COURT OF QUEEN'S BENCH
COSTS MANUAL

COSTS BETWEEN PARTIES
RECOVERABLE COSTS OF LITIGATION

Updated September 29th, 2010

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

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

Note the **Disclaimer** at the bottom of this page.

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

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

Introduction to Costs

Assessment of Costs

Schedule C

Disbursements

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

Disclaimer

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

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

COURT OF QUEEN'S BENCH COSTS MANUAL

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Introduction to Costs

A BRIEF OVERVIEW OF RECOVERABLE COSTS OF LITIGATION

This section of the Costs Manual attempts to answer questions about what costs are, why costs exist, the underlying principles of costs, and who or what determines who gets costs, when and for how much.

Because this manual is prepared by the Assessment Office it focuses less on judicial awards of costs (those made by a Master or Judge) and more on what happens when the judiciary or circumstance leave it up to an assessment officer to determine who is to receive the recoverable costs of litigation, how much, and when.

But first, some generalities.

What Are Costs?

Parties to any Court proceeding incur **expenses** in prosecuting or defending a legal dispute: filing fees, travel expenses, lawyer fees and expenses, witness expenses and charges, et cetera. The Court – or, in the absence of a direction from the Court, the default provisions in the ***Alberta Rules of Court*** (***ARC***) – may require that one party pay all or part of the other party's expenses: these are referred to as **"costs"**.

Within the ***ARC*** these expenses are referred to as "*costs*," "*recoverable costs of litigation*," and "*costs awards*." Which word or phrase is used depends upon context and grammatical propriety, but each refers to the **expenses** incurred during the course of litigation between two or more litigants/parties.

Why Do Costs Exist?

In *McCullough Estate v. Ayer* [1998] A.J. No. 111; 212 A.R. 74; 22 E.T.R. (2d) 29 the Court of Appeal identified **two reasons** for the existence of "costs". At paragraph 29:

> "Costs exist primarily for two reasons. First, to take some of the burden off victors, ensure that not all victories are pyrrhic [won at excessive cost], and so to encourage those who are right to persevere. And, second, to deter those who are wrong."

In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, at para. 26 [as quoted in Orkin's ***The Law of Costs*** (2nd e., 29th rel. August 2010) 101] the Supreme Court of Canada "discussed the policy objectives underlying the modern approach to costs" which dovetails nicely with the above quote of the Alberta Court of Appeal:

> "Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs."

Three Underlying Principles of Costs

When contemplating any issue or question related to the recoverable costs of litigation three underlying principles of costs have to be considered:

1. Indemnification: has any loss or expense been incurred?
2. Costs belong to the litigant.
3. Discretion of the Court: has the Court addressed its mind to the issue of costs?

1. ***Indemnification*** *(compensation for a monetary harm or loss)*

Whether a party entitled to recover costs from another party has actually incurred any loss or expense is a question fundamental to determining their entitlement to costs and how much they can recover. That is, a party may *not* recover more in costs than he/she/it actually incurred in **expenses**, unless otherwise ordered by the Court. So, if a party's expenses total $4,000, the party cannot recover $4,500 in costs. The level of indemnification is subject to the Court's discretion but is most commonly limited to only a *portion* of what a

party may have actually paid. In unique circumstances the court may award costs which fully indemnify or compensate a party for *all* expenses incurred. On rare occasion the Court may deviate from the principle of indemnification and use costs as a means of punishment or deterrence. Such a departure must be specifically ordered by the Court. A more detailed explanation is provided below in "What is the Principle of Indemnification?", at p. 4.

2. ***Costs Belong to the Litigant***

Costs to which a litigant becomes entitled belong to the litigant, save when legislation dictates otherwise. In Orkin's ***The Law of Costs*** (2nd e., 29th rel. August 2010) 204 it states:

> "Costs are wholly the moneys of the client, and not of his or her legal representative, even though they may be recovered under the name of solicitor's fees or fees paid to counsel, sheriff or other officer."

Some legislation, such as the *Legal Aid Act*, R.S.O. 1990, c. L.9, 2.19, may provide that costs are the property of someone or some entity other than the litigant.

The fact that by means of a retainer agreement a litigant has contracted that recovered costs will constitute compensation of a lawyer does not appear to detract from this basic principle. This can become relevant when it comes to the payment of costs to a litigant who, for example, has dismissed its lawyer or who disputes the lawyer's claim of entitlement to the costs.

3. ***A Successful Party is Entitled to Costs, Subject to the Discretion of the Court***

Rule 10.29(1) grants a "successful party to an application, a proceeding or an action" an automatic and binding **entitlement** or **right** "to a costs award against the unsuccessful party." It further stipulates that "the unsuccessful party must pay the costs **forthwith**." (Emphasis added) This right to partial or complete indemnification of a successful party's costs and to payment without undue delay is subject to, primarily, the general discretion of the Court to order otherwise under **Rule 10.31**. The "subject to[s]" are the following:

> "(a) the Court's general discretion under rule 10.31 *[Court-ordered costs award]*,
>
> "(b) the assessment officer's discretion under rule 10.41 *[Assessment officer's decision]*,
>
> "(c) particular rules governing who is to pay costs in particular circumstances [see **Rules**
> **3.66**: costs of an amendment to be borne by party amending,
> **4.29**: entitled to double costs re formal offer to settle,
> **4.36-37**: entitlement to costs on discontinuance,
> **5.12**: possible costs penalty for failure to serve affidavit of records,
> **5.17(2)**: costs of questioning 2nd and subsequent persons to be paid by questioning party,
> **5.21**: allowance to be paid together with appointment to question - Part 5,
> **5.40**: party requesting an expert's attendance for cross-examination must pay expert's costs,
> **5.43**: costs associated with medical examinations,
> **6.17**: allowance to be paid together with appointment for questioning - Part 6,
> **6.43**: costs of expert to be paid by parties in equal proportions,
> **10.22**: no costs to lawyer or law firm for review of lawyer's charges.]
>
> "(d) an enactment governing who is to pay costs in particular circumstances, and
>
> "(e) subrule (2) [ex parte hearings]."

This rule is a shift from the prevailing position throughout most of Canada (British Columbia excepted) and, until now, even Alberta, that costs are solely in the discretion of the court, subject to "express provision to the contrary in any enactment."

In Mark M. Orkin's, ***The Law of Costs*** (2nd e., 29th rel. August 2010) 202.1 the general rule and its exceptions are detailed:

> "A successful litigant has by law no right to costs. That being said, the general rule is that costs follow the event. However, although a litigant may have a reasonable expectation of receiving them, this is subject to what some cases have termed the court's absolute and unfettered discretion to award or withhold costs. The court's discretion to depart from the basic rule, however, must be based upon good reasons. While earlier cases have held that this discretion is absolute, it is now expressly

subject to any statutory provisions or rules of court."

The *Court of Appeal Act*, RSA 2000, C-30, as am., s. 12 and the *Court of Queen's Bench Act*, RSA 2000, C-31, as am., s. 21, are worded identically, and each gives a judge of the respective Court almost **unfettered** discretion to make any order as to costs:

> "Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the discretion of the Court or judge and the Court or judge may make any order relating to costs that is appropriate in the circumstances."

Section 9 of the *Court of Queen's Bench Act*, RSA 2000, C. 31, as am., gives a master in chambers the "same jurisdiction as a judge sitting in chambers" and the exceptions to the masters jurisdiction do not extend to costs. That is, costs of proceedings properly before a master in chambers are in the discretion of the master.

Rule 10.31 affirms the Court's broad discretion to award costs. As explained below in "Who Possesses the Authority to Award Costs?" the Court's discretion is subject to (a) some generally accepted principles and practices, and (b) some specific provisions of the Rules of Court (see page IC-7).

Note too that **Rule 10.31(5)** provides greater clarity as to how the Court may exercise it discretion in awarding costs to **self-represented litigants**:

> "In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C . . .."

Who or What Decides Who Gets Costs? When? And for How Much?

Usually the Court will specify in its decision who is to get costs of an application, a proceeding or an action. Occasionally the Court will also stipulate an exact amount of costs to be received by the party awarded costs: eg. "The plaintiff is awarded costs of $3,500,00, all inclusive." When both of these determinations have been made by the court they are entered directly into the resulting order or judgment which is filed with the clerk of the court and there is no need for a bill of costs or an assessment of costs.

Not infrequently the Court will award costs without being specific about the amount. It may make many different types of directions as to costs which will require the parties, their lawyers and, possibly, the assessment officer to look to the ***ARC*** to determine the amount of the awarded costs. Some times the court does not exercise its discretion at all and is silent as to costs of an application, a proceeding or an action, which, again, requires the parties, their lawyer and, possibly, the assessment officer to look to the rules of court (***ARC***) in order to determine who gets costs, when and for how much. While these scenarios will be addressed in more detail later in this manual, the following is a quick overview of what are commonly referred to as the *default* cost provisions of the ***ARC***:

1. *Who is entitled to costs and when?* As previously noted, **Rule 10.29(1)** entitles the successful party to a "costs award against the unsuccessful party," who must pay the costs "forthwith." This default award of costs does not apply to applications or proceedings heard without notice to the other party, otherwise known as *ex parte* hearings - see **Rule 10.29(2)**. In either circumstance the assessment officer looks to **Rule 10.41** for direction regarding the *default costs* to be allowed.

2. *How much is the party able to recover?* **Rule 10.41(2) defines** "costs" as "the reasonable and proper costs that a party incurred to bring an action" and may also include the costs of "an assessment of costs."

   Subject to directions by the Court to the contrary, there are some **limitations** to the costs an assessment officer can allow under **Rule 10.41(1&2)**:

   1/ **Rule 10.41(3)(d)** dictates that the *fees charged by a lawyer* are limited to the amounts specified in **Schedule C** (see sub-document "Schedule C - Rule 10.41").

   2/ The *charges of experts for attending to give evidence* are limited to the amounts mandated by "**Schedule B, Division 3**". Historically, the Court has almost invariably waived this limitation by pronouncing that "all reasonable disbursements are to be allowed". We will await the Court's practice post November 1, 2010.

3/ The *charges of experts for "an investigation or inquiry" or "for assisting in the conduct of a summary trial or a trial*" are not permitted unless "the court otherwise orders" - **Rule 10.41(2)(e)**. Similarly, the Court has almost invariably waived this prohibition by pronouncing that "all reasonable disbursements are to be allowed". Again, we will await the Court's practice post November 1, 2010.

4/ "Costs related to a *dispute resolution process*" (**Rule 4.10**) or "a *judicial dispute resolution process*" (**Rule 4.12**) are not permitted by an assessment officer - see **Rule 10.41(2)(d)**.

5/ Charges claimed as *disbursements which are actually for the performance of legal services* (see sub-document "Disbursements - Agent's Charges"). A litigant cannot recover as a disbursement lawyer's fees, even when hired as agents, as those charges are already addressed and limited to the amounts prescribed in Schedule C - see **Rule 10.41(3)(d)**.

6/ Charges / costs which *precede the commencement of the "proceeding*" (see sub-document "Disbursements - Incurred Prior to the Action").

7/ **Rule 10.41(3)(b)** requires an assessment officer, in determining whether the costs that a party incurred are "reasonable and proper," to "disallow an item in a bill of costs that is *improper, unnecessary, excessive or a mistake*."

For a more detailed discussion of costs which may not be recoverable without a direction from the Court or the consent of the opposing party, see sub-document "The Assessment of Costs - Issues to be Resolved Prior to an Assessment Hearing".

As demonstrated by the **Post-Judgment** items #13 to #17 in **Schedule C**, *default costs* clearly include the steps taken to enforce a judgment.

When litigants settle the whole or part of an application or proceeding or action they may, or course, make any agreement they want as to the amount one party will pay the other in costs, in which case the assessment officer "must certify the bill of costs under rule 10.43, without change" - **Rule 10.36(1)**. However, if the settlement simply agrees that "one party will pay costs without determining the amount" (**Rule 10.30(1)(b)**) the party entitled to the costs will file an Appointment for Assessment (**Rules 10.36(2)** & **10.37**) and the assessment officer will assess the costs as per **Rule 10.41**.

When litigants discontinue all or part of their action (Rule 4.36) or defence to an action (Rule 4.37) they become entitled to costs. If they are unable to reach agreement as to the amount of those costs the party entitled to the costs would follow the same procedure as noted above when litigants settle.

Costs in a Class Proceeding are addressed in **Rule 10.32**.

WHAT IS THE PRINCIPLE OF INDEMNIFICATION?

The Traditional Definition of party-and-party or litigation costs has been that found in *Harold v. Smith* (1860) 5 H. & N. 381 at 385, 157 E.R. 1229 at 1231, Bramwell B. – it is premised upon the principle that one cannot recover in costs more than one has incurred in expense:

> "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained."

As noted by Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. August 2010) at 204 the courts have recently started to treat costs with somewhat different objectives in mind:

> "Traditionally, the fundamental principle of costs as between party and party has been that they are given by the court as an indemnity to the person entitled to them; they are not imposed as punishment on the person who must pay them, or on the person's lawyer. The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called 'outdated' since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexatious litigation and to discourage unnecessary steps."

In *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81, 203 D.L.R. (4th) 157, [2001] 5 W.W.R. 448, 89 Alta. L.R. (3d) 289, 277 A.R. 333 our Court of Appeal, at para. 8, validates this shift in the ends to which costs are awarded and notes that it was for this purpose that our former **Rule 601** (now **Rules 10.31 & 10.33**) was amended in 1998:

> "The various principles underlying costs set out in r. 601(1) [now r. 10.33] also support Ms. Dechant's argument that indemnity is not the only rationale for a costs order. An ability to award costs serves many objectives. Costs provide partial indemnity for legal fees incurred, encourage settlement, and discourage frivolous actions as well as improper and unnecessary steps in litigation."

Stevenson & Côté, in their ***Alberta Civil Procedure Handbook (2010)*** at r. 10.31, "G. Indemnity as Costs Ceiling," nicely summarizes the status of the principle of indemnification in Alberta in the process of commenting on the compensation of self-represented litigants (now codified in **Rule 10.31(5)**):

> " Costs are ordinarily capped at full indemnity for expenses and should not exceed that. In other words, the winner should at best break even; he or she should not make a profit out of getting costs. However, despite earlier cases, now it seems settled that an award of costs is not limited to disbursements, and may include fees, even if the party getting costs did not hire a lawyer, and represented himself or herself, whether or not he or she is trained in law or belongs to the Bar. That can be based on a number of factors, including lost salary or opportunity costs, degree of complexity, quality of work, lost time, undue consumption of other's time, and reasonableness of conduct.. . . But if the party had a lawyer and did not do the work personally, ordinarily costs are limited to what the lawyer charges; the party cannot make a profit on them."

When is the Principle of Indemnification Negated or Set Aside?

The dilemma for an assessment officer is knowing *when* the Court has *exercised its discretion* to permit costs which exceed the expenses incurred by a litigant. To the end of resolving this predicament a **Rule 10.39** reference was made to the Court seeking its direction. The result is found in *Shillingford v. Dalbridge Group Inc.* [2000] A.J. No. 63, 2000 ABQB 28, [2000] 5 W.W.R. 103, 76 Alta. L.R. (3d) 361, 268 A.R. 324, 42 C.P.C. (4th) 214. *Though somewhat dated and even though costs for self-represented litigants is now specifically addressed in **Rule 10.31(5)**, Shillingford's conclusions and the judicial consideration of them are instructive and provide a convenient framework for explaining exceptions to the principle of indemnification.*

The following is a summary of the Court's directions, some of the case law relied on by it, and some of the judicial consideration of the decision itself (numbers in square brackets "[14]" are references to paragraph numbers):

General Principles

1. Unless otherwise ordered, a litigant's entitlement to costs is dependent upon the recipient having *actually incurred costs* [19 & 29].

See *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81, 203 D.L.R. (4th) 157, [2001] 5 W.W.R. 448, 89 Alta. L.R. (3d) 289, 277 A.R. 333 (C.A.) - "In our view, costs under the *Rules* are still primarily concerned with reimbursement for costs expended and a partial indemnification for legal fees, having regard to value for work." [20] And, *Vysek v. Nova Gas International Ltd.* 2001 CarswellAlta 1148, 2001 ABQB 750, 11 C.C.E.L. (3d) 63 (Q.B) [285]

[Caselaw needs updating]

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2. The principle of indemnification may be *exceeded if costs flow from the application of the compromise rules* – **Rule 4.29** [20 & 29].[1] Formerly **Rule 174** and worded somewhat differently, this rule is now found in Part 4, Division 5, Settlement Using Court Process.

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[1] See *Forster v. MacDonald* [1995] A.J. No. 1063 (C.A.), *Larson v. Garneau Lofts Inc.* 2000 CarswellAlta 1379, 2000 ABQB 857, 275 A.R. 165, 5 C.P.C. (5th) 382 (Q.B.), *Greep v. Josephson* [2001] A.J. No. 388 (Q.B.), & *Hillside Investments Ltd. v. Boychuk* 2002 CarswellAlta 6, 2002 ABQB 26 (Q.B.) in support of this conclusion.

[Caselaw needs updating]

Over indemnification is permitted because the costs associated with **Rule 4.29** are intended to promote settlement and to punish those who fail to compromise [24].

This exception to the principle of indemnification applies whether the costs recipient is (a) represented by a lawyer working pro bono, for a partial fee or under a Legal Aid certificate, or (b) is self-represented [25-26).[1]

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[1] *Huet v. Lynch* [2001] A.J. No. 145, 2001 ABCA 37, [2001] 6 W.W.R. 441, 91 Alta. L.R. (3d) 1, 277 A.R. 104 (C.A.) and *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81, 203 D.L.R. (4th) 157, [2001] 5 W.W.R. 448, 89 Alta. L.R. (3d) 289, 277 A.R. 333 (C.A.) considered the *Shillingford* decision as it related to self-represented litigants generally. Though they did not address a **Rule 174** exception to the principle of indemnification, the decisions would suggest that even when a self-represented litigant has succeeded in obtaining a **Rule 174** award of costs (now **Rule 4.29**) the litigant cannot rely on **Schedule C** unless the Court has so specified; that is, the Court must exercise its discretion to allow more than out-of-pocket expenses.

Observation: **Rule 4.29** "entitles" the plaintiff or defendant to "double" the ordinarily permissible costs. However, the costs which flow from the application of **Rule 4.29** are not allowable by an assessment officer unless specifically ordered by the Court, or acknowledged by the parties. **Rule 10.30(1)** permits parties to appear before the Court to obtain such a direction whether an action has settled, been discontinued or after judgment or a final order has been entered.

3. The principle of indemnification may be *exceeded if the court so directs* [29 & 35]. However, the decision clarifies that the court's direction must provide an "express statement" that costs are to over indemnify (brief reasons for so ordering should be included) [34-35].[1]

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[1] In *O'Leary v. MacLeod* 2001 CarswellAlta 386, 2001 ABQB 239, 287 A.R. 43 (Q.B. Master) the Master provided such an "express statement". Note the wording of **Rule 10.31(5)** which permits the court to grant costs to a self-represented litigant "in appropriate circumstances," implying the need for reasons.

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4. In recognition of

(a) the time and effort expended by a self-represented litigant [55],
(b) the injustice of holding "an unrepresented litigant liable for costs while not offering the benefit of costs" [49], and
(c) the intent of the Rules of Court to "promote settlement and deter frivolous actions" [48],

it is "in keeping with the general spirit and intent of the Rules of Court that the taxation officer should allow *unrepresented litigants the benefits of Schedule C costs* where the judge has directed costs or where they follow success at trial pursuant to the Rules of Court [**Rule 10.29(1)**]" [52].[1]

However, to avoid overcompensation (unless permitted by the costs provisions of **Rule 174** [now **4.29**] or the "express statement" of the court) the taxing officer should allow a self-represented litigant costs at *two-thirds* what would have been allowed a represented litigant under Schedule C [53-56].[2]

[1 & 2] *Huet v. Lynch* (above) and *Dechant v. Law Society of Alberta* (above) considered the *Shillingford* decision as it related to self-represented litigants. Both concur that a self-represented litigant should probably receive something more than mere out-of-pocket expenses, but both, especially *Dechant*, state that Schedule C is not to be applied automatically and that costs to a self-represented litigant should be left to the discretion of the Court. Therefore, if the Court is silent on costs the self-represented litigant may only recover out-of-pocket expenses.

See too **Rule 10.31(5)**.

Also, see Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. August 2010) 209.15, "Party in Person."

Taxing Officers [now assessment officers]

1. "In Alberta it is within the power of the taxing officer, under **Rule 635***, to reduce the party/party costs awarded under Schedule C to assure that an over indemnification does not occur [18]."

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* See an overview of **Rule 635**'s replacement, **Rule 10.41**, at p. 3.

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2. In determining whether a bill of costs over indemnifies a party, the assessment officer is to look at the *"final total"* of the bill of costs, not at whether any particular Item in Schedule C over indemnifies [16].

With rare exception, the *assessment officer does not initiate inquiries* into the issue of over indemnification, preferring to defer that prerogative to the party obliged to pay the costs.

WHO POSSESSES THE AUTHORITY TO AWARD COSTS?

A Default Entitlement to an Award of Costs

As noted earlier, **Rule 10.29(1)** grants a successful party to an application, a proceeding or an action, an *entitlement* or *right* to a costs award which is to be paid by the unsuccessful party *forthwith*. In short, the ***ARC*** authorize, by default, any successful party to an award of costs. The "subject to" provisions in this rule are as follow:

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

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

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

3.66:	costs of an amendment to be borne by party amending,
4.29:	entitled to double costs re formal offer to settle,
4.36-37:	entitlement to costs on discontinuance,
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5.43:	costs associated with medical examinations,
6.17:	allowance to be paid together with appointment for questioning - Part 6,
6.43:	costs of expert to be paid by parties in equal proportions,
10.22:	no costs to lawyer or law firm for review of lawyer's charges.]

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

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

As noted above, at page 2, this *default* entitlement is unique to Alberta's new Rules of Court and, to our knowledge, to the Rules of British Columbia.

Judges – Court of Appeal and Queen's Bench

As previously noted, the *Court of Appeal Act*, RSA 2000, C-30, as am., s. 12 and the *Court of Queen's Bench Act*, RSA 2000, C-31, as am., s. 21, are worded identically, and each gives a judge of the respective Court almost **unfettered** discretion to make any order as to costs:

> "Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the discretion of the Court or judge and the Court or judge may make any order relating to costs that is appropriate in the circumstances."

Further, **Rule 10.29** of the ***Alberta Rules of Court*** provides:

> "(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

"(a) the Court's general discretion under rule 10.31, ..."

And, **Rule 10.31** *(see as well the remaining subrules (2) to (6))*:

"(1) After considering the matters described in rule 10.33 *[Court considerations in making a costs award]*, the Court may order one party to pay to another party, as a costs award one or a combination of the following:

"(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action or incurred by a party to participate in an application, proceeding or action, or

"(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

"(i) an indemnity to a party for that party's lawyer's charges, or

"(ii) a lump sum instead of or in addition to assessed costs."

Rule 10.33 details the considerations the Court may utilize in making a costs award. Instructive is the first paragraph in the "Information Note" to rule 10.33, which states:

"The Court has complete discretion over what to order in a costs award unless a specific rule limits that discretion."

In *Reese v. Alberta* (1993) 5 A.L.R. (3rd) 40 McDonald J. sets out the **general principles** applicable to awarding costs, at page 44:

"While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. It is traditionally accepted in Canada's common law provinces that as a general rule the successful party recovers its costs from the unsuccessful party. However, such recovery is normally on a party-and-party basis. That is, the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees (Schedule C in Alberta's Rules of Court), plus reasonable disbursements. It is not intended that the successful party receive full indemnification of those fees and disbursements which it would be charged by its counsel. In England the degree of indemnification appears to be considerable higher than is normal in Canada. In almost all jurisdictions of the United States of America the rule is that no costs are recoverable by the successful party.

"The Canadian practice reflects an attempt to balance two conflicting interests. On the one hand, it is argued that if a party is successful and there are no circumstances constituting blameworthiness in the conduct of the litigation by that party, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.

"When the case is of considerable magnitude and complexity, the practice in Alberta contemplates that the court may order the unsuccessful party to pay a multiple of the fees that are fixed by Schedule C. But even then it is not intended that there be full indemnity, except in extraordinary circumstances."

As explained by the authors of the ***Alberta Civil Procedure Handbook 2010*** at r. 10.29 - "A. Basic Approach,"

"Many . . . Rules and tariffs appear to set costs, but they do not bind judges or masters; they only bind the taxing officer. Those Rules are a default mode which only applies where the judge or master setting costs has been silent on a topic. . . The trial judge need not use the Schedule, and can award higher amounts, or award costs on a totally different basis."

See too *Dechant v. Law Society of Alberta* [2001] A.J. No. 373, 2001 ABCA 81, 203 D.L.R. (4th) 157, [2001] 5 W.W.R. 448, 89 Alta. L.R. (3d) 289, 277 A.R. 333 (C.A.) at para. 6: "Costs are always discretionary based on the matters set out in r. 601(1) [now r. 10.29(1)(a) plus r. 10.31 plus r. 10.33]. While there is a tendency to automatically order Schedule C costs, these costs are not and should not be treated as automatic." There is substantial intervening Alberta case law supportive of this position.

[Caselaw needs updating]

Nonetheless, the Court frequently defers the quantum of costs to Schedule C fees, "plus reasonable and proper disbursements." Mason, J., in *Pharand Ski Corporation v. Alberta* (1991) 122 A.R. 395, at page 399, considered

circumstances under which the Court might choose to depart from the scale of costs set by the ***Alberta Rules of Court*** (many of which were codified in the 1998 revision of **Rule 601(1)** and now found in **Rule 10.33**):

> "[19] Costs on a party and party scale can, in theory, totally indemnify the successful party. See **N.P.P. and M.E.P. v. Regional Children's Guardian (Calgary)** (1989), 98 A.R. 77; 68 Alta. L.R. (2d) 394 and 398. However, in principle, costs on a party and party scale are awarded on the basis of a reasonable apportioning of the litigation expenses incurred by the successful party, having regard to such factors as:
>
> (a) the difficulty and complexity of the issues;
>
> (b) the importance of the case between the parties and/or the community at large;
>
> (c) the length of the trial;
>
> (d) the position and relationship of the parties and their conduct prior to and during the course of the trial; and
>
> (e) other factors which may affect the fairness of an award of costs."

Summary: Judges of the Court of Appeal or Court of Queen's Bench have broad discretionary power to allow costs,

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See r. 10.29(1)(a) and r. 10.31.

See *Court of Appeal Act*, R.S.A. 2000, c. C-30, s. 12; *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 21; Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. August 2010) 201 & 204; Stevenson & Côté, ***Civil Procedure Encyclopedia*** (Vol. 4), c. 71, "C. Scope of Costs" & "I. Bars to Costs" & ***Handbook 2010***, r. 10.29, "A. Basic Approach;" *Jackson v. Trimac Industries Ltd.* [1993] A.J. No. 218 (Q.B.), at para. 11; *Parkridge Homes Ltd. v. Anglin* [1996] A.J. No. 768 (Q.B.), at para. 8; *Sidorsky v. CFCN Communications Ltd.* [1997] A.J. No. 880 (C.A.), at para. 28.

(a) on a partial indemnity basis,

See r. 10.31(1)(a), (2) & (3).

See *McCarthy v. Calgary Roman Catholic Separate School Board District No. 1* [1980] A.J. No. 55, Sinclair C.J.Q.B, at para. 3 & 5.

(b) where appropriate, on a full indemnity basis, or,

See r. 10.31(1)(b)(I).

See Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. August 2010) 201, 204, 219.1 & 219.1.1; Stevenson & Côté, ***Civil Procedure Encyclopedia*** (Vol. 4), c. 71, "E. Costs As Indemnity" & ***Handbook 2010***, r. 10.31, "I. Full Indemnity Costs;" *McCarthy* (above), at para. 5 to 8; *Wenden v. Trikha* [1992] A.J. No. 217 (Q.B.), at para. 21; *Jackson* (above), whole decision, but especially para. 24; *Sidorsky* (above), at para. 28 to 34.

(c) with strongly mixed opinion, on a punitive or deterrence basis which exceeds indemnification.

See Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. August 2010) 204; Stevenson & Côté, ***Civil Procedure Encyclopedia*** (Vol. 4), c. 71, "E. Costs As Indemnity;" *Collins v. Collins* [1999] A.J. No. 1075 (Q.B.), at para. 12; *Shillingford v. Dalbridge Group Inc.* [2000] A.J. No. 63 (Q.B.).

However, as previously noted, where the Court is silent as to costs of an application, a proceeding or an action **Rule 10.29(1)** entitles the successful party to costs against the unsuccessful party (ex parte hearings excepted), payable forthwith. Whichever circumstance creates the entitlement to costs, the assessment officer looks to **Rule 10.41** for direction regarding the costs to be allowed.

Masters – Queen's Bench

S. 9 of the same *Court of Queen's Bench Act* gives masters the same authority as judges relative to costs of applications within the masters' jurisdiction.

Assessment Officers – Court of Appeal and Court of Queen's Bench

Rule 10.41(2) gives the taxing officer limited authority to allow costs only of assessment of costs proceedings before the Court and assessment of costs proceedings before the assessment officer:

> "(2) Reasonable and proper costs of a party under subrule (1)
>
> (a) include the reasonable and proper costs that a party incurred to bring an action,
>
> (b) unless the Court otherwise orders, include costs that a party incurred in an assessment of costs before the Court,
>
> (c) unless the Court or an assessment officer otherwise directs, include costs that a party incurred in an assessment of costs before an assessment officer, . . ."

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

Assessment by Appointment: Where an assessment necessarily proceeds by way of Appointment for Assessment **Items 6(1)** or **7(1)** of Schedule C would apply, unless otherwise directed by the assessing officer.

Other Courts or Tribunals

Provincial Court judges, arbitrators, mediators, etc. have the authority to award costs as allowed by the legislation and rules of their enabling legislation, or their contracts of engagement, or both, as the case may be.

Agreement Between Parties to the Action as to Costs

Is an agreement between parties relative to costs binding on the Court and the Assessment Officer?

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."

Generally: See Stevenson & Côté, ***Civil Procedure Encyclopedia*** (Vol. 4) 72-90 for a discussion of "Contracts Calling for Solicitor-Client Costs." As to their enforceability:

> "A contract calling for solicitor-and-client costs on default is valid. If there is no misconduct, such a covenant for solicitor-client costs should be enforced. It is not discretionary. Where a lease provided for solicitor-and-client costs, that in itself overrode any tariff of costs in the Provincial Court." [Footnotes excluded]

Rule 10.41(3)(d) permits an assessment officer to allow lawyer's fees in excess of **Schedule C** if a "written agreement expressly provides for a different basis for recovery." An assessment officer will rely upon a written agreement to allow costs more than or less than those contemplated in **Schedule C** only if a judgment or order has been entered which recognizes or otherwise endorses the claimant's entitlement to rely upon the written agreement. **Rule 10.36** details some of the different scenarios in which such agreements arise: judgment in default of defence being one example. See too **Rule 9.35** in Part 9: Judgments and Orders, Division 5: Foreclosure Actions wherein an "assessment officer must assess the reasonable and proper costs" and provide a "certification" of those costs even though the costs will usually be for more than **Schedule C** costs.

WHAT ASSORTMENT OF COSTS MAY THE COURT AWARD?

This section is somewhat repetitive of "Who Possesses the Authority to Award Costs," above. However, it serves its own purpose.

As described in **Rule 10.31(1) & (3)** the Court has great flexibility in how it may award costs:

> "(1) After considering the matters described in rule 10.33 *[Court considerations in making a costs award]*, the Court may order one party to pay to another party, as a costs award one or a combination of the following:
>
> (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action or incurred by a party to participate in an application, proceeding or action, or
>
> (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
>
> (i) an indemnity to a party for that party's lawyer's charges, or
>
> (ii) a lump sum instead of or in addition to assessed costs."

and,

> "(3) In making a costs award under subrule (1)(a), the Court may order one party to pay to another any one or more of the following:
>
> (a) all or part of the reasonable and proper costs with or without reference to Schedule C;
>
> (b) an amount equal to a multiple, proportion or fraction of any column of Schedule C or an amount based on one column, and to pay another party or other parties on the same or another column;
>
> (c) all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;
>
> (d) a percentage of assessed costs, or to pay assessed costs up to or from a particular point in an action."

Usually awards of costs fall within one of three categories (the terminology may change what with the revisions to the ***ARC*** and the use of 'plain language' therein):

Full Indemnity Costs:

Often referred to as "costs on an indemnity basis", "party/party [litigation] costs on a solicitor and client basis" or as "solicitor and own client costs". With some exceptions, full indemnity costs are intended to reimburse the party 100% of its reasonable and proper legal expenses. An award for "full indemnity" or "solicitor and client" costs is to be interpreted, for assessment purposes, as being "what a solicitor could tax against a resisting client,"[1] subject to the requirement that the costs be "necessary for the proper presentation of the case."[2] Note the reference in **Rule 10.31(1)(b)** to the Court's ability to award "any amount that the Court considers to be appropriate in the circumstances, including, without limitation, (I) an indemnity to a party for that party's lawyer's charges, ..."

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[1] See *Sidorsky v. CFCN Communications Ltd.* [1995] 5 W.W.R. 190, 27 Alta. L.R.

(3d) 296, 167 A.R. 181, 35 C.P.C. (3d) 239, McMahon, J., reversed on other issues (1997) 206 A.R. 382; and, *McCarthy v. Board of Trustees of Calgary Roman Catholic Separate School District #1* [1980] 5 W.W.R. 524.

[2] See *Magee v. Trustees R.C.S.S. Ottawa* (1962) D.L.R. (2d) 162, (Ont. H.C.), at p. 165, where McRuer, C.J.H.C., stated:

> "The distinction that is to be drawn between a case where the costs taxed on a solicitor and client basis are to be paid by an opposite party and one where they are to be paid by the client is this: if the client instructs the solicitor to do certain things or to take certain action, which is unnecessary for the proper presentation of the case, the client is liable to pay, providing the solicitor has properly safeguarded himself with full and fair advice. On the other hand, where the costs are to be paid by a third party, only those costs that are necessary for the proper presentation of the case must be recovered."

See r. 10.31(1)(b)(I).

See also Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. August 2010) 201, 204, 219.1 & 219.1.1; Stevenson & Côté, ***Civil Procedure Encyclopedia*** (Vol. 4), c. 71, "E. Costs As Indemnity" & ***Handbook 2010***, r. 10.31, "I. Full Indemnity Costs."

Partial Indemnity Costs:

An award of partial indemnity costs is intended to reimburse the party only a portion of its litigation expenses.[1]

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[1] See *McCarthy v. Calgary Roman Catholic Separate School Board District No. 1* [1980] A.J. No. 55, Sinclair C.J.Q.B, at para. 3 & 5.

See also r. 10.31(1)(a), (2) & (3).

Costs of this nature, pre-November 1, 2010, used to fall into the following sub-categories (again, the terminology may change with the introduction of the new ***ARC***):

Solicitor & Client A Court award of "solicitor and client" costs will usually result in "full indemnification" of the party's legal expenses. For reasons that are best explained in a paper of more depth than this one, such an award of costs may result instead in only "partial indemnification".[1]

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[1] See *Guarantee Co of North America v. Beasse* [1993] A.J. No. 1073; 139 A.R. 241; 14 C.P.C. (3d) 182 (Q.B.).

Note too: r. 10.31(3)(a): the Court can award "all or part of the reasonable and proper costs with or without reference to Schedule C;"

Lump Sum The Court grants the party a lump sum award of costs, which is not subject to taxation, does not require the filing of a Bill of Costs, and forms part of the judgment granted.

Note: r. 10.31(1)(b)(ii): "a lump sum instead of or in addition to assessed costs."

Schedule C The Court specifies that the party is entitled to costs under **Schedule C**, under a

particular column of **Schedule C**, or multiples, proportions, or fractions of a column of **Schedule C**, or one column for one party and a different column for another or the rest of the parties.

Note: r. 10.31(3)(b): "(b) an amount equal to a multiple, proportion or fraction of any column of Schedule C or an amount based on one column, and to pay another party or other parties on the same or another column;"

Default No order as to costs is an order for costs. The ***ARC*** contain default provisions which apply to every legal proceeding, unless otherwise ordered by the Court (discussed below under "What Directions or Expressions . . . Silent about Costs", at p. 15).

Punitive or Deterrence Costs:

A less frequently utilized and controversial category of costs, some decisions say that the Court does have the discretion to make an award of costs which will actually exceed indemnification. Others disagree.

See Mark M. Orkin, ***The Law of Costs*** (2nd e., 29th rel. August 2010) 204; Stevenson & Côté, ***Civil Procedure Encyclopedia*** (Vol. 4), c. 71, "E. Costs As Indemnity;" *Collins v. Collins* [1999] A.J. No. 1075 (Q.B.), at para. 12; *Shillingford v. Dalbridge Group inc.* [2000] A.J. No. 63 (Q.B.), [2000] 5 W.W.R. 103, 76 Alta. L.R. (3d) 361

Most frequently this occurs when a party becomes entitled to augmented costs pursuant to the provisions of **Rule 4.29**, the so called "Compromise Rules."

WHAT DIRECTIONS OR EXPRESSIONS MIGHT BE USED IN AWARDING COSTS?

The following are the more common directions or expressions used in awarding costs. For a more comprehensive list refer to Mark M. Orkin, ***The Law of Costs*** (2nd ed., 29th rel. August 2010) 105, "Directions as to Costs" and note the summary of common phrases in Stevenson & Côté, ***Alberta Civil Procedure Handbook*** (2010), at r. 10.31, "C. Terminology."

"Costs in the Cause" **a.k.a.** **"costs in the action",**
"costs follow the event",
"costs to the successful party in the cause"

"Costs in the Cause" is interpreted differently in different jurisdictions. In England the phrase means that costs of, for example, an interlocutory proceeding are to go to whichever party is ultimately successful in the action, and the trial judge has no jurisdiction to vary the award of costs. In Ontario the phrase "does not finally dispose of the costs but merely puts them in the same position as any other costs of the action: that is, they are left to the discretion of the trial judge".[1] In Alberta it is suggested that the phrase means that costs of a proceeding go to the party ultimately successful in the action, but, unlike England, trial judges have been known to exercise their jurisdiction to revisit an award of "costs in the cause".[2]

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[1] See ***Law of Costs*** (above) 404, "Discretion of Trial Judge."

[2] In *Centrac Industries Ltd. v. Vollan Enterprises Ltd.* [1989] A.J. No. 1050; 70 Alta.L.R. (2d) 396; 100 A.R. 301; 39 C.P.C. (2d) 136 (C.A.) the Panel addressed the meaning of this phrase:

> "Costs in the cause" means that the costs go to the party entitled to tax costs in the action. . . . We acknowledge that if the case went to trial, the trial judge exercising his plenary authority under Rule 601, might deal with those costs as he might deal with any other costs."

If the Court did not address itself to the costs of an interlocutory proceeding, **Rule 10.29(1)** effectively awards costs to the successful interlocutory party, unless otherwise ordered by the Court, payable "forthwith" (see "Costs in Any Event of the Cause" below).

The following illustrates the diverse consequences an award of "costs in the cause" can produce if counsel is not on top of costs issues at the time that costs are addressed before the trial judge or appeal panel:

> A Defendant successfully applies to the Court for an order compelling the Plaintiff to answer its undertakings given at (oral questioning) discoveries, but the Court rules that "costs will be in the cause". The Plaintiff is successful at trial, resulting in one of the following awards of costs:
>
> > 1/ The Court grants the Plaintiff costs of the action, but chooses to intervene and specifically awards the Defendant its costs of the application to compel.
> >
> > 2/ The Court grants the Plaintiff costs of the action, but chooses to intervene and specifically denies the Plaintiff its costs of the application to compel, but does not allow the Defendant its costs of the application.
> >
> > 3/ The Court grants the Plaintiff costs of the action but is silent with respect to costs of the application to compel. Costs of the application automatically go to the Plaintiff.
> >
> > 4/ The Court is silent as to costs of the action. The Plaintiff is entitled to its costs of the action (**Rule 10.29**) and of the application to compel.
>
> If the Chambers Judge or Master had been silent as to costs of the application to compel, **Rule 10.29(1)** would have entitled the Defendant to its costs of the application in scenarios #3 and #4. Inasmuch as **Rule 10.29(1)** costs are taxable and payable forthwith, one wonders what discretion the trial judge has to override the consequences of the interlocutory adjudicator's silence?

See Stevenson & Côté, ***Alberta Civil Procedure Handbook*** (2010) at r. 10.29 for a discussion of costs awards of interlocutory applications, especially relative to procedural defaults.

"Costs to One Party in the Cause"

Both Mark M. Orkin, ***The Law of Costs*** (above) and Stevenson & Côté, ***Alberta Civil Procedure Handbook*** (above) suggest this phrase means that only the "One Party" will be entitled to costs of the proceeding, but only if the party is awarded costs of the action. If the party is not awarded costs of the suit no one recovers costs of the proceeding in question.

"Costs Reserved to the Trial Judge (or Appeal Panel)"

The ***Civil Procedure Handbook*** (above) interprets this direction to mean that "the trial judge (or panel) at the end of the suit will decide who (if anyone) gets costs of the present step."

"Costs in any Event of the Cause" a.k.a "Costs in any Event"

"Costs in any Event of the Cause" entitles the party named in the order to costs of that particular proceeding regardless the final outcome of the action. Therefore, in the foregoing illustration ("Costs in the Cause"), if the Defendant had been awarded costs of the application to compel undertakings "in any event of the cause" the Plaintiff would not be entitled to any costs of that application even if it should win the action. And, the Defendant would be entitled to recover its costs of that application even if the Plaintiff should win the action; even if the action should settle "without costs".[1] However, "costs in any event" are not payable until the end of the action - see *566320 Alta. V. Lethbridge (City) (#2)* 2005 ABCA 244, 371 A.R. 270, 53 Alta LR (4th) 90, 257 DLR (4th) 311, 20 CPC (6th) 369, as referenced in Stevenson & Côté, ***Alberta Civil Procedure Handbook*** (2010) at p. 10-38, footnote #2.

[1] See Orkin's, ***The Law of Costs*** (above) at 105.3.

"Costs of this Hearing" a.k.a. "Costs of this Application"

Includes costs of preparing for the hearing - examinations on affidavit, written submissions, fiats, etc. - unless the Court clearly limits the award of costs to just the hearing or application itself.

Rule 10.29(1) entitles the "successful party to an [interlocutory] application" to a "costs award" against the "unsuccessful party." Furthermore, "the unsuccessful party must pay the costs forthwith," unless otherwise ordered. The successful party is entitled to present it's proposed bill of costs (**Rule 10.35**) to the unsuccessful party and, failing consensus, (**Rule 10.36(3)**) to take out an Appointment for Assessment (**Rule 10.37**). Issue: which column in **Schedule C** should be used? **Schedule C**, **Division 1**, **Rule 1(3)(c)** answers:

> "(3) . . ., the dollar range indicates the amount recoverable . . . (c) in the case of an interlocutory application, as against the person liable to pay the costs with reference to the amount claimed by the plaintiff."

Note: if costs of an interlocutory hearing were to be ordered by the Court as "costs in any event of the cause" or simply as "costs in any event" the costs are not payable until the end of the action/proceeding. (See *566320 Alta. V. Lethbridge (City) (#2)* 2005 ABCA 244, 371 A.R. 270, 53 Alta LR (4th) 90, 257 DLR (4th) 311, 20 CPC (6th) 369, as referenced in Stevenson & Côté, ***Alberta Civil Procedure Handbook*** (2010) at p. 10-38, footnote #2.)

"Costs of the Trial"

In *MacPhail v. Karasek*, 2008 ABCA 98 the Court of Appeal awarded the successful Appellant party and party costs of the appeal and of the "trial." The Respondent argued that costs of the "trial" did not include steps leading up to the trial itself. The court ruled: "An award of trial costs under Schedule C includes, by necessary implication, the pre-trial steps set out in the Schedule." The decision then goes on to allow specific Items in the Schedule, especially examinations for discovery and interlocutory applications. Presumably, "costs of the trial" would also include pre-trial conferences (Item 9) and preparation for trial (Item 10).

"No Order as to Costs"

Unlike silence as to costs which invokes the *default provisions*, a direction by the Court that there be "no order as to costs" or "no costs of these proceedings" or that "each party bear their own costs" means that *neither* party is to pay or collect costs.

Silent about Costs?

If the Court says nothing about costs a number of default provisions of the ***ARC*** take effect. They should be considered in the following order:

1/ **Who pays?**

The answer depends on the stage of the proceedings:

Failure to Defend: If a plaintiff becomes entitled to costs upon obtaining a judgment or order under a provision of Part 3, Division 3, Subdivision 4: Failure to Defend and if no order to the contrary has been made relative to costs **Rules 3.37(2)**, **3.38** and **3.39(1)(b)** entitles the plaintiff to a costs award as against the party or parties who have failed to successfully defend or have failed to defend at all.

Interlocutory Proceeding: If the court is silent about costs of an interlocutory proceeding, **Rule 10.29(1)** says that the successful party is entitled to costs of the proceeding as against the unsuccessful party. As previously noted, these costs are taxable and payable forthwith.

Conclusion of Action: If the Court is silent about costs at the conclusion of the action **Rule 10.29(1)** states:

"A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, ..." The successful party is thereby entitled

(a) to be paid its costs of the action by the unsuccessful party,
(b) even of interlocutory proceedings where the court ordered "costs in the cause", and
(c) most especially of interlocutory proceedings for which the successful party was awarded costs "in any event of the cause", but
(d) not of interlocutory proceedings where, by order of the court or by function of **Rule 10.29(1)**, costs were or are to be paid to the unsuccessful party.

2/ **How much?**

Rule 10.41 authorizes an assessment officer to allow a party "the reasonable and proper costs . . . incurred to bring an action," including costs of an assessment of costs proceeding. (For a more detailed review of this **Rule** and particular items of costs, see sub-documents "Schedule C" and "Disbursements").

The assessment officer is to apply this broad discretion to any Bill of Costs (save for a **Rule 10.36(3)** approved/consented to Bill of Costs), subject to the following restrictions:

10.41(1) - the costs must be reasonable and proper;
- they must have been incurred by the party claiming them;
- they must have been incurred to
(a) file an application,
(b) take proceedings,
(c) carry on an action, or
(d) participate in an action, application or proceeding.

10.41(2) - the costs may not include
(d) any costs related to a *dispute resolution process* as described in **Rule 4.10** or a *judicial dispute resolution process* under an arrangement described in **Rule 4.12** (unless "a party engages in serious misconduct in the course" of either of these processes, but the rule does not clarify who makes that determination), nor
(e) "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*" unless otherwise ordered by the Court.

10.41(3) - the assessment officer
(b) "may" disallow any item in a bill of costs that is "improper, unnecessary, excessive or a mistake,"
(c) "may" set the amount a party may recover "for services performed by a lawyer that are not specified or described in Schedule C (this is akin to the former Rule 605(4) which allowed only the Court to make such a determination),
(d) "may not" allow more than the amounts found in Schedule C for lawyer's fees unless
- the rules permit it (eg: 4.29 - doubling of costs),
- Schedule C permits more (3(2) - document review and 10(2) - preparation for trial both allow for an increase if merited), or
- a written agreement between the parties "expressly provides for a different basis for recovery" (such as security documents allowing for full indemnity costs, etc.),

(e) "may not" reduce the amounts specified in Schedule C unless
- the Schedule specifically permits (see 1(2) - uncontested matters, 3(3) - limited amount of time to review, 5(3) - oral questioning by observing lawyer, 7(3) & 8(2) - abandoned applications, 10(2) - trial preparation, or
- "exceptional circumstances" exist,

(f) "may, in exceptional circumstances" reduce or allow a fraction of an amount in the Schedule "if the services were incomplete or limited" (seems to contemplate circumstances like those in former Rule 605(3) where only a portion of the usual steps taken are actually taken).

10.41(4) - if a fee in Schedule C is disallowed or reduced reasons must be given for doing so.

Witnesses Fees / Allowance - unless otherwise ordered by the Court the taxing officer may only allow compensation for witness fees and expenses as per "**Schedule B**". Known rules [to us] requiring or having

the potential to require compensation per "**Schedule B**" are the following [there may be others]:

5.40(3)	Party who requests attendance of an *expert at trial* for cross-examination when parties had explicitly or impliedly agreed to let the expert's report be entered as evidence without calling the expert at trial "must pay the costs of the expert's attendance" as determined by Schedule B, unless otherwise ordered.
6.16(3)	The allowance for *questioning of a person* is restricted to the witness fees and expenses permitted in Schedule B.
8.8(5)	Service of Notice to Attend as *witness at trial* "must be accompanied with an allowance" per Schedule B, 10 days before trial.
13.32(1)	*Court fees* must be paid as per Schedule B unless waived per guidelines.
13.35(1)	*Peace officer* is exempt from paying fees or other amounts under Schedule B for search of name, inspection of file, copy or certification of court document if required in discharge of his/her duties.
13.36(1)(b)	*Legal Aid* is exempt from filing fee under Schedule B if subsisting Legal Aid Certificate is presented. Does not apply to document filed in action before Legal Aid Certificate is issued.
13.37(2)	Commencement document for a *restraining order* per subrule (1) is exempt from filing fee, Item 1 of Schedule B.
Form 29	*Notice of Appointment for Questioning* details the allowance accompanying the notice. The Warning box reiterates the need to pay the allowance if required by the rules.
Definitions -	"Document" in rule 13.36 *[Fee waiver: legal aid]* means any document for which a fee is payable under item 1, Schedule B.

Scale of Costs on Appeal (formerly Rule 608 - new rule unknown at this time, if any) - if the Court of appeal is silent as to costs the "scale of costs" to be applied to the successful party is the same as that applicable at the lower level of court, regardless which party wins the appeal.[1]

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[1] See *Wadsworth v. Hayes* [1996] A.J. No. 340; 184 A.R. 66, (C.A.), quoted above.

"Subsequent Costs"

Referred to in the November 1, 2010, Schedule C as "post-judgment" costs — are a default 'award' of costs by the ***ARC*** to *any* judgment creditor for steps taken after or "subsequent" to judgment and for the purpose of enforcing or realizing on the judgment. Examples would be garnishment proceedings, seizure proceedings, etc.

"Thrown Away Costs"

Squandered costs which a party would not have incurred save for the failure of another party to comply with the Rules of Court.

We are not aware of a default provision for "thrown away costs;" that is, you must have a court order granting them.

General Principles: In *Dr. Sandy Koppe v. Garneau Lofts Inc.* 2005 ABQB 727 Statter, J (as he then was) clarifies the following points:

- "Procedural missteps" can usually be remedied, but the inconvenienced party (respondent for our purposes) will usually be awarded 'thrown away costs.'

- "'Thrown away costs' may be awarded as a method of negating any prejudice that might otherwise fall on the responding party."
- A distinction exists between
  (1) the "procedural misstep" which, by seeking its correction, the applicant party renders "wasted" or "thrown away" the "action taken by the respondent" and
  (2) the determination whether "the applicant who made the misstep is entitled to some relief" from its mistake.

  This distinction is important in determining what steps taken do or do not constitute "thrown away costs."
- "Thrown away costs" (#1 above) compensate for the "wasted effort of the respondent" but, per Slatter J. (as he then was), the "fight over whether the applicant is entitled to relief from the procedural default" (#2 above) is not a "thrown away cost."

Slatter, J. (as he then was) gave some examples, as follow:

- *Amending Pleading:* where "one party asserts a right to amend pleadings, and the other party denies that right" requiring the former to apply to the court for an amendment,
  - the costs of the application will go to whomever is successful, but,
  - the costs of the amendment itself (see Schedule C (1)(1) amending pleadings) will, unless otherwise ordered, be born by the applicant.

- *Noted in Default:* "if a party is noted in default, but asserts that it has met the test for opening up a default, it should be entitled to costs if successful." Naturally, the wasted costs associated with having noted the party in default, perhaps having performed an assessment, the filing of a writ, etc. will most likely be payable to the respondent.

- *Adjournment Application:*
  - "if the applicant asserts a right to adjournment, and under the prevailing rules and practice the applicant is entitled to that adjournment, then if the respondent resists, costs should follow the event" (Rule 607 if court is silent)
  - "if the adjournment is the result of some fault of the applicant, the applicant is often required to pay the costs of the adjournment application, even if successful."

In summation (para. 22) the Honourable Justice stated:

> "It should be noted that in these situations the costs of determining whether the applicant is entitled to be relieved of its procedural misstep is not really 'wasted'. There is a dispute over the rights of the applicant to relief from its error, and the application resolves that dispute. Those efforts are not 'wasted', because the dispute must be resolved. Furthermore, those proceedings are not a direct result of the procedural misstep of the applicant; they are really brought on by the respondent's failure to accept that the applicant has made out its right to be relieved of the consequence of its procedural misstep. Where the applicant is entitled to relief the respondent should not unreasonably litigate the point. As a result, the rule that costs go to the successful party (Rule 607) should prevail over any rule about 'wasted' costs."

Note that this case runs contrary to the following decisions related to the setting aside of default judgments, but does consider the *Woodspan* decision:

- *Van de pol v. Woodspan Developments (Alberta) Ltd.* 1999 ABQB 610, Master Funduk: "By thrown away costs I mean all the Plaintiff's taxable costs . . . starting with the noting in default to and including the present application."
- *Williams v. S.A.W. Construction Ltd.* 1999 ABQB 690, Master Breitkreuz: "Thrown away costs . . . include all the plaintiff's taxable cost relating to the noting in default, which means they will start with the noting in default to and including the present application."

In light of the *Koppe* decision, we have revised how we treat "thrown away costs" in a situation where (for example) an aspiring defendant is successful in having default judgment set aside. Consider the following (below):

Item #	Description	Thrown Away Cost?
1	Pleadings (drafting, filing & serving Statement of Claim)	no
6(2)	Ex Parte Application for a Substitutional Service Order	no
1	Noting in Default (a component of Item 1 - get a proportion of the Item)	yes
2	Uncontested Assessment Application	yes
5	Examination on Affidavit re: application to set aside default judgment	no
7(1)	Defence of Application to Set Aside Default Judgment	no