



HARLING V LAUF FINDS SECOND-COUNSEL COSTS PROPER FOR REMOTE TRIAL

By Ashley Cosgrove, Student-At-Law, Brownlee LLP

The Alberta Court of Queen's Bench recently illustrated the modern, more flexible approach to costs awards. In doing so, the Court considered the new phenomenon of remote trials.

Takeaway

Remote trials create extra electronic and logistical needs. Courts will consider those as another justification for retaining second counsel, allowing recovery for second-counsel costs.

Factual Background

The Court in *Harling v Lauf*, 2021 ABQB 850 contemplated the amount of costs arising from a five-week medical malpractice trial in which the Plaintiff lost. The Plaintiff objected that the Bill of Costs was excessive on many grounds, such as:

- Second counsel at trial was unnecessary.
- The defence claimed disbursements for experts that did not eventually testify at trial.
- Pre-trial fees for questioning should be prorated for days when only a half day was needed.
- Costs should be calculated under a lower column of the tariff to match an agreement on damages reached prior to the trial.

Analysis

Using second counsel can be reasonable, without being essential

When considering whether second counsel costs were appropriate, the Court considered four factors from *Alberta Productions Corp v Canada Lands Co*, 2004 ABCA 25. Those factors included the complexity of the issues, the importance of the issues to the parties, the size of the trial records, and the involvement of second counsel in addressing the court.

In applying those factors, the Court reasoned that the negligence claim at hand was a complicated one, requiring an understanding of medical specialties and related matters. Simply because Plaintiff's counsel managed to attend a five-week trial without second counsel, did not show that defence counsel could not reasonably split the duties.



As well, the trial had proceeded on a remote basis, after initially being scheduled as an in-person proceeding. That change created complicated electronic tasks, such as document sharing and facilitating online connections, thereby justifying the assistance of second counsel.

Hindsight doesn't decide whether expert costs are reasonable

On the cost of Defence experts, the issues in the lawsuit narrowed over time such that experts in some fields became unnecessary for trial. Applying the test in *Seidel v Kerr*, 2004 ABCA 157, the Court believed that those costs were reasonable on the part of Defence counsel at the time of retaining the experts.

A costs award covering 28% of costs can be reasonable

Besides reviewing fees for second counsel and experts, the Court discussed the modern mindset on cost awards—the Court merely took guidance from the tariff. On those tariff costs, the Court analyzed them based on the initial amount in the Statement of Claim, according to *UBG Builders Inc., Re*, 2017 ABQB 791. The Court found it irrelevant that before trial, the parties had agreed on the quantum of damages.

When reviewing Defence counsel's Bill of Costs for fairness and accuracy, the Court relied on *McAllister v The City of Calgary*, 2021 ABCA 25. In that case, a successful party appealed a costs determination, given that the amount awarded only reflected 17% of actual costs incurred. The Court remitted the matter back to the trial judge, because a proper costs award should reflect a reasonable level of indemnification for costs incurred in the litigation, and so costs listed in the Schedule C tariff could be used as a mere guide, or not at all.

In this litigation, the Defendant was seeking 28% of his total costs. Citing the *McAllister* approach, the Court found the level of costs to be reasonable. Thus, the Court found no need to scrutinize details, like the half-day increments.

Conclusion

In summary, the Court dismissed all of Plaintiff counsel's cost objections, and accepted the entire Bill of Costs. Using this new information, the Province commenced a claim in negligence against Grant Thornton on June 23, 2014.



BROWNLEE LLP
Barristers & Solicitors



ASHLEY COSGROVE

 403-260-1474

 acosgrove@brownleelaw.com

A 2021 graduate from the University of Calgary's Juris Doctor program, Ashley is passionate about furthering her experience in the legal field, and prides herself on open communication with her clients.

If you have any questions with respect to this bulletin, please contact the writer,
Ashley Cosgrove at acosgrove@brownleelaw.com or at 403.260.1474.

Contact our specialists
to stay **ahead of the crowd.**

EDMONTON OFFICE

2200 Commerce Place
10155 - 102 Street
Edmonton, AB T5J 4G8

T: 780.497.4800
F: 780.424.3254
1.800.661.9069

CALGARY OFFICE

Watermark Tower
#1500, 530 - 8 Ave. SW
Calgary, AB T2P 3S8

T: 403.232.8300
F: 403.232.8408
1.800.661.9069