 does provide that the charges of barristers and solicitors shall be determined by the taxing officer but shall not exceed the amount set out in Schedule C. Again, it should be emphasized this merely sets a ceiling on the most that can be allowed."

NEW

Rule 605(1.1) - Proclaimed February 26th, 2003, Alberta Regulation 38/2003 amended the ***Alberta Rules of Court*** by adding subrule **(1.1)** which provides:

> "Schedule C shall be applied without reduction by a taxing officer in making a determination under subrule (1) unless the taxing officer specifies reasons why doing so would constitute a significant injustice."

The writers are somewhat baffled by this amendment since we have always felt obliged to give reasons when exercising our discretion to set amounts in **Schedule C**, but also because we are not sure how the standard of "significant injustice" varies significantly from the standard already in imposed upon taxing officers by **Rule 600(1)(a)** that costs be "reasonable and proper" and the protective provisions of **Rule 635** that costs be refused which are "excessive having regard to the circumstances of the matter, including its nature and the interests and amounts involved."

Attempts to secure a description of what constitutes a "significant injustice" from Canadian and American "Legal Words & Phrases" publications and from a survey of Alberta and Canadian law reports have, to date, not been of assistance. It is of assistance to consider the following definitions:

"**Significant**" is defined in ***Webster's Ninth New Collegiate Dictionary*** as:

> "1: having meaning . . . <a significant glance> 2a: having or likely to have influence or effect: important <a significant piece of legislation>; also: of a noticeably or measurably large amount <a significant number of layoffs> . . . "

"**Injustice**" is defined in ***Blacks Law Dictionary***, fifth edition, as:

> "The withholding or denial of justice. In law, almost invariably applied to the act, fault or omission of a court, as distinguished from that of an individual. . . ."

"**Justice**" is defined in ***Blacks*** (above), as:

> "Proper administration of laws. In Jurisprudence, the constant and perpetual disposition of legal matters or disputes to render every man his due."

"**Due**" is defined in ***Blacks*** (above), as"

> "Just; proper, regular; lawful; sufficient; reasonable, as in the phrases 'due care,' 'due process of law,' 'due notice'."

Therefore, in the context of **Rule 605** and **Schedule C**, **sub-rule (1.1)** implies that the maximum amounts in **Schedule C** are still subject to reduction if the taxing officer is satisfied that to not reduce them would be unjust,

improper, irregular, or unreasonable, but only if it would be *significantly* unjust, improper, irregular or unreasonable.

Which brings us back to **Rule 600(1)(a)** permitting the taxing officer to allow "all the reasonable and proper expenses" incurred for the "purpose of carrying on or appearing as a party". And, back to the concern in **Rule 635(a)** that the taxing officer "refuse to allow costs which are excessive having regard to the circumstances of the matter, including its nature and the interests and amounts involved."

Conclusions: 1) Since taxing officers were already exercising their discretion on the premise that the maximums in Schedule C were to be reduced if they were, "having regard to the circumstances . . .," unreasonable, improper, unjust, irregular; the true significance of the new **sub-rule** is that the clerks must give *reasons* for any reduction from the maximum. Whether counter clerks were doing this or not, taxing officers in contested taxation hearings already were.

2) **Sub-rule (1.1)** does not impede or change the application of **sub-rule (3)** (see **Rule 605(3)**, below).

3) Relevance to the following **Schedule C Items**:

Item 3(1) - Document Discovery - Footnote #1 still applies: ". . . taxing officers may award lower or fractions of columns in cases where few documents are relevant or one party does not have to either produce or review a significant number of documents."

Item 5 - Oral Discovery - an "additional ½ day" is still 2.5 hours and "is pro-rated to the extent that a full one half day of two and one half hours is not occupied in the examination" (see pre-1998 Schedule C, Item 21(b) and see **Item 5** below in the "Annotation").

Item 8 - Special Chambers Applications - additional ½ days are, at the taxing officer's discretion, time based and treated not unlike **Item 5** (above).

Item 10 - Preparation for Trial - Footnote #2 still applies: ". . . may be varied . . . down depending on the length and complexity of the trial."

Item 11 - Trial - an "additional ½ day" is still 2.5 hours and "a proportionate allowance is to be made to the extent that any second one day is not wholly occupied" (see pre-1998 Schedule C, Item 26).

Item 16 - Appearance to argue before Appeal Court for each full ½ day occupied after the first ½ day - the fee is still time based.

Rule 605(3) provides,

> "Each item in Schedule C shall be deemed to include all instructions, documents, attendances, letters and other services necessary or convenient to be taken, prepared, made, written, read, performed or had, for the purpose of fully completing the step in the cause referred to or implied in the item."

It further allows that,

> "If any step has been begun but only partially completed a proper proportionate part of the charge may be allowed."

For example: if a party files and serves a Notice of Motion and supporting Affidavit to compel production of undertakings, but production subsequently renders attendance in chambers and the obtaining and filing of the desired Order moot, the applicant might still be entitled to a portion of Item 7(1) - Contested Applications for those steps necessarily taken.

See *Canadian Egg Marketing Agency v. Richardson* (c.o.b. Northern Poultry) [1997] N.W.T.J. No. 68 (N.W.T.S.C.) Wachowich J. (as he then was) at para. 15.

Rule 605(4) states that,

> "Where services have been performed by a barrister and solicitor in any proceedings which are not provided for in Schedule C, either expressly or by implication, such allowance may be made as the court may see fit."

Therefore, where **Schedule C** is silent about a particular type of proceeding and where the clerk / taxing officer cannot imply[1] the application of a particular Item in **Schedule C** to the "proceeding", the party must apply to the Court for some form of allowance.[2]

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[1] See Rule 4: "As to all matters not provided for in these Rules the practice as far as may be shall be regulated by analogy thereto."

NEW

[2] In Stevenson & Côté's ***Alberta Civil Procedure Handbook 2004***, at p. 489, concern is expressed over the lack of use of this sub-rule:

> "In weighing the adequacy of tariff items, one must recall that many services are not listed, and so are often provided for by the size of the amounts given for the items listed. Unfortunately, judges rarely apply subrule 605(4), which seems to be little known. Some cases ignore it by implying that every step mujst necessarily be part of one of the items in Schedule C, which is plainly not correct, given both their wording and this subrule."

"Court" is defined by **Rule 5(1)(e**) as including "a judge thereof". The definition of "court" does not extend to a clerk of the court: *Ukrainian (Edmonton) Credit Union Ltd. v. 258753 Alberta Ltd.* (1984) 39 Alta. L.R. (2d) 310 (Q.B.), at 312..

For example: "mini-trials" or "JDRs" are not provided for in **Schedule C** and the clerks have been given specific direction to not allow any costs in relation to such proceedings (see "Mini-Trials / JDRs", below at p. SC - 42). To recover any costs for such a proceeding it would be necessary to obtain a direction from the "Court" pursuant to Rule 605(4).

Rule 605(5) & **(6)** set the guidelines by which a party determines the "Column" under which it is entitled to recover costs in **Schedule C**, *if the Court has been silent on the issue*. ***N/B:*** *As noted above in the "INTRODUCTION", the following are guidelines for clerks/taxing officers and are always subject to the Court exercising its discretion: a search through any reporting services of "Rule 605(5 & 6)" will disclose numerous instances in which the Court does not follow the guidelines set by Rule 605. But, if the Court does not exercise its discretion, clerks/taxing officers are bound by the* ***Rules of Court*** *and any judicial consideration of them.*

UPDATED

Rule 605(6) provides that if a proceeding does not involve "the payment of money" the costs of the entitled party are to be taxed under "Column 1". Furthermore, the preamble to **Schedule C** specifically states that "unless otherwise ordered, Divorce and corollary relief matters . . . will be dealt with under Column 1."[1]

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[1] Which begs the interesting question, is spousal support or child support awarded pursuant to the finding of a constructive trust limited to Column 1?

Rule 605(5) provides that if a proceeding does involve "the payment of money" the "Column" under which the costs of the entitled party are to be taxed "shall be determined" according to the "amount involved". The "**amount involved**" is determined as follows:

- **Costs to a Defendant**: "*by the amount claimed*" by the Plaintiff. For example:

If Plaintiff claimed:	Defendant would recover **Schedule C** fees under:

$48,000.00	Column 1
$250,000.00	Column 3
$1,300,000.00	Column 5

- **Costs to a Plaintiff**: "*by the amount of the judgment*" obtained against the Defendant. "Judgment" includes interest[1] and prejudgment interest[2].

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[1] *Valley Forest v. Reinsurance* [1977] A.J. No. 44, 3 Alta. L.R. (2d) 106, 4 C.P.C. 79 (Q.B.)

[2] *Janos Papp v. Nakaska* [1989] A.J. No. 357, 66 Alta.L.R. (2d) 382, 96 A.R. 161, 33 C.P.C. (2d) 203 (Q.B.), NEW *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1994)* 26 Alta.L.R. (3d) 16 (Q.B.); *Beller Correau Lucyshyn Inc. v. Cenalta Oilwell Servicing Ltd. (1997)* 211 A.R. 10 (Q.B.), *Pugsley v. Wong* [2000] A.J. No. 273, 2000 ABQB 146, (2000) 265 A.R. 80 (Q.B.)

- **Costs to a 3rd Party**: "*by the amount claimed*" by the Plaintiff[1] but "by the amount of the judgment" if the 3rd Party did not take an active role in defending the action[2] or if the 3rd party action proceeds after resolution of the action between Plaintiff and Defendant and after the judgment amount is known.[3]

[1 & 2] *Fleming v. Olsen* [1988] A.J. No. 394 (Q.B.)

[3] *Mitz v. Eastern; Canadian Linen* [1968] 2 O.R. 109, (H.C.J)

- **Costs against a 3rd Party**: "*by the amount of the judgment*" obtained by the Defendant against the 3rd Party or

- **Costs of Interlocutory Hearings**

Defendant & 3rd Party: Rule 605(5) makes no distinction between costs of the action and costs of interlocutory hearings. Consequently a Defendant or 3rd Party awarded costs of an interlocutory hearing determines the appropriate column "*by the amount claimed*" by the Plaintiff.

See *Penn West Petroleum Ltd. v. Koch Oil Co.* [1993] A.J. No. 1079 (Q.B.)

Plaintiff: Inasmuch as the "amount involved" is determined in favour of a Plaintiff "*by the amount of the judgment*" how does one establish a "Column" for the Plaintiff when a judgment does not yet exist?

This problem was addressed in *Justik vs. Brosseau* [1979] A.J. No. 71; 9 C.P.C. 97 by the Court of Appeal when concern was raised "that a party may be unfairly dealt with, in that costs may be taxed on a column appropriate to what is quite clearly an exaggerated claim." The court responded:

> "We say two things in respect of this argument. The first is that such a matter should be left to the good sense of the Taxing Officer; and, secondly, in a case where counsel are of the view that the claim as it is advanced in the statement of claim is an exaggerated one, counsel would be advised to make a submission to the Court that the Court direct the column under which the costs will be taxed."

Until recently when counsel or the Court have not spoken to the Column under which the costs are to be taxed the practice of the Clerk has been to give the Plaintiff the option of

(a) taxing its Bill of Costs immediately on an interim basis (see Rule 636) in the non-monetary column (#1) and picking up the difference when and if judgment is obtained in a higher column, or

(b) waiting until the judgment amount is known.

However, 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."

The practice of the Clerk follows that of the Court.

- **Divorce & Matrimonial Property Actions** are now initiated and conducted as one action. Divorce proceedings are restricted by the preamble to **Schedule C** to Column 1 unless otherwise ordered by the Court: *Pattison v. Pattison* (1977) 4 Alta. L.R. (2d) 256; 9 A.R. 70 (S.C.T.D.) Milvain, C.J.T.D.; mentioned in *Toma v. Toma* [1996] A.J. No. 882.

  But what of matrimonial property proceedings?

  - *Toma v. Toma* [1996] A.J. No. 882, Rooke J., September 27, 1996 - Stands for the following conclusions:

    1/ Divorce matters are subject to the default column [now Col. 1], unless otherwise ordered by the court. Follows *Pattison* (above).

    2/ MPAs are entitled to costs in the appropriate column, not restricted to default column (reviews number of cases which support this position), subject to following guidelines:

    (a) MPAs to be treated as any other litigation;

    (b) Where there is full disclosure of matrimonial assets, no significant arguments for challenged exemptions or of unequal distribution, no significant

dispute over value (aside from the differences between professional appraisers), and the process is merely to identify the assets, set the value, and make a distribution, often costs are awarded to neither party - "divided success";

(c) Where there is a significant difference between the argued positions on exemptions, evaluation, and distribution of matrimonial assets then the difference in the amount awarded the successful party from that proposed by the losing party might be considered the real amount in dispute beyond "divided success"; and,

(d) There should be no duplication between divorce and MPA costs and where costs are of a combined nature (e.g. trial) it ought to be awarded one half on each scale.

- *Cador v. Chichak* [1998] A.J. No. 1188, Wilson J. granted divorce and collateral relief as well as a division of matrimonial property. The decision did not consider or specifically apply the principles set out in **Toma** (above). The husband's net worth was found to be $246,035.32 and the wife's to be $86,009.84. The Court ordered the husband to make an equalization payment to the wife of $80,012.74 (Col. 2). The court ruled that "the appropriate column is Column II, based on the amounts in issue."

- **Effect of a Finding of Contributory Negligence**: "amount involved" is the judgment amount less the apportionment of fault.[1] However, there ought not to be a proportionate reduction in disbursements, only in **Schedule C** fees.[2]

---

[1] *Cornish v. Bubbles Car Wash Ltd* [1995] A.J. No. 654, 32 Alta.L.R. (3d) 103, 172 A.R. 388 (Q.B.); *Hobday v. Bergen* [1995] A.J. No. 25, 5 W.W.R. 96, 27 Alta.L.R. (3d) 51, 164 A.R. 340 (Q.B.); *Jivraj v. Fischer* [1992] A.J. No. 133, 124 A.R. 81; *Dixon v. C.P.R.* (1950) 2 W.W.R. 385 (Alta. S.C.); *Picklyk v. Tinsley* (1986) 1 A.C.W.S. (3rd) 357 (B.C.S.C.)

[2] *Jivraj v. Fischer* (above)

- **Effect of a Counterclaim**:

  - Where the Plaintiff and Counter claimant are both successful and the costs go to the net winner, the "amount involved" is based on the net judgment.[1] That is, both parties do not get a full set of costs, which are then set-off against each other.[2]

---

[1] *Parkridge Homes Ltd. v. Anglin* [1996] A.J. No. 768 (Q.B.)

[2] To the contrary see *Modern Livestock Ltd. v. Elgersma* (1990), 74 Alta. L.R. (2d) 392 (Q.B.)

  - Where both Defendant and Defendant by Counterclaim are fully successful, no costs to either: *S.J.M. Properties Ltd. v. Kasper* [1999] A.J. No. 658 (Q.B.).

  - Where one party succeeds in both claims the "amount involved" is that of the main action, the costs of the counterclaim being only those which are not duplications of the main action, and then in the column appropriate to the counterclaim.[**]

See, *Shillelagh Cabarets v. Celona* [1980) 5 W.W.R. 708, 15 C.P.C. 230 (B.C.Q.B.). The Ontario decision *Limon v. London Frozen Foods* [1964] 2 O.R. 96 which proposed adding the amounts of the claim and counterclaim was reversed on that very point on appeal ([1964] 2 O.R. 235-236, Donnelly, J.), indeed, the appeal decision was mentioned in *Shillelagh* (above) and stated the Ontario law to be that found in *Simpson v. McGee and Fitzpatrick; Firemen's Insurance Co. of Newark, Third Party* [1964] 1 O.R. 31-46, namely, the same position as that in *Shillelagh* (above).

Rule 605(6) is amended to change the default and non-monetary column from Column "2" to Column "**1**".

Rule 605(7) states:

> "Notwithstanding anything in this Rule, unless otherwise ordered
>
> > "(a) in the case of an action commenced in the Court of Queen's Bench when the amount sued for or the amount of the judgment does not exceed the amount for which the Provincial Court has jurisdiction under section 9.6 of the Provincial Court Act, the costs to and including judgment shall be taxed in the amount of 75% of that provided for under Column 1 of Schedule C;
> >
> > "(b) in respect of subrule (a), post judgment matters shall be taxed in the amount of 100% of that provided for under Column 1 of Schedule C."

NEW

Rule 605(7) & the Provincial Court Limit of $25,000

November 1st, 2002 **Provincial Court Civil Division Regulation 215/2002** changed the Provincial Court limit from ***$7,500*** to ***$25,000***. Taxation offices across the Province have been receiving queries concerning the application of **Rule 605(7)(a)** to Court of Queen's Bench actions which began when the limit was $7,500 but settled or were otherwise resolved after the limit became $25,000. Hence this brief explanation of our understanding of how taxing officers might and likely should address the issue.

Issue: If an action was commenced in the Court of Queen's Bench on October 31st, 2002 for $24,000 (an amount in excess of the then $7,500 Provincial Court limit) and if it settled, with costs, on November 1st, 2002 for (a) $5,000 or, alternatively, (b) $20,000, how would **Rule 605(7)(a)** be applied?

Answer:

(a) If settled for $5,000 **Rule 605(7)(a)** would apply and costs would be reduced by 25% for steps taken up to and including judgment.

(b) If settled for $20,000 **Rule 605(7)(a)** would not apply and costs would not be reduced by 25%.

Reason: ***Queen's Bench Rule 605(7)*** states:

"Notwithstanding anything in this Rule, unless otherwise ordered

> "(a) in the case of an action commenced in the Court of Queen's Bench when the amount sued for or the amount of the judgment does not exceed the amount for which the Provincial Court has jurisdiction under section 9.6 of the Provincial Court Act, the costs to and including judgment shall be taxed in the amount of 75% of that provided for under Column 1 of Schedule C;
>
> "(b) in respect of subrule (a), post judgment matters shall be taxed in the amount of 100% of that provided for under Column 1 of Schedule C."

Provincial Court Civil Division Regulation 215/2002 changed the Provincial Court's jurisdiction "for the purposes of . . . any claim or counterclaim referred to in section 9.6(1)(a)(i) of the Act," from $7,500 to $25,000: see ***Rules of Court***, Provincial Court, Civil Division Regulation, p. 12.1.1.

Case Authority - As of February 25th, 2002, there is only one reported decision directly on point. In *Ritchie v. Edmonton Eskimo Football Club* [2003] ABQB 59, 2003 CarswellAlta 57, Lee J. awarded Mr. Ritchie a judgment of $10,400.00 which figure, at

the time the action was initiated and the Certificate of Readiness was filed, exceeded the Provincial Court limit of $7,500.00. That limit changed to $25,000.00 one month prior to the trial. Addressing the issue of whether the increased limit obliged the application of **Rule 605(7)(a)** to the plaintiff's costs, the court ruled:

> "[9] My analysis of the situation is that **Rule 605(7)(a)** does not apply to this case given that at the time the action was commenced and at the time the Certificate of Readiness was filed, the amount of the ultimate Judgment still exceeded the small claims limit. This analysis is further supported by the actual amendments themselves to the *Provincial Court Act* which greatly increased the jurisdiction of the Civil Claims Division of that court, which themselves do not purport to give jurisdiction to that court unless the cause of action arose after the proclamation of increased limits.
>
> "[10] Accordingly the Provincial Court never had jurisdiction with respect to the case at bar even after the amendment raised the monetary limits in that court approximately one month before this trial was heard by me. As such I conclude that **Rule 605(7)(a)** is not applicable, and the costs should not be taxed at 75 percent."

Application: **Taxing Officers** are bound by this decision.

UPDATED

Note: **Regulation 215/2002** leaves a gap between the Provincial Court limit of $25,000.00 and the **Schedule C**, **Column 1** starting figure of $10,000.00. Since some claims seeking relief in the form of the payment of money (eg: builders' lien or defamation suits) could never fall within the jurisdiction of the Provincial Court and since **Rule 605(8)** ensures that **Rule 605(7)(a)** only applies to "actions the subject matter of which is within the jurisdiction of the Provincial Court," it is suggested that, until further notice, **Schedule C**, **Column 1** be treated as constituting amounts from $0.01 up to and including $50,000.

Rule 605(8) states:

> "Subrule (7) applies only in respect of actions the subject-matter of which is within the jurisdiction of the Provincial Court."

UPDATED

The following details what is within the Provincial Court's jurisdiction - refer to the **Provincial Court Act**, P-31 RSA 2000, s. 9.6(1) & (3-5):

> "9.6(1) The Court has, subject to this Act, the following jurisdiction:
>
> (a) for the purposes of Part 4 [Civil Claims],
>
> (i) to hear and adjudicate on any claim or counterclaim
>
> (A) for debt, whether payable in money or otherwise, if the amount claimed or counterclaimed, as the case may be, exclusive of interest payable under an Act or by agreement on the amount claimed, does not exceed the amount prescribed by the regulations,
>
> (B) for damages, including damages for breach of contract, if the amount claimed or counterclaimed, as the case may be, exclusive of interest payable under an Act or by agreement on the amount claimed, does not exceed the amount prescribed by the regulations,
>
> (C) for the return of personal property if the value of the personal property does not exceed the amount prescribed by the regulations, and
>
> (D) for specific performance or rescission of a contract if the value of the rights in issue does not exceed the amount prescribed by the regulations;
>
> (ii) to grant an equitable remedy in respect of a claim or counterclaim referred to in subclause (i);
>
> (b) where provided for or directed under any enactment, and subject to that enactment, to hear and adjudicate on any matter, provide any relief, carry out any duty or perform any function assigned to the Court under that enactment or in respect of which the Court is empowered to undertake or provide under that enactment;
>
> (c) for the purposes of the Mobile Home Sites Tenancies Act and the Residential Tenancies Act, without limiting the jurisdiction of the Court provided for under those Acts, to grant
>
> (i) an order terminating a tenancy;
>
> (ii) an order for the recovery of possession of premises;
>
> (iii) an order to vacate premises."

"(3) W here an amount is prescribed by the regulations for the purposes of subsection (1), that amount applies with respect

(a) to civil claims issued, or

(b) subject to clause (a), to matters that arose, after the prescribed amount came into effect.

"(4) If the claim of a plaintiff or the counterclaim of a defendant exceeds the amount prescribed for the purposes of subsection (1), the plaintiff or the defendant, as the case may be, may abandon that part of the claim or counterclaim that is in excess by filing a notice to that effect with the Court.

"(5) Subject to section 56(4), where a notice is filed under subsection (4), the person forfeits the excess and is not entitled to recover it in the Provincial Court or in any other court."[1]

---

[1] Note: "56(4) If a matter is transferred into the Court of Queen's Bench and a party had abandoned a portion of the party's claim or counterclaim under section 9.6(4), that party may, subject to any conditions that the Court of Queen's Bench considers proper, withdraw the abandonment of that portion of the claim or counterclaim and proceed on the entire claim or counterclaim, as the case may be."

---

and, what is not within the Provincial Court's jurisdiction - refer to s. 9.6(2):

9.6(2) The Court does not have jurisdiction to hear and adjudicate on a claim or counterclaim

(a) in which the title to land is brought into question,

(b) in which the validity of any devise, bequest or limitation is disputed,

(c) for malicious prosecution, false imprisonment, defamation, criminal conversation or breach of promise of marriage,

(d) against a judge, justice of the peace or peace officer for anything done by that person while executing the duties of that office, or

(e) by a local authority or school board for the recovery of taxes, other than taxes imposed in respect of the occupancy of or an interest in land that is itself exempt from taxation.

NEW

Rule 605(9) addresses the issue of GST recoverable for Schedule C fees:

(9) Unless otherwise ordered by the court,[1] a party entitled to costs is entitled to recover the goods and services tax on those costs upon providing a certificate[2] in accordance with subrule (10) that is satisfactory to a taxing officer.

---

[1] For a sampling of Alberta cases relative to GST on Schedule C fees see below at SC45.

If your client's ability to meet the criteria set out in **sub-rule (10)** is in question it might be advisable to obtain the direction of the court on the issue. See the commentary following **sub-rule 10** (below) relative to potential difficulties for unsuspecting parties.

[2] Emphasis is added. In the absence of a GST Recovery Certificate **no GST is recoverable** on **Schedule C** fees, unless "otherwise ordered by the Court."

NEW

Rule 605(10) spells out the criteria for qualifying for or being disqualified from receiving GST on Schedule C fees:

(10) A certificate under subrule (9) shall be in the form of an affidavit endorsed on, attached to or filed with the Bill of Costs deposing that

(a) the person making the affidavit has a personal knowledge of the facts being deposed to,

(b) the party entitled to receive payment under the Bill of Costs, and not a third party, will actually be paying the goods and services tax on that party's litigation costs;

(c) the goods and services tax will not be passed on to, or be reimbursed by, any other person, and

(d) the party referred to in clause (b) is not eligible for the goods and services tax input tax credit.

- A sample "GST Recovery Affidavit" is proffered below at SC51.

- Relative to **sub-rule (10)(b)** is a party's insurer a "third party" and, therefore, not entitled to GST on the fees? Inasmuch as the insurer, by means of its right (conventional or legal) of subrogation, "step[s] into the shoes of the party whom they compensate and sue any party whom the compensated party could have sued" (Black's Law Dictionary, 5th, 1279) it would seem to follow that the insurer becomes the party and would not properly be viewed as a "third party." After all, the insurer is the one who has been paying its lawyer and paying the GST for its lawyer's legal charges. If the insurer has, in essence, become the plaintiff or defendant it follows that the GST is not being "passed on to . . . any other person," **sub-rule (10)(c)**. We will follow this reasoning until such time as we are directed or convinced otherwise.

Annotation of Schedule C

Note: To distinguish the text of **Schedule C** from that of the "Annotation" the text is in both **bold** and *italics*. No quotation marks are used.

COSTS - CIVIL ACTIONS OTHER THAN SMALL CLAIMS

Unless otherwise ordered, Divorce and corollary relief matters and matters which have no monetary amounts, for example, injunctions, will be dealt with under Column 1. Costs in relation to residential tenancies are not dealt with under any of these columns and are in the discretion of the Court. For monetary amounts within the jurisdiction of the Provincial Court see Rule 605(7).

NEW

Column 1 - Why Does it Start at $10,000 & Not $0.01? - **Regulation 215/2002** leaves a gap between the Provincial Court limit of $25,000.00 and the **Schedule C**, **Column 1** starting figure of $10,000.00. Since some claims seeking relief in the form of the payment of money (eg: builders' lien or defamation suits) could never fall within the jurisdiction of the Provincial Court and since **Rule 605(8)** ensures that **Rule 605(7)(a)** only applies to "actions the subject matter of which is within the jurisdiction of the Provincial Court," it is suggested that, until further notice, **Schedule C**, **Column 1** be treated as constituting amounts from $0.01 up to and including $50,000.

Non-monetary Column - Reiterates **Rule 605(6)** which has changed the non-monetary Column from 2 to **1**.

UPDATED

Provincial Court Appeal to Queen's Bench, Costs of . . . - Clark J. in *Deyell v. Siroccos* [1999] A.J. No. 914, 1999 ABQB 592, [2000] 1 W.W.R. 454, (1999) 72 Alta. L.R. (3d) 329, (1999) 245 A.R. 302, (1999) 35 C.P.C. (4th) 347 has provided the Clerk with direction broader than that previously provided (see *Cormier v. Lens Sandblasting* & *Mikes Diesel v. Cormier* both cited in *Deyell*).[1] It concludes that "it is inappropriate to apply Schedule C to matters initiated in the Provincial Court, even where this Court is faced with an appeal by way of trial de novo. Costs are in the discretion of the Court and regard ought not to be had to the Schedule C . . .."

Therefore, the Clerk of the Court of Queen's Bench is to allow no costs relative to a Provincial Court appeal except as specifically directed by the Court. This means:

(a) Silence as to costs means "no costs";
(b) An award of "costs" without further clarification means "no costs" (the Provincial Court Fees and Costs Regulation (18/91) makes no provision for costs of an appeal and costs of an application or hearing in Provincial Court are "in the judge's discretion", and
(c) In the off chance that a Queen's Bench Justice should award costs "in **Schedule C**" the Clerk will continue to limit costs to, at most, an **Item 8**, all inclusive.[2]

---

[1] As of November 10th, 2003 the *Deyell* decision has been mentioned three times, explained once and followed once. It has yet to be rejected or distinguished (save for its limitation to civil claims matters - see "Family Division" immediately below). A good summary of the rationale for the *Deyell* approach is found in *Precision Label Ltd. v. Rocky Canada Resources Corp.* [2000] A.J. No. 1236, 2000 ABQB 989, (2000) 279 A.R. 324 (2000) 12 C.P.C. (5th) 332 (Q.B.) where Hutchinson, J. deals with an application for leave to appeal, not even an appeal. See too *Lee v. Anderson Resources Ltd.* [2002] A.J. No. 706, 2002 ABQB 536, (2002) 307 A.R. 303.

[2] In *Yakiwczuki v. Chmilar* [2002] A.J. No. 1465, (2000) 283 A.R. 165, (2000) 11 C.P.C. (5th) 219, Clark, J. considered and did not take issue with this interpretation of his *Deyell* decision.

Does the *Deyell* decision apply to appeals from Provincial Court - Family Division? We are not sure. The decision of Madam Justice Bielby in *C.B. v. P.C.* [2003] A.J. No. 885, 2003 ABQB 605, an appeal *de*

novo of a Provincial Court Family Division custody decision, concludes as follows:[1]

> 16 . . . the C.s finally argued, however, that they should not be required to bear her Schedule C costs because this action amounted to a family court appeal and Schedule C does not apply to Provincial Court matters; see *Deyell v. Siroccos Hair Co.* [1999] A.J. No. 914. However, that decision on its facts must be limited to appeals from small claims actions, which Clark J. makes clear in his reliance therein upon *Cormier v. Len's Sandblasting & Painting Ltd.* (1985) 64 A.R. 65 (Alta. Q.B.), a decision in which McDonald J. expressly refers to the philosophy of costs in small claims matters.

It should be kept in mind that this appeal lasted many days and was in no way representative of a typical Family Division appeal to Q.B. It is worth watching to see what happens in more typical appeal scenarios.

---

[1] The Provincial Court Act's provisions vis-à-vis an **appeal** from Civil Division and Family Division appeals to the Court of Queen's Bench are as follows (as of July 2003):

> *Family Division:*
> "21. A party to proceedings under this Part [Part 3 - Family Matters] who is dissatisfied with an order or refusal to make an order may appeal to the Court of Queen's Bench and the provisions of section 30 of the Domestic Relations Act relating to appeals apply with all necessary modifications to that appeal."
>
> *Domestic Relations Act*, s. 30(19) provides: "The Court in determining an appeal may
> (a) set aside, confirm or vary an order made by the provincial judge, or make any other order mentioned in this section and warranted by the evidence, and
> (b) make any order it considers appropriate relating to the costs of the appeal and the amount of them."*
>
> * Note that s. 30 of the DRA relates to "Part 4 - Protection Orders - Desertion". Nonetheless, it is the referenced authority in s. 21 of the Prov. Crt. Act.
>
> *Civil Division:*
> "51. An appeal is to be heard as an appeal on the record unless, on application by a party, the Court of Queen's Bench orders the appeal to be heard as a trial de novo.
> "52. The Court of Queen's Bench may adjourn an appeal from time to time as circumstances require and may make any order that it considers proper in respect of costs.
> "53. (1) The Court of Queen's Bench shall (a) hear and determine an appeal, (b) give its judgment, and (c) make an order awarding costs, if any, to the parties, including costs of all proceedings previous to the appeal."

The Act's provisions relative to "costs" are as follows (as of July 2003):

> *Part 1.2 - General Judicial Matters:*
> "9.8. (1) The court may at any time in any proceeding before the Court and on any conditions that the Court considers proper award costs in respect of any matters coming under Part 3 [Family Matters] or 4 [Civil Claims].
> (2) The Court may award costs at any time in respect of pre-trial conferences conducted under Part 4."
> *Family Division:* Nothing save for the costs provision in DRA s. 30(19)(b), above.
> *Civil Division:*
> "44. Where judgment is entered or given under this Part, the amount of the judgment shall include costs and any prejudgment interest claimed or payable pursuant to the Judgment Interest Act."

To our knowledge the only regulations relating to costs in Provincial Court proceedings are those found in the ***Alberta Rules of Court***, Provincial Court tab, Fees and Costs sub-tab.

UPDATED

Provincial Court Civil Claims Jurisdiction - Presently stands at $25,000 maximum. See notes re: **Rule 605(7)** above, at page 11.

Residential Tenancy Proceedings - Any costs associated with residential tenancies are completely within the discretion of the Court.

By memorandum dated September 23, 1998, Master W.J. Quinn advised the Clerk of the Court, Edmonton, that, "The Masters have decided to allow fees of $400.00 plus disbursements on these matters if only one chambers application is required. If more than one chambers application is required some additional fee would be allowed."

The additional fee will be as dictated by the Masters only, not the taxing officers.

The practice in Calgary has not been reduced to writing.

Pleadings

Item 1

(1) Pleadings - all drafting, issuing, filing, serving, reviewing and amending pleadings - except pursuant to Rule 605(7) - and including desk divorces

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
$10,000	Over $50,000	Over $150,000	Over $500,000	Over $1.5 million
Up to $50,000	Up to $150,000	Up to $500,000	Up to $1.5 mill	
1000	1500	2000	2500	3500

(2) The limit of recovery in all cases when the matter is uncontested, for example, default judgments, is 50% of this amount

Appointment for Taxation - **Item 1** cannot be claimed for the preparation and filing of an Appointment for Taxation: *Shoctor, Mousseau & Ferguson vs. Modular Windows*, unreported, 10 April 1989, J.D. of Edmonton, 8903 01624, Master Funduk, denied a **Rule 129** application to strike an Appointment for Taxation as it "is not a pleading." A party awarded costs of a taxation proceeding may claim either **Item 6** or **7** for the hearing, as the case may be, but the amount may be reduced per **Rule 605(3)**.

Avoid Double Compensation - If an action is initiated by Originating Notice (**Part 33)** some accommodation will be made in the application fee (**Item 7** for instance) to allow for not having to prepare a Notice of Motion for the application. See *McArdle & Davidson v. Howard* (1915) 8 W.W.R. 1056 (Alta. S.C.) and *Schwartz, et al v. Guerin* [1922] 2 W.W.R. 862, (Alta. C.A.)

"Desk Divorces" - refers to the "desk divorce" procedure - **Rule 568**: Note respondent in Default, submit Request for Divorce, Affidavit in Support, Proposed Judgment & Order, and envelope. Not infrequently a "Desk Divorce" application will be rejected and directions given for further or alternative steps to be taken. Depending on the directions of the Court and, where applicable, the exercise of the taxing officer's discretion (**Rules 600** & **635**) costs may be allowed for the preparation of the "Desk Divorce" documents notwithstanding the "Desk Divorce" is not granted and a trial or uncontested trial undertaken.

"Desk Divorces" & the Uncontested 50% Rule - Notwithstanding a desk divorce is "uncontested", its specific inclusion in subsection **(1)** excludes it from the application of the subsection **(2)** "uncontested 50%" rule. Note that taxing officers may allow less than the full amount of **(1)** in allowing for the degree of complexity or difficulty involved.

Example of the Application of R. 605(7) & of Item 1(2) -

Facts - Plaintiff submits a Bill of Costs for issuing a Statement of Claim and all documents necessary to obtaining a default judgment of $10,500.00.

Law - Because the Judgment does not exceed the $25,000.00 limit to the Provincial Court's jurisdiction **Rule 605(7)(a)** limits the Plaintiff's costs to 75% of Column 1. Further, because the matter was uncontested (default judgment) **Schedule C**, **Item 1(2)** provides that the costs are further limited to 50%.

Application - Consequently, the Plaintiff's Bill of Costs is limited to a maximum of 75% of Item 1 ($750.00) and, further, to 50% of that figure ($375.00).

Comments - (1) The 50% rule only applies to **Item 1** and not to any subsequent steps taken prior to judgment (such as an assessment under **Rule 152**).

(2) The 75% rule only applies up to and including judgment. Any post-judgment steps are at 100% of Column 1 (see **Rule 605(7)(b)**).

NEW **Note:** See the discussion regarding the transition from the $7,500 to the $25,000 Provincial Court limit and its application to **Rule 605(7)**, above at page 11.

Filing an Amended Document - **Rule 141** says that, where leave is required, the party doing the amending must bear the cost, unless otherwise ordered by the court.

Judicial Review - A "record" is not a "Pleading". See **Item 3**.

Parental & Maintenance Proceedings - **Item 1** cannot be claimed for the preparation, filing and serving of the Affidavit and Summons associated with Parentage & Maintenance proceedings. It is suggested that if the *initial* appearance before the Court proceeds uncontested that **Item 6(1)** for an uncontested application be claimed and if it proceeds contested that **Item 7(1)** for a contested application be claimed. Any proceedings subsequent to the initial appearance would be as per any normal litigation matters.

NEW However, see *Gero v. Joseph* 1999 CarswellAlta 1066, [1999] A.J. No. 1325, 1999 ABQB 883 (Q.B) where Veit, J. allowed the full $1,000 for Item 1(1), plus $100 for obtaining an Order for substitutional service, disallowed preparation for trial, but allowed $1,000 for an uncontested trial relative to s. 7 expenses. We are perplexed by the allowance of costs for Pleadings and await further direction before adopting that practice.

NEW
Reciprocal Enforcement of Judgments - To the extent that the procedure followed is that of making an *ex parte* application and paying the $200.00 filing fee, your Bill of Costs may claim **Item 6(2)** - *Ex Parte* Applications and the filing fee. Nothing is recoverable under **Item 1(1)** - Pleadings.

"Pleadings" defined - Rule 5(1)(m) - "'Pleadings' means the written statements delivered alternately by the parties one to the other until the issues in the action are defined and include, a statement of claim, a statement of defence, a counterclaim, a defence to counterclaim, a reply, a reply to defence to counterclaim, a joinder of issue, a demand for particulars, a reply to demand for particulars, an originating notice and a petition." An Appointment for Taxation, a Notice of Motion for interlocutory purposes, an Affidavit, and a Certificate of Readiness are not "pleadings". (For a more detailed analysis of what does and what does not qualify as a "Pleading" see *Procinsky v. Biel* [1999] A.J. No. 692 and *Golda v. Aetna* [2001] A.J. No. 1494.)

UPDATED
Taxing Officer's Discretion to Reduce from the Maximum - See **Rule 605(1)** and **Rule 605(1.1)**, above at page 4.

Waiver of Filing Fees — Legal Aid / Restraining Orders -

Legal Aid - **Rule 586.1** provides that the Clerk's Filing Fees for commencement documents are to be waived by the Clerk if a subsisting Legal Aid Certificate is presented with the document to be filed.

Rule 440.1 Restraining Order - **Rule 586.2** provides that the Clerk's Filing Fees for commencement documents are to be waived by the Clerk if (a) the document being filed is for the purpose of obtaining a restraining order pursuant to **Rule 440.1**, and (b) no relief other than a restraining order is being sought.

Item 2

Uncontested trial appearance

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
200	400	600	800	1000

Examples - **Rule 568(4)(f)** - Uncontested trial for Decree Nisi pursuant to the direction of the Court in refusing to grant a desk divorce.

Rule 152(b) - Uncontested assessment hearing as per directions of the Court in Default Judgment proceedings.

Uncontested Trial Defined - In *Gero v. Joseph* 1999 CarswellAlta 1066, [1999] A.J. No. 1325, 1999 ABQB 883 (Q.B) - upheld 2001 CarswellAlta 872, 2001 ABCA 153 (C.A.) - Veit, J., in *obiter*, observed:

NEW Without deciding the issue since it is not necessary to do so in this case, it appears that item 2 is designed to deal with those situations where the party opposite has declined to enter an appearance in the proceedings but where an appearance before a trial judge is required. In coming to that conclusion, I note that item 2 is found under that portion of Schedule C dealing with Pleadings and that it is immediately preceded by item 1(2) which states that the limit of recovery for pleadings is 50% of the amount set out in tariff

item 1(1) "when the matter is uncontested, for example default judgments". A similar context must apply to the interpretation of tariff item 2.

In *Gero* the matter had been set down for trial, the applicant fully expected the respondent to appear, he did not. The Court concluded that “a trial of this sort, where the plaintiff is unaware until she walks into the courtroom that the defendant will not appear, is not an ‘uncontested trial appearance’.”

Discovery

Interrogatories - At present taxing officers are allowing costs related to posing and responding to interrogatories on the following basis:

Q.B. Family Law Practice Note "6" permits a party to file and serve a Notice to Reply to Written Interrogatories in divorce, matrimonial property, parentage & maintenance and domestic relations actions up to a maximum of 15 questions. For doing so the tenderer will be entitled to ½ of **Item 3(1)**, subject to the taxing officer's discretion. A reply is by way of Affidavit and will be similarly compensated.

Part 48, Streamlined Procedure, Rule 662(5) permits discovery by way of written interrogatories of no more than 1000 words. Tender and Reply will be treated the same as above.

Part 26, Evidence Taken Out of Court, Rule 276 permits examination by way of written interrogatories with no limitation. Where the interrogatories and/or answers are of considerable number and length taxing officers may allow **Item 5** or multiples thereof as the circumstances dictate.

Item 3

(1) Document discovery including affidavit of documents and review of opposite party documents[Footnote #1] including statement of property

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
500	750	1000	1250	1500

Footnote #1 ***Judges or masters may award higher or multiples of columns in document-intensive cases, and judges, masters or taxing officers may award lower or fractions of columns in cases where few documents are relevant or one party does not have to either produce or review a significant number of documents.***

It follows that in a contested taxation hearing evidence will be provided as to how document-intensive any given case may have been.

Affidavit of Records - Failure to File Within Time Limit - Failure to file within the prescribed 90 days after receipt of the Statement of Defence (**Rules 187**) makes the offending party liable to pay a penalty (**Rule 190**). **N/B:** The Court, not the taxing officer, imposes this penalty.

Failure to file on time, even when resulting in a costs penalty, does not, unless otherwise ordered by the Court (**Rule 190 & 190.1**), preclude recovery of the costs of the affidavit's production. Unlike **Rule 538(1)** which specifies that a party which has failed to file a factum within the time limit "shall not be entitled to costs for the preparation of the factum" unless otherwise ordered, **Rules 187, 190 & 190.1** are silent as to the tardy party's entitlement to its own costs for filing its Affidavit of Records.

Judicial Review - It is suggested that the "return" & the "record" are not "Pleadings" (**Item 1**), but should, if anything, fall under **Item 3(1)**. As noted in the *Alberta Rules of Court*, Court of Appeal Practice Notes, Form F, p. 10.3.30, "Return of the . . ." falls under "Part II - Evidence".

Related Rules & Practice Notes - Part 13 - Division 1 - Discovery of Records

"Relevant & Material" - Given the specific discretion endowed on taxing officers by "Footnote #1" **Rule 186.1** is noteworthy:

> "186.1 For the purpose of this Part [13], a . . . record is relevant and material only if . . . the record, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings."

(See *Dorchak v. Krupka* (1997) 196 A.R. 81 (C.A.) & Veronique Abele, "Summary of Law, Affidavit of Records" (1999) ***New Discovery Rules***, L.E.S.A., October, for a succinct review of what ought and what ought not to be included in an Affidavit of

Records, and how to include it)

Two Part Discovery - Note that this Item contemplates the taking of at least two steps in order to qualify for the whole fee: preparation of an Affidavit of Documents and review of the opposite party's documents. Subject, of course, to the discretion afforded in **Footnote #1**.

"Unduly Expensive or Cumbersome" - **R. 189.1** provides

> "In a very long trial action, the case management judge may establish a mechanism for the production or description of the records in the affidavit of records when the number, nature or location of the records makes production or description in the normal course unduly expensive or cumbersome."

Failure to take advantage of this option might occasionally result in the disallowance of unnecessary expenses.

Item 3

(2) Notice to Disclose and Reply on matrimonial matters (unless otherwise ordered)

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
250	–	–	–	–

Examination of Opposing Party's Reply - The costs recoverable for reviewing the documents provided with the opposing party's Reply fall under **Item 3(1)**.

Two Step Fee - As a general rule, to qualify for the full $250.00 one must prepare and serve both a Notice to Disclose and a Reply to the opposing party's Notice to Disclose.

Item 4

Notice to admit facts, opinion or non- adverse inference or the admission of any of these where, in the opinion of the Court, the notice or admission resulted in expediting the case or better defining the matters in question

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
200	400	800	1200	1600

"Opinion of the Court" - This Item is at the discretion of the Court and the Order or Judgment occasioning the Bill of Costs ought to specifically address the allowance of this cost.

NEW

Some Cases to Consider:

- *Millott Estate v. Reinhard*, [2002] A.J. No. 1453 (AltaQB) - Notice to Admit Facts para 33-36, Notice to Admit Opinions para 37-39, Notice to Admit Documents para 40.
- *Parrish & Heimbecker Ltd. v. All Peace Auctions Ltd.*, [2002] A.J. No. 998 (AltaQB) - Agreed Statement of Facts para 16-20.
- *Castillo v. Go*, [2000] A.J. No. 842 (AltaQB) - Notice to Admit Facts & Agreed Statement of Facts para 7.
- *PBX Properties Ltd. v. Cowan Drugs* (1975) Ltd., [1998] A.J. No. 1215 (AltaQB) - Agreed Statement of Facts para 21.

Related Rules & Practice Notes - Part 20 - Admissions (Rules 230 - 231)

Oral Discovery

Item 5

	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
First ½ day or portion of it for attendance for examination of parties or witnesses or cross-examination on an affidavit	500	750	1000	1250	1500
Each additional ½ day	500	750	1000	1250	1500

(When attending counsel is acting for neither witness nor examining party, 50% of these amounts)

Additional Half Days - The practice has arisen in both Calgary and Edmonton of allowing only one (1) "first half day" fee per action. Any examination after that "first half day" is an "additional half day".

Allow Full 1st Half Day - The fee for the 1st half day will be allowed in whole, even though a full 2½ hours may not be occupied.

Bill of Costs Must Identify Counsel's Status - In light of this Item's 50% provision, any Bill of Costs claiming **Item 5** must identify counsel's status vis-à-vis the party examined. "Examinee" - counsel acts for the party being examined. "Examiner" - counsel acts for the party examining. "Observer" - counsel acts for a party to the action, but who is neither being examined, nor examining.[1]

NEW

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[1] Regarding "observer" status see *Edmonton v. Lovat Tunnel* 2002 CarswellAlta 1467, 2002 ABQB 1033:

> [145] The City, . . . in its calculation of costs for examinations for discovery . . . reduced the costs to Rotek for those occasions when counsel for Rotek was neither acting for the witness nor undertaking the examination. Ordinarily, that would be the correct approach in accordance with Item 5 of Schedule C, which awards one half of the normal amount when attending counsel is simply observing.
>
> [146] However, in the present case, Rotek and Lovat agreed to split the examinations for discovery of the City's officer and employees so that counsel for Lovat would ask questions pertaining to the tender and pre-failure time period and Rotek to subsequent events. The party not examining could supplement with questions of their own and it was agreed that the examinations conducted by one would be considered the examinations of the other party.
>
> [147] As the answers were adopted, it can be said that counsel was acting for the examining party, even if they were silent. In any event, the amount of preparation would be similar as the non-examining counsel would have to ensure that all necessary questions were asked either by counsel for the other defendant or by them.
>
> [148] Costs should be calculated on the basis of the time reflected on the chart prepared by the City under the column headed " Commenced/ Adjourned & Duration" (Tab 12). However, counsel for Rotek should be credited as examining counsel when examinations were conducted of the City's officer or employees.
>
> [149] I do not accept the City's suggestion that costs should be reduced because Rotek duplicated and repeated some questions. The agreement between Lovat and Rotek reduced the overall amount of time spent in examination for discovery and under the circumstances a certain amount of duplication can be forgiven as can a certain number of questions relating to irrelevant matters.

Calculation of "Half Day" - The number of "half days" is calculated by adding up the total number of hours of Examination and dividing by 2½ (see "Analysis of *Van Campenhout v. Gov't. of Saskatchewan*" at page 41 hereafter for an explanation of how this practice was arrived at). The 2½ hours is no longer prescribed by the Rules but is a convention carried over from the pre-September 1, 1998, **Schedule C**.[1]

NEW

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[1] Practice approved in *Schuttler v. Anderson* (1999) 246 A.R. 17 (Q.B.) at para. 25-26, in *Hughes v. Gillingham* 1999 ABQB 747 at para. 12 and in *Edmonton v. Lovat Tunnel* (Q.B.) (above, at para. 159 and at para. 160 where special allowance was made for "compressed trial days"). Note: the writers take the view that while these cases related to "trial time," Item 11 they apply equally to "discovery time," Item 5.

Must be a Party "Adverse in Interest" - See **Rule 200**. See too *Keystone Shingles and Lumber Ltd. v. Royal Plate Glass* (1955) 16 W.W.R. 222 (B.C. S.C.).

Must be "Relevant and Material Questions" - See **Rule 200(1.2)**. See too *Rose and Laflamme Ltd. v. Campbell et al* (1955) 16 W.W.R. 222 (Sask. C.A.).

No Shows - Because of **Rule 605(3)** the fee herein is not limited to time spent in actual cross-examination but is intended to also compensate for putting in one's time on "no shows" in order to qualify for a Certificate of Non-Attendance (**Rule 216**).

Require Court's Direction - Note the following restraints on the taxing officer's jurisdiction:

a/ **Rule 378 -** Relative to **Part 28 - Enforcement of Judgments & Orders, Division 5 - Information Regarding Enforcement Debtors** "the costs of any examination . . . are in the discretion of the court."

b/ **Rule 200(3)** - "The costs of examining more than one employee shall, unless the court otherwise orders, be borne by the party examining."

c/ **Rule 662(1)** Relative to **Part 48 - Streamlined Procedure** "no party or representative designated by a party under Rule 214 shall be examined for discovery for more than a total of 6 hours of actual examination . . .."

Applications

Applications to Clerk of the Court - Applications formerly permitted under Item 12 - Applications to Clerk may now be allowed under **Items 6** or **7**, with some of these applications' fees, in the taxing officer's discretion, possibly being reduced due to their more summary nature.

Examples: settling minutes of an Order or Judgment (**Rule 318**); fixing the amount of conduct money (**Rule 612**); review of contingent (**Rule 619**) and non-contingent (**Rule 646**) fee agreements.

Fees Related to Taxation of a Bill of Costs - **Items 32 & 33** in the old **Schedule C** are now treated in the following manner:

Party & Party Bill of Costs:

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)** would apply, unless otherwise directed by the taxing officer.

Solicitor and Client Bill of Costs:

Client initiated taxation: **Rule 629** permits taxing officer (in limited circumstances) to award costs against the client. If the amount is not fixed by the taxing officer then **Items 6(1)** or **7(1)** would apply. **N/B:** the **Rule** is specific that no costs flow against the client unless the taxing officer so directs - in other words, silence does not constitute an award of costs.

Solicitor initiated taxation: **Rule 629** specifically precludes a taxing officer from awarding costs against the client. Leave of the Court must be obtained, in which case **Items 6(1)** or **7(1)** would apply.

Motion Initiated Prior to But Concluded At Trial - In *Canadian Egg Marketing Agency v. Richardson* [1997] N.W.T.J. No. 68 an application was initiated by way of Notice of Motion and supporting Affidavit. By telephone conference call the application was directed to be heard during the upcoming trial. At trial Wachowich, A.C.J.Q.B. (as he then was) ruled that the applicant was entitled to 1/3 of the contested application Item (for preparation of the Notice of Motion & Affidavit, service of same, and preparation for the application), but that the hearing itself was subsumed in the Counsel Fee at trial.

Pre-Hearing Telephone Conferences - In *Canadian Egg Marketing Agency v. Richardson (c.o.b. Northern Poultry)* [1997] N.W.T.J. No. 68 (N.W.T.S.C.) Wachowich J. (as he then was) offers three (3) ways in which the costs of these "conferences" might be addressed:

"(1) If Orders resulted from the conferences, then costs should be allowed under this item pursuant to the appropriate headings (Consent, Simple, Complex, Opposed and Unopposed) [our Items 6, 7 or 8].

"(2) If the conferences were an extension of later hearings for which the Applicants have already claimed costs, this Item may be denied or only proportionate costs awarded on the authority of Rule 648(2) [our Rule 605(3)] . . .

"(3) If the Court determines that an allowance for costs are in order for these items (for example, if a case management judge orders the telephone conferences as part of the on-going preparations for trial), it has the discretion to order costs for specific items. However, this discretion should be reserved for occasions where there is no corresponding item in the tariff schedule: *Eileen's Quality Catering Ltd. v. Depaoli et al* (1985) 1 C.P.C. (2d) 152 (B.C.S.C.).

"Rule 648(5) [our Rule 605(4)] also authorizes the court to award costs for a service performed by a solicitor which is not listed in Schedule A [our C]."

Summary Trials - Part 11 - Summary Judgment, Division 1 - Summary Trials (see **"Trial"**, below)

Item 6

(1) Uncontested applications

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
300	400	600	700	800

Application of Rule 605(3) - In order to claim the full amount of this Item it is anticipated that a Notice of Motion and supporting Affidavit will have been filed and served, an actual appearance made in Court, and an Order filed and served. Anything less will likely result in a proportionate reduction from the full amount.

Consent Order - Where the respondent's consent is obtained only after filing and serving of a Notice of Motion and Affidavit the full **6(1)** fee will be recoverable. However, a Consent Order obtained without the issuance of a Notice of Motion and Affidavit only merits **6(2)**.

NEW To the contrary, see *Diamond Park Builders Ltd. v. Conlee Construction Ltd.* [2002] A.J. No. 622 (Q.B) where it was concluded that "there is no tariff item for consent orders. It may be that the Rules of Court should be amended to allow most consent orders to be filed without a court appearance." This decision exemplifies a failure to apply **Rule 605(4)** to imply the application of **6(1)** or **6(2)**, or **Rule 4** to find an analogous item in the **Schedule**. There is compensable work associated with negotiating, preparing and filing a Consent Order, even if one did not have to appear in court. We will continue to allow costs for consent orders.

Notice of Motion Must be Filed - In order to claim **Item 6(1)** over **Item 6(2)** a Notice of Motion must have been filed and served.

Originating Notice - If an application is initiated by Originating Notice (**Part 33**) the party may be entitled to both **Item 1 - Pleadings** and **Item 6, 7 or 8 - Applications**, however with some adjustment made to the latter per **Rule 605(3)** for not having to file a separate Notice of Motion for the application.

Preamble of Order - The preamble of the applicable Order should disclose whether the application was or was not opposed.

Item 6

(2) Ex parte applications

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
100	100	100	100	100

Includes Fiats - To avoid any confusion, this Item does include the obtaining of a Fiat, as a Fiat is a decree or short order. Fee should be proportionate to the amount of work involved; note whether an Affidavit in support was filed, or not. N/B: only disallow the cost of obtaining a Fiat if the Court has denied the costs of obtaining same.

Item 7

(1) Contested applications before a master, judge or taxing officer

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
500	750	1000	1250	1500

Application of Rule 605(3) - In order to claim the full amount of this Item it is anticipated that a Notice of Motion and supporting Affidavit will have been filed and served, an actual appearance made in Court, and an Order filed. Anything less will likely result in a proportionate reduction from the full amount.

Motion to Amend Pleadings - The costs occasioned by an amendment include the costs of the Motion itself: *Massey-Harris v. Kindrachuk* (1930) 2 W.W.R. 272 (Sask. Q.B.). **Rule 141** provides that costs occasioned by an amendment shall be borne by the party making it unless the Court otherwise orders.

Originating Notice - See "Originating Notice" above at **Item 6**.

Item 7

(2) Matrimonial special applications where no brief required

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
750	1000	1250	1500	1750

"Matrimonial special application" defined - Most Family Law Chambers Applications of more than 20 minutes fall under **Item 7(2)** rather than **Item 8**. The only exceptions would be (a) circumstances where the court has specifically requested a brief, or (b) when the Application is placed on the Civil Trial List, in which case **Item 8** would apply.

Q.B. Family Law Practice Note "3" (B)(2): "A Special Family Law Chambers Application is a contested chambers application in respect of a family law matter likely to take more than 20 minutes but not more than one hour to argue. Matters likely to require more than one hour for argument must have special leave of the Court obtained through the Chambers Clerk before they can be set down for Special Family Law Chambers. Applications likely to take more than a half day shall be placed on the Civil Trial List. The practice governing Special Family Law Chambers Applications shall apply to Family Law Applications placed on the Civil Trial List."

Consequently, a brief is required in "matrimonial special chambers" only when the Application is placed on the Civil Trial List. Otherwise, the only requirement is the provision of "Information Sheets" (Family Law Practice Note "3" (B)(3)).

Item 7

(3) Contested adjournment applications

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
150	150	150	150	150

Must be Opposed - It is the practice to only allow this Item if the adjournment is opposed in court.

Uncontested . . . Yet You Appeared? - The **Schedule** could not be much clearer. Only get this **Item** if opposed and in court.

Item 8

Special Chambers applications when brief required or allowed by the Court

"Allowed by the Court" - This is a change from the old **Item 27**. One would think that this wording would overcome the conclusion reached in *Nova v. Guelph Eng. Co.* (1988) 60 Alta. L.R. (2d) 366 (Q.B.) wherein the Court advised counsel they could tender written submissions "if they wished". The Court disallowed [then] **Item 27** since this constituted an accommodation, not a request, by the Court. However, it will still be incumbent on a claimant of this Item to substantiate that the Court at least "allowed" the submitted brief, if it was not otherwise required.

"Brief Required" -

Justice's Special Chambers: Civil Practice Note "6"(B)(8) requires that each party submit a written brief.

Matrimonial Special Chambers: Family Law Practice Note "3", (B)(2) only requires a brief if the Family Law Application is placed on the Civil Trial List. In all other circumstances only an "Information Sheet" is required.

Master's Special Chambers: There is no standing requirement that any party submit written briefs in hearings before a Master.

However, note *Acquest/Alberta Mining Inc. v. Barry Developements Inc.* [1999] A.J. No. 1313. Hutchinson, J. concluded at para. 17 &18 that while the application before him did not technically qualify as a "special chambers application" because briefs were not filed, he was allowing **Item 8** because (a) the application was booked by the chamber's clerk as a judge's special, (b) the application ran for 3 hrs. & 55 minutes, &

(c) written arguments (not briefs) were requested after the judge reserved.

Civil Claims Appeal, Costs of . . . - See "Annotation of Schedule C", above at page 15.

Originating Notice - See "Originating Notice" above at **Item 6**.

"Special Chambers application" defined - Civil Practice Note "6" (A)(1)(b): "A Special Chambers application is a contested Chambers application other than a family law matter likely to take longer than 20 minutes to argue but not longer than a half day. It includes any appeal from the decision of a Master."

NEW

Viva Voce Evidence Permitted - Effect on Costs - Instances exist where the Court has, during the course of a Special Chambers Application, permitted *viva voce* evidence (see **Rule 267**). The Court, in its discretion, has been known to allow **Item 8** as well as a portion of **Item 10 - Preparation for Trial**. It is recommended that in such circumstances a direction from the Court allowing **Item 10** be obtained.

Item 8

First ½ day or portion of it

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
1000	1250	1500	1750	2000

Allow Full 1st Half Day - The fee for the 1st half day will be allowed in whole, even though a full 2½ hours may not be occupied.

Item 8

Each additional ½ day (limited to ½ day unless otherwise ordered by the Court)

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
500	625	750	875	1000

For complex chambers applications, the Court may direct that costs relating to item 15 apply

"Complex Chambers" Defined - In *Acquest/Alberta Mining Inc. v. Barry Developements Inc.* (above) the court, at para. 18, did not find the application to be "of sufficient complexity" as to "warrant the application of Item 15". This despite the $6 million value of the matters in issue in the action, the 4 hrs. spent in chambers, the request for written argument, and the 141.7 hours of counsel's time spent in preparation for and participation in the application.

"Ordered by the Court" - If the application goes over 5 hours (2 half days) a direction of the Court will be required in order to obtain any additional costs.

Item 9

Each pre-trial conference and case management attendance, including preparation and all steps taken in connection with it, including interlocutory applications if heard during those conferences or attendances.

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
250	400	600	800	1000

Taxing Officer's Discretion - Given the perfunctory nature of some of these PTC/CMMs (e.g.: a 5 minute telephone conference call to report compliance with deadlines set at the last PTC/CMM) a taxing officer may adjust the allowed fee to suit the circumstances.

Consider too *Canadian Egg Marketing Agency v. Richardson (c.o.b. Northern Poultry)* above at p. 25.

Related Rules & Practice Notes - UPDATED

Pre-Trial Conferences:

Part 16 - Pre-Trial Conference (Rules 219, 219.1)
Part 48 - Streamlined Procedure (Rule 665)
Q.B. Civil Practice Note “2" - Civil Jury Practice Note (7-9)
Q.B. Civil Practice Note “3" - Pretrial Conferences (1-15)
Q.B. Civil Practice Note “4" - Setting Down for Trial (5, 8, 10)
Q.B. Family Law Practice Note “5" - Family Law Pretrial Conferences (A & B)

Case Management:

Part 1 - Definitions & Introductory Matters (Rule 5 (1)(b.1)
Part 13 - Discovery - Documents (Rule 186.1)
Part 15.1 - Very Long Trial Actions (Rules 218.6, 218.8, 218.9)
Part 16 - Pre-Trial Conference (Rule 219.1)
Part 24 - Delay in Prosecution of Action (Rule 244.4)
Q.B. Civil Practice Note “1" - Case Management (1-58)
Q.B. Civil Practice Note “4" - Setting Down for Trial (8)
Q.B. Civil Practice Note “7" - Very Long Trial (1-56) - for actions commenced prior to Sept. 1, 2001
- all other actions are subject to CPN “1" (40-41)
Family Law Practice Note “5" - Family Law Pretrial Conferences (A)(II) & (B)(5)
C.A. Practice Notes - Notices to the Profession - Draft Case Management Practice Directive (starting at p. 10.2.6)

Trial

Summary Trials - Part 11 - Summary Judgment, Division 1 - Summary Trials are commented upon in the December 2000 update of Q.B. Civil Practice Note No. "8", para. 14:

> "Schedule 'C' does not specifically reference Summary Trials. However, items 10 (modified as appropriate in regard to footnote 2 thereof) and 11 would appear adequate in accordance with the Court's discretion on costs. Note that the fees in item 11 are identical (except for 2nd counsel fees) to item 8 for special chambers."

Item 10

Preparation for trial *Footnote #2*

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
2000	4000	6000	8000	10000

Footnote #2 ***Item 10, preparation for trial, may be varied up or down depending on the length and complexity of the trial.***

NEW

Preparation for Trial: An Overview

Introduction:

Prior to September 1st, 1998, preparation for trial was easily calculated by adding up how many witnesses were "examined" or "their evidence briefed" after the filing of the "Certificate of Readiness" and multiplying it by the appropriate fee amount.

Since the amendment of ***Schedule C***, ***Item 10*** now tersely - yet broadly - allows compensation for "Preparation for trial." It provides a maximum fee amount per Column which the taxing officer may allow, with the proviso that "preparation for trial, may be varied up or down depending on the length and complexity of the trial."

> **Note:** a taxing officer has no authority to increase ***Item 10*** beyond the maximum dictated by ***Schedule C***. **Rule 605(1)** specifically prohibits a taxing officer from increasing fees beyond the amounts prescribed in **Schedule C**:
>
> > "Unless otherwise ordered the charges of barristers and solicitors provided by Rule 600 shall be determined by the taxing officer, but shall not exceed the amounts set out in the columns of Schedule C, depending upon the amount involved."
>
> Consequently, only the Court may vary **Item 10** "up".

There are few Alberta decisions which speak to what constitutes "preparation for trial." Ontario has had a similar tariff item for many years and its case law is useful in giving some guidance to lawyers and taxing officers as to what constitutes "preparation for trial." Even it is limited in value since the Ontario's fee tariff sets a minimum to be allowed and leaves it to the discretion of the assessment officer to increase it. Some useful commentary can be found in Mark M. Orkin's, ***The Law of Costs*** (2nd e., 16th rel. 2001) 705.7.

Point in the Action When Preparation Begins or Ends:

Generally: Previously, preparation for trial began after the filing of the Certificate of Readiness. That starting point no longer applies.

The Law of Costs (above) observes,

> "The general principle has been stated that the tariff item relates to work done after it has become likely that the case will proceed to trial and with a view to the proper presentation of the case when called for trial: *Hazelton v. Quality Products Ltd. and*

Heywood, [1971] O.R. 1 (C.A.)."

And,

> ". . . preparation work performed prior to commencement of the action may be allowed if incurred in preparation for trial as contrasted with preparation for other steps in the action: *Waters v. Smith*, [1973] 3 O.R. 962 (H.C.J.);"

a proposition which assessment officers in Ontario have generally chosen not to follow.

Mr. Orkin continues:

> "The amount of time allowed for preparation should not be arbitrarily reduced on the view that trial preparation is that which immediately precedes trial: good trial preparation, it has been said, commences when the client walks in the door: *Schlau v. Boyesko* (1989), 17 A.C.W.S. (3d) 1003 (Ont. H.C.J.)."

To date, Alberta cases tend to consider what **steps or activities** constitute "preparation for trial", not at what point in time they may or may not be permitted. However, this latter consideration is relevant when matters settle before "preparation for trial" is completed.

"Preparation" After Commencement of Trial: ***The Law of Costs*** (above) observes that, in Ontario, trial preparation "after commencement of the trial" is permitted only in "exceptional cases (*Cavotti v. Cavotti* (1987), 22 C.P.C. (2d) 109 (Ont. Assessment Officer))." In our ***Reid v. Stein***,1999 CarswellAlta 397, 73 Alta. L.R. (3d) 311, [2000] 2 W.W.R. 349, 253 A.R. 90 (Q.B.) (at paragraph 54) the Court allowed that "preparation for trial" may include "preparation each day of the trial after court recessed for the day."

This is in keeping with the writers' practice which recognizes (a) that briefing of some witnesses does not occur until after the commencement of trial and (b) ***Item 12, Trial*** allows for time in trial only, not for daily preparation.

Components & Stages of Preparation:

Assessing "preparation for trial" when the matter goes to and proceeds through trial affords a host of factors for consideration:

1. number and type of witnesses,
2. factual and legal complexity of the trial,
3. length of the trial,
4. amounts sought and recovered,
5. importance of the issues, and more.

When the action settles, discontinues, or is adjourned with 'thrown away costs' the aforementioned factors have to be considered in combination with an evaluation of what level of preparation was reached relative to the following:

1. preparation and filing (where applicable) of a Certificate of Readiness,
2. vetting of evidence,
3. compilation and collation of exhibits and authorities,
4. preparation for direct and cross-examination,
5. briefing of witnesses,
6. preparation of an agreed book of exhibits,
7. obtain and service of Rule 218.1 statements.

An Agreed Statement of Facts is covered by ***Item 4***, which is allowed at the exclusive discretion of the Court.

In *Pugsley v. Wong* [2000] A.J. No. 273, 2000 ABQB 146, (2000) 265 A.R. 80 (Q.B.), at para. 32-35, the Court accepted the proposition that,

> "Preparation for trial covers several areas and should be divided roughly into three parts: items up to and including service of the Rule 218.1 statements - one-third; briefing of witnesses - one-third; and preparing questions for direct and cross-examination - one-third."

In *Goddard v. Day* 2000 CarswellAlta 1259, 2000 ABQB 799, 86 Alta. L.R. (3d) 293, 276 A.R. 358, 5 C.P.C. (5th) 140 (Q.B.) the Court recognized the following as being "items of preparation" (para. 11-13):

> "(1) Preparation of witness list;
> (2) Correspondence with potential witnesses;
> (3) Preparation of Notices to Attend;
> (4) Discussions with potential witnesses;
> (5) Review and finalization of experts' reports;
> (6) Retention of rebuttal experts;
> (7) Extensive legal search and review of issues of law both substantive and procedural;
> (8) Three preliminary Court Applications dealing with pre-trial issues involving jury selection, file transfer and whether or not this trial should proceed with a jury;
> (9) Review of documents and potential Exhibits;
> (10) Draft preparation of opening and closing statements in preparation of examinations of the parties, including cross-examination of Mr. Day."

Item #8, "preliminary Court Applications", is clearly compensated for elsewhere in ***Schedule C*** : ***Items 6, 7, 8 & 17*** compensate for Interlocutory Applications, and ***Item 9*** compensates for Pre-trial and Case Management Conferences and should not be considered "preparation for trial."

Four Alberta decisions related to the costs of trial adjournment illustrate the need for the court, in assessing "Preparation for Trial," to consider the stage or level of preparation: *Goddard v. Day* (above), *Armstrong v. Foxridge Homes Ltd.* (below), *Kowdrysh v. Delong*, 2001 CarswellAlta 1787, 2002 ABQB 207 (Q.B.), and *Foothills Decorating Ltd. v. Amigo Construction Ltd.*, [2000] A.J. No. 1451, 2000 ABQB 993, 285 A.R. 28, 7 C.L.R. (3d) 217, 8 C.P.C. (5th) 383 (Q.B.). The first three allowed two-thirds of ***Item 10*** while the fourth allowed only half, notwithstanding some of the former were further from trial than the latter.

Factors Considered by Post-September 1998 Alberta Courts:

A large number of post-September 1st, 1998 Alberta decisions, in assessing "preparation for trial," have referred to the factors itemized in ***Rule 601(1)***:

> "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:
>
> (a) the amounts claimed and the amounts recovered,
> (b) the importance of the issues,
> (c) the complexity of the proceedings,
> (d) the apportionment of liability,
> (e) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding,
> (f) a party's denial of or refusal to admit anything that should have been admitted,
> (g) whether any step or stage in the proceedings was
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution,
> (h) whether a party commenced separate proceedings for claims that should have been made in one proceeding or whether a party unnecessarily separated their defence from another party, and
> (i) any other matter relevant to the question of costs."

The ***amounts involved*** were considered in *Schuttler v. Anderson*, [1999] A.J. No. 871, 1999 ABQB 576, 246 A.R. 17 (Q.B.), *Reid v. Stein*, (above), *Beenham v. Rigel Oil & Gas Ltd.*, 1998 CarswellAlta

1182, 240 A.R. 122 (Q.B.), *Vysek v. Nova Gas International Ltd.*, 2001 CarswellAlta 1148, 2001 ABQB 750, 11 C.C.E.L. (3d) 63 (Q.B.), *Troppmann v. Troppmann*, 2000 CarswellAlta 1611, 2000 ABQB 236 (Q.B.), *Wolf v. Shaw*, 1999 CarswellAlta 529 (Q.B.), *Kowdrysh v. Delong*, 2001 CarswellAlta 1787, 2002 ABQB 207 (Q.B.), *B.E. Kennedy Design Ltd. v. Kibo Group Inc.*, [2001] A.J. No. 47, 2001 ABQB 32 (Q.B.), *Ellis v. Friedland*, [2000] A.J. No. 1455, 276 A.R. 364 (Q.B.).

The ***time spent*** or ***anticipated to be spent in trial*** was considered in *Schuttler v. Anderson*, (above), *Vysek v. Nova Gas International Ltd.*, (above), *Gero v. Joseph*, 1999 CarswellAlta 1066, [1999] A.J. No. 1325, 1999 ABQB 883 (Q.B) - upheld 2001 CarswellAlta 872, 2001 ABCA 153 (C.A.), *Goddard v. Day* (above), *Troppmann v. Troppmann*, (above), *Pettipas v. Klingbiel*, [2000] A.J. No. 1289, 2000 ABQB 1289, 276 A.R. 24 (Q.B.), *M.M. v. J.B.* [2001] A.J. No. 1175, 2001 ABPC 164, 289 A.R. 110 (Prov. Ct.), *Ellis v. Friedland*, (above).

The ***complexity of the proceedings***, not necessarily of the trial, was considered in *Schuttler v. Anderson*, (above), *Reid v. Stein*, (above), *Vysek v. Nova Gas International Ltd.*, (above), *Gero v. Joseph*, (above), *Wolf v. Shaw*, (above), *Pettipas v. Klingbiel*, (above).

The ***necessity of steps taken*** or the *conduct of a party which unnecessarily lengthened the proceeding* were considered in *Schuttler v. Anderson*, (above), *Beenham v. Rigel Oil & Gas Ltd.*, (above), *Vysek v. Nova Gas International Ltd.*, (above), *Armstrong v. Foxridge Homes Ltd.*, 1992 CarswellAlta 343, 11 C.P.C. (3d) 230, 136 A.R. 243 at 248 (Q.B.), *M.M. v. J.B.* (above), *Ellis v. Friedland*, (above).

The ***importance of the issues*** was considered in *Schuttler v. Anderson*, (above).

The ***number and type and preparation of witnesses*** was considered in *Schuttler v. Anderson*, (above), *Vysek v. Nova Gas International Ltd.*, (above), *Gero v. Joseph*, (above), *Armstrong v. Foxridge Homes Ltd.*, (above), *M.M. v. J.B.* (above), *Ellis v. Friedland*, (above).

The ***locating and retaining of experts*** was considered to be a task customarily carried out by counsel and compensated for in "preparation for trial" in *Hetu v. Traff*, [1999] A.J. No. 1270, 1999 ABQB 826, 74 Alta. L.R. (3rd) 326, 252 A.R. 304 (Q.B.).

Legal research was considered to be part of preparing for trial in *Hughes v. Gillingham*, [1999] A.J. No. 1158, 1999 ABQB 747 (Q.B.) and in *Goddard v. Day* (above).

Allowance if Witness Not Called - A preparation fee may be claimed for a witness who did not testify if preparation of the witness was reasonable at the relevant time (for case law see Stevenson & Côté, ***Civil Procedure Guide*** (1996), Rule 600(1,vi) C, and see sub-document "Disbursements - Reasonable & Proper"). Eg., opposing party admits a fact or issue just prior to trial, or testimony of opposing party's witness does not require the anticipated rebuttal.

NEW

Mini-trials/JDRs - Recovery for Preparation? - Argument can be made that a portion of the preparation done specifically for a JDR/Mini-trial also qualifies as "preparation for trial" in the sense that had the matter proceeded to trial (as opposed to settling) that "portion" would not have been repeated and would have seamlessly fit into the lawyer's true preparation for the actual trial.

In *Northland Forest Products Ltd. v. Wood Buffalo (Regional Municipality)* [2002] A.J. No. 1106, 2002 ABQB 789 (Q.B.) Clarke J. helpfully addressed the issue of when and how time and effort spent in the preparation for a mini-trial can or cannot be properly claimed as a legitimate "preparation for trial" expense. He discounted the concept unless the mini-trial was held, in his example, a month before trial. See excerpts from the decision below at SC43.

Non-Applicable to Summary Proceedings (like uncontested divorces) - In *Horspool v. Anderson* [1945] 2 W.W.R. 262 (Alta. S.C.) a landlord made an application for possession by Originating Notice. Shepart, J. held that he was not entitled to a "preparation for trial fee" as this Item was not applicable to a summary proceeding and it was not a trial in the ordinary meaning of that term. The applicant was, however, entitled to an opposed Motion Fee (**Item 7 or 8**).

NEW

Preparation of Rebuttal Evidence - For a discussion of the unique circumstances in which trial preparation time may be allowed for presenting rebuttal evidence, see *Diamond Park Builders Ltd. v. Conlee Construction Ltd.* [2002] A.J. No. 622 (Q.B).

NEW

Preparation and Filing of a Certificate of Readiness (disbursement excepted) is one step in "trial preparation" and is recoverable under ***Item 10***. It is not a pleading and cannot be claimed under ***Item 1(1)***. It may be claimed together with a fee for making an Application (***Items 6, 7, 8***) to set the matter down for Trial.

NEW

Preparing, Serving and Accepting of Payments In, Offers of Judgment or Settlement (***Rules 166 - 174***) are not steps in or types of trial preparation. The pre-September 1998 ***Schedule C*** made specific or inferred allowance for them. They are not pleadings. It is assumed that if they warrant compensation, such compensation is amply provided for when the Court grants the cost penalties contemplated by ***Rule 174***.

Waiver of Filing Fees — Legal Aid - **Rule 586.1** provides that the Clerk's Filing Fees for "setting a matter for trial" (**Schedule E**, **Number 1**, **Item 2**) are to be waived by the Clerk if a subsisting Legal Aid Certificate is presented with the document to be filed.

Item 11

Trial:

	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
For first ½ day or portion of it	1000	1250	1500	1750	2000
Second counsel fee (when allowed by trial judge)	500	625	750	875	1000
Each additional ½ day	500	700	900	1200	1500
Second counsel fee (when allowed by trial judge)	250	350	450	600	750

UPDATED

Adjournment of Trial - With the demise of the pre-September 1, 1998, Item 25 - Adjournment of Trial (opposed) one presumes that, in the absence of any direction from the Court, an opposed application to adjourn a trial will be treated as an **Item 7** or **8 - Contested Application**, or possibly an **Item 9 - Pre-trial Conference & Case Management**, dependent in large part on the extent of the argument, the submissions (written or otherwise) and the point-in-time that the application occurs relative to the date of trial.

Some recent cases and a unique set of circumstances wherein the Court did not allow costs of an adjournment can be found in *Northland Forest Products Ltd. v. Wood Buffalo (Regional Municipality)* [2002] A.J. No. 1106, 2002 ABQB 789 (Q.B.) Clarke J..

Allow Full First 1/2 Day - The whole of the first 1/2 day fee may be allowed even though the full 2 1/2 hours may not be used.

Calculation of "Half Day" - The number of "half days" is calculated by adding up the total number of hours of trial (use clerk's notes for time entries) and dividing by 2½ (see "Analysis of *Van Campenhout v. Gov't. of Saskatchewan*" at page 41 hereafter for an explanation of how this practice was arrived at). The 2½ hours is no longer prescribed by the Rules but is a convention carried over from the pre-September 1, 1998, **Schedule C**. This practice was followed by the Court in *Hughes v. Gillingham* [1999] A.J. No. 1158, 1999 ABQB 747, after consideration of the *Van Campenhout* decision. See too *Edmonton v. Lovat Tunnel* 2002 CarswellAlta 1467, 2002 ABQB 1033. NEW

Clerk's Notes Resolve Disputes - If there is a dispute as to the actual time spent in trial it would be beneficial to produce the Clerk's notes.

NEW

Cost Consequences of Trial Adjournment - In *Goddard v. Day* 2000 CarswellAlta 1259, 2000 ABQB 799, 86

Alta. L.R. (3d) 293, 276 A.R. 358, 5 C.P.C. (5th) 140 (Q.B.) Ritter, J. identified three categories of trial adjournment:

Fault of one of the Parties: Neglect to call a witness, last minute amendment required. "Invariably [result in] the payment of thrown away costs. For example, . . . *Vincent v. Foster* (October 5, 1992), Doc. Victoria 90/07/50 (B.C. Master); aff'd (March 1, 1993), Doc. Victoria 750/90 (B.C. S.C.). ". . . whoever is at fault resulting in cost is responsible for that cost."

Court Scheduling Problems: "Where the adjournment arises as a result of necessity without an Application by either party, then no costs are awarded, because there is no party to award costs against (See, for example, *Macdonell v. Perry* (1904), 10 B.C.R. 326 (B.C. Co. Ct.); *Union Carbide Canada Ltd. v. Scott-Foster Ltd.* (1964), 46 W.W.R. 442 (B.C. S.C.); *Okanagan Prime Products Inc. v. Henderson* (August 2, 1995), Doc. Kelowna 8793 (B.C. S.C.) clarified at (October 4, 1995), Doc. Kelowna 8793 (B.C. S.C.); *William Hamilton Manufacturing Co. v. Victoria Lumber Co.* (1896), 5 B.C.R. 53 (B.C. S.C.); and *Moore v. Dhillon* (January 14, 1992), Doc. Quesnel 1043 (B.C. Master))."

Responsible for the Adjournment, Fault or Not: "Being responsible for an adjournment, in my view, carries with it a cost consequence." See: *Incandescent Revolution Manufacturing Co. v. Gerling Global General Insurance Co.* (1989), 33 C.P.C. (2d) 21 (Alta. Q.B.) (witness' health made appearance unreasonable).

Ritter, J. distinguished decisions which suggested that "diligent efforts to secure the attendance of witness within the jurisdiction of the court fail for a cause beyond party's control, . . . costs of the adjournment should be in the cause." See*Brown v. Porter* (1886), 11 T.R. 250 (Ont. C.P.) & *Vivian v. Wolf* (1884), 2 Man. R. 122 (Man. Q.B. [In Chambers]).

Delay Caused by the Court - The following expands upon the foregoing:

In *MacDonell v. Perry* (1904) 10 B.C.R. 326, the Court stated that no costs of an adjournment of a trial would be allowed to the successful party where the adjournment was caused by reason of there being no courtroom available.

See also *Union Carbide Canada Ltd. v. Scott-Foster Ltd.* (1964) 46 W.W.R. 442 (B.C. S.C.) where a trial had to go over by reason of the state of the list. The Court held that costs could not be allowed to either party.

In the *William Hamilton Mfging Co v. The Victoria Lumber Co.* (1896) 5 B.C.R. 53, the costs of the day of a trial thrown away by reason of the absence of the Trial Judge were not allowed. The Court held that the unsuccessful litigant was in no way to blame for an occurrence which might be described as "the law's delay".

In *Stewart v. IAC Ltd.* [1949] 1 W.W.R. 944 (B.C.) Whittaker, J. stated at p.944:

> "...The attendance of the parties and their counsel was required in Court on six separate days although the trial consumed in the aggregate approximately only 11 hours. One of the adjournments was granted at the request of plaintiffs' counsel, the others were necessitated by the congested condition of the trial and chambers lists. I think that is a chance that litigants and their counsel must take. I do not think that the circumstances supply any special reason for ordering taxation on a higher scale."

Failure to Comply with Rule 218.1 - Opinion varies on whether or not a fee should be allowed for examining a witness that could not be called at trial due to a failure to comply with **Rule 218.1**.

Motion Initiated Prior to But Concluded At Trial - (see **Applications** - at p. SC25)

Second Counsel - Direction for second counsel fees must be obtained from the Court.

Item 12

Submission of written argument at the request of the trial judge or where allowed by the trial judge

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
1000	2000	3000	4000	5000

"Allowed by the Court" - This is a change from the old **Item 27**. One would think that this wording would overcome the conclusion reached in *Nova v. Guelph Eng. Co.* (1988) 60 Alta. L.R. (2d) 366 (Q.B.) wherein the Court advised counsel they could tender written submissions "if they wished". The Court disallowed [then] **Item 27** since this constituted an accommodation, not a request, by the Court. However, it will still be incumbent on a claimant of this Item to substantiate that the Court at least "allowed" the submitted brief, if it was not otherwise required.

NEW

Two Sets of Written Submissions - In *Ellis v. Friedland* 2000 CarswellAlta 1558, 276 A.R. 364 (Q.B.) McMahon, J. acknowledged that **Rule 605(4)** permits the ***Court*** to allow costs for two or more written submissions:

> 9 Both parties submitted pre-trial briefs of law and post-trial written arguments. Mr. Justice Power ordered the former, and I ordered the latter. Schedule C only provides for one set of written arguments, although R.605(4) could arguably be used to compensate the defendant for both sets. In these circumstances, however, costs are only appropriate for one set of written argument. Although both were ordered, there is extensive overlapping between them. In addition, double costs were awarded above, so that the written argument compensation is already $10,000. That is sufficient.

Appeals

Item 13

All steps taken to file Notice of Appeal and speak to the list

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
200	300	400	500	600

Civil Claims Appeal, Costs of . . . - For costs related to an appeal from the Provincial Court Civil Division to a Q.B. Justice please see **Preamble to Annotation** (above, at pp. 15).

Multiple Speaking to the List - Due to the specific wording of this Item - "all steps taken" - this Item will likely be allowed only once, in the absence of some direction from the Court.

NEW

"Steps Taken" - Item 13 would normally consist of (1) preparation, filing and service of Notice of Appeal (**Rules 506 & 510**), (2) production of court file (**Rule 513**), (3) service of proposed agreement as to contents of the appeal book, approval of and filing of appeal book(s) - applications excepted (**Rule 515**), and (4) speaking to the List.

Waiver of Filing Fees — Legal Aid - **Rule 586.1** provides that the Clerk's Filing Fees for "a notice of appeal and all subsequent filings" (Schedule E, Number 2, Item 1) are to be waived by the Clerk if a subsisting Legal Aid Certificate is presented with the document to be filed.

Item 14 UPDATED

Preparation for appeal

	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Preparation of factum	1000	2000	4000	6000	8000
All other preparation	500	1000	2000	3000	4000

NEW

Change to Item 14 - 2003 - The splitting of "Preparation for Appeal into "factum" and "other" makes it easier to facilitate the results of **Rule 538(4)**, late filing of a factum.

Late Factum . . . No Costs - Rule 538(4) - If a factum is filed late, no costs are allowed for preparation of the factum unless the Court otherwise orders.

Item 15

Appearance to argue before Appeal Court for first ½ day or part of it:

	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
First counsel	1000	1500	2000	2500	3000
Second counsel (when allowed by the Court)	500	750	1000	1250	1500

Item 11 - Note comments under **Item 11**.

Item 16

Appearance to argue before Appeal Court for each full ½ day occupied after the first ½ day:

	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
First counsel	500	750	1100	1300	1600

Second counsel (when allowed by the Court)	–	375	550	650	800

Item 11 - Note comments under **Item 11**.

Item 17

Appearance on contested application before Appeal Court, including brief	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
	750	1250	1750	2000	2500

Application of Rule 605(3) - If no "brief" was submitted a downward adjustment will likely be made in the fee allowed.

"Brief" - Presumably refers to the "memorandum" required to be submitted by Court of Appeal Consolidated Practice Directions (F)(1-9).

NEW

Interlocutory Applications in Court of Appeal are Subject to Rule 607 - In *Rushton v. Condominium Plan No. 8820668* [1998] A.J. No. 720, 1998 ABCA 217, (1998) 219 A.R. 51, (1998) 23 C.P.C. (4th) 7 (C.A.) referred to and applied the **Rule**. Likewise in *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.), at para. 43-45.

NEW

Telephone Application? Item 7(1) Instead of Item 17? - In *Strandquist v. Coneco Equipment* 2000 CarswellAlta 443, [2000] A.J. No. 554, 2000 ABCA 138 the Court of Appeal was only prepared to allow **Item 7(1)** in place of **Item 17** for procedural applications made by phone because they were not motions to the whole court.

Post-judgment

Certificate of Judgment from Provincial Civil Claims - The filing of a Certificate of Judgment with Queen's Bench and all post-judgment steps taken to enforce the judgment are, pursuant to **Rule 605(7)(b)**, to be taxed at 100% of Column 1. Subject of course to the application of **Rule 605(3)** (see p. 6, above).

Item 18

(1) Issue of Writ of Enforcement including the registration of the Writ in the Personal Property Registry

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
200	250	300	350	400

no comment

(2) Renewals, amendments or status reports

100	*100*	*100*	*100*	*100*

Clerk's Discretion - Consultation with some of the drafters of the September 1st,1998 **Schedule C** left the writers with the view that this Item was intended to be claimed only once in an action, subject to the Clerk's exercise of his/her discretion in each circumstance. Our recommendation would be that $100.00 be permitted in the first instance and $25.00 for each instance thereafter, regardless whether it be a renewal, amendment or status report.

Item 19

(1) Request and review of a financial report from enforcement debtor

COLUMN 1	*COLUMN 2*	*COLUMN 3*	*COLUMN 4*	*COLUMN 5*
100	*200*	*300*	*400*	*500*

Application of Rule 605(3) - If a request has been formally made, but not replied to, an allowance will be made for a portion of this Item. Suggest 25% for the request and 75% for reviewing the reply.

Rule 370 Request & Report - Refers to the formal written notice to and to the Schedule A, Form I or I.1 reply from the enforcement debtor.

Item 19

(2) Examination in Aid of Enforcement

COLUMN 1	*COLUMN 2*	*COLUMN 3*	*COLUMN 4*	*COLUMN 5*
100	*200*	*300*	*400*	*500*

Rule 378 - Note that "... costs of any examination in [aid of enforcement] are in the discretion of the court."

Rule 460.1 - Under the provisions of the PPSA a secured party is entitled to examine the debtor. It does not appear to be subject to the same costs limitation as **Rule 378**. It might even be argued that costs should be recoverable under Item 5. NEW

Item 20

Instructions for and preparing all papers leading to seizure

COLUMN 1	*COLUMN 2*	*COLUMN 3*	*COLUMN 4*	*COLUMN 5*
100	*200*	*300*	*400*	*500*

no comment

Item 21

Issuing each Garnishee Summons, Notice of Continuing Attachment under the Maintenance Enforcement Act, or Garnishee Summons Renewal Statement

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
200	250	300	350	400

Even if Unsuccessful - To be allowed where a justifiable attempt has been made, even if unsuccessful: *R. in Right of Alberta v. Brewka* (1985) 36 Alta. L.R. (2d) 89, at page 91:

> "The clerk has a discretion which in the case of multiplicity of unsuccessful garnishee summonses, in the circumstances in which they would obviously be unsuccessful, no doubt he would exercise by reducing the amount of costs awarded. But, in the ordinary case, where the garnishee summonses result in recovery or, even if unsuccessful, are a justifiable attempt at recovery, there would be no reason for not permitting the taxation of costs at the regular amount for each garnishee summons."

Item 22

Instructions for and preparing all papers leading to sale of lands under Order or Judgment (including attendance at sale whether aborted or not)

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
200	300	400	500	600

Civil Enforcement Proceedings - Sale of land pursuant to **Part 7 - Land** of the **Civil Enforcement Act** would fall within **Item 22**. Note that a sale of land under the **CEA** does not normally require an application to the court, rather, it involves sending instructions to a Civil Enforcement Agency which then follows a prescribed course of Notices and waiting periods, whereupon the property is simply listed on the real estate market and sold in the normal course. If any court applications are required for the purpose of facilitating a sale under **Part 7** of the **CEA** then **Items 6 - 8** would be allowed for them in addition to **Item 22**.

NEW

Enforcement of Possession Order - Does the analogy provision of **Rule 4** open the door to allow costs under this **Item** for instructing and preparing the papers leading to the enforcement of a possession order? Why not?

Foreclosure Proceedings - Costs in foreclosure proceedings are almost always on a "full indemnity" basis. Consequently, it is a rare occasion that this **Item** is claimed. However, in the event of that occasion Agrios, J., in *Credit Foncier Trust Company v. Hornigold* (1985) 35 Alta. L.R. (2d) 341, said:

> "Item 33 of the old Sched. C (now item 48) [now Item 22] allowed a fee for 'sale of lands under Order or Judgment (exclusive of attendance at sale whether abortive or not)'. This item will normally be allowed as a party-party cost following advertising for judicial sale. Item 34 (now item 49) [now Item 22] allowed a fee for 'solicitor attending sale, whether abortive or not'. In my view, item 34 does not reflect a service actually carried out by any lawyer in present-day Alberta. It is an anachronism from a former era when land was sold by public auction. It was argued before me that the modern solicitor must still prepare documents and spend time on the phone with prospective tenderers, and that these services fall within the wording of this item. I think that to do so would stretch those words beyond any reasonable limit and I therefore hold that this item is not taxable except in the rare instance where a solicitor can show that he in fact performed these services."

"Pre-September 1, 1998, Schedule C - This **Item** is a consolidation of **Items 48** & **49** of the pre-September 1, 1998, **Schedule C**. Prior to that they were **Items 33** & **34**.

Related Rules - **Part 37 - Sales of Real Estate (494.1 to 498)**

Sale of Seized Goods - Though **Item 22** clearly applies to the "sale of lands" one wonders if, by analogy (**Rule 4**), it might not also be applied to compensate for instructions for and preparing all papers leading to the sale of seized goods.

Miscellaneous Matters Relevant to Schedule C

Analysis of Van Campenhout Decision - Items 11, 15 & 16

There is considerable misunderstanding of the C.A. decision in *Van Campenhout v. Gov't. of Saskatchewan* (1960) 32 W.W.R. 332 (Sask. C.A.), precipitated, one assumes, by the sentence, "The hearing was completed at 11:55 that morning, so the argument extended to 25 minutes into the third 'full half day'". The argument is made that the case stands for the proposition that if you only spend 25 minutes of an "additional half day" you should get the full amount for the "additional half day. A careful reading of the whole of *Van Campenhout* will reveal that the Court's conclusions were the exact opposite. The proof is in the figures.

The Tariff being relied upon was surprisingly similar to ours, save that it counted a "full half day" as two (2) hours,

> "4. On argument before Court of Appeal for the first full half day's sitting of two hours or any part thereof.
>
> "(a) to first counsel $100.00
>
> . . .
>
> "5. On argument before the Court of Appeal for each full half day occupied after the first full half day, a proportionate allowance to be made for any part of a half day required to conclude hearing after the first or any subsequent full half day. $50.00"

The hearing proceeded on November 19th from 11:30 to 12:00 (.5 hrs) and from 2:00 to 4:00 (2.0 hrs). Then on November 20th from 10:00 to 11:55 (1.92 hrs.) – a total of 4.42 hrs.

Date	Registrar's Approach		Court of Appeal's Approach	
November 19th	11:30 - 12:00 (.5)	½ day = $50	11:30 - 12:00 + 2:00 - 3:30 (2.0)	1st ½ day = $100
	2:00 - 4:00 (2.0)	½ day = $50		
			3:30 - 4:00 + 10:00 -11:30 (2.0)	1st additional ½ day = $50
November 20th	10:00 - 11:55 (1.92)	½ day = $50		
			11:30 - 11:55 (.21, but used .24)	.24 x 2nd additional ½ day = $12
Totals Allowed	**$150**		**$162**	

Registrar's Approach: ruled that since the 11:30 to 12:00 session did not constitute a "first full half day's sitting" he/she would not allow the $100.00 first half day fee, but only $50.00. The Registrar then allowed $50.00 for each of the remaining "half days" for a total of **$150.00** – no pro-rating.

Court of Appeal's Approach: simplified the process by saying, "treat a 'half day' as a period of two hours in court" regardless of what point in the day it occurs. It ruled that the "first full half day's sitting" was made up of the time from 11:30 to 12:00 plus 2:00 to 3:30 ($100.00). And, that the second half day was made up of the time from 3:30 to 4:00 on the 19th plus 10:00 to 11:30 on the 20th, which equals 2 hrs., which equals a $50.00 fee. And, that the balance of 25 minutes (11:30 to 11:55) was to be pro-rated as exactly 25 minutes of a 2 hour "half day", for which the Court allowed $12.00. The total allowed by the Court of Appeal was **$162.00. If the Court had not pro-rated**, but had allowed a full "additional half day" for the additional 25 minutes, the fees allowed would have come to $200.00, **not** the $162.00 it actually allowed.

Therefore, the court **did**, virtually, add up the time actually spent at the hearing and divided it by the number of hours which made up their "half day" – you would never know it by reading their decision unless you analyze the court's calculations and the figures it allowed.

Note that the way we (James Christensen & Joe Morin) tax accounts the result would have been more beneficial to the costs' claimant in that we would have treated the 11:30 to 12:00 session as the "first full half day sitting" ($100), and would have then added up the remaining time (3.92 hours), divided it by (to use their 2 hour half day) 2 and allowed fees of $98.00 for 1.96 "additional half days" – a total of $198.00.

Mini Trials / Judicial Dispute Resolution

Johnston v. Mainwaring [1997] A.J. No. 854, Johnstone J., April 25, 1997, defines JDRs and it is clear that definition is broad enough to include not only mini trials, but also pre-trial and case management conferences:

> "Judicial Dispute Resolution is a term unique to Alberta which is used to refer to what other jurisdictions usually call Alternate Dispute Resolution or "ADR". But since ADR can be conducted by a judge, a mediator or another individual agreed by the parties, the Court has adopted the term JDR to distinguish ADR generally from ADR conducted by a justice. The Albertan JDR mechanism is flexible, ranging from variations within our pre-trial conference process under Rule 219, where the parties may attempt non-binding settlement negotiations before a justice, to the more formal "Mini-Trial" where short briefs, arguments, and statements from the parties are received by a justice who then renders a non-binding oral or written opinion. The parties to whichever form of JDR elected may or may not choose to be bound by the justice's decision, and may or may not advise the justice of this choice.
>
> "In most cases, however, and in the JDR adopted by the parties at bar, the mechanism is essentially one of a settlement conference before a justice chosen by the parties, where positions are stated in argument and the justice is then expected to provide a non-binding opinion which the parties may adopt, ignore, or use in further settlement negotiations as a good prediction of the likely outcome should the matter proceed to court."

A **Memorandum**, dated April 5, 1993, from Chief Justice W.K. Moore to the Calgary taxing officer Joe Morin gave the following direction:

> "I direct that in the future no fees be allowed for mini trials on taxation. The parties, when attending upon me or any other judge, do so voluntarily and no costs are to be assessed. That is understood from the beginning and all counsel agree that costs are not a factor at a mini trial."

Consequently, no fees, disbursements or GST are permitted relative to mini trials, which are now sometimes referred to as JDRs.

Query: Would it make a difference if the mini trial was, by agreement, binding upon the parties?

Lines v. Brink & Jasper [1994] A.J. No. 757; 24 Alta.L.R. (3d) 227; 160 A.R. 341, Veit J., October 14, 1994, the court exercised its **Rule 601** jurisdiction to allowed costs for the work associated with a mini trial and comments extensively upon the topic. Madam Justice Veit's reference therein to a direction from Chief Justice Moore is not the same one reproduced above.

Note Justice Veit's decision in *Atkinson* (below).

Jamieson v. Draper [1994] A.J. No. 1098, Rooke J., November 16, 1994, allowed no costs for mini trials:

> "It is clear from the guidelines that the Chief Justice has set down and from reinforcement of those guidelines within our judicial group that there are no costs that flow for a mini trial or from a mini trial, ... Costs aren't dealt with in mini trials, as a rule. At least, I've not know of one where the issue of costs has been subject to a mini trial."

Atkinson v. McGregor [1998] A.J. No. 838, Veit J., July 23, 1998, explains the distinction between a mini trial and a pre-trial conference, no costs for the former:

> "The costs treatment of mini-trials may appear somewhat difficult to reconcile with the costs treatment of pre-trial conferences. Pre-trial conferences constitute a taxable step in the process; according to the Directive on mini-trials issued by Moore C.J.Q.B. in 1993, and published, for example in the November-December 1993 Newsletter, "5. No costs are assessed at a mini-trial." The distinction in treatment can, however, be explained, I suggest, by the fact that the mini-trial is an extensive attempt at settling the litigation, while the pre-trial conference is mainly focused on ensuring that the lawsuit is, or will be, ready for trial.
>
> "The bottom line is, however, that no costs are awarded for mini-trials. "

PBX Properties Ltd. v. Cowan Drugs [1998] A.J. No. 1215, MacCallum J., November 10, 1998, affirms the court's inherent jurisdiction to allow costs of a mini trial, but counsels against it:

> "In the wide discretion that is given to me, I do not doubt that I have authority to grant a lump sum for a mini trial, but I doubt the wisdom of doing so. A mini trial is entered into with the consent of the parties, in the hope of avoiding the costs of a full trial. As such, it can be very beneficial to litigants whose efforts to arrive at an early resolution of their differences should not be discouraged by an award of costs should the matter not be successful. For these reasons, I decline to award costs in connection with the mini trial."

Beenham v. Rigel Oil & Gas Ltd. [1998] A.J. No. 1451, McMahon, J., December 21, 1998, states:

> "It is a matter of policy of this Court that no costs are awarded in respect of [a Judicial Dispute Resolution] process in order to encourage pre-trial settlement effort. Accordingly, that claim cannot stand."

Gerla v. Gerla [1999] A.J. No. 108, Marshall J., February 2, 1999, concerned an application "in the form of a binding mini-trial" wherein the proceedings were recorded. Justice Marshal set costs of the "application" at $1,000.00.

Purich v. Purich [1999] A.J. No. 307 (Q.B.) Veit J., March 19, 1999:

> "Without more, the results of a mini trial should not be taken into account in a costs determination.
>
> "Settlement negotiations are, generally, privileged. This privilege supports the underlying policy that fair settlements are a worthwhile objective and that parties should feel free to make concessions for the purposes of settlement which should not come back to haunt them if no settlement is, in fact, reached.
>
> "The Rules create a statutory interference with the privilege in order to give punch to certain, defined, types of offers of settlement. The common law establishes that a party can put the party opposite on notice that if an offer of settlement is not accepted, that party intends to ask for costs. Without such glosses on the privilege, no reference at all could be made to settlement negotiations at the costs hearing because those negotiations are privileged.
>
> "A mini-trial is just another form of settlement negotiation. Without some legislated term or some understanding between the parties that the mini-trial will be referred to at the costs hearing, it is improper for the court to be advised of the results of a mini-trial. "

Northland Forest Products Ltd. v. Wood Buffalo (Regional Municipality) [2002] A.J. No. 1106, 2002 ABQB 789 (Q.B.) Clarke J., in addition to following the conclusions reached by MacCallum J. in *PBX* and Veit J. in *Purich* that costs associated with mini-trials are a non-issue, helpfully addressed the issue of when and how time and effort spent in the preparation for a mini trial can or cannot be properly claimed as a legitimate "preparation for trial" expense under Item 10 of Schedule C. He discounted the concept unless the mini-trial was held, in his example, a month before trial:

> "8 The time used to prepare experts' briefs and attend at the mini trial were not lost or rendered useless because that effort was all done for that specific purpose. The mini trial was entered into with the consent of all of the parties in the hopes of avoiding the costs of a full trial. The Applicants would have a stronger case if a mini trial had not occurred. Since everyone agreed that there should be a mini trial and they had to get ready for it, how can they say that it was wasted. In addition, the mini trial was not so close to the actual trial date that the mini trial preparation would have applied directly to trial preparation. Trial preparation would have been separate from the mini trial preparation. This particular proposition was strongly objected to, particularly by the Plaintiff who repeated that the timing of the mini trial had been selected deliberately to occur close to the trial date so that the mini trial preparation work could be used as part of the trial preparation work. If that was the only logic driving the timing decision of the mini trial then one would have expected the mini trial to occur about a month before the start of the trial. The fact that it occurred some time earlier than that time suggests that the parties also had in mind the saving of significant pre-trial preparation costs as one of the reasons for trying to resolve the matter when they did.
>
> "9 The Plaintiff included in its claim costs for the time of first and second counsel attendance at the mini trial as well as the preparation and attendance of some of their experts at the mini trial. Wood Buffalo did not make a similar claim. I agree with the approach taken by my colleagues Madam Justice Veit and Mr. Justice MacCallum that the mini trial process undertaken with the consent of the parties and without prejudice to their ultimate position at trial should not be

visited with an award of costs depending on the success or lack of success of that process. The parties should not be discouraged from an early resolution of the case on the basis they might subsequently face costs depending on the result obtained at trial or an event like this adjournment after the mini trial."

"13 . . . costs should not include the preparation for and attendance at the JDR. That is a process designed deliberately to be separate and apart from the normal litigation process, is designed to encourage settlement and should not be discouraged by attracting costs."

Goods and Services Tax / GST

With the introduction of Sub-Rules 605(9-10) in March of 2003 we were tempted to simply remove this section and save ourselves the trouble of updating authorities and case law. However, the sub-rules are intended as a default position which is always subject to an order of the court to the contrary. Furthermore, the sub-rules leave some room for interpretation. We are interested in keeping current on developments in the area.

(See too the commentary to Sub-Rules 605 (9-10), above at SC13)

Effect of Various Awards of Costs

Full Indemnity or "Solicitor/Client" Awards of Costs: Because awards of "full indemnity costs" or "solicitor and own client costs" or "solicitor and client costs" either invariably or almost always provide for full indemnification and are not limited to the amounts prescribed by the **Schedule C** tariff, a Clerk will almost always allow GST on both the fee and disbursement portion of the resulting bill of costs.

Lump Sum Awards of Costs: An award of costs which sets the fees at a fixed amount "plus reasonable disbursements" or sets both the fees and disbursements at a fixed amount are presumed to be inclusive of GST.

Schedule C Costs - By Award or By Default: When the Court awards costs "in Schedule C" or some multiple of Schedule C it is recommended that a specific direction be sought allowing GST on Schedule C fees. In the absence of such a direction the default provisions of **Sub-Rules 605(9-10)** apply:

> (9) Unless otherwise ordered by the court, a party entitled to costs is entitled to recover the goods and services tax on those costs upon providing a certificate in accordance with subrule (10) that is satisfactory to a taxing officer.
>
> (10) A certificate under subrule (9) shall be in the form of an affidavit endorsed on, attached to or filed with the Bill of Costs deposing that
>
> (a) the person making the affidavit has a personal knowledge of the facts being deposed to,
>
> (b) the party entitled to receive payment under the Bill of Costs, and not a third party, will actually be paying the goods and services tax on that party's litigation costs;
>
> (c) the goods and services tax will not be passed on to, or be reimbursed by, any other person, and
>
> (d) the party referred to in clause (b) is not eligible for the goods and services tax income tax credit.

It is easier to simply obtain and include in your Order or Judgment Roll a direction from the Court allowing GST on Schedule C costs. Furthermore, preparing the Affidavit is a bother and, even worse, the provisions of sub-rule (10) may exclude your client - the taxing officer is bound, strictly, by the provisions of the sub-rule, there is no built-in discretion.

Disbursements: GST paid on disbursement is *always* recoverable, regardless the type of costs award (save for a "no costs" order). For a discussion of when and when not to claim GST on disbursements for which no GST was paid refer to the sub-heading "GST & Party/Party Disbursements," below.

Treatment of GST Across Canada

The status of the law across Canada relative to a party's entitlement to collect GST on awards of costs between parties is best summarized by Mark M. Orkin, ***The Law of Costs*** (2nd e., 16th rel. 2001) at 204.1 "Goods and Services Tax (GST)":

> "While the relationship between GST and an award of costs *inter partes* is perhaps not clear, Ontario courts have

held that litigants who have been awarded party-and-party costs are also entitled to receive GST on such costs. The reasoning behind this conclusion is that since the object of an award of costs is indemnification, whether partial or complete, then GST must be added to the award in order to achieve that goal, the principle being applicable to all awards of party-and-party costs, whether on the solicitor-and-client or the tariff scale.

"There was until recently no provision in the Ontario tariffs for GST; however, by virtue of s. 131(1) of the *Courts of Justice Act* the costs of and incidental to a proceeding are in the discretion of the court which, by rule 57.01(3) has the option of itself fixing the costs, and in so doing is not bound by the tariffs. The assessment officer, who is bound by and limited to the tariffs, has no authority to allow GST; in the absence of an express provision in the tariffs it can be awarded only by the court.

"In Ontario a recent amendment to the tariffs now includes provision for GST. Tariff A, item 36 provides as follows:

> 36. Goods and services tax actually paid or payable on the solicitor's fees and disbursements allowable under rule 58.05. O.Reg. 351/94, s. 19.

NEW "Courts have added GST to awards of costs in Alberta, although the view has been expressed that the court should refrain from awarding GST on taxable fees in the absence of specific provision in the rules, or compelling evidence that the payee of fees will ultimately have to pay GST and not be reimbursed of it. The court has also added GST in Manitoba.

"In Prince Edward Island the prothonotary when assessing party-and-party costs has jurisdiction to include GST on fees and applicable disbursements.

"There are conflicting decisions in Nova Scotia on whether or not GST is recoverable as part of party-and-party costs.

"GST is not recoverable in Newfoundland where the rules do not provide for it.

"In jurisdictions such as British Columbia where the court is bound by the tariffs and the latter do not provide for GST, the court has no power to make provision for it.

"The responsibility of a party for costs may be structured in such a way as to avoid the incidence of GST, in which event no GST would be payable.

"GST is properly part of a claim for costs without specific reference to it in the statement of claim: *Bifolchi v. Sherar (Litigation Administrator* of) (1998), 38 O.R. (3d) 772, 108 O.A.C. 370, 33 MXR. (3d) 275 (C.A.). See, however, ATU v. ICTU (1998), 20 C.P.C. (4th) 193, 225 A.R. 220, 59 Alta. L.R. (3d) 1 (Q.B.) (court refused to include GST in previous order where no timely request by parties)."

Alberta Courts' Treatment of GST - Pre-March 2003

A number of Alberta decisions have addressed the issue of GST. Some say it is and others that it is not properly recoverable on party & party costs (see below). In each instance where the Court *has* allowed GST it has done so through the exercise of its **Rule 601** discretion vis-à-vis costs.

Allowed GST:

Ropchan v. Duncan (1992) 134 A.R. 224, Montgomery, J., September 18, 1992 - The decision considered *Ligate v. Abick* (1991) 2 C.P.C. (3d) 209; 5 O.R. (3d) 332; 5 T.C.T. 4067; [1992] G.S.T.C. 4 (Ont. Ct. J. G.D.) and the British Columbia case of *Borisoff v. Cooper* [1991] B.C.J. 3704; [1992] G.S.T.C. 7; 5 T.C.T. 4063. It concluded,

> "In my opinion, the purpose of party-and-party costs is to indemnify the Plaintiff, at least in part, for his actual costs on which he must pay GST. Section 19 of the Court of Queen's Bench Act permits me to 'make any order relating to costs that is appropriate in the circumstances.' Unlike British Columbia, my power is unfettered. In my opinion, the Plaintiff should recover GST on his bill of costs . . .."

Sidorsky v. CFCN (1995) 27 Alta. L.R. (3d) 296; 167 A.R. 181, McMahon, J., February 15, 1995, which followed *Ropchan* in allowing GST on "all taxable fees and disbursements".

Simpson v. Bender [1996] A.J. No. 58; 5 W.W.R. 96; 37 Alta.L.R. (3d) 191; 180 A.R. 220, Murray J., January 25, 1996 concurs with conclusion reached in *Ropchan* (above).

Dilcon Constructors Ltd. v. ANC Developments Inc. [1996] A.J. No. 759; 42 Alta.L.R. (3d) 132; (1996) 189 A.R. 161, McMahon J., August 26, 1996 concluded the Plaintiff was "entitled to recover Goods and Services Tax paid by it on all taxable fees and disbursements and which has not been otherwise recovered by way of a corresponding credit."

Beller Carreau Lucyshyn Inc. v. Cenalta Oilwell Servicing Ltd. [1997] A.J. No. 611; 211 A.R. 10, Lewis, J., June 12, 1997 - "GST is not applicable only to a solicitor and client bill of costs, but to any bill of costs whether it be for party and party costs or solicitor and client costs. Counsel for Beller Carreau cites *Mackie v. Wolfe* [(1994) 23 Alta. L.R. (3d) 400, Rowlins, J.] as authority for this proposition."

All *Mackie v. Wolfe* said was, "My understanding from the representation by counsel is that G.S.T. was charged on legal fees and so should be recoverable on an award of costs. If G.S.T. was also payable or recoverable on disbursements the disbursements should be increased by the G.S.T. as well."

Michel v. Lafrentz [1997] A.J. No. 801-2, Perras, J., July 31, 1997 - "G.S.T., of course, is paid by a client on the fees paid to his or her solicitor. The theory underlying party and party costs is that the successful party ought to be compensated, to some extent, for the cost of running the litigation. Under Schedule 'C', of course, there is no heading to accommodate a claim for G.S.T. However, s. 19 of the Court of Queen's Bench Act gives a discretionary power to the Court to 'make any order relating to costs that is appropriate in the circumstances' provided there is no express provision to the contrary. Hence it would appear that an award relating to G.S.T. is a discretionary matter for the Court or judge presiding." Then proceeded to allow GST because, "The litigation here was complex, lengthy and a huge number of paper exhibits were involved. Hence, undoubtedly the Plaintiff incurred substantial legal costs to run the litigation and would pay G.S.T. on his solicitor's fees. It therefore appears fair to allow some recovery of this mandatory cost of running litigation in this case. Hence, the Plaintiff will be allowed to recover G.S.T. on the recoverable costs."

Sabol (Trustee of) v. Rousseau [1997] A.J. No. 815; 207 A.R. 399, Kenny J., August 5, 1997, allowed GST on **Schedule C** fees without elaboration.

MacCabe v. Westlock Roman Catholic Separate School District No. 110 [1999] A.J. No. 499, Johnstone J., April 23, 1999 - "Although the new Schedule C is silent as to the award of GST, it appears that, having not addressed this issue, it leaves this matter open to the Court. If the Court deems it appropriate to award this amount in order to achieve indemnification, at least in part for the plaintiff, it is at liberty to do so in the exercise of its discretion." The court permitted the GST.

Schuttler v. Anderson [1999] A.J. No. 871, Lee J., July 21, 1999 - Relying on the reasoning in *Union of India v. Bumper* (above) and *Morrison v. Smithson* (above) the Court concluded "that GST should not be assessed for the fees portion of the party-and-party costs awarded under Schedule C."

Madge v. Meyer [2000] A.J. No. 225, 2000 CarswellAlta 188, 77 Alta. L.R. (3d) 391, [2000] 6 W.W.R. 272, 259 A.R. 351, Brooker J. (followed by Clarke J. in *Mar Automobile Holdings Ltd. v. Rawlusyk* 2001 CarswellAlta 855, 2001 ABQB 516) - reviews Alberta decisions and concludes:

> "I am not prepared to award GST on the taxable fees recovered by the Plaintiffs in this case for several reasons. First, there is no evidence before me as to the ultimate effect of payment of GST in this case. For example, while I am prepared to assume that the Plaintiffs have been or will be charged GST by their counsel on their account for professional legal services, I do not know whether some or all of such GST charges will ultimately be recovered by or refunded to the Plaintiffs through input tax credits or some other tax arrangement. Second, it is not uncommon for clients and their counsel to enter into contingency agreements wherein it is agreed that counsel will retain any taxable fees recovered. In such an arrangement it is questionable whether any GST is paid on the taxable fees recovered. Third, and in my opinion most importantly, the law is clear in this jurisdiction that taxable fees are not a perfect indemnity for the expenses of litigation. They are only a partial indemnity. The Rules of Court contain a new Schedule "C" tariff of fees. There is no mention of GST in the new schedule or elsewhere in the Rules of Court. It would have been a simple matter to provide for GST in these revisions. Ontario seems to have done so: see Orkin, M.M., The Law of Costs , 2nd. ed. (Aurora: Canada Law Book, 1999) at 2-26 and 2-27. The new schedule is sufficiently generous in its provisions to allow one to infer that the drafters of the new schedule took GST into account in arriving at and establishing the various tariffs. Indeed, there is merit in so concluding because it provides certainty as to costs and obviates the inevitable post-trial applications for an order for GST on taxable fees with the calling of evidence to prove the party's obligation to ultimately pay GST as hereinbefore discussed."

Disallowed GST:

Lynch v. Hodgson May 11, 1993, Edmonton Action 9003 22537, Picard, J. - Award of party/party costs and all reasonable disbursements, but GST not allowed.

Union of India v. Bumper May 23, 1995, Calgary Action 9401 04867, R.P. Fraser, J., which considered *Ropchan* and noted that Montgomery, J. had been referred to section 182 of the Excise Tax Act and to an opinion which questioned "whether an order for payment of party and party costs could be described as a 'supply made in the course of a commercial activity' on which GST would normally be levied." Fraser, J. concluded that an award of party and party costs is not subject to GST. He states:

> "Party and party costs are in substance awarded by the court to a winning party in an action. Although no authority on this point has been cited to me, I understand that they are the property of the party to whom they are awarded and not his lawyer. As a result they are in form to be retained by the party receiving them on appeal against his legal bill. They are not awarded for 'services'. In contrast, a legal account is rendered by a lawyer for services performed on which I understand GST is payable as a tax. On this reasoning GST should not be payable on the party and party costs and I decline to award them."

Morrison v. Smithson [1997] A.J. No. 389; 50 Alta.L.R. (3d) 253; 202 A.R. 194; 9 C.P.C. (4th) 144, Veit, J., April 16, 1997 - denied GST for the following reasons:

> "4 No, as to the GST, both because it is not an item found in Schedule C, and because even if it could be properly characterized as a "reasonable and proper expense" of litigation, there is no evidence that this plaintiff will have to pay GST on the fees portion of the costs."
>
> "16 The case law on this issue is mixed; there is no uniformity of the type that is building around the granting of an inflation factor. The main problem here is that Revenue Canada has not yet told litigants and lawyers whether it will exact GST on the fees portion of costs."
>
> "23 If it were clear that the plaintiff would have to pay GST on the fee portion of the costs, then it would be appropriate for the taxing officer to recognize a claim for GST as a proper, reimbursable, expenditure."

Conditional Allowance of GST:

Parkridge Homes Ltd. v. Anglin [1996] A.J. No. 768, Rooke, J., March 15, 1996, awarded a mix of **Schedule C** costs and solicitor and client costs, but refused to allow GST unless Parkridge could certify that it was unable to claim any GST paid to its Counsel by way of input tax credits.

> "See in this regard the logic, which I support, set out in Sherman, 'GST Times', Supplement to Canada GST Service, (Calgary: Carswell), July 17, 1995, at 4, where after reference to then existing GST cases on costs, the editor states:
>
> > 'Allan Selkopf of Blake, Cassels & Greydon points out that an award of 7% to cover GST will be a windfall if the winning party is already able to claim input tax credits in respect of the GST it pays on the legal services . . . In such cases it would be appropriate for no amount to be added to an award of costs to reflect the GST.'"

V.A.H. v. Lynch [1998] A.J. No. 1298, Rooke J., November 27, 1998, reiterates his conclusions in *Parkridge* (above). The Court of Appeal reversed the substantive decision and in [2001] A.J. No. 145 addressed the issue of costs of the successful appellant and stated:

> "33 In respect of legal fees paid, it is difficult to accept an argument that a lay person will not pay G.S.T. on that fee unless they are G.S.T. exempt, e.g. a government. So, too, with actual disbursements."

GST & Party/Party Disbursements

Notwithstanding Corporate Registry, Courts, PPR, Land Titles, etc. are not permitted to charge lawyers or other clientele GST for conducting searches, Revenue Canada takes the position that lawyers must charge their clients GST on the disbursements they incur in these regards. On account of Revenue Canada assessments of law firms in Alberta for GST on GST-exempt searches and municipal compliance certificates the Clerk of the Court is allowing GST on **search fees**, on the cost of obtaining a **municipal compliance certificate**, and on **experts' charges** (even when not claimed by the expert). Until such time as this position is reversed the Clerk of the Court is permitting GST on these disbursements in Bills of Costs.

Schematic of Application of GST in Different Cost Scenarios

Below is a summary of the effects of GST on Party/Party and Solicitor/Client Taxations, prepared for the benefit of the Clerks of the Court of Queen's Bench:

	PARTY & PARTY TAXATIONS			SOLICITOR & CLIENT TAXATIONS	
	Lump Sum Basis	**Schedule C Basis**	**Solicitor & Client Basis / Full Indemnification Basis**		
Definition	**Rule 601(1)** - The Court may award a party a lump or gross sum as a part or the whole of its costs. Eg., "$2,000.00 plus reasonable disbursements" or "$2,500.00 all inclusive."	**Rule 601(1)** - The Court may award costs under a specific column of **Schedule C** or, if silent with respect to costs, **Rules 600(1)(A)(i)** & **605** would dictate the relevant costs.	**Rule 601(1)** - The Court may award costs to be paid by one litigant to another on a Solicitor & Client Basis or a Full Indemnification Basis.	**Rule 613** entitles a lawyer to "reasonable" compensation for the services performed by him or her.	
				Fees	**Disb'ts**
Treatment	G.S.T. should be allowed on the disbursements but not on the fee awarded as a lump sum by the Court.	G.S.T. should be allowed on the disbursements, but not on the fee prescribed by the Schedule **unless** the party complies with **Rule 605(9&10)**.	G.S.T. should be allowed on both the fee and disbursement portion of the Bill of Costs.	G.S.T. should be allowed on all reasonable fees.	G.S.T. should be allowed on all disbursements paid or liable to be paid by the lawyer, even for 'other charges.'
Rationale	NEW A lump sum award is presumed to include the allowance for GST, unless otherwise specifically stated by the court.	NEW The clerk of the court / taxing officer has no authority to allow GST unless an Affidavit has been filed which meets all the criteria set out in **subrule (10)**.	When awarding party and party costs on a solicitor and client basis the Court intends "full indemnification" costs. Implicit in such an award of costs is full recovery of all of the party's expenditures to his or her solicitor, inclusive of G.S.T..	The legislation requires service providers to collect the GST from their clients.	The legislation permits it.

Action No. _____

IN THE COURT OF QUEENS BENCH OF ALBERTA

JUDICIAL DISTRICT OF **[Name of your J.D.]**

IN THE MATTER OF:

[Party's name]

Plaintiff

- and -

[Party's name]

Defendant

GST RECOVERY AFFIDAVIT (Rule 605(10))

I, **[deponent's name]**, **[relationship to the party(s)]**, HEREBY CERTIFY that:

1/ I have personal knowledge of the facts herein deposed to;

2/ **[Party(s) claiming the costs]**, who is entitled to receive payment under the Bill of Costs, and not a third party, will actually be paying the Goods and Services Tax on the party's litigation costs;

3/ The Goods and Services Tax will not be passed on to, or be reimbursed by, any other person, and;

4/ **[Party(s) claiming the costs]** is not eligible for the Goods and Services Income Tax Credit.

DATED at the City/Town/Village of _____ in the Province of Alberta this **[Date]**.

_____
[Deponent's Name]
[Relationship to the Party(s) if Solicitor]

Action No. **[Action #]**

IN THE COURT OF
QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF **[Name of your J.D.**]

IN THE MATTER OF:

[Party's name]

Plaintiff

- and -

[Party's name]

Defendant

GST RECOVERY AFFIDAVIT
(Rule 605(10))

Solicitor's Address:

[Street Address]
[City/Town]
[Province (AB)], [Postal Code]

Phone:

[Area Code & Phone Number]