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ORKIN ON THE LAW OF COSTS Mark M. Orkin Robert G. Schipper Release No. 4, July 2026
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This is a unique looseleaf service that covers all costs issues in legal proceedings, with relevant decisions analyzed and rules of court and tariffs referenced for every jurisdiction. This practical all-in-one resource provides coverage of the awarding and fixing or assessment of costs between party-and-party and between solicitor-and-client; costs in both civil and criminal proceedings; and costs awards in bankruptcy and insolvency proceedings and construction liens.

What’s New in this Update

This release includes updates to Chapter 3—Solicitor-and-Client Costs, Chapter 5—Security for Costs, Chapter 6—Assessment of Costs, Chapter 8—Appeals, Chapter 11—Costs in the Federal Court, Chapter 14—Costs in the Family Court and the Small Claims Court.

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Highlights:

- **Assessment of Costs—The Assessment Officer—Powers and Duties of Assessment Officer—Production of Documents**—This decision of the Supreme Court of British Columbia addressed the scope of disclosure required on an assessment of special costs, particularly where the party seeking costs asserts solicitor-client or litigation privilege over counsel's file. The underlying action involved a dispute over an alleged agreement by the defendant aunt to leave the bulk of a substantial estate to the plaintiff. The plaintiff's claims were dismissed at trial, the appeal was dismissed, and leave to appeal to the Supreme Court of Canada was denied. The defendants then sought special costs of approximately \$2.4 million, subject to a 30% discount ordered by the trial judge, leaving about \$1.7 million to be assessed. Before the assessment, the plaintiff sought disclosure of the defendants' counsel's file, including communications, draft and final pleadings, and documents relating to other matters handled by the same lawyers. The issue was complicated because the defendants' lawyers had not opened separate files for work performed on other matters, making it necessary to distinguish recoverable litigation work from non-recoverable work. The Registrar confirmed that, on a special costs assessment, the party claiming costs bears the burden of proving that the fees were reasonable. A lawyer's assertion that the accounts are reasonable is generally insufficient. The payor must have a fair opportunity to test the reasonableness of the fees claimed. The Registrar recognized the importance of solicitor-client privilege, describing it as having quasi-constitutional protection. However, privilege may be implicitly waived where a party seeking special costs puts the contents of counsel's file in issue. Here, the defendants' lawyers filed affidavits explaining how they separated recoverable time from unrelated work, including by reviewing their file materials. In doing so, they placed the contents of the file in issue and could not use privilege as both a "sword and a shield." The Registrar emphasized that disclosure should not automatically mean opening the entire file. The proper approach is a tailored and proportionate one. The court must balance the protection of privilege against the principles of natural justice and the payor's right to test the reasonableness of the costs claimed. Given the large amount at stake, the complexity of the matter, the number of timekeepers, and the long period over which work was performed, the Registrar ordered further disclosure. The defendants were required to disclose the full accounts, not merely edited time-entry summaries, and to identify documents over which they claimed litigation privilege, solicitor-client privilege, or irrelevance, together with the basis for

each claim. *De Angelis v. Siermy*, 2025 A.C.W.S. 2782 (B.C. S.C.).

- **Assessment of Costs—The Assessment Officer—Objections to Assessment; Review of Assessment; Certificate of Assessment—Objections to Assessment**—This decision of the Ontario Divisional Court concerned a dispute between a client and a law firm over legal fees assessed under the Solicitors Act. The assessment officer reduced the law firm's accounts from approximately \$110,164.81 to \$80,000, inclusive of HST and disbursements. The client sought to challenge the assessment and have the fees reduced further. The case is significant because it highlights confusion in Ontario over the proper procedure for challenging an assessment officer's decision in a solicitor-client assessment. The Divisional Court distinguished between two different regimes:
- Solicitor-client assessments under the Solicitors Act; and
- Party-and-party costs assessments under the Rules of Civil Procedure.

The court explained that the Solicitors Act governs disputes over “fees, charges and disbursements for business done by a solicitor.” Under the Act, the assessment is treated as a “reference,” and the assessment officer's decision is confirmed in the same manner as a referee's report. A party opposing confirmation must bring a motion to a judge of the Superior Court. By contrast, Rule 58 of the Rules of Civil Procedure governs assessments of costs between parties to litigation. Rule 58 includes an objections procedure. The Divisional Court observed that this objections procedure, which properly belongs to party-and-party costs assessments, has unfortunately been imported into solicitor-client assessments, even though the Solicitors Act does not provide for objections. The court referred to the earlier Divisional Court decision in *RZCD Law Firm LLP v. Williams*, which had stated that objections were required before an appeal from a certificate of assessment could proceed. Although the court acknowledged the procedural confusion, the majority did not resolve the broader issue by overruling that approach. Instead, it dismissed the appeal, finding that the assessment officer's reasons, read as a whole, sufficiently addressed the client's position and showed no basis for intervention. The Divisional Court reiterated that a court reviewing a certificate of assessment should not retry the matter. Intervention is appropriate only where the assessment officer made an error in principle or a patent misapprehension of the evidence. One judge concurred in the result but wrote separately to address the procedural problem directly. In that judge's view, *RZCD* was wrongly decided because the objections procedure is not required by the Solicitors Act for solicitor-client assessments. The judge stated that the error was procedural, not substantive, and that the Divisional Court

should correct it rather than leaving the problem to the Court of Appeal or the legislature. *Nakano v. Cohen Highley LLP*, 2025 A.C.W.S. 2613 (Ont. Div. Ct.).