

## **PARTY AND PARTY COSTS**

### **How to Prepare Your Bill of Costs - How to Present Your Bill of Costs**

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#### ***A. Preliminary Considerations***

1. These comments apply in a situation where you are winning counsel following a trial. You do not rush out and prepare a Bill of Costs, but must first carefully consider some items.
2. Assuming the judge is silent on this score, do you wish to make costs submissions in writing or orally? Typically, judges prefer written submissions and wish them to be brief.
3. Is it appropriate to ask the trial judge to fix the costs, as opposed to having them assessed?
4. Were there offers to settle in writing, formal offers to settle or otherwise. If so, what is their impact? Be sure to consider all offers in writing, not only formal offers to settle (rule 49.13).
5. Based upon offers to settle or otherwise, can you obtain costs on a solicitor and client basis?
6. You must think ahead and anticipate challenges that may be made to your bill at the assessment. As such, you may wish to seek special directions from the trial judge, such as a direction that there be a co-counsel fee or a counsel fee for both senior and junior counsel, and for broad reimbursement for experts' fees. It is important to look at all interlocutory attendances to ensure that any matters that were referred to the trial judge are specifically dealt with. For example, costs of an interlocutory motion may have been left to the trial judge. They should be addressed at this stage.

**B. *Preparing Your Bill of Costs***

7. The starting point is always your docket. First, you must ensure that all dockets have been entered. You then work with the skeleton of the bill of costs, containing general headings. Together with your legal assistant, go through the dockets and the bill of costs. The object is to include as much docketed time in the bill of costs. However, one must be careful not to overreach. Be particularly sensitive to duplication of effort, through repeated in-house conferences or extensive student research. As well, any time spent in the "administration" of the file is not properly included in the party and party costs.

8. Begin with a copy of the dockets, and highlight those entries which you wish to include in your bill of costs, and use a cross-reference numeric scheme on the dockets to coincide with items on the bill of costs. Have your assistant tally the dockets under each heading, for each docketer, and later add particulars such as the number of documents in the affidavit of documents, the dates of discoveries and number of transcript pages, etc.

9. It is always difficult to assign an hourly rate or a per diem counsel fee. Some assessment officers appear to have their own grids that they apply, based upon the years of experience of the lawyer. A useful yardstick can be the guidelines as to what parties can expect as costs on a motion, as reproduced at page 701 of Watson & McGowan's Civil Practice, 2000 Edition.

10. In relation to disbursements, you should follow Part II of Tariff A.

11. Attendance money, court filing fees, and reporters' fees are typically paid in full. In relation to experts' fees, these are often large amounts and are often disputed, especially in relation to fees for preparing for trial, advising and instructing counsel, and attendance at trial.

12. In relation to copies of documents, these are typically allowed at 15¢ to 20¢ per page on a party and party basis and 25¢ to 30¢ per page on a solicitor and client basis. Part II of the Tariff is very specific to limit photocopies; all photocopying expenses on the file cannot be recovered. Although that Tariff does not include an amount for faxes, these are often claimed.

13. Your Bill of Costs should also include G.S.T. actually paid or payable. The disbursement section of your Bill of Costs should distinguish those disbursements for which G.S.T. is not exigible.

**C. *Presenting Your Bill of Costs***

14. The tone in most assessments is set before the first few minutes. If it is your bill, before you attend on the assessment, try to find out from the other side if they have any problems with any of the disbursements, and try to resolve them in advance.

15. Also try to find out what your opponent's areas of attack on the bill will be. Well in advance of one week prior to the return date, serve an offer to settle.

16. Your file must be well organized and cross-referenced. You must be able to establish the reasonableness of your bill.

17. At the assessment, you should begin with a brief overview of the action. If the matter was reported, bring a copy of any reported decisions.

18. You should bring the entire file to the assessment, both to show the extent of the effort, and also to deal with any unanticipated challenges.

19. You should bring a clean copy of the bill to the assessment, as often, assessment officers deal with entries item by item. I always found it easier to deduct from the bill items that are not allowed.

20. The evidence on an assessment of costs is typically unsworn evidence, without the presence of a court reporter. On rare occasions, court reporters have been present on assessments on a solicitor and client basis.

21. In relation to party and party costs on a solicitor and client basis, Master Linton recently released reasons, which are important for two reasons. Firstly, they address the confusion caused by the terms “solicitor and client scale” and “solicitor and client basis”. Secondly, they state in the strongest of terms, that on a solicitor and client basis, the court is not bound to accept whatever rates per hour counsel may choose to bill.

“May I conclude by stating that the *Apotex* decision and those following it do not stand for the proposition that the court is bound to accept whatever rates per hour counsel may choose to bill when it assesses a bill on a solicitor and client basis. They do not and cannot override the discretion granted to the court in s. 131 of the Courts of Justice Act. When the cases talk about complete indemnification, they are referring to indemnification for what the client ought to have been charged, and not what the client, in fact, was charged. If such were the case, then there would be no need for the exercise of discretion or, for that matter, assessments where costs have been awarded to a party on a solicitor and client basis. What may have contributed to the misinterpretation of the *Apotex* line of cases is the unfortunate use of the word “scale”, where it is said that costs shall be assessed on a solicitor and client scale, when, in fact, costs are not assessed on such a scale because, in fact, no such scale (or tariff as for party and party costs) exists, except as may have been developed in the cases. Costs may be awarded on a solicitor and client basis. See Rule 57.01(4)(c).”

Reference: *Wisebrod and Mandel v. American Home Assurance Company*, Court File No. 91-CQ-001879

22. The client is not entitled to retain the most expensive solicitor in the province and then expect that the other side cannot question or challenge the bill or hourly rate in any way.

***D. What the Assessment Officers Consider***

23. The assessment officers typically consider the time spent, the appropriate hourly rate, the factors under rule 58.06(1), and any directions under rule 57.02(1).

24. In terms of hourly rate, the assessment officers consider the experience of the lawyer, both in terms of number of years of practice and as well, the area of expertise, the complexity of the case, both on a legal and factual basis, and the recovery or award made. In setting hourly rates, the assessment officer considers when the matter was dealt with and how many years it

took to resolve the issues. For matters that take many years, the assessment officers often average the hourly rates or use blended hourly rates.

25. In assessing costs, the court will consider the following factors:

a) *The Amount Involved in the Proceeding:*

- what was ultimately recovered or awarded is more important than what was claimed;
- the assessment officer will compare recovery to the initial claims

b) *Complexity of the Proceeding:*

- the assessment officer will consider both the legal and factual complexity (ie. was this a precedent setting case)
- the court will consider the number of parties involved
- was it a jury or non-jury matter

c) *The Importance of the Issues:*

- the assessment officer will consider the impact and effect of the litigation and the importance of the outcome to the party

d) *The Duration of the Hearing:*

- the assessment officer will consider not only the number of days spent at the hearing, but also the time period over which the hearing took place if it was not heard on consecutive days

- e) *The Conduct of Any Party That Tended to Shorten or Lengthen Unnecessarily the Duration of the Proceeding:*
  - the assessment officer will consider how each party and their counsel conducted themselves; that is, were Requests to Admit properly made and answered; were the parties cooperating; were undertakings duly answered, etc.
  
- f) *Whether Any Step in the Proceeding was Improper, Vexatious or Unnecessary:*
  - could a simpler or more expeditious step been taken?
  - were there excessive hours spent because of duplication of effort or because of an abundance of caution?
  
- g) *A Party's Denial of or Refusal to Admit Anything that should have been Admitted:*
  - an assessment officer will consider a party's denial or refusal to admit, especially pursuant to a pleading or a request to admit, where this caused excessive hours to be spent gathering information or proving facts
  
- h) *Any Other Matter Relevant to the Assessment of Costs:*
  - this is a catch-all basket clause. The assessment officer may consider, for example, any previous awards of costs on motions

**E. Rules of Thumb**

26. The actual number of hours and hourly rates is determined by applying time honoured factors.

27. As a rule of thumb, it is estimated that 20 pages of transcript equal approximately 1 hour of attendance time, but this is subject to adjustment, for example, where there is a translator.

28. In terms of total time spent for trial preparation, the assessment officers are guided by the actual time claimed, but generally, for a simple case, they would allow 1 or 2 days of preparation for each day of trial, but more days of preparation for each day of trial as the complexity increases.

29. On a party and party basis, correspondence is usually allowed in the range of \$8.00 to \$12.00 per letter, but on a solicitor and client basis, in terms of the time spent.

30. A counsel fee per day at trial is based upon the complexity of the matter, and can be as high as \$2,000.00 on a party and party basis.

*F. Costs of the Assessment*

31. The assessment officer can and will deal with the costs of the assessment itself and will consider any offers to settle. It is important to bring dockets and billing and disbursement summaries to the assessment to substantiate the amounts claimed.

*E. Appeal of the Assessment*

32. The procedure for appealing the assessment, is to have the assessment officer grant time for objections. The objecting party serves and files their written objections, the responding party has the opportunity to respond in writing, and then there is typically a reply. The assessment officer then considers the objections and issues written reasons and the certificate.

33. An appeal from a certificate of assessment of costs lies to a judge of the Superior Court of Justice, and must be made within seven days from the date of the certificate appealed from. Subject to relief from the court, only those issues respecting which objections have been served may be the subject of an appeal.

34. On an appeal, the question of quantum should only be interfered with if it can be shown that the amounts allowed were grossly unfair, against conscience, or constitute the grossest kind of mistake. The court is concerned with questions of principle and not with questions of the

amount or the manner in which the assessment officer exercises his or her discretion. The difficulty in appealing a party and party assessment of costs shows the importance of devoting the time to prepare for the initial assessment.

35. Mr. Justice Killeen had some interesting remarks at the conclusion of reasons on a recent appeal. Killeen, J., commented on how the tariffs are hopelessly outdated and unprincipled, then went on to say that the assessment process is on the brink of losing its credibility and that the bar must take the initiative for substantial reform.

Reference: *Zuppinger v. Erb*, [1999] O.J. No. 1673 at pars. 36 and 37

**PARTY AND PARTY ASSESSMENTS**  
**Rule 58**

<b>WHO DOES IT</b>	<b>WHAT TO DO</b>	<b>WHEN</b>
Party entitled to costs (Rule 58.03(1))	- obtain appointment for assessment by taking notice of appointment for assessment of costs (Form 58A), bill of costs and copy of order giving entitlement to costs to the court office	- in reasonable time
(Rule 58.03(2))	- serve notice of appointment for assessment and bill of costs	- at least 7 days before date fixed for assessment
Party liable to pay costs (Rule 58.04(1))	- if no bill of costs received in a reasonable time, obtain delivery of bill of costs by taking notice to deliver bill of costs for assessment (Form 58B) to the court office	
(Rule 58.04(2))	- serve notice to deliver bill of costs for assessment	- at least 21 days before date fixed for assessment
Party required to deliver bill of costs (Rule 58.04(3))	- serve and file bill of costs	- at least 7 days before date fixed for assessment

## NOTES:

- all appointments and notices to deliver bill of costs are given by the assessment officer
- all forms require back pages
- assessment officer may fix costs where party fails to deliver bill of costs when required (Rule 58.04(4))



Court File No.

**SUPERIOR COURT OF JUSTICE**

BETWEEN:

**AGGRESSIVE REALTY CO.**

Plaintiff

- and -

**GREEDY LANDLORD and  
NEW REAL ESTATE COMPANY**

Defendants

**BILL OF COSTS OF THE PLAINTIFF  
(On a Party and Party Basis to July 2, 1996)  
(On a Solicitor and Client Basis Thereafter)**

Item No.

## 1 Pleadings

- preparation of statement of claim  
and of reply and defence to counterclaim

Time Spent:

Lawyer	5.1 hrs. @ <sup>150</sup> \$120.00	\$612.00	\$600.00
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## 2 Discovery of Documents

- preparing plaintiff's affidavit of documents  
(32 documents) and reviewing productions  
of two defendants (21 documents and 4 documents)

Time Spent:

Lawyer:	1.4 hrs. @ <sup>150</sup> \$120.00	\$168.00	
Law Clerk:	1.7 hrs. @ \$60.00	<u>102.00</u>	
		\$270.00	250.00



b) Attendance on Examinations for Discovery  
 - all parties on July 7 and 8, 1996

i) Examination of Plaintiff  
 - 120 pages

ii) Examination of Defendant, Greedy Landlord  
 - 79 pages

iii) Examination of Defendant, New Realty  
 - 25 pages

Time Spent:

Lawyer	14 hrs. @ <sup>275</sup> \$225.00	3,150.00
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c) Undertakings and Refusals

Time Spent:

Lawyer	1.4 hrs. @ <sup>275</sup> \$225.00	315.00
Law Clerk	.7 hrs. @ \$90.00	<u>63.00</u>
		378.00

6 Pre-Trial Conference

- including preparing pre-trial conference memorandum and reviewing pre-trial memoranda of the defendants, obtaining specific settlement instructions from client, and preparation for and attendance on pre-trial on January 30, 1998 before The Honourable Mr. Justice Smith

Time Spent:

Lawyer	10.4 hrs. @ <sup>300</sup> \$250.00	2,600.00
Law Clerk	4.1 hrs. @ \$100.00	<u>410.00</u>
		3,010.00
		3,000.00

7 Preparing Notice or Offer

- Offer to Settle dated July 2, 1996	150.00	
- Request to Admit dated Sept. 20, 1998	250.00	400.00

## 8 Preparation for Trial

- including reviewing transcripts and exhibits,  
compiling document briefs, obtaining and  
organizing evidence, consulting with and  
briefing witnesses, communication with  
opposing counsel, client and witnesses,  
preparing evidentiary aids for trial 33,000.00

## Time Spent:

Senior Lawyer	60.4 hrs. @ <sup>300</sup> \$250.00	15,100.00
Junior Lawyer	82.4 hrs. @ \$150.00	12,360.00
Law Clerk	21.3 hrs. @ \$100.00	2,130.00
Student	12.7 hrs. @ \$125.00	<u>1,587.50</u>
		31,177.50

Trial Brief 350.00

## Correspondence:

- 92 letters sent and received  
12 @ \$12.00/letter = \$ 144.00  
80 @ \$20.00/letter = \$1,600.00 1,744.00

## 9 Trial 30,000.00

- attendance at trial on October 18, 19, 20,  
23, 24, 25 and 26, 1998

## Senior and Junior Counsel Fee:

7 days @ \$3,500.00 24,500.00  
<sup>4,000</sup>

- preparation for and attendance on December  
4, 1998, regarding submissions on interest and  
costs

## Time Spent:

Senior Lawyer	8.4 hrs. @ <sup>300</sup> \$250.00	2,100.00
Junior Lawyer	21.2 hrs. @ \$150.00	<u>3,180.00</u>
		5,280.00

## 10 Judgment

- review of reasons and preparing judgment 100.00

Disbursements

[\* = G.S.T. included]

Paid to Issue Statement of Claim		\$ 132.00	
Paid for Service of Statement of Claim		126.60*	
Paid to Official Examiner:			
	75.50		
	410.20		
	162.00	647.70*	
Paid for Conduct Money:			
- 3 witnesses called at trial (3 x \$53.00)		159.00	
Paid for Service of Summons to Witness		145.12*	
Paid for Copies of Documents or Authorities			
- 125 copies @ 15¢	18.75		
- 1,252 copies @ 25¢	<u>313.00</u>	331.75*	
Paid for Costs of Certified Title Documents		75.00	
Paid Experts' Fees:			
- Jim Perry (Business Valuator)			
March 17, 1998	2,172.50		
December 21, 1998	8,669.43		
- Tim Mitchell (Real Estate Appraiser)			
November 16, 1998	15,176.49	26,018.42	
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		\$27,635.59	\$75,380.00
		<u>75,380.00</u>	
		\$103,015.59	
G.S.T. on Fees (\$75,380.00 x 7%)		<u>7,211.09</u>	
TOTAL		\$110,226.68	

Costs assessed and allowed at \$ \_\_\_\_\_, this day of \_\_\_\_\_, 1999.

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