COURT OF QUEEN'S BENCH
COSTS MANUAL

COSTS BETWEEN PARTIES

UPDATED January 17th, 2011

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

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

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

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

Introduction to Costs

Taxation of Costs

Schedule C

Disbursements & Other Charges

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

Disclaimer

The advice and opinions which follow are those of the writers, James Christensen & Joe Morin, Assessement 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.

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Disbursements & Other Charges

Introduction

Disbursements

The ***Rules of Court*** now make use of the term "disbursement" and “disbursements”. With reference to **Division 2, Recoverable Costs of Litigation** the ***Rules*** make the distinction between “disbursements” and “other charges” in three (3) locations:

> **Preparation of Bill of Costs:** **“10.35(2)(a)** The [Form 44] bill of costs must (a) itemize all the costs sought to be recovered, distinguishing between fees, disbursements and other charges, . . . “
>
> and
>
> **Assessment Officer’s Authority:** **“10.38 (1)(f)** For the purpose of assessing costs payable, an assessment officer may . . . (f) require details of the services provided and disbursements or other charges claimed . . .”
>
> **Form 44 Bill of Costs:** The sample form makes allowance for details of fees, disbursements and other charges.

Other Charges

It is a natural reflex to assume that “other charges” is a reference to in-house charges by law firms - such as photocopying and facsimile transmissions - as opposed to out-of-pocket expenses incurred by the lawyer / law firm. For the most part this is probably the intent, to be using the same terminology in litigation bills of costs as is used in lawyer’s accounts.

It is bit misleading in that a Form 44 Bill of Costs is detailing the costs of either a plaintiff, defendant, 3rd party, applicant, respondent, et cetera, **not** that party’s lawyer’s costs. If, during the course of the litigation, a party was represented by a lawyer / law firm it will have received invoices / accounts which, as the result of a 1990's direction of the Law Society of Alberta, must distinguish between ***disbursements*** incurred by the law firm and ***other charges***, the latter being in-house fees charged by the law firm to its client to off-set the costs associated with its office overhead. To the party/client all charges received from its lawyer / law firm could properly be characterized as “disbursements” - fees, disbursements and other charges - they all constitute an out-of-pocket expense to the party.

However, since lawyer’s fees have been distinguished from lawyer’s disbursements in bills of costs for good reason (full reimbursement of lawyer’s fees having been deemed unreasonable save in unusual circumstances), it is not a big leap to now distinguish “other charges” from “disbursements.”

The creation of the distinction, besides creating a bit more work for the paralegals who put the Form 44 Bill of Costs together, opens an opportunity for self-represented litigants to try to recover some of their “over head” expenses (use of their own photocopier, fax machine, scanner and printer) which have not historically fallen into the “out-of-pocket” expenses normally allowed to self-reps who are, specifically or by default, entitled to costs but who have not been awarded compensation for their time and effort (as **Rule 10.31(5)** now specifically permits the Court to do “in appropriate circumstances.”) Time will tell to what degree the Court will permit self-reps the right to recover “other charges.” For now we will treat the “other charges” costs which a self-rep has incurred in the same manner we treat the “other charges” claimed as costs paid to a lawyer / law firm.

For the sake of simplicity this document will treat “disbursements” as also including “other charges,” unless the distinction becomes relevant.

To be sure, for the purposes of this commentary the term "disbursements" will be used to represent all charges or expenses claimed as costs between parties, with the exception of **Schedule C** fees,** unless a clear distinction is made.

See *Petrogas Processing Ltd. v. Westcoat Transmission Co.* [1990] A.J. No. 317; [1990] 4 W.W.R. 461: 73 Alta.L.R. (2d) 246; 105 A.R. 384, O'Leary J. at page 18 of A.J.:

> "It will be seen that the amounts which a litigant may claim as costs are "all the reasonable and proper expenses which any party has paid or become liable to pay" for the purpose of prosecuting or defending any action or proceeding. The non-exhaustive list of examples in Rule 600(1)(a) includes the charges of barristers and solicitors as well as other expenses paid either by a party or a solicitor on behalf of a party. I will refer to the amounts claimed by a party in respect of the charges of his solicitor as "fees", and other litigation expenses,

whether incurred by the litigant directly or by the solicitor on the litigant's behalf, as "disbursements".

Fees

It should be clear that "disbursements" and “other charges” do not include the charges of barristers & solicitors for their legal services, which are limited by **Rule 10.41(3)(d)** to the amounts prescribed by **Schedule C** and are addressed in the preceding "Annotation of Schedule C".

Reasonable & Proper

The Taxing Officer's discretion to allow or disallow disbursements comes from **Rule 10.41**, which states that "costs" include "the ***reasonable and proper*** costs that a party incurred to bring an action," do not include costs associated with dispute or judicial dispute resolution processes (unless otherwise ordered by the Court), and may exclude “an item in a bill of costs that is improper, unnecessary, excessive or a mistake."

Reasonableness

The test of ***reasonableness*** was addressed in *MacCabe v. Westlock Roman Catholic Separate School District No. 110* [1999] A.J. No. 499; [1999] 10 W.W.R. 461; 70 Alta.L.R. (3d) 1; 243 A.R. 280, Johnstone J., at para. 76:

> "In determining whether or not a disbursement is reasonable, I may consider the following factors:
>
> (a) the length of the trial;
>
> (b) its complexity;
>
> (c) the nature and number of the issues involved in the trial;
>
> (d) the degree of contest as to evidentiary matters;
>
> (e) the degree of contest as to credibility of witnesses, including professional expert witnesses;
>
> (f) the nature and number of the defenses mounted;
>
> (g) the requirement for and use of experts;
>
> (h) the use of models, tests and scientific evidence;
>
> (i) the nature and amount of damages at issue;
>
> (j) the relationship of the expenses claimed as costs to the amounts at issue in damages;
>
> (k) any agreement of counsel to share specific expense items.
>
> "(See Westco Storage Limited v. Inter-City Gas Utilities Ltd. [1988] 4 W.W.R. 396, (Man.Q.B.) at p. 403 per Schwartz, J.; Lalli [v. Chawla (1997) 53 Alta.L.R.121 (Alta. Q.B.)] above, at pp. 127 and 128; Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co., (1994), 170 A.R. 341 (Alta.Q.B.) pp. 22 and 23, Berger, J. (as then he was))."

In *Petrogas Processing Ltd. v. Westcoat Transmission Co.* [1990] A.J. No. 317; [1990] 4 W.W.R. 461: 73 Alta.L.R. (2d) 246; 105 A.R. 384 (Q.B.), at page 29, the court observed:

> "The issues raised from time to time by the pleadings and by discovery and production are significant circumstances. The magnitude of the expenditure in relation to the amount at risk in the proceedings is another important consideration. In all cases the party taxing costs has the burden of showing that both the nature of the expense and its amount were reasonable and proper in the circumstances."

Applied in *McCabe* (above).

Propriety

The propriety of an expense was considered in *Fung v. Berkun* [1982] 4 W.W.R. 381, (B.C.S.C.), wherein Wetmore, L.J.S.C. states, at p. 383:

> "In *Francis v. Francis*, [1956] P. 87, [1955] 3 All E.R. 836, Sachs J. said at p. 840:
>
> > 'When considering whether or not an item in a bill is "proper" the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client.'"

In *Waters v. Smith* (1973) 2 O.R. 490 at 494, Ontario Taxing Officer McBride expressed words of circumspection to slash-happy taxing officers:

> "I favour the . . . argument that I should not "second guess" counsel with respect to such matters as the necessity of surveys, photographs and so on. I might say that a Taxing Officers is required to do just that in cases falling within the ambit of [Ontario] Rules 674, 675 and 677. However, I incline to the view that costs should be disallowed in such cases only when it is quite clear to the Taxing Officer that the services rendered or expenses incurred were not necessary and should have been seen at the time to be unnecessary or unreasonable."

Point in Time to Apply the Test

In *Van Daele v. Van Daele* (1983) 45 C.P.C. 166 (B.C.C.A.) it was held that the "reasonableness" and "propriety" of an expense should be considered as at the time it was incurred. See too *Monashee Petroleums Ltd. v. Pan Cana Resourses Ltd.* (1988) 85 A.R. 183 at 192-3 (C.A.) which concluded:

> "It has always been the rule that expenditures for witnesses are based on what seemed reasonable at the time, not on hindsight about witnesses who in the event turned out later to be unnecessary. Costs are for proper expenses, and expenses are incurred by ordinary mortals, not by prophets."

In *Petrogas Processing Ltd. v. Westcoat Transmission Co.* [1990] A.J. No. 317; [1990] 4 W.W.R. 461: 73 Alta.L.R. (2d) 246; 105 A.R. 384, O'Leary J., at page 29, stated:

> "The test of reasonableness is not, in my opinion, entirely based on the importance of the expenditure to success at trial. Hindsight may show that some liabilities assumed were, in the end, of little or no benefit. The question is whether the expense was reasonable and proper in the light of the circumstances which existed at the time it was incurred."

Sidorsky v. CFCN Communications Ltd. 1995 CarswellAlta 86, 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, [1995] 5 W.W.R. 190 (Q.B.), McMahon, J.:

> "17 It is equally clear that the reasonableness of the expenditures for witnesses is based on what seemed reasonable at the time, that is during and before trial. One should not rely upon hindsight, particularly in respect of experts retained for rebuttal purposes and then not called because the plaintiffs' evidence does not warrant it."

In *Viridian Inc. v. Dresser Canada Inc.* [1998] A.J. No. 947, 1998 ABQB 687, 1998 CarswellAlta 797, 82 A.C.W.S. (3d) 26 (Q.B.) the Honourable Mr. Justice Côté stated:

> "3 The issue in this Court is the amount of fees payable to two expert witnesses, . . .
>
> "4 It is trite law that the question is not what was necessary, still less how much hindsight suggests was really necessary. The question is whether what was done, and the money that was spent at the time, were reasonable, given the state of knowledge then existing."

Both *Van Daele* and *Petrogas* were followed in *Hetu v. Traff* [1999] A.J. No. 1270, 1999 ABQB 826 (Q.B.).

And *S.F.P v. MacDonald* [1999] A.J. No. 478 wherein Veit, J, relying upon *Monashee*, concluded:

> "that the test of whether an expert's expense is reasonable is whether it was reasonable at the time the expense was incurred. It would be too onerous to a litigant to impose a higher test, as for example, whether the evidence was useful in the result."

Stevenson & Côté, ***Civil Procedure Handbook 2010***, at r. 10.31(6) - "F. Disbursements" (midway), elaborates:

> "Hindsight is not the test, and still less is whether the disbursement later actually contributed to victory. An unreasonable and so unrecoverable disbursement may be one which was negligent, or overcautious or extravagant, bearing in mind all the facts then known, including the amounts in issue in the suit and whether

other matters such as people's reputations were at stake."

Incurred Prior to the Action

At the very least, the "costs of any step necessarily taken before action to give regularity to the statement of claim when issued" are recoverable (see *Northern Trusts Company v. Coleman* [1923] 1 W.W.R. 802; [1923] 1 D.L.R. 1132 (Alta.S.C.), Walsh J. at 804; recognized in *Canadian Egg Marketing Agency v. Richardson* [1998] N.W.T.R. 58, Wachowich J. (as he then was)). Therefore, an ex parte application for service ex juris, an application for garnishment prior to judgment, or such other applications which pre-date the commencement of proceedings are recoverable notwithstanding they precede the action.

A broader view was taken in *Spiess Earth Construction Ltd. v. Cominco Ltd.* [1978] A.J. No. 669 (S.C.T.D.) where Moore J. (as he then was) allowed, on a consent basis, significant costs incurred for "claim preparation and negotiation" prior to commencement of the proceedings. The decision does not clarify if this conclusion was possibly due to some contractual obligation of indemnification. As well, in *Mar Automobile Holdings Ltd. v. Rawlusyk*, 2001 CarswellAlta 855, 2001 ABQB 516, 93 Alta. L.R. (3d) 141 (Q.B.), Clarke, J. concluded, "As to the period prior to Ellis being named as a party in the litigation, to the extent that the expert report work related to the issue of the audit prepared by Ellis then I have concluded that is properly taxed as a disbursement."

A contrary and more predominant view is taken in *Chicago Blower Corp. v. 141209 Canada Ltd.* [1986] M.J. No. 443; [1986] 6 W.W.R. 143, 43 Man.R. (2d) 130, Wilson, J., followed in *Alberta v. Alberta (Labour Relations Board)* [1998] A.J. No. 1310; 240 A.R. 81 wherein Veit J. said, at para. 14, "Usually, costs incurred before an action is brought are not allowable: *Chicago Blower Corp.*" *Chicago Blower* relied in its reasons on *Re Matton and Township of Toronto* [1965] 2 O.R. 792 wherein the Taxing Officer was directed to allow only those costs which were incurred subsequent to the commencement of the proceedings. In *Re Matton* the Taxing Officer and the Chief Justice relied upon the Manitoba Court of Appeal decision in *Weston Bakeries Ltd. v. Baker Perkins Inc. and Canadian Petersen Oven Co. Ltd.* (1960), 23 D.L.R. (2d) 122, 31 W.W.R. 200 which refused certain costs because that Province's equivalent to our former **Rule 600(1)(a)** [now **Rule 10.41**] was much more restrictive. Indeed, the Manitoba Court of Appeal made specific reference to our **Rule** and that its wording would have given that Court jurisdiction to allow the costs in question:

> "In England and in other jurisdictions Rules have been formulated to deal with outlays and expenses not generally considered as being included in the term 'costs'. Counsel for defendants cited British Columbia and Alberta cases but those jurisdictions have, by their Rules, covered the matter."

The wording of the relevant costs rule in that jurisdiction permitted costs "of and incidental to all proceedings" while ours contemplates "all . . . expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceeding" [**Rule 600(1)(a)].** The November 1st, 2010 change to the ***ARC*** changed that wording to read: "the reasonable and proper costs that a party incurred to bring an action" or "file an application, take proceedings, carry on an action, or participate in an action, application or proceeding" [**Rule 10.41(2)(a)** and **(1)(a-d)]**.

A number of other Ontario decisions take a similarly contrary view: *Re Magee and Ottawa Separate School Board* [1962] O.W.N. 83, 32 D.L.R. (2d) 162, a decision of McRuer, C.J.H.C.; *Hazelton v. Quality Products Ltd. and Heywood* [1971] 1 O.R. 1 (Ont. C.A.); and *Erco Industries Ltd. v. Allendale Mutual Insurance Co.* (1984) 47 O.R. (2d) 589 (Ont. H.C.J.). In *Bunkowsky* (above) McBride T/O explains the flaw in the court's reasoning in *Re Magee* and it is interesting that, as Mark M. Orkin explained in his ***The Law of Costs*** (2nd e., 13th rel. 1998) at 103.0, footnote 50:

> On appeal the item was disallowed on other grounds . . ., the court specifically leaving open whether Magee ought to be followed in all cases.

In a more recent Alberta decision, *Kha v. Salhab* [2001] A.J. No. 61, 2001 CarswellAlta 53, 2001 ABQB 44 (Q.B.), Kenny J. considered the cost of hiring interpreters to aid the Plaintiff's lawyer in determining whether the Plaintiff had a case worth pursuing. In reluctantly concluding that then **Rule 600(1)(a)** [now **Rule 10.41**] is not broad enough to include costs incurred prior to commencement of the "proceeding" the court considered the following decisions:

> *Ukrainian (Edmonton) Credit Union Ltd. v. 258753 Alberta Ltd.* (1984) 60 A.R. 148 (Q.B.) - the court upheld the taxing officer's decision to disallow the cost of demand letters sent prior to commencement of the action. The Court of Appeal affirmed. The demand letters had, says Kenny J. no "direct connection to whether or not a legal action could or would be commenced."
>
> *Bow Island (Municipal District) v. Wortz* [1921] 2 W.W.R. 153 (Alberta A.D.S.C) - the plaintiff conducted an audit of the accounts of the defendant after he left his position as secretary-treasurer of the municipality. The Court of Appeal concluded that since this audit occurred prior to the commencement of the action the costs related to it could not form part of the costs of the action because the wording of the relevant rule did not

extend that far.

Erco Industries Ltd. v. Allendale Mutual Insurance Co. (above), affirmed (1987) 62 O.R. (2d) 766 (Ont. C.A.) - at the trial level the court expressed its desire to allow the costs of an insurer, incurred prior to commencement of the action, to investigate the claim against the defendant but concluded that they did not fall within the intent of that jurisdiction's rules allowing for "costs of and incidental to" the trial. The Court of Appeal said that on such matters the trial judge's discretion should prevail.

Kenny J. concluded, at paragraph 9, as follows:

> "From a public policy prospective, it does seem somewhat unjust that minority groups in the position of the plaintiffs are liable to incur added expense in hiring an interpreter in order to access justice in the Province. Nevertheless, this seems to be the case in light of the decision in Wortz . Unless there is a wording change in Rule 600 of the Rules of Court that would encompass expenses such as interpreter costs or a re-examination of the law as it currently stands by the decision of the Court of Appeal of Alberta in Wortz , there appears to be nothing this Court can do to assist. Therefore, although it may not be the fairest result, I find I have no choice but to abide by the current law and Rules of Court in Alberta. The application for costs for interpretive services incurred prior to the commencement of the action is hereby dismissed."

More recently *Millot (Estate) v. Reinhard* (2002) 322 A.R. 307, 2002 ABQB 998, [2003] 3 W.W.R. 484, (2002) 9 Alta. L.R. (4th) 292, (2002) 322 A.R. 307 (Q.B.) considered a circumstance in which two accident re-enactments were conducted, one before filing of the Statement of Claim, the other after Examination for Discovery. The first ($15,000.00) was disallowed, even thought the court concluded that the expense was "reasonable and necessarily incurred." The court relied upon *Kha* which relied upon *Wortz*. Justice Fraser lamented, at para. 92:

> 92 In the result, while I am of the view that the costs incurred by the plaintiffs in respect of the first re-enactment were reasonable and necessarily incurred, I find that, unfair as it may be, I am bound by the current law and must therefore disallow the recovery by the plaintiffs of the costs of the first re-enactment.

English courts have long taken the view that costs incurred before the commencement of an action are recoverable if

(a) they were or would have been "of use and service in the action",

(b) were or would have been "of relevance to an issue" in the action, and

(c) were "attributable to the conduct of the" opposing party(s)

(see *Pêcheries Ostendaises (Société Anonyme) v. Merchants' Marine Insurance Company* 138 L.T. Rep. 532, (1928) 1 K.B. 750; *Frankenburg v. Famous Lasky Film Service Ltd.* (1931) 144 L.T. 534, (Eng. C.A.); *British United Shoe Manufacturing Co., Ltd. v. Holdfast Boots, Ltd.* [1936] 3 All E.R. 717 (Ch D); *Re Gibson's Settlement Trusts Mellors and another v. Gibson and others* [1981] 1 All ER 233 (Ch D).

There is no question but that the English equivalent to our former **Rule 600(1)(a)** [now **Rule 10.41**] allowing for "costs of and incidental to" a proceeding is, to quote Stevenson & Côté, ***Civil Procedure Guide*** (1996) at page 1938, "broader than costs 'of' a proceeding"; neither our former **Rule 600** nor our present **Rule 10.41** reference costs "incidental to" a "proceeding". A reading of *Re Gibson's* (above) illustrates the distinction between the two regulations and just how much "broader" the English is as compared to ours. But, as noted in *Weston Bakeries* (below), our former **Rule 600(1)(a)** is sufficiently "broad" as to permit pre-action expenses which fall within the guidelines delineated in *Frankenburg* (above). Following the lead of *Frankenburg and British United* was taxing officer McBride of Ontario in *Gioberti v. Gioberti* [1972] 2 O.R. 263; *Bunkowsky v. Bunkowsky* [1973] 1 O.R. 320; and *Singer v. Singer* (1976) 11 O.R. (2d) 234. Likewise Justice Keith in *Waters et al. v. Smith et al.* [1973] 3 O.R. 962. These decisions would allow the costs of collecting evidence while it was still fresh (such as an accident report or an investigator's services to locate witnesses); the cost of experts' reports incurred to attempt to negotiate a failed settlement but which prove useful to the action (frequently the case in personal injury actions); corporate, PPR, court house, and Land Titles searches to ascertain who or what to sue or the proper description; etc. We dare say that our current **Rule 10.41** continues the "broad" allowance of reasonable and proper costs permitted by its predecessor.

Summary: Costs incurred prior to the commencement of an action are not recoverable, with one exception. They are recoverable if they are necessary to give "regularity" to the originating document (Statement of Claim, Originating Application, etc.). Even costs of securing evidence ultimately used at trial or which is instrumental in settling the action are not recoverable if incurred prior to the commencement of the actions.

Expenses Unpaid At Time of Taxation May Be Allowed

Former **Rule 601(1)(a)** provided that "costs" include "all expenses which any party has paid or become liable to pay".

McCready Products Ltd. v. Sherwin-Williams Co. of Canada Ltd. [1986] A.J. No. 172; 43 Alta.L.R. (2d) 269; 68 A.R. 342; reversed on appeal on a different issue, [1986] A.J. No. 414; 45 Alta.L.R. (2d) 228, (Q.B.) Wachowich J. (as he then was) accepted the rationale in *Barlee v. Capozzi* [1976] 5 W.W.R. 110 (B.C.S.C.) that a disbursement may be properly taxable even if it remains unpaid at the time of taxation, so long as its liability is established. Quoting Bouck J.:

> "In this province we have a vigorous, honest and well disciplined Bar. Of course exceptions exist, and occasionally a member of the profession fails to meet the high standard set by the Law Society. But that is no reason to condemn all the members as a group. For these reasons I do not think the rule in Freeman v. Rosher is applicable in British Columbia. So long as a litigant proved by affidavit evidence or otherwise that he has incurred a disbursement as a result of the proceeding, then that amount may be allowed on a taxation. He does not have to show it was paid before calling on the other side to compensate him for this contingent debt. If the costs are paid to the solicitor he is a trustee of the moneys on behalf of the unpaid witnesses."

The decision distinguishes the prior decision of the Alberta Supreme Court in *Mulcahey v. Edmonton, Dunvegan and B. C. R. Company* (1919) 46 D.L.R. 654 as the wording of the relevant Rules of Court of the time specifically allowed only for fees and charges "paid" and made no provision for "liability to pay".

New **Rule 10.41** drops the reference to “paid” or “liable to pay” and only refers to “reasonable and proper costs that a party incurred” to bring an action. Thus the party need only establish its liability.

Proof of Payment or Liability to Pay: Certificate or Affidavit Needed?

Former **Rule 642** stated:

> “**(1)** No disbursements other than fees paid to officers of the court shall be allowed unless the liability therefor is established either by the certificate of the solicitor conducting the matter, or by affidavit.
>
> **(2)** The certificate or affidavit shall state how the amount of any witness fees claimed is calculated.”

It has been removed, leaving us to rely on the “oath” or affirmation or other evidence or good sense **Rule 10.38** permits the assessment officer to take or use.

Note: the following provisions address the detail which ought to be provided in every bill of costs and the assessment officer’s right to direct and receive detail of claimed expenses:

R. 10.35(2):

(a) The bill of costs must itemize all the costs sought to be recovered, distinguishing between fees, disbursements and other charges, and

(b) be signed by the person responsible for its preparation.

and **R. 10.38(1)(f):** For the purpose of assessing costs payable, an assessment officer may . . . require details of the services provided and disbursements or other charges claimed or require information about any other matter necessary to understand the reason for an item in the bill of costs to decide whether the item and charge is reasonable and proper.

That said, the assessment officer should use wisdom and discretion as outlined in the following:

> The Alberta Court of Appeal, in *Watts v. Wakerich* 2001 CarswellAlta 1000, 2001 ABCA 207, gave some sound advice to taxing officers to use reason when requiring proof of disbursements beyond the solicitor's certification that the claimed disbursements were necessary to the proceedings. At paragraph 4:
>
> > "The successful respondent will of course also recover reasonable disbursements. We do not wish a repetition of the extreme difficulty experienced earlier in taxing the disbursements in the Surrogate Court or the Court of Queen's Bench in this and related litigation. Therefore, we direct that whoever taxes these costs may dispense with vouchers or sworn proof of any disbursements which are:
> >
> > (a) comparatively small, or

(b) appear to the taxing officer to be reasonable, in light of common practice, or his or her other experience."

This accords with an earlier decision in *Sprung Enviroponics Ltd. v. Calgary (City)* (1990), 103 A.R. 131 (C.A.) at p. 137 where Côté J.A said:

> "In my view Masters or judges should decide what evidence (if any) they need of amount, case by case, looking at what is practical and fair in each case. Often they will need no sworn evidence to show Schedule C items or fairly common disbursements, such as witness travel expenses. Had the defendants here asked for (say) $5,000.00 security for experts' fees, I doubt they would have needed any more evidence to support that than they gave. The Chambers judge approached the question conscientiously, and made his own independent estimate, and halved the amounts sought for experts."

The latter quote was accepted and relied upon by the Court of Appeal in *Sidorsky v. CFCN Communications Ltd.* 1997 CarswellAlta 772, 53 Alta. L.R. (3d) 255, [1998] 2 W.W.R. 89, 206 A.R. 382, 156 W.A.C. 382, 15 C.P.C. (4th) 174, 40 C.C.L.T. (2d) 94 (C.A.) in which an "investigatory fee" of roughly $200,000.00 for keeping track of witnesses and their changes of address was reduced to $10,000.00 on account of a lack of evidence as to its necessity and reasonableness. At paragraphs 44 & 45 the Court explains its reasons:

> "44 . . . We must emphasize the definition of "costs" in Rule 600(1)(a), "all the reasonable and proper expenses." In justifying the disbursement, the witnesses were identified as people who were transient and difficult to locate. In this case, it is unknown how many of these witnesses were transient, unwilling, or failed to notify the respondents of any change of address. A $200,000 award represents a significant sum. While judges must often, for practicable purposes, award disbursements on the basis of counsel's representations, when the award is of this magnitude it should not be awarded without evidence as to its necessity and reasonableness. . . . Frequently, keeping a list of the current addresses of witnesses is simply part of the overhead of a law firm and should not be the subject of a separate disbursement. As such, it should be included as part of the party and party costs award.
>
> "45 We accept that some amount can be awarded without evidence. In that regard we refer to the comments of Côté J.A. in case of Sprung Enviroponics Ltd. v. Calgary (City) [quoted above] . . . Given the absence of evidence to justify an investigatory fee of $200,000, we would award $10,000 for these claimed disbursements."

Recommendation: In the case of Bills of Costs containing sizeable claims for disbursements, parties who have serious concerns about the disbursements are encouraged to specify, preferably in writing, their concerns to the party claiming the costs well before the assessment hearing in order that the party can come to the assessment prepared to address and justify those particular expenses. In light of *Watts v. Wakerich* the issue of what disbursements must or must not be "proven" is in the discretion of the assessment officer, and always in the discretion of the Court.

Agreement to Split a Disbursement: Is it Recoverable at the End of the Action?

Generally: See Stevenson & Côté, ***Civil Procedure Encyclopedia*** at 72-91 where the following cases are cited.

In *Stimac v. Wasson* [1991] B.C.J. No. 3902 (S.C.) Bolton (Registrar) concluded that an agreement to split a disbursement made during the course of the action does not preclude recovery of it at the end. To do that would require a very specific agreement. In this case there was no evidence of any agreement introduced at the taxation hearing, only "the assertions of counsel that it was agreed that each side would pay half" of the cost of a JDR. The Registrar concluded:

> "In my opinion, this is not an agreement that would preclude either party from passing on its half to the ultimately unsuccessful party after an order or agreement concerning costs was made. It was, in my judgement, simply an interim arrangement made in order to get the alternate dispute resolution procedure in motion. The plaintiff had to pay part of the cost, in order to proceed with his case, in a manner agreed between the parties; just as he might have had to pay conduct money to the defendant to compel his appearance at an examination for discovery."

In *Marzetti v. Marzetti* [1991] A.J. No. 768, (1991) 82 Alta. L.R. (2d) 67, (1991) 123 A.R. 1, (1991) 8 C.B.R. (3d) 238, (1991) 35 R.F.L. (3d) 225 (Q.B.) the Court concluded that an agreement between parties as to costs (who to pay, how much, etc.) takes precedence over the decision of the court. In this instance the husband was ordered to pay support to his wife. He defaulted. He declared bankruptcy. The Director of Maintenance Enforcement and a Trustee in Bankruptcy both applied for right to attach the husband's income tax return. Master Funduk granted the Trustee's application and awarded solicitor and client costs payable to the Trustee. On appeal the Court concluded:

"Although Master Funduk awarded costs, the parties had entered into a prior agreement that each party would bear its own costs due to the nature of this inquiry. That agreement takes precedence over Master Funduk's decision and binds the parties. Therefore the portion of his decision dealing with costs is set aside."

Disbursements Paid in Foreign Currency

If a litigant has incurred an expense in a foreign currency and the cost must be converted to Canadian dollars the important question of when and at what rate of exchange (the latter being determined by the former) can be of significant importance.

In *Dillingham Corporation Canada Ltd. v. "Shinyu Maru"* 1979 CarswellNat 12, 13 C.P.C. 38, [1980] 1 F.C. 303, 101 D.L.R. (3d) 447 (F.C. T.D.) it was concluded that the conversion was to be ascertained and calculated as of the date of the assessment. This conclusion was followed in *Capitol Life Insurance Co. v. R.* 1987 CarswellNat 369, [1987] 1 C.T.C. 394, 10 F.T.R. 247, 87 D.T.C. 5208 (F.C.T.D.); in *Chicago Blower Corp. v. 141209 Canada Ltd.* 1986 CarswellMan 348, [1986] 6 W.W.R. 143, 43 Man. R. (2d) 130 (Man. Q.B.).

There is no obvious issue when the payment was made in Canadian dollars and the cost of conversion to the foreign currency can be verified by a receipt or statement.

Interest on Costs Generally

Generally: See Mark M. Orkin's, ***Law of Costs*** (2nd e., 29th rel. 2010) 224 - Interest on Costs.

Judgment or Pre-Judgment Interest: Assessment officers do not concern themselves, in the course of assessing a bill of costs, with claims of interest on the costs of participating in or pursuing litigation.

Why? The *Judgment Interest Act*, R.S.A. 2000, c. J-1 specifically provides that pre-judgment interest cannot be awarded on costs in the action (fees, disbursements, interest on disbursements, financing of the litigation):

"Pre-judgment Interest

"2(2) The court shall not award interest under this Part

(d) on an award of costs in the action;"

Post-Judgment Interest: The *Judgment Interest Act* (above) dictates what rate of interest is to be applied, and from when, on the "judgment debt" which does include the costs and expenses flowing from the judgment:

"Post-judgment Interest

"6(1) In this section, "judgment debt" means a sum of money or any costs, charges or expenses made payable by or under a judgment in a civil proceeding.

"(2) Notwithstanding that the entry of judgment may have been suspended by a proceeding in an action, including an appeal, a judgment debt bears interest from the day on which it is payable by or under the judgment until it is satisfied, at the rate or rates prescribed under section 4(3) for each year during which any part of the judgment debt remains unpaid."

This would seem to accord with the common law which favors interest as running from the date costs are awarded, not from the date of assessment: see *Andree v. Pierce* 1986 CarswellMan 212, 41 Man. R. (2d) 262 (Man. Q.B.); *Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co.* (1998) 216 A.R. 304 (C.A.), 1998 ABCA 118, at para. 19.

Note that the Court has no power to deny a party post-judgment interest per s. 6(2) of the *Judgment Interest Act* (above): see *Madge v. Meyer* (2002) 303 A.R. 41 (C.A.), 2002 ABCA 73, at para. 11 and *Clay v. Petro-Canada* 2006 ABCA 104, at para. 5.

Since a "judgment debt bears interest from the day on which it is payable by or under the judgment" (s. 6(2) *Judgment Interest Act*) it bears noting that where a party accepts a formal offer of settlement, thereby agreeing to pay $xx.xx and "taxable costs and disbursements to the date of acceptance of [the] offer to settle", the "judgment" date is the

date of acceptance of the offer, not the date that those costs are quantified: see *Clay v. Petro-Canada* 2006 ABCA 104, at para. 6. In that case the acceptance of the offer occurred February 13th, 2004, but a dispute arose as to the quantum of the costs and disbursements, which was resolved by an application to the Court heard on February 23rd, 2005. By ruling that post-judgment interest ran from the date of acceptance of the offer the plaintiff received an additional $152,000!

An appellant is entitled to interest on refunded trial costs from the date of payment to the date of reimbursement: *Hanke v. Resurfice Corp., 2006 ABCA 116*. To be sure, Party A pays costs to Party B on Date 1, per trial ruling. On Appeal the Trial ruling is overturned, including the costs award. Party A is entitled to interest on the costs from the date of payment (Date 1) to the date of reimbursement by Party B (Date 2).

See also Stevenson & Côté, ***Civil Procedure Encyclopedia*** *(Vol. 3) 51-32 - "Interest on Costs."*

Calculation of Interest Per Judgment Interest Act: If pre-judgment interest is being calculated under the *Judgment Interest Act* (as opposed to some contractual stipulation) or post-judgment interest per the *JIA*, **Rule 4** and regulation flowing therefrom stipulates the following:

Pre-Judgment Interest

4(1) Interest on non-pecuniary damages = 4% per year (this has not changed for at least 10 years).

4(2) Interest on pecunary damages, and in debt and other actions = amount prescribed each year in ***Judgment Interest Regulation***, Alta. Reg. 364/1984:

1984	**11%**
1985	**10%**
1986	**8%**
1987	**8%**
1988	**8%**
1989	**9%**
1990	**11%**
1991	**11%**
1992	**7.5%**
1993	**6%**
1994	**4.5%**
1995	**5.25%**
1997	**3.5%**
1998	**3.5%**
1999	**4.0%**
2000	**6.25%**
2001	**6.25%**
2002	**5.25%**
2003	**4.5%**
2004	**3.75%**
2005	**3.4%**
2006	**3.5%**
2007	**4.0%**
2008	**4.25%**
2009	**2.75%**
2010	**0.825%**
2011	**1.85%**
2012	
2013	

Post-Judgment Interest

6(2) Notwithstanding delays in the action, or appeals, a "judgment debt" bears interest from the day on which it is payable at the rates prescribed above in **4(2)**.

Interest on Disbursements Incurred During Course of Litigation

In circumstances where the *Judgment Interest Act* (above) applies, the foregoing discussion of "Interest on Costs" suggests that not even the Court, much less the assessment officer, can award interest on the costs of litigation incurred in getting to the point of judgment. Outside the parameters of the *Judgment Interest Act* there appear to be

differing approaches.

In *Dillingham Corporation Canada Ltd. v. "Shinyu Maru"* 1979 CarswellNat 12, 13 C.P.C. 38, [1980] 1 F.C. 303, 101 D.L.R. (3d) 447 (F.C. T.D.) at p. 453, the Court concluded:

> "Many expenditures are incurred in the course of an action which can eventually be taxed as part of a bill of costs, but there is as far as I am aware no precedent allowing any interest on them from the time of expenditure to the date of taxation, and I do not believe that it is desirable that this should be allowed on this one type of disbursement included in a bill of costs, however substantial it may be."

In Bourgoin v. Ouellette [2009] N.B.J. No. 164, [2009] A.N.-B. no 164, 343 N.B.R. (2d) 58, 177 A.C.W.S. (3d) 318 the trial judge concluded that interest paid in order to finance the applicant's litigation was to be recoverable as a cost of litigation on grounds that the applicant's circumstances were such that to not do so would have prevented the applicant access to justice.

In *Schmolzer v. Higenbottan* [2009] A.J. No. 1396, 2009 ABQB 616, 18 Alta. L.R. (5th) 79, 2009 CarwellAlta 2033 the Q.B. trial judge concluded that "the facts of Bourgoin v. Ouellette [2009] N.B.J. No. 164 are distinguishable, and that in Mr. Schmolzer's case, there is not a strong access to justice issue that would warrant an exceptional award of interest on disbursements." Interest charges on disbursement for expert witnesses was denied.

As noted in Stevenson & Côté, ***Civil Procedure Guide*** (1996) at p. 1940, "interest to finance a litigant's expenses during a suit is not recoverable as part of party-and-party costs: *Hunt v. R.M. Douglas (Roofing)* (HL) [1988] 3 WLR 975, 3 All ER 823, [1990] 1 AC 398." This decision was followed in *Davidson v. Patten* [2005] A.J. No. 842, 2005 ABQB 519, 381 A.R. 1, 141 A.C.W.S. (3d) 372 where the Q.B. justice concluded:

> "33 Interest to finance a litigant's expenses during a suit is not recoverable as party and party costs. (Hunt v. R.M. Douglas (Roofing) (HL) [1988] 3 WLR 975; All E.R. 823; [1990] 1 A.C. 398; Stevenson and Côté 2004 Alberta Civil Procedure Guide (1996) p. 1940.
>
> 34 However, interest is awarded on costs from the date when a party becomes entitled to them. The party entitled to costs in this action will have interest on those costs, at the post-judgment interest rate, from the date of judgment to the date costs are paid."

Conclusion: the Court may choose to award and allow the recovery of interest as a cost of litigation. It would be unwise for the assessment officer to make such an allowance without specific direction from the Court. Get the Court to provide direction on this issue.

GST and Disbursements

Canada Customs & Revenue Agency, GST/HST Policy Statement, P-209 Lawyers Disbursements, Date of Issue: March 11,1997, Final Version: October 7, 1998 was updated to P-209R as of 2004: requires lawyers to charge clients GST on disbursements for which no GST was paid. On account of this obligation the Clerk of the Court is allowing GST on all **search fees**, on the cost of obtaining a **municipal compliance certificate**, on **witness fees**, on **experts' charges** (even when GST is not claimed by the expert), on **court reporter fees (including any charge to obtain a copy of a transcript)**, on **process server fees**, and on **any transcription fee (even of court proceedings)**.

In unique circumstances the charges of a **non-resident lawyer** retained to assist in or run an action, when deemed by the Court to be recoverable as a disbursement above and beyond **Schedule C** fees, may be subject to GST.

As of November 19th, 2010 a copy of the Policy Statement could be found on the CCRA's web site at ***http://www.cra-arc.gc.ca/E/pub/gl/p-209r/p-209r-e.html#P35***.

Preparation of a Bill of Costs

Some **tips** which may assist in avoiding the need for an assessment or in the conduct of an assessment.

1. Onus is on the party claiming the costs to justify and prove its entitlement to recover each cost specified in the Bill of Costs.

2. The Bill of Costs is telling a story to the opposing counsel or party and, if necessary, to the assessment officer:
   a. The more complete it is the more likely there will be no assessment hearing because opposing counsel will be able to read the story and understand the claim for costs, will be better able to provide specific objections, and be in a position to negotiate a settlement of the bill.
   b. The more complete it is the better prepared the claimant lawyer will be if it must go to assessment.
   c. The more complete it is the better prepared the assessment officer will be if it must go to assessment.
   d. The more complete it is the greater the recovery is likely to be.

3. As now required by Form 44, identify after the "contact information" whose bill it is (plaintiff / defendant / which one if multiples)

4. Identify the Column being relied upon (be prepared to speak to how arrived at that column)

5. Provide details in the Schedule C (fee) portion of the Bill of Costs (below is a sample plaintiff's bill - time-lines may not accord with new rules but the new Rules apply):

ITEM	DESCRIPTION	DETAILS (including dates)	COLUMN 1
Commencement			
1(1)	Commencement Documents, et cetera	- Statement of Claim / May 5, 2008 - Statement of Defense (reviewed) / June 12, 2008 - Counterclaim (reviewed) / June 12, 2008 - Defense to Counterclaim / June 20, 2008	$1,000.00
Part 5 Document Disclosure			
3(1)	Disclosure of Records	- Prepare, file & serve Affidavit of Records - fall 2008	$500.00
3(2)	Review of Def's Documents	- receipt and review of 45 documents: pay stubs, tax returns, insurance policy & misc - receipt and review of 12 documents: pension info, corporate minute books, correspondence - receipt and review of 3 documents in response to written questions - irrelevant - receipt and review of 4 documents in response to undertakings: budget, home and cottage appraisal, vehicle registration	$500.00
Oral Questioning			
5(1)	Prep for Questioning	(once per action)	$500.00
5(2)	Oral Questioning first ½ day or portion	- of Y, 12 Jun 10, 10:00 - 11:15 = 1.25 hrs. (full first ½ day)	$500.00
5(3)	Oral Questioning additional ½ days	- of Y, 12 Jun 10, 2:00 - 4:00 = 2.0 hrs (½ day is 2-3 hrs) - of V, 13 Jun 10, 10:00 - 1:00 = 3 hrs (½ day is 2-3 hrs) - of X, 23 Sep 10, 2:00 - 5:30 = 3.5 hrs (by 2.5 = 1.4 ½ days) - of Z, 24 Sep 10, 1:30 - 2:30 = 1.0 hrs (observer @ 50%) - of V, 18 Oct 10, 2:00 - 3:00 = 1.0 hrs (.4 ½ days)	$500.00 $500.00 $700.00 $100.00 $200.00
5(4)	Preparation of & Response to Written Questions	- 24 questions prepared & tendered to opposing counsel - 12 Nov 10 - responded to 14 questions from opposing counsel - 03 Jan 11	$500.00

Applications & Case Management			
6(2)	App w/o Notice	- Master Martin / 18 Jul 08 - order for substitutional service - granted - costs: silent	$100.00
7(1)	Contested App	- Judge Abraham / 05 Sep 08 - interim child support, spousal support, exclusive possession, restraining order - granted e/p & r/o - adjourned c/s & s/s - costs: in the cause	$500.00
8(1)	Contested Special	- Case Management Judge John / 21 Jan 09 - 10:00 - 12:00 & 2:00 - 3:00 - interim c/s & s/s - granted and guideline incomes set - costs: in the cause	$1,200.00
7(1)	Contested App	- Case Management Judge John / 24 Sep 10 - relief: compel answers to undertakings - granted - silent re costs	$500.00
9(2)	Case Management	- Case Management Judge John / 24 Sep 10 - ~ ½ hour spent discussing access issues, location for exchange, telephone visitation & exchange of personal belongings - not reduced to order - silent re costs	$250.00
6(1)	Uncontested App	- Judge Stanley / 04 Oct 11 - amend terms of r/o - urgent - granted - costs: silent	$300.00
9(2)	Case Management	- Case Management Judge John / 04 Dec 11 - phone conference (both counsel) - Christmas access, production of last remaining undertaking, need for updated appraisal, discussed dates for trial (o/s noncommital)	$250.00
7(1)	Contested App	- Case Management Judge John / 12 Feb 12 - trial date set, o/s ordered to facilitate updating appraisal, dead-line for pre-trial hearing - costs in any event to plaintiff	$500.00
Trial Readiness			
9(1)	Pre-trial Application	- Judge Expeditious / 04 Apr 12 - trial set for June 3 & 4, 2012	$250.00
Trial			
10	Preparation for . . .	- 2 day trial - divorce, c/s, s. 7, s/s, division of matrimonial home and cottage ($650,000), corporation ($250,000), investment portfolio ($150,000), pensions, vehicles, household goods, personals - no exemptions - parties only witnesses - court ordered Column 1 even allowing for value of Mprop	$2,000.00
11	Trial	- 03 Jun 12, 10:00 - 12:00 = 2.0 hrs (1st ½ day or portion) - 03 Jun 12, 2:00 - 5:00 (½ day is 2 to 3 hours) - 24 Oct 06, 10:15 - 12:00 = 1.75 hrs = .7 ½ day =	$1,000.00 $500.00 $350.00

6. Provide details in the "disbursements subject to GST" portion of the Bill of Costs:

DESCRIPTION	DETAILS (including dates, where applicable)	AMOUNT

Photocopies (in-house)	- 2,300 @ $0.15	$345.00
ABC Court Reporters	- Oral discovery of Defendant #2 at XY LLC on 18 Oct 10	$300.00
Facsimiles (in-house)	- 340 @ $0.15	$51.00
Acme Colour Photocopies	- 46 @ $1.20 - damage to house & bodily injuries: re restraining order	$55.20
Print-copying (in-house)	- 450 @ $0.10	$45.00
Fred Economics Inc.	- economist - to establish future loss of income of Plaintiff - detailed bills available (time, hourly rates, who, descriptions) June 6/08. . . . . $2,500.00 Aug 12/09. . . . . $5,500.00 Sep 20/11. . . . . $2,340.00 Nov 10/12. . . . . $2,000.00 - 2 reports (available) and trial attendance (detailed in bills)	$12,340.00
Ricardo Interpreters Inc.	- interpreter for plaintiff's mother - assisted in interviews, discovery & trial (details in bills) - one bill - Nov 15/12 - time for non-litigation related interpreting services excluded (- $412.00 - hi-lighted in bills)	$1,745.00

7. Provide details in the "disbursements not subject to GST" portion of the Bill of Costs:

DESCRIPTION	DETAILS (including dates)	AMOUNT
Provincial Treasurer	- filing statement of claim for Divorce and MP / May 5/08	$210.00
LTO	- filing lis pendens / May 15/08	$35.10
Provincial Treasurer	- trial fee - May 12/12	$600.00

8. Party/Party Costs on a Solicitor/Client or Full Indemnity Basis - format of Bill of Costs:

   a. Front Page:
      i. Action Number, JC, Court & Style of Cause
      ii. Total fees claimed
      iii. Total other charges claimed
      iv. Total disbursements claimed
      v. Total GST claimed
      vi. Total claimed
      vii. Place for date, assessed amount and signature of assessment officer

   b. Subsequent Pages: Details of the claimed charges:
      i. Copy of actual bills rendered to client (black out privileged portions, if any, or portions which do not relate to the recoverable costs), or
      ii. Reconfigure (if necessary) the contents of the actual bills to,
         (1) remove or reword privileged details,
         (2) remove references to charges extraneous to the award for costs,
         (3) provide more detail for the benefit of opposing counsel and the assessment officer.

9. For all Bills of Costs, please provide a place for entry of the date of the assessment, the assessed amount and the signature of assessment officer.

Common Disbursements Reviewed

The following are comments on some of the most common disbursements allowed and disallowed (listed alphabetically):

Accommodation - **Schedule B**, **Division 3**, **Item 3** allows for the reasonable cost of accommodating a witness. In some circumstances parties to the litigation and their solicitor(s) may be entitled to recover the costs of accommodation.

Private Accommodation (relative, friend, et cetera): This references circumstances where the witness or counsel may not actually be paying for their accommodation but out of courtesy to their host may provide a gift or other demonstration of appreciation. In this regard it has become the practice of the taxing officers to apply the "private accommodation" allowance set out in the ***Subsistence, Travel and Moving Expenses Regulation*** under the ***Public Service Act*** - Part 4 - S. 9. As of 2010 it permits **$20.15 per night**, without need for any receipts.
The regulation may be found at **http://alberta.ca** and progressing through the site in the following order: Government > Corporate Human Resources > HR Practitioners > Directives, Regulations, . . . > Regulations > Public Service Subsistence . . . and by clicking on "Part 4".

Public Accommodation (hotel, motel, et cetera): The cost of accommodation will no doubt vary from venue to venue, but in Edmonton a survey of downtown hotels is undertaken yearly and a mean rate established. In 2010 the Taxing Officer in Edmonton is allowing $140.00 per night plus Federal Hotel tax and GST.

Note: room service and beverages are allowed to the limit addressed in "Meals", below.

Note too: dry cleaning, laundry, pay-per-view T.V., video rentals, massages and the like are considered luxuries, not necessities. In long trials some exceptions may be made.

(See also: Conduct Money, Meals, Travel, Witness Fees & Expenses)

Agent's Charges - Process servers, interpreters, Civil Enforcement Agencies, sometimes private investigators, etc. are examples of *agents* whose reasonable charges may be allowed.

Exception for Counsel Fees: To the extent that an "agent" is performing legal services compensable by **Schedule C** (referred to in the Canadian and Alberta Weekly Digests as "Counsel Fees") such "agent's" fees will be disallowed, though the agent's reasonable disbursements may be allowed. The general principle is stated in *Sidorsky v. C.F.C.N. Communications Ltd.* (1998), 216 A.R. 151 (C.A.), at para. 4:

> "Disbursements should not be used as a means, even unintentionally, of distorting the cost scheme by allowing, as a disbursement, fees for work normally considered part of the cost of litigation to which Schedule C applies. Taken to the extreme, preparation for trial could be subcontracted to another firm and reimbursement of that firm's account sought as a disbursement."

*Sidorsky was f*ollowed in *Murphy Oil Canada Ltd. v. Predator Corp.* [2005] A.J. No. 721, 2005 ABQB 134, 379 A.R. 389, 138 A.C.W.S. (3d) 28, at para. 41.

In this regard see *Walcer v. Shmyr and Shmyr* (1982) 15 Sask. R. 239, MacLeod J., at p. 291:

> "For an appearance in chambers the appropriate tariff item may be claimed. The unsuccessful party may not be charged a further or higher amount by engaging another counsel to provide the service and showing this account as a disbursement on the party and party bill of costs. Its treatment in the solicitor and client account is, of course, another matter."

In *Hetu v. Traff* 1999 CarswellAlta 1006; 74 Alta. L.R. (3d) 326, 252 A.R. 304 (Q.B.) wherein Johnstone, J. disallowed the disbursement of an out-of-province law firm used to locate expert witnesses for two reasons:

> "Firstly, if allowed, this would have the demonstrated effect of increasing the total legal fees taxable against the other party above the amount prescribed by the legislature for those fees. Secondly, the professional service for locating and retaining experts is a normal task of counsel in preparation for a trial and I accept it as common practice for counsel to seek such experts from outside its own city or province without utilizing an agent."

Exercise of Court's Discretion Re: Costs: In *Freyberg v. Fletcher Challenge Oil and Gas Inc.* 2006 ABCA 260, [2006] A.J. No. 1181 (C.A.) the Court followed the general rule:

> "20 The appellant is an unsophisticated older woman who resides in the United Kingdom. Following the trial of Phase 1 and pending appeal she consulted her solicitor in the United Kingdom from time to time to ensure she understood the issues on appeal and to clarify and confirm her instructions to counsel. The

> appellant claims the amount paid her United Kingdom solicitor as a reasonable disbursement incurred in connection with the appeal.
>
> "21 We are not satisfied that the services performed by the appellant's United Kingdom solicitor are in addition to the fee items referred to in Schedule C. In our view they are subsumed in the fees taxable under Schedule C and are therefore not recoverable as a separate disbursement."

Then it made an exception to the rule:

> "34 Many of the documents relevant to the appellant's claim were situated at various locations in the United Kingdom. Counsel for the appellant retained agents in London to assist in assembling the documents and to prepare the appellant for examinations for discovery and trial. The trial was expedited and counsel had a limited time to prepare.
>
> "35 The respondents submit this disbursement is subsumed in the Schedule C fees recoverable by the appellant and should not be allowed as a disbursement.
>
> "36 In the circumstances it was reasonable and prudent for appellant's counsel to enlist the assistance of agents in the United Kingdom, and we allow a reasonable disbursement for this purpose."

Since the services provided by the London agents (presumably barristers and solicitors) are all subsumed in Items 3, 5 and 10 of Schedule C we take the position that this is an example of the Court exercising its discretion to award costs as it sees fit on a case by case basis, but not as a statement of a new rule. We take this stance (a) because of the havoc it would create to conclude otherwise, (b) because the second instance contradicts the Court's conclusion in the first instance and (c) a reading of the decision reveals a certain sympathy by the Court for the successful appellant who had to face a committee of heavy-hitting respondents.

The charges of runners / document processors are not compensable (see "Runner's Charges", below)

(See also: Civil Enforcement Agencies, Computer Research, Interpreters, Private Investigators, Process Servers, Runners)

Appeal Books - In *Goudreau v. Falher Consolidated School District No. 69* [1993] 6 W.W.R. 767 (Alta. C.A.), the Court awarded costs of the appeal to the appellants "including charges for Appeal Books privately prepared by the appellants at a rate equal to what the court reporters would have charged for preparation of the Appeal Books". However, the same Court considered *Goudreau* in *Huet v. Lynch* [2001] A.J. No. 145, 2001 ABCA 37 and said a "disbursement" means to expend money and concluded that the self-represented litigant, having prepared the appeal books herself, was only entitled to 15 cents a page. This figure was applied on the basis of lack of evidence of the actual cost of photocopying and relied upon *Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)* (1992), 5 Alta. L.R. (3d) 40 (Q.B.) McDonald, J. at 56:

> "In the present case, without benefit of any evidence as to the actual cost of photocopying, I am prepared to recognize a cost of 15 cents a page."

and on *Sidorsky v. CFCN Communications Ltd.* (1997), 206 A.R. 382 (C.A.) (see "Photocopies", below). The *Huet* decision did note that the Q.B. reporters rate for preparation of Appeal Books was $4.76 per page in 2001.

The practice of most law firms is to charge, as an "other charge", the same rate for preparing Appeal Books as is charged by reporters. This would seem to allow recovery of the expense of not only photocopying and binding costs, but also compensation for the labour of the law firm's assistants / paralegals who do the preparation. One could claim that to be an overhead expense subsumed in the fees charged by lawyers and compensated for by Schedule C. Until the 1980's that was how all "other charges" were dealt with.

The practice of these and other assessment officers has been to allow the going Q.B. Reporters rate for self-represented litigants and law firms alike (see "Binding Charges," below). In light of the *Huet v. Lynch* decision assessment officers may be restricted to allowing 15 cents per page to self-represented litigants. Indeed, we may be obliged to apply the same rate to law firms too. Time will tell.

Binding Charges - Disbursements incurred for the purpose of binding written submissions, case authorities, undertakings, exhibits, etc. may be allowed where it is deemed to have been of assistance to the Court to have incurred the expense. No allowance is made for extravagance (leather binding with gold leaf trim). Binders used for this purpose which will not be recovered for re-use are also reimbursable.

Normally nothing extra is allowed for time and labour in collating and binding, it being deemed part of the overhead expense covered by **Schedule C, Division 1, Rule 2** as compensated for by **Schedule C** fees. See *Ukrainian Credit Union Ltd. v. 258753 Alberta Ltd., Gourdine and Olsen* (1984) 39 Alta. L.R. (2d) 310; *Reese et al. v. HMQ Alberta &*

Daishowa Canada Co. Ltd. (1992) 133 A.R. 127; *Samsonite Canada Inc. v. Entreprises National Dionite Inc.* [1995] F.C.J. No. 849 (F.T.D.) Reinhardt, Taxing Officer at para. 55; and *Dableh v. Ontario Hydro* [1998] F.C.J. No. 491 (F.C.A.) Stinson, Taxing Officer at paras. 66 & 67. Exception is made relative to the preparation of Appeal Books: this is a task normally performed by a 3rd party and to the extent that the in-house preparation does not exceed in cost that normally charged by the 3rd party (normally Court Reporters up to now) it is allowed (see "Appeal Books", above).

Conduct Money [see Witness Allowances, below at page 34]

Consulting Experts - In *Mar Automobile Holdings Ltd. v. Rawlusyk*, 2001 CarswellAlta 855, 2001 ABQB 516, 93 Alta. L.R. (3d) 141 (Q.B.), Clarke, J. allowed the cost of an expert hired for consulting purposes only:

> 28 Mr. Herman was an accountant practicing in a private firm. He accepted an appointment as the auditor of the Plaintiff companies. He was not put forward in this case as an expert in the sense of having prepared either any primary or rebuttal expert reports. However, he was hired by one of the Plaintiffs' experts to do an analysis of the Defendants' records on the basis that Mr. Herman was more likely to understand those records given his knowledge of the business than would a person from the expert's firm. In those circumstances I am satisfied that his accounts should be included for taxation purposes.

Likewise, see *Sidorsky v. CFCN Communications Ltd.* 1995 CarswellAlta 86, 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, [1995] 5 W.W.R. 190 (Q.B.) - reversed in part on unrelated issues, [1997] A.J. No. 880; 53 Alta.L.R. (3d) 255; 206 A.R. 382; 40 C.C.L.T. (2d) 94, (C.A.) :

> 16 There is no doubt that a court has the discretion to allow costs of experts for investigations and inquiries and for assisting counsel at trial even though the experts do not testify. See *Nova, an Alberta Corp. v. Guelph Engineering Co.* (1988), 89 A.R. 363 [60 Alta. L.R. (2d) 366] (Q.B.). See also *Petrogas Processing Ltd. v. Westcoast Transmission Co.*, supra.

Note that **Rule 10.41(2)(e)** specifically precludes an assessment officer from allowing such costs . . . the Court must allow them or give the assessment office authority to rule on them on a case by case basis.

(see Witness Fees)

Courier Charges - Considered by the Court in *Gainers v. Pocklington* (1996) 182 A.R. 78 to have "become an ordinary and accepted part of the practice of litigation." However, note less enthusiasm for such charges in *Dornan Petroleum v. Petro-Canada* [1997] A.J. No. 21 wherein the same Court considered courier or delivery charges as "luxuries" which "should not be allowed unless it can be shown . . . that the circumstances of their use was necessary to facilitate the orderly disposition of the litigation." The rationale given for the position taken in the latter decision was that delivery charges "are taking the place of ordinary mail and traditionally we have not taxed postage as a disbursement." However, in *Mar Automobile Holdings Ltd. v. Rawlusyk* 2001 CarswellAlta 855, 2001 ABQB 516 (Q.B.) Clarke J. revisited the issue, considered *Dornan*, and stood by his previous conclusion, noting that he was not aware of any Court of Appeal decision to the contrary. This is curious, because his decision, relative to QuickLaw research costs, does consider *Standquist v. Coneco Equipment* [2000] A.J. No. 554; 2000 ABCA 138 (C.A.) which, while specifically addressing fax charges, made the following ruling:

> "We have never seen a case disallowing postage, and Dornan Petr. v. Petro-Can. (1997) 199 A.R. 334 does not either. Maybe what is referred to here is delivery charges. In principle, one should show why the post office would not do, or would be as expensive. But the amount is small here, and the slowness and expense of mailing appeal books could well be imagined. We allow the $20.48 disbursement, even if it was for a courier service."

The Edmonton taxing officer tends to follow the *Gainers* decision and allows such charges, within reason.

Court Reporter's Fees - Rarely disallowed, unless it can be established that they were unnecessary (eg. daily transcripts of a trial are allowed on a case by case basis - see, *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, T.F. McMahon J., which considered (contrary) *Lauzon v. Davey*, [2007] A.J. No. 212, 2007 ABQB 121; *H.(S.G.) v. Gorsline*, [2001] A.J. No. 1021, 2001 ABQB 671 and (in favour) *Millott (Estate) v. Reinhard* [2002] A.J. No. 1453, 2002 ABQB 998, [2003] 3 W.W.R. 484 (Q.B.) Fraser, J.; *Sidorsky v. CFCN Communications Ltd.* 1995 CarswellAlta 86, 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, [1995] 5 W.W.R. 190 (Q.B.)).

Data Recovery - More increasingly, parties are having to pursue a form of computer forensics in order to retrieve

accidentally, inadvertently or intentionally deleted or lost data from computer hard drives. The process usually requires a level of expertise beyond that of lawyers and their assistants. Larger firms with IT personnel may be able to recover such data, but usually the services of experts in data recovery will be required to recover the lost data and to report or testify regarding the process. In Alberta we are aware of only one decision where such services were made use of - *R. v. Traub*, [2008] A.J. No. 1088, 2008 ABQB 604, 458 A.R. 197, 79 W.C.B. (2d) 718, 180 C.R.R. (2d) 318 - but it did not involve civil litigation and the forensic costs were not addressed. A number of Ontario and British Columbia cases deal with issues involving "data recovery", the privacy problems and protocols associated with the process and costs, but our brief survey of them did not reveal any helpful discussion of the associated costs: examples being *Desganage v. Yuen*, [2006] B.C.J. No. 1418 (B.C.S.C.) & *Vector Transportation Services Inc. v. Traffic Tech Inc.*, [2008] O.J. No. 1020, 165 A.C.W.S. (3d) 803, 58 C.P.C. (6th) 364, 2008 CarswellOnt 1432 (ONSupCtJus).

(see "Document Production", below)

Debt Recovery Network (A.K.A. Litigation Highway, "on line searches" & a number of other aliases) - Such is the phrase Master Funduk utilized to describe a disbursement claimed in a foreclosure bill of costs for the "provision of electronic data transfer services for communications between client and law firm." A new trend in electronic collaboration between financial institutions and their out-sourced law firms, the former are, for a fee, providing law firms with software and license to a form of intra-net connection to the institution's e-mail and data-base networks in order to simplify and expedite the exchange of information regarding any particular debtor. This disbursement claim is an attempt to recoup the cost to the law firm.

In a memorandum from Master Funduk to Chambers Clerks in Edmonton, dated July 27th, 2000, he advised that this disbursement "is not to be allowed in any foreclosure lawsuit unless the Master or Judge granting the order directs that it be allowed."

If it is not to be allowed in a Bill of Costs for full indemnity costs, it follows that it will not be allowed in a Bill of Costs for partial indemnity costs.

Document Production - (See too "Report, Opinions or Briefs", below) - ***Alberta Rules of Court* - Part 5 - Division 1 - Subdivision 2: Disclosing and Identifying Relevant and Material Records** provides a right of inspection of records not objected to in an Affidavit of Records (**R. 5.1, 5.6 & 5.14**) and a mechanism for obtaining a Court Order for inspection of those same records (**R. 5.11 & 5.14**). Indeed, **R. 5.13** allows for the Court to order production from a "person who is not a party" in which instance the Court is to determine how much must be paid to "the person producing the record." **R. 5.1** encourages **& R. 5.14(1)** entitles a party to "receive a copy of the record on making a written request for the copy and paying reasonable copying expenses" or "to make copies of the record when it is produced." **R. 5.14(3)** addresses "computer-generated document(s)" and the right to request a copy in electronic format (see below).

Stevenson & Côté, ***Alberta Civil Procedure Handbook (2010)***, in the commentary to r. 5.6 [Form and Contents of Affidavit of Records] nicely clarifies that "these Rules in Subdivision 2 [of Part 5] require disclosure of every method (other than human memory) by which information may be recorded, and this includes many things:

1. any written note, however informal, such as appointments noted on a calendar;
2. any computer record, including previous drafts or backup copies of letters;
3. bookkeeping entries, made manually or by computer;
4. photographs;
5. sound recordings, movies, videotapes, CDs or DVDs;
6. signs or inscriptions on vehicles, buildings or graves;
7. logs or tapes produced by instruments."

And goes on to provide useful instruction on the preparation of Affidavits of Records.

All of which is tendered here to highlight the fact that the new ***ARC*** codifies the entitlement to inspect much more than just paper documents (more on computer generated documents below).

In Stevenson & Côté, ***Alberta Civil Procedure Handbook (2010)***, commenting on r. 5.14, clarifies:

> "Usually, the solicitor possessing the [producible] records makes an empty office or boardroom available for examining the records and will make photocopies in return for reasonable payment of the cost of copying. This Rule adds a new requirement that electronic copies be provided, although this was common practice before."

In Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. 2010) adds, at 219.6(3) - "Documents produced by a party":

> "Normally the cost of producing documents or information should be borne by the party requiring their production, the expense thereof to be considered when costs are assessed at the conclusion of the litigation."

Production of Computer Generated Document in Electronic Format: **Rule 5.14(3)** states: "A party to an action who receives a computer generated document that was filed with the court clerk, or the Court, may request the person filing that document or causing it to be issued to provide a copy of it in an electronic format." Gone is the provision in former **Rule 5(4)** for the assessment officer to fix the amount payable on an ex parte basis, subject to adjustment by the court at a later date.

How Much to Pay & Resolution of Disputes: The rules simply state that the party is entitled to "reasonable copying expenses." Therefore, see "Photocopying" / "Photographs" / "Print/Laser Copying" / "Data Recovery" / "Email" / "Scanning / Conversion of Paper to Electronic Format" [cross reference]

Disputes will normally await the conclusion of the proceedings when costs of the application, proceeding, or action are addressed in an assessment hearing. Where a more timely resolution is desired the parties could seek direction from the Court. Alternatively, on a non-binding interim basis, the assessment officer could resolve any dispute pending ultimate assessment of the costs.

Email, Production of - A party may be obliged to pay the cost of producing either an electronic or hard copy of email as part of the Part 5 production process. We are unclear what allowance would be proper for the production of an electronic version of one or many emails (the out-of-pocket expense may be nothing more than the cost of a disc drive or flash drive) and we surmise that the cost of producing hard copies would be no more than that of Print or Laser-copying, for which we allow between **$0.10 to $0.15** per copy.

Expert Witness Fees and Expenses - Are limited by **R. 10.41(2)(e)** to the amounts found in **Schedule B** as to witness fees and related expenses (for details see "Witness Fees & Expenses" later in this paper), unless otherwise ordered, and may not include steps taken by experts for investigations, inquiries and assisting at trial, unless otherwise ordered by the Court. Where such directions have been received from the Court, reasonableness of the fees and expenses is dependant upon the circumstances and the nature of the services performed. Reference can often be made to trade standards for fees, hourly rates, and billing practices.

Note: the new ***ARC*** is somewhat unclear as to what can and cannot be allowed by an assessment officer. **Schedule B, Division 3, Item 20(a)** defines an "expert" as "a witness [who] is not a party to the action and is called as an expert to give evidence" for which he/she is entitled to:

(a) $100.00 per day allowance to secure her/his attendance to give evidence at trial (including travel days), plus accommodation, meal and travel expenses

and

(b) "the reasonable fees that the Court may order under rule 10.31(1)(a) *[Court-ordered costs award]* or the assessment officer may fix under rule 10.41 *[Assessment officer's decision]*.

Then, while **Rule 10.41(1)** empowers an assessment officer to determine whether the costs that a party incurred are "reasonable and proper costs" **subrule (2)(e)** restrains the assessment officer by stating:

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

"(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."

Query: If the expert conducts an investigation or inquiry in order to prepare an expert report and to testify at trial does that preclude an assessment officer from allowing anything for the preparation of the report?

Query: Since testifying at trial could be interpreted as "assisting in the conduct of a . . . trial" is the assessment officer limited to allowing the expert the *allowance* contemplated by **Schedule B, Division 3**?

The wording of the former **Rule 600(1)(a)(ii)** permitted as "costs" the "charges of accountants, engineers, medical practitioners or other experts for attendance to give evidence" but not "the charges made by such persons for investigations and inquiries or assisting in the conduct of the trial" unless "the court so directs." If an extrapolation is made between the wording of the former ***ARC*** and the new ***ARC*** we might be able answer these questions as follows:

- ***Testifying at Trial:*** an expert is entitled to the allotted amounts prescribed in **Schedule B, Division 3** plus such additional "reasonable fees" as the assessment officer might "fix" for the expert's travel to, waiting and actual testifying at trial.

- ***Preparing to Testify at Trial:*** a witness "called as an expert to give evidence" at trial would be expected to have to prepare in order to testify. Since expert almost invariably are called for their ability to assist the Court by providing opinion evidence, it stands to reason that in order to prepare to testify at trial the expert would have to familiarize him/herself with the relevant facts thru questioning, examining, reviewing (a.k.a investigating and inquiring) in order to perform an analysis of the facts, to maybe conduct confirming or tell-tale tests, to prepare charts or tables or graphs, whatever needed in order to provide a reasoned and educated analysis to the parties (by report) and the court (by testimony). These activities are apparently outside the scope of the assessment officer's authority and may not be remunerated without order of the court

- ***Assisting in the Conduct of Trial:*** an expert may not be remunerated for assisting to any extent other than actually testifying at trial, unless other ordered by the court.

It is our position that the distinction between what an assessment officer may allow as "reasonable and proper" experts charges per **Rule 10.41** and what the Court must specifically allow is the role which almost all experts play for the party who retained them, that of being not only a witness, but also being a consultant. The distinction is often blurred by the commonality of both roles, but is most clearly evident when (a) the expert is used by a party to vet and analyze the report and analysis of the opposing party's expert and (b) when the expert performs a similar function at the trial itself in helping counsel to prepare for cross-examination of the opposing party's testimony by reading that expert's report(s) and listening to his/her testimony at trial, analyzing it and counseling legal counsel in the deficiencies or lack thereof in the opposing expert's testimony and conclusions. Because of the opportunities for abuse in the associated costs of performing the role of consultant and because the Court which actually hears the respective expert's evidence and reaches conclusions as to their reliability or usefulness, it stands to reason that the Court should, at the very least, give direction if not actually set the expert's remuneration for performing consultative services.

This does not explain why the assessment officer is not permitted to fix the reasonable remuneration for preparing reports required by the rules as a prerequisite to testifying at trial.

(See too "Witness Fees & Expenses" / "Reports & Briefs", below.)

Loss of Revenue: On claiming as part of an expert's fees the lost revenue for the day of appearance in court, see *Byron v. Larson* 2003 ABQB 347, 2003 CarswellAlta 558, Kent, J.:

> [5] Dr. Brown submitted an account for $5,000.00. His account indicates that the lost revenue for the day that he was required to testify was approximately $8,200.00. He uses that figure to arrive at his fee of $5,000.00 . . . The Plaintiff argues that Dr. Brown is entitled to be compensated for the loss that he suffered by not being able to run his clinic. There are two problems with this argument. The first is that Dr. Brown says that he lost revenue for the day when in fact he was required to be in court for only half of the day. More importantly, however, is the principle of using lost revenue as the basis for charging expert fees. For many professionals, some of what they do generates more income than other activities. It appears from Dr. Brown's letter that running his clinic may be more profitable than consulting on legal matters. That, however, is a choice that he can make himself. It is not an appropriate way to base his fees for consulting on legal matters.

The court allowed $2,500.00.

Charges for Consultation Services: On claiming as a disbursement the charges of a "legal expert" as a consultant see *Sidorsky v. CFCN Communications Ltd.* 1995 CarswellAlta 86, 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, [1995] 5 W.W.R. 190 (Q.B.):

> 16 There is no doubt that a court has the discretion to allow costs of experts for investigations and inquiries and for assisting counsel at trial even though the experts do not testify. See *Nova, an Alberta Corp. v. Guelph Engineering Co.* (1988), 89 A.R. 363 [60 Alta. L.R. (2d) 366] (Q.B.). See also *Petrogas Processing Ltd. v. Westcoast Transmission Co.*, supra.

UPDATE

Fax Charges - Telecopy Charges - Considered by the Court of Queen's Bench in *Gainers v. Pocklington* (1996) 182 A.R. 78 (Q.B. / Clarke J.) to have "become an ordinary and accepted part of the practice of litigation." However, in considering the Gainers decision in *Dornan Petroleum v. Petro-Canada* [1997] A.J. No. 21 (Murray J. / Q.B.) the same Court considered fax charges as "luxuries" which "should not be allowed unless it can be shown . . . that the circumstances of their use was necessary to facilitate the orderly disposition of the litigation." The rationale given for this position in the latter decision was that facsimile transmissions "are taking the place of ordinary mail and traditionally we have not taxed postage as a disbursement." However, in *Mar Automobile Holdings Ltd. v. Rawlusyk* 2001 CarswellAlta 855, 2001 ABQB 516 (Q.B.) Clarke J. revisited the issue, considered *Dornan*, and stood by his previous conclusion, noting that he was not aware of any Court of Appeal decision to the contrary. This is curious, because his decision, relative to QuickLaw, does consider *Standquist v. Coneco Equipment* [2000] A.J. No. 554; 2000 ABCA 138 (C.A.) which, while specifically addressing fax charges, made the following ruling:

> "We have never seen a case disallowing postage, and Dornan Petr. v. Petro-Can. (1997) 199 A.R. 334 does not either. Maybe what is referred to here is delivery charges. In principle, one should show why the post office would not do, or would be as expensive. But the amount is small here, and the slowness and expense of mailing appeal books could well be imagined. We allow the $20.48 disbursement, even if it was for a courier service."

The Edmonton taxing officer tends to follow the *Gainers* decision and allows such charges, within reason, at the rate of 15 cents per page, in or out, nothing for long distance charges.

Both writers allow postage related to advancing the proceeding (see "Postage," below).

More recent case law (emphasis are added):

Dechant v. Law Society of Alberta, 2001 ABCA 81, [2001] A.J. No. 373 (C.A.) [While this decision related to photocopying the principles enunciated by the Court relate to facsimile charges]

> 23 . . . Photocopying is a difficult disbursement to address. Evidence in a given case may show that there should be no charge for photocopies for the represented litigant because the cost associated with copying is just part of the overhead of the firm which is compensated by a general costs order. Alternatively, there may be evidence in a given case as to the actual costs incurred as a result of farming out the expense to a third party. . . .

Hansraj v. Ao [2002] A.J. No. 1038, 2002 ABQB 772, [2002] 11 W.W.R. 688, 4 Alta. L.R. (4th) 147, 314 A.R. 283, 116 A.C.W.S. (3d) 163, Slatter J. (as then was):

> FACSIMILE COSTS
>
> 16 The Defendant claims $483.66 for telecopier charges. It is stated that these charges are calculated based on $1.00 per page for telecopies sent. No charge is made for telecopies received. Use of telecopiers is recognized by the Rules of Court, for example in Rules 5(1)(t) and 16.1 and Part 54.1. The sending of facsimiles is a standard practice and is no longer considered a "luxury": Gainers Inc. v. Pocklington (1996), 50 C.P.C. (3d) 25, 182 A.R. 78, 38 Alta. L.R. (3d) 124 at para. 6. But unless it is a proper disbursement it is not taxable as such. ***Long distance charges*** relating to the use of telecopiers are clearly an appropriate disbursement. The question is whether a party can impose an ***internally-generated fee*** as a taxable party and party disbursement, where such a charge is a part of the amount that the lawyer in question would bill to his or her own client.
>
> 17 As noted disbursements are provided for in R. 600(1)(a), which allows the taxation of "all the reasonable and proper expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceeding". A disbursement must generally be an amount payable to a third party, must be an expense specifically related to the file in question, and must be something over and above the general overhead expenses of the lawyer. A disbursement is not allowed if it is merely a disguised form of fee for the lawyer, as those are to be taxed in accordance with the Schedule. By convention an **exception to this rule** has evolved in party and party taxations with respect to **photocopies**, which do not have all of the characteristics of a disbursement, but which are commonly allowed as such to recognize the costs of paper and the copy fees charged for the use and maintenance of the machine.
>
> 18 Facsimile machines are now very common, and almost every law office would have one. The cost of having the machine, and the cost of maintaining the telephone line to which the machine is connected, are generally a part of the overhead of the firm. There is no direct expense involved in sending any one facsimile message, and with outgoing messages there is not even the cost of paper. The time it takes to activate the facsimile machine is little more than the time it takes to dial a telephone call, or to put a letter in an envelope and mail it.
>
> 19 The Law Society does not regard facsimile charges as being true disbursements. In Commentary No. 5 of Chapter 13 of the Code of Professional Conduct it is stated that:
>
> > . . . Internal office expenses assigned some value by the law firm itself, such as photocopying and fax charges (apart from the long distance component), do not constitute disbursements and should not be presented to the client as such on a statement of account. Expenses of this kind are in fact a fee component and must be charged to the client as fees, although they may be itemized separately under the fees heading on an account.

The amount claimed by the Defendant for facsimile charges is not a proper disbursement. It reflects an internal charge made by the firm to its clients as a part of its fee structure. While it may be appropriate in that context, it is not a proper disbursement in a party and party taxation.

Pauli v. Ace Ina Insurance [2003] A.J. No. 893, 2003 ABQB 600, [2003] 11 W.W.R. 74, 15 Alta. L.R. (4th) 286, 336 A.R. 85, 4 C.C.L.I. (4th) 204, 40 C.P.C. (5th) 317, 124 A.C.W.S. (3d) 432, Rooke J. (as then was)

OVERHEAD COSTS

69 In my Decision at para. 5(d), I stated that:

> ... there shall be no costs for overhead items (such as stationery, supplies, printing (except at the equivalent to photocopying cost), . . ., or the equipment costs/fees for communications (except that *local and long distance toll costs* of telephone, facsimile and other electronic communications, are allowed))....

70 As Slatter J. noted in Hansraj at paras. 16-19, except for photocopies and the long distance component of electronic communication, such items, . . . , are overhead and not allowed. At para. 17, he stated:

> A disbursement must generally be an amount payable to a third party, must be an expense specifically related to the file in question, and must be something over and above the general overhead expenses of the lawyer.

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 Macklin J.

67 Regarding the facsimile charges, it is unclear precisely what these include. To the extent that they include any amounts paid to third parties, such as long distance charges, they are recoverable. **If they are simply costs charged by the Plaintiff's law firm to offset its ordinary overhead costs for maintaining a telecopier, then they are not recoverable.**

Filing Fees (Court) -

Queen's Bench: The filing fees for the Court of Queen's Bench are, by **Rule 13.32(1)**, those authorized by **Schedule B, Division 1**.

N/B: No $100.00 charge for filing Appointment of an Assessment. There is an **error** in **Item 6** which states the "the fee for each appointment for review by a review officer or appointment for an assessment of costs by an assessment officer is $100.00." The rules rewrite committee has confirmed that the portion dealing with the charge for filing an Appointment for an Assessment of Costs is being removed. The $100.00 filing fee is only to apply to an Appointment for Review of lawyer's charges.

Court of Appeal: The filing fees for the Court of Appeal are, by **Rule 585(1)**, those authorized by the "tariff of fees in Schedule E" - yes, of the former ***ARC*** and which should change in the not too distant future. **Schedule E, Number 2** addresses Registrar's Fees (C.A.).

Provincial Court: The filing fees for the Provincial Court vary by Division of the Court and are governed by **Alberta Regulation 18/91** found, as of December 2010, at page 15.1.1 of the ***Alberta Rules of Court***.

Filing Fee for Provincial Court Civil Appeals Under The Residential Tenancies Act - The ***Residential Tenancies Act***, **Part 5**, permits the initiation of claims in Provincial Court by means of a written notice and affidavit requiring the Clerk of the Provincial Court to issue a "Notice of Application". **Alberta Regulation 18/91**, Civil Division, 1(b) prescribes the filing fee associated with that process. The Clerk of the Court of Queen's Bench charges a **$200.00 filing fee** for the Originating Notice of Motion which must be filed for an appeal from the Provincial Court in **Residential Tenancy Act** rulings - the fee arises from the application of **Schedule B, Division 1**, **Item 1**.

NEW - Paragraph 1

Interpreter Fees & Expenses - To our knowledge there are no Rules or Regulations which dictate the fees to be allowed an interpreter relative to civil proceedings. There used to be an item in the old Schedule E, but for reasons

associated with streamlining the Rules it was repealed. A helpful guide, emphasis on *guide*, is s. 4 of the ***Fees and Expenses for Witnesses and Interpreters Regulation*** 123/84 as am. which provides that an interpreter for the "proceedings" outlined in s. 1 is entitled to $45.00 per hour while in attendance at the proceedings (as of May 2008).

The practice across Alberta is to allow a minimum charge of 2 hours for interpreter fees relative to court proceedings (examinations, court appearances, trial, et cetera).

Interpreters are, with greater frequency, being used outside actual discovery and court time; they assist the party in consultations with its lawyer, with experts, etc. Some of this expense is properly recoverable so far as it is for the "purpose of carrying on or appearing as party to" the proceeding. However, consideration should be given to the amount of time claimed and the purposes for which interpreters are used.

Note the ruling in *Kha v. Salhab* [2001] A.J. No. 61, 2001 CarswellAlta 53, 2001 ABQB 44 (Q.B.), Kenny J. that the cost of hiring interpreters to aid the Plaintiff's lawyer in determining whether the Plaintiff had a case worth pursuing could not be allowed because **Rule 600(1)(a)** is not broad enough to include costs incurred prior to commencement of the "proceeding".

NEW

Legal Aid Waivers - In **Rule 586.1** the holder of a Legal Aid Certificate for Alberta is exempt from paying fees under **Schedule E, Number 1, section 1 or 2 or Number 2, section 1**. These fees are "waived" and ***cannot*** be recovered as a *cost of litigation*.

More particularly, as of November 2005, the fees subject to this waiver include the following:

Number & Section	Description	Fee
1/1: Clerk's Fees	Commencement of actions or proceedings	$200.00
1/2: Clerk's Fees	Setting a matter for trial	$600.00
2/1: Registrar's Fees	Filing notice of leave to or of appeal	$600.00

UPDATED

Legal Counsel's Expenses - In question are expenses for meals, accommodation and travel. When allowed they are usually the same as the amounts allowed to a witness. (See: Accommodation, Meals & Travel Expenses)

Airfare is expected to be the same as that afforded any normal witness - economical, but not restrictive (like standby). The treatment of these expenses varies depending upon the context in which they occur - *the use of local vs. outside counsel* and *interviewing or briefing of witnesses*.

The General Rule is that a client is responsible for placing his/her lawyer at the place of hearing at his/her own expense: *Dennis v. Northwest Territories (Commissioner)* (1990) 39 C.P.C. (2d) 41 (N.W.T.S.C.); *Reference re Electoral Divisions Statutes Amendment Act 1993 (Alta.)* (1993) 17 C.P.C. (3d), [1993] 6 W.W.R. 148 (Alta. C.A.); *Fayerman v. Sears Canada Inc.* (1994) 163 A.R. 172 (Alta. Prov. Ct.)) From a transcript of oral reasons given by Côté, J.A. in *The Matter of a Reference by the Lieutenant Governor in Council . . . Respecting the Electoral Divisions Statutes Amendment Act, 1993* on May 12, 1993:

> "I believe the other loose end is the question of paying for travel expenses for Mr. Price to and from Calgary. The other parties all appear to be based in Edmonton or Northern Alberta and indeed I think maybe Lac La Biche is the only other one that is not from Edmonton. All the others have retained Edmonton counsel. I do not see that there is anything so peculiar about this type of litigation that one cannot find local counsel to do it and, therefore, I am not going to direct that the government pay for travel expenses to or from Calgary or anywhere else."

In *Kennett Estate v. Manitoba (Attorney General)* [2001] M.J. No. 342, [2001] CarswellMan 384, 2001 MBQB 204 (Man. Q.B.) the court disallowed the travel expenses of esteemed legal counsel with expertise in Jehovah's Witnesses cases. The Court noted a lack of evidence that the Attorney General could not have found competent Manitoba counsel for the areas of law involved.

In *Freyberg v. Fletcher Challenge Oil and Gas Inc.* 2006 ABCA 260, [2006] A.J. No. 1181 (C.A.) the appellant (a resident of the UK & obliged to bring proceedings in Alberta) sought the travel costs of her United Kingdom solicitor for attendance at trial. Conclusion: "In our view that is not a reasonably necessary disbursement and is not recoverable." para. 33.

Hansraj v. Ao [2002] A.J. No. 1038, 2002 ABQB 772, [2002] 11 W.W.R. 688, 4 Alta. L.R. (4th) 147, 314 A.R. 283, 116 A.C.W.S. (3d) 163, Slatter J. (as he then was) confirms the ***general rule*** and clearly enunciates some **exceptions to**

the rule:

> "13 There are a few cases where the travel expenses of counsel have been allowed. Some proceed on the assumption that the counsel retained had some special ability that could not be found in the judicial district in question: North American Systemshops v. King (1989), 99 A.R. 138 at para. 16. In others there were special reasons for the travel: Ligate v. Abick (1991), 5 O.R. (3d) 332, 2 C.P.C. (3d) 209 (trial moved due to limited court facilities); Reese v. R. (#2), [1993] 1 W.W.R. 450, 5 Alta. .R. (3d) 40, 133 A.R. 127 (counsel attended applications in Calgary, on an Edmonton action); Madgett v. Dawley (1986), 170 A.R. 351 (multiple parties prevented retaining local counsel).
>
> "14 Apart from these exceptional cases, the general rule should be that travel costs for counsel to attend court proceedings in the judicial district where the action was started are not taxable, as was held in Charon v. Mohawk Oil Co., [1997] A.J. No. 1274 (C.A.) at para. 8; Dennis v. Northwest Territories (Commissioner) (1990), 39 C.P.C. (2d) 41 (N.W.T.S.C.); Re Electoral Divisions Statutes Amendment Act, 1993 (1993), 141 A.R. 66, 17 C.P.C. (3d) 266 (C.A.); Holt v. Gorsline, [2001] 11 W.W.R. 405, 292 A.R. 329, 96 Alta. L.R. (3d) 88 at para. 18; Pratt Estate v. Pratt Estate, 2002 ABQB 144; McDonald Crawford v. Morrow, 2002 ABQB 241 at para. 7; and MacDonald Estate v. Martin (1993), 91 Man. R. (2d) 21 varied 100 Man. R. (2d) 1 (C.A.).

"15 It is undoubtedly true that parties have the right to select counsel of their choice. However, that is not the issue; the issue is who is to pay for that choice. Where counsel are retained outside the judicial district where the action is commenced, the travel expenses of that counsel are not taxable unless the party who retained out-of-town counsel can demonstrate that there were no competent counsel within the judicial district who could handle the matter, or other special reasons. It is generally not sufficient that the party has formed a particular relationship with the counsel, or prefers for personal reasons to deal with that counsel. Those are legitimate personal reasons to hire that counsel, but not sufficient reasons to pass the costs on to another party. There was nothing unusual about this litigation. I am not satisfied that the Defendants' insurer could not have retained counsel in Edmonton who could deal with these issues. Accordingly, the travel expenses of counsel are not a proper disbursement.

In *Allen (Next Friend of) v. University Hospitals Board* [2006] A.J. No. 377, 2006 ABCA 101 the Court of Appeal also acknowledges the ***general rule*** and recognizes **exceptions** to the rule:

> "A. Entitlement to Travel Expenses
>
> "2. In our opinion, entitlement to travel expenses for out-of-town counsel is governed by the "unavailability of local counsel" test set out in cases such as *Re Electoral Divisions Statutes Amendment Act (Alta.)* (1993), 141 A.R. 66 (C.A.), [1993] A.J. No. 351 (C.A.); *McDonald Crawford v. Morrow*, 2002 ABQB 241, [2002] A.J. No. 279 (Q.B.); *Hansraj v. Ao* (2002), 314 A.R. 283 (Q.B.), 2002 ABQB 772. We prefer the articulation of the test by Slatter J. in *Hansraj v. Ao* (at paras. 12 & 15):
>
> > The test under R. 600(1)(a) is whether the disbursement is `reasonable and proper' for `carrying on the proceeding'. In this context reasonableness must be measured in terms of whether one litigant should expect another to pay the expense, not whether it was reasonable for the litigant to incur the expense for his own personal purposes and reasons. In other words, the test is more objectively based than subjectively based. ...
>
> It is undoubtedly true that parties have the right to select counsel of their choice. However, that is not the issue; the issue is who is to pay for that choice. Where counsel are retained outside the judicial district where the action is commenced, the travel expenses of that counsel are not taxable unless the party who retained out-of-town counsel can demonstrate that there were no competent counsel within the judicial district who could handle the matter, or other special reasons. It is generally not sufficient that the party has formed a particular relationship with the counsel, or prefers for personal reasons to deal with that counsel. Those are legitimate personal reasons to hire that counsel, but not sufficient reasons to pass the costs on to another party. . . .
>
> "3. In so stating, we are not unmindful of the observation of Wittmann, J.A. in *Refco Alberta Inc. v. Nipsco Energy Services Inc.*, 2003 ABCA 125 at para 16, [2003] A.J. No. 455 (C.A.), that:
>
> > The competency of counsel must be viewed with some deference through the eyes of the client. Trust and confidence must surround competence in a healthy and sustainable solicitor-client relationship.
>
> "4. It does not follow, however, that a relationship so described is sufficient to merit an award of travel costs: *Charan Holdings Ltd. v. Mohawk Oil Co.*, [1997] A.J. No. 1274 (C.A.) at para. 8. The issue is whether, absent unique or exceptional circumstances, the additional expenses should be borne by the opposite party. We think not. In the result, we would deny the respondents' travel expenses for out-of-town counsel."

Wainwright (Town) v. 876947 Ontario Ltd., 2010 ABCA 23 approves Hansraj

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Interviewing or Briefing of Witnesses: Legal counsel's travel expenses for the purpose of *interviewing and briefing a witness* have been addressed in a number of the above-noted decisions as well. In proceedings of some significance in which the choice is between a key witness traveling to the lawyer or the lawyer to the witness it has been deemed appropriate to allow counsel's travel expenses: *Mar Automobile Holdings Ltd. v. Rawlusyk* 2001 CarswellAlta 855, 2001 ABQB 516 (Q.B.) at paragraph 30.

Life Insurance Premiums (on the life of the Judge) - A life insurance premium paid on the life of a trial judge was deemed to not be a disbursement necessary and reasonable to proving a litigant's case and was disallowed on taxation, *Emil Anderson Const. Co. v. B.C. Railway Co.* (1989) 39 C.P.C. (2d) 105. However, see *Westco Storage Ltd. v. Inter-City Gas, et al.* [1988] 4 W.W.R. 396, (Man. Q.B.), Schwartz, J., at p. 407.

Letter of Credit - The Court of Appeal has, on a number of occasions, permitted the recovery of the fee paid to a bank for obtaining a letter of credit as security for the repayment of a trial judgment pending the hearing of an appeal.[1] The cost of obtaining the letter is recoverable because it represents the interest the appellant would have lost in having paid out and then recovered the judgment amount upon succeeding on its appeal. The one condition imposed by the court appears to be that the cost for the letter of credit should not exceed a rate of 6% per year of the lump sum being secured.[2]

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[1] See *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.* [1998] A.J. No. 26, 1998 ABCA 12, 212 A.R. 57 (C.A.); *Beller Carreau Lucyshyn Inc. v. Cenalta Oilwell Servicing Ltd.* [1999] A.J. No. 936, 1999 ABCA 243 (C.A.); *Eagle Resources Ltd. v. MacDonald* [2002] A.J. No. 66, 2002 ABCA 12 (C.A.); *Madge v. Meyer* [2002] A.J. No. 344, 2002 ABCA 73, [2002] 5 W.W.R. 50, 100 Alta. L.R. (3d) 1, 303 A.R. 41 (C.A.).

[2] See *Eagle Resources Ltd. v. MacDonald* (above).

Meals - **Schedule E**, **Number 3**, **Item 4** provides an allowance for meals to witnesses and jurors.

In Calgary and Edmonton it has become the practice of the taxing officers to apply the meal allowance set out in the **Subsistence, Travel and Moving Expenses Regulation under the Public Service Act** - Part 4 - S. 8. As of May, 2008 it was the following (add on GST):

Breakfast	**$9.20**
Lunch	**$11.60**
Dinner	**$20.75**
Per Diem for Meals	**$41.55**

The regulation may be found at **http://alberta.ca** and progressing through the site in the following order: Government > Corporate Human Resources > HR Practitioners > Directives, Regulations, . . . > Regulations > Public Service Subsistence . . . and by clicking on “Part 4".

NEEDS UPDATING: Mediation Provisions in Practice Notes / Relevance to Schedule C

Mediation - *Mar Automobile Holdings Ltd. v. Rawlusyk*, 2001 CarswellAlta 855, 2001 ABQB 516, 93 Alta. L.R. (3d) 141 (Q.B.), Clarke, J. disallowed any claim for costs associated with mediation:

> 31 The Plaintiffs had a number of complaints about the way they felt Ellis participated in the mediation process. It was on the basis of those complaints that they claimed that their share of the mediation costs should be a taxable disbursement.
>
> 32 One of the fundamental principles of the mediation process is that it is confidential and without prejudice to the rights of the parties if the mediation is not successful. Normally costs of the mediation are shared equally by the parties involved. I see no reason to disturb that principle nor would I be prepared to open up the mediation process to make judgments about the conduct of the parties for the purposes of determining if that conduct was warranted by the punishment of taxable costs or disbursements. Mediation costs are not an item that should be included in taxable costs or disbursements.

Models - **Rule 600(1)(a)(iv)** provides for the "expenses for the preparation of ... models, ...;" The allowance of this expense as a taxable disbursement is in the *discretion of the taxing officer*, it does not require the approval of the Court.

Ordinary Witness Fees & Expenses - (See "Witness Fees & Expenses", below.)

Para-legal Services - Because of the "block tariff" utilized in **Rule 605** and **Schedule C**, and because a para-legal is performing services of a barrister and solicitor which are limited to the fee Items in the **Schedule**, no extra

allowance can be made for a para-legal's services in a party/party Bill of Costs. It is not appropriate to include any para-legal services as a disbursement in a Bill of Costs.

UPDATED
Parking - **Witnesses** and **jurors** recover their reasonable parking expenses.

Allowed for **legal counsel** otherwise entitled to travel expenses (see "Legal Counsel's Expenses", above and "Travel Expenses", below) and obliged to incur reasonable parking expenses for the purpose of attending examinations or court. Not allowed for other legal counsel not otherwise entitle to travel expenses (i.e. in-town counsel).

Party to the Action - A party to the action is entitled to claim a witness fee (*Smith v. Bartlett* (1920) 3 W.W.R. 313 (Alta. S.C.)) and expenses, but only for his/her participation as a witness and not for simply monitoring the trial proceedings.

NEW - Jul07 - insert citation
Where the party lives outside Alberta but was "obliged to bring the proceedings in Alberta" the party is entitled to recover "the reasonable cost of attendances in [Alberta] for pre-trial discoveries and for the trial." para. 32

In larger, more complicated cases, the courts have been showing leniency in this regard, allowing the party all its reasonable expenses for attending at trial, other hearings and for consulting with its legal counsel: *Petrogas Processing Ltd. v. Westcoat Transmission Co.* [1990] A.J. No. 317; [1990] 4 W.W.R. 461: 73 Alta.L.R. (2d) 246; 105 A.R. 384, at p. 41; *Begro Construction Ltd. v. St. Mary River Irrigation District* [1995] A.J. No. 1046, (Q.B.)). However, note that in each of these instances the Court is exercising it's discretion relative to costs, a degree of discretion considerably greater than that of a taxing officer.

Photocopying - Needs updating of cases - recent reviews show no increases in amounts and some even struggling with the 15 cents/pg - evaluate for general policy change

Update for new Rules.

What photocopied documents may be recovered? *Past Policy:* In *Ukrainian Credit Union Ltd. v. 258753 Alberta Ltd., Gourdine and Olsen* (1984) 39 Alta. L.R. (2d) 310, at p. 311, and in *Reese et al. v. HMQ Alberta & Daishowa Canada Co. Ltd.* (1992) 133 A.R. 127 D.C. McDonald, J. took the position that photocopying was an overhead expense compensated for by the fee portion of **Schedule C** by application of the reasoning in **Rule 605(3)**. As a consequence taxing officers have limited cost recovery to photocopying of such items as *case authorities*, *undertakings*, *exhibits*, *experts' reports*. The photocopying of the typed portion of pleadings, written submissions, briefs, or of correspondence and other typed material has been disallowed.

Present Policy: In *Millott (Estate) v. Reinhard* [2002] A.J. No. 1453, 2002 ABQB 998, [2003] 3 W.W.R. 484 (Q.B.) Fraser, J. considered Justice D.C. McDonald's treatment of photocopying and expanded upon what documents can be claimed under "photocopying." He concluded, at para. 72:

> "The cost of producing copies of documents required for use in the trial including expert reports, exhibits, and arguments and other documents which must be served, is in my view a cost which can be passed on. However, the cost of repeated photocopying of drafts of documents prepared for use in the action such as arguments, or of other miscellaneous documents such as letters, is not."

At para. 78 he also, in assessing a reasonable charge for photocopying, appears to have taken into consideration copies of transcripts of examinations for discovery provided to expert witnesses, briefs tendered at trial, Rule 218.1 reports, final arguments and the pleadings record.

In summary, at the very least, recoverable photocopying includes the following:

- arguments (final)
- briefs tendered to the court
- case authorities
- documents required to be served (pleadings, notices of motion, affidavits, etc.)
- exhibits
- experts' reports
- pleadings record
- transcripts provided to experts
- undertakings

Not recoverable would be the following:

- drafts of documents
- miscellaneous documents, such as letters

At what cost per page? Cost per page depends upon the circumstance in which the copies were produced. Consider the following:

1. **Photocopying by the Court:** If a party has been charged $1.00/page for obtaining photocopies at any level of our court system (Provincial, Queen's Bench or Court of Appeal), that amount is recoverable in full as a disbursement incurred either by themselves or their lawyers.

We speculate that the clerk/registrar charges $1.00/page in an effort to offset other costs for which the clerk/registrar cannot, at present, obtain recovery. The cost of photocopying, exclusive of labour, is somewhere close to 8.0 cents per page, so $1.00 per page provides a significant margin of profit.

2. **Photocopying by a 3rd Party Provider:** If a litigant were to take documents to a photocopy provider to obtain copies and was charged, for the sake of argument, 9.5 cents per page, the provider is in the business of making a profit from its photocopying business and the litigant is permitted to recover that cost . . . providing that the photocopying was necessary and relevant to the proceeding. If the litigant should choose to go to a provider who bills more per page than the "market" generally allows - say 30.0 cents per page - then the taxing officer would reduce the amount to a reasonable amount based upon his or her experience.

3. **Photocopying by Litigant's Lawyer:** A bit more confusing is the recovery of photocopying charges made by a lawyer to its litigant client.

It must be understood that, in our humble but somewhat informed opinion, if a litigant pays a lawyer 25.0 cents per page for photocopying the lawyer is making a profit, as that figure is not representative of its actual cost. The fact that lawyers are charging that much is a topic of discussion irrelevant to a discussion of costs between parties. However, it is important to distinguish a 3rd party provider from a lawyer / law firm whose business is to provide legal services, not to provide photocopying services; the former is in the business of making a profit (whatever the margin) for providing such services, the later is not.

The courts have recognized, of late, that the lawyer-represented-litigant is only entitled to recover the actual "cost" to the lawyer of photocopying, and that cost cannot include a "time and effort" or labour component.

Past Policy: Until recently, the practice of the taxing officers has been to allow 25 cents per page for *allowable* photocopying.

Present Policy: However, recent rulings by the Court of Appeal have rendered that practice untenable:

In *Sidorsky v. CFCN Communications Ltd.* [1997] A.J. No. 880; [1995] 5 W.W.R. 190; 27 Alta.L.R. (3d) 296; 167 A.R. 181; 35 C.P.C. (3d) 239, the Court of Appeal (Bracco, Conrad and Hunt JJ.A.), at para. 46, refused to address an argument that 25 cents per page is not a true disbursement:

> "Finally, the appellants argued that the photocopy charge of 25 cents per page is not a true disbursement. They argued that the true cost of photocopying should be in the neighbourhood of 3 to 5 cents, and that any amount above this should be included in overhead costs. Unfortunately, there was no evidentiary basis for the argument and accordingly we leave it to another day whether a 25 cent charge for such disbursements is excessive. The trial judge allowed this amount as a disbursement and we do not disturb this portion of the award."

Then in *Huet v. Lynch* [2001] A.J. No. 145, 2001 ABCA 37 (C.A.) the court noted, at para. 22, that:

> "The word 'disbursement' is derived from 'disburse' which means to expend money. One would expect evidence that money was paid to a third party in order to qualify as a disbursement."

And at para. 32:

> "Third party service providers profit from the provision of the[ir] service. The notional compensation for time and effort of the . . . litigant can be reflected in the award of fees, not 'disbursements'"

The Court then allowed, at paragraph 48, "in the absence of evidence" 15 cents per page.

In *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81 the Court of Appeal stated, at para. 30:

> "Regarding disbursements, Ms. Dechant is entitled to all reasonable disbursements. If she has paid 25 cents per page for photocopying, she should be allowed that expense. If not, we are satisfied that 15 cents per page is an appropriate figure."

Millott (Estate) v. Reinhard (above) considered these decisions, considered evidence given of the actual cost of photocopying being 8.15 cents, apart from labour, considered that in that instance the photocopying "involved a comparatively small number of copies of a great number of documents, rather than a multitude of copies of the same documents," and reduced the total photocopying claim (at 28 cents per page, including GST) of $14,626.92 down to $2,500.00. At 28 cents per page the claim related to 52,239 copies, which, divided by $2,500.00 works out to 4.8 cents per page. The decision does not establish an allowable per page rate for photocopying, but it is clearly not 25 cents per page.

Fullowka v. Royal Oak Ventures Inc. [2005] N.W.T.J. No. 57, 2005 NWTSC 60, [2006] 3 W.W.R. 636, (2005) 45 C.C.E.L. (3d) 235, (2005) 141 A.C.W.S. (3d) 189, 2005 CarswellNWT 55 (N.W.T.S.C.) at para. 163, considered these four cases and concluded the appropriate per page charge for photocopying is 15 cents per page.

In summary, the *Huet* decision suggest that photocopying should not include a "time and effort" or labour component and, in the absence of evidence as to the actual disbursement cost of photocopying, the court set the per page allowance at 15 cents. The *Dechant* decision suggested that 15 cents per page is an appropriate figure. The Court of Queen's Bench decision heard evidence that the actual disbursement cost per page is 8.15 cents, however it is unclear from the *Millott* decision if that figure was used in its reduction of photocopying to 4.8 cents per page or if the figure arrived at was the consequence of disallowing the number of photocopies claimed. While 15 cents per page no doubt includes a labour component the writers intend to use 15 cents per page as the standard until further clarification has been provided. It is clear that 25 cents per page is no longer recoverable in party and party taxation hearings relative to in-house photocopying by a litigant's lawyer / legal firm.

Conclusions: The writers are allowing 15 cents a page for photocopying generated in-office, but for a broader spectrum of documents than previously allowed.

Aug08

Examples of How Court's Have Dealt with Photocopying:

Klemke Mining Corporation v. Shell Canada Limited 2007 ABQB 427 (Q.B.), L.J. Smith, J.

> Photocopying
>
> [43] The internal photocopying charged by the plaintiff's counsel was reduced from $.20 to $.15 per page for this matter, and after the first 28,875 pages it was further reduced to $.10 per page. Color photocopying was reduced from $.40 to $.15 for this client. Despite these reductions, the photocopying expense came to $55,556.35, which consisted mostly of non color photocopying.
>
> [44] The plaintiff concedes that a further reduction of about 5 percent for letters and non recoverable items (allowing in effect for 27,000 copies) is fair, and further a 5 percent reduction for labour efficiencies due to photocopying of bundles is not unfair. The plaintiff notes that wherever possible, materials were recycled as opposed to re-copied.
>
> [45] The defendants maintain that the increase in the Document Production and Trial Preparation fee items ought to compensate considerably for the cost of photocopying, which is a fee item as well: Law Society of Alberta, Code of Professional Conduct, Ch. 13 - Fees; Dechant v. Law Society of Alberta, [2001] A.J. No. 373 (C.A.) at para. 25. They note that in a number of cases, no photocopying disbursement was allowed: for example Phillip at paras. 106, 107. Further, drafts ought not to be charged in addition to the items conceded by the plaintiff. The defendant suggests $10,000 to $20,000 be granted for photocopying, referring to Millott (Estate) v. Reinhard, (2002) 322 A.R. 307 (Q.B.) at paras. 72 and 74.
>
> [46] I disagree that the increases in the two fee items include a significant quantum for photocopying. This was a document heavy case. The plaintiff's documents were exceedingly well organized and this was in part why this complex trial was tried quickly. Accordingly, and in all of the circumstances, my view is that a fair fee for photocopying is $40,000 with GST to follow.

(See too "Print / Laser Copying", below)

Photographs - Photographs are not provided for specifically in **Rule 600(1)(a)**. However, the wording of the **sub-rule** is broad and photographs fall within "all reasonable and proper expenses" so long as the cost is reasonable and their need proper to advancing the proceeding.

Plans - **Rule 600(1)(a)(iv)** provides specifically for the "preparation of plans". A standard dictionary definition of the noun "plan" includes "a drawing or diagram drawn on a plane: as a: a top or horizontal view of an object b: a large-scale map of a small area". To the extent that the cost is reasonable and the plan(s) was essential to the proceeding the cost ought to be allowed.

Postage - In *Standquist v. Coneco Equipment* [2000] A.J. No. 554; 2000 ABCA 138 (C.A.) the following ruling was made regarding postage:

> "We have never seen a case disallowing postage, and *Dornan Petr. v. Petro-Can.* (1997) 199 A.R. 334 does not either. Maybe what is referred to here is delivery charges. In principle, one should show why the post office would not do, or would be as expensive. But the amount is small here, and the slowness and expense of mailing appeal books could well be imagined. We allow the $20.48 disbursement, even if it was for a courier service."

Therefore, all postage reasonably and properly incurred "for the purpose of carrying on or appearing as party to any proceeding" (**R. 600(1)(a)**) is permitted.

Print / Laser Copying - It has become common practice for law firms, when making copies of a computer generated document within the firm's office, to simply print off copies of the document from the computer terminal . . . as opposed to printing a copy and walking the original over to the photocopier and making copies of the original. Copies produced in this manner are commonly referred to as "print copies" or as "laser copies" (laser printer??).

This practice of the writers is to allow the cost of such copies, but at 5 cents less than photocopying as the labour component of the cost is significantly reduced.

We presently allow 10 cents per page.

(See too, "Photocopying", above)

Private Investigator Charges - Have been allowed where circumstances called for the skills of a private investigator (*McCann v. Moss* (1984) B.C.L.R. 129 (S.C.)) and where it was necessary or proper for the attainment of justice (*Kenton v. Kenton* (1955) 16 W.W.R. 175 (B.C.S.C.)); as in a private investigator's report of a motor vehicle accident (*Bowers v. White* (1977) 2 B.C.L.R. 355 (S.C.)).

In *Sidorsky v. CFCN Communications Ltd.* [1995] A.J. No. 174; [1995] 5 W.W.R. 190; 27 Alta.L.R. (3d) 296; 167 A.R. 181; 35 C.P.C. (3d) 239, McMahon J. found it reasonable to pay a private investigator to track down, interview & maintain contact with witnesses. On appeal the Court of Appeal ([1997] A.J. No. 880; [1995] 5 W.W.R. 190; 27 Alta.L.R. (3d) 296; 167 A.R. 181; 35 C.P.C. (3d) 239), started (in para. 4) with a cautionary note:

> "In the ordinary case, witness tracking would be part of the preparation for trial and would be partially covered by an award of party and party costs. This kind of expense cannot, without good reason, also be recovered as a disbursement. Disbursements should not be used as a means, even unintentionally, of distorting the cost scheme by allowing, as a disbursement, fees for work normally considered part of the cost of litigation to which Schedule C applies."

Then, taking into consideration the size of the immediate litigation, permitted the charges of a private investigator for locating and taking witness statements, but denied the cost for keeping current addresses of witnesses as it is normally an overhead expense which falls into preparation for trial. The Court took exception to the extent of the use of the private investigator in this instance. It felt that the party claiming the cost has an obligation to first ask the opposing party to admit the facts involving these witnesses and to only then incur the considerable cost of locating and taking statements if the opposing party fails to admit. Not having done so the Court greatly reduced the allowance from $200,000 to $10,000.

In *Pfeifer v. Westfair Foods Ltd.* [2003] A.J. No. 1222, 2003 ABQB 829, 347 A.R. 236, 126 A.C.W.S. (3d) 23, Bielby, J considered *Sidorsky* and denied even the location costs as the case was too simple to warrant an exception to the general rule that locating and taking the statements of witnesses was part of preparation for trial, Schedule C, Item 10.

In *Kenton* (above) private investigator charges were allowed even though incurred before the action commenced.

Process Servers - To the extent that the charge is reasonable it is an allowable disbursement (see *Maclin U-Drive Ltd. v. Western Plastics Ltd.* (Alta District Court) (1963) 42 W.W.R. 64). However, the claimant must establish that a process server was necessary and that a less expensive means of delivering documents could not have been used (example: see *Rivard v. Rivard*, 2004 ABQB 759 at para. 21 - continue search of Q.B. for "process server")

[21] Ms. Rivard has the obligation of establishing that the disbursements she has claimed as costs are reasonable. However, in the affidavit filed in support of this application, she neither provided a receipt for the $252.21 paid to a <-process server, nor did she explain why service on Mr. Rivard of her financial disclosure by this very expensive method was necessary. At the hearing, she indicated that it was necessary because she had received a sort of ultimatum from Mr. Rivard's law firm about the timing of receipt of disclosure. However, unless that information is sworn to in an affidavit and thus made both known to Mr. Rivard and available for him to test by way of cross-examination before the hearing, that information is not evidence.
[22] In the result, instead of the $252.21 that she has claimed as a disbursement, Ms. Rivard is entitled to $15, which I understand to be the usual cost of a courier from Peers to Edmonton.

In Edmonton the following allowances are made:

Base Allowance (without question or investigation): There is a base allowance of ***$40.00 urban*** and ***$50.00 rural*** all inclusive. Service by a process server within the boundaries of the City of Edmonton for $40.00 or less (total charges) will be allowed without question. Service effected outside the city limits (St. Albert, Spruce Grove, Sherwood Park, etc.) for $50.00 or less (all inclusive) will be allowed without question.

DESCRIPTION	URBAN	RURAL
File Opening Fee	$5.00	$5.00
Actual Service	$30.00	$35.00
Attempts (Max of 5)	$10.00	$10.00
Mileage: May 1/07 $0.44 May 1/08 $0.46 July 1/08 $0.505 Dec 1/10 $0.505 (Per Kilometre)	The rate provided for in the Subsistence, Travel & Moving Expenses Regulation under the Public Service Act *(details for finding it are given below)*	
Postage	Current rates.	
Rush (verified by letter or affidavit)	$30.00	$30.00
Locate (provide detailed breakdown of hours, if no breakdown - $50.00 allowed)	(per hour) $50.00	(per hour) $50.00

The **50.5 cents/km** is derived from the **Subsistence, Travel and Moving Expenses Regulation** under the **Public Service Act** - Part 6 - S. 15. The regulation may be found at **http://alberta.ca** and progressing through the site in the following order: Government > Corporate Human Resources > HR Practitioners > Directives, Regulations, . . . > Regulations > Public Service Subsistence . . . and by clicking on "Part 6".

Professional Witness Fees & Expenses - (See "Witness Fees & Expenses", below.)

UPDATE - Case Law

Research (Contract or Computer) - In *Moser v. Derksen* [2003] A.J. No. 231, Rowbotham, J. (Q.B.), at para. 45, in disallowing a claim for a research disbursement, relied on a succinct explanation of what does and what does not constitute a disbursement. "The general principle regarding disbursements is:

> Disbursements should not be used as a means, even unintentionally, of distorting the cost scheme by allowing, as a disbursement, fees for work normally considered part of the cost of litigation to which Schedule C applies. Taken to the extreme, preparation for trial could be subcontracted to another firm and reimbursement of that firm's account sought as a disbursement.
>
> (See *Sidorsky v. C.F.C.N. Communications Ltd.* (1998), 216 A.R. 151 (C.A.).)"

This accords with the courts' general view of computer research as being a technological substitute for a lawyer's time spent in preparing for discoveries or trial or interlocutory applications, for which **Schedule C** applies a fee. In

Standquist v. Coneco Equipment [2000] A.J. No. 554; 2000 ABCA 138 (C.A.) the court stated:

> "Most courts do not allow a fee for [computer-assisted research] without special circumstances, largely because it is a substitute for lawyers' work and so in theory already covered by the other fee items in Schedule C, such as 'preparation for appeal'. We do not allow it here."

Prior to computer research a lawyer either bought legal reports and research materials, or attended at the law library to make use of the library's resources: he/she was not able to include in a bill of costs the time spent doing the research (that is covered by **Schedule C** fees), could not recover the expense of hiring another lawyer to do it (see "Legal Agents", above), and could not recover the cost of purchasing the books or paying library fees. In *Dornan* (below) Murray J. noted:

> "I am unaware of any Court allowing a successful party to tax as an expense a portion of the depreciation or maintenance of the law firm's library. In any event, R. 605(3) seems to preclude such expense being taxed."

In short, legal research, electronic or otherwise, is <u>not</u> allowable by the clerk as a disbursement without specific direction from the court. Note the following cases.

Cases <u>not allowing</u> it:

Lee et al v. Leeming (1985) 61 A.R. 18, at 19, (Q.B.)
Argentia v. Warshawski [1990] A.J. No. 340, 106 A.R. 222 (C.A.)
Sidorsky v. C.F.C.N Communications Ltd. (1995), 27 Alta. L.R. (3d) 296 (Q.B.) at p. 304
Dornan Petroleum v. Petro-Canada [1997] A.J. No. 21 (Q.B.)
Lalli v. Chawla [1997] A.J. No. 457; 53 Alta.L.R. (3d) 121; 203 A.R. 27 (Q.B.) at para. 25
Kelly v. Lundgard (1997), 47 Alta. L.R. (3d) 184 (Q.B.)
Atkinson v. McGregor (1998), 66 Alta. L.R. (3d) 289 (Q.B.)
Reid v. Stein [1999] A.J. No. 533; [2000] 2 W.W.R. 349; 73 Alta.L.R. (3d) 311 (Q.B.)
Standquist v. Coneco Equipment [2000] A.J. No. 554; 2000 ABCA 138 (C.A.)
Edmonton (City) v. Lovat Tunnel Equipment Inc. [2002] A.J. No. 1440 (Q.B.)
Milsom v. Corporate Computers Inc. [2003] A.J. No. 895, 2003 ABQB 609, [2003] 9 W.W.R. 269 (Q.B.) at para. 7
Moser v. Derkson [2003] A.J. No. 230 (Q.B.)
Davidson v. Patten 2005 ABQB 521 (Q.B.) at para. 46
Marshall RVR (2000) Ltd. v. Gorman (2007), 2007 CarswellAlta 1567, 2007 ABPC 313, A.H. Lefever A.C.J. Prov. Ct. (Alta. Prov. Ct.)

Cases <u>allowing</u> it:

Westco Storage Limited v. Inter-City Gas Utilities Ltd [1988] 4 W.W.R. 396, (Man.Q.B.), at p. 407
Holmes (Re) [1991] A.J. No. 462; 80 Alta.L.R. (2d) 373; 121 A.R. 170; 7 C.B.R. (3d) 82; 2 P.P.S.A.C. (2d) 106 (Q.B.M.)

Reports, Opinions or Briefs, cost of . . . - (See too "Experts . . ." & "Document Production", above) - The cost of a Report, Opinion or Brief prepared by an "expert" is permissible if

(a) it was reasonable and proper to have incurred the expense "as at the time it was incurred" (see comments and cases in "Point in Time to Apply the Test", above at page D-4) and

(b) there is compliance with **Rule 600(1)(a)(ii)**.

Non-disclosure of a Report, Opinion or Brief is <u>not</u> fatal to claiming it as a cost of litigation. Consider the following decisions:

Hobbs v. Hobbs [1959] 3 All ER 827, allowed the costs of a privileged "brief", even after the suit was over.

Dinunzio v. Gill (1986) 5 B.C.L.R. (2d) 189 (B.C. S.C.) Wong, J. held that "the fact that the report may not have been used by the parties in effecting settlement or at the trial for the judgment finally rendered is irrelevant, . . ."

Forsythe v. Strader (1987) 17 B.C.L.R. (2d) 124, Court of Appeal unanimously agreed that non-disclosure of an expert report was not grounds for disallowance of the cost of obtaining it, so long as at the time the expense was incurred it was reasonable and proper to do so.

Runner's Fees - This cost was ruled to not be allowable in *Credit Foncier Trust Company v. Leslie Hornigold* (1984) 35 Alta. L.R. 341, Agrios, J.. Likewise, *Pfeifer v. Westfair Foods Ltd.* [2003] A.J. No. 1222, 2003 ABQB 829, 347 A.R. 236, 126 A.C.W.S. (3d) 23 (Q.B.) and *Davidson v. Patten* [2005] A.J. No. 842, 2005 ABQB 519, 381 A.R. 1, 141 A.C.W.S. (3d) 372 at para. 28: "Court Runner Expense. Court Runner Expense is not allowed because it is part of normal office overhead."

Searches -

a/ **Identification of Parties to Action** - searches at Corporate or Personal Property or Vehicle Registry, the Court, Land Titles office etc. for the purpose of identifying or locating parties to an action are generally acceptable.

b/ **Civil Juror Background Investigation** - searches for the purpose of investigating the background of jurors prior to civil jury trial selection are recoverable within reason if to the end of corroborating or challenging any statement a juror might make during the selection process.

Note comments on GST on searches, above at page D-11.

Scanning / Conversion of Paper to Electronic Format / Electronic Discovery - (see too "Document Production") - Scanning of documents into an electronic form has become a common litigation practice to facilitate the more efficient management and use of data in litigation proceedings, especially ones which are particularly document intensive. Associated with the scanning process (which requires hardware and software) is the use of optical character recognition software, the indexing of the scanned documents and the management of the data for use in the discovery and evidentiary aspects of the litigation.

How Much? Missing in any of the case law we have reviewed is a general rule as to what cost is to be allowed for all of the above-described. In just the past year or two the costs associated with this process have dropped dramatically as the technology has matured, as firms have gained experience in the use of the technology, and as standards have been set by regional court systems and, in recent years, across Canada.

One of the writers has canvassed a number of Edmonton and Calgary firms in the past two years in an effort to seek a consensus as to the actual cost to the client of the use of these technologies. Almost all of the cost falls into the category of "overhead" expense (labour, software, training) as opposed to out-of-pocket expense (paper, ink, non-reusable storage drives).

As noted under photocopying, fax, laser print charges there are differing opinions from the Court as to what is and what is not recoverable as "costs" for these (as now characterized by the new ***ARC***) "other charges."

In most "large" litigation files where electronic production of documentation is in the thousands, tens of thousands, or more, it is customary for the Court to hear argument from the parties and set an amount.

Left to our own devises, these assessment officers have resolved to allow the same amount for electronic paper production as we allow for photocopying, fax and print-copying: presently **$0.15/page**.

Costs Allowed: In *Murphy Oil Canada Ltd. v. Predator Corp.* [2005] A.J. No. 721, 2005 ABQB 134, 379 A.R. 389, 138 A.C.W.S. (3d) 28 the Court considered this practice and concluded:

> "[37] The Plaintiffs claim costs in relation to copying, imaging and converting paper records into electronic form. Predator complains that this was done at the discretion of the Plaintiffs rather than pursuant to an order and that there is no evidence as to the number of pages copied or at what cost.
>
> "[38] Virtually all of the documents from the Predator affidavit of records were imaged. This amounted to 21,580 imaged pages and undoubtedly saved all of the parties time and money. Litigants should be encouraged to take steps that will reduce trial time greatly. Cost recovery serves as such encouragement. In my view costs of this nature are reasonable in preparing for trial in litigation of this magnitude. Also see: *J.S. v. Clement* [1995] O.J. No. 1849 (Ont. Ct. G.D.)."

The J.S. decision, at paragraph 15. recognized that in this era costs of scanning and optical character recognition and data management ought to be recoverable:

> ". . . The taxing officer shall provide reimbursement to the plaintiffs for the reasonable cost of the

scanning of documents, the optical character recognition of documents and the costs of the related software for managing the scanned documents, . . .

"Such costs are in my view a reasonable cost of preparing for trial in a computerized era."

In support of compensation of such costs see too: *Clarke v. Bean*, 2010 ABQB 112, [2010] A.J. No. 169 (Q.B. / Wachowich, J.)

And Not: Of a contrary view is *Do v. Sheffer*, 2010 ABQB 422 (Q.B) in which a one person law firm sought, on behalf of its client, reimbursement of the cost of hiring a 3rd party to undertake the scanning and organization of documents pertinent to the litigation. The court characterized these as overhead expenses not recoverable as a disbursement:

"Document Scanning and Document Organization Disbursements of $3,002.42 and $2,699.55 - Conclusion

"[21] With respect to this matter, I conclude that it is not appropriate to have the unsuccessful party pay what is essentially office overhead to the victorious party's law firm. The *Rules of Court* contemplates certain proper litigation disbursements, whether the Plaintiff's counsel is a large law firm or a one person law firm such as is presently the case. There can be no difference in this regard between the divergent size of law firm. There is not one rule for single person law firms, for medium sized law firms, and for national size law firms. The resources that go into managing the file in conducting the trial are matters of compensation as between the client and the solicitor. It cannot as such be passed on as a disbursement as is proposed by the Plaintiff in this case.

". . .

"[23] Accordingly the cost of software document organization and scanning is not allowed in either instance."

Collaboration of Litigants I.O.T. Reduce Costs: For an example of counsel collaborating relative to the exchange of electronic information/documents/data in an effort to reduce discovery (& ultimately trial) costs see *Enbridge Pipelines Inc. v. BP Canada Energy Co.* [2010] O.J. No. 4397, 2010 ONSC 3796, Ontario Superior Court of Justice, Commercial List. Counsel entered into a Discovery Agreement which followed the spirit of the Sedona Canada Principles (see http://www.cba.org/CBA/practicelink/tips/sedona.aspx for more information) established, if we understand correctly, in an effort to provide practical advice and best practices on how to handle electronic discoveries. While clearly more common to large, document intensive litigation cases, such practice may be practical in more moderately document intensive cases. We will keep an eye on developments in this area.

Service Fees - See "Postage" or "Process Server", above.

Stationary - Letterhead, paper, envelopes and the like are still treated as overhead and not recoverable as separate disbursements. However, see "Binding Charges", above.

Tabs - The cost of tabs used for written submissions or the presentation of case authorities, etc. may be recovered in circumstances where they cannot be reused. Again, within reason.

Telephone **(long distance)** - Usually allowed, subject to ensuring that the calls were for legitimate purposes directly related to the legal proceeding and not just commiserating over the nefariousness of the opposing party. Also, long distance telephone charges are not recoverable when they are the consequence of "out-of-town" counsel for whom the costs of being from out-of-town have been deemed unjustified or non-compensable. Further, this is not the place to attempt recovering the cost of the your cell-phone plan, however disenchanted you may be with your telecom service provider.

Transcripts - The costs of transcripts, on a party and party basis, if produced by an **official court reporter**, are governed by **Schedule B**, **Division 4**.

If produced by a **private court reporter** the **Schedule** does not necessarily limit the cost of transcripts, though it is suggested that it be used as a guideline.

Allowance of the cost of transcripts will vary depending upon the circumstance:

Transcripts of **Part 5 Discoveries** would be allowable under most circumstances as being vital to preparing for an application or trial. Usually the costs of transcripts of discoveries are only disallowed when the Court has so directed or has expressed specific concern as to the utility of the examinations.

Transcripts of **trial proceedings** may be allowed on an appeal from the trial, but, should not be allowed for merely anticipating an appeal (*Westco Storage Ltd. V. Inter-City Gas Utilities Ltd.* [1988] 4 W.W.R. 396, (Man.Q.B.), Schwartz, J., at p.406).

Transcripts of **trial proceedings on a daily basis**, even when provided to the judge daily, will normally be deemed a luxury and will not be allowed (*Creighton v. Clark* [1935] 2 W.W.R. 649, (B.C.C.C.); *Chicago Blower Corp. v. 141209 Canada Ltd.* [1986] 6 W.W.R. 143, (Man.Q.B.); *Hamelin v. Canada*[1997] A.J. No. 304 (Q.B.) Clarke J. at para. 11-13) unless specifically requested by the Court or agreed to between the parties (*Creighton v. Clark* (above) & *NPS Farms Ltd. v. E.I. du Pont Canada Co.* (2008), 2008 CarswellAlta 94, 2008 ABQB 69 (Q.B.)); *Nova* (above) - "Having regard to the length of the trial and the technical nature of most of the evidence, it was virtually imperative that this be done."). In *Elliott v. Hill Bros. Expressways Ltd.* 1999 CarswellAlta 292, 240 A.R. 371 the court acknowledged that daily transcripts may have been useful, but not necessary. Moreover, the lawyer did not share them with opposing counsel or the court, so not allowed.

However, in *Marathon Canada Ltd. V Enron Canada Corp.* [2008] A.J. No. 1468, 2008 ABQB 770, 100 Alta. L.R. (4th) 356, T.F. McMahon J. reviewed *Lauzon v. Davey,* [2007] A.J. No. 212, 2007 ABQB 121; *H.(S.G.) v. Gorsline*, [2001] A.J. No. 1021, 2001 ABQB 671 as disallowing daily transcripts and *Millott (Estate) v. Reinhard* [2002] A.J. No. 1453, 2002 ABQB 998, [2003] 3 W.W.R. 484 (Q.B.) and *Sidorsky v. CFCN Communications Ltd.* 1995 CarswellAlta 86, 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, [1995] 5 W.W.R. 190 (Q.B.) as allowing them. The court concluded:

> "Here, the daily transcripts were a valuable tool for counsel in preparing for both examination in chief and cross examination. An electronic copy was provided to me which gave me an important search capability. In document intensive and complex trials, the use of real time reporting is to be encouraged. I allow this claim."

Of significance in the allowance of daily transcripts seems to be the size and complexity of the proceeding together with (a) the degree to which the transcripts are share with the court and (b) their utility to all involved in reaching are more speedy resolution of the dispute.[1]

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[1] See also Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. 2010) at 219.6(2a)

Travel Expenses - "Mileage" for travel by private auto by a witness or juror is, as of December 2010, **50.5 cents** per kilometer. Mileage for a solicitor, where allowed, is the same. The amount will vary as **Schedule B, Division 3, Item 19(b)** is tied to the *Subsistence, Travel and Moving Expenses Regulation* under the ***Public Service Act*** - Part 6 - S. 15. It is, therefore, worthwhile to occasionally check the Regulation.
The regulation may be found at **http://alberta.ca** and progressing through the site in the following order: Government > Corporate Human Resources > HR Practitioners > Directives, Regulations, . . . > Regulations > Public Service Subsistence . . . and by clicking on "Part 6 - S. 15".

Airfare on Regularly Scheduled Air Carrier: Note that **Schedule B, Division 3**, **Item 21** of the new ***ARC*** allows for airfare if the distance traveled will exceed 200 kilometres and a regularly scheduled air carrier is available:

> "If a witness has to travel over 200 kilometres and uses a regularly scheduled air carrier, the witness is to be reimbursed the reasonable airfare actually paid by the witness."

Witness Allowances - (formerly known as "Conduct Money")

Former **Rule 204** has been replaced with:

> **Part 5: Disclosure of Information, Subdivision 3: Questions to Discover Relevant and Material Records and Relevant and Material Information - Rule 5.21** which provides for serving a person with a notice of appointment for questioning and requires the payment of a witness allowance per **Rule 6.17**.
>
> and
>
> **Part 6: Resolving Issues and Preserving Rights, Division 1: Applications to the Court, Subdivision 5: Procedure for Questioning - Rule 6.15** which requires the service of a notice of appointment for

questioning and **Rule 617** which requires that an allowance must be paid with and when a notice of appointment for questioning is served, unless dispensed with by the Court.

Rule 6.17(3) states that the allowance to be paid is "the amount determined under Schedule B" or "if there is a dispute over the amount to be paid, the amount ordered by the Court."

In the absence of a Court set amount for a witness allowance, it is helpful to be familiar with **Rules 13.32** and **13.33** of **Part 13: Technical Rules, Division 5: Payment of Fees and Allowances, and Waivers of Fees**. **Rule 13.32** states:

> **(1)** In every action, application or proceeding in Court, there must be paid to the . . . appropriate person the fee specified, referred to or determined in accordance with Schedule B . . ..

Rule 13.33 states:

> **(1)** If the amount of a fee, allowance or other amount is uncertain or impossible to determine, the fee or amount may be estimated by the court clerk and adjusted when the fee or amount is fixed by a judge.
>
> **(2)** When a person is paid or given an allowance before actual attendance at an application or proceeding conducted under these rules, the person is entitled to receive an additional sum that is determined to be payable after completion of the attendance.
>
> **(3)** When a party is permitted or required to pay an allowance, that party may have the amount fixed by an assessment officer without notice to any other person, subject to adjustment after completion of the actual attendance.

In other words,

(1) the tendered witness allowance should comply with **Schedule B, Division 3: Allowance Payable to Witnesses in Civil Proceedings** (reviewed below);

(2) if the tendered allowance does so comply, the recipient should attend even if the amount seems insufficient, and the amounts sufficiency may be determined after the attendance (or at the attendance, if before a master or judge);

(3) if the party paying the allowance is unsure what amount is in compliance with **Schedule B** or anticipates the recipient will take exception to the amount the payor proposes the amount may be fixed by the assessment officer without notice to the recipient, and adjusted after the actual attendance.

(i) The assessment officer will usually require an affidavit setting out relevant facts -
- the residence or current location of the recipient,
- the cost of regular commercial airfare if recipient is located more than 200 km from where the questioning or other form of appearance will occur,
- how long the recipient is realistically expected to be displaced on account of the questioning or other form of appearance,
- any thing else of relevance;

(ii) The assessment officer will provide a certificate detailing the amount to be paid to the recipient and reciting the provisions of **Rule 13.33** which should be served on the recipient together with the fixed amount.

Schedule B, Division 3, Items 16 to 21 stipulate or have resulted in assessment officers Christensen & Morin arriving at the following figures:

Witness Allowances at a Glance *As of Nov 1, 2010*

Description	$$	Source / Details
Witness Fees		Schedule "B", Division 3, Items 16 & 20
Witness Daily Fee	$50.00	• Witness who is a party to the action, or who is not a party and is not called as an expert. • Includes travel days. • Plus meals, travel & accommodation.

	Expert Witness Daily Fee	$100.00	• Witness who is not a party to the action and is called as an expert. • Includes travel days. • Plus meals, travel & accommodation.
Meals			Schedule "B", Division 3, Item 18: Same rate as is paid to Government employees under regulations per *Public Service Act* or successor Act.
	Breakfast	$9.20	
	Lunch	$11.60	Assessment officers use the Public Subsistence, Travel and Moving Expenses Regulation under the *Public Service Act* - Part 4 - S. 8.
	Dinner	$20.75	It may be viewed at **http://alberta.ca/home** and progressing through the site in the following order: Government > Corporate Human Resources > HR Practitioners > Directives, Regulations, . . . > Regulations > Public Service Subsistence . . . and by clicking on "Part 4".
	Total Daily	$41.55	
Travel	Public Transportation		Schedule "B", Division 3, Item 19 (a): train, bus, other public transport . . . "the reasonable fare actually paid" & Item 21: air fare if over 200 km . . .
		Bus Fare	Local: Bus Fare (Edmonton currently $2.75 each way) or taxi if unable to take bus or drive
		Air Fare	Long Distance: Anything over 200 km. Air Fare (regularly scheduled air carrier) & Shuttle (currently $25.00 round trip / $15.00 one way)
	Private Automobile	$0.505	Schedule "B", Division 3, Item 19 (b) Private Automobile, s. 15 of the Subsistence, Travel and Moving Expenses Regulation under the *Public Service Act* - Part 6 (subject to Item 21 re: airfare). It may be viewed at **http://alberta.ca** and progressing through the site in the following order: Government > Corporate Human Resources > HR Practitioners > Directives, Regulations, . . . > Regulations > Public Service Subsistence . . . and by clicking on "Part 6".
Accommodation			Schedule "B", Divison 3, Item 17, Such amount as "assessment officer considers reasonable."
	Private: (relative/friend)	$20.15	Assessment officers use the Subsistence, Travel and Moving Expenses Regulation under the *Public Service Act* - Part 4 - S. 9. It may be viewed at **http://alberta.ca** and progressing through the site in the following order: Government > Corporate Human Resources > HR Practitioners > Directives, Regulations, . . . > Regulations > Public Service Subsistence . . . and by clicking on "Part 4".
	Public: (hotel/motel) Edmonton's Rate (add GST of 5% & Hotel Tax of 5%)	$140.00	Survey conducted by Edmonton Assessment Office annually.

FAQs Relating to Conduct Money *(by no means comprehensive & subject to the Court's interpretation of the new Rules of Court - we have been advised to tread carefully in applying judicial interpretation of the old Rules of Court to the new Rules)*:

Are there hard and fast rules for fixing witness allowances?

See discussion above regarding rules **5.21** and **6.15 - 6.19** and **13.32 - 13.33**.

If a party to the action moves out of the jurisdiction during the course of the action, is the allowance payable from the new residence or the old?

In *F.G. Bradley Co. v. Maxwell Taylor's Restaurant Inc.* 1984 CarswellAlta 493; 53 A.R. 79 Master Breitkreuz concluded that (to quote the head-note), "For the purposes of conduct money for attendance on a cross-examination in interlocutory proceedings, a corporation is required to make its officers available as of the place of its head office. Where the company changes the address of its head office after the commencement of the transactions giving rise to the lawsuit, it is entitled to conduct money from the new address."

We are confident we can find case law reaching the same conclusion relative to a non-corporate recipient of an allowance.

If the deponent of an affidavit is from out of the jurisdiction, from where is the witness allowance payable when questioning on the affidavit?

In *Canada (Attorney General) v. Sandford* [1995] A.J. No. 847, 34 Alta.L.R. (3d) 170, 175 A.R. 118, 41 C.P.C. (3d) 162 (Edmonton Q.B.) S took out student loans from a bank, ceased full time schooling, made no payments on the loans, whereupon the bank assigned the loans to C. S defended on the grounds that there was no proof of assignment to C and that C was statute barred. C brought an application for summary judgment, the deponent of its supporting affidavit being from Ontario. Ordered that S only had to pay conduct money from C's office in Calgary because the loan transactions took place in Calgary and there was no information to suggest that there was no Federal Employee in Edmonton or Calgary who could do the same thing the Ontario deponent did with the defendant's file and swear the same affidavit.

In *Peckford Consulting Ltd. v. Akademia Enterprises Inc.* (1997) 205 A.R. 239, 52 Alta. L.R. (3d) 324, 12 C.P.C. (4th) 145 (Q.B.) the applicant wanted to examine a deponent who was in Singapore and was ordered to pay for the return trip to Canada or the cost of a teleconference or a conference call.

In *Total Client Recovery (ALB) Ltd. v. Oxford Development Group Inc.* [1999] A.J. No. 41, 240 A.R. 387 (Q.B.) Master Quinn understood Canada v. Sandford to mean that "where the party relying on an affidavit insists that the deponent, who does not reside at the site of the action, is the only person who can swear a proper affidavit, that party will have an onus of satisfying the court on that point. If they do not satisfy the court, proper conduct money will be determined on some basis more amenable to the party being required to pay the conduct money." T was an Ontario company registered and carrying on business in Alberta. O leased from T and commenced the action for a declaration that it was entitled to carry on its lease notwithstanding T's termination of it. T's president, a resident of Ontario, filed an affidavit. Ordered that O must pay conduct money for T's president's from Ontario as he was the one who had done all of the dealings and negotiations with O of the lease - no one else could properly answer really important questions in dispute.

If a party wishes to examine an officer of a corporation, from where is the allowance payable?

In *Pacific Engineering Ltd. v. Pine Point Investments Ltd.* (1968), 66 W.W.R. 244, a NWT decision by Moore J. (as he then was) using the Alberta Rules of Court PE's corporate head office was in Calgary, PP's head office was in Edmonton, the subject matter of the litigation was property in the NWT, and the officer of PE which PP wished to examine lived in B.C. Ordered that "the ends of practical justice are better served to require a corporation to make its officers available as of the place of the head office, in this case Calgary."

Can the wage loss of factual witnesses constitute part of the allowance to be paid?

In *Sidorsky v. CFCN Communications Ltd.* 1995 CarswellAlta 86; 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, [1995] 5 W.W.R. 190 (Q.B.) McMahon J. - reversed in part on unrelated matters [1997] A.J. No. 880; 53 Alta.L.R. (3d) 255; 206 A.R. 382; 40 C.C.L.T. (2d) 94, (C.A.) - permitted this, but only after the conclusion of the action and for unique circumstances. The Court concluded that the tenant witnesses “had been poorly treated by the plaintiffs. They have suffered enough loss without having to incur further loss as a consequence of giving testimony.” An assessment officer will not be allowing this expense without some direction from the court.

Is a witness who attempts to but for reasons beyond its control is unable to attend a hearing entitled to its allowance?

In *Union Investment Co. v. Pullishy* 1908 CarswellAlta 45; 1 Alta. L.R. 489, 8 W.L.R. 530; Alberta Supreme Court (Trial Division) Harvey, J. considered and allowed conduct money in a circumstance in which,

> “The plaintiffs attempted to examine some of the defendants for discovery. Owing to snow blockades, or other interruptions of train service, they were not able to attend at the time appointed, but having attended as soon after as they were able they claimed a further sum than had been paid them for conduct money. The plaintiffs refused to pay this and abandoned the examination. It is contended that, having failed to appear at the proper time, they are not entitled to this sum.”

If you have tendered an allowance for examinations for discovery or on affidavit are you entitled to an immediate accounting of the use of those monies or, if the recipient of the allowance, to

the immediate provision of any deficiency in the witness allowance?

The most succinct answer is found in Stevenson & Côté, ***Civil Procedure Handbook 2010***, at r. 13.33 - "Uncertainty of Amount of Fees and Allowances":

> "A witness's allowance is only an estimate of the fees and disbursements which a witness will be entitled to. In most cases that estimate must be paid to the witness in cash before the witness is obliged to attend. . . . But, *once the case is over*, there has to be an accounting: the witness will have to refund any excess (says judge-made law), and will be entitled to be paid any shortfall (says R. 13.33(2)). Costs taxable [assessable] by a winning party against a losing party at the end cover everything payable to the witnesses, and so include full witness fees and expenses, not merely what was tendered as conduct money [witness allowance]." *[Emphasis is added]*

This does not accord with the strict wording of **Rule 13.33(2) or (3)**, which makes reference to a review "after completion of the attendance". However, a review of Alberta case law suggests that unless (a) a significant disparity exists and (b) you can convince a court to hear your application for an accounting or directing the matter to assessment for an accounting, you must await the conclusion of the action to obtain an accounting.

(see Accommodation, Meals, Travel, Witness Fees)

Witness Fees & Expenses - Witnesses now fall into one of only two categories (the "professional witness" category has been removed):

1/ **Witness** -

(a) A *witness who is a party to the action:* entitled to $50.00 per day witness fee (inclusive of travel days) plus meals, travel and accommodation (**Schedule B, Division 3, Item 16**).

(b) A *witness who is not a party to the action and is not called as an expert* - an example would be an orthopaedic surgeon who witnessed a defendant's car hitting a plaintiff's car and is attending to provide factual evidence regarding the incident: in which case the witness would be entitled to the $50 per day witness fee plus meals, travel and accommodation (**Schedule B**, **Division 3**, **Item 16**).

2/ **Expert Witness** - A *witness who is not a party to the action and is called as an expert* - an example would be an orthopaedic surgeon who, even if a witness to the accident or one who treated the plaintiff for his/her injuries, is called as an expert to provide opinion evidence, for example, as to the disabling effects of the plaintiff's injuries: in which case the witness would be entitled to the $100 per day witness fee (inclusive of travel) plus meals, travel and accommodation (**Schedule B**, **Division 3**, **Item 20(a)**).

Item 20(a) (daily witness fee of $100.00 plus meal, travel and accommodation expenses) is what the expert is entitled to in order to "secur[e] the attendance of the expert." However, **Item 20(b)** provides that, in addition, the expert "is entitled to . . . the reasonable fees that the Court may order under rule 10.31(1)(a) or the assessment officer may fix under rule 10.41."

Note that **Rule 10.41(2)(e)** precludes an assessment officer from allowing "the fees and other charges of an expert for an *investigation or inquiry*, or the fee and other charges of an expert for *assisting in the conduct of a summary trial or a trial*" unless "the Court otherwise orders." Therefore, it would appear that without an order of the Court the assessment officer has no authority to allow the recovery of any expert charges in excess of **Item 20(a)** - $100.00 plus travel, meals and accommodation.

According to the "Note" in **Division 3** of **Schedule B**,

> "Allowances to witnesses may be increased under special circumstances ***by a judge***."

The assessment officer requires some form of direction from the Court implying the grant of such an increase. The Courts have, in the past, strongly suggested that simply granting "all reasonable disbursements" serves to negate the strictures of **Schedule B**, **Division 3** so far as expert witnesses are concerned.

On whether costs can be recovered for a witness who was not ultimately called to testify, the consensus is that not being called is not fatal to the recovery of their charges & expenses. Each claim has to be assessed on its own merits. See: *Van Daele v. Van Daele* (1983) 45 C.P.C. 166 (B.C.C.A.); *Monashee Petroleums Ltd. v. Pan Cana Resourses Ltd.* (1988) 85 A.R. 183 at 192-3 (C.A.); *Petrogas Processing Ltd. v. Westcoat Transmission Co.* [1990]

A.J. No. 317; [1990] 4 W.W.R. 461: 73 Alta.L.R. (2d) 246; 105 A.R. 384; *Hetu v. Traff* [1999] A.J. No. 1270, 1999 ABQB 826 (Q.B.); *S.F.P v. MacDonald* [1999] A.J. No. 478; and Stevenson & Côté, ***Civil Procedure Handbook 2010***, at r. 10.31(6) - "F. Disbursements." For more detail refer to "Point in Time", above at page D-4.

In *Viridian Inc. v. Dresser Canada Inc.* [1998] A.J. No. 947, 1998 ABQB 687, 1998 CarswellAlta 797, 82 A.C.W.S. (3d) 26 (Q.B.) Côté, J.A. sitting in Q.B., in considering whether costs should be allowed for two experts and the level of preparation counsel should be permitted, stated:

> "4 It is trite law that the question is not what was necessary, still less how much hindsight suggests was really necessary. The question is whether what was done, and the money that was spent at the time, were reasonable, given the state of knowledge then existing. It is not appropriate for me to state my own views on the substantive issues, such as whether extrinsic evidence was useful on all these points, as contrasted with a matter of interpreting a document which is often just a matter of law. The law on that subject is not plain, and experts are often called to testify on such topics. Not every judge seems to share the view that a lot of this evidence is unnecessary. Counsel preparing for trial had to be ready to meet any of these viewpoints in whoever turned out to be the judge. And of course counsel had to be prepared to meet unexpected arguments and pieces of evidence and cross-examination."

Stevenson & Côté, ***Civil Procedure Guide*** (1996) p. 1938 notes:

> "If the winning party is legally obliged to pay witness fees they are properly costs even if they were not demanded at the time: U. Inv. Co. v. Pullishy (1908) 8 WLR 530, 1 Alta LR 489."

That is, if you are awarded costs, and a witness of yours was produced at Examinations or Trial without making any demand of the other side for conduct money, you are still entitled to recover the proper costs of producing that witness.

On the cost of keeping track of witnesses *Sidorsky v. CFCN Communications Ltd.* 1997 CarswellAlta 772, 53 Alta. L.R. (3d) 255, [1998] 2 W.W.R. 89, 206 A.R. 382, 156 W.A.C. 382, 15 C.P.C. (4th) 174, 40 C.C.L.T. (2d) 94 (C.A.), at paragraph 44 stated:

> "Frequently, keeping a list of the current addresses of witnesses is simply part of the overhead of a law firm and should not be the subject of a separate disbursement. As such, it should be included as part of the party and party costs award."

That is, "included as part of the" **Schedule C** fee (see **Schedule C, Division 1, Rule 2**).

Fees and Expenses for Witnesses and Interpreters Regulation, Alta. Reg. 123/1984: note that the $75.00 per hour allowed to a Professional or an Expert witness under this regulation relate to

> (a) a witness who attends for the purpose of giving evidence on behalf of the Crown in criminal proceedings, summary conviction appeals, preliminary inquiries, summary trials of indictable offences and summary convictions, or
>
> (b) a witness who attends for the purpose of giving evidence in a proceeding on behalf of a director or on behalf of the Child and Youth Advocate as defined in the Child, Youth and Family Enhancement Act.

Otherwise, **Schedule B, Division 3** allows only $50.00 or $100.00 per day.

Word-Processing Charges - Assessment officers allow $0.10/page for "print/laser copying", as noted under the heading by the same title. The extent to which an attempt is made to recover for secretarial charges for "word-processing" there is no charge allowed.