IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Millership v. British Columbia & Canada (Attorney General),*** 2003 BCSC 730

Date: 20030509
Docket: 30272
Registry: Kamloops

Between:

Kevin James Millership

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia, and Her Majesty the Queen in Right of the Attorney General of Canada

Defendants

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Kevin James Millership appeared on his own behalf

Counsel for the defendant, Attorney General for British Columbia — G. Morley

Counsel for the defendant, Attorney General of Canada — D.W. Zachernuk

Date and Place of Trial/Hearing: May 6, 2003, Kamloops, B.C.

[1] Mr. Millership was unsuccessful in these proceedings and the defendants, Her Majesty the Queen in Right of the Province of British Columbia (“the Province”) and Her Majesty the Queen in Right of the Attorney General of Canada (“Canada”) apply for their costs on scale 5. In addition, Canada seeks directions that its disbursements include counsel’s attendance in Vancouver and Ottawa for consultation, to give advice and receive instructions, and the expense of having two government employed scientists attend the summary trial proceeding in Kamloops.

[2] Mr. Millership has appealed the decision and has filed an application that all proceedings in regards to costs be stayed pending the appeal. The application before the Court of Appeal has not yet been heard. Mr. Millership argues that the present application should be adjourned until the Court of Appeal decides on the issue of the stay of proceedings, alternatively, that the application should be dismissed on its merits.

[3] Mr. Millership brought proceedings in the Supreme Court for damages for personal injuries as a result of public fluoridation of the water in Kamloops, and for injunctive relief and declaratory relief dealing with public water fluoridation throughout British Columbia and Canada. Public

water fluoridation has a long history of controversy. Mr. Millership firmly believes that public water fluoridation is contrary to the public interest and pursued these proceedings with vigour and enthusiasm. The defendants do not question the sincerity of his beliefs, but argue he should still be responsible for costs under the **Rules** to compensate the defendants for the considerable costs and expense they have incurred in opposing his applications.

ADJOURNMENT APPLICATION

[4] The application by Mr. Millership to adjourn this application for costs is dismissed. Canada filed its notice of motion seeking costs on March 17, 2003, and the Province filed their motion, to be heard at the same time, approximately a week ago. Mr. Millership filed his motion in the Court of Appeal to stay the proceedings with regard to costs four days ago. My decision on the issue of costs will not prevent Mr. Millership from proceeding with his motion before the Court of Appeal, and asking the Court of Appeal to stay any further steps with regard to the assessment or payment of those costs. The application has been fully argued before me, and there will be no time saving if the matter is simply adjourned.

THE ORDER FOR COSTS

[5] Costs generally follow the event, in other words, the successful party receives their costs, and the unsuccessful party is required to pay. (Rules of Court 57(9)). The application of that rule is subject to the court's discretion, and the question is whether I should exercise that discretion in favour of the defendants or in favour of Mr. Millership.

[6] Mr. Millership argues that this was really public interest litigation, and that his claim for personal injuries was only one portion of the proceedings, but his primary goal was to stop all public water fluoridation throughout Canada. His motive was his genuine belief that public water fluoridation amounted to the unlawful administration of a poison or a drug to the people of Canada. He argues public water fluoridation is in breach of a large range of federal and provincial statutes and the **Charter of Rights and Freedoms**, as well as a number of international treaties.

[7] He argues that the litigation involved the protection of the environment as well as the public interest, and raised novel points of law. He argues that his views are well supported by the evidence, and that his appeal is a meritorious one which should succeed. The Court of Appeal will deal with the merits of his appeal.

[8] The defendants argue that Mr. Millership has simply been pursuing his own view of the public interest, and has used the courts for what really amounts to his own political ends. They argue that this has put them to a great deal of expense, time and trouble, and that the taxpayers should not bear the burden of the court proceedings which were largely unnecessary. The defendants argue that the issues of public water fluoridation have been tried in the courts in other jurisdictions, and despite any controversy amongst scientists or members of the public about its merits, it does not raise novel points of law. They argue that the wide-ranging claims made by Mr. Millership, and references to a wide range of statutes, the **Charter of Rights** and international treaties, all indicate his lack of objectivity in pursuing his personal beliefs of what is in the public interest.

THE LAW

[9] The defendants also referred me to three decisions as follows:

1. ***Sierra Club of Western Canada v. British Columbia (Chief Forester),*** [1994] B.C.J. No. 1713 (B.C.S.C.)

2. ***Campbell v. Attorney General (British Columbia)***, [2001] B.C.S.C. 1400;

3. ***Friesen v. Hammell***, [2002] B.C.S.C. 1103.

These cases all deal with the issue of whether costs should be awarded on the basis that the litigation is public interest litigation.

[10] The ***Sierra*** decision dealt with a claim of costs by a defendant corporation, not a defendant government. The ***Sierra Club*** sought judicial review of a decision of an appeal board, on an appeal from a decision of the chief forester, dealing with permissible annual harvests of timber by MacMillan Bloedel Limited. The court reviewed a number of decisions and concluded that the exercise of judicial discretion in each case was determined by the particular circumstances of the case. The court said at ¶49:

> I do not think it would be wise to establish a principle that any person bringing a proceeding out of a bona fide concern to vindicate his or her perception of the public interest should be insulated from an award of costs in all cases. Such a motive will always be a relevant and important factor, but it should not be considered to the exclusion of all other relevant and important factors. The Court must retain the flexibility to do justice in each case.

The court allowed the costs of the private corporation in the ***Sierra Club*** case.

[11] The court in ***Campbell v. Attorney General (British Columbia)*** allowed costs against the unsuccessful plaintiff.

The costs were being sought by the Nisga'a Nation. The plaintiffs argued that costs should not be allowed against them because they had acted in good faith as public interest litigants. They had no personal, proprietary or pecuniary interest in the outcome, and argued it raised constitutional issues of broad importance, a resolution of which benefited the public at large. The plaintiffs in the ***Campbell*** case were members of the government opposition and the court found they did not qualify as a public interest group as defined in ***Reese v. Alberta (Ministry of Forests, Lands and Wildlife)***, [1992] 13 C.P.C. (3rd) Alta.Q.B. at p. 326 - 327 as:

> What is meant here by "a public interest group" is an organization which has no personal proprietary or pecuniary interest in the outcome of the proceeding, and which has as its object the taking of public or litigious initiatives seeking to effect public policy in respect of matters in which the group is interested (here, the protection of the environment) and to enforce constitutional statutory or common-law rights in regard to such matters.

(This definition was quoted with approval in the ***Sierra*** case.) The ***Campbell*** case also referred to the fact that denying costs would require the taxpayers to foot the entire bill for defending the validity of an act of the government which may in some circumstances not be appropriate. It also referred to the ***Sierra*** case at ¶15, where it said:

> I also agree with Smith, J's observation, in ¶47, that the task of an elected government includes seeking to achieve a balance between competing interests of various segments in society. It follows that where one group purporting to defend the public interest brings an action putting forward a view that is not universally shared, it would not be wise to establish a principle that such people, even though their concern is *bona fide*, should be exempt from the normal rule of costs. To do so would be to penalize those who had no role in bringing the claim, who disagree with the position advanced, and who found they had to defend the action.

[12] The court in ***Campbell*** found a number of reasons for ordering costs against the unsuccessful plaintiffs and considered the following factors:

1. Was it necessary for the plaintiffs to bring the action in order to have the question that concerned them determined?

2. That the parties seeking costs had no option but to defend;

3. That the unsuccessful plaintiff sought costs at the time the application was heard;

4. The role of opposition members of government did not extend their duty to litigate if they disagreed with the majority of the government;

5. The decision of the Lieutenant Governor and counsel not to refer the matter to the Court of Appeal under the ***Constitutional Questions Act*** does not effect the decision of the court whether or not to award costs.

6. The plaintiffs were really acting as individuals and should not be treated differently from other litigants before the court.

[13] The ***Friesen*** case was an application by voters to set aside the election of MLAs in their ridings pursuant to sections of the ***Election Act***. They were unsuccessful, but the court ordered each party to bear their own costs. The court referred to the ***Sierra*** case and the factors to be considered, such as:

1. Who the parties are (private citizens, public interest groups, government);

2. Their personal financial circumstances;

3. The motive for bringing the action;

4. Whether a novel point of law is involved;

5. Whether the public would benefit from having a decision on the issue;

6. The conduct of the parties;

7. Whether the court has been used as a political forum.

The court found that the litigation was public interest litigation, and in the facts of that particular case, costs should not be awarded.

[14] In argument, reference was made to the ***Class Proceedings Act*** and Mr. Millership's application to have the proceedings certified pursuant to that ***Act.*** Mr. Millership was unsuccessful in that application. However, I note that under s.37 of the ***Class Proceedings Act***, R.S.B.C. 1996 c.50 and amendments thereto, the costs are to be awarded leading to the application for certification only where the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party, or that there was an improper or unnecessary application or step being taken for the purpose of delay or increasing costs, or improper purposes, or that exceptional circumstances make it unjust to apply the successful party of costs. None of those circumstances have been established in the case before me and, therefore, there can be no order for costs against Mr. Millership with regard to the ***Class Proceeding*** applications.

ANALYSIS

[15] Mr. Millership does not fit within the definition of a public interest group. He has very limited financial means. He has brought these proceedings in good faith in the sense that he has no ulterior motives, but proceeds on a sincere belief in his view of what is in the public interest. However, a sincere in their cause does not insulate an unsuccessful litigation from costs. He did seek significant damages at the hearing before me for his personal injuries, including loss of future income. In that sense, he had a personal proprietary or pecuniary interest in the outcome.

[16] The legislation which allows fluoridation of a public water system requires a public referendum before a municipality to pass a bylaw to fluoridate its water. This involves public debate and an opportunity for all members of the public to present and consider arguments for and against fluoridation of public water, and make their own decision about whether it is in their interest. The legislation requires a 60% vote in favour of public water fluoridation. However, those members of the public who oppose, it could be significant, as many as 40%, would be subject to the decision of the 60% majority. A court proceeding to challenge the validity of the legislation would be the only means short of

further lobbying to sway the 60% majority to the beliefs of the minority.

[17] The defendants in this case were certainly justified in opposing the application by Mr. Millership. The evidence they relied on supported the benefits of public water fluoridation as a health measure, and they argue that the procedures in place, including the referendum, ensure that fluoridation was not in breach of any individuals' rights under the **Charter.**

[18] Mr. Millership sought costs against the defendants in these proceedings.

[19] Mr. Millership was entitled to bring these proceedings to mount an aggressive challenge to the legislation of public water fluoridation. He was entitled to refer to any and all statutes, charters or treaties which he felt were important to the decision.

[20] The issue of public fluoridation of water has been litigated in a number of jurisdictions before, but I was not referred to any case that dealt with all of the **Charter of Rights** that Mr. Millership was raising, nor all of the various statutes, provincial and federal, which he referred to.

[21] However, it is my conclusion that to deny costs to these defendants would be to require the taxpayers to foot the

entire bill for defending the validity of the act of the government. Mr. Millership's arguments raised serious concerns, but the case was not a close one.

[22] I have concluded that the defendants should be allowed their costs of the proceeding, with the exception of the portion dealing with the ***Class Proceeding Act.***

THE SCALE OF COSTS

[23] The defendants say that costs should be allowed at scale 5 rather than scale 3. The court may set the scale of costs from scale 1 to 5 under Appendix B of the **Supreme Court Rules Party and Party Costs.** Scale 3 is the scale allowed if the court does not fix the scale. The scale determines the amount of money allowed per unit attributed to each of the tariff items. For instance, scale 1 provides for $40.00 per unit, scale 5 $120.00 per unit. Appendix B, ¶2(b) states the following:

> c) Scale 3 is for ordinary matters of difficulty or importance;
> d) Scale 4 is for matters of more than ordinary difficulty or importance;
> e) Scale 5 is for matters of unusual difficulty or importance;
>
> 2(3) In fixing the appropriate scale under which costs will be assessed the court may take into account the following:

a) whether a difficult issue of law, fact or construction is involved;
b) whether an issue is of importance to a class or body of persons, or is of general interest;
c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond their relief that was actually granted or denied.

[24] The defendants say that this was a matter of unusual difficulty or importance. The difficulty they say arises from the large volume of scientific information and research that had to be reviewed and presented to the court as part of the argument on the merits of the case. Mr. Millership did not specifically say so, but based on his entire approach to this litigation, I am sure that he views the matter as one of unusual importance. He may disagree as to whether or not it is of unusual difficulty.

[25] The affidavits presented, including all of the scientific report information, exceeded 1,000 pages. The issue of fluoride in public water systems has been extensively researched, and there are a number of meta studies which have reviewed the research itself. I agree that the matter was of more than ordinary difficulty or importance, but I do not agree that it was unusual difficulty or importance. The costs will be allowed at scale 4.

DISBURSEMENTS

[26] Canada also seeks directions that its disbursements should include counsel's attendance in Vancouver and Ottawa for consultation to give advice and receive instructions. Whether those disbursements were reasonable and necessary is a matter that the assessing officer can properly determine.

[27] Canada also seeks directions that the expenses of having two employee scientists attend at the summary trial be allowed as disbursements.

[28] The ***Sierra Club*** case referred to the Alberta decision ***Reese v. Alberta*** (1992), 13 C.P.C. (3rd) 323 (Alta.Q.B.), and approved the comments made by Mr. Justice McDonald in the ***Reese*** case that talked about policy considerations which may justify moderation in the allegation of costs against an unsuccessful applicant for judicial review, when those costs are sought by the Crown.

[29] Mr. Millership, as an anti-fluoride activist, had schooled himself extensively in the literature dealing with fluoridation of public water. He was very knowledgeable of those studies which supported his position, and was knowledgeable of those studies which did not, although he was also selective in those portions he referred to. Sometimes

the selectivity resulted in inaccuracies and a misrepresentation as to what the studies actually concluded. I am not suggesting Mr. Millership intentionally misrepresented the studies, but his lack of objectivity simply prevented him from appreciating those portions of the studies that did not support his views.

[30] Canada argues that it was reasonable to have their scientists available for the summary trial application for consultation on the scientific aspects of the evidence as it was being presented. I am sure that they were helpful to counsel and probably saved a good deal of time that would have otherwise been spent in preparation. However, I am of the view that this is one occasion when policy considerations do justify moderation, at least on this aspect of the costs. Counsel for Canada did appear to have a good grasp of the science of public water fluoridation. The two scientists did provide some assistance on a few occasions, but it does not seem reasonable to burden Mr. Millership with the costs of their three weeks attendance in Kamloops. Therefore, I direct that the taxing officer not allow the disbursements with regard to their attendance.

[31] The Province and Canada will have their costs against Mr. Millership on scale 4 except with regard to the ***Class***

Proceedings application. Each party will bear their own costs with regard to the ***Class Proceedings*** application.

"R.E. Powers, J."

POWERS, J.