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PAPER 2.1

The Bill of Costs, a Registrar's View

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THE BILL OF COSTS, A REGISTRAR'S VIEW

— There are three forms of costs that could arise in a personal injury action:

(1) Civil costs pursuant to Supreme Court Civil Rules, B.C. Reg. 3/2016 ("SCCR")14-1;

(2) Fast track costs pursuant to SCCR 15-1; and

(3) Special costs pursuant to SCCR 14-1(3).

— If the costs are to be assessed before the Registrar, an appointment needs to be taken out; see Form 49 under the SCCR. The appointment and all supporting documentation needs to be served five clear days before the hearing date - see SCCR 14-1(21).

— A Hearing Record is required, see SCCR 23-6(3.1). The required contents of the Hearing Record is itemized in SCCR 23-6(3.1)(b).

— Take note of Administrative Notices AN-5 and AN-8, both of which apply to cost hearings before the Registrar.

— Pre-hearing conferences ("PHCs") are mandatory in certain circumstances. Where not mandatory, they are still discretionary, if a party chooses. PHCs are useful tools to provide disclosure and define the issues. Parties can be compelled to identify what they take issue with in the bill of costs and why. Further, if the paying party needs further particulars of a claim for costs, or documents in support, these matters can be compelled at a PHC. The PHC can prevent ambush and allow for a fair hearing. To schedule a PHC the party needs to file and serve a requisition for same.

— The Registrar has no jurisdiction to assess costs of a "proceeding" without an agreement or an entered order which provides for costs. See *Maurice v Maurice*, (1994) 100 BCLR (2d) 291. Entered orders after "applications" should also make provision for costs. See *Stelmaschuk v. The College of Dental Surgeons of B.C.,* 2017 BCSC 806.

— The legal principles to be applied in assessing tariff items under SCCR 14-1 are summarized in *Carreiro v. Smith*, 2015 BCSC 2379 and *Wheeldon v. Magee*, 2010 BCSC 491. In *Carreiro*, supra, the court states:

> 12 Pursuant to Supreme Court Civil Rule 14-1(2), the Registrar is to allow tariff fees with respect to work that was proper or reasonably necessary to the proceeding and must consider Supreme Court Civil Rule 1-3, the object of the Rules.
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> 13 Whether work for which fees are claimed should be allowed must be determined objectively. A step was necessary if it was indispensable to the conduct of the proceeding. A step was proper if it was not necessary, but was nevertheless reasonably taken or incurred for the purpose of the proceeding. In fixing the number of units for items where a minimum and a maximum number of units is allowed, the Registrar is to allow the minimum amount of units for matters upon which little time should ordinarily have been spent; and the maximum amount of units for matters upon which a great deal of time should ordinarily have been spent.

In *Wheeldon*, supra, the court states:

> 21 With respect to the tariff items, where the minimum number of units are provided for an item, the assessing officer must consider this question: "How much time, on a scale of 1 to X (where X is the maximum units the tariff provides) should a reasonably competent lawyer have spent on the work for which the costs are claimed?": See *Practice Before the Registrar* (CLE) at p. 2-22.
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> There should be affidavit evidence that supports the claim for tariff items and the amount of units claimed.

— Be aware of "Appendix B Party and Party Costs" which contains various specific legislative provisions regarding costs and the application of the Tariff.

— The full fast track cap of $6,500 following settlement is available under SCCR 15-1 where "significant preparation" has occurred. See *Christen v McKenzie*, 2013 BCSC 1317 at paras. 35 and 36:

> 35 To my mind significant preparation for trial ought to be sufficient to entitle the successful party to costs for pre-trial preparation to the full amount of the cap, presently $6,500 pursuant to Rule 15-1(15). Pre-trial preparation may take various forms given the demands of the particular action. Whether the parties engage in extensive negotiations or mediation and thus achieve a settlement months or days before trial, the preparation by counsel may easily approach that required to actually conduct the trial. The focus ought to be on the amount of useful preparatory work done and not where in the pre-trial timeline the resolution was reached. Indeed, the focus of Rule 15-1 and the Civil Rules generally is to encourage early and fulsome preparation to resolve cases earlier as opposed to later if possible; and also to limit the scope of the proposed trial to what is truly at issue, thus reducing the time and costs associated with resolving the dispute.
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> 36 In the present case it is clear that the matter was substantially prepared to the level necessary to achieve a significant settlement prior to trial. While there may be fast track cases where a review of the costs amount claimed for preparation is warranted, this is not one. However one dissects and analyzes what was done or not done to prepare this case for trial, a considerable amount of preparation was performed by plaintiff's counsel to achieve the sizable settlement. Extensive and protracted negotiations, such as occurred here, ought not to be regarded as requiring significantly less preparation than preparing a case for mediation or trial. Indeed, such negotiations are to be encouraged as the most cost-effective way of dealing with cases that would otherwise proceed to trial. The efficacy of conducting a fast track action ought not to be undermined by a costs analysis that bogs down in the picayune.

— The legal principles involved in assessing disbursements are summarized in *Schroeder v McGivern*, 2015 BCSC 362 at paras. 10-13:

> 10 Supreme Court Civil Rule 14-1(5) provides:
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> > (5) When assessing costs under subrule (2) or (3) of this rule, a registrar must
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> > > (a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
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> > > (b) allow a reasonable amount for those disbursements.
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> 11 There are a number of principles to be considered on an assessment of disbursements. Those applicable principles were summarized in *Turner v. Whittaker*, 2013 BCSC 712 at para. 5, wherein Master McNaughton stated:
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> > [5] Counsel were also able to agree on the following legal principles which are applicable on an assessment of disbursements:

> 1. Rule 14-1(5) requires an assessing officer to determine which disbursements were necessarily or properly incurred in the conduct of a proceeding and to allow a reasonable amount for those disbursements.
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> 2. The consideration of whether a disbursement was necessarily or properly incurred is case- and circumstance-specific and must take into account proportionality under Rule 1-3. (*Fairchild v. British Columbia (Vancouver Coastal Health Authority)*, 2012 BCSC 1207).
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> 3. The time for assessing whether a disbursement was necessarily or properly incurred is when the disbursement was incurred not with the benefit of hindsight. (*Van Daele v. Van Daele*, 56 B.C.L.R. 176 (SC) rev'd 56 B.C.L.R. 178 at para. 4 (CA))
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> 4. A necessary disbursement is one which is essential to conduct litigation; a proper one is one which is not necessary but is reasonably incurred for the purposes of the proceeding. (*McKenzie v. Darke*, 2003 BCSC 138, para. 17-18)
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> 5. The role of an assessing officer is not to second guess a competent counsel doing a competent job solely because other counsel might have handled the matter differently. (*McKenzie v. Darke*, 2003 BCSC 138, para. 21).

12 To these principles, I would add those in *Holzapfel v. Matheusik* (1987), 14 B.C.L.R. (2d) 135, which are summarized in *Cloutier v. Wong*, (1992) 12 C.P.C. (3d) 169 where the Court stated at para. 5:

> 5 In Holzapfel v. Matheusik (1987), 14 B.C.L.R. (2d) 135, the Court of Appeal approved the following principles set out in the authorities:
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> > 1. The onus of proof rests on the party submitting the bill to establish affirmatively the necessity or reasonableness of the charges he claims as disbursements (Hall v. Strocel (1983), 34 C.P.C. 170 (B.C.S.C.).
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> > 2. The solicitor responsible for the preparation of the case should give evidence, which may be by affidavit, verifying that the work was necessary for the full and proper presentation of the case and that the fees charged for the work were reasonable in the circumstances (Berite v. Schuette (1980), 17 C.P.C. 259 (B.C.S.C.).
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> > 3. If the expert's bill contains less than a reasonably detailed outline of the work he performed and the hours he devoted to his retainer, an affidavit sworn by the expert may be required (Berite v. Schuette (1980), 17 C.P.C. 259 (B.C.S.C.).
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> > 4. The affidavit of verification does not bind the assessment officer but he should consider it carefully and weigh it against the other evidence (Bell v. Fantini; Fasciana v. C.N.R. (1981), 32 B.C.L.R. 322 (B.C.S.C.)).

13 In *Bell v. Fantini* (1981), 32 B.C.L.R. 322 (S.C.) at para. 23, the Court stated:

> 23 I consider that Rule 57(4) entitles the Registrar to exercise a wide discretion to disallow disbursements in whole or in part where the disbursements appear to him to have been incurred or increased through extravagance, negligence or mistake or by payment of unjustified charges or expenses. The Registrar must consider all the circumstances of each case and determine whether the disbursements were reasonably incurred and were justified. He must be careful to balance his duty to disallow expenses incurred due to negligence or mistake, or which are extravagant, with his duty to recognize that a carefully prepared case requires that counsel use care in the choice of expert witnesses and examine all sources of information and possible evidence which may be of advantage to his client.

— Where the "reasonableness" of the cost of a disbursement is put in issue by the paying party, a disclosure order may be made to compel the paying party to disclose what they paid their "like experts", provided the information is relevant, and privilege has been waived. See *Sturdy v Dhadda*, 2016 BCSC 505.

— Where "special costs" are to be assessed, *Gichuru v Smith*, 2014 BCCA 414, is essential reading. See paras. 104, 105, 113, 114, and 155:

> 104 As we explained above, the principle underlying R. 14-1 is that parties are only entitled to their objective reasonable legal costs as determined by the precise scale of costs they were awarded. In order to determine if a legal fee is reasonably objective, it is often necessary to know the particulars of what the lawyer did to accrue it. As noted by Kirkpatrick J., as she then was, in *Canadian National Railway Co. v. A.B.C. Recycling*, 2005 BCSC 1559 at para. 28 [A.B.C.], it is difficult to conceive that a proper examination of a party's incurred legal costs can take place without disclosure of the other side's file and an examination of the other side's lawyers in respect of the file and the matters arising therefrom.
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> 105 The fact that a lawyer has billed a certain sum does not necessarily make the fee reasonable. This is of particular importance when the other party to the litigation is paying the bill. As noted by Seaton J.A. in *Royal Trust Corporation of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 (C.A.) at 88:
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> > ...The party who made that arrangement, the successful party in the litigation, might have made a very poor bargain. The bill rendered pursuant to the agreement might be justifiable between the solicitor and his client but thoroughly unjustifiable to impose on another. The client might have demanded more work to be done than was appropriate in the circumstances, or more lawyers and more expensive lawyers to be retained than were appropriate in the circumstances. Of course, at the taxation, if the other litigant is paying the bill the client will be particularly pleased to see that the bill is as high as possible.
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> > . . .
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> 113 This same situation existed in *A.B.C.* There Kirkpatrick J. recognized that the assessment of special costs would require a waiver of privilege. One of the main purposes of special costs is to indemnify the successful party for the actual legal costs they have incurred. Absent a bill or other evidence of the legal fees incurred there is no way of knowing the amount of those costs. While the disclosure of the legal account may result in a waiver of privilege, that is the price that a party may have to pay if it seeks to recover special costs.

> 114 It is difficult to conceive how a proper examination of a party's reasonably incurred legal fees can be made without disclosure of the party's file: see *A.B.C.* at para. 28 and *Williston* at para. 53. A simple presentation of the client's bill to the trial judge together with counsel's submission would not usually allow a party to challenge the reasonableness of the legal costs nor would it allow for an objective determination of the reasonableness of those costs. In *A.B.C.*, Kirkpatrick J. considered that the prejudicial effect of disclosure could be minimized or eliminated by deferring the assessment until both parties had exhausted or waived their rights of appeal.
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> 155 When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).

— Four practice tips:

(1) Prepare for the pre-hearing conference, give consideration to what would streamline the hearing;

(2) Prepare an affidavit of justification with evidence sufficient to obtain the relief sought;

(3) Know the jurisdiction of the Registrar better than the Registrar;

(4) Remember the claiming party has the onus of proof.