Federal Court Cour fédérale

Date: 20161013

Docket: T-653-10

Citation: 2016 FC 1140

Toronto, Ontario, October 13, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

CALWELL FISHING LTD., MELVIN GLEN CALWELL, DALE VIDULICH, GERALD WARREN, AQUAMARINE TRANSPORTATION LTD., AND GEORGE MANSON

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

I. INTRODUCTION AND BACKGROUND

[1] By Judgment and Reasons dated March 11, 2016, the within action against Her Majesty the Queen in Right of Canada (the "Defendant") was dismissed.

[2] By Direction issued on March 11, 2016, the parties were invited to serve and file written submissions on costs, should they be unable to agree.

[3] The Defendant served and filed submissions on March 21, 2016, seeking her costs in the amount of $110,000.00. The draft Bill of Costs attached to the submissions shows her costs totalled $113,332.02.

[4] By letter dated March 30, 2016, the Defendant sought to correct an omission in her draft Bill of Costs, that is the fee paid for the expert evidence of Mr. Stuart Nelson. A revised draft Bill of Costs showed the Defendant's costs were $177,312.02. She claimed costs in the lump sum of $160,000.00, rather than $110,000.00.

[5] Calwell Fishing Ltd., Mr. Melvin Glen Calwell, Aquamarine Transportation Ltd. and Mr. George Manson (collectively the "Plaintiffs") filed responding submissions dated March 31, 2016.

[6] By Oral Direction dated April 1, 2016, the parties were directed to appear on April 15, 2016 to make oral submissions on costs. A second Oral Direction dated April 13, 2016, invited the parties to address at the hearing the Supreme Court of Canada decision in *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331.

II. SUBMISSIONS

A. *The Defendant's Submissions*

[7] The Defendant submits that there is no reason to depart from the general rule that costs should follow the event; see the decision in *Aird v. Country Park Village Properties (Mainland) Ltd.*, 2004 FC 945. She argues that she was successful on the main issue in this proceeding, that is whether the elements of a regulatory taking were made out.

[8] The Defendant claimed her costs in the higher end of the range in Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106 (the "Rules"). She submits that the higher end is warranted due to the complexity of the issues and the amount of work, relying upon Rules 400(3)(c), 400(3)(n.1), and 400(3)(g) of the Rules. In this regard, she points out that she reviewed 2713 documents, conducted oral examinations over eight days, cross-examined the Plaintiffs' witnesses over four days, and brought two substantial motions.

[9] The Defendant also submits that the expert witness disbursement is reasonable because that evidence was necessary to establish the proximate causes of the Plaintiffs' business losses.

[10] The Defendant argues that the Plaintiffs did not meet the elements of a public interest litigant set out in *McEwing et al. v. Canada (Attorney General) et al.)*, 439 F.T.R. 149, otherwise known as *Bielli*.

[11] In that case, the following factors are referred to as indicia of a public interest litigant:

> 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.

[12] The Defendant takes issue with the first three factors. She argues that this case does not involve issues of importance which extend beyond the immediate interests of the parties; the Plaintiffs have a pecuniary interest in the outcome; and the case is not novel.

[13] The Defendant argues that "this case is historically interesting, but it's really of no application going forward. The case, it relates to regulatory measures taken by DFO decades ago."

[14] The Defendant submits that this proceeding was driven by the immediate interests of the Plaintiffs, which is illustrated by the relief they sought, that is a declaration of personal entitlement to compensation. She argues that the Court did not address the alternate declarations sought by the Plaintiffs which extended beyond the interests of the Plaintiffs.

[15] The Defendant submits that the Plaintiffs had a pecuniary interest in the proceeding since they maintained throughout the proceeding that they were relying upon the good faith of the Defendant to pay them in accordance with any declaration granted in this proceeding.

[16] The Defendant argues that the Plaintiffs' own expert evidence showed that their potential pecuniary interest in the outcome of the proceeding was sufficiently large to "justify this proceeding economically".

[17] In her oral submissions, the Defendant referred to the expert reports of Mr. Hooge. In those reports, the losses of Aquamarine were estimated to be approximately $658,000. The losses of Mr. Calwell and Calwell Fishing were estimated to be between $841,000 and $1,022,000.

[18] The Defendant further submits that this case is not novel since an identical declaration was sought in *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101.

[19] The Defendant concedes that the fourth factor was established, that she has a superior capacity to bear the cost of the proceeding. She also admits that the fifth factor, that whether the Plaintiffs engaged in abusive, vexatious or frivolous conduct, does not arise in this case.

B. *The Plaintiffs' Submissions*

[20] The Plaintiffs submit that each party should bear their own costs since they meet the test for public interest litigants set out in *McEwing, supra*.

[21] The Plaintiffs argue that this proceeding involved issues of public importance that transcended their personal interests. They say that, despite their failure to meet the evidentiary burden of proof, their pleadings and evidence led to a Judgment that provides a useful guide to the applicable principles for those impacted by the Defendant's management of the public fisheries.

[22] The Plaintiffs argue that this case raised issues of public importance, specifically, the boundaries of the Minister of Fisheries and Oceans' in managing the fisheries as a common property resource while balancing public and private interests.

[23] The Plaintiffs submit that this proceeding explored an underdeveloped area of jurisprudence relating to a unique area of public law. They argue that the law surrounding the fisheries is unique because it is the only common property resource in Canada.

[24] The Plaintiffs submit that their action attempted to establish a framework to assess the duties and powers of the Defendant as a steward over the fisheries. They argue that this public importance is not diminished simply because they were unsuccessful on the merits.

[25] The Plaintiffs argue that they did not have a pecuniary interest in the outcome of this proceeding because they did not seek monetary relief. Rather, they relied upon the good faith of the Defendant to act in accordance with any declaration granted.

[26] The Plaintiffs claim that the issues raised in this proceeding have not been previously determined. They submit that the novel features of this case include the claims that no "wrongdoing" was alleged against the Crown and their interest in access to the fisheries, as a common property resource, was of value.

[27] The Plaintiffs further submit that they do not seek a substantial departure from the general rule that costs follow the event, relying upon the decision in *Victoria (City) v. Adams* (2009), 100 B.C.L.R. (4th) 28 at paragraph 190, where the British Columbia Court of Appeal said:

> While similar, or even identical, factors may apply to various forms of departure from the normal rule, that is not to suggest that all forms of departure are of equal magnitude. The justification necessary to grant an exceptional cost award is, in part, related to the magnitude of derogation from the usual cost structure of the award being considered. An award of interim costs requires one party to incur liability for the other's costs before the case has been heard and irrespective of the outcome. These are truly exceptional orders. Likewise, as this Court observed in *Barclay* at para. 37, an award of costs to an unsuccessful party represents a more significant departure than an order that each side bear their own costs. …

[28] The Plaintiffs further argue, relying upon Rule 400(3)(i), that much of the difficulty with scheduling this proceeding was driven by the appointment of new Counsel for the Defendant.

[29] The Plaintiffs submit that the Court should not rely upon the draft Bill of Costs submitted by the Defendant, in particular, the disbursement claimed for the expert evidence.

[30] Finally, the Plaintiffs request that if costs are awarded, they be at a "level beyond the very modest level."

III. DISCUSSION

[31] Pursuant to Rule 400 of the Rules**,** the award of costs is wholly within the discretion of the Court. Rule 400(3) sets out a non-exhaustive list of factors which may be considered by the Court in its exercise of discretion.

[32] The Plaintiffs rely primarily upon the factor set out in Rule 400(3)(h), which provides that the Court may consider whether the public interest in having the proceeding litigated justifies a particular award of costs.

[33] An important principle underlying costs is that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party; see the decision in *Apotex Inc. and Novopharm Ltd. v. Wellcome Foundation Ltd.* (1998), 159 F.T.R. 233, aff'd 199 F.T.R. 320 (C.A.).

[34] A losing party who raises a serious legal issue of public importance will not necessarily bear the other party's costs; see the decisions in *Little Sisters Book and Art Emporium v. Canada,* [2007] 1 S.C.R. 38 at paragraph 35 and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76.

[35] The Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 at paragraph 27, explained the significance of costs in public interest litigation:

> 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 ... 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.

[36] The parties submit that the criteria adopted by Justice Mosley in *McEwing*, *supra* at paragraph 13, ought to be applied here, in determining if costs should not be awarded against a person who commences public interest litigation.

[37] In *Carter, supra* the Supreme Court of Canada recently reviewed the principles relevant to awards of costs in public interest litigation. The parties were given the opportunity to address this jurisprudence.

[38] In my opinion, the decision is relevant here for the proposition that costs should not automatically be awarded in respect of public interest litigation in order to avoid creation of "an alternative and extensive legal aid system"; see *Carter*, *supra* at paragraph 137.

[39] In my opinion, the Plaintiffs have met the test as public interest litigants set out above**.**

[40] First, I agree with the Plaintiffs that this case addressed a serious issue of public importance, that is the unique nature of the public fishery as a common property resource, and the public administration of that resource.

[41] This case explored the constraints on the powers of the Minister of Fisheries and Oceans, as a steward of the fisheries, which requires the balancing of several different public and private interests. The impact of these important issues extends beyond the parties to this action and is not limited to the particular factual circumstances of this case.

[42] The scope of the Defendant's obligations to manage the public fisheries as a common property resource has been the subject of debate for more than 100 years; see the decision in *Attorney-General of British Columbia v. Attorney General of Canada,* [1914] A.C. 153 (J.C.P.C.).

[43] The issues raised in this case are not cut and dry. According to the Index of Recorded Entries, the Defendant did not attempt to strike out the Statement of Claim but chose to proceed to trial. In the course of that trial the Respondent argued two motions.

[44] The first motion sought an Order striking parts of the Plaintiffs' affidavits. The second motion, presented at the close of the Plaintiffs' case, sought an Order dismissing their action on the basis that no evidence had been submitted to establish their claims. The motions were unsuccessful.

[45] The fact that the Respondent argued two motions in the course of the trial demonstrates, in my opinion, that the issues raised by the Plaintiffs were complex and significant.

[46] Second, I am satisfied that the Plaintiffs did not have a defined pecuniary interest in the outcome of this action.

[47] The Plaintiffs sought declaratory relief. In their closing submissions at trial, the Plaintiffs repeatedly said that they relied upon the hope that the Defendant would "do the honourable thing".

[48] In my opinion, there was no pecuniary interest in the outcome, apart from the potential reliance by the Plaintiffs upon any declaration, in consultations with the Defendant.

[49] In any event, in my opinion, an interest in the outcome of the proceeding is not the determinative factor; see the decision in *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723. I agree with the view expressed by Justice Perrell at paragraph 98 of *Incredible Electronics*, *supra* that "altruism and having little to gain financially work better as indicia than criteria for qualification as a public interest litigant."

[50] I am satisfied that, although the Plaintiffs had a personal interest in the outcome of this proceeding, the public interest was served by the adjudication of the issues raised.

[51] Third, the Defendant submits this case is not novel. I disagree.

[52] The Plaintiffs alleged that they had a property interest in the Canadian fisheries and that their interest was taken by the Defendant's actions. Whether public access to the fisheries, a common property resource, is "property" that can be the subject of a regulatory taking is an issue that has not been previously resolved by a Court.

[53] The Plaintiffs were unsuccessful at trial because the evidence they submitted failed to establish the necessary elements of their claim. In *Harris v. Canada* [2002] 2 F.C. 484 (T.D.) a similar result ensued, where the plaintiffs' action was dismissed because he had not established his stated causes of action; see paragraph 213.

[54] Nonetheless Justice Dawson, as she then was, awarded costs in favour of the unsuccessful plaintiff, Mr. Harris. She acknowledged the broad discretion conferred upon the Court by Rule 400 of the Rules, and observed that such discretion must be exercised on a "principled basis".

[55] Justice Dawson also recognized the significance of costs in the context of public interest litigation at paragraph 221, when she said the following:

> The question of costs is of considerable significance when rationally deciding whether to bring an action. Where a plaintiff lacks a personal, proprietary or pecuniary interest in an action the plaintiff is effectively deterred from bringing the action, notwithstanding he or she may have, as a matter of law, public interest standing.

[56] In my opinion, the within action likewise raised important issues that are in the public interest. This finding warrants a departure from the general rule that costs follow the event.

[57] Accordingly, in the exercise of my discretion, I order that each party bear its own costs.

ORDER

THIS COURT ORDERS THAT each party shall bear its own costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-653-10
STYLE OF CAUSE:	CALWELL FISHING LTD., MELVIN GLEN CALWELL, DALE VIDULICH, GERALD WARREN AQUAMARINE TRANSPORTATION LTD., AND GEORGE MANSON v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
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