Beaudril v. WCB, 2001 NWTSC 82

Date: 20011115
Docket: CV07949

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BEAUDRIL LIMITED

Applicant

- and -

THE WORKERS' COMPENSATION BOARD OF THE NORTHWEST TERRITORIES
and THE CORPORATE BOARD OF THE WORKS' COMPENSATION BOARD
OF THE NORTHWEST TERRITORIES and
DEAN DOUGLAS McAVOY

Respondents

Application for costs arising out of unsuccessful motion for judicial review.

Heard at Edmonton, Alberta on September 14, 17 and 27, 2001.

Memorandum filed: November 16, 2001.

MEMORANDUM OF DECISION OF THE HONOURABLE MADAM JUSTICE J.B. VEIT

Counsel for the Applicant:	Murray H. Dale, Q.C.
Counsel for the Workers' Compensation Board:	Gordon A. McKinnon
Counsel for the Respondent, Dean McAvoy:	Adrian C. Wright

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MEMORANDUM OF DECISION

Summary

[1] Beaudril Limited, which unsuccessfully petitioned for judicial review of a decision under the *Workers' Compensation Act*, proposes that no costs should be awarded against it because it was reasonable, and indeed in the public interest, to seek the Court's guidance on the new issue of whether a subrogated lawsuit commenced by the Board was barred by the *Act*. It also argues that the court should reduce the amount of costs that would otherwise be awarded to reflect the duplication in the respondents' arguments. Finally, it proposes that any costs awarded should be calculated under Column 2 of Schedule A.

[2] Douglas McAvoy proposes either a multiple of costs under Column 2 or a lump sum that exceeds the amount which the strict application of Column 2 would provide.

[3] The Workers' Compensation Board argues that it would be fair and reasonable to triple the costs awarded pursuant to column 2 so as to adequately reflect the complexity of the issues.

Cases and authorities cited:

[4] **By the Applicant Beaudril Limited:** M.M. Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 1991 - current); ***Fullowka v. Witte***, [2000] N.W.T.J. No. 16 (N.W.T. C.A.); ***Woodley v. Yellowknife Education District No. 1***, [2000] N.W.T.J. No. 68 (S.C.).

[5] **By the Respondent Dean Douglas McAvoy:** ***Woodley v. Yellowknife Education District #1*** 2000 NWTSC 62; ***Coopers & Lybrand Ltd. v. Tallah Developments Ltd.*** [1993] N.W.T.J. No. 95; ***Canadian Imperial Bank of Commerce v. 882432 N.W.T. Ltd.***, [1993] N.W.T.J. No. 133; ***McElheran (c.o.b. Gord-Mar Enterprises) v. Great Northwest Insulation Ltd.*** [1993] N.W.T.J. No. 73.

[6] **By the Respondent Workers' Compensation Board:** ***Witte et al v. The Workers' Compensation Board of the Northwest Territories***, [2000] N.W.T.J. No. 16 (NWTCA).

[7] **By the court:** ***Reese v Alberta (Ministry of Forestry, Lands & Wildlife)*** [1992] A.J. No. 745 (Q.B.), (1992) 35 A.C.W.S. (3d) 378 (Alta. Q.B.); ***Diakun-Thibault v. Ontario (Advocacy Commission)*** 60 A.C.W.S. (3d) 914 (Ont. Div. Ct.); ***Rigaux v. British Columbia (Commission of Inquiry into death of Vaudreuil)*** (1999) 87 A.C.W.S. (3d) 184 (B.C.S.C.)

1. Background

[8] This was a lengthy application for judicial review. The parties filed complex briefs when the application was originally argued for a full day in June 1999, and a further brief after the application for leave to appeal to the Supreme Court of Canada was denied in the fall of 2000.

[9] The current costs schedule came into force on April 1, 1996. The Rules provide that if a defendant is awarded judgment in an action in which relief other than the payment of money is sought, costs shall be taxed under column 2. The amount allowed for written argument under column 2 is $300.00.

[10] The Bill of Costs prepared by McAvoy claims $2,290.53; the bill of costs prepared by the Board claims $4,736.65.

2. General principles

[11] The parties acknowledge that costs are in the discretion of the court, and that costs normally follow the event.

[12] It is also accepted that "an action or motion may be disposed of without costs when the question involved is a new one, not previously decided by the courts on the theory that there is a public benefit in having the court give a decision; or where it involves the interpretation of a new or ambiguous statute; or a new or uncertain or unsettled point of practice; or law; or where there were no previous authoritative rulings by courts; or decided cases on point": *The Law of Costs*.

[13] It has been suggested that "the level of party-and-party costs awarded to the Crown against an unsuccessful applicant for judicial review whose application was reasonably

meritorious should not be so high as to discourage prospective applicants from initiating judicial review proceedings": *The Law of Costs*, para. 219.5.1. As authority for that proposition, one Alberta case is cited: ***Reese***. In that case, although the "chill" argument was raised by the unsuccessful claimants who asserted that they represented the public interest, as I read the decision, that position was rejected by the judge. McDonald J.'s decision includes the following comments:

> Moreover, counsel for the applicants argues, to require the applicants to pay any of Alberta's costs would render Pyrrhic the victory of the applicants in being granted the standing to bring this application: public interest groups will be unduly hesitant to challenge the validity of legislation which has environmental implications or to challenge executive acts which purport to be authorized by such legislation, if they must face the possibility that, even if they are granted standing, they may, if unsuccessful, face the obligation to pay costs and to do so on a high scale which might render the groups insolvent and thus unable to take further steps to protect the public interest. That result, the argument runs, would itself be contrary to the public interest because it is in the public interest that the validity of possibly invalid or unlawful acts by the executive be tested in the courts upon the initiative of non profit public interest groups when, as in this case, neither the government nor the other contracting party will have any reason to impugn the agreement which they have entered into.
>
> I approach the issue by assuming, for the sake of discussion, that the applicants' case was, both before and during the court hearing, put on the basis of expert evidence of high quality. (Whether that was in fact so I shall consider later.) In that event, there is a good deal to be said for the applicants' argument as I have stated it. On the other hand, is that argument sufficiently persuasive to overcome the general rule that the successful party is entitled to recover party and party costs (fees on a partial indemnity basis, and reasonable disbursements)?
>
> I think that there is a consideration not yet mentioned, which supports the application of the general rule that costs should be payable by the unsuccessful applicants. It is that the successful party hero - the Crown, or, "Alberta" - has a purse the contents of which are raised from the taxpayers of Alberta. If the court were to decide that no costs be recovered by the Crown from the unsuccessful applicants, that would amount to requiring the taxpayers to foot the entirety of the bill of successfully defending the validity of an act of government. I do not think that the taxpayers should have that burden imposed upon them in favour of groups which, without solicitation by the taxpayers to do so, have decided to launch and pursue legal proceedings which were ultimately held to be without foundation. I do not go so far as to say that that is a paramount consideration in all cases where the challenge to a statute or to a governmental act, made by a public interest group without economic interest in the income, is unsuccessful on

> its merits. The weight to be attached to this consideration may vary from one case to the next. It may well be that if it is a close case, in which the court recognizes that there is considerable force to the facts or legal interpretation advanced by the applicants, the court will regard the applicants as having performed a public service in having the issue adjudicated, such that it is appropriate that, although the court has held that the claim fails on the merits, the Crown (that is, the taxpayer) should not recover any of its costs from the unsuccessful applicants. However, without statutory reform along the lines recommended by the Ontario Law Reform Commission in its Report on the Law of Standing, 1989 (Chapter 6 "Costs"), I do not think that it would be correct in principle, under the established practice, to deny the successful party (here, the Crown) any recovery of costs whatsoever from the unsuccessful public-interest applicants for judicial review, or to limit such recovery to cases in which the applicants have engaged in vexatious, frivolous or abusive conduct. In my view, in the absence of such statutory reform, the court should feel free also to allow some degree of costs to be recovered by the successful respondent when the case for the applicants has fallen far short of being a close case, even if the court would hesitate to describe the applicants' case as vexatious, frivolous or abusive.
>
> In my view, the present application for judicial review is one in which the case for the applicants fell far short of being a close case.

[14] McDonald J.’s comments reject a general acceptance of the “chill” argument, and add a gloss to the novel situation argument in which he posits a standard of the “close case”.

[15] Nor, with respect to the authors of *The Law of Costs*, does the decision in ***Diakun*** support the proposition set out under para 219.5.1. In that case, the costs applicant was asking for solicitor-client costs, an extraordinary scale of costs. In awarding the usual thrown away costs of an abandoned application, White J. said:

> [para25] When an applicant for judicial review abandons his or her application, it is the general rule that the applicant be required to pay the respondent's costs thrown away. There is no reason, on the facts of the case at hand, why that principle should not apply to the parties involved in the abandoned application. However, the responding Commission which received knowledge that the application for judicial review had been abandoned by notice on November 25, 1995, did and does not seek the costs thrown away and incurred by it, in its response to the application for judicial review. The moving parties are asking for an extraordinary reversal of the principle that the party who abandons an application for judicial review should expect to pay the responding parties' costs thrown away in that regard. An extraordinary reversal of that principle is only justifiable in extraordinary circumstances, and such extraordinary circumstances are absent on the facts in the matter under

> discussion. All that can be said about the merits of the moving parties' abandoned application for judicial review, is that it was arguable. That is a far distance from saying, as the moving parties would assert on this motion, that it was meritorious or was in effect successful as a result of the fresh resolutions passed by the Commission on April 20, 1995. It is by no means clear that the resolution of December 9, 1994, was ultra vires.
>
> [para26] Costs should generally be awarded to a successful or deserving litigant payable by the loser at the conclusion of the proceeding for allowable expenses and services incurred relevant to the proceeding. Generally speaking, the award of costs must follow the proceeding. Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save-The-Valley Committee Inc. et al. (1985), 19 D.L.R. (4th) 356. See also Township of Bruce v. Thornburg Et Al (1986), 57 O.R. (2d) 77.
>
> [para27] There are narrow exceptions to costs awaiting the conclusion of the proceeding such as interim costs in family law matters or costs to a trustee, but the matter at bar does not fall within such narrow exceptions. If the conduct of the respondent Commission during the course of the proceedings on the application for judicial review had in some way been oppressive, then the court would have a jurisdiction to sanction such oppressive conduct by an award of costs against it. In the case at bar, however, there is absolutely no indication that the respondent Commission on the application for judicial review, conducted itself other than in a mannerly, appropriate, and non-oppressive way.

[16] Finally, in the ***Rigaux*** case, as the text itself points out, far from setting costs at a low level, Allan J. awarded increased costs:

> In this case, the numerous relevant factors which justify such an award include the following:
>
> (a) Ms. Rigaux's only recourse was to apply for judicial review;
> (b) the issues relating to the parameters of an inquiry and the structure of the Inquiry Act are matters of public importance;
> (c) the factual and legal issues were hotly contested by the Attorney General and the Commissioner;
> (d) both the petitioner and the Commissioner were represented by more than one counsel;
> (e) the petitioner was obliged to respond to extensive arguments made by both respondents with "deep pockets";
> (f) the Government originally took the position that the Superintendent's Review was beyond the jurisdiction of the Commissioner but, on the judicial review proceedings, supported the Commissioner;

(g) the Commissioner's findings of misconduct triggered the disciplinary proceedings which caused Ms. Rigaux to incur considerable expense; and

(h) because of the nature of these proceedings, the petitioner was unable to make an offer under the Rules of Court which could have resulted in an order for double costs.

Conclusion:

[para42] I conclude that, in all the circumstances, the petitioner is entitled to an award of increased costs in the amount of 90% of special costs on the judicial review proceedings.

[para43] I anticipate that a similar award for costs is justified with respect to the costs of this supplementary hearing. If counsel cannot agree, they may file written submissions not exceeding two pages on that issue.

[17] In summary, then, it appears to me that the cases cited in *The Law of Costs* support only the unsurprising proposition that, in a close case on a novel point of law in a judicial review proceeding, costs to which the Crown is otherwise entitled might be attenuated. The cases do not support the "chill" argument.

2. Application of the general principles to the facts of this case

a) New Issue

[18] As was pointed out by the Court of Appeal in ***Fullowka***, while the application of the general principles to the situation of the Board in that case, and in this, was somewhat unique, the general standard of review was well known. This application was neither novel, not a "close case". Therefore, there is nothing in the application itself, or the parties themselves, or the conduct of the application which attracts unusual treatment.

b) Duplication

[19] In this case, the lawsuit in the name of McAvoy was commenced by the Board in its subrogated position. Therefore, counsel for both the Board and McAvoy represented the interests of the Board in upholding the Board's decision that its subrogated lawsuit could proceed. The costs awarded to the Board and McAvoy must reflect that reality.

c) Column

[20] The new schedule of costs cannot be characterized as being outdated: ***Woodley***. By implication at least, the Northwest Territories Court of Appeal approved a standard of costs for applications for judicial review of this type in ***Fullowka***. This case is no more difficult than ***Fullowka***; indeed, it might be said that this case was easier because the main issues had been explored in ***Fullowka***.

d) Conclusion

[21] Beaudril will pay each of McAvoy and the Board $2,000 in costs.

3. Costs of this application

[22] If the parties are not agreed on the costs of this application, I may be spoken to within 30 days of the release of this decision.

HEARD on the 14th, 17th, and 27th days of September, 2001.
DATED at Edmonton, Alberta this 15th day of November, 2001.

_____

D.J., N.W.T.S.C.

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