

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN

THOMAS J. PROCINSKY

Applicant

- and -

JOLANTA BIEL

Respondent

BEFORE:	JAMES A.B. CHRISTENSEN	Taxing Officer
PARTICIPANTS:	J.W. MURPHY	Barrister & Solicitor
	B.J. HERRING	Barrister & Solicitor

CERTIFICATE OF TAXATION

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BACKGROUND & RULING

[1] The hearing of this matter took place May 3rd, 1999.

[2] Presented for taxation is the Respondent's Bill of Costs for successfully defending the Applicant's application for an injunction against the construction by the Respondent of a Gazebo in its backyard on grounds that it allegedly contravened a restrictive covenant on its title. The Bill of Costs claims the following **Schedule C** fees:

1(1)	Pleadings	\$1,000.00
7(3)	Contested adjournment application	\$150.00
7(1)	Contested application before Justice Sulyma November 5, 1998	\$500.00

Total Fees

\$1,650.00

[3] The Applicant initiated its proceeding by way of Originating Notice filed pursuant to **Part 33** of the **Alberta Rules of Court**. It also filed and served an Affidavit in support of the application. The Respondent filed and served an Affidavit in response. After a contested adjournment application, the application itself was heard and denied, costs were awarded to the Respondent under Column 1, and the Order was prepared and ultimately filed and served on the Applicant.

[4] The Respondent's claim for **Items 7(3)** and **7(1)** is not contested. However, exception is taken to the allowance of anything for **Item 1(1) - Pleadings**. The Respondent claims that its Affidavit qualifies as a "pleading". Additionally, or in the alternative, the Respondent submits that its review of the Applicant's Originating Notice entitles the Respondent to claim this **Item** in its entirety.

[5] The Respondent's claim that the Affidavit is a "pleading" within the contemplation of **Item 1(1)** is denied and disallowed. The Respondent's claim that review of the Applicant's Originating Notice entitles her to **Item 1(1)** is accepted and a fee is allowed of \$100.00.

[6] Accordingly, the Respondent is allowed total **Schedule C** fees of \$750.00. Disbursements are reduced by \$25.00, we do not allow a "file storage" charge in party/party Bills of Costs. The total Bill of Costs is allowed at **\$891.00**.

[7] To put things in perspective, under the **Old Schedule** the Respondent would have been entitled to **Item 2 - Service of its Affidavit** (\$25), **Item 16 - Opposed Adjournment** (\$50), **Item 15 - Opposed Application** (\$200), and **Item 31 - Preparation of Bill of Costs** (\$40): total fees of \$315. The Respondent is recovering **2.6** times that permissible under the **Old Schedule** (considerably more than the 1.4 inflation factor being utilized by the court prior to the introduction of the **New Schedule**). If I had acceded to the Respondent's claim for \$1,650.00 in fees the recovery would have been **5.24** times that permissible under the **Old Schedule**.

[8] Inclined to believe that this decision will be appealed, I provide my reasons for decision. Forgive their length and the fact that they wander somewhat from the specifics of the Bill of Costs before me, but certain principles of costs form the basis for the conclusions reached in the taxation of this Bill of Costs.

RUDIMENTS OF RULE 605

[9] **Rule 600(1)** provides that a taxing officer may allow “all reasonable and proper expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceeding.” The **Rule** specifically permits the recovery of “the charges of barristers and solicitors”.

[10] **Rule 605(1)** limits the “charges of barristers and solicitors” to the amounts prescribed by **Schedule C**, unless otherwise ordered by the court.

[11] **Rule 635** permits a taxing officer to “refuse to allow costs which are excessive having regard to the circumstances of the matter, including its nature and the interests and amounts involved,” and contemplates some other causes for reduction.

Schedule C is a Block Tariff

[12] **Schedule C** utilizes what is frequently referred to as a “block tariff”. In **Waters v. Smith** (1973) 2 O.R. 490, a “block tariff” is described as follows, at p. 493:

“The block tariff, however, seems designed to allow a successful litigant a lump sum for each of several stages of an action, e.g. pleadings, examinations, preparation for trial, counsel fee at trial, and judgment. It may be that the philosophy behind the block tariff, assuming there was one, was that a successful litigant had no inalienable right to a partial indemnity for the charge made to him by his solicitor for every attendance and every letter written and received. In that case, it would be sufficient if he received a fee for each succeeding phase or block of services performed by his solicitor during the prosecution of his action to judgment.”

In **Paskivski v. C.P.R.** (1974) 1 W.W.R. 13 (Alta. C.A.), Clement J.A., commenting on Alberta’s “block tariff”, stated, at p. 18:

“Such a tariff does not contemplate an inquiry into all of the costs of a litigant in order to provide a full indemnity; it provides a recognition that costs are involved and arbitrarily establishes the amount of indemnity that may be recovered in respect of specified items....There can be no doubt that litigation costs the litigant money either way, and the block tariff measures the indemnity that may be recovered from the losing side, without attempting to determine the amount of a real or full indemnity.”

[13] With the advent of the September 1, 1998, **Schedule C** the number of “blocks” of costs one might claim have been reduced from fifty-five (55) to twenty-two (22). The most significant example of this

amalgamation is **Item 1(1) – Pleadings**: whereas there were once eight (8) “blocks” for the preparation, filing and service of various PLEADINGS, there is now but one (1):

OLD	NEW
<p>(1) To commencement of proceedings by Statement of Claim, Petition, Originating Notice, or Notice of Motion (Part 30)</p> <p>(2) To effect service of any pleading, appointment or notice required by the Rules of any applicable Act</p> <p>(3) To filing Defence or Answer, including a Defence to Counterclaim</p> <p>(4) To filing Counterclaim or Counter-Petition</p> <p>(5) To issuing Third (or additional) Party proceedings</p> <p>(6) To filing Notice of Contribution</p> <p>(7) To preparation and filing of Reply, if necessary</p> <p>(8) To fee on Demand for Particulars if demand responded to or subsequently ordered</p>	<p>1(1) Pleadings - all drafting, issuing, filing, serving, reviewing and amending pleadings - except pursuant to Rule 605(7) - and including desk divorces</p> <p>(2) The limit of recovery in all cases when the matter is uncontested, for example, default judgments, is 50% of this amount</p>

Tariff Amounts are Maximums and are Subject to Reduction

[14] With the implementation of the 1998 **Schedule C** the augmented dollar value of party/party costs has piqued the interest of those obliged to pay them. With unprecedented frequency, taxing officers are being asked to exercise their discretion to reduce tariff amounts where appropriate.

[15] **Rule 605(1)** clearly states that the amounts set out in **Schedule C** are the maximum a taxing officer may allow; other than that restriction, the appropriateness of the charges are in the discretion of the

taxing officer:

“Unless otherwise ordered the charges of barristers and solicitors provided by Rule 600 shall be determined by the taxing officer, but shall not exceed the amounts set out in the columns of Schedule C, depending upon the amount involved.”¹

[Emphasis is mine]

[16] Additionally, where an **Item** in the **Schedule** has been only partially completed, **Rule 605(3)** permits a taxing officer to allow a proportionate part of what might otherwise have been allowed:

“Each item in Schedule C shall be deemed to include all instructions, documents, attendances, letters and other services necessary or convenient to be taken, prepared, made, written, read, performed or had, for the purpose of fully completing the step in the cause referred to or implied in the item, and if any step has been begun but only partially completed a proper proportionate part of the charge may be allowed.”

For example, if a party (Applicant) files and serves a Notice of Motion and an Affidavit in an effort to compel the production of undertakings, whereupon, duly induced, the Respondent produces the undertakings without the need for either the Applicant or the Respondent to attend in chambers or to prepare, file and serve an Order, the Applicant may still be entitled to a portion of **Item 7(1) - Contested Application** for the steps actually taken.

[17] A number of Alberta decisions affirm what **Rule 605(1 & 3)** plainly states, that **Schedule C** gives the taxing officer maximum amounts to allow, not minimums, and that the taxing officer has an obligation to reduce from those maximum amounts where appropriate: **First City Trust Co. v. Triple Five Corp.** [1990] A.J. No. 597, 74 Alta. L.R. (2d) 272 (Alta. C.A.); **Nova, an Alberta Corp. v. Guelph Engineering Co.** (1988) 60 Alta.L.R. (2d) 366, (1988) 89 A.R. 363; **Jake's Northern Pride Potato Wholesale Ltd. v. 24346 Alberta Limited** [1982] A.U.D. 1072, Alta. Decisions 3599-01; **Northern Crown Bank v. Woodcrafts** (1919) 2 W.W.R. 917 (Alta. S.C.); **Garvie v. Coleman** (1919) 3 W.W.R. 511 (Alta. C.A.); **McArdle & Davidson v. Howard** (1915) 8 W.W.R. 1056 (Alta. S.C.).

[18] In **McArdle** (supra) Stuart J. states at p. 1058:

"The sums allowed in the schedule are not fixed arbitrarily, but are maximum

1

The “amount involved” refers to the Column to be utilized in the Schedule and is determined by reference to sub-rules 5 & 6.

amounts and the taxing officer is always at liberty, and indeed it is his duty, to reduce them if in his opinion the sum named should not be allowed."

[19] In **Garvey** (supra) Harvey C.J.A. responds to a taxing officer's failure to exercise the discretion mandated by [now] **Rule 605(1)**, at p. 513:

"It also shows that the taxing officer paid absolutely no regard to the provisions of Rule 21 [now Rule 605(1)] of the Rules of Court, which provides that the costs shall be in his discretion up to the limit of the column applicable, for in every single instance he has allowed the maximum. I fear that there are other taxing officers who similarly fail to discharge the responsibility which the Rule places upon them of themselves deciding whether each particular item of charge in a bill of costs is entitled to the maximum or something less. Whether this is through misunderstanding of the meaning of the Rule, or through a desire to be complaisant and generous, or a disinclination to investigate, the result is that the Rule is not given effect to and an injustice is done to the party who has to pay the costs....I merely call attention to it here with the hope of causing some more regard to be paid to the Rule than in some cases has been the case heretofore."

[20] Therefore, it is not for the taxing officer to blithely allow the maximum of each **Item** in each and every instance, however temptingly expedient that might be. Indeed, the combination of (a) considerably more significant dollar values permitted by the 1998 **Schedule C** and (b) the merging of several stages of the litigation process into fewer "blocks" has augmented exponentially the taxing officer's obligation to weigh each **Item** and to reduce it where appropriate.

[21] It has been argued that the specific grants of discretion furnished to judges, masters and taxing officers by the footnotes to **Item 3(1) - Document Discovery** and **Item 10 - Preparation for Trial** evidence the Rules Committee's intent to deny such discretion vis-à-vis the remaining Items in the **Schedule**. That is, what is mandated specifically cannot be exercised generally. Such reasoning fails to take into consideration the clear wording of **Rule 605(1)** (supra) and the equally clear judicial consideration of that **Rule**. It also fails to recognize the overriding discretion afforded taxing officers by **Rule 600** to allow "all reasonable and proper expenses" and by **Rule 635** to "refuse to allow costs which are excessive having regard to the circumstances of the matter, including its nature and the interests and amounts involved." In this taxing officer's opinion the footnotes to **Items 3(1)** and **(10)** serve two purposes: (a) to recognize the unique heterogeneity of the work these particular Items may or may not require and, most significantly, (b) to draw to the attention of judges and masters the fact that they may want to exercise their inherent jurisdiction (**Rule 601**) to increase the amounts of these Items beyond the maximum where warranted. I note that masters and judges have always had such authority (**Rule 605(1)** - "Unless otherwise ordered, . . .") - these footnotes serve only to emphasize the point.

SCHEDULE C – ITEM 1(1) – PLEADINGS

[22] Without question the most controversial Item in the new **Schedule is 1(1) - Pleadings**. As previously noted, eight (8) separate pleadings have been condensed into one. It now reads:

“Pleadings - all drafting, issuing, filing, serving, reviewing and amending pleadings - except pursuant to Rule 605(7) - and including desk divorces.”

[23] I would like to examine some of the issues this new **Item** raises.

Should the Maximum Be Allowed in Every Instance?

[24] Consider the following illustration utilizing two different scenarios and three different “amounts involved” (for a more comprehensive version see Schedule “A”, appended):

(1) \$3,000 - which places it in the old Column 1 and in the new column 1, but subject to the 75% rule imposed by the new **Rule 605(7)**,

(2) \$14,000 - which places it in the old Column 2 and in the new Column 1, and

(3) \$200,000 - which places it in the old Column 6 and in the new Column 3.

Each scenario is premised on the assumption that one is entitled to the maximum amount of each **Schedule C** Item.

Scenario #1 – *Plaintiff drafts, files and serves a Statement of Claim whereupon the Defendant files a Statement of Defence. Plaintiff gets costs.*

\$3,000.00		\$14,000.00		\$200,000.00	
Old	New	Old	New	Old	New
195	750	245	1,000	545	2,000

Scenario #2 – Plaintiff drafts, files and serves a Statement of Claim. Defendant files a Statement of Defence and a Counter-Claim for \$2,000.00, \$700.00 and \$250,000 respectively. Plaintiff files a Demand for Particulars, which is responded to. Plaintiff files a Defence to Counter-Claim. Plaintiff wins at trial, with costs. Counterclaim is dismissed with costs to the Plaintiff.

\$3,000.00 + \$2,000.00		\$14,000.00 + \$700.00		\$200,000.00 + \$250,000.00	
Old	New	Old	New	Old	New
420	750	545	1,000	1,195	2,000

[25] Note that under the **New Schedule**, if the taxing officer were to allow the maximum in each and every instance, despite the disparity in expended time and effort the Plaintiff in scenario #1 will recover exactly the same costs for Pleadings as will the Plaintiff in scenario #2. Such was not the case under the **Old Schedule**. Why should it be under the **New**?

[26] I note **Item 1(2)** which provides that:

“The limit of recovery in all cases when the matter is uncontested, for example, default judgments, is 50% of this amount.”

A default judgment entails drafting, filing and serving a Statement of Claim, drafting and filing an Affidavit of Service, and drafting and filing a Default Judgment; for all of which the Plaintiff is entitled to 50% of the appropriate column. Why then, if a Plaintiff drafts, files and serves a Statement of Claim, drafts and files an Affidavit of Service, and reviews a Defendant’s Statement of Defence, and does nothing more so far as “pleadings” are concerned, should that Plaintiff recover more than the Plaintiff who obtained Default Judgment?

[27] It has been suggested that an Originating Notice is unique in that no other pleadings can be filed in relation to it and in that the Originating Notice, possible Examinations on Affidavit and the resultant Hearing constitute the whole of the proceeding. Allowing only a portion of **Item 1(1)**, it is suggested, is a failure to recognize that the Originating Notice and its supporting Affidavit must be crafted and fine-tuned to identify all the issues and produce all the evidence that are normally brought out through the lengthy process of getting to and conducting a Trial. In short, more thought and effort goes into the drafting of an Originating Notice and its supporting Affidavit than, say, the drafting of a Statement of Claim. I note firstly that the supporting Affidavit is not a “pleading”, it is a document in support of the Application for which compensation is provided under **Items 6 to 8**. Secondly, I refer the reader to Schedule “B” of this decision, which reviews the simplified procedure Originating Notices are meant to address – **In re Lloyd Estate** [1954] 3 D.L.R. 834, 12 W.W.R. 445 (Man. C.A.), Coyne, J.A. explained:

“Determination on originating notice, . . . is a limited process intended as a simple method of deciding neat questions of interpretation of documents, including statutes, or application of law to undisputed facts and inferences arising out of such facts.”

As with any other pleading, a taxing officer has an obligation to consider all the relevant factors and considerations in exercising the discretion to allow the whole or only a part of **Item 1(1)** relative to the preparation, filing and serving of an Originating Notice. I do not see that as a general rule Originating Notices should be treated any differently than Statements of Claim or Petitions.

[28] If not allowing the maximum in every instance is seen as introducing complexity, doubt and confusion into the costs and taxation process I hope the foregoing has explained why that concern is out of the taxing officer’s hands. To assist litigants I provide a set of guidelines in Schedule “C” of this decision, with the emphatic qualification that the guidelines are **subject to the taxing officer’s discretion in each and every instance**.

What Qualifies as a “Pleading”?

[29] Please forgive me for stating the obvious, but everything, including the proverbial kitchen sink, is being claimed these days as a “pleading”, all for the sake of recovering **Item 1(1)**.

[30] A “pleading” is defined in **Rule 5(1)(m)**:

“Pleadings’ means the written statements delivered alternately by the parties one to the other until the issues in the action are defined and include, a statement of claim, a statement of defence, a counterclaim, a defence to counterclaim, a reply, a reply to defence to counterclaim, a joinder of issue, a demand for particulars, a reply to demand for particulars, an originating notice and a petition.”

[31] **Rule 104** provides, concerning the contents of pleadings, that:

“Every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, . . .”

[32] **Rule 101** provides, concerning pleadings subsequent to a reply, that:

“No pleading other than a joinder of issue subsequent to a reply or a reply to a defence to counterclaim may be pleaded except by leave of the Court.”

[33] **Rule 102** provides that a *joinder of issue* is implied if,

“. . . no reply or joinder of issue has been delivered . . . 8 days after the delivery of the statement of defence or defence to counterclaim.”

[34] **Rule 103** provides that pleadings are closed,

“As soon as

- (a) either party has delivered a joinder of issue upon the pleading of the opposite party, or
- (b) joinder of issue is implied, . . .”

[35] Once pleadings are closed **Rule 101** permits the Court to grant leave to file what can only be referred to as subsequent pleadings which, I understand from those more learned than I, could include the following:

- a) Rejoinder by the Defendant;
- b) Surrejoinder by the Plaintiff;
- c) Rebutter by the Defendant; and
- d) Surrebutter by the Plaintiff.²

[36] Additionally, the closure of pleadings is subject to the **Alberta Rules of Court** provisions allowing for the amendment of pleadings with leave of the Court - **Rules 132 - 141**. Note, however, that the costs associated with any amendment requiring leave of the Court, “shall be borne by the party making it, unless the Court otherwise orders.”³

[37] **Certificate of Readiness is not a Pleading** – A Certificate of Readiness comes well after pleadings have closed and cannot properly be claimed under **Item 1** of **Schedule C**. **Rule 236(1)** permits the parties to “enter the action for trial by filing a certificate of readiness” only “when all parties have

² See P. St. J. Langan, Civil Procedure (London: Sweet & Maxwell, 1983), p. 87.

³ **Rule 141**

completed all pleadings, . . .” As a taxing officer it is my practice to allow the preparation and filing of a Certificate of Readiness and of the Record as but two of many components which make up the **Item 10 - Preparation for Trial** block of costs. I recommend 10% of the appropriate Column (**subject to the taxing officer’s discretion in each instance**).

[38] **Appointment for Taxation is not a Pleading** – In **Shoctor, Mousseau & Ferguson vs. Modular Windows**, unreported, 10 April 1989, J.D. of Edmonton, 8903 01624, Master Funduk denied a **Rule 129** application to strike an Appointment for Taxation as it “is not a pleading.”

[39] **Originating Notice is a Pleading** – **Rule 5(1)(k)** provides that “originating motion” means a pleading by which a petitioner commences his action. **Rule 5(1)(m)** specifically lists an “originating notice” in its definition of “pleadings”. **Rule 6(2)** provides that “proceedings may be commenced by originating notice where permitted by statute or by these Rules.” Likewise, **Rules 404** and **410** outline circumstances in which “proceedings” may be commenced by Originating Notice. An Originating Notice is a pleading.

[40] **Motion is not a Pleading** – In **Port v. Auger** [1994] W.L.R. 862 Harman, J. ruled that “neither an ordinary application, nor indeed . . . an ordinary motion, is a pleading.” To be clear, “any application to the court other than an originating application, . . . meaning an application which is not an application in pending proceedings, shall be an ‘ordinary application’.” **Part 30 - Special Application to the Court** used to allow an “originating application” by way of notice of motion, but as noted below, it no longer does. A notice of motion is not a pleading.

[41] **Affidavit is not a Pleading** – “Affidavit” is not addressed in the **Part 1 - Definitions** section of the **Alberta Rules of Court**. The Rules governing the form, content and execution of Affidavits are notably found under **Part 26 - Evidence** and **Rule 305** confines affidavits “to the statement of facts within the knowledge of the deponent” but makes an exception for hearsay evidence vis-à-vis interlocutory motions.

[42] In Williston and Rolls, **The Law of Civil Procedure** (1970, Vol. 2) 647 light is shed on why an Affidavit is not a pleading: “It is an elementary rule in pleading that when a state of fact is relied on, it is enough to allege it simply without setting forth the subordinate facts which are the means of proving it or the evidence to sustain the allegation.” Affidavits fill the latter role, not the former. This accords with **Rule 104** (supra) which specifically provides that pleadings are not to include “the evidence by which [the material facts of the pleading] are to be proved.”

[43] Consider too **Rule 129(1)(a)** which permits the court to “strike out or amend any pleading on the ground that it discloses no cause of action or defence” but in **sub-rule (2)** specifically provides that “no

evidence shall be admissible on [such] an application.” If an affidavit cannot be used in support of an application to strike or amend a pleading on this ground, does it not follow that an affidavit cannot be and is not a pleading?

[44] Consider the following scenarios in which claims have been made under **Item 1(1)** for the preparation or review of an Affidavit:

Part 11 - Summary Judgment – Rule 159 contemplates the filing of an Affidavit which “can swear positively to the facts” and “state” either that there is no genuine issue to be tried (Plaintiff) or that there is no merit to the claim (Defendant). Does the inclusion of such a “statement” qualify the Affidavit as a “Pleading”? It is notable that in each of those instances the issues would have been pleaded in their Statement of Claim and Statement of Defence respectively. In Stevenson and Côté’s **Civil Procedure Guide** (Juriliber, 1996) at page 676 cases are cited which do not allow a defendant to rely on a point in a summary judgment application (by affidavit or by viva voce evidence) if it has not been pleaded in the Statement of Defence; though leave may be granted to amend. The authors cast a doubtful eye upon a decision which found that “a motion for summary judgment may succeed if made out on the affidavits even if the prayer for relief in the statement of claim [was] poorly worded” (**Bank of B.C. v. Rohata Dev. & Cons** [1982] A.U.D. 240, J.D. of Edmonton 8103 36794, Master, October 20, 1982) and an equally doubtful eye upon one which permitted a defendant to “swear to a defence which he ha[d] failed to plead” (**Bartle & Gibson Co. v. Spicer**(1982) 35 A.R. 324 (Master)).

Part 33 - Originating Notice – The **Rules** in this **Part** describe when proceedings may be “taken” or “commenced” by originating notice. **Rule 405** requires that “every originating notice shall include a statement of the questions on which the applicant seeks the determination or direction of the court or, as the case may be, a concise statement of the nature of the claim made and of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause of action for which the applicant claims that relief or remedy.” **Rule 406** gives direction for service of the Originating Notice and “of each affidavit in support”. **Alberta Rules of Court - Form G - Originating Notice** contemplates that “in support of the application will be read” the Affidavit or Affidavits served with the Originating Notice. It is instructive that the supporting Affidavit(s) are not part of the Originating Notice, but are documents in support of the application.

Part 30 – Special Application to the Court – In certain specified circumstances (**Rule 394**) an applicant may apply *ex parte* to a judge without filing an initiatory document. **Rule 395(1)** provides:

"In any such case it is not necessary to file any document commencing proceedings, but the applicant shall, on an affidavit of the facts, apply *ex parte* to a judge, who may

- "(a) proceed to determine the matter, *ex parte*, or
- "(b) direct that the matter be set over for hearing on notice, in which case the judge shall designate what persons are to be served with notice, and may prescribe the nature of the notice, and the time for and mode of service."

Rule 395(2) provides that "the directions given shall either be endorsed upon the affidavit of facts or set forth in an order" while sub-rule **(3)** states that "subject to any such directions, the form and content of the notice and the procedure applicable shall be as provided in Part 33, *mutatis mutandis*" (**Part 33** being the commencement of proceedings by Originating Notice). Sub-rule **(5)** requires that "all original affidavits, orders, or directions and copies of notices, shall be filed in the office of the clerk of the district in which the application is made."

Notice too that any costs associated with an application of this nature "are in the discretion of the Court" (**Rule 395(7)**).

Does the Affidavit initiating this proceeding qualify as a "pleading"? Until told otherwise, it is my opinion that it does not. Once again, the Affidavit is a supporting document, it places evidence before the court in an *ex parte* proceeding such as will enable the court to decide whether the matter may be dealt with summarily, or whether notice is to be given, in which case an Originating Notice is to be filed.

[45] Nothing I have read suggests that Affidavits filed (a) in *support* of an **application to strike** a pleading, (b) in *support* of or in *response* to an **Originating Notice** for any purpose, (c) filed (subsequently) in *support* of an *ex parte* Part 30 - **Special Application**, or (d) filed in *support* of a **interlocutory notice of motion** are to be treated as "pleadings", nor that their preparation entitles a party to claim **Item 1(1) of Schedule C**.

CONCLUSIONS

[46] The **Alberta Rules of Court Schedule C** utilizes a block tariff which "measures the indemnity that

may be recovered from the losing side, without attempting to determine the amount of a real or full indemnity.”⁴ The amounts set out in the various columns of **Schedule C** are maximums which only the Court, not the taxing officer, may exceed.⁵ Indeed, the taxing officer has a duty to allow less than the maximum where the sum claimed is excessive or unjustified.⁶

[47] **Schedule C - Item 1(1) - Pleadings** sets a maximum amount to be allowed for the drafting and review and amendment of all pleadings in any given action. It is, in most circumstances, unreasonable to allow the maximum amount for the preparation, filing and serving of only one pleading. Multiple dealings with pleadings may justify the maximum amount. The review of an opposing party’s pleading entitles one to a portion of **Item 1(1)**. The costs associated with the amendment of pleadings which require leave of the court are not recoverable unless otherwise ordered by the Court.⁷ What is reasonable in each instance is in the taxing officer’s discretion.⁸

[48] A Certificate of Readiness is not a pleading,⁹ but the costs associated with its preparation, obtaining approval of it and filing it and the Record may be recovered under **Item 10 - Preparation for Trial**.

[49] An Appointment for Taxation is not a pleading.¹⁰

[50] An Originating Notice is a pleading.¹¹

[51] A Notice of Motion is not a pleading.¹²

4 **Paskivski v. C.P.R.** (supra)

5 **Rule 605(1)** and cases (supra at page 6)

6 Cases (supra at page 6) - see too, in a different vein, **Rule 605(3)**

7 **Rule 141**

8 **Rule 605(1)**

9 **Rules 102 / 103 / 236(1)**

10 **Shocter vs. Modular** (supra)

11 **Rule 5(1)(k)/(m)**

12 **Port v. Auger** (supra)

[52] An Affidavit is not a pleading, regardless the circumstances.¹³

[53] The Respondent's Bill of Costs is allowed at \$891.00.

[54] **APPEAL MAY BE MADE** from this taxation pursuant to the provisions of **Rule 655** of the **Alberta Rules of Court**.

DATED AT THE CITY OF Edmonton, in the Province of Alberta, Friday, July 16, 1999.

James A. B. Christensen
Taxing Officer / Deputy Clerk of the Court

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See discussion at page 12

“SCHEDULE A”

“Amount Involved”	\$3,000.00		\$14,000.00		\$200,000.00	
	Old	New	Old	New	Old	New
(1) To commencement of proceedings by Statement of Claim, Petition, Originating Notice, or Notice of Motion (Part 30)	\$150.00		\$200.00		\$500.00	
(2) To effect service of any pleading, appointment or notice required by the Rules of any applicable Act	\$25.00		\$25.00		\$25.00	
(3) To filing Defence or Answer, including a Defence to Counterclaim	\$150.00		\$ 200.00		\$ 500.00	
(4) To filing Counterclaim or Counter-Petition	\$150.00	\$750.00	\$ 200.00	\$1,000.00	\$ 500.00	\$2,000.00
(5) To issuing Third (or additional) Party proceedings	\$150.00		\$ 200.00		\$ 500.00	
(6) To filing Notice of Contribution	\$25.00		\$25.00		\$25.00	
(7) To preparation and filing of Reply, if necessary	\$50.00		\$50.00		\$75.00	
(8) To fee on Demand for Particulars if demand responded to or subsequently ordered	\$75.00		\$ 100.00		\$ 150.00	

Scenario #1: Plaintiff drafts, files and serves a Statement of Claim whereupon the Defendant files a Statement of Defence. No further pleadings are filed and the Plaintiff obtains judgment - for the sake of illustration all steps extraneous to Item 1 - Pleadings are being ignored.

	\$3,000.00		\$14,000.00		\$200,000.00	
	Old	New	Old	New	Old	New
Statement of Claim, Service, Review Statement of Defence	\$195.00	\$750.00	\$245.00	\$1,000.00	\$545.00	\$2,000.00

Scenario #2: Plaintiff drafts, files and serves a Statement of Claim. Defendant files a Statement of Defence and a Counter-Claim for \$2,000.00, \$700.00 and \$250,000 respectively. Plaintiff files a Demand for Particulars, which is responded to. Plaintiff drafts a Defence to Counter-Claim. Plaintiff wins at trial, with costs. Counterclaim is dismissed with costs to the Plaintiff.

	\$3,000.00 & \$2,000.00		\$14,000.00 & \$700.00		\$200,000.00 & \$250,000.00	
	Old	New	Old	New	Old	New
Statement of Claim, Service, Review Statement of Defence, Demand for Particulars, Statement of Defence to Counter-Claim	\$420.00	\$750.00	\$545.00	\$1,000.00	\$1,195.00	\$2,000.00

“SCHEDULE B”

Delving into the “nature” of the “originating notice” Stevenson and Côté’s *Civil Procedure Guide* (Juriliber, 1996) at page 1389 notes the case of **Re Busfield** (CA 1886) 55 LJCh 467, 468, 32 ChD 123 as standing for the conclusion that: “Unlike an action, (i) an originating notice has no pleadings, and (ii) it is in chambers, not court: . . .” Our **Rule 5(1)(k)** rectifies that 1886 notion. It is true that proceedings initiated by Originating Notice are heard in chambers. Occasionally the court will order the trial of an issue. From a reading of the cases and commentary in the *Civil Procedure Guide* (supra) pages 1388 to 1410, there are limitations on what the courts will entertain in proceedings initiated by Originating Notice: to quote from page 1388 regarding “issues of fact”:

- (1) “An originating notice should not be used where real disputed proceedings are likely and title, trusts, etc. will be raised.”
- (2) “Primary facts in dispute bar use of R. 410(e), but disputed inferences (from undisputed primary facts) do not.”
- (3) “A complex matter with disputed questions of fact, issues of credibility, and considerable **viva voce** evidence should proceed by way of trial rather than originating motion.”
- (4) “Cannot use an originating notice if facts have to be found especially if they are disputed, and involves assessing damages. Trial is necessary.”
- (5) “Where an originating notice stated questions too abstract to be useful or dispose of the rights of the parties, they should be left to a statement of claim.”

And, from page 1394 regarding **Rule 410** generally:

- (1) “This procedure is not for serious questions of fact and law.”

At page 1389 reference is found to **In re Lloyd Estate** [1954] 3 D.L.R. 834, 12 W.W.R. 445 (Man. C.A.) wherein are found the following two comments relative to the purpose of proceedings initiated by Originating Notice:

McPherson, C.J.M. – “The procedure of hearing disputes by way of originating motion was for the purpose of simplifying the administration of

justice and court procedure and to lessen the cost of litigation.”

Coyne, J.A. – “Determination on originating notice, . . . is a limited process intended as a simple method of deciding neat questions of interpretation of documents, including statutes, or application of law to undisputed facts and inferences arising out of such facts.”

“SCHEDULE C”

To draft, file and serve an Initiatory Document	50% of the appropriate Column
To review an Initiatory Document or Statement of Defence & Counterclaim or Third Party Notice or other Pleading	10% of the appropriate Column, per instance
To draft, file and serve a Statement of Defence or Defence to Counter-Claim	50% of the appropriate Column
To draft, file and serve a Third (or additional) Party Notice	50% of the appropriate Column
To draft, file and serve a Notice of Contribution	5% of the appropriate Column
To draft, file and serve a Reply (where necessary)	7.5% of the appropriate Column
To draft, file and serve a Demand for Particulars (if responded to or subsequently ordered)	10% of the appropriate Column

Subject, in each and every instance, to the taxing officer's discretion.

ACTION NO. 9803-16581

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN

THOMAS J. PROCINSKY

Applicant

- and -

JOLANTA BIEL

Respondent

CERTIFICATE OF TAXATION

Clerk of the Court
Office of the Taxing Officer

Law Courts Bldg.
1A Sir Winston Churchill Square
Edmonton, AB T5J 0R2

422-1520