

RULE 57

COSTS OF PROCEEDINGS BETWEEN PARTY AND PARTY AND BETWEEN SOLICITOR AND CLIENT

GENERAL PRINCIPLES

Factors in Discretion

- 57.01** (1) In exercising its discretion under section 53 of the *Supreme Court Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
- (a) the amount claimed and the amount recovered in the proceeding;
 - (b) the apportionment of liability;
 - (c) the complexity of the proceeding;
 - (d) the importance of the issues;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
 - (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
 - (g) a party's denial of or refusal to admit anything that should have been admitted;
 - (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and
 - (i) any other matter relevant to the question of costs.
 - (j) the principal of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

- (k) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed.

Costs Against Successful Party

- (2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

Fixing Costs: Tariffs

- (3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Assessment in Exception Cases

- (3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Authority of Court

- (4) Nothing in this rule or Rules 57.02 to 57.07 affects the authority of the court under section 53 of the *Supreme Court Act*,
 - (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
 - (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding; or
 - (c) to award all or part of the costs on a substantial indemnity basis.
 - (d) to award costs in an amount that represents full indemnity; or
 - (e) to award costs to an unrepresented party.

Bill of Costs

- (5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it with proof of service.

Costs Outline

- (6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length.

Process for Fixing Costs

- (7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties.

DIRECTIONS TO PROTHONOTARY

- 57.02** (1) Where costs are to be assessed, the court may give directions to the Prothonotary in respect of any matter referred to in Rule 57.01.
- (2) The court shall record,
 - (a) any direction to the Prothonotary;
 - (b) any direction that is requested by a party and refused; and
 - (c) any direction that is requested by a party and that the court declines to make but leaves to the discretion of the Prothonotary.

COSTS OF A MOTION

Contested Motion

- 57.03** (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,
- (a) fix the costs of the motion and order them to be paid within 30 days; or
 - (b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.
- (2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceedings, strike out the party's defence or make such other order as is just.

Motion Without Notice

- (3) On a motion made without notice, there shall be no costs to any party, unless the court orders otherwise.

COSTS ON SETTLEMENT

57.04 Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs may be assessed under Rule 58 on the filing of a copy of the minutes of settlement in the office of the Prothonotary.

COSTS OF LITIGATION GUARDIAN

- 57.05** (1) The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent, but may further order that the successful party pay the costs only to the extent that the successful party is able to recover them from the party liable for his or her costs.
- (2) A litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom he or she has acted, unless the court orders otherwise.

LIABILITY OF SOLICITOR FOR COSTS

- 57.06** (1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
- (a) disallowing costs between the solicitor and client or directing the solicitor to repay to the client money paid on account of costs;
 - (b) directing the solicitor to reimburse the client for any costs that the client had been ordered to pay to any other party; and
 - (c) requiring the solicitor personally to pay the costs of any party.
- (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the solicitor is given a reasonable opportunity to make representations to the court.
- (3) The court may direct that notice of an order against a solicitor under subrule (1) be given to the client in the manner specified in the order.

SOLICITOR AND CLIENT COSTS: GENERAL

Costs to Be Reasonable

- 57.07** (1) A solicitor is entitled to such compensation from a client, who is a party, as is reasonable for the services performed, having regard to
- (a) the nature, importance and urgency of the matters involved;
 - (b) the circumstances and interest of the person by whom the costs are payable;
 - (c) the fund out of which they are payable;
 - (d) the general conduct and costs of the proceeding;
 - (e) the skill, labour and responsibility involved, and
 - (f) all other circumstances, including, to the extent hereinafter authorized, the contingencies involved.
- (2) The charges of a solicitor for services performed by him under subrule (1) are, notwithstanding any agreement to the contrary, subject to assessment as provided by Rule 58.
- (3) Upon taxation between a solicitor and his client, allowances may be made in the discretion of the Prothonotary, but the exercise of such discretion is subject to review upon an appeal. Where for any reason the services covered by an item are not completed, the fee may be apportioned by the Prothonotary.

Contingent Fee Agreement

- 57.08** A solicitor may, with respect to an intended or existing proceeding, make an agreement with a client for the amount and manner of payment of the whole or any part of past or future services, fees, charges or disbursements rendered and incurred, or to be rendered and incurred, by him with respect to the proceeding, and the form of payment may consist of a gross sum, commission, percentage or otherwise in an amount which may be the same, greater or less than that which the solicitor normally receives as remuneration, subject however to assessment under Rule 58.

Agreement Must Be in Writing

- 57.09** (1) Where an agreement referred to in Rule 57.08, a solicitor's compensation is dependent or contingent, in whole or in part upon the successful disposition of the subject matter, then the agreement shall be in writing and signed by the client or his authorized agent.
- (2) The agreement shall contain,

- (a) the name and address of each client;
- (b) the name and address of the solicitor;
- (c) a statement of the nature of the claim;
- (d) a statement of the contingency upon which the compensation is to be paid, and, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected by the solicitor;
- (e) a statement that reasonable contingent compensation is to be paid for the services, and the maximum amount or rate which the compensation is not to exceed, after deduction of all reasonable and proper disbursements; and
- (f) a statement to the following effect:

"This agreement may be reviewed by the Prothonotary at the client's request, and may either at the instance of the Prothonotary or the client be further reviewed by the court, and either the Prothonotary or the court may vary, modify or disallow the agreement".

Agreement Must Be Filed

- 57.10** (1) Within ten days after it is signed, a copy of an agreement referred to in Rule 57.08 shall be filed with the Prothonotary, and the Prothonotary shall file the agreement separately from any proceeding and, unless the court otherwise orders, the agreement is not available for inspection by, or its contents shall not be communicated to any person, other than the client, solicitor, or Prothonotary engaged in the assessment.
- (2) Where an agreement as mentioned in Rule 57.08 does not comply with Rule 57.09, or is not properly filed as provided in subrule (1), the solicitor is, upon the successful disposition of the subject matter, entitled only to the compensation as would have been payable in the absence of any contingency arrangement and without regard to the contingency.

Review of Agreement by Prothonotary or Court

- 57.11** (1) Any agreement as mentioned in Rule 57.08 may, at any time after its making until the expiry of six months from the last date on which a solicitor has received, on his own account, the fee or any part of it, be reviewed by the Prothonotary at the instance of the client.
- (2) At any time after he has given his decision on review, the Prothonotary may, and on the request of the client shall, refer the agreement to the court. The Prothonotary shall obtain an appointment for the review by the court and shall notify the solicitor and the client of the appointed time.
- (3) The court and Prothonotary have power on review to,
- (a) approve the agreement,
 - (b) vary, modify or disallow all or any of the provisions of the agreement, and if the agreement is so disallowed, any amount payable to the solicitor shall be determined in accordance with Rule 57.10(2), and
 - (c) exercise the powers which a Prothonotary has on the assessment of a solicitor and client bill of costs in a proceeding.

Void Provisions in Agreement

- 57.12** (1) A provision in an agreement respecting solicitor and client fees which purports to,
- (a) relieve a solicitor from liability for negligence or other liability to which he might be subject as a solicitor;
 - (b) provide that a proceeding cannot be abandoned, discontinued or settled without consent of the solicitor
- is void.
- (2) Notwithstanding anything in an agreement to the contrary, a client may change his solicitor before the conclusion of the retainer.

Death of a Solicitor

- 57.13** (1) Where a solicitor dies or becomes incapable of acting before his retainer has been completely performed by him, an application may be made by or on behalf of either party to the Prothonotary to determine the amount, if any, due in respect of the services rendered under the retainer and, subject to subrule (2), the

Prothonotary in determining the amount shall have regard to terms of any agreement between the parties.

- (2) Where an agreement provides that payment is to be contingent, in whole or in part, upon the successful disposition of the subject matter, the Prothonotary has the powers provided by Rule 57.11 or may refuse any compensation, and no monies in respect of the agreement are payable until the disposition has been made.
- (3) Where a client changes or discharges his solicitor before the conclusion of the retainer, the solicitor shall be deemed to have become incapable of acting within the meaning of subrule (1).
- (4) Where a client personally settles any matter which is the subject of an agreement as described in subrule (2), without changing or discharging his solicitor, he shall be deemed to have discharged him within the meaning of subrule (3).
- (5) Where a client discontinues or abandons any matter which is the subject of an agreement as described in subrule (2) without changing or discharging his solicitor, then the solicitor may apply to assess his costs against his client, and the Prothonotary may, if he finds the discontinuance or abandonment to be wholly unreasonable, allow to the solicitor reasonable compensation therefor, and has the powers provided by Rule 57.11.
- (6) Payment of any amount found to be due under Rule 57.13 may be enforced in the same manner as if the solicitor had completely performed his retainer, except that in any case falling within subrule (2), payment may not be enforced prior to the successful disposition, and then only with the leave of the court.

Costs of a Solicitor Acting as a Trustee, Etc.

57.14 Unless an enactment otherwise provides, a solicitor who is a guardian, committee, mortgagee, trustee or personal representative is entitled as against the estate, fund, or mortgaged property, to make the same charges for services performed by him as a solicitor for or in connection with the estate, fund or mortgaged property as might have been payable out of the estate or fund, or be chargeable against the mortgaged property, as if the solicitor had been employed by some other person acting in that capacity.

Costs Payable Out of Trust Funds

57.15 Costs payable out of or chargeable against any trust estate, trust fund or mortgaged property, shall not be so paid as against any person interested therein, unless

- (a) the costs have been assessed;

- (b) any interested person is sui juris and has consented to the payment; or
- (c) the court has fixed the amount of, and directed the payment or charge.

Payment in Advance or Security Taken

57.16 A solicitor may obtain payment in advance or take security for his future fees, charges or disbursements, subject to the right of assessment.

Charging Property for Fees

- 57.17** (1) The court may, on the application of a solicitor, declare that the solicitor is entitled to a charge for his proper fees and disbursements in a proceeding upon the property recovered or preserved through his instrumentality in the proceeding, and may make such order as is just for the payment of the fees and disbursements out of the property.
- (2) Nothing shall defeat any such charge referred to in subrule (1) unless the property has been disposed of to a bona fide purchaser for value without notice.
- (3) An order shall not be made under subrule (1) where the right of a solicitor to recover payment of his fees and disbursements is barred by any statute of limitations.

Proceeding for Costs

57.18 A solicitor may bring a proceeding for any costs due to him.

COSTS OF A PROCEEDING REMOVED TO THE SUPREME COURT

57.19 The court may deal with the costs of a proceeding transferred or removed to the court from any other tribunal, including the costs arising both before and after the transfer or removal, as it deems just.

MacPherson v. Ellis 2005 PESCAD 19

Costs ordered on a substantial indemnity basis. In assessing costs, the principles of indemnification apply. The amount should reflect what the parties would expect as a reasonable and fair amount to be contributed by the unsuccessful party to the costs of the successful party.

Corps. of Commissionaires v. Labour Rel. Bd. (P.E.I.) 2005 PESCAD 11

The function of the court in assessing costs is to consider what is reasonable in the circumstances.

Tannereye v. Hansen 2002 PESCTD 37

In deciding to award the plaintiffs 50% of their costs on a party-party basis the trial judge indicated that four factors were significant; (1) none of the offers attracted cost consequences under Rule 49.10 or 49.11; (2) the plaintiff's claim was disproportionately high in relation to the final award; (3) the major portion of trial time related to claims that were disallowed; and (4) the plaintiffs were partially successful on the issue of general damages. *Terris v. Crossman* [1995] P.E.I.J. No. 16 (Q.L.) (PEISCTD) was applied.

Action Press v. PEITF 2002 PESCTD 02

The trial judge considered the criteria for awarding solicitor-client costs and awarded costs on a party-party basis.

Branton v. Dixon 2002 PESCTD 11

In exercising his discretion not to make an award of costs to either party the trial judge considered the fact there is some importance to be attached to not upsetting the balance achieved by the award itself.

Polar Foods v. Labour Relations Board et al. 2002 PESCTD 78

The power of the court to award costs of a "proceeding" relates to a proceeding in the Supreme Court and does not extend to a hearing before the Board. The Rules Committee established pursuant to the provisions of the *Supreme Court Act*, R.S.P.E.I. 1988 Cap. S-10, does not have power to make rules with respect to proceedings before an inferior tribunal like the Board. Alternatively, this Rule is rendered meaningless by virtue of the application of *Judicial Review Act* and the procedure it contemplates.

Callaghan v. Montague (Town) (2000), 195 Nfld. & P.E.I.R. 190; 286 A.P.R. 190

Where the applicant sought to recover a variety of costs incurred in preventing the respondent from demolishing her property, the Court found that only those expenses which were directly related to or were incidental to her application for the injunction restraining the respondent from carrying out such demolition, came within the meaning of "costs".

Aucoin v. Martin (1999), 185 Nfld. & P.E.I.R. 178 (P.E.I.S.C.T.D.)

On an application for support, the applicant was represented by counsel who, in accordance with Practice Note 22, filed a statement of costs. The applicant was awarded costs of preparation for trial but was not awarded a "counsel fee" as he did not set forth in the statement of costs the basis upon which the counsel fee was sought.

Griffin v. Town of Summerside et al., [1998] P.E.I.J. No. 30 (Q.L.) (P.E.I.S.C.-T.D.)

The fact a party is successful in a proceeding does not prevent the court from awarding costs against that party in a proper case. Where the parties “achieved divided success” on an application for judicial review, the court awarded the applicant his entire party and party costs because the conduct of the respondent and its agents contributed to the applicant having to resort to making the application.

Morrissey v. MacNeill et al. (1997), 151 Nfld. & P.E.I.R. 287 (P.E.I.S.C.T.D.).

After a jury trial the plaintiff’s claim against the defendants for defamation based on the publication of a newspaper story, was dismissed. The Court ordered the plaintiff to pay only one-half of the defendant’s party and party costs because the defendant displayed a lack of care and vigilance in the publication of the story.

Terris v. Crossman, [1995] 2 P.E.I.R. 227 (P.E.I.S.C.T.D.)

The court reduced the amount of the party and party costs to which the plaintiff was entitled by 25% because of certain actions of the plaintiff throughout the course of the proceedings. The court also awarded the defendants their costs in obtaining and consulting independent counsel by reason of the fact the plaintiffs claim was originally in excess of the policy limits of the defendants insurance. The court was of the view the claim was initially unrealistic and as it was reduced to the limits of the defendants’ insurance policy one week before the trial, the defendants should have their costs associated with having to defend the larger claim. The court also noted that where a party calls expert witnesses to give *viva voce* evidence, even when the other party is prepared to accept the expert’s report in accordance with Rule 53, there may be cost consequences. There were none here because of the application of Rule 49.

Huynh v. Mills (1994), 129 Nfld. & P.E.I.R. 9 (P.E.I.S.C.-T.D.)

While an offer may not trigger the application of Rule 49.10, it remains a factor which the court may consider in the exercise of its discretion to award costs.

Clark v. Biggar (1993) 112 Nfld. & P.E.I.R. 330 (P.E.I.S.C.-T.D.)

The general rule in legal proceedings is that costs follow the result. A successful party has no legal right to costs, but only a reasonable expectation of receiving them, subject to the court’s discretion in that regard - this general rule should govern the award of costs in the family proceedings. The rule was developed to foster realistic assessments and realistic settlements. That objective has application in family law matters. Unless a case is an exception

to the ordinary rule, the successful party should be entitled to party and party costs.

Rayner v. Knickle and Kingston (1992), 99 Nfld. & P.E.I.R. 35 (P.E.I.S.C.-A.D.)

Costs are in the absolute and unfettered discretion of the court, subject only to the requirement that the discretion must be exercised judicially, and the judge ought not to exercise it against a successful party, except for some reason connected with the case. Action brought against two physicians, only one of whom was found liable. Because the plaintiff had reasonable cause to sue both physicians, the plaintiff was allowed to recover from the negligent physician the costs he had to pay the other physician. This is known as a "Bullock Order."