COURT OF QUEEN'S BENCH
COSTS MANUAL

COSTS BETWEEN PARTIES
RECOVERABLE COSTS OF LITIGATION

Updated October 31th, 2010

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 assess 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

Assessment 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 - Assessment 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, Assessment Officers for the Province of Alberta. They are not necessarily representative of how they or other Assessment officers of any Judicial Centre 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.

"Lack of predictability in costs awards is a disincentive to settlement and efficiency in litigation: Canadian Bar Association, Systems of Civil Justice Task Force Report 46 (1996)."

Metz v. Weisgerber [2004] A.J. No. 510, 2004 ABCA 151, 243 D.L.R. (4th) 220, 33 Alta. L.R. (4th) 17, 348 A.R. 143, 47 C.P.C. (5th) 253, 8 E.T.R. (3d) 117, 2 R.F.L. (6th) 87, 133 A.C.W.S. (3d) 603, (Alta. C.A., Fraser C.J. A. and Côté and Picard JJ.A.), at para. 39.

COURT OF QUEEN'S BENCH COSTS MANUAL

Draft Oct 31/10

Schedule C

Note: This document is intended as an annotation of **Schedule C: Tariff of Recoverable Fees** from an assessment officer's perspective. Please note the **Disclaimer** on the front page of this document.

Note: To assist those still unfamiliar with the November 1st, 2010, set of "new" Rules and still thinking in terms of the "old rules" we have attempted, where possible, to reference the "old rule" most closely related to the "new rule" or concept being discussed. For reasons which should be obvious, the relationship between *new* and *old* is sometimes fuzzy and in many instances *old* rules have either been amalgamated into one *new* rule or *old* rules have been broken up into many *new* rules.

It is helpful to keep in mind that the *new* rules start from the premise that a "successful" party to litigation is automatically entitled to costs, unless otherwise ordered, as against the "unsuccessful" party (rule 10.29) whereas the *old* rules gave the impression of being focused more on entitlement to costs arising from an order or judgment of the court (rule 601).

Note: We readily acknowledge ignorance of all the *new* rules. Where our observations and the rule(s) conflict the rule(s) prevail, especially when it is apparent that we were unaware of the conflicting rule(s). Further, we anticipate considerable interpretation of the rules, which we welcome and hope to incorporate in future updates to the Costs Manual.

Introduction to Schedule C - Tariff of Recoverable Fees

Successful Party is Entitled to Costs, Unless Otherwise Ordered - Rule 10.29(1)

Rule 10.29(1) of the ***Alberta Rules of Court [ARC]*** grants a successful party to an application, a proceeding or an action, an *entitlement* or *right* to a costs award which is to be paid by the unsuccessful party *forthwith*. In short, the ***ARC*** authorize, by default, any successful party to an award of costs. This entitlement to costs is "**subject to**" the following restrictions: *[Rule 601(3) & 607]*

"(a) the Court's general discretion under rule 10.31 *[Court-ordered costs award]*, *[Rule 601]*

"(b) the assessment officer's discretion under rule 10.41 *[Assessment officer's decision]*, *[Rule 629]*

"(c) particular rules governing who is to pay costs in particular circumstances [see **Rules**

3.66:	costs of an amendment to be borne by party amending,
4.29:	entitled to double costs re formal offer to settle,
4.36-37:	entitlement to costs on discontinuance,
5.12:	possible costs penalty for failure to serve affidavit of records,
5.17(2):	costs of questioning 2nd and subsequent persons to be paid by questioning party,
5.21:	allowance to be paid together with appointment to question - Part 5,
5.40:	party requesting an expert's attendance for cross-examination must pay expert's costs,
5.43:	costs associated with medical examinations,
6.17:	allowance to be paid together with appointment for questioning - Part 6,
6.43:	costs of expert to be paid by parties in equal proportions,
10.22:	no costs to lawyer or law firm for review of lawyer's charges.]

"(d) an enactment governing who is to pay costs in particular circumstances, and

"(e) subrule (2) [ex parte hearings]."

For a more detailed review of "costs" see sub-documents "Introduction to Costs" and "Assessment of Costs" at the Court Services - Assessment Office website.

The Court's Discretion to Award Costs - Rules 10.29 & 10.31

As noted in **Rule 10.29(1)(a)** (above) a successful party's entitlement to costs is subject to (among other things) the discretion of the Court.

Rule 10.31(1) grants the Court almost unfettered discretion to grant a costs award as between parties at any stage in an action, proceeding or application. Without fettering the Court's discretion, **Rule 10.31** instructs that it may award,

- "the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action or incurred by a party to participate in an application, proceeding or action . . . with or without reference to Schedule C;

- "an amount equal to a multiple, proportion or fraction of any column of Schedule C . . .;

- "an indemnity to a party for that party's lawyer's charges;
- "a lump sum instead of or in addition to assessed costs;
- other combinations or permutations of costs; and
- 'in appropriate circumstances, . . . payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C." *[Rule 601]*

Court May Give Directions to Assessment Officer - Rule 10.34

Rule 10.34 says that "the Court may order an assessment of costs by an assessment officer and may give directions to the assessment officer about the assessment." *[Rule 601(4)]*

Default Costs, If the Court Is Silent about Costs

If the Court is silent as to 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/ **Costs to Successful Party - Rule 10.29(1)** - when the Court makes no order as to costs, by default, the "successful party . . . is entitled to a costs award against the unsuccessful party."[1] *[Rule 601(3) & 607]*

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[1]
1. Likewise if an assessment officer is silent as to the costs of an assessment of costs proceeding.

2. Exceptions:
5.43 - no costs of medical examinations;
10.22(b) - no costs of action by lawyer to recover his/her lawyer's charges . . .;
10.29(2) - no costs of application or proceeding heard without notice to a party;
10.31(2)(c)/10.41(2)(c) - no costs related to dispute resolution processes or judicial dispute resolution arrangements;
10.31(2)(d)/10.41(2)(d) - no costs of expert witnesses (unless the parties agree/consent that the cost(s) should be allowed, even the amount, but if not the amount they can present the cost(s) for assessment).

2/ **Application, Proceeding or Action - Rule 10.29(1)** - this 'default' entitlement to a costs award applies to "an application, a proceeding or an action." Indeed, **Rule 10.30(2)** states:

> If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37 *[Appointment for assessment]*. *[Rule 601(3) & 607]*

Therefore, the entitlement to costs can arise at an interlocutory stage (such as an application) or after the action or proceeding is finalized. Regardless when the entitlement to costs arises, unless otherwise ordered, the "unsuccessful party must pay the costs *forthwith* [**10.29(1)**]."

[The "payable forthwith" was canonized in Rule 607 relative to interlocutory proceedings. In the Part 47 - Costs provisions of the old Rules of Court it was not spelled out relative to non-interlocutory proceedings.]

3/ **Certification of Costs - Rule 10.43 - Appendix: Definitions** - a "*costs award* means the amount payable by one party to another in accordance with [in this instance] . . . (b) a certificate under rule 10.43," being the assessment officer's certification of costs payable after completing an assessment of costs.

[Combination of Rules 636 & 637]

4/ **Prepare a Bill of Costs - Rule 10.35** - a party entitled to receive costs must prepare a bill of costs (see Form 44 in the ***ARC*** or the sample at the end of sub-document "Assessment of Costs" of the Costs Manual) either at the party's own initiative or at the request of the party required to pay the

costs. The bill of costs must itemize the fees, disbursements and other charges being sought and be signed by the person preparing it. *[Rules 630, 638, 633, 644 & 645]*

5/ **Book, File and Serve an Appointment for Assessment - Rule 10.37** - the party seeking to have the bill of costs assessed should contact the assessment office for a date and time. The time frames associated with an Appointment for Assessment are addressed in sub-rules **(2)**, **(3)** & **(4)**: *[Rules 630, 631 & 638 - new time limits]*

(2): A party entitled to be paid costs must **file and serve** every "affected" party with both the proposed *Bill of Costs* and the *Notice of the Appointment for Assessment of Costs* (see Form 45 in the ***ARC*** or the sample at the end of subdocument "Assessment of Costs" of the Costs Manual) ***10 days or more*** before the appointment date.

(3): A party obliged to pay costs to another party must **file and serve** every "affected" party with either a proposed *Bill of Costs* or a *Request to Prepare a Bill of Costs* together with the *Notice of the Appointment for Assessment of Costs* (see Form 45 in the ***ARC*** or the sample at the end of subdocument "Assessment of Costs" of the Costs Manual) ***20 days or more*** before the appointment date.

(4): The party served with a *Request to Prepare a Bill of Costs* must **prepare, file and serve** every other party with its proposed *Bill of Costs* ***10 days or more*** before the appointment date.

6/ **Assessment Officer - Reasonable & Proper Costs - Rule 10.41** grants an assessment officer the right to determine whether the costs proposed in a *Bill of Costs* (or otherwise presented) are "reasonable and proper," within prescribed guidelines.

"**(1)** Subject to an order, if any, an assessment officer may, with respect to an assessment of costs payable, determine whether the costs that a party incurred to

(a) file an application,

(b) take proceedings,

(c) carry on an action, or

(d) participate in an action, application or proceeding,

are reasonable and proper costs." *[Rule 600(1)(a)]*

"**(2)** Reasonable and proper costs of a party under subrule (1)

(a) include the reasonable and proper costs that a party incurred to bring an action, *[Rule 600(1)(a)]*

(b) unless the Court otherwise orders, include costs that a party incurred in an assessment of costs before the Court [a costs hearing conducted by the Court: Master/Judge], *[Formerly inherent]*

(c) unless the Court or an assessment officer otherwise directs, include costs that a party incurred in an assessment of costs before an assessment officer," *[Rule 629]*

(d) but "do not include costs related" to a dispute resolution process or judicial dispute resolution process "unless a party engages in serious misconduct . . ." and *[New. Canonizes practice notes, general principle & case law]*

(e) "do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry, or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial." *[Rule 600(1)(a)(ii)]*

7/ **Disallow Improper, Unnecessary, . . . Costs - Rule 10.41(3)** - empowers an assessment officer,

in the course of an assessment,

(a) to decide whether an item in a bill of costs "is reasonably and properly incurred" and *[Rule 600(1)(a)]*

(b) whether an item in a bill of costs should be disallowed that "is improper, unnecessary, excessive or a mistake." *[Rule 635]*

8/ **Lawyer's Fees are Limited to Schedule C - Rule 10.41(3)(d)** - limits the amount an assessment officer may allow for "lawyer's fees" to "the amounts specified in Schedule C" except when otherwise "explicitly" permitted in the Rules (for example: *[Rule 605]*

a/ **Rule 10.41(3)(c)** permits an assessment officer to allow costs for "services performed by a lawyer that are not specified or described in Schedule C" or *[This authority formerly existed only with the Court, as noted in former Rule 605(4)]*

b/ such amounts or scales of costs as specified in a **written agreement** between the parties - such as a default judgment which allows for solicitor/client or indemnity costs). *[Formerly acknowledged by case law - see **Marzetti v. Marzetti** [1991] A.J. No. 768, 82 Alta. L.R. (2d) 67, 123 A.R. 1, 8 C.B.R. (3d) 238, 35 R.F.L. (3d) 225 and discussed in **Civil Procedure Encyclopedia** (Vol. 4) 72-90 - "Contracts Calling for Solicitor-Client Costs."])*

9/ **Mandatory Fee Reduction for Actions within Provincial Court Jurisdiction - Rule 10.42** states:

"**(1)** This rule applies only to actions the subject-matter of which is within the jurisdiction of the Provincial Court." *[Rule 605(8)]*

"**(2)** Despite anything in this Division [Part 10: Division 2: Recoverable Costs of Litigation] or Schedule C *[Tariff of Recoverable Fees]*, unless the Court otherwise orders,

(a) in the case of an action brought in the Court of Queen's Bench for which the amount sued for or the amount of the judgment or order 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 or order must be assessed, if at all, at not more than 75% of the amount specified under Column 1 in Division 2 of Schedule C *[Tariff of Recoverable Fees]*;

(b) in the case of an action described in clause (a), post-judgment matters are to be assessed, if at all, at not more than 100% of the amount specified in Column 1 in Division 2 of Schedule C *[Tariff of Recoverable Fees]*." *[Rule 605(7)]*

For a recitation of the provisions of **S. 9.6** of the ***Provincial Court Act*** listing what is and what is not within the jurisdiction of the Provincial Court (plus some related matters) please refer to the section entitled "Miscellaneous" at page ?? of this sub-document.

9/ **GST on Schedule C Fees - Rule 10.48** - entitles a party to recover the goods and services tax on Schedule C fee provided a GST affidavit is "endorsed on, attached to or filed with the bill of costs" and states that:

"(a) the person making the affidavit has personal knowledge of the fact stated,

(b) the party entitled to receive payment under the bill of costs, and not another party, will actually pay the goods and services tax on that party's costs,

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

(d) the party entitled to receive payment under the bill of costs is not eligible for the goods and services tax input tax credit." *[Rule 605(9) & (10)]*

A sample GST Affidavit is attached to the end of this document. See too Form 44 *[Bill of Costs]* in the ***ARC*** with the affidavit endorsed on it.

Note:

1. In the absence of a GST Recovery Certificate **no GST is recoverable** on **Schedule C** fees, "unless the Court otherwise orders."

2. If your client's ability to meet the criteria set out in **sub-rule (2)** is in question it might be advisable to obtain the direction of the court on the issue.

3. Insurer: we understand that two considerations come into play relative to the subrogated insurer of a litigant:

    1. **Sub-rule (2)(b):** Until otherwise directed, it is our understanding that, by right of subrogation, the insurer of a costs claimant does not fall into the classification of "a third party." Subject to complying with all other criteria, the insurer is entitled to GST on **Schedule C** fees.
    2. **Sub-rule (2)(d):** Most insurers are normally eligible for the GST input tax credit, but we understand that such is not the case relative to awards or settlements of damage claims and their related costs and are entitled to a GST costs recovery.

10/ **No More Affidavit of Disbursements** - note that there is *no longer* a requirement to file an Affidavit of Disbursements.

Schedule C Only Binds the Assessment Officer

Schedule C is binding upon an assessment officer, but not the Court, which may make almost 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)** (CA 1998) 216 A.R. 304, 61 Alta. L.R .(3d) 256. which concludes that,

"[6] Schedule C is addressed to taxing [assessment] officers, not judges . . .

"[8] Schedule C is a series of rubber stamps which a judge may approve for a bill of costs . . ."

See too Stevenson & Côté, ***Civil Procedure Handbook 2010*** at **Rule 10.29** - "Basic Approach" - especially its reference to *Samaska v. Soykut (#2)* 2004 ABQB 541, [2004] A.R. Uned 529, JDC 9801 03726 - an excellent example of a judge exercising his discretion to use and not use Schedule C. Note especially para. 22.

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

Consented to Bill of Costs - Rule 10.36(3): "If one party approves a bill of costs prepared by another party adverse in interest, an assessment officer must certify the bill of costs under rule 10.43, without change" **Rule 10.36(3)**.
[Rule 629.1]

Schedule C, Rule 10.41(3)(d) & the "Inflation Factor"

Background: December 5, 2006, the Honourable Mr. Justice T.F. McMahon rendered a decision in *Zust Bachmeier International Air Cargo, Inc. v. Klapatiuk*, 2006 ABQB 875 which awarded the successful

defendant an "inflation factor" of 1.2 times Column 3 of Schedule C. At paragraph 6 the decision of the Court states:

> "The Defendants seek to increase Schedule 'C' costs by a factor of 1.2 based upon a Bank of Canada inflation calculation from 1998 (when the current Schedule 'C' came into effect) to the date of trial. Plaintiff's Counsel does not take issue with the calculation. An inflation factor was in common use before Schedule 'C' was revised upwards in 1998. See *Dilcon Constructors Ltd. v. ANC Developments Inc.* (1996), 42 Alta. L.R (3d) 132 (Q.B.). Now in 2006 an inflation factor is again reasonable so that the costs address their intended purpose of reasonable reimbursement to the successful party of its actual costs. Except for that, there are no factors present here which would take these costs out of Column 3, increased by a factor of 1.2."

In *Spar Aerospace Limited v. Aerowerks Engineering Inc.*, 2007 ABQB 688 Madam Justice Veit also awarded an inflation factor (1.1974 for 2006 / 1.227 for 2007) after a very comprehensive analysis of case law and legislation.

Issue: Do these and other decisions of the Court oblige Assessment officers to apply an inflation factor to all bills of costs tendered for Assessment post-December 5, 2006?

Answer: No. Assessment officers lack the authority to apply an inflation factor except as otherwise ordered on a case-by-case basis by the Court. **Rule 10.41(3)(d)** states:

> "In making an assessment under subrule (1) and taking into account the conduct of the parties, the assessment officer may not allow lawyer's fees at more than the amounts specified in Schedule C except when these rules, including the Schedule, explicitly permit or a written agreement expressly provides for a different basis for recovery."

In these instances, the Court has merely exercised the discretion accorded all Justices of the Court of Queen's Bench by the following:

- **Court of Queen's Bench Act, R.S.A. 2000, c. C-31, Costs - s. 21** "Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the discretion of the Court or judge and the Court or judge may make any order relating to costs that is appropriate in the circumstances."

- **Alberta Rules of Court - 10.31(1)** ". . . the Court may order one party to pay to another party, as a costs award, one or a combination of the following:
  "(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action or incurred by a party to participate in an application, proceeding or action, or
  "(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
    (i) an indemnity to a party for that party's lawyer's charges, or
    (ii) a lump sum instead of or in addition to assessed costs."

Therefore, each decision granting an inflation factor is the exercise of the Court's judicial discretion relative to costs of a particular application or action. Veit, J. goes to some lengths to explain how Schedule C might be "updated" annually or intermittently but recognizes that no such mechanism currently exists and that the application of an inflation factor will, for the present, be dependent upon the circumstances of each case.

Court of Appeal Costs & The *New* Rules of Court *(Don't Throw Away the "Old" Rules of Court . . . Yet)*

Under **Part 15, Transitional Provisions And Coming Into Force**, we find **Rule 15.14(3)** which states:

> "Despite the repeal of the *Alberta Rules of Court* (AR 390/68), the *Alberta Rules of Court* (AR 390/68) continue to apply to appeals to the Court of Appeal."

The significance of this is, at the very least, the following:

1. **Rule 607** (costs associated with interlocutory proceedings) still applies to appeal proceedings, especially given the Court of Appeals practice to usually remain silent on costs and to rely on the default rules. This rule would apply most commonly to **Item 17** "Appearance on contested

application before the Appeal Court, including brief."

Costs go to the successful party and are to be paid by the unsuccessful party "forthwith."

2. **Rule 601(3)** (costs at the conclusion of appeals, whether by abandonment or ruling of the Court) still applies to appeal proceedings such that "Costs follow the event."

3. **Rule 608** (the scale of costs on appeal is the same as that of the court appealed from) still applies to Court of Appeal proceedings.

4. **Rule 605** governing the application and use of Schedule C of the "old" Rules of Court still applies.

5. **Schedule C, Items 13 to 17** of the "old" Schedule C still apply to appeal proceedings.

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

Schedule C: Tariff of Recoverable Fees: Division 1 - Introduction

Framework

Rule 1(1): ***This Schedule specifies the lawyer's fees that may be recovered as costs by one party from another.*** [Rule 605(1)]

Rule 1(2): ***Each column of the tariff in Division 2 [The Tariff] gives a dollar amount range for the purpose of determining the lawyer's fee under that column for the work described under each item.***

[Rule 605(1)]

Rule 1(3): ***Subject to subrule (4), the dollar range indicates the amount recoverable***

> ***(a)*** ***as against the plaintiff, with reference to the amount claimed by the plaintiff,***
>
> [Rule 605(5)]
>
> ***(b)*** ***as against the defendant, with reference to the amount of the judgment or order against the defendant, or*** [Rule 605(5)]
>
> ***(c)*** ***in the case of an interlocutory application, as against the person liable to pay the costs with reference to the amount claimed by the plaintiff.***
>
> [New. Based on existing case law.]

Rule 1(4): ***Unless the Court otherwise orders,***

> ***(a)*** ***when a remedy is given in a judgment or order other than or in addition to the payment of money, or***
>
> ***(b)*** ***when judgment is given for a defendant in an action in which a remedy other than or in addition to the payment of money is sought,***
>
> ***costs must be assessed according to the higher of Column 1 of the tariff in Division 2 [The Tariff], and the scale that would have applied if the other remedy had not been given or sought.***
>
> [Rule 605(6]

Information Note

Note rule 10.42 [Actions within Provincial Court jurisdiction].

Selecting the Proper Column in the Tariff

Rule 1(3) & (4) 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 "Schedule C Only Binds the Assessment Officer," at p. 5, the following are guidelines for clerks/assessment officers only and are always subject to the Court exercising its discretion: a search through any reporting services of "Rule 605(5 & 6) [now Schedule C, Division 1, Rule 1(3&4)]" will disclose numerous instances in which the Court does not follow the guidelines set by the Schedule C tariff. But, if the Court does not exercise its discretion, clerks/assessment officers are bound by the ***ARC*** and any judicial consideration of them.

Rule 1(3) provides that if a proceeding does involve the payment of money the Column or "dollar range" under which the costs or "amount recoverable" of the entitled party are to be assessed is determined as follows (see also the commentary on r. 1(3) in Stevenson & Côté, ***Alberta Civil Procedure Handbook 2010***, "Schedule C, Division 1, Introduction"):

> **Amount Recoverable by a Defendant**: is based upon "*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 4

Amount Recoverable by a Plaintiff: is based upon "*the amount of the judgment or order*" obtained against the Defendant. "Judgment" includes interest[1] and prejudgment interest[2], but does not include costs.[3]

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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.), *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.)
[UPDATE CASELAW]

[3] *Gerber v. Telus Corp.* [2004] A.J. No. 543, 2004 ABCA 162, [2004] 6 W.W.R. 205, 27 Alta. L.R. (4th) 231, 40 C.C.P.B. 42, 131 A.C.W.S. (3d) 209, 2004 CarswellAlta 628 (as referenced in Stevenson & Côté, ***Alberta Civil Procedure Handbook 2010***, at Schedule C: Tariff of Recoverable Fees, Division 1, Introduction, "Framework")

Amount Recoverable by a 3rd Party: "*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)

Amount Recoverable Against a 3rd Party: "*the amount of the judgment or order*" obtained by the Defendant against the 3rd Party

Amount Recoverable for Interlocutory Hearings: "*the amount claimed by the Plaintiff*" regardless of which party is entitled to the costs of the hearing: plaintiff, defendant, 3rd party, whatever. **Rule 1(3)(c)** is new to the ***ARC*** and is in keeping with the established practice of the Courts of Alberta. It is important to recognize that "amount recoverable" is based upon the "amount claimed" in the commencement documents, not the amount in issue in the interlocutory hearing.

Amount Recoverable for Unresolved Proceedings: Consider the 2007 decision of Mahoney J. in *Pastyryeva v. Krall* 2007 ABQB 45, [2007] A.J. No. 66 in which the Plaintiff succeeded in a trial restricted to liability as against one of two defendants (the other was absolved of liability), but with the quantum of damages awaiting settlement or another trial, reached the following conclusions:

> "7. I agree with the Administrator [unsuccessful defendant] and the Plaintiff that, as the dollar amount of damages has yet to be determined, Column 1 under Schedule "C" of the *Rules of Court* is the appropriate column for the assessment of the Plaintiff's costs. Furthermore, I agree with them as well that costs should be subject to adjustment upwards once the amount of damages has been established."
>
> "10. The Defendant Ms. Krall was successful in her defence and is awarded costs using Column 3 of Schedule "C", which column was agreed to by the Administrator."

Amount Recoverable in Divorce & Matrimonial Property Actions: are usually initiated and conducted as

one action *but* the costs arising from them may be treated differently.

Divorce and corollary relief proceedings are no longer specifically restricted by the preamble to **Schedule C**'s Tariff to Column 1. However, in Stevenson & Côté, ***Alberta Civil Procedure Handbook 2010***, at Schedule C: Tariff of Recoverable Fees, Division 1, r. 1(4), *Katrib v. Katrib (#2)* 2008 A.B.Q.B. 162 is cited as authority for "family law matters" falling under Column 1, subject to the Court's discretion to increase the column or to do even more. *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 held likewise, though more weight may have been placed upon the specific reference to "divorce" proceedings in the preamble then would now be applicable.

Custody disputes are, by default and according to *Katrib* (above), restricted to Column 1, but, "There is no presumption against costs awards in custody cases."[1]

[1] *Metz v. Weisgerber* [2004] A.J. No. 510, 2004 ABCA 151, 243 D.L.R. (4th) 220, 33 Alta. L.R. (4th) 17, 348 A.R. 143, 47 C.P.C. (5th) 253, 8 E.T.R. (3d) 117, 2 R.F.L. (6th) 87, 133 A.C.W.S. (3d) 603, (Alta. C.A., Fraser C.J. A. and Côté and Picard JJ.A.), at para. 47.

Matrimonial property proceedings have for some time permitted costs in excess of the default column, currently column 1. The following decisions give a feel for how courts deal with Matrimonial Property Actions (MPAs):

1. *Toma v. Toma* [1996] A.J. No. 882, (Q.B.) - concluded that MPAs are entitled to costs in the appropriate column, not restricted to the 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.

2. *Cador v. Chichak* [1998] A.J. No. 1188, (Q.B.) - 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."

3. *Lawson v. Lawson* [2005] A.J. No. 905, 2005 ABCA 253, [2006] 1 W.W.R. 241, 48 Alta. L.R. (4th) 224, 19 R.F.L. (6th) 81, 141 A.C.W.S. (3d) 464, 2005 CarswellAlta 1005 (C.A) interpreted by Stevenson & Côté, ***Alberta Civil Procedure Handbook 2010***, at Schedule C: Tariff of Recoverable Fees, Division 1, r. 1(4) as standing for "a party who was successful on appeal on a question of spousal support got costs, but under Column 1 since the amount was unknown." Implying that had the spousal support amount been known costs could have exceeded Column 1 (one wonders after reading para. 16).

4. *D.B.C. v. R.M.W.* [2005] A.J. No. 1875, 2005 ABQB 898, 393 A.R. 160, 23 R.F.L. (6th) 120, 2005 CarswellAlta 2017, cited in Stevenson & Côté, ***Alberta Civil Procedure Handbook 2010***, at Schedule C: Tariff of Recoverable Fees, Division 1, r. 1(4). At para. 39: "RMW is entitled to Schedule C costs for these proceedings. These Schedule C costs are to be calculated on the basis of the column which reflects the net value of the matrimonial property that was available for immediate distribution at the time of trial."

5. *M. (J.J.) v. M. (C.D.) Estate*, 2008 ABQB 235, 2008 CarswellAlta 501 (Q.B.), involved

proceedings solely related to the division of matrimonial property. Primary issue was the equal vs unequal division of the property; defendant claimed $4.5 million (col 5), was awarded $1.4 million (col 4). Rule 605(5) (now r. 1(3)) applied and costs awarded in Column 4.

Amount Recoverable for Court of Appeal Proceedings: Rule 608 states:

> "On any appeal the scale of costs of the appeal, and if so stated in the judgment, also fo the proceedings in the court below, shall be as directed by the judgement in appeal, or in default of direction shall be the same as that applicable under the order or judgment appealed from."

(As to why the "old" ***ARC*** is still used relative to the Court of Appeal see "Court of Appeal Costs & the *New* Rules of Court" above at p. 6.)

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] [UPDATE THIS]

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[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: [UPDATE THIS]

1. 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]

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[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.)

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2. 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.).

3. 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.[1]

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[1] 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).

Effect of an Amendment of the Claim, Up or Down - in Stevenson & Côté, ***Alberta Civil Procedure Handbook 2010***, at Schedule C: Tariff of Recoverable Fees, Division 1, r. 1(3) is found the following:

> "Steps before the plaintiffs amend their claim upwards should get costs on the lower column: **Jordan v. Power (#2)** 2002 ABQB 875, 325 AR 71. Where the amount claimed is reduced partway through the suit, the column for the costs drops at that point too: **Parrish & Heimbecker v. All Peace Actions (#2)** 2002 ABQB 602, 326 AR 383."

Proper Column if Non-monetary or Combination of Monetary & Non-monetary Remedies

Rule 1(4) provides that if a proceeding does not involve "the payment of money" the costs of the entitled party are to be assessed under "Column 1". The preamble to **Schedule C** specifically states that "unless the Court otherwise orders, matters which have no monetary amounts, for example, injunctions, will be dealt with under Column 1."[1] It is noteworthy that the preamble no longer makes specific reference to divorce and corollary relief proceedings as being under Column 1. Yet, in Stevenson & Côté, ***Alberta Civil Procedure Handbook 2010***, at Schedule C: Tariff of Recoverable Fees, Division 1, r. 1(4), *Katrib v. Katrib (#2)* 2008 A.B.Q.B. 162 (action 4803 128311) is cited as authority for "family law matters" falling under Column 1 subject to the Court's discretion to increase the column or to do even more.

- In *Freyberg v. Fletcher Challenge Oil and Gas Inc.* 2006 ABCA 260, [2006] A.J. No. 1181, at para. 14, the Court of Appeal concluded:

  > "Where there is no amount involved [non-monetary remedy], or it is impossible to calculate, Column 1 of Schedule C applies unless the court orders an enhanced scale."

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

What the items in the tariff include

Rule 2(1): ***The description of items in Division 2 [The Tariff] includes, with respect to each item:***

- ***(a) instructions from a client;***
- ***(b) all preparatory work related to the commencement of an action and preparatory work related to an item and the preparation of all records and materials;***
- ***(c) the drafting, issuing and service of any required commencement document, pleading, affidavit and related documents;***
- ***(d) attendances;***
- ***(e) correspondence;***
- ***(f) all material read or written;***
- ***(g) if any application is abandoned, all work done in connection with the abandonment;***
- ***(h) other activity undertaken or implied in the item, including necessary or convenient services.*** [An expanded upon version of Rule 605(3)]

Rule 2(2): ***If any item described in the tariff has been started but not completed, or is only partially completed, a proportion of the fee may be allowed.*** [Rule 605(3)]

Information Note

For rules related to the application of the tariff see Part 10 [Lawyer's Charges, Recovery Costs of Litigation and Sanctions] Division 2 [Recoverable costs of litigation], and in particular rule 10.31 [Court-ordered costs award] and rule 10.41 Assessment officer's decision].

Most of these rules have been addressed in the "Introduction" portion of this Schedule C segment of the Costs Manual.

General - Schedule C: Division 1: Rule 2

This rule bears a close resemblance to the former Rule 605(3):

> "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."

Which further allowed that,

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

Rule 2 must be read together with **Rule 10.41**, more particularly **subrule (3)**, and even more particularly **subrules (3)(e)** & **(f)**, which state:

> "(e) [the assessment officer] may not reduce an amount provided for in Schedule C . . . (I) unless Schedule C . . . so permits, or (ii) except in exceptional circumstances, and
>
> "(f) [the assessment officer] may, in exceptional circumstances, reduce an amount,

or allow a fraction of an amount, if the services were incomplete or limited."

Save for "abandoned applications" (addressed below) Rule 2 serves the purpose of guiding assessment officers in determining (a) when "exceptional circumstances" exist or (b) when to increase or decrease items in the Schedule which specifically provide for same or (c) when to reduce an amount in an item where the services are less than complete or particularly "limited," which seems to be another word for *unusually easy* even though all the usual steps were taken.

Abandonment - Schedule C: Division 1: Rule 2(g)

The use of the word "abandoned" is new to Schedule C. Indeed, besides the reference to it in Rule 2 of this Division, "abandoned" is specifically used twice under "Applications contested":

> "7(3) Abandoned applications [–] A fee equivalent to 50% of the fee that would be payable under this item if the application had not been abandoned."
>
> "8(2) Abandoned application [–] A fee equivalent to 50% of the fee that would be payable under this item if the application had not been abandoned."

Our guess, for now, is that "abandoned" implies that if a party quits a contested application - Item 7 or Item 8 - whichever party becomes entitled to the costs of that application is entitled to only 50% of the Item amount, regardless the stage at which the application was abandoned (egs: after preparation of supporting affidavit, but prior to preparation of motion / prior to hearing / during the course of the hearing but before decision rendered / other permutations).

For example: if a party files and serves a Notice of Motion and supporting Affidavit to compel production of undertakings, but production by the opposing party subsequently renders attendance in chambers and the obtaining and filing of the desired Order unnecessary, the application would be deemed "abandoned" and only 50% of the "amount" in Schedule C could be allowed.

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

Application of the Tariff

Rule 3: The tariff in Division 2 [The Tariff] applies whether the services described in the tariff are provided before, at the time or after these rules come into force.

In other words, come November 1st, 2010, **all** bills of costs will be assessed using the *new* tariff of fees.

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

Schedule C: Tariff of Recoverable Fees: Division 2: The Tariff

Unless the Court otherwise orders, 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 10.42 [Actions within Provincial Court jurisdiction].

Non-monetary Column - is Column 1.

Appeal from Provincial Court - see **Item 7(1)** and commentary thereafter.

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 Assessment officers.

We understand that the practice remains the same today.

The practice in Calgary has not been reduced to writing but is apparently similar to that of Edmonton.

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

Commencement documents, pleadings related documents

Item 1

(1) Commencement documents, affidavits, pleadings and related documents, and amendments.

(2) When the matter is uncontested (a default judgment is an example of an uncontested matter), the limit of recovery is 50% of this amount.

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

Appointment for Review - **Item 1** cannot be claimed for the preparation and filing of an Appointment for Review: *Shoctor, Mousseau & Ferguson vs. Modular Windows*, unreported, 10 April 1989, J.D. of Edmonton, 8903 01624, Master Funduk, denied a **Rule 129 (now 3.68)** application to strike an Appointment for Review as it was "not a pleading."

Indeed, though we take the position that a Notice of Appointment for Review should be treated as a "commencement document" for purposes of service under Part 11, the **Appendix: Definitions** portion of these rules does not recognize a Notice of Appointment for Review as being either a "commencement document" or a "pleading."

A party awarded costs of a Review proceeding may claim either **Item 6** or **7** for the hearing, as the case may be.

Assessment Officer's Discretion to Stray from the Maximum - **Rule 10.41(3)** states:

"**(3)** In making an assessment under subrule (1) and taking into account the conduct of the parties, the assessment officer

- **(a)** may decide whether an item in the bill of costs is reasonably and properly incurred,
- **(b)** may disallow an item in a bill of costs that is improper, unnecessary, excessive or a mistake,
- **(c)** may fix the amount recoverable for services performed by a lawyer that are not specified or described in Schedule C . . .,
- **(d)** may not allow lawyer's fees at more than the amounts specified in Schedule C . . . except when these rules [eg: r. 4.29 - doubling of costs - direction of court required], including the Schedule [items 3(2) - document review and 10(2) - preparation for trial both allow for an increase if merited], explicitly permit or a written agreement expressly provides for a different basis for recovery,
- **(e)** may not reduce an amount provided for in Schedule C . . .
  - **(i)** unless Schedule C . . . so permits,
    [1(2) - uncontested matters,
    3(3) - limited amount of time to review,
    5(3) - oral questioning by observing lawyer,
    7(3) & 8(2) - abandoned applications,
    10(2) - trial preparation,] or
  - **(ii)** except in exceptional circumstances, and
- **(f)** may, in exceptional circumstances, reduce an amount, or allow a fraction of an amount, if the services were incomplete or limited."

Subrules (e) and (f), taken in context of the whole rule, set the parameters under which an assessment officer may reduce Schedule C amounts.

"Desk Divorces" - is the terminology used in the past to refer to now described as the "divorce without appearance by parties or counsel" procedure found in **Rule 12.50**. For now we will treat such procedures as warranting fees under Item 1(1) notwithstanding they are technically "uncontested" and limited to "50%" of Item 1.

Example of the Application of R. 10.42 *[Actions within Provincial Court Jurisdiction]* & 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. The claim falls within the jurisdiction of the Provincial Court.

Law - Because the Judgment does not exceed the $25,000.00 limit to the Provincial Court's jurisdiction **Rule 10.42** 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 ("determination of damages") under **Rule 3.37(3)(c)**).

(2) The 75% rule only applies up to and including judgment. Any post-judgment steps are at 100% of Column 1 (see **Rule 10.42(2)(b)**).

Amendment of Pleading - **Rule 3.66** says that the party doing the amending must bear the cost, unless (a) the amending is "in response to an amended pleading" or (b) "the Court otherwise orders."

Parental & Maintenance Proceedings - We are inclined to continue as before in only allowing either an uncontested application (**Item 6**) or contested application (**Item 7**) but not **Item 1**. If this position is merely a reflection of our ignorance of P&M proceedings we are willing to hear argument to convince us to change our position.

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)** - Applications without Notice to another Party and the filing fee. Nothing is recoverable under **Item 1(1)** - Commencement / Pleadings.

Waiver of Filing Fees — Legal Aid / Restraining Orders -

Legal Aid - **Rule 13.36** provides that the filing fee for commencement documents is to be waived by the Clerk if a subsisting Legal Aid Certificate is presented with the document to be filed.

Restraining Order - **Rule 13.37(2)** provides that the filing fee for commencement documents is to be waived by the Clerk if (a) the document being filed is for the purpose of obtaining a restraining order as described in **Rule 13.37(1)**, and (b) no relief other than the described restraining order is being sought.

Uncontested trial

Item 2

Uncontested trial appearance.

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

Examples - **Rule 12.50(5)(d)** - Uncontested trial for judgment of divorce pursuant to the direction of the Court in refusing to grant a 'desk' or uncontested divorce.

Rule 3.37(3)(c) - Hearing for a "determination of damages" where defendant has been noted in default..

Uncontested Trial Defined - In *S.G. v. S.J.* 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:

> "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 *S.G.* 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’.”

Disclosure under Part 5 [Disclosure of Information]

Part 5 Does Not Usually Apply to Originating Applications - **Rule 3.10** states that "Part 5 *[Disclosure of Information]* do[es] not apply to an action started by originating application unless the parties otherwise agree or the Court otherwise orders."

Purpose of Part 5 - **Rule 5.1** states that the purpose of the "Disclosure of Information" portion of the ***ARC*** is:

> "(a) to obtain evidence that will be relied on in the action,
>
> "(b) to narrow and define the issues between parties,
>
> "(c) to encourage early disclosure of facts and records,
>
> "(d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and
>
> "(e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them."

These objectives may be relevant especially where specified opportunities are provided for increasing or reducing the Tariff's specified fee allowances Items 3(2) and 3(3).

"Significantly Help" - Rule 5.2(1) - it is noteworthy that ***Division 1: How Information is Disclosed, Subdivision 1: Introductory Matters*** begins with this wording:

> "**5.2(1)** For the purposes of this Part [Part 5: Disclosure of Information], a question, record or information is relevant and material only if the answer to the question, or the record or information, 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."

Part 5 Costs Award by the Court - **Rule 5.3(2)(a)** specifically provides that "the Court may . . . :

> **(a)** make a costs award under Part 10 . . . or require an advance payment against costs payable, or both;"

Item 3

(1) Disclosure of records under Part 5 [Disclosure of Information] including affidavit of records

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

See *Subdivision 2: Disclosing and Identifying Relevant and Material Records*

Affidavit of Records - Penalty for Failure to File Within Time Limit - **Rule 5.5** requires "every party" to serve an affidavit of records within the following time periods:

(2) Plaintiff: within 3 months after receipt of the first (if there is more than one) Statement of Defence.

(3) Defendant: within one month of having been served with the plaintiff's affidavit of records.

(4) A Third Party Defendant Who Has Filed a Statement of Defence: within 3 months after filing its statement of defence.

[Note that the Affidavit of Records must not be filed unless needed for an application or at trial: r. 5.5 info note / r. 5.32]

Per **Rule 5.12** the ***Court*** may impose a penalty of 2 times item 3(1) of the Schedule C Tariff (or more or less) for failure to

(a) serve one's affidavit of records within the prescribed time limits (or within "any modified

period agreed on by the parties or set by the Court"),

(b) comply with the **Rule 5.10** obligation to give notice of "not previously disclosed" records and supply it/them if requested and serve a "supplementary affidavit of records" prior to "a date for trial."

Note that the assessment officer has no authority to grant or impose this penalty, only the **Court**.

Failure to file an Affidavit of Records on time, even when resulting in a costs penalty, does not, unless otherwise ordered by the Court (**Rule 5.12(1)**), preclude recovery of the costs of the affidavit's production. Unlike Court of Appeal **Rule 538(4)** which specifies that a party which has failed to file a factum within the prescribed time frame "shall not be entitled to costs for the preparation of the factum" unless otherwise ordered, **Subdivision 2** says nothing which disentitles the tardy party its own costs for ultimately filing its Affidavit of Records.

Judicial Review - In the past we have treated the "return" & the "record" as evidence which should, if anything, fall under **Item 3(1)**. Given the new wording of **Item 1(1)** we will wait to see how the Court chooses to treat these documents.

"Relevant & Material" - See "Significantly Help," above in the discussion of **Rule 5.2(1)**.

(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 - considered together with the wording and information notes of the new ***ARC***.)

Standard vs. Complex Case Litigation - Note the provisions in **Part 4: Managing Litigation, Division 1: Responsibilities of Parties** placing obligations on the parties to plan the resolution of their dispute "in a timely and cost-effective way" (**Rule 4.1)** and how, whether an action is considered "standard" or "complex" the onus is on the parties to complete "disclosure of information" within a "reasonable time" (**Rule 4.4**) or, if complex, to agree on a complex case litigation plan which would include setting dates for the completion of disclosure (**Rule 4.5**).

Item 3

(2) Review of opposite party documents (once per action) including statement of property: the equivalent of a ½ day under item 5(2); this amount may be increased if the circumstances warrant.

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
500	750	1000	1200	1500

Allowed "Once per Action."

Increase of Item 3 Fee - the "½ Day" fee allowance under **5(2)** may be increased by the Assessment Officer "if the circumstances warrant." Presumably a significant number of documents requiring more than a ½ day to review. (For what constitutes a "½ day" see item **5**, below.)

Item 3

(3) If there are only a few records requiring a limited amount of time to review, the fee may be reduced

Reduction of Item 3 Fee - Assessment Officer may reduce the fee, but only if the number of records require a "limited amount of time to review" them. (See "What constitutes a '½ day'" in item **5**, below.)

Expedition or better definition of the case

Item 4

Notice to admit facts, opinion or non- adverse inference or the admission of any of these if, 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

"In the 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 item of costs (see **Rule 10.31** & **10.33** generally, but specifically **(1)(f)** & **(2)(b)** of the latter rule).

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 - Part 10, Costs of Litigation (Rule 10.31 & 10.33) and Part 6 - Division 5: Facilitating Proceedings (Rule 6.37)

Oral questioning under Part 5 [Discovery of Information]

Item 5

(1) Preparation for questioning under Part 5 (once per action): the equivalent of a ½ day attendance fee under Item 5(2).

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

"Preparation" is New to Schedule C: Only recoverable once (1) in an action. We fought to obtain a "preparation allowance" which was based on a portion of the total number of hours of actual time spent in examination (an easy calculation), but ended up with this.

Question: does a party recover even a portion of this if the oral questioning does not actually get scheduled, is scheduled but does not proceed, or an appearance is made but it proves to be a "no show"?

Item 5

(2) First ½ day or portion of it for attendance for questioning of parties or witnesses or cross-examination on an affidavit.

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

(3) Each additional ½ day (If an attending counsel is acting for neither witness nor examining party, 50% of these amounts).

500	750	1000	1250	1500

What Constitutes a "Half Day" - Prior to 1966 the *Alberta Rules of Court*, Schedule C, provided compensation per witness examined. That is, it allowed a party a fixed sum of money as compensation for "the charges of barristers and solicitors" (1914 - *Rules as to Costs - Rule 16*) for examination per witness. In the **1914** "***Consolidated Rules of the Supreme Court of Alberta***," in Column 1, Item 14, the costs claimant received $8.00 for examining "one witness or opposite party," $5.00 for "each additional witness or opposite party" examined, and $5.00 for "attending on examination of a party or witness by an opposite party."

In the 1944 "consolidation" of the "***Rules of the Supreme Court of Alberta***," in Column 1, Item 16, the costs claimant received $12.00 for examining "one witness or opposite party", $8.00 for "each additional witness or opposite party" examined, and $8.00 for "attending on examination of a party or witness by opposite party." By the 1962 consolidation of the "***Rules of the Supreme Court of Alberta***" the wording and the amounts for examination per witness had not changed.

In **1966** [Alta.Reg. 384/66] Schedule C was changed to a hybrid combination of per witness examined fee for each time based ½ day of 2.5 hours or portion thereof. Using Column 1, Item 12 reads:

> "Examination of parties or witnesses before trial or in aid of execution for first full half day of 2½ hours . . .
>
> (a) Where one witness or opposite party examined. 20.00
>
> (b) For each additional witness or opposite party examined 15.00
>
> (c) For attending on examination of a party or witness by an opposite party 15.00
>
> For each full half day of 2½ hours occupied after the first full half day of 2½ hours, a proportionate allowance is to be made for any part of a half day required to conclude the examination of any witness after the first or any subsequent full half day of 2½ hours."

For example, if three (3) witnesses were examined and costs were awarded to the plaintiff, the taxing officer of the time would calculate costs under Item 12 as follows:

Witness #1:	November 1, 1967 - 2.0 hrs - Full 1st ½ day	20.00
	November 4, 1967 - 2.5 hrs (a.m.)	15.00
	November 4, 1967 - 1.5 hrs (p.m.) 2.5 hrs = 60% of 15.00	9.00
Witness #2:	November 4, 1967 - 1.0 hrs (p.m.) - Full 1st ½ day	15.00
	November 5, 1967 - 1.0 hrs (a.m.) 2.5 hrs = 40% of 15.00	6.00

Witness #3:	November 5, 1967 - 1.5 hrs (a.m.) - Full 1st ½ day	15.00
	November 5, 1967 - 2.5 hrs (p.m.)	15.00
	December 10, 1967 - .5 hrs (p.m.) 2.5 hrs = 20% of 15.00	3.00

By **1984** Schedule C changed to a strictly time based compensation, dropping any reference to compensation *per witness examined*. Item 21, Column 1:

> "To conducting or attending on Examination of Parties or Witnesses before Trial or in Aid of Execution for full one half day or portion thereof. 50.00
>
> (a) For each additional one half day. 75.00
>
> (b) The second or additional one half day fee shall be prorated to the extent that a full one half day of two and one half hours is not occupied in the examination."

Thus, in the example above where costs were calculated by witness plus time spent, the charges in, say, 1985, were calculated from time alone: 1967 the charges allowable (using the same figures so as not to confuse) in 1985 would have been:

November 1, 1985, Witness #1	2.0 hrs - Full 1st ½ day	50.00
November 4, 1985, Witness #1	2.5 hrs (a.m.)	75.00
	1.5 hrs (p.m.) 2.5 hrs = 60% of 75.00	45.00
Witness #2:	1.0 hrs (p.m.) 2.5 hrs = 40% of 75.00	30.00
November 5, 1985, Witness #2:	1.0 hrs (a.m.) 2.5 hrs = 40% of 75.00	30.00
November 5, 1967, Witness #3:	1.5 hrs (a.m.) 2.5 hrs = 60% of 75.00	45.00
Witness #3:	2.5 hrs (p.m.)	75.00
December 10, 1967, Witness #3	.5 hrs (p.m.) 2.5 hrs = 20% of 75.00	15.00

In 1998 Schedule C was amended. Oral discovery remained time based in that the amounts permissible for "oral discovery" were based on a "½ day" for either the first ½ day or each additional ½ day, but no further reference was made in the Schedule to 2.5 hours constituting a ½ day. Item 5, Column 1 stated:

> "First ½ day or portion of it fo attendance for examination of parties or witnesses or cross-examination on an affidavit.. . . . . 500.00
>
> Each additional ½ day. 500.00
>
> (When attending counsel is acting for neither witness nor examining party, 50% of these amounts.)"

Hence was added the following entry in the Q.B. Costs Manual:

> "The 2½ hours is no longer prescribed by the Rules but has been used by us as a convention carried over from the pre-September 1, 1998, **Schedule C**[1] Furthermore, a phone call to the Trial Coordinator's office and to the Court of Appeal will confirm that Appeals, Trials and Special Chamber's applications are booked in 2.5 hour segments: 10:00 am to 12:30 pm / 2:00 to 4:30 pm. We see no reason why Discoveries should be treated any differently. Defining a 'half day' as a fixed period of time also facilitates predictability and consistency in preparing bills of costs and in the Assessment of those bills.
>
> [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* [2002 CarswellAlta 1467, 2002 ABQB 1033] (Q.B.) (above, at para. 144 re: examinations - see also para. 159 and at para. 160 where special allowance was made for "compressed trial days"). Note: the writers take the view that while some of these cases related to "trial time," Item 11 they apply equally to "discovery time," Item 5.

Virtues of Predictability: As observed by our own Court of Appeal, "Lack of predictability in costs awards is a disincentive to settlement and efficiency in litigation: Canadian Bar Association, Systems of Civil Justice Task Force Report 46 (1996)." *Metz v. Weisgerber* [2004] A.J. No. 510, 2004 ABCA 151, 243 D.L.R. (4th) 220, 33 Alta. L.R. (4th) 17, 348 A.R. 143, 47 C.P.C. (5th) 253, 8 E.T.R. (3d) 117, 2 R.F.L. (6th) 87, 133 A.C.W.S. (3d) 603, at para. 39. We feel that so long as the fee allowance for oral discovery remains time based it should be easy for the parties to calculate the number of ½ days and the associated fee allowance. We have gone so far as to describe how to calculate the number of "half days" as follows:

> The number of "half days" is calculated by adding up the total number of hours of Examination and

> dividing by 2½. While one's first inclination is to take umbrage with the inflexibility of this practice we find that most appreciate it for its consistency, predictability, and tendency to limit the need for contested Assessment hearings.

Well, umbrage has been taken, and two decisions of the Court of Queen's Bench oblige us to amend our practice. In *Patterson v. Hryciuk*, [2005] A.J. No. 245; 2005 ABQB 136; 45 Alta. L.R. (4th) 240; 12 C.P.C. (6th) 378; 138 A.C.W.S. (3d) 22; 2005 CarswellAlta 309 at paras. 43-46 (Q.B.) the Court concluded, starting at paragraph 44:

1. "There is nothing in the Rules or Schedule C that defines a half day as two and a half hours. "

2. ". . . when a substantial portion of a half day is spent in oral discovery or trial, a party should recover the amount allocated for a half day. "

3. ". . . anything over two hours and less than three hours in a half day should be considered "substantial" and be considered a half day for the purpose of calculating costs."

4. "In a half day where less than two hours is spent in oral discovery or trial, those times can be added up and divided by two and a half so as to calculate the number of half days the taxing party is entitled to recover. The time over three hours can be handled in the same way."

The Court in *NPS Farms Ltd. v. E.I. du Pont Canada Co.* [2008] A.J. No. 78, 2008 ABQB 69, 439 A.R. 34, 163 A.C.W.S. (3d) 912 adopted the reasoning in *Patterson*.

Stevenson & Côté, ***Civil Procedure Handbook 2010*** at **Rule 10.41** cites *Patterson v. Hryciuk* as standing for the position that, "A substantial portion of a half day justifies the full fee for a half day."

What Constitutes the *New* Half Day?

1. As always, the "first ½ day or portion of it" (**5(2)**) is allowed in whole, even though a full 2½ hours may not be used.

2. Hours spent will be those established by the transcript of or invoice for each examination . . . it is simply easier for everyone involved.

3. Each "additional ½ day" may be constituted as follows:

   a. Any examination between 2.0 and 3.0 hours constitutes a full ½ day.

   b. Any examination less than 2.0 hours will, per *Patterson*, be prorated on the basis that 2.5 hours constitutes a full ½ day.

   c. If you want to save your assistant, the opposing party and the assessment officers some time, you can add up all your transcript hours (after the 1st ½ day), divide by 2.5 and times the result by the appropriate fee allowance.

Must be a Party "Adverse in Interest" - See **Rule 5.17**.

Must be "Relevant and Material Questions" - See **Rule 5.17** and **5.25**.

No Shows - We have not succeeded, to date, in finding provision in the rules (like former Rule 216) for some means of certifying the failure of a party to appear for questioning, which certification would otherwise enable one to recover costs associated with the non-appearance.

"Allowance" to Party to be Questioned (Formerly Conduct Money) - see *Schedule B: Witness Allowances: Division 3: Allowances Payable to Witnesses in Civil Proceedings*. See too **Rule 13.33** regarding "fixing" the amount to be paid without notice to the other person, subject to adjustment after completion of the actual attendance (as in former Rule 612(2)).

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

a/ **Rule 9.29 -** Only the Court may order a person to attend for questioning under oath to the end of enforcing or assisting in the enforcement of a judgment or order. Once the order is granted the rules relating

to questioning in Part 5 apply.

b/ **Rule 5.17(2)** - "The costs of questioning the second and subsequent persons are be paid by the questioning party unless (f) the parties otherwise agree, or (g) the Court otherwise orders." *[Emphasis added]*

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 when only an "Observer" - counsel acts for a party to the action, but who is neither being examined, nor examining.[1]

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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.

Regarding "**review of transcript**" status see *Power Farms. Ltd. V. Magi* [2003] A.J. No. 1154, 2003 ABQB 782:

> [16] Schedule C, Column 5. Item 5 sets costs at $1500.00 for each half day of examination. It also provides that when attending counsel is acting for neither the witness nor the examining party, costs should be 50% of the amount ($750.00). Schedule C does not include a tariff for review of transcripts. It seems to me that a fair way to award costs for the examination is as follows:
>
> 1. If counsel were present and examining Mr. Warthe, $1500.00 for each half day of examination, or portion thereof;
> 2. If counsel were present but not examining, $750.00 for each half day or portion thereof;
> 3. If counsel did not attend but reviewed transcripts, $375.00 for each half day's transcript reviewed.
>
> In my view, the review of the transcript, while not specifically described as a tariff item, was necessary to keep counsel informed and at the same time not increase the costs to the client. This was in keeping with the earlier directions of Sulatycky A.C.J. and Hutchinson J. Indeed Justice Hutchinson directed that there be a daily transcript of the examination. The costs of the transcript is a disbursement for each party who incurred that cost.

See too **Rule 10.41(3)(c)**: the assessment officer "may fix the amount recoverable for services performed by a lawyer that are not specified or described in Schedule C. . .".

Item 5

(4) Preparation of and response to written questions – a fee equivalent to one full day's attendance for oral questioning under item 5.

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
1000	1500	2000	2500	3000

New - Pretty straightforward. Bring copy of questions and responses to the assessment hearing.

Applications

Appeal from Master: Item 8 . . . NOT Court of Appeal Items 13 to 17 - **Rule 6.14** directs that an appeal from the judgment or order of a master is an appeal on the record to a judge of the Court of Queen's Bench. (See too *Court of Queen's Bench Act*, s. 12) Civil Practice Note "6" (A)(1)(b) clarified that "A Special Chambers application . . . includes any appeal from the decision of a Master." We await clarification that the new Rules do anything to change that practice.

Costs Associated with the Review of Lawyer's Charges:

Client initiated Review: **Rule 10.23** permits a review officer (in limited circumstances) to award costs against the client. If the amount is not fixed by the review 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 review officer so directs - in other words, silence does not constitute an award of costs.

Lawyer initiated Review: **Rule 10.23** specifically precludes a review officer from making a costs award against the client unless the client acted improperly or unreasonably at the review and the Court approves the review officer's award of costs. Therefore, even if the review officer awards costs against the client, the client must then have the Court approve the award of costs. The proper Items in Schedule C would be **Items 6(1)** or **7(1)**.

Costs Associated with the Assessment of Litigation (Party & Party) Bills of Costs:

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

Assessment by Appointment: Where a Assessment necessarily proceeds by way of Appointment for Assessment **Rule 10.41(2)(c)** enables the assessment officer to award costs of the assessment. Clearly, **Items 6(1)** or **7(1)** would apply, unless otherwise directed by the Assessment officer.

No Costs for Dispute Resolution / Judicial Dispute Resolution Proceedings - costs related to such proceedings are strictly prohibited by **Rules 10.31(2)** & **10.41(2)** unless the "a party engages in serious misconduct in the course of" either process. Until otherwise instructed by the Court, assessment officers will **not** be allowing any associated costs.

Applications: uncontested

Item 6

(1) Uncontested applications

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

Full or Proportionate Amount of the Fee? Rule 10.41(3)(f) & Schedule C, Division 1, Rule 2(2) - 10.41(3)(f) states that in "exceptional circumstances" the assessment officer may "reduce an amount, or allow a fraction of an amount, if the services were incomplete or limited." **Rule 2(1)** recites the steps commonly associated with each item in the Tariff. **Rule 2(2)** provides that "if an item described in the tariff has been started but not completed, or is only partially completed, a proportion of the fee may be allowed."

For example: to claim the full amount of this Item it is normally 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. Cutting out any of those steps *may* result in a proportionate reduction from the full amount.

Consent Order - *Diamond Park Builders Ltd. v. Conlee Construction Ltd.* [2002] A.J. No. 622 (Q.B) concludes 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."

A Consent Order obtained without the issuance of a Notice of Motion and Affidavit but with an appearance in chambers will receive no costs.

Where the respondent's consent is obtained only after the filing and serving of a Notice of Motion and Affidavit, negotiation of the consent order and appearance in chambers we feel compelled to apply **Rule 10.41(3)(c)** to *imply* the application of **6(1)** or **6(2)** depending on the circumstances. The rule states that "the

assessment officer may fix the amount recoverable for services performed by a lawyer that are not specified or described in Schedule C." Furthermore, **Schedule C, Division 1, Rule 2(2)** allows that "if an item described in the tariff has been started but not completed, or is only partially completed, a proportion of the fee may be allowed." In circumstances where parties were adversarial to the point that, to achieve a particular end, one party felt reasonably compelled to prepare, file and serve a motion and supporting affidavit(s) only after which settlement is reached between them resulting in a consent order, surely some form of compensation is justified. This reasoning disappears if it is demonstrated that the applicant was unreasonably precipitous in its bringing of the application.

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

Originating Application, Originating Notice, Notice of Motion, Other - If an application is initiated by Originating Application, Originating Notice, Notice of Motion or some other means which also has the effect of starting an action (**Rule 3.2(2)&(3)**) the party may be entitled to both **Item 1 - Commencement** and **Item 6, 7** or **8 - Applications**, *possibly* with some adjustment made to the latter per **Rule 10.41(3)(f)** or **Schedule C, Division 1, Rule 2(2)** for not having to file a separate Notice of Motion for the application.

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

Item 6

(2) Applications without notice to another party

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 normally obtained without notice to another party. The fee should be proportionate to the amount of work involved; such as 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. See **Rule 13.38**.

Applications: contested

Item 7

(1) Contested applications or assessments or reviews before a master, judge, assessment officer or review officer and appeal from Provincial Court, masters, review officers and assessment officers.

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

Appeal from Provincial Court, Masters, Review Officers and Assessment Officers - This is a new addition to this Item. While appeals from masters, review and assessment officers were always *understood* to fall within this Item, there has been doubt as to what costs to apply to Provincial Court appeals (see "related case law, below).

If the Judge hearing the appeal specifically grants costs other than or in addition to **Item 7** (such as allowing for written submissions - **Item 8** or **Item 12** - or specifying that **Item 8** should be applied and the number of ½ days or allowing **Items 10** & **11** for preparation for and participation in a trial where the appeal becomes exceptionally involved) such directions will, of course, be followed.

Related Case Law - Prior to this change to **Item 7(1)** we had relied upon the decision 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.[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 . . .." We did not allow any costs unless awarded specifically by the Court of Queen's Bench.

Full or Proportionate Amount of the Fee? Rule 10.41(3)(f) & Schedule C, Division 1, Rule 2(2) - 10.41(3)(f) states that in "exceptional circumstances" the assessment officer may "reduce an amount, or allow a fraction of an amount, if the services were incomplete or limited." In **Rule 2(1)** a recitation of the steps commonly associated with each item in the Tariff. **Rule 2(2)** provides that "if an item described in the tariff has been started but not completed, or is only partially completed, a proportion of the fee may be allowed."

For example: to claim the full amount of this Item it is normally 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. Cutting out any of those steps may result in a proportionate reduction from the full amount.

Motion to Amend Pleadings - **Rule 3.66** provides that costs occasioned by an amendment to a pleading are to be borne by the party making it unless (a) the amendment is a response to an amended pleading, or (b) the Court otherwise orders.

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

Originating Application, . . . - See "Originating Application" above at **Item 6**.

Item 7

(2) 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 Adjournment, But You *Did* Appear - The **Schedule** could not be much clearer. Only get this **Item** if opposed and in court.

Item 7

(3) Abandoned applications – A fee equivalent to 50% of the fee that would be payable under this item if the application had not been abandoned

"Abandoned" - Until some judicial consideration of this Item arises we understand that "abandoned" implies that if a party quits a contested application - Item 7 or Item 8 - whichever party becomes entitled to the costs of that application is entitled to only 50% of the Item's maximum amount, regardless the stage at which the application was abandoned (egs: after preparation of supporting affidavit, but prior to preparation of motion / prior to hearing / during the course of the hearing but before decision rendered / other permutations).

The following example demonstrates why that strict interpretation may, at times, be unfair: Suppose the Plaintiff (presume Column 1) files and serves a Notice of Motion and supporting Affidavit to compel the Defendant's production of undertakings, but production by the Defendant subsequently renders attendance in chambers and the obtaining and filing of the desired Order unnecessary, the application could be deemed "abandoned". Such a circumstance, under the "old" Rules of Court, would have resulted in fees to the Plaintiff of approximating 50% of the full amount (50% of $500 = $250) utilizing **Rule 605(3)** (now **Rule 10.41(4)** and **Schedule C, Division 1, Rule 2(2)**) - Plaintiff got what was reasonably seeking for) and, using **Rule 607**, nothing to the Defendant who would be deemed to have been unsuccessful in that the Plaintiff got what it was reasonably seeking for. However, if the Court should rule that the Defendant should get costs of this "abandoned" application, it would seem unfair to allow the Defendant the full amount that would have been allowed to the Plaintiff ($250). However, using this provision in Schedule C the Defendant would only be allowed 50% of what the Plaintiff would have been allowed (½ of $250 = $125).

It will be interesting to see how this will be utilized and how it is to be distinguished from **Schedule C, Division 1, Rule 2(2)**.

"50% of the fee . . . payable . . . if . . . had not be abandoned" - To be sure, the maximum recoverable is ½ of the maximum amount depending on which Column applies. The amount could be reduced by more if the maximum would not otherwise have been allowed.

Applications: requiring written briefs

Item 8

(1) Applications when brief is required or allowed by the Court, including preparation of confirming letters required for Family Law Special Chambers:

"Allowed by the Court" - It is 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" - We have been given to understand that the following Practice Notes may be reworded but they will survive the implementation of the new ***ARC*** and will still require written briefs or letters:

- *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" [often referred to as a "confirmation letter"] is required.

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

Other than the above, a word search of the newest version of the ***Alberta Rules of Court*** only finds two (2) references to a "brief;" both are found in Item 8 of the Tariff in Schedule C. All other uses of the root word "brief" are in the verb tense and contextually do not apply. There are references to "further written argument" and "any affidavit or other evidence in support of the application" which, in light of *Acquest v Barry* (below), may or may not qualify as "briefs" or qualify one to recover costs under Item 8. Examples:

- *Appeal from Master, Review or Assessment Officer:* **Rules 6.14**, **10.26** and **10.44** respectively permit an appellant and respondent in either of these hearings to, in addition to submitting the "record of proceedings," each file and serve "any further written argument."

- *Appeals Under the Family Law Act:* **Rule 12.69** requires the appellant and respondent to each file and exchange an "appeal memorandum" with facts, relief sought, argument & authorities, and particular references to evidence re: grounds or arguments.

In *Acquest/Alberta Mining Inc. v. Barry Developments 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.

Evidence Court May Consider in Application Hearings - **Rule 6.11(1)** allows the Court to consider "only the following evidence:"

(a) affidavit evidence, (b) a transcript of questioning under Part 6, (c) written or oral answers to Part 5 questions, (d) admissible records disclosed in an affidavit of records under rule 5.6, (e) anything permitted by any other rule or by an enactment, (f) evidence taken in any other action (if give sufficient notice to other side and obtains court's permission, and (g) oral evidence given in the same manner as at trial, if permitted by the Court.

What qualifies as a "brief" will become apparent with the passage of time.

Civil Claims Appeal, Costs of . . . - See **Item 7(1)**, above.

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

"Special Chambers application" defined - Civil Practice Note "6" (A)(1)(b) - which we understanding will be somewhat reworded after the new ***ARC*** take effect - defined a Special Chambers application as "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." A Family Special Chambers application only requires a "confirmation letter", not a brief per say.

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 6.11(1)(g)** & **3.21**). 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 specific direction from the Court allowing **Item 10** or both 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 an Appearance to argue before Appeal Court apply, instead of the costs of this item.

"Complex Chambers" Defined - In *Acquest/Alberta Mining Inc. v. Barry Developements Inc.* [1999] A.J. No. 1313, 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.

No More Than 2 Half Days Unless "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 8

(3) Abandoned applications – A fee equivalent to 50% of the fee that would be payable under this item if the application had not been abandoned

"Abandoned" - See **Item 7(3)**, above.

Trial readiness/case management

Item 9

(1) Each pre-trial application to schedule a trial date and each case management attendance (including an interlocutory application if heard during those conferences or attendances, other than an application under rule 6.3).

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

Item 9

(2) If an interlocutory application is brought under rule 6.3 and heard during case management attendance, the fee awarded may include either a fee for the application or fees for both the application and case management attendance, depending on the duplication of work, if any.

Rule 6.3 Application - consists, unless otherwise ordered, of the following components:

- Be in the **form** prescribed by Schedule A, Division 1 - (**Form 27**),
  - state briefly the grounds for filing the application,
  - identify the material or evidence intended to be relied on,
  - refer to any provision of an enactment or rule relied on,
  - state the remedy claimed or sought,
  - state how the application is proposed to be heard or considered under the ***ARC***.

- Notice of the application & any affidavit or other evidence must be **filed and served** on all parties and every affected person 5 days or more before the application is to be heard (unless the rules allow otherwise).

Part 8, Division 2 - Scheduling of Trial Dates - **Rule 8.4** details an exhaustive list of prerequisites to obtaining a trial date from the court clerk. However, **Rule 8.5** allows for a **Form 38** application to be made to the Court in order to set a trial date or to direct the court clerk to set a trial date. This would appear to be the application contemplated in **Item 9(1)**.

Part 4, Division 2 - Court Assistance in Managing Litigation - **Rule 4.9** contemplates a party applying for or the court, of its own accord, granting either

- a "procedural order,"
- an "Assistance by the Court" order under **Rule 4.10** (which can be related to dispute resolution, complex case planning or modification, case management, (or more), or
- "any other appropriate order."

Save for anything related to dispute or judicial resolution, these proceedings would seem to be **Rule 6.3 applications**, which would attract costs under either **Items 6, 7 or 8**.

Once parties to an action are subject to case management and appointed a case management judge has the authority to

- order the parties to "identify, simplify or clarify the real issues in dispute,"
- order the parties to comply with a "complex case litigation plan,"
- order the facilitation of "an application, proceeding, questioning or pre-trial proceeding,"
- "make an order to promote the fair and efficient resolution of the action by trial,"
- "facilitate efforts" by the parties to bring about the "efficient resolution of the action" or of "any issue in the action" or
- "make any procedural order" necessary.

Many of these orders and objectives will be accomplished without **Rule 6.3** applications involving a motion, affidavits or even an written and filed order; such might constitute a case management "attendance". Often the case management judge will set deadlines with specific objectives which the parties will report on by

phone or by means of a quick attendance; also a case management "attendance." However, what would otherwise be considered a case management meeting will also involve a **Rule 6.3** application, entitling the ultimate costs recipient to both an item **6, 7 or 8** in addition to an item **9**.

Trial and summary trial

Item 10

(1) Preparation for trial and summary trial.

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

Item 10

(2) This item amount may be varied up or down depending on the length and complexity of the trial or summary trial.

Summary Trials - Are found in **Division 3** of **Part 7: Resolving Claims Without Full Trial**. **Rule 7.5(1)** allows "a party [to] apply to a judge for judgment by way of a summary trial on an issue, a question, or generally." How much to allow for preparation for a summary trial will depend upon a number of factors which are address below in "Preparation for Trial."

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 and summary trial." It provides a maximum fee amount per Column which the Assessment officer may allow, with the proviso in **10(2)** that preparation for trial "may be varied up or down depending on the length and complexity of the trial or summary trial."

> **Note:** thanks to **Rule 10.41(3)(d)** an Assessment officer is now authorized to increase ***Item 10*** beyond the maximum dictated by ***Schedule C***. It states:
>
> > "The assessment officer . . . may not allow lawyer's fees at more than the amounts specified in Schedule C except when these rules, including the Schedule, explicitly permit or a written agreement expressly provides for a different basis for recovery, . . ."
>
> Consequently, the assessment officer may vary **Item 10** "up".

There are a limited number of 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 Assessment 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., 29th rel. 2010) 710.7 - Preparation for Trial.

Point in the Action When Preparation Begins or Ends:

Generally: Prior to September 1st, 1998, 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 the action or proceeding 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 11, Trial*** allows for time spent 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 [now **Form 37** - Request to Schedule a Trial Date],
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. obtaining and service of Rule 218.1 statements [now **Form 25** - Expert's Report - see **Part 5, Division 2: Experts and Expert Reports**].

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. None of these 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)*** [now **r. 10.33(1) & (2)** and in which some of the factors are reworded or expanded upon - as decisions of the Court consider the new rule we will try to update this analysis]:

"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.), *Clay v. Petro-Canada* [2005] A.J. No. 188, 2005 ABQB 122, 137 A.C.W.S. (3d) 692 (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), *Clay v. Petro-Canada* [2005] A.J. No. 188, 2005 ABQB 122, 137 A.C.W.S. (3d) 692 (Q.B.), *Marathon Canada Ltd. v. Enron Canada Corp.* [2008] A.J. No. 1468, 2008 ABQB 770, 100 Alta. L.R. (4th) 356, 447 A.R. 89, 2008 CarswellAlta 2068, 174 A.C.W.S. (3d) 62 (Q.B.).

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), *Marathon Canada Ltd. v. Enron Canada Corp.* [2008] A.J. No. 1468, 2008 ABQB 770, 100 Alta. L.R. (4th) 356, 447 A.R. 89, 2008 CarswellAlta 2068, 174 A.C.W.S. (3d) 62 (Q.B.).

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), *Clay v. Petro-Canada* [2005] A.J. No. 188, 2005 ABQB 122, 137 A.C.W.S. (3d) 692 (Q.B.), *Marathon Canada Ltd. v. Enron Canada Corp.* [2008] A.J. No. 1468, 2008 ABQB 770, 100 Alta. L.R. (4th) 356, 447 A.R. 89, 2008 CarswellAlta 2068, 174 A.C.W.S. (3d) 62 (Q.B.).

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.).

The ***conduct of a party which unnecessarily lengthened the proceeding*** was given considerable weight in *Wallat v. Marshall* [2005] A.J. No. 1805, 2005 ABQB 773, 385 A.R. 28, 153 A.C.W.S. (3d) 41 (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.

Dispute Resolution Process & Judicial DRP - Recovery for Preparation?

Old Rules: Argument has been 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. The Court of Queen's Bench largely disagrees with this position.

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 SC?.

At present, therefore, except where a JDR occurs within a month or so of trial, the Assessment officer is limited to allowing only such "preparation for trial" as would have been permitted had the JDR never occurred; this exercise would involve all the considerations addressed above.

New Rules: **Rule 10.41(2)(d)** is emphatic that an assessment officer may not allow costs of a dispute resolution process (r. 4.16) or a judicial dispute resolution process (r. 4.18) "unless a party engages in serious misconduct in the course of the dispute resolution process or the judicial dispute resolution process." Assessment officers will be hesitant to make a finding of "serious misconduct" and will be inclined to await some direction from the Court. Judges are under a similar restriction as to costs of this type of proceeding - **Rule 10.31(2)(c)**.

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**).

Will the wide-ranging provisions of **Part 7: Resolving Claims Without Full Trial** and the specific inclusion of "Summary Trials" in **Items 10 & 11** change this perspective?

Preparation of Rebuttal Evidence - For a discussion of the 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).

Preparation and Filing of a Certificate of Readiness [now **Form 37** - Request to Schedule a Trial Date] (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.

Preparing, Serving and Accepting of Offers of Settlement (***Rules 4.24 - 4.30***) are not part 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 13.37** provides that the Clerk's filing fee to "set a trial date" (**Schedule B**, **Division 1**, **Item 4**) is to be waived by the Clerk if a subsisting Legal Aid Certificate is presented with the document to be filed.

Item 11

Trial and summary 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

Adjournment of Trial, Where No Direction as to Costs by the Court - 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 (2) - opposed adjournment**.

In *Northland Forest Products Ltd. v. Wood Buffalo (Regional Municipality)* [2002] A.J. No. 1106, 2002 ABQB

789 (Q.B.) Clarke J. the court did not allow costs of the adjournment.

Adjournment of Trial, Cost Consequences of - 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." In *Kowdrysh v. Delong* [2001] A.J. No. 1745, 2002 ABQB 207, 310 A.R. 48, 20 C.P.C. (5th) 300, 113 A.C.W.S. (3d) 222 the court awarded costs in excess of $17,000 payable by plaintiff's counsel before the trial could proceed.

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]).

Adjournment of Trial, 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."

Adjournment: "Thrown Away Costs" Explained - In *Koppe v. Garneau Lofts Inc.* [2005] A.J. No. 1318, 2005 ABQB 727, 59 Alta. L.R. (4th) 255, 385 A.R. 265, 28 C.P.C. (6th) 216, 143 A.C.W.S. (3d) 237, 2005 CarswellAlta 1437 (Q.B.) gives an excellent explanation of what do and what do not constitute "thrown away costs." (For further details see the case or see "Thrown Away Costs" in subdocument *Introduction to Costs*, towards the end.)

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" - See "Calculation of Half Day" detailed in **Item 5 - Questioning** at page 23.

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.

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

Written argument

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.

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)** [now **r. 10.41(3)(c)**] 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.

COURT OF APPEAL COSTS: AS PREVIOUSLY NOTED **RULE 15.14(3)** STATES THAT THE "OLD" RULES OF COURT WILL CONTINUE TO APPLY TO APPEALS TO THE COURT OF APPEAL. THIS INCLUDES SCHEDULE C: ITEMS 13 TO 17 OF THE "OLD" SCHEDULE C.

ACCORDINGLY, WE WILL RETAIN OUR ANNOTATION OF ITEMS 13 TO 17 AS THEY RELATE TO THE COURT OF APPEAL. BECAUSE THESE VERY ITEMS NOW CONSTITUTE THE "POST-JUDGMENT" PORTION OF THE "NEW" SCHEDULE C, THE COURT OF APPEAL ITEMS WILL BE CODED IN RED TO AVOID CONFUSION.

Appeals

Appeal from Master: Item 8 . . . NOT Items 13 to 17 - Civil Practice Note "6" (A)(1)(b): "A Special Chambers application . . . includes any appeal from the decision of a Master." This accords with the practice of the Clerk of the Court for at least the past 20 years. This subsection of Schedule C relates ***solely*** to appeals to the Court of Appeal.

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. 16).

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.

"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** [**r. 13.36** in new ***ARC***] 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

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

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

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

What constitutes a "½ day?" - For Q.B. Trial see **Item 11**. For C.A. a " ½ day" is 2.5 hours, regardless directions from the Court limiting the oral presentations of each party to prescribed time frames. As in Queen's Bench, the Court of Appeal's objective is to sit for 2.5 hours in the morning and 2.5 hours in the afternoon, though, in reality, that objective is frequently exceeded (hence the time restrictions).

Bottom-line: a "½ day" is 2.5 hours. The "first ½ day" is allowed in full regardless less the full 2.5 hours might not be spent. "Additional ½ days" are time based: add up the time and divide by 2.5 to calculate the number of "additional ½ days."

In *MacPhail v. Karasek*, 2008 ABCA 98 considered the fact that the appeal was scheduled for 10:00 am, both parties were present and ready at 10:00 am but the matter was not heard until the afternoon. The Court of Appeal allowed the successful party costs of not just the afternoon, but also of the morning.

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

Generally - Note comments under **Item 11** and above under **Item 15**.

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).

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.

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 10.42(2)(b)**, to be assessed at 100% of Column 1.

Item 13

(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

(2) Registering a status report in the Personal Property Registry to renew the writ (allowed once every 2 years)

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

(3) Registering a status report in the Personal Property Registry to amend the writ

25	*25*	*25*	*25*	*25*

Item 14

(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*

Item 14

(2) Examination in Aid of Enforcement under the Civil Enforcement Act

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

Item 15

Seizure and related matters

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

no comment

Item 16

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 17

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 17**. 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 17**.

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 that event 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 17] 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 17] 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."

Related Rules - **Part 9, Division 6: Sale and Disposition of Land Other than by Foreclosure Action (9.37 - 9.39)**

Miscellaneous

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 the Application of GST in Different Cost Scenarios

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

	PARTY & PARTY ASSESSMENTS			SOLICITOR & CLIENT ASSESSMENTS	
	Lump Sum Basis	**Schedule C Basis**	**Solicitor & Client Basis / Full Indemnification Basis**		
Definition	**Rule 10.31** - 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 10.31** - The Court may award costs under a specific column of **Schedule C** or, if silent with respect to costs, Rules 10.29 & 10.41 would dictate the relevant costs.	**Rule 10.31** - The Court may award costs to be paid by one litigant to another on a Solicitor & Client Basis or a Full Indemnification Basis.	**Rule 10.1** 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 <u>not</u> on the fee awarded as a lump sum by the Court.	G.S.T. should be allowed on the disbursements, but <u>not</u> on the fee prescribed by the Schedule **unless** the party complies with **Rule 10.48(2)**.	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 / Assessment officer has no authority to allow GST unless an Affidavit has been filed which meets all the criteria set out in **subrule (2)**.	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.

Provincial Court Act, S. 9.6 - Matters Within and <u>Not</u> Within Jurisdiction of the Court - Rule 10.42(1)

Rule 10.42(1) is discussed above at page ??.

Provincial Court Act, R.S.A. 2000, c. P-31 (as of October 8th, 2010):

> ***Matters Within Jurisdiction of the Provincial Court***
>
> **9.6(1)** The Court has, subject to this Act, the following jurisdiction:
>
> (a) for the purposes of Part 4,
>
> (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,

(A.1) for unjust enrichment, including a claim or counterclaim for the recovery of the value of services provided or goods supplied, if the amount claimed or counterclaimed, as the case may be, 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 a determination of the title to and the right of possession of personal property, and for the delivery 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.

(2) [Details matters outside jurisdiction of the Court - see below] . . .

(3) Where 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) [Deals with a notice of abandonment of amounts exceeding the prescribed monetary limits.] . . .

(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.

RSA 2000 c16(Supp) s6;2008 c32 s1

Matters <u>Not</u> Within Jurisdiction of the Provincial Court

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.

Rule 10.42(2) *[605(7)]* & Multiple Parties

What happens if four (4) plaintiffs in a personal injury suit sue together in one action (the preferred course, barring conflicting interests), two settle for less than $25,000.00 and want to assess their bill of costs, and the remaining two do not settle until later, but the combined "judgment" of all four ends up exceeding $25,000?

Consider: Because it is unknown whether plaintiffs 3 & 4 will actually recover anything or anything which would bring the aggregate recovery above $25,000, **Rule 10.42** would have to be applied in the Assessment of the bill of costs tendered by plaintiffs

1 & 2.

One means of preserving 1 & 2's entitlement to the additional 25% in costs could be for the Assessment officer to issue an “interim” or “special circumstances” Certificate of Assessment (see **Rule 10.43**) which provides that the application of **Rule 10.42** is open to revisitation upon the conclusion of the whole of the action. That way, if, when plaintiffs 3 & 4 finally settle the action, the aggregate judgment exceeds the Provincial Court limits, the Assessment officer is free to assess not only plaintiffs 3 and 4's portion of the costs of the action at the full assessable amount, but to also revisit the previously assessed bill of costs of plaintiffs 1 and 2 and add on the 25% previously deducted from their half of the costs of the action.

COURT FILE NUMBER _____ Clerk's Stamp:

COURT OF QUEENS BENCH OF ALBERTA

JUDICIAL CENTRE OF _____

PLAINTIFF(S) *(Applicant(s))* _____

DEFENDANT(S) *(Respondent(s))* _____

DOCUMENT **RULE 10.48 GST RECOVERY AFFIDAVIT**

ADDRESS FOR SERVICE & CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Street _____

City/Town _____

Province, Postal Code _____

Phone (area code & # / fax # (if any)) _____

Email (if any) _____

AFFIDAVIT OF _____ *(my name)*

Sworn/Affirmed on _____, 20_____.

I, _____, of _____,
(Name) *(Municipality, Province)*

MAKE OATH/AFFIRM AND SAY THAT:

1. I have personal knowledge of the facts herein deposed to.

2. The party entitled to receive payment under the bill of costs attached to (or endorsed on or filed with) this bill of costs, and not another party, will actually be paying the goods and services tax on that party's costs.

3. The goods and services tax will not be passed on to, or be reimbursed by, any other person.

4. The party entitled to receive payment under the bill of costs is not eligible for the goods and services tax input tax credit.

SWORN / AFFIRMED BEFORE ME THIS _____

day of _____, 20_____, at

_____, Alberta. _____
(My Signature)

_____

(Commissioner for Oaths in and for the Province of Alberta)

_____
PRINT NAME & EXPIRY DATE/LAWYER/STUDENT-AT-LAW