PRACTICE BEFORE THE REGISTRAR

EXCERPT FROM CHAPTER 1

General Advice on Practice Before the Registrar

II. INITIAL CONSIDERATIONS IN PRACTICE BEFORE THE REGISTRAR [§1.2]

A. IS A REGISTRAR'S HEARING NECESSARY? [§1.3]

Before obtaining an appointment, counsel should consider what a hearing is expected to accomplish and whether a hearing is really needed.

Hearings before the registrar certainly increase the expense of litigation and, in the case of lawyers' bills to their own clients, add expense that is sometimes wasted. Many hearings could be avoided and energy spent more productively. This is especially true of hearings under the *Legal Profession Act*, where proceedings can occupy lawyers for long periods outside their offices without remuneration. Recoverable costs will not contribute adequately toward any legal expenses actually incurred, and lost income cannot be recouped. For an example of a matter that was almost certainly not economical for the parties involved, see *Davis & Co. v. Jiwan*, 2006 BCSC 658 (Registrar), appeal dismissed 2007 BCSC 1775, further appeal dismissed 2008 BCCA 494, leave to appeal refused 2009 CanLII 19892 (SCC). The hearing of this case, in the first instance, consumed some 41 court days. Whether there was any real possibility that the hearing could have been avoided by an agreed resolution is another matter.

B. BILLS OF COSTS PAYABLE TO PARTIES [§1.4]

Counsel should ensure that entered orders for costs clearly state the details of the costs decision and any directions for the registrar. In contentious matters, registrars will usually not proceed with assessments until entered orders are produced because, without the court's clear direction, the scope of their authority is undefined. However, in a case where the terms of the order have been agreed upon, the registrar may proceed but will not sign a certificate until the order is entered.

Except in respect of costs for "applications" (which are governed by Rule 14-1(12) of the Civil Rules and Rule 16-1(9) of the Family Rules), if an entered order does not provide for costs, then no costs can be assessed, even though the party wanting to claim them has succeeded in the event (see Civil Rule 14-1(9), Family Rule 16-1(7), and *Maurice v. Maurice*, 1994 CanLII 3323 (BC SC)). The court may not re-open a matter to include a provision as to costs unless its omission is a slip that may be corrected under Civil Rule 13-1(17) or Family Rule 15-1(18) (see *Leyden v. Strata Plan NW3235*, 2004 BCSC 934). If an order is ambiguous, it can be clarified by the judge who pronounced it, even if the judge would otherwise be *functus officio* (see, for example, *Avery & Son v. Parks*, 1917 CanLII 543 (ON CA); *Abbott v. Andrews*, (1882), 8 Q.B.D. 648).

Where actions have been tried together or one after the other, counsel should consider whether an order for costs provides for one or more bill of costs. Where no order has been made as to apportionment of costs,

s. 7 of Appendix B of the Civil Rules sets out the registrar's powers. For a discussion of costs where there was more than one proceeding, see "Set-off of Costs" in chapter 2.

Counsel should carefully consider how to prove the claimed costs. Much (sometimes wasted) effort can be devoted to preparing long affidavits in support of claimed costs when it may be more efficient and perhaps more effective to forgo affidavits in favour of *viva voce* evidence. Nevertheless, a carefully drawn affidavit may be enough to satisfy reasonable counsel for the party bound to pay and can be key in convincing the registrar that a party has appropriately claimed an item or items (see, for example, *McKenna v. Anderson*, 2005 BCSC 84 (Registrar)).

C. LAWYERS' BILLS TO CLIENTS [§1.5]

Except in cases where it is necessary to obtain an appointment quickly to preserve a right of review that is about to be lost because of a limitation in s. 70(1) of the *Legal Profession Act*, no lawyer should obtain an appointment for the review of one of his or her own bills until the lawyer has made every reasonable effort with the client to resolve the dispute over the charges. "Every reasonable effort" includes meeting or trying to meet with the client to discuss the dispute and how it might be resolved. Unlike an exchange of correspondence, which will probably solidify positions, a meeting carries with it the possibility of the parties reaching some sort of resolution. The Law Society of British Columbia's Fee Mediation Program offers three hours of mediation free of charge to mediate a fee dispute, provided the bill has not already been ruled upon by the courts.

Unless a limitation date is looming, no lawyer acting for the former client of another lawyer should obtain an appointment for a review without first interviewing the former client at length, studying the correspondence file kept by the lawyer, or as much of it as has made its way into the hands of the former client, and (if it may be arranged) interviewing the former lawyer. Obviously, the bills themselves should first be studied, as should available time records and any correspondence that might have been exchanged about the retainer and the lawyer's charges.

Counsel should also decide whether, on the available information, the registrar is likely to find that he or she has jurisdiction to conduct the review. Normally, the question of jurisdiction should be decided by the registrar as a threshold issue (see *Degner v. Longpre*, [1987] B.C.J. No. 1360 (QL) (S.C.) (Chambers)). Even in the face of *Pierce, van Loon v. Davro Investments Ltd.*, 1995 CanLII 731 (BC CA), in which Southin J.A. (in chambers) suggested that parties should not litigate "in slices", arrangements can sometimes be made—at least where the parties agree on the procedure—for an advance hearing to determine the jurisdiction question before evidence on the merits is led. (See, for example, *Nathanson, Schachter & Thompson v. Levitt*, 2004 BCSC 1402.)

Where a review is barred because of a limitation issue (that is, it is conceded that a final bill was paid more than three months before an appointment for review was obtained or that a final unpaid or partly paid bill was delivered or sent more than 12 months before that event; for more information, see "Limitation Periods and Special Circumstances in Legal Profession Act Reviews" in chapter 3), either party will need to make an application to the court to allow a review to take place. This may be done either under s. 70(11) of the *Legal Profession Act* (which requires that "special circumstances" be shown to justify the pronouncement of an order for a review that the registrar would not otherwise have jurisdiction to conduct), or on the basis of the inherent jurisdiction of the court to supervise the conduct of solicitors (*Ladner Downs v. Thauberger*, 1980 CanLII 504 (BC SC); *Smith, Hutchison & Gow v. Van't Reit*, 1985 CanLII 491 (BC CA); and the majority judgment in *Harrington (Guardian ad litem of) v. Royal Inland Hospital*, 1995 CanLII 2345 (BC CA); compare with *Harrison v. Tew*, [1990] 1 All E.R. 321 (H.L.)). There is no exhaustive definition of "special circumstances" (*Doig v. Davidson Muir*, 1998 CanLII 6432 (BC CA), and *Morriss v. Harper Grey Easton*, 1998 CanLII 5127 (BC SC) (Chambers)), although more recent decisions have set out useful considerations (see, for example, *Worth v. Spelliscy*, 2011 BCSC 847 (Master), which was cited with approval in *Grewal v. Singleton Urquhart LLP*, 2016 BCCA 289). For further information, see "Agreements to Settle Bills or Deny Client's Right to Review Bills" in chapter 3.