

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/".

Disclaimer

The advice and opinions which follow are those of the writers, James Christensen & Joe Morin, Taxing Officers for the Province of Alberta. They are not necessarily representative of how they or other taxing officers of any Judicial District of Alberta might exercise their discretion.

This document has been prepared primarily as a resource for Clerks of the Court of Queen's Bench. Its treatment of the subject matter is rudimentary and is not a substitute for obtaining legal advice. It does not constitute legal advice. It does not represent policy of Alberta Justice or any other Government Department.

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In Which Judicial Centre Must a Bill of Costs Be Taxed?

Rule 5(s.1) determines where a Bill of Costs is to be taxed:

<i>Queen's Bench</i>	“Taxing officer’ means the clerk of the court for the judicial centre in which the proceedings are being carried on or were determined.”
<i>Court of Appeal</i>	“Taxing officer’ means in the taxation of costs of any appeal to the Court of Appeal the Registrar in whose jurisdiction the proceedings are being carried on or were determined.”

Unless otherwise ordered the taxation of a bill of costs of an *interlocutory proceeding* which are taxable forthwith must be performed by a clerk of the court for the judicial centre in which the proceedings are being carried on or by the Registrar in whose jurisdiction the proceedings are being carried on.

Unless otherwise ordered the taxation of a bill of costs of a concluded *proceeding* must be performed by a clerk of the court for the judicial centre in which the proceedings were determined or by the Registrar in whose jurisdiction the proceedings were determined.

Power of the Taxing Officer

Rule 628 empowers the taxing officer to

- (a) take **evidence** by affidavit or orally under oath;
- taxation hearings tend to proceed on an informal and expeditious basis, with evidence being taken by affidavit or under oath only when one or both parties so request
 - effective January 1, 2001, contested taxation hearings are all recorded¹
 - parties are permitted, at their own expense, to have a court reporter present at any taxation hearing”

¹ In *Calgary* transcripts of hearings may be ordered through Transcript Management Services, located on the 5th floor of the Court House Annex, 603 - 6th Ave. S.W., Calgary, AB T2P 2L8 (403-297-7392).

In *Edmonton* transcripts may be ordered through Transcript Management Services, located on the 7th floor of the Brownlee Building, 10365 - 97 St., Edmonton, AB T5J 3W 7 (780-427-6181).

- (b) direct the **production** of books, papers & documents;
- the taxing officer’s authority is limited to directing production for the purposes of facilitating the taxing process only
 - disputes relating to one party’s entitlement to view another’s privileged document(s) during the course of a taxation hearing may be resolved by the taxing officer following the principles set out in *Mintz v. Mintz* (1983) 43 O.Rule (2d) 789 (for details see sub-document “Introduction to Costs - What is the Principle of Indemnification ? - What of Solicitor and Client Privilege?”)
 - the taxing officer has no authority to direct that one party transfer ownership or possession of a book, paper or document to another¹

¹ However, note **Rule 649** which states, “The court may, on the application of the client, order any barrister and solicitor to deliver up any deeds, documents or papers of the

client in the possession, custody or power of the barrister and solicitor, his assignee or representative."

- (c) require **notice of the taxation** to persons as directed;
- (d) give directions as to the **manner of service** of the notice of taxation;
- (e) require a party to a taxation to be represented by a separate **solicitor**;
- (f) enlarge or abridge **time restrictions** set by the Rules relative to taxation proceedings.

Rule 629 authorizes the taxing officer to allow or disallow **costs** of proceedings before her/him. The taxation of a Bill of Costs by a "counter clerk" does not entitle a party to any costs. A taxation initiated by an Appointment for Taxation which (a) proceeds on an uncontested basis entitles a party to a portion of **Item 6(1)**, or (b) proceeds on a contested basis entitles a party to a *portion* of **Item 7(1)**. "A portion" allows for the fact that the **Rule 642** "Affidavit of Disbursements" is *usually* a very perfunctory document.

Rule 629.1 is often referred to as the **rubber stamp taxation** rule in that it prohibits a taxing officer from exercising any discretion in the taxation of a Bill of Costs which has been **consented to** by a barrister and solicitor on behalf of the party responsible to pay the costs. This is as it should be. The taxing officer is still obliged to "tax and allow" the Bill, but "without alteration or further consideration".

Rule 634 permits the taxing officer to **refer** any question arising on a taxation to the court for determination. Exercising this right requires discretion and due consideration to avoid wasting the court's time.

Issues to be Resolved Prior to a Taxation Hearing

Court's Direction:

There are a number of cost related issues which only the Court has the jurisdiction to address. If they are brought before the taxing officer s/he must either disallow the related costs or direct the party back before the Court.

- Note **Rule 600(3)**, "Costs may be dealt with at any stage of the proceedings." A number of cases have addressed the parameters of this Rule; see Stevenson & Côté, ***Civil Procedure Guide*** (1996) and subsequent ***Handbooks***.
- Note too **Rule 600(4)**, "Any direction or order as to costs, whether made under **subrule (1)(a)(ii)** or **Rule 605** or otherwise may be made after entry of judgment unless it is inconsistent with the express provisions of the entered judgment". For commentary see Stevenson & Côté, ***Civil Procedure Guide*** (1996) and subsequent ***Handbooks***.

NEW On the rule of *functus officio* as it relates to costs, see *Seal v. Ketz* [1993] A.J. No. 571, 12 Alta. L.R. (3d) 41, 142 A.R. 386, 17 C.P.C. (3d) 21 (Q.B.) at paras. 7-8, and on judicial discretion, see *Edmonton (City) v. Lovat Equipment Inc.* [2002] A.J. No. 316, 2002 ABQB 203 (Q.B.) at paras. 22-24, both cited in *R. Derose* 2002 ABPC 53 (Prov. Ct.) at paras. 15-16. See also *A.T.U. v. I.C.T.U.* [1998] A.W.L.D. 221 (Q.B.) where court held that Rule 600(4) did not cover "omissions by counsel."

The following is a list of most of the items which a taxing officer cannot address. The list was first generated in 1989 and every effort is made to keep it current. To be sure, please rely on the **Rules of Court**, not this list.

Court of Queen's Bench Civil Practice Notes

NEW **Case Management Practice Note “1” - Sanctions - 55 (j) & (k)** - in imposing **sanctions** only the court may impose a costs penalty for non-compliance with the Rules / Practice Note (**Rule 599.1**). See too “**Sanctions**” **56** as to when to speak to the issue of sanctions.

Court of Appeal Practice Notes

NEW **Consolidated Practice Directions - Costs in Civil Matters** - details the Court of Appeal's **general practice** of relying upon the application of **Rule 601(3)**, exceptions to that practice, and of the need for a factum to address any **request for an exception** to the general practice.

Part 1 - Definitions and Introductory Matter

Rule 5.11(4) - while the cost of **producing copies of computer generated documents** to the other side may be fixed by the taxing officer, only the court may adjust the fixed costs “at a later date”.

Part 9 - Pleadings

Rule 128 - “extra costs” occasioned by a **failure to admit facts** may be ordered by the court.

NEW **Rule 130** - the amendment, without leave, of a pleading to **remove a party** is “subject to the payment of such costs as the Court may order on application by the party that has been removed.”

Rule 141 - costs of an **amendment with leave** “shall be borne by the party making it”, unless otherwise ordered.

Part 10 - Procedure on Default

Rule 157 - terms as to costs of **amending a default judgment** entered for an amount in excess of what the claimant was entitled to may be set by the court.

Part 12 - Compromise using Court Process

Rule 174 (1) - costs for steps taken by the defendant after service of a notice of **payment in or offer of judgment** “shall [be] to the defendant” if the plaintiff fails to beat the payment or offer, unless otherwise ordered.

(1.1) - costs payable under subrule (1) shall be doubled if the plaintiff’s action is dismissed entirely, unless otherwise ordered.

(2) - costs of steps taken by the Plaintiff subsequent to serving notice of his **offer to settle**, if the Plaintiff succeeds in equaling or beating the offer, shall be doubled, but upon the direction of the court.

- **Note:** While the Court is obliged to award these costs, save “for special reason”, they *must be awarded* by the Court. A taxing officer will not implement these costs without specific direction from the court.
- Note too that **Rule 518.1** makes these **Part 12 Rules** applicable to Court of Appeal proceedings.

Part 13 - Discovery of Records

Rule 190(1) - **failure to file an Affidavit of Records** in compliance with **Rules 187** or **188.1** makes the party liable to pay a penalty of costs. However, it is the Court which must impose the penalty, not the taxing officer.

Rule 190.1 - **failure to file an Affidavit of Records** in compliance with **Rules 187** or **188.1** may also result in a **Rule 599.1** costs sanction. Again, the sanction must be imposed by the court.

Rule 192(5) - if a party denies the **authenticity, receipt or dispatch of a record**, which is later proven, the court must take the denial into account in exercising its discretion as to costs, not the taxing officer.

Part 13 - Examination for Discovery

Rule 200(3) - costs of examining more than one **corporate officer** “shall be borne by the party examining”, unless otherwise ordered.

Rule 209 - costs of an application directing the production of a **record in the possession of a third party** “shall be borne by the party making the application”, unless otherwise ordered.

Rule 213 - costs of and occasioned by an **objection to any question on examination** “are in the discretion of the Court”.

Rule 216.1 - only the Court may impose terms in respect of costs upon any **modification or waiver** by it of **rights or powers under Part 13** - Discovery.

Part 14 - Medical Examination

Rule 217 (2) - Independent Medical Examination - costs of IME are to be at the expense of the party seeking it. Would require a court order to countermand this direction.

(3) - **Independent Medical Examination** - costs of a court ordered second or further IME are as "deemed proper" by the court.

(5) - **Independent Medical Examination** - costs of the person to be examined having his/her own physician present during the examination are in the discretion of the Court.¹

¹ *Pohynayko v. Vries* [2001] A.J. No. 57, 2001 ABCA 20

"[1] The issue on the appeal . . . is whether a person to be examined under Rule 217 is automatically entitled to the immediate payment of the interlocutory costs for the provision of a nominee under Rule 217(5). There have been several conflicting Queen's Bench decisions on the point.

"[2] The short answer to the question before us is 'No'. The normal default rule is that a party who is the subject of a medical examination bears the cost of a nominee in the first instance and, if successful at the end of the trial, can seek the costs of the nominee, as with any other aspect of the litigation. If costs are to be awarded, a party would have to apply under Rule 600(3). Costs in that instance should be determined upon the merits of the application before the Court and in the exercise of the Court's judicial discretion, not as a matter of right."

Part 15 - Experts

Rule 218.11(3) - the party requiring the **attendance of an expert for cross-examination** "shall pay the costs of the expert's attendance unless the Court . . . makes a different order about the payment of those costs."

Rule 218.15 - the party who objects to the **admission of an expert's opinion** "shall" pay "the cost of calling the expert . . . unless the Court otherwise determines."

Part 15.1 - Very Long Trial Actions

Rule 218.5 - costs occasioned by the **calling of unnecessary additional experts**:

- (1) if "the trial judge is of the opinion" that the expert was unnecessary the "trial judge shall require" the producing party to pay the other party's costs, and
- (2) the "trial judge shall direct" that the costs be on a solicitor and client basis, and
- (3) if more than one party must pay the costs the "trial judge shall determine the proportion of the costs to be paid and received."

Rule 218.7 - costs occasioned by **refusing to accept an expert or expert evidence**:

- (1) if "the trial judge is of the opinion" that such refusal was unreasonable the "trial judge shall require" the refusing party to pay the other party's costs, and
- (2) the "trial judge shall" direct that they be on a solicitor and client basis and determine any apportionment between parties.

Rule 218.8(3)(c) - under **Rule 612(2)** a taxing officer has the authority to set or fix, in advance, the conduct money to be tendered to a witness. Relative to the **examination of an expert witness** it is now possible to get an advance direction from a case management judge if **conduct money** in excess of the **Schedule E** limits is desired -a taxing officer cannot.

Rule 218.91 - costs occasioned by the **call of unnecessary rebuttal expert evidence**:

- (2) if "the trial judge is of the opinion" that the rebuttal evidence was unnecessary the "trial judge shall require" the producing party to pay the other party(s) costs, and
- (3) the "trial judge shall" direct that they be on a solicitor and client basis and determine any apportionment between parties.

Part 18 - Discontinuance

Rule 225 - Discontinuance of Action

(1) if done before entry for trial, the plaintiff "shall pay that defendant's taxed costs of the action". There is no need to obtain any form of direction from the court - one simply submits a bill of costs and, if necessary, an Appointment for Taxation. Only an agreement between the parties or an order of the court would preclude taxation of the bill of costs.

(3) if leave required, it will be "upon such terms as to costs" as the court imposes, not the taxing officer.

Part 20 - Admissions

Rule 230(4) - costs of proving a matter which was the subject of a **notice to admit**, was not admitted, and was proved at trial "shall be paid by the party who refused to make the requested admission, whatever the result of the cause", unless otherwise ordered.

Part 26 - Evidence

Rule 283 - costs of **examination under order or commission** are, "in the first instance", to be paid by the party for the examination of his witnesses, unless otherwise ordered.

Rule 296.1(5) - when a party objects to the **intention not to call a person** "the cost of calling that person shall be paid by the party who objected . . . unless the Court determines that the objection was reasonable."

Part 27 - Judgment

Rule 331 - costs related to obtaining a "**new judgment**" may be ordered, "if in the discretion of the court costs are allowed".

Part 28 - Enforcement of Judgments and Orders

Rule 367(2) - the expenses incurred by a 3rd party in order to carry out the **obligations of a contemptuous or disobedient party** "may be ascertained in such manner as the Court directs"; ie., only the court can direct a taxing officer to make such an assessment.

Rule 378 - costs of any **examination or application in aid of the enforcement** of judgments or orders "are in the discretion of the court". Particulars may be found in **Part 28, Division 5** of the *Rules of Court*; refer to **Rules 371, 372.1, 373, 374, 375, & 376**. Note that an examination of debtor conducted pursuant to **Rule 460.1** is not subject to this restriction; it is treated the same as any other examination.

Part 30 - Special Application to the Court

Rule 395 - costs of or incidental to any **application under Part 30 - Special Application to the Court** "are in the discretion of the court".

Part 39 - Appeals to the Court of Appeal

Rule 518(f) - "The court may make such order as to costs as to it seems just, but where the court is equally divided, the costs shall follow the event of the appeal." The mandatory component of the **Rule** is binding upon the taxing officer, unless otherwise ordered.

Rule 524(2) - "unless the court otherwise orders an appellant who fails to give **security for costs** when ordered shall be **deemed to have abandoned** his appeal and the respondent is entitled to his costs."

Rule 525 - Discontinuance of Appeal - "the respondent is entitled to his costs of the appeal" unless the parties agree or the court provides otherwise.

- Note that **Rule 527** makes costs which flow from **Rules 524 & 525** taxable without an order and once taxed the costs are treated as a judgment.

Rule 538(4) - costs of **preparation of a factum (Item 14 in Schedule C)** not filed within the time fixed by the Rules "shall not be [allowed]", unless otherwise ordered.

Part 47 - Costs - Costs for Non-compliance with the Rules

Rule 599.1(1) - where any person involved in an action fails to comply with the Rules or Practice Notes and, in so doing, has **interfered with the administration of justice**, "the Court may order that . . . person to pay to the clerk a penalty in the form of costs as determined by the Court."

Part 47 - Costs - Costs Between Parties

Rule 600(1)(a)(ii): the charges made by experts for "investigations and inquiries or assisting in the conduct of the trial" are allowable only "if the Court so directs".

Rule 601(3) - costs of the action will "follow the event", unless otherwise ordered.

UPDATED

- Note "**Court of Appeal Practice Notes - Consolidated Practice Directions - Costs in Civil Matters**" concerning the Court of Appeal's general practice of relying upon the application of **Rule 601(3)**, exceptions to that practice, and of the need for a factum to address any **request for an exception** to the general practice.
- Note **Rule 518(f)**, above.

Rule 605(1) - the recoverable "charges of **barristers and solicitors**" (**Rule 600(1)(a)(i)**) are limited to the amounts set forth in **Schedule C**, unless otherwise ordered.

Rule 605(6) - unless otherwise ordered **relief other than for the payment of money** shall be taxed according to Column 1 of **Schedule C**.

Rule 605(7) - unless otherwise ordered, where the amount sued for or the amount of the judgment does not exceed the **\$7,500 Provincial Court limit** and where the subject matter of the action was within the **jurisdiction of the Provincial Court**, "the costs to and including judgment shall be taxed in the amount of 75%" of Column 1.

Rule 607 - costs of an **interlocutory proceeding** will be "paid forthwith by the party who was unsuccessful", unless otherwise ordered.

Rule 608 - the **scale of costs of any appeal** "shall be the same as that applicable under the order or judgment appealed from". Note the rule provides that the *court* may set the "scale of costs" of both the appeal and "of the proceedings in the court below".

Part 47 - Costs - Lawyer and Client Charges

Rule 626(b) - **barristers & solicitors** may bring an **action for their charges** but may receive no costs of their action except by order of the court.

Part 47 - Costs - Taxation

Rule 629 - re: **costs of a taxation hearing** between solicitor and client

- (a) where the *client initiated* the hearing "costs shall not be allowed against the client . . . unless the taxing officer is of the opinion that the client has acted unreasonably", and
- (b) where the *solicitor initiated* the hearing "costs shall not be allowed against the client . . . except by leave of the court."

Rule 635 - **excessive or improper** costs are to be disallowed by the taxing officer, unless otherwise ordered.

Part 47 - Costs - Taxation Between Party and Party

Rule 640 - no costs shall be taxed until after the judgment or order allowing the costs has been **signed, entered or otherwise perfected**.

Rule 642 - **disbursements** other than fees paid to officers of the court shall not be allowed unless liability for same is established by **certificate** of the solicitor or by **affidavit** - either must state how the amount of any **witness fees** claimed is calculated.

Part 47 - Costs - Taxation Between Lawyer and Client

Rule 652 - **re-taxation of a bill of costs** - "a taxing officer shall not tax a bill of costs which has been previously taxed" unless the court orders otherwise.

Part 48 - Streamlined Procedure

Rule 661(6) - under the "Streamlined Procedure" where a party, in order to receive copies of records, must pay **copy charges**, the taxing officer may **fix the sum** to be paid ex parte, subject to adjustment by the court at a later date.

Rule 670 (1) - under the "Streamlined Procedure" a party making an **unnecessary or ill-founded motion, or failing to**

comply with a deadline, "shall be ordered to pay costs in any event and forthwith, except for special reason."

Part 49 - Foreclosure and Specific Performance Actions

Rule 693 (1) - in **foreclosure and specific performance actions**, when the Court grants an order declaring the balance owing to the plaintiff or grants judgment against any party "the clerk or the taxing officer shall tax the costs, if so required by the order."

Part 57 - Rules and Orders Promulgated Under the Winding-up Act

Rule 809 - fees of "solicitors, counsel, clerks, sheriff, and the registrar" in proceedings under the **Winding-Up Act** shall be those in **Schedules C** and/or **E**, unless otherwise ordered.

Rule 810 - in proceedings under the **Winding-Up Act** where an order is made in court or in chambers for the payment of any costs, those costs "shall be taxed by the clerk" unless otherwise directed by the court.

Schedule C - Barristers and Solicitors Fees

Preamble - "costs in relation to **residential tenancies** are not dealt with under any of these columns and are in the discretion of the Court" (See notes in sub-document "Schedule C - Annotation of . . .").

Item 3 - Document Discovery - only the court can **increase costs beyond the maximums** prescribed in the Schedule, the taxing officer lacks the jurisdiction.

Item 4 - Notice to Admit, etc. - the taxing officer will not allow costs under this Item without a direction from the court that the notice or opinion, in the court's "opinion, . . . expedited the case or better defined the matters in question."

Item 8 - Special Chambers

- there is a limit of one (1) "**additional half day**", unless otherwise ordered by the court.
- "for **complex chambers applications**, the Court may direct that costs relating to Item 15 apply."

Item 10 - Preparation for Trial - only the court can increase the costs beyond the maximums prescribed in the Schedule, the taxing officer lacks the jurisdiction.

Item 11 - Trial - costs of **second counsel** at trial are allowable only "by trial judge".

Item 12 - Written Argument - may only be allowed where **requested** or **allowed** by the trial judge.

Item 15 & 16 - Argument before Court of Appeal - costs of **second counsel** on appeal are allowable only "by the court".

Schedule E - Tariff of Fees for Court Officials - Number 3

Witness Fees - "allowances to **witnesses** and jurors may be increased under special circumstances by a judge".

Entry of Order or Judgment:

Rule 640 precludes taxation of a Bill of Costs "until after the judgment or order allowing the costs has been signed, entered or otherwise perfected, . . ." If the Taxation of a Bill of Costs has been made coincidental to an Appointment for Settling of Minutes of the Order or Judgment the Clerk of the Court / Taxing Officer will settle the minutes and will then tax the Bill of Costs subject to the party's undertaking to not file the Bill of Costs until the Judgment or Order is filed.

Payment In, Acceptance of Offer to Settle or Confession of Judgment, Discontinuance or Settlement:

If under any one of these circumstances costs to be allowed to experts as witnesses are to be in excess of the amounts prescribed by **Schedule "E"** or costs to such persons are to be allowed for "investigations, and inquiries or assisting in the conduct of the trial," application should have been made to the Court under **Rule 600(2)** for such direction.

Note that **Rule 600(4)** permits a party to apply for directions or an order as to costs even after entry of judgment.

Settlement:

If a matter has been concluded by way of settlement and costs are to go to one of the parties, but the amount has not been resolved, **Rule 611** requires the filing of a "memorandum of the settlement or a consent signed by the party agreeing to pay the costs." Failure to provide a document outlining the terms of agreement vis-à-vis costs may result in the Bill of Costs not being taxed and the parties having to reduce the terms of the settlement as to costs to writing. Of course, consensus between the parties at the hearing as to the terms of the agreement eliminates the need for the memo.

Issues Taxing Officers Would Prefer the Court to Address

Multiple Parties

Few issues frustrate a taxing officer as much as how to tax costs awarded to either multiple plaintiffs or multiple defendants. One or more Bills of Costs? What if one settles and wants its costs before the rest? How many Bills of Costs if represented by the same counsel? If more than one Bill of Costs: which column to apply? apportion the maximums? permit more than the maximums? Et cetera.

Such issues are best addressed by the Court which is familiar with the proceeding(s) and can best evaluate the proper distribution, apportionment or consolidation of awards of costs. If the Court does not do so **Rule 600(3)** provides that, "Costs may be dealt with at any stage of the proceedings," which has been interpreted very freely so far as permitting parties to seek guidance from the court, even after the entry of judgment (see **Rule 600(4)** and judicial consideration).

Reference is made to these issues in this paper because parties often choose not to seek direction from the Court and because Taxing Officers are asked about the issues regularly and frequently. You will note that the writers' own opinions are not expressed.

Speaking generally, Stevenson & Côté, in their ***Civil Procedure Handbook 2001***, at page 480, observe:

"One of the principal aims of the Rules of Court is to prevent multiplicity of proceedings, and many of the Rules allow a party to get relief against unnecessary duplication. Therefore, where two proceedings are conducted where one would do, or some steps are unnecessary, or where several parties with the same interest all appear by separate counsel and all argue, the court may well give only a single set of costs. (See the C.P.G., Rule 601(1), commentary B, and Rule 635, and the C.P.G.'s commentary on it.)"

A reading of the case law suggests that the treatment of costs to be allowed to multiple parties differs as between plaintiffs and defendants.

Several Defendants

Mark M. Orkin, ***The Law of Costs*** (2nd e., 16th rel. 2001) 209.4

"Where defendants have separate interests, each is justified in severing the defence if he or she chooses to do so, and each if successful is entitled to a separate bill of costs, unless the trial judge, in his or her discretion, sees fit to provide that there shall be but one set of costs. This principle is said to rest on 'the old practice in Chancery' which was that as a general rule parties in the same interest ought to join in their defence, as for example trustees and executors, husband and wife, mortgagor and mortgagee, bankrupt and assignee, trustee and *cestui que trust* and, generally, persons standing in a fiduciary position. It has been held that the practice of having two solicitors represent the same interest, *e.g.*, insurer and insured, in a motor vehicle action, is not to be encouraged and such parties, if successful, may be limited to one set of costs. Where the trial judge in his discretion awarded two separate sets of costs to the defendants, it was not open to the assessment officer or to a judge on appeal from the assessment to review the trial judge's disposition of the matter.

"A contrary view has, however, been expressed, deriving in part from a dictum in the Supreme Court of Canada: 'I know of no law or rule ... which compels persons ... to appear by the same solicitor because their interest, as regards their opposition to the claim of the plaintiff, may be identical'.

"While it is true that no defendant is under an obligation on being sued to hunt up some other party's solicitor instead of his or her own, a defendant will not be entitled to a separate bill of costs, if successful, when he or she is identical in interest with a co-defendant, or is a member of a group or class with a common interest as, for example, persons entitled to one share of an estate under administration proceedings, or a group of beneficiaries in an application for construction of a will; or parties having essentially the same interest in trust lands being sold by trustees.

"Certain exceptions to the general rule may be stated. When serious charges are made which reflect on the character of the defendants, such as libel, conspiracy, and matters of fraud and wrongdoing, defendants are entitled to make separate defences and to employ separate solicitors, and to be allowed their separate costs if they succeed, although not in an action for false arrest and, malicious prosecution.

"A trial judge who dismisses a plaintiff's action with costs, may exercise his or her discretion as to the number of bills

of costs to be allowed the defendants, or may leave it to the assessment officer to decide what proper costs under the rules the defendants are entitled to have assessed.

"The general rule does not apply to appeals, and the separate representation of respondents having identical interests is not to be encouraged."

Stevenson & Côté, *Civil Procedure Guide* (1996) 1955

"Usually parties with identical interests and arguments can expect only a single set of costs."

"There is no rule that all defendants must appear by the same solicitor, and even then he may charge some costs for each defendant?"

"If criminal allegations are made against defendants, a separate lawyer and bill of costs for each is proper even if the issues and arguments are similar."

"One of several co-defendants against whom the action was dismissed got full costs of the suit."

"Only one set of costs where parties with identical interests hire separate lawyers on an appeal."

"On when parties on the same side will be awarded separate costs, see":¹

Mitchell v. Martin & Rose [1925] 1 W.W.R. 500 (Man. K.B.) Dysart, J. - 2 defendants, 1 solicitor, filed 2 Statements of Defence, claimed for two sets of pleadings in 1 Bill of Costs with one set of items to cover common matters and separate sets of items for separate matters. Diverse interests - eg. the arrest and early detention were the sole acts of defendant Rose; likewise the conviction and imprisonment were sole acts of Rose:

"Where the interest of two or more defendants is diverse in any material respect, the defendants are entitled to sever their defenses. They are not bound to link themselves up to each other's fortunes . . . And the consequence that the severed statements of defence incidentally include much matter that is common to both is immaterial. Being practically unavoidable, it is all taxable.

"But where the interests, though diverse are not conflicting, there is no good reason why the defendants may not employ the same solicitor - at least up to the trial. And conversely, it is quite proper for a solicitor to act for them. But in such a case he is limited to one bill of costs, in which there should be but one set of items to cover all the common matters, and separate sets of items for separate matters. . . . *McDonald v. Cunningham* (1885) 3 Man. 39."

Hunt v. Texaco Exploration Company & Hunt v. Thom (1954) 14 W.W.R. 449, (Alta. S.C.) Cairns, J. - 2 actions, 1 plaintiff, 2 defendants - defendants have same three solicitors - 2 actions heard together for trial - costs to 2 defendants - ordered two sets of costs up to trial, whereupon become 1 set of costs.

Merrill Petroleum Limited & Cancoll Oil & Gas Company Limited v. Seaboard Oil Company, Canadian Superior Oil of California, Limited and Honolulu Oil Corporation (1957) 22 W.W.R. 529 (Alta. S.C.) Egbert, J.; affd. (1958) 25 W.W.R. 236 (C.A.) - 3 defendants, 2 plaintiffs - 1 action - defendants all had own solicitor - very diverse interests - set of costs to each defendant:

"On the question of costs, each defendant in the action was in a different position. The interests of Honolulu as a participant were quite different from the interests of Seaboard as the operator, and the interests of Superior were, of course, not united in any way with those of its co-defendants. The action is in reality three separate actions against each defendant. The defendants all filed separate defences, and were represented, and rightly so, by separate counsel. Under the circumstances I can see no reason why each defendant should not be entitled to its separate costs against the plaintiff's."

Several Plaintiffs

Mark M. Orkin, *The Law of Costs* (2nd e., 16th rel. 2001) 208.1 & 208.3 - extracts:

"Where several plaintiffs sue by the same solicitor, and one succeeds while others fail, the successful plaintiff will be

¹ These examples are cited in Stevenson & Côté, *Civil Procedure Guide* (1996). For convenience we have provided the details and the quotes.

entitled to recover the whole of his or her costs from the defendant, and not merely a proportion.

NEW "The unsuccessful plaintiffs will be obliged to pay the defendant's costs occasioned by their having been joined unless the court otherwise orders. (*Duchman v. Oakland Dairy Co. Ltd.* [1930] 4 D.L.R. 989 (Ont. H.C.) *affd loc. cit.* (S.C.App.Div.), however, *Ouston et al. v. Zurowski et al.* (1985) 33 A.C.W.S. (2d) 79 (B.C.C.A.)).

"Where two or more parties entitled to costs are represented by the same solicitor, one bill of costs can be submitted for assessment."

"Where a number of plaintiffs are represented by the same solicitor who delivers a joint statement of claim on their behalf, and one of them accepts money paid into court in satisfaction of his or her claim but does not then assess costs, and the others proceed to trial and judgment is given awarding the plaintiffs one set of costs, only one bill of costs can be assessed for all plaintiffs.

"However, although the plaintiff who accepted the money paid into court may not file and assess a separate bill of costs, his or her costs must be borne in mind by the assessment officer when assessing the plaintiff's bill. (*Boyuk v. Blake* [1961] O.W.N. 283, *varg* [1961] O.W.N. 215 (H.C.J.). See also *Osmond v. Sears Canada Inc.* (1988) 10 A.C.W.S. (3d) 260 (Nfld.S.C.) two plaintiffs who succeeded against defendant awarded one counsel fee only.)"

Stevenson & Côté, *Civil Procedure Guide* (1996) 1955-57

"Usually parties with identical interests and arguments can expect only a single set of costs."

"Only one set of costs where parties with identical interests hire separate lawyers on an appeal."**

For several examples of how multiple plaintiffs are treated see page 1955, "3. Separate Suits".

For miscellaneous examples of how multiple parties are treated see page 1956, "5. Extra Parties".

Issues to Be Addressed in Taxing the Bill of Costs

Service of the Appointment for Taxation - Rule 631

NEW

Elementary, but must be in order. Rule 631 requires:

"A copy of the appointment, together with the bills of costs and certificate of or affidavit (if any) shall be served on every person interested in the taxation at least **five days** before the time fixed for the taxation." [Emphasis added]

In counting the five days do not include weekends or holidays. Rule 545 states:

"Where any period less than seven days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, holidays and Saturdays shall not be reckoned in the computation of the period."

Further, do not include the day of service of the Appointment nor the day of the taxation. Rule 546(2):

"Where the days are expressed to be 'clear days' or where the term '**at least**' or the term 'not less than' is added, the first and the last days shall be excluded." [Emphasis added]

Note that under Rule 628(d & f) the Taxing Officer has the authority to provide a Fiat deeming service good and sufficient, and abridging the time for service. An Affidavit in support of such a Fiat would be necessary. The Taxing Officer cannot dispense with service.

Court's Discretion

In what manner or to what extent has the Court utilized its discretion relative to costs (see **Rule 601(1 & 2)**)? In other words, be familiar with the filed Judgment or Order from which the Bill of Costs arises.

Look for the following information:

- Whether the court awarded costs or was silent as to costs.

- If the court awarded costs, the nature of the costs awarded, to whom and against whom they were awarded.
- Whether any compulsory default cost awards apply (eg. **Rule 296.1**, **Rule 174**, **Rule 607**, etc.)
- If the court was silent as to costs, any clues from the judgment or order as to who won the event (**Rule 601(3)**) and as to the appropriate column to be applied in **Schedule C (Rule 605(5-8))** for the charges of barristers and solicitors.
- The existence of any set-off (**Rule 641**) against the Bill of Costs, such as a Counter Claim, costs of an interlocutory application, "thrown away costs", interpleader proceedings, etc.

Default Provisions

If the court was silent as to costs the following default provisions of the Rules of Court may need to be addressed:

- **Rule 601 (3)** - costs follow the event - even distributively, if there is more than one event;
- **Rule 605** - charges of Barristers and Solicitors are limited to **Schedule C**;
- **Rule 607** - the costs of interlocutory applications follow the event;
- **Rule 608** - the scale of costs in appeal proceedings are the same as the lower court's ruling, or as provided by the default provisions;
- Other compulsory default cost provisions, most of which are referred to in "Issues to be Resolved Prior to Taxation" (above).

Note that if the costs are influenced by the terms of any contractual obligations (mortgages, promissory notes, etc.) or of statutory provisions (Expropriation Act, Surface Rights Act, etc.) the relevant portions should be provided to the Taxing Officer.

Terms of Settlement

If there has been a settlement between the parties the Taxing Officer will need to know the terms of same as they relate to costs. As previously indicated (see "Issues to be Resolved Prior to Taxation - Settlement" (above)) it may be necessary to have these terms in writing, otherwise, should there be a conflict at the taxation as to the agreed terms of the agreement, the Taxing Officer may not be able to proceed with the taxation.

Substantiation of Costs:

It is in your best interests to have the whole of your file with you.

Fees: It is not uncommon for the opposing party to challenge a fee on the grounds that it was unnecessary or that it was not performed, most especially in circumstances where the court record may be deficient. For example, if one prepares and files a Notice of Motion and Affidavit to compel the provision of undertakings, but prior to the hearing of the application the other party capitulates or comes to agreement with you on the point in question, there may never be a Court appearance or an Order filed on the issue. Under **Rule 605(3)** you would be entitled to a portion of the **Item 7** fee for preparation of the Notice of Motion and the Affidavit, and even for preparation for the Application. Being able to open up your file and draw attention to correspondence, memos and notes which substantiate the reasonableness of incurring these costs, highlighting the circumstances giving rise to the application, would go a long way towards entitling your client to an allowance of costs for the steps taken.

Disbursements: **Rule 642** requires the filing of an Affidavit of Disbursements or a Certificate of the Solicitor (a sample may be found at the end of sub-document "Disbursements") for the purposes of (1) establishing the liability for disbursements incurred, and (2) the calculation of witness fees and expenses. However, that document usually does not adequately address all the objections that **Rule 635** might permit: the necessity or propriety of charges, for example, for fax, courier, long distance telephone, searches, etc. Reference to one's file can answer many questions regarding the necessity and propriety of such costs.

Costs of the Taxation

Rule 629 leaves the costs of the taxation in the discretion of the Taxing Officer, but he/she will want submissions on the issue.

Appeals from Taxation

NEW

Relevant Rules of Court

Time for Appeal and Contents

- Rule 655 (1)** Any person pecuniarily interested in the result of any taxation may, not later than 10 days after he has received notice of any certification on taxation, appeal the taxation as herein provided.
- (2) The appellant shall appeal to a judge in chambers by filing with the taxing officer and the clerk of the court to which the appeal lies a notice of appeal and serving it upon the opposite party or parties.
- (3) The notice of appeal shall specify the items objected to, the grounds of the objection and the date of the hearing of the appeal.
- (4) The notice of appeal shall be
- (a) returnable within 20 days from filing it with the clerk, and
 - (b) served on all parties directly affected by the appeal not less than seven days before the date set for the hearing of the appeal.

Appeal Confined to Items Specified

Rule 656 Unless otherwise ordered, the appeal shall be confined to the items and grounds specified and shall be heard on the evidence before the Taxing Officer.

Powers of Court

- Rule 657 (1)** On any such appeal the court may exercise all of the powers of the taxing officer and may review any discretion exercised by the taxing officer as fully as if the taxation were made by the court in the first instance.
- (2) The court may make such order as to costs of the appeal and taxation as seems fit.

Amendment of Writ

- Rule 658(1)** If a writ of enforcement has been issued for costs which are reduced on appeal, the writ of enforcement shall be returned to the clerk issuing it for amendment in accordance with the order made upon the appeal.
- (2) If the amount as originally taxed by the taxing officer has been paid and after payment is reduced on appeal, the court hearing the appeal may order the return of the excess by the party who has received it and the order may be enforced as an order of the court, but if the costs have been paid to a solicitor, the solicitor may be ordered to return the excess (and if he fails to do so he may be guilty of a civil contempt).

Reasons of Taxing Officer: Requirements

In *Fontaine v. Veylan* [2002] A.J. No. 397, 2002 ABQB 327 (Q.B.) Veit, J. cites *McLennan Ross and Keen Industries Ltd. v. Mercantile Bank of Canada* (1987) 55 Alta. L.R. (2nd) 290 (C.A.) and *Mercantile Bank of Canada v. McLennan Ross and Keen Industries Ltd.* (1988) 59 Alta. L.R. (2nd) 369 (C.A.) as authority for the conclusion that "a taxing officer is not required to give extensive reasons for decision; nor are written reasons required [para. 4]." In response to the appellant's position that "the law states somewhere that a decision should be explained in detail so that the monetary value of the decision matches that of the reasons for the decision" the Honourable Madam Justice Veit responded,

"On the contrary, our Court of Appeal has held that a high standard of giving reasons for decision should not be imposed upon taxing officers: **Keen Industries**. This is because, contrary to Mr. Fontaine's expectation, a taxing officer's job is not to give reasons, but to come to the right decision; that is to say that, with few exceptions related for example to credibility, an appeal is not from the reasons for decision, but from the decision itself. . . . For example, in any appeal, the appeal court could conclude that the decision made in the tribunal below was the correct decision, but that the reasons given by the tribunal below were erroneous. The result is that the appeal would be denied or dismissed because the appeal court upheld the decision below."

In the *Keen Industries* (above) 1987 decision the panel explained,

"In our view, the learned chambers judge erred. In our view, he set far too high a standard in terms of the reasons

required of a judicial officer. This taxing officer gave Reasons for judgment several pages in length. He expressed a view about all the relevant factors and he made findings of fact on all the disputed points. He did not, to be sure, articulate precisely why his balancing of the relevant factors led him to the figure he chose. We agree that, in cases of this sort, a judge can do more than settle upon the various factors to be considered, and make the kinds of decisions that the learned chambers judge made. He then must, in his own mind, balance those factors and choose a figure. This is what judges do, for example, in sentencing, or in the award of general damages. Indeed, we note that, when he proceeded to tax the account himself, the learned chambers judge did precisely the same thing. To demand more of a judicial officer in such a case would inevitably lead to him assigning some specific quantification to each factor - which in the end would be just as arbitrary as assigning one in total."

Who May Appeal?

Any party with a financial interest in the result of any taxation may appeal (**Rule 655(1)**).

Time Limit

Rule 655 requires that a Notice of Appeal be filed with the clerk of the court no more than **10 days** after the appellant received notice of any certification of taxation.

The Notice of Appeal must be served on the taxing officer and on the opposite party or parties, not less than **7 days** before the date set for the hearing of the appeal.

The date chosen for the hearing of the appeal must be within **20 days** of the date of filing of the Notice of Appeal.

However, see *Lee v. Anderson Resources Ltd.* [2002] A.J. No. 706 (Q.B.) where **Rule 390** was utilized to permit a Justice of the Court of Queen's Bench to direct the hearing of an appeal even after having, himself, granted judgment on the taxed bill of costs. Cites other case law good explanation for conclusions reached.

To Whom?

An appeal from the decision of a taxing officer is heard by a **Justice of the Court of Queen's Bench** sitting in open chambers. It is *not* heard by the Court of Appeal of Alberta; unless, of course, it is an appeal from a decision of a Justice on appeal, or from a Justice's taxation of a Bill of Costs.

Standard of Review

In the *Keen Industries* (above) 1988 decision the panel explained the issue before it: "The problem in this case is to determine the standard of review to be applied by the Court of Queen's Bench on an appeal from a taxation."

The panel concluded:

"The solicitors say that the chambers judge was in the position of a judge hearing the matter "de novo" and was entitled to exercise his own discretion in determining the quantum. The court may approach the subject de novo, the question is when ought that power be exercised?"

"The majority of Canadian authorities support the conclusion that on an appeal from a taxing officer "the judicial approach appears rather uniform and is one of non-interference unless the taxing master operates on a wrong principle and thereby fell into error". This statement is taken from a judgment of the Nova Scotia Supreme Court Appeal Division in *Cape Breton Landowners et al v. Stora Kopparbergs etc.* (1963), 33 C.P.C. 1. The relevant Nova Scotia rule is in the same terms as rule 657. A number of other authorities are reviewed in that decision. If the quantum awarded can be said to be inordinately high or low, that is a ground of interference because it betrays an error of principle. Once error is found the reviewing court may then make its own assessment.

"The solicitors' case is based on the assumption that the calculation of the proper amount of fees is, itself, a matter of discretion. While we do find that term used from time to time, I prefer the view that the assessment is not "the exercise of a discretion". It is a determination of value or worth which

ordinarily involves a weighing of the factors relevant to that assessment like any determination of a quantum meruit claim. I do not read rule 657 as giving the judge sitting on appeal a power to re-assess or re-weigh the material before the taxing officer. There are some matters of discretion open to a taxing officer and open for review by the judge hearing the appeal, but not the assessment of a value. In making his assessment the taxing officer is not exercising a discretion, any more than the judge who fixes general damages is exercising a discretion.

“There are practical grounds for not making the hearing before the reviewing judge a de novo hearing. In the first place, the taxing officer will often hear evidence and examine material which gives rise to questions of credit or weight. A chambers judge cannot effectively substitute his views on such questions. Moreover, the taxing officer’s function is a specialized one and he may have to bring his own experience and expertise to bear. It is thus unlikely that the standard of review should be “de novo”.

“In my view in Alberta the primary question on review of a quantum fixed by a taxing officer is (as in many other jurisdictions) whether he has made an error of principle, or whether the award is inordinately high or low.”

Judicial consideration and general acceptance of the *Keen Industries* decisions is extensive.

Transcripts are Required for an Appeal

In *Fontaine* (above), at para. 3, the court stated, “Because this is an appeal, and not a new hearing, a litigant who appeals a taxing officer’s reasons for decision should provide the appeal court with a transcript of the taxation hearing.”