Anderson v. *Bell Mobility Inc.*, 2011 NWTSC 28

Date: 2011 06 01
Docket: SICV2007000247

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES DOUGLAS ANDERSON and SAMUEL ANDERSON
on behalf of themselves, and all other members of a class
having a claim against Bell Mobility Inc.

Plaintiffs

AND

BELL MOBILITY INC.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Samuel Marr — Counsel for James Douglas Anderson and Samuel Anderson

Brad W. Dixon — Counsel for Bell Mobility Inc.

REASONS FOR JUDGMENT
(Costs of Certification Application)

INTRODUCTION

[1] The Andersons apply for costs in their successful certification of this class action described in *Anderson v. Bell Mobility Inc.*, 2010 NWTSC 65 (the "certification decision").

[2] The Andersons seek an award of costs in the amount of $124,869.96 based upon the novelty, complexity and importance of the first contested certification of a class action in the Northwest Territories. The amount sought will require the court to exercise its discretion to fix costs above the tariff set out in Schedule A of the *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. 010-96, (the "*Rules of Court"*).

[3] Bell Mobility objects to the Andersons' calculation of costs, which is apparently based upon the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 representing two-thirds of solicitor/client costs, plus a $16,000 counsel fee, plus taxes and disbursements.

[4] Bell Mobility submits that any costs ordered should be costs in the cause, which is the usual costs order for an interlocutory proceeding, and means that the costs are only payable if the Andersons are awarded costs after trial. The Andersons seek costs payable in 30 days and in any event of the cause; that is the costs would be payable whether or not they succeed in obtaining costs after trial.

[5] If the Court determines that costs should be awarded in any event of the cause, Bell Mobility submits they should be taxed in accordance with Schedule A of the *Rules of Court.* Alternatively, Bell Mobility says that if costs are fixed using column 6 of Schedule A (claims over $150,000), the appropriate award would be $7,415.65 based upon the tariff items plus taxes, and $17,903.28 in allowable disbursements, which would result in an award of $25,318.93. Bell Mobility submits that costs should not be accounted for until the end of the proceeding.

[6] The terminology of court costs is somewhat confusing and I adopt the following from the judgment of Richard J. in *Storr (c.o.b. Robert Storr Contracting) v. Aklavik (Hamlet)*, [1998] N.W.T.J. No. 173:

> 2 Costs are a matter for the discretion of the presiding judge and directions as to costs of interlocutory proceedings can be expressed in a variety of ways.
>
> 3 The phrase "costs in the cause" is often used and means that the costs of the interlocutory proceeding are to abide by the result of the eventual trial. "Costs in the cause" is not an order which finally disposes of those costs -- it is subject to the final discretion of the trial judge.

> 4 An award of costs of an interlocutory proceeding to a named party in the cause; e.g., "costs to the plaintiff in the cause" means that only if the party in whose favour the order is made is later awarded the costs of the action will that party be entitled to the costs of the interlocutory proceeding in question. That party's opponent is not entitled to the costs of the interlocutory proceeding even if at trial it obtains an order for the costs of the action.
>
> 5 When the Court directs that the costs of an interlocutory proceeding are given to a named party "in any event of the cause" it means that the named party is entitled to the costs in question regardless of the final result of the action as to costs.

[7] I add that, in appropriate cases, costs may be fixed and paid forthwith or within a set period of time.

Background

[8] This is the first contested certification of a class action in the Northwest Territories. *Kuptana v. Canada (Attorney General)*, 2007 NWTSC 1, the only other certified class proceeding, was a certification of the residential school class action, but on a settlement basis.

[9] There is no class proceeding statute, as found in other jurisdictions, to guide the Court and the parties. Class proceedings here are based on Rule 62 which is entitled “Common interest” and states:

> Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

[10] The Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (“*Dutton*”), provided the general principles to be followed based on Rule 62. Nevertheless, it is fair to say that there is a certain amount of uncharted territory where there is no *Class Proceedings Act*.

[11] The actual hearing took two days. Each of the eight proposed common issues were vigorously contested, as well as the general issue of whether there should be a class action at all.

[12] The Andersons both filed affidavits and were cross-examined on them. Bell Mobility filed two affidavits by Nuno (Mike) Martens, a professional engineer. These affidavits provided a great deal of context but were not without technical and factual complexity.

[13] Counsel for the Andersons filed 30 authorities and Counsel for Bell Mobility filed 47 authorities.

[14] It appears that counsel for the Andersons spent 200 hours on the matter including appearing at the hearing. I do not find that exceptional given the complexity and importance of the application for certification.

[15] After the dismissal of the application of Bell Mobility to strike the Andersons' claim in *Anderson v. Bell Mobility Inc.*, 2008 NWTSC 85, counsel for the Andersons wrote the following to counsel for Bell Mobility Inc. in a letter dated November 18, 2008:

> I understand that costs in the Northwest Territories on a contested motion are on a fixed tariff basis without any discretionary increase. This rule of practice would also apply to the Certification Motion. If you have a different understanding of the costs tariff, please immediately advise.
>
> We understand that the Tariff in Northwest Territories is being amended. We have prepared the Bill of Costs in accordance with the draft tariff that is pending in the NWT. As costs are discretionary, we propose that this tariff more closely reflects the amount of costs that should be charged in this case.

[16] It is my understanding that counsel for Bell Mobility did not respond to this letter. Counsel for Bell Mobility says they agreed with the letter and that it remains a correct statement of the law.

[17] Neither party addressed the issue of whether the travelling and living expenses of a lawyer who does not reside in the Territories are recoverable under Rule 648(4). Counsel for the Andersons reside in Toronto and counsel for Bell Mobility reside in Vancouver. As Bell Mobility did not object to claimed disbursements, I will accept them at $17,903.28. It would be my inclination to grant them in any event for this proceeding.

[18] Counsel for the Andersons submits that if their costs are fixed according to Column 6 of Schedule A in the *Rules of Court* at $25,318.83, this would reflect a recovery of 17.8% of the actual costs of legal fees and disbursements calculated at $141,953.28.

Rule 649 and Costs in the Cause

[19] The *Rules of Court* provide that:

> Awarding and Scale of Costs
>
> **643.** (1) Notwithstanding anything else in this Part, the Court has discretion as to awarding of the costs of the parties, including third parties, to an action or a proceeding, the amount of costs and the party by whom or the fund or estate out of which the costs are to be paid, and the Court may
>
> (a) award a gross sum in lieu of, or in addition to, any taxed costs;
>
> (b) allow costs to be taxed to one or more parties on one scale and to another or other parties on the same or another scale; or
>
> (c) direct whether or not any costs are to be set off.
>
> (2) Where no order of costs is made in an action or proceeding the costs follow the event.
>
> (3) Costs may be dealt with at any stage of an action or a proceeding before the entry of judgment.
>
> ...
>
> **648.** (1) Unless otherwise ordered, the costs of a solicitor shall be determined by the taxing officer, but shall not exceed the relevant amounts set out in Schedule A.
>
> ...

> **649.** Unless otherwise ordered, the costs of an interlocutory proceeding, whether *ex parte* or otherwise, are costs in the cause and shall be taxed on the same scale as the general costs of the action. (my emphasis)

[20] Rule 649 is a "default" rule best explained by Vertes J. in *Fernandes (Next friend of) v. Sport North Federation*, [1996] N.W.T.J. No. 131, at para. 2:

> Rule 649 provides that, unless otherwise ordered, costs of an interlocutory proceeding are costs in the cause. This is a "default" rule that merely sets the mode for dealing with costs if nothing is said about them. It does not direct the judge as to when or how to award costs of an interlocutory motion.

[21] In a Memorandum of Judgment dated November 27, 1998, quoted in *Fullowka v. Royal Oak Ventures Inc*., 2005 NWTSC 60, at para. 54, Vertes J. said:

> ... Rule 649 provides that, unless otherwise ordered, the costs of an interlocutory proceeding are costs in the cause. The rationale, as I understand it, for making the costs of interlocutory motions generally in the cause is presumably that an interlocutory proceeding advances the case and costs should therefore be left to be decided according to the eventual merits.

[22] That observation was made in the context of case management in one of the largest and longest cases in the history of this Court. He added with respect to Rule 649 the following:

> Having said that, I am also of the opinion that if there is a formal motion then there is no impediment to making a claim for costs. If the motion is truly a discrete one, then it would be appropriate to claim costs to be paid forthwith and, at least, in any event of the cause. By "discrete" I mean one that deals with an issue that is unrelated to and independent of the ultimate outcome. (my emphasis)

[23] Thus, where nothing is said by the judge after ruling on an interlocutory proceeding, the costs are left to the judge that ultimately hears the trial and has a more complete picture of which party should be awarded costs, if any. As

previously stated, Rule 649 is a default rule and does not direct when or how to award costs on an interlocutory motion.

[24] Nevertheless, there is some value in determining when an application is an "interlocutory proceeding". The word "interlocutory" is not defined in the *Rules of Court*. In its general sense, it refers to an application or a motion that is taken in the course of an action before coming to trial. In that sense, it is often referred to as 'interim', 'preliminary' or 'provisional' as opposed to 'final'.

[25] An interlocutory proceeding usually applies to applications to strike particular pleadings, produce specific documents, answer specific questions and the like. The *Rules of Court* provide a procedure under Part 31 ("Motions and Applications") for matters that would be described as "interlocutory". The *Rules* consider that, interlocutory applications will be heard by a judge "in chambers" (as opposed to "in court") on a regularly scheduled basis. If the application is more complex, factually or legally, and likely to take longer than 30 minutes, Rule 387 provides for a special chambers to hear the matter.

[26] Not every application before trial results in a decision that is interim pending trial. Rule 129 provides for an application to strike out a pleading and dismiss the action. Rules 174 and 175 provide for summary judgment applications that may result in a final judgment against a plaintiff or defendant.

[27] Counsel for Bell Mobility submits that an order for costs in the cause is the appropriate award for a certification motion. Counsel says that certification is not "discrete" as it is not unrelated to and independent of the ultimate outcome. Counsel submits that the Andersons may not ultimately succeed or that the matter may be decertified, thereby suggesting that costs should not be determined until the outcome is known.

[28] Counsel for Bell Mobility acknowledges that it is open to this Court as a matter of inherent jurisdiction to determine the appropriate policy approach to costs of certification applications. Counsel also points out that in the *Class Proceedings Acts* in British Columbia, Saskatchewan, Manitoba, Newfoundland and the Federal Court, it is specifically provided that there shall be no costs of a certification motion absent litigation misconduct (which has not occurred in this certification application) or exceptional circumstances. In Alberta, New Brunswick and Nova Scotia, costs of certification are left to be determined in the same manner as in other actions or proceedings.

[29] It is my view that this certification should not be treated as an interlocutory application under Rule 649 for several reasons.

[30] Firstly, Rule 643(1)(a) indicates that notwithstanding anything else in the costs part of the Rules, the court has discretion to award costs in a gross sum in lieu of, or in addition to, any taxed costs. This is a discretion to be exercised judicially.

[31] Secondly, Rule 649 is a default rule that applies where an order is silent as to costs. Judicial discretion is explicitly provided for in the introductory words "unless otherwise ordered". I reiterate that Rule 649 is not a direction on when or how to award costs, even in an interlocutory proceeding.

[32] Thirdly, a certification motion is unique to class actions. It is not an interlocutory proceeding as contemplated in Rule 649. Unlike most court actions that will proceed to trial without any early consideration of the procedural merits, a class action must first be certified in order to proceed. The class action must satisfy four tests or conditions set out in *Dutton*, at paras. 38 – 41. Even when those four factors or "essential conditions" have been met, it does not mean that the court must allow the action to proceed (para. 42). The court may still exercise its discretion that the class action not proceed "for negative reasons in a liberal and flexible manner" (para. 44). The proposed class action may never proceed if the certification application is dismissed.

[33] I agree with Winkler J., as he then was, in *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 (S.C.), at para. 28:

> The defendants submit that a costs disposition in a class proceeding is no different from that in any other proceeding. I disagree. In no other court proceeding is it necessary for a plaintiff to obtain the sanction of the court in the form of certification of the proceeding in order to go forward with the action. A class proceeding is not merely a normal action up to the time of certification. Rather, it is an intended class proceeding and subject to the full range of the CPA.

[34] For the above reasons, I conclude that an award of costs in the cause is not a necessary nor an appropriate cost disposition for this certification application.

Costs on the Tariff or Enhanced Costs in any Event of the Cause

[35] Counsel for the Andersons submits that the Court should depart from the usual tariff in this certification application based on the fact that the certification is

precedent setting, complex, and raises public interest issues beyond the immediate interest of the parties.

[36] Counsel for the Andersons points out that, given the low value of the individual claims ($9 per year), the claims are not likely to proceed on an individual basis, and therefore the certification application becomes a significant procedural step.

[37] Counsel for Bell Mobility submits that the costs of certification should be measured by the tariff. Counsel says the fact that this was the first contested certification application does not justify any departure from the usual costs orders. Bell Mobility strongly objects to the application of the Ontario Costs Rule as it is based upon a percentage of the solicitor/client or actual fees incurred.

[38] Bell Mobility says that if the Court determines that costs should be awarded in any event of the cause, the costs should be taxable costs pursuant to Schedule A of the *Rules of Court*. Counsel submits that the appropriate award would be $7,415.65 on the tariff items using column 6, plus disbursements which would result in a total costs award of $25,318.93 (assuming disbursements of $17,903.28).

[39] In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, LeBel J., for the majority, set out the principles for costs awards (paras. 19 – 30). Although that case was decided upon the issue of interim or advanced costs in public interest litigation, the general principles are worth reciting:

1. The traditional principle for an award of costs is to indemnify the successful party after judgment. They are not related to assuring participation in a proceeding (paras. 19 – 21).

2. The modern approach to costs is to treat costs as an instrument of policy. This approach considers the indemnification principle as outdated and suggests that courts as a matter of routine employ the power to order costs as a tool to further the efficient and orderly administration of justice (paras. 22 – 26)

3. Access to justice is also a policy consideration, particularly in *Charter* cases (paras. 27 – 30).

[40] The Court goes on to discuss the award of interim or advanced costs which is not relevant here. However, it is important to reiterate that the power to award

costs is discretionary and must be exercised judicially (para. 22). There is no doubt that policy considerations should apply to an award of costs in class actions.

[41] In Alberta, s. 37 of the *Class Proceedings Act*, R.S.A. 2003, c. C-16.5, states that the court may award costs as provided in the *Rules of Court*.

[42] In *Ayrton v. PRL Financial (Alta.) Ltd.*, 2006 ABCA 88 and *Pauli v. Ace INA Insurance Co.*, 2004 ABCA 253, the Alberta Court of Appeal discussed the policy criteria for a no costs award in any event of the cause in class actions.

[43] In *Ayrton*, the Court said at para. 36:

> A purposive treatment of s. 37 of the Class Proceedings Act is in keeping with the Supreme Court of Canada's pronouncements on class proceedings. In *Western Canadian Shopping Centres*, *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69, and *Hollick*, the Court stated that class proceedings statutes shall be construed generously to give full effect to the objectives of judicial economy, access to justice and behaviour modification.

[44] The Supreme Court of the Northwest Territories has recognized the need to award what may be described as enhanced costs based upon the columns in Schedule A of the *Rules of Court*. This is not to say the Court does not have discretion to award a gross sum on a solicitor-client basis but it does suggest a preference for a practice that grants enhancements based on multiples of the tariff as opposed to solicitor-and-own-client fees. Solicitor-client cost awards are reserved for exceptional circumstances or misconduct on the part of a litigant: See *Beamish v. Miltonberger*, [1997] N.W.T.J. No. 54, at para. 2.

[45] In *Rosebrugh v. Iapaolo*, [1991] N.W.T.J. No. 140, de Weerdt J. set out his reasons for quadrupling column 4 in the tariff:

> Ordinarily, the costs would be taxed according to the tariff in the Rules of Court. That tariff is now woefully out of date and is about to be revised. It is therefore appropriate, in the meantime, that the tariff amounts be considered; but that those amounts be increased as reflected in Morin v. Nuni (ye) Forest Products Ltd. (1991), 49 B.L.R. 179 (N.W.T. S.C.), particularly in view of the $300,000 amount above mentioned.

> I therefore fix the total amount of the costs payable by the plaintiffs to the defendants at $2,000.00, based on quadruple column 4 in the tariff and the material on file.

[46] In *Engle v. Carswell*, [1993] N.W.T.J. No. 74, Veit J. followed *Rosebrugh*, saying at para. 31:

> In summary, costs should be awarded on the basis of column 4, rather than on column 2, in recognition of the major property issues in dispute. These are party and party costs; therefore, even the successful party will not receive a full indemnity for costs. Taking into account the value of the property disputed, costs should be awarded here on the basis of four times Column 4; indeed, judging by the standard used in Rosebrugh, that scale might have been increased to six times column 4.

[47] *Engle* was a divorce action where the husband successfully resisted the wife's claim that the court had no jurisdiction to hear the case. The husband did not plead for costs in his petition but submitted that an acceleration of four times column 4 was appropriate.

[48] Enhanced costs of two and three times the tariff have been assessed in *5142 NWT Ltd. v. Hay River (Town)*, 2008 NWTSC 31, and *Diavik Diamond Mines Ltd. v. Northwest Territories (Director of Human Rights)*, 2007 NWTSC 83, respectively.

[49] In a particularly hard-fought case involving an explosion that killed nine miners at Giant Mines in Yellowknife, the trial judge reflected the length and complexity of the case by awarding costs at eight times the column 6 schedule for the main plaintiff in *Fullowka v. Royal Oak Ventures Inc.*, 2005 NWTSC 60. The trial judgment was reversed on appeal and the Court of Appeal reconsidered the enhanced costs that the defendant would be entitled to. While the Court of Appeal decision, cited as *Fullowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 9, involved other factors and different cost rules, Costigan J.A., observed that Schedule A in the trial court has not been adjusted since 1996, while inflation has increased by approximately 30%. He ordered that costs for the defendant be taxed at three times column 6. Counsel for Bell Mobility has correctly pointed out that this award was after judgment.

[50] It is not appropriate that the Ontario practice of costs awards based on solicitor-client fees should be adopted, particularly where the counsel for the

Andersons expressed that they were following the Northwest Territories tariff. Nor do I think that counsel for the Andersons should be bound by their misunderstanding that the principle of "discretionary increase" did not apply to the *Rules of Court*. By the same token, counsel for Bell Mobility should not be able to take advantage of a proposal that was incorrect in law when they did not respond in any way to the proposal put forward two-and-a-half years ago. In other words, I conclude that there was no agreement on costs except a general understanding that they would be based on the tariff in the *Rules of Court.*

[51] In the case at bar, I am of the view that enhanced costs are appropriate. In the certification hearing, the common issues were quite complex and argued vigorously. This is a case where individual claims for $9 per year will never proceed except by way of a certified class action. It is appropriate in a contested certification application to use costs as an instrument of policy to ensure that the principle of access to justice is given meaning. I conclude from the past practice of this court and the circumstances of this case that an award of three times column 6, or $22,246.95 is the appropriate award of costs to the Andersons against Bell Mobility. The total award of costs including disbursements of $17,903.28 is therefore $40,150.23, payable in any event of the cause.

[52] I turn now to the question of whether the costs should be payable in 30 days, which is the equivalent of "forthwith" in costs terminology. While not determinative, I note that the previous motion to strike this court action resulted in costs against Bell Mobility payable forthwith in both this Court and the Court of Appeal.

[53] Bell Mobility asserts that costs should not be awarded immediately or in 30 days because the proceeding may be shown to have no merit. Counsel says "a defendant should not be mulcted in costs, if at all, until the outcome of the proceeding is known." "Mulcted" is an unusual word that could mean money extracted by fine or by swindling. At the same time, counsel acknowledges that payment of costs forthwith would not impede the defendant's continued defence of these proceedings.

[54] In my view, the certification motion is a significant procedure and each party has devoted considerable resources to the application.

[55] For the Andersons and class members, a class action is the only economically viable procedure given the small financial value for each member. If the certification motion did not succeed, there would have been no economically feasible alternative procedure.

[56] The success of the certification application indicates, at the very least, that the class action is not without merit and should proceed to trial on the principles of access to justice, judicial economy and efficiency. The costs that I have assessed are far less than the actual fees incurred, and considering both the risk and resources required, the costs should be paid within 30 days.

VEALE J.

S-1-CV2007-000247

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