# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***PHS Community Services Society v. Canada (Attorney General),*** 2008 BCSC 1453

Date: 20081031
Docket: S075547
Registry: Vancouver

Between:

**PHS Community Services Society, Dean Edward Wilson and Shelly Tomic**

Plaintiffs

And

**Attorney General of Canada**

Defendant

Before: The Honourable Mr. Justice Pitfield

## Reasons for Judgment

## Re: Costs

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|---|---|
| Counsel for the Plaintiffs: | M. Pongracic-Speier<br>F.A. Schroeder |
| Counsel for the Defendant: | K.M. Stephens<br>G. Van Ert |
| Date and Place of Hearing: | July 31, and<br>September 19, 2008<br>Vancouver, B.C. |

***Introduction***

[1] The plaintiffs apply for special costs following my determination that ss. 4 and 5 on the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19 (the "*CDSA*") were unconstitutional, the provisions would be of no force and effect as of June 30, 2009, and in the interim, the Vancouver Safe Injection Site ("Insite") would be afforded a constitutional exemption from the application of ss. 4 and 5 of the *CDSA*: see 2008 BCSC 661, 293 D.L.R. (4th) 392. As an alternative to an award of special costs, the plaintiffs apply for increased costs pursuant to s. 2(4.1) of Appendix B to the *Rules of Court*, and in the further alternative, for party and party costs at Scale C of Appendix B.

[2] The plaintiffs say that the court should exercise its discretion to award special costs because the subject matter of the action was of exceptional public interest, and special considerations associated with the litigation justify such an award.

[3] The defendant says that the parties should bear their own costs because none of the plaintiffs can be characterized as a public interest litigant with anything other than a personal interest in the safe injection facility and the outcome of the litigation, there were no unusual circumstances which would make an award of costs on a party and party scale grossly inadequate or unjust and, in any event, success was divided on the action with the result that each of the parties should bear their own costs.

[4] The defendant's claim that success was divided so that the parties should bear their own costs can be dealt with summarily. The issue in this action was whether or not Insite was permitted to operate other than by virtue of a ministerial exemption granted under s. 56 of the *CDSA*. The plaintiffs advanced two arguments in support of their claim that it was free to do so. The first centered on the doctrine of inter-jurisdictional immunity. The second centered on the constitutional invalidity of ss. 4 and 5 of the *CDSA* as those sections pertained to Insite. While I did not accede to the argument in relation to inter-jurisdictional immunity, I did accept the plaintiffs' claim that ss. 4 and 5 of the CDSA contravene s. 7 of the *Charter of Rights and Freedoms* (the "*Charter*").

[5] The issue of whether Insite could operate without a ministerial exemption was resolved in the plaintiffs' favour by reference to one argument as opposed to another. There is no basis upon which success can be said to have been divided. I reject the defendant’s claim that the parties should bear their own costs.

[6] The primary question to be addressed then is whether the court should exercise its discretion to award the plaintiffs special costs rather than party and party costs or party and party costs at an increased scale as permitted by s. 2(4.1) of Appendix B to the *Rules of Court*.

***Relevant Law***

[7] Subrule 57(12) provides that costs of a proceeding shall follow the event unless the court otherwise orders. Subrule 57(1) provides that where costs are

payable, they shall be assessed as party and party costs under Appendix B unless the court orders that they be assessed as special costs. The text of both rules and the authorities confirm that the court is vested with discretion to depart from the default provisions of subrules 57(1) and 57(12), but the discretion must be exercised judicially: see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 and *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412.

[8] Applications for special costs have been considered in a variety of circumstances, but most often in the context of reprehensible conduct that warrants such an award. The Crown's conduct is not questioned or criticized in this case. Rather, the plaintiffs rely in part upon the fact that the Supreme Court of Canada has exercised the discretion conferred upon it by s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to award special costs to a party in that court in public interest litigation, frequently without offering extensive reasons for doing so.

[9] In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, the court awarded special costs to the Society for the reasons stated at 80:

> On the matter of costs, it is my view that this is a proper case for awarding costs on a solicitor-client basis to the respondent Society, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did not earlier seek leave to appeal to this Court.

[10] The court did not elaborate on the "circumstances" which it considered relevant. The judgment did recite the fact that the Society had been incorporated by

a number of persons who, prior to incorporation, had individually opposed construction of a dam on the Oldman River in Alberta. The Ministers to whom the court referred were the federal Minister of Transport and the Minister of Fisheries and Oceans. Until they were added as parties, Her Majesty the Queen in Right of Alberta, as represented by the Minister of Public Works, Supply and Services, had been the sole respondent in the Society's application for orders of *certiorari* and *mandamus*.

[11] In *McCullock Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, 2004 SCC 36, which was an action concerned with the Barreau's responsibility to monitor the professional competence of its members, the Court awarded special costs for reasons described at para. 48:

> Given the circumstances of this case, I would award the respondent her costs in this Court on a solicitor and client basis. Costs are awarded on this basis only in exceptional cases, under s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at paras. 86-87; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 445-46). In this case, the respondent represented herself until the case came before this Court, where a lawyer agreed to represent her. The appellant's appeal raised issues of general importance concerning the application of the legislation governing the professions in Quebec, the implications of which go beyond her particular case. Given the situation, this Court is justified in awarding the respondent costs on a solicitor and client basis.

[12] In *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, the Supreme Court of Canada awarded special costs to a party who succeeded in establishing that the differential treatment of natural and adoptive parents with respect to parental leave provided for in the *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48 contravened s. 15 of the *Charter*. The breach was eventually corrected by

parliamentary amendment, but the action proceeded to the Supreme Court of Canada on the issue of remedy, where the claimant was ultimately unsuccessful. The Court set forth its reasons for the award at 726:

> Despite the fact that the respondent has lost in this Court, I do not feel it appropriate that he should bear the costs. He did win with respect to the s. 15 issue at trial and the subsequent litigation has, upon the concession of the appellants, centred only on choice of remedy. According to this concession, the respondent by his claim brought a deficiency to the attention of Parliament which has since been remedied by the repeal and replacement of the impugned provision. He should not be penalized now because of a dispute solely with respect to remedy. I therefore award the respondent his solicitor-client costs.

[13] Finally, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.LR. (4th) 1, applicants who unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections were awarded costs on a party and party basis payable by the Attorney General of Ontario. While the case did not involve an award of special costs, the reasons provided by La Forest J. at 390 in upholding the lower court decisions on costs are instructive:

> The order to award costs against an intervening Attorney General, acting as she is statutorily authorized to, in the public interest in favour of a party who raises the constitutionality of a statute, appears highly unusual, and only in very rare cases should this be permitted. Nevertheless, this case appears to have raised special and peculiar problems, and the District Court's exercise of discretion was supported by the Court of Appeal. I am loath to interfere with the exercise of their discretion in this case.

[14] Instances in which courts in British Columbia have awarded special costs in completed litigation, other than in cases of unacceptable conduct, are limited. Boyd J. awarded special costs to a litigant whose action became moot when, in another

action, the Supreme Court of Canada declined to order funding for persons with autism: *Barclay (Guardian ad litem of) v. British Columbi*a (2005), 46 B.C.L.R. (4th) 180, 2005 BCSC 640 . The costs order was set aside on appeal to the Court of Appeal: 231 B.C.A.C. 98, 2006 BCCA 434. In doing so, the Court of Appeal said that the public policy dimension of the litigation was insufficient to permit the trial judge to exercise her discretion to award costs to the unsuccessful litigant. In the court's view, the litigation did not fall within the category of highly exceptional cases that warrant an order of the kind made by the trial judge.

[15] The plaintiffs also reference *Broomer (Litigation Guardian of) v. Ontario (Attorney General)* (2004), 187 O.A.C. 192, 121 C.R.R. (2d) 163, an instance in which the Ontario Superior Court of Justice awarded special costs to a party whose action succeeded without need for a hearing as a consequence of a change in government policy during the course of the litigation.

[16] In addition to relying on cases in which awards of special costs have been made following the completion of litigation, the plaintiffs rely on the principles described by the Supreme Court of Canada when considering an application for interim costs in the context of public interest litigation. In *Okanagan Indian Band*, *supra*, the Court reversed the British Columbia Court of Appeal and restored the trial judge's decision dismissing an application for an order requiring the defendant to pay the plaintiff's interim costs on a solicitor-client basis prior to the completion of the litigation and in any event of the cause.

[17] The court observed that traditionally, costs were intended "to ensure that the justice system works fairly and efficiently," by transferring "some of the winner's litigation expenses to the loser," and by acting "as a disincentive to those who might be tempted to harass others with meritless claims." The court then discussed the importance of costs in relation to public interest litigation and access to justice at para. 27:

> Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

[18] The court described the principles that should predominate when considering whether or not to exercise the discretion to make an award of interim costs at para. 40:

> With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[19] Also relevant in the present context is the case of *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner)* (2005), 50 B.C.L.R. (4th) 19, 2005 BCCA 368, a case in which the Raincoast Conservation Society and the Guide Outfitters Association of British Columbia were in conflict regarding disclosure by the Information and Privacy Commissioner of information relating to the location of grizzly bear kills in the province. The information was ordered to be released to Raincoast, and the objections of the Guide Outfitters Association were not sustained. The Association applied for an order that the parties bear their own costs because the Association undertook the litigation in the public interest and in good faith. Raincoast applied for an order that it recover costs from the unsuccessful Association.

[20] The Court of Appeal described the factors that should be taken into account when considering whether to depart from the general principle that costs follow the event at para 8:

> ...
>
> (a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
>
> (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
>
> (c) The issues have not been previously determined by a court in a proceeding against the same defendant.
>
> (d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
>
> (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[21] The Court of Appeal concluded that, in the circumstances, no departure from the general rule was warranted.

***Analysis***

[22] In the present case, the plaintiffs say that the proceeding, which involved the application of the *Charter* to Insite, is public interest litigation with an important access to justice dimension that affects numerous injection drug users who face a variety of obstacles in gaining access to justice, and that none of the plaintiffs has a pecuniary or proprietary interest in the outcome of the litigation.

[23] The defendant says that the plaintiffs have a personal interest in the outcome of the litigation because PHS is the operator, and the individual plaintiffs are users, of Insite. Moreover, says the defendant, PHS is not impecunious.

[24] There is little doubt that this action fits squarely within the scope of public interest litigation. My reasons for judgment described the evolution of the policy decisions that led the City of Vancouver and the provincial government to pursue a harm reduction strategy and to use Insite as one means of reducing the harm associated with intravenous drug use. The plaintiffs undertook this litigation with a view to preserving the operations of a publicly-funded facility. It undertook the challenge without financial assistance from either the City or the Province.

[25] It is facile to say that PHS or the individual plaintiffs have a personal interest in this litigation. PHS is a non-profit society that operates the facility under contract with a provincial health authority. It does so for the benefit of the community as a

whole and not, on the evidence, for its own benefit or financial gain. The individual plaintiffs have the same interest in the ongoing operation of the facility as any citizen has in respect of any other healthcare facility, namely their personal health and welfare. This action benefits all who suffer from the illness of addiction. The interests that PHS and the individual plaintiffs have in the outcome of the litigation are not such as to remove them from the ambit of public interest litigants.

[26] In support of its claim that the Society is not impecunious and can afford the conduct of the litigation, the defendant points to the fact that in the fiscal year ending March 31, 2007, PHS had revenue in excess of expenditures of approximately $1.32 million. While the amount is significant, it means little without analysis, of which the defendant has presented none. Included in revenue is a gain from the sale of public or social housing assets of $1.28 million, a grant of $1.33 million from BC Housing, a grant of $5.08 million from the Vancouver Coastal Health Authority, and other service grants of $433,000. PHS has provided affidavit evidence in support of its claim that it is without resources to conduct this litigation whether for its benefit, or the benefit of the community as a whole.

[27] The defendant has offered no evidence indicating that the grant revenue or the proceeds of sale from one or more housing projects is unrestricted in use or purpose, or that it was open to PHS to apply its financial resources to this litigation. The affidavit evidence establishes that counsel for the plaintiffs accepted this retainer on a *pro bono* basis. In my opinion, that is further evidence of financial need. Finally, and in any event, I am not persuaded that financial worth or the ability

to pay is a factor that should predominate where what is under consideration is an award of special costs following the successful completion of litigation, rather than an interim costs award to be payable in any event of the cause.

[28] In the course of submissions on costs, the defendant urged that no award of special costs should be made because the plaintiffs had been represented on a *pro bono* basis and therefore had not incurred any fees that should be reimbursed. I cannot accede to the argument. Costs have been incurred by someone, whether by the plaintiffs or by third parties in order to assist the plaintiffs. The defendant should not derive a windfall because of the fact that a third party has underwritten the costs of the litigation. With respect, the defendant contradicts itself when it says on the one hand that one must be impecunious if an award of special costs is to be considered, but says on the other that if a party is impecunious and cannot afford counsel but is represented on a *pro bono* basis, the benefit of an award of special costs should be denied or reduced.

[29] In all of the circumstances, and with due regard for the principles to which I have referred in these reasons, I am satisfied that the plaintiffs should be awarded special costs of the proceeding to date on a full indemnity basis, subject only to a registrar's consideration of reasonableness in accordance with subrule 57(3). For greater certainty, the indemnity will extend to and include the reasonable value of all *pro bono* services provided to PHS and the individual plaintiffs, and the amount of all reasonably necessary disbursements, by whomever incurred.

"Mr. Justice Pitfield"