

RULE 58
ASSESSMENT OF COSTS

GENERAL

- 58.01** (1) Where a rule or order provides that a party is entitled to the costs of all or part of a proceeding and the costs have not been fixed by the court, they shall be assessed in accordance with Rules 58.02 to 58.10.
- (2) Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs may be assessed in accordance with Rules 58.02 to 58.10 on the filing of a copy of the minutes of settlement with the court.

WHO MAY ASSESS COSTS

General Rule

58.02 Costs shall be assessed by the Prothonotary.

ASSESSMENT AT INSTANCE OF PARTY ENTITLED

By Filing Submission on Costs and Obtaining Appointment

- 58.03** (1) A party entitled to costs may obtain a notice of appointment for assessment of costs (Form 58 A) from the Prothonotary on filing a Submission on Costs (Form 57 A) and a copy of the order or other document giving rise to the party's entitlement to costs with the Prothonotary.
- (2) The notice and the Submission on Costs shall be served on every party interested in the assessment at least seven days before the date fixed for the assessment.

ASSESSMENT AT INSTANCE OF PARTY LIABLE

By Obtaining Appointment and Serving Notice

- 58.04** (1) Where a party entitled to costs fails or refuses to file or serve a Submission on Costs for assessment within a reasonable time, any party liable to pay the costs may obtain a notice to deliver a Submission on Costs for assessment (Form 58 B) from the Prothonotary.
- (2) The notice shall be served on every party interested in the assessment at least twenty-one days before the date fixed for the assessment.

Delivery of Submission on Costs

- (3) On being served with the notice, the person required to deliver a Submission on Costs shall file and serve a copy of the bill on every party interested in the assessment at least seven days before the date fixed for the assessment.

Failure to Deliver Submission on Costs

- (4) Where a party required to deliver a Submission on Costs for assessment fails to do so at the time set out in the notice and thereby prejudices another party, the Prothonotary may fix the costs of the defaulting party at an appropriate sum in order to prevent further prejudice to the other party.

ASSESSMENT

Generally

- 58.05** (1) If costs are to be assessed, the Prothonotary shall consider Rule 57.01 and the Rule 57 Tariff.

Students-at-Law and Law Clerks

- (2) No other fees, disbursements or charges shall be assessed or allowed unless the court orders otherwise.

Disbursements

- (3) No disbursements other than fees paid to the court shall be assessed or allowed unless it is established by affidavit or by the lawyer appearing on the assessment that the disbursement was made or that the party is liable for it.

Directions

- (4) The Prothonotary may direct production of books and documents and give directions for the conduct of an assessment.

Set Off of Costs

- (5) Where parties are liable to pay costs to each other, the Prothonotary may adjust the costs by way of set off.

Costs of Assessment

- (6) The Prothonotary may, in their discretion, award or refuse the costs of an assessment to either party, and fix those costs.
- (7) In assessing costs, the Prothonotary is bound by the court's direction or refusal to make a direction under Rule 57.02, but is not bound where the court declines to make a direction and leaves the matter to the Prothonotary's discretion.

58.06 Revoked.

COSTS OF ABANDONED PROCEEDING

58.07 The costs of a motion, application, action or appeal that is abandoned or deemed to be abandoned may be assessed on filing in the office of the Prothonotary,

- (a) the notice of motion or application served, together with an affidavit that the notice was not filed within the prescribed time or that the moving party or applicant did not appear at the hearing; or
- (b) the notice of abandonment served; or
- (c) a copy of the order dismissing the action or appeal as abandoned.

COSTS OF PARTICULAR PROCEEDINGS

Passing of Accounts

58.08 (1) The costs of passing the accounts of a trustee, committee, guardian, attorney under a power of attorney or other representative having similar duties shall be fixed in accordance with the schedule to the *Probate Act*, subject to increase where the tariff appears to be inadequate.

Costs out of Fund or Estate

(2) Where costs are to be paid out of a fund or estate, the Prothonotary may direct what parties are to attend on the assessment and may disallow the costs of the assessment of any party whose attendance is unnecessary because the interest of the party in the fund or estate is small, remote or sufficiently protected by other interested parties.

CERTIFICATE OF ASSESSMENT

58.09 On the assessment of costs, the Prothonotary shall set out in a certificate of assessment of costs (Form 58 D) the amount of costs assessed and allowed.

OBJECTIONS TO ASSESSMENT

58.10 (1) On request, the Prothonotary shall withhold the certificate for seven days or such other time as they direct, in order to allow a party who is dissatisfied with the decision of the Prothonotary to serve objections on every other interested party and file them

with the court, specifying concisely the grounds for the objections.

- (2) A party on whom objections have been served may, within seven days after service or such other time as the Prothonotary directs, serve a reply to the objections on every other interested party and file it with the court.
- (3) The Prothonotary shall then reconsider and review the assessment in view of the objections and reply and may receive further evidence in respect of the objections, and the Prothonotary shall decide on the objections and complete the certificate accordingly.
- (4) The Prothonotary may, and if requested shall, state in writing the reasons for their decision on the objections.

APPLICATION TO HAVE A LAWYER'S ACCOUNT ASSESSED

- 58.11** (1) An application for assessment of a lawyer's account to their client shall be commenced by notice of application in Form 14E.
- (2) No notice of application under this subrule shall be issued unless brought within 12 months from the date of the rendering of the account.
 - (3) The application may be made by either the client or the lawyer.
 - (4) The Prothonotary has jurisdiction to hear the application under this Rule.
 - (5) An application shall be accompanied by either Form 58 C or a completed affidavit which should include relevant facts, including:
 - (i) a copy of the lawyer's account(s);
 - (ii) certification that disbursements were made;
 - (iii) a copy of any Retainer Agreement and/or Engagement Letter;
 - (iv) a copy of any document routinely used to outline fees payable by a client;
 - (v) any estimate of fees and disbursements;
 - (vi) any discussion about what, if anything, was required or expected to be done or provided by the client and the

- lawyer and by other persons not associated with the lawyer;
- (vii) any discussion of a timetable of the conduct of the matter with appropriate milestones identified, if appropriate;
 - (viii) any discussion of the method and frequency of communications between the parties;
 - (ix) any discussion of ownership of the work product and the client's right of access;
 - (x) any discussion of the basis on which fees will be set in regard to the payment of costs outside services and disbursements;
 - (xi) any discussion of the frequency of billing of fees and disbursements and time of payment;
 - (xii) any discussion of the charging of interest on accounts more than 30 days overdue.
- (6) A hearing date must be obtained from the Registrar before the notice of application is issued.
 - (7) The notice of application shall be served at least ten clear days before the date of the hearing, except where the notice is served outside Prince Edward Island, in which case it shall be served at least 20 clear days before the date of the hearing.
 - (8) Proof of service of the notice of application and affidavit or Form 58C must be filed at least three clear days before the hearing date.
 - (9) A respondent who has been served with a notice of application shall serve the applicant, a notice of appearance in Form 38 A and a completed Form 58 C, or an affidavit described in subrule (5), at least three clear days before the date of the hearing.
 - (10) Proof of service of the respondent's notice of appearance and the affidavit or Form 58 C must be filed at least one clear day before the date of the hearing.
 - (11) In assessing costs, the Prothonotary may consider Rule 57.01(1) and the Rule 57 Tariff.

- (12) On the hearing of the application, the Prothonotary may:
- (a) decide any issue of fact or law;
 - (b) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms;
 - (c) impose sanctions for the failure of a party, to attend, including
 - (i) the award of costs;
 - (ii) dismissal of part or all of the application; and
 - (iii) noting the respondent in default.
- (13) The Prothonotary shall provide brief written reasons for their decision.

APPEAL FROM ASSESSMENT

58.12 The time for and the procedure on an appeal under section 10 of the *Judicature Act* from a certificate of the Prothonotary on an issue in respect of which an objection was served is governed by Rule 62.

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CONTINGENT FEE AGREEMENT

58.13 A lawyer may, with respect to an intended or existing proceeding, make an agreement with a client for the amount and manner of payment of the whole or any part of past or future services, fees, charges or disbursements rendered and incurred, or to be rendered and incurred, by them with respect to the proceeding, and the form of payment may consist of a gross sum, commission, percentage or otherwise in an amount which may be the same, greater or less than that which the lawyer normally receives as remuneration, subject however to assessment under Rule 58.

Agreement Must Be in Writing

- 58.14** (1) Where under an agreement referred to in Rule 58.13, a lawyer's compensation is dependent or contingent, in whole or in part upon the successful disposition of the subject matter, then the agreement shall be in writing and signed by the client or their authorized agent.
- (2) The agreement shall contain,
- (a) the name and address of each client;
 - (b) the name and address of the lawyer;

- (c) a statement of the nature of the claim;
- (d) a statement of the contingency upon which the compensation is to be paid, and, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected by the lawyer;
- (e) a statement that reasonable contingent compensation is to be paid for the services, and the maximum amount or rate which the compensation is not to exceed, after deduction of all reasonable and proper disbursements; and
- (f) a statement to the following effect:
 "This agreement may be reviewed by the Prothonotary at the client's request, and may either at the instance of the Prothonotary or the client be further reviewed by the court, and either the Prothonotary or the court may vary, modify or disallow the agreement."

Agreement Must Be Filed

- 58.15** (1) Within ten days after it is signed, a copy of an agreement referred to in Rule 58.13 shall be filed with the Prothonotary, and the Prothonotary shall file the agreement separately from any proceeding and, unless the court otherwise orders, the agreement is not available for inspection by, or its contents shall not be communicated to, any person, other than the client, lawyer, or Prothonotary engaged in the assessment.
- (2) Where an agreement as mentioned in Rule 58.13 does not comply with Rule 58.14, or is not properly filed as provided in subrule (1), the lawyer is, upon the successful disposition of the subject matter, entitled only to the compensation as would have been payable in the absence of any contingency arrangement and without regard to the contingency.

Review of Agreement by Prothonotary or Court

- 58.16** (1) Any agreement as mentioned in Rule 58.13 may, at any time after its making until the expiry of six months from the last date on which a lawyer has received, on his own account, the fee or any part of it, be reviewed by the Prothonotary at the instance of the client.
- (2) At any time after giving a decision on review, the Prothonotary may, and on the request of the client shall, refer the agreement to the court. The Prothonotary shall obtain an appointment for the review by the court and shall notify the lawyer and the client of the appointed time.
- (3) The court and Prothonotary have power on review to,
- (a) approve the agreement,
 - (b) vary, modify or disallow all or any of the provisions of the agreement, and if the agreement is so disallowed, any amount

payable to the lawyer shall be determined in accordance with Rule 57.01, and

- (c) exercise the powers which the Prothonotary has on the assessment of costs in a proceeding.

Void Provisions in Agreement

- 58.17** (1) A provision in an agreement respecting lawyer and client fees which purports to,
- (a) relieve a lawyer from liability for negligence or other liability to which they might be subject as a lawyer; or
 - (b) provide that a proceeding cannot be abandoned, discontinued or settled without consent of the lawyer;
- is void.
- (2) Notwithstanding anything in an agreement to the contrary, a client may change their lawyer before the conclusion of the retainer.

Death of a Lawyer

- 58.18** (1) Where a lawyer dies or becomes incapable of acting before their retainer has been completely performed by them, an application may be made by or on behalf of either party to the Prothonotary to determine the amount, if any, due in respect of the services rendered under the retainer and, subject to subrule (2), the Prothonotary, in determining the amount, shall have regard to terms of any agreement between the parties.
- (2) Where an agreement provides that payment is to be contingent, in whole or in part, upon the successful disposition of the subject matter, the Prothonotary has the powers provided by Rule 58.16 or may refuse any compensation, and no monies in respect of the agreement are payable until the disposition has been made.
- (3) Where a client changes or discharges their lawyer before the conclusion of the retainer, the lawyer shall be deemed to have become incapable of acting within the meaning of subrule (1).
- (4) Where a client personally settles any matter which is the subject of an agreement as described in subrule (2), without changing or discharging their lawyer, the lawyer shall be deemed to have discharged them within the meaning of subrule (3).
- (5) Where a client discontinues or abandons any matter which is the subject of an agreement as described in subrule (2) without changing or discharging their lawyer, then the lawyer may apply to assess their costs against their client, and the Prothonotary may, if they find the discontinuance or abandonment to be wholly unreasonable, allow to the lawyer reasonable compensation therefor, and has the powers provided by Rule 58.16.

- (6) Payment of any amount found to be due under subrule (1) may be enforced in the same manner as if the lawyer had completely performed their retainer, except that in any case falling within subrule (2), payment may not be enforced prior to the successful disposition, and then only with the leave of the court.

Lewis v. Prince Edward Island (1993), 112 Nfld. & P.E.I.R. 111 (P.E.I.S.C.T.D.)

The Court will not enter into a new hearing and will not interfere with the Prothonotary's assessment unless it is so unreasonable as to suggest an error in principle. The prothonotary properly considered and applied all the factors to be considered on an assessment. The prothonotary has the jurisdiction to include GST in a taxation award unless the judge who ordered costs gave some other direction.