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Cost Award for Trial Prep Without Attending the Trial: Can the Photocopy Clerk Accused of Conspiracy Seek Costs for Trial Preparation?

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The recent decision of a BC Master in *Equustek Solutions v. Jack*, 2022 BCSC 1742 is a novel decision and unique assessment of a partially-disputed bill of costs wherein the successful applicant/defendant sought his Tariff costs for his counsel's preparation for many days of trial; days of trial counsel did not attend.

The underlying action concerned breach of confidence, conspiracy, theft of trade secrets, and copyright infringement, to name but a few. The trial lasted 73 days. The applicant in the costs decision performed web marketing services for the alleged conspirators and was completely exonerated of the many claims against him.

Key Takeaway

- Courts have the discretion to award costs under Tariff Item 34 of Schedule B of the BC *Supreme Court Civil Rules* for trial preparation even for days counsel did not attend trial.

Costs Generally

Costs are recoverable expenses incurred by litigants in relation to court proceedings. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, the Court, at paragraph 21, described the traditional purpose of an award of costs as:

[T]o indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed).

Generally, costs in BC are awarded on one of Scale A, B, or C and based on the Tariff system set out in Schedule B of the BC *Supreme Court Civil Rules*.

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Costs Award for Preparation for Trial

Tariff Item 34 in Schedule B of the *Rules* stipulates that five Tariff units are to be awarded for preparation for trial “if proceeding set down, for each day of trial.” *Equustek* is the first written decision wherein the BCSC decided whether the number of Tariff Item 34 units a party is entitled to is directly tied to the days their counsel attends trial; or, is there no linkage between “preparation” and actual “attendance” at trial. If there is no link, a party may claim for “prep.”

In *Equustek*, as a cost saving measure, the applicant elected to not have his counsel present at trial when unnecessary, but to remain on call for each day. The applicant argued that he was entitled for trial preparation costs for the days his counsel did not attend trial. Despite not physically attending each day of trial, the applicant’s counsel nonetheless prepared for each day of trial in the event it became necessary to attend.

Counsel for the applicant gave *viva voce* evidence to the Court that while he did not attend each day of trial, he relied on other defence counsel (Cassels partner Carey Veinotte) to be his “eyes and ears” and to advise him if his attendance was required. On other days, counsel would attend Court for only the morning or afternoon session as needed. Counsel for the plaintiffs challenged counsel for the applicant on his evidence, and counsel for the applicant acknowledged that while he did not spend all day preparing for the next day of trial, he nonetheless communicated with Mr. Veinotte every day. He did not waive solicitor-client privilege over his time records to specifically particularize for the Court with what exactly he did on specific dates with respect to the trial, but instead gave general evidence on what his practice was throughout the trial to prepare for each day. The Court accepted this evidence.

The Court agreed that counsel for the applicant performed trial preparation-related work on days he did not physically attend trial. The Court also agreed that in this case, counsel for the applicant was involved throughout the trial, even when not personally attending the courtroom.

In interpreting the wording of Tariff Item 34 – “preparation for trial if proceeding set down, for each day of trial” – the Court concluded this wording was not so narrow as to preclude preparation for dates counsel did not attend, but not so broad as to require costs for every day irrespective of counsel’s attendance. Instead, the wording allowed the Court to exercise its discretion and decide within the range of scheduled days of trial and the actual days of trial attended by counsel.¹

In exercising this discretion to achieve a just result in the interests of justice, the Court awarded counsel for the applicant five units for each day his counsel was in attendance and five units for half of the trial days his counsel was not. As there had been a previous award of double costs in favour of the Applicant for the Plaintiffs’ failure to accept a pre-Trial offer, the costs Judgement in *Equustek* proved to be a good day for the applicant. The Plaintiffs have not sought leave to appeal the Master’s Decision.

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¹ *Equustek Solutions v. Jack*, 2022 BCSC 1742 at para. 49.

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