Kátlodéechee First Nation v. *H.M.T.Q.*, 2004 NWTSC 12

Date: 2004 03 16
Docket: S-001-CV 2002 000104

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE KÁTLODÉÉCHE FIRST NATION

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and
THE CANADA INDUSTRIAL RELATIONS BOARD

Defendants

MEMORANDUM OF JUDGMENT

[1] These brief reasons address a question of costs.

[2] On December 12, 2003, I issued Reasons for Judgment wherein I (a) dismissed a motion by the defendants to strike out the Statement of Claim but directed the plaintiff to amend, and (b) dismissed a motion by the plaintiff to stay certain proceedings before the Canada Industrial Relations Board. The latter application saw the participation of the Public Service Alliance of Canada ("PSAC") as an interested party although not a named party to the action itself. On the question of costs, I said the following:

> There were no submissions as to costs. Considering all of the circumstances I am inclined to direct that costs of these applications be in the cause. However, if counsel are unable to agree, I will entertain submissions, in writing, within a period of 60 days from the date of these reasons.

[3] On February 10, 2004, that being the 60th day after my Reasons for Judgment were issued, counsel for PSAC forwarded a letter setting out his client's claim for costs with respect to the plaintiff's unsuccessful stay application. Immediately afterward, plaintiff's counsel forwarded a letter requesting that the issue of costs be resolved by "the normal procedure", that being a Notice of Motion and a subsequent oral hearing. The PSAC counsel objected to this as being time-consuming and costly, saying that my previous direction was "clear". I thought it was clear as well. I see no reason, as I saw no reason in December, to require an oral hearing on the question of costs of these interlocutory applications. I therefore directed the clerk to notify all parties that any written submissions on costs should be received no later than March 12th (that being some 91 days after my Reasons for Judgment).

[4] I have now reviewed the written submissions from the plaintiff and PSAC. The only issue is the costs of the stay application. Counsel for the defendant CIRB had the courtesy of at least informing me that there would be no submissions from that party. As far as I can tell, nothing was received from counsel for the defendant government.

[5] Insofar as there is an issue of costs as between the plaintiff and the named defendants, absent some agreement of those parties, those costs are in the cause.

[6] The position of PSAC raises a different consideration.

[7] I was reminded by PSAC counsel that PSAC is not a party to this action. Thus it cannot share in any "costs in the cause" should costs eventually be awarded. PSAC participated in the stay application at its request, and by leave of the Court, since it is an interested party to the proceedings before the Canada Industrial Relations Board. The plaintiff opposed PSAC's request to participate in the application but, apparently, it is now willing to add PSAC as a party defendant. The PSAC is still considering its position on that.

[8] The plaintiff, in any event, has submitted that PSAC will eventually participate in any costs disposition since it is now a defendant, albeit in a separate action. On February 12, 2004, the plaintiff commenced a new action, one that substantially mirrors the present action, but naming PSAC as the only defendant. The plaintiff has also filed a motion to consolidate the two actions.

[9] The difficulty I have is that the consolidation application has not yet been determined. Plus, the stay application was brought in the context of this proceeding, a proceeding to which PSAC is not a party. And, it was the plaintiff who originally decided not to name PSAC as a party. Thus I agree with the submission that, as things stand

now, PSAC would not be in a position to recover costs should it be left as costs in the cause.

[10] PSAC seeks costs on a solicitor-client basis. Its counsel submitted that (1) costs on a party-and-party basis in accordance with the tariff are insufficient to properly compensate PSAC; (2) the stay application was brought in the face of clear and well-established jurisprudence that made it unlikely to succeed; and, (3) costs should act as a disincentive so as to discourage others, i.e., other employers, from interfering with the presumptive jurisdiction of the CIRB.

[11] The jurisprudence is clear that solicitor-client costs should only be awarded in rare and exceptional circumstances. Generally speaking, they are awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties: *Young* v. *Young*, [1993] 4 S.C.R. 3 (at para.251). I find no such conduct here. Indeed the evidence is that, after the oral hearing on the stay application, and prior to the filing of further written submissions, the parties tried to negotiate a resolution to the concerns raised by the application. This, if anything, shows a bona fide effort on the part of the plaintiff to avoid the need for further litigation. I find no basis for an award of solicitor-client costs.

[12] Plaintiff's counsel referred to Rule 649 of the *Supreme Court Rules*. That rule provides that, unless otherwise ordered, costs of an interlocutory proceeding are costs in the cause. This, however, is not a directive. It is merely a default rule that sets the method for dealing with costs if nothing is said about them. I have already noted that, on reflection, I agree with the argument made on behalf of PSAC as to why costs in the cause would be inappropriate in its situation. Therefore the question is the scale of costs.

[13] Rule 648(7) provides that, where no monetary amount is in issue, the scale of costs is based on column 2 of the tariff. In recognition of the effort that had to be put into the preparation of some complex legal arguments, at least prior to the release of two pertinent judgments by the Supreme Court of Canada after the oral hearing on the stay application, some adjustment to that tariff is warranted.

[14] I therefore order that PSAC recover from the plaintiff its costs, on a party-and-party basis on double column 2 of the tariff of costs, for the stay application as well as its costs for the application to be added as a party to the stay application. Those costs are to include one allowance for item 29 ("submission of written argument") and reasonable disbursements for travelling to Yellowknife for the oral hearing on August 25, 2003.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
16th day of March 2004

Counsel for the Plaintiff: Priscilla Kennedy
Counsel for the Defendant, H.M.T.Q.: David Stam
Counsel for the Defendant, C.I.R.B.: Thomas Isaac
Counsel for the Interested Party,
Public Service Alliance of Canada: David Yazbeck

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
