

SUPREME COURT OF YUKON

Citation: *Maraj v Commissioner of the Yukon Territory*
2022 YKSC 40

Date: 20220913
S.C. No. 21-AP002
Registry: Whitehorse

BETWEEN:

RAMONA MARAJ, PhD

APPELLANT

AND

COMMISSIONER OF THE YUKON TERRITORY

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Appellant

Vincent Larochelle

Counsel for the Respondent

Lesley Banton

REASONS FOR DECISION (COSTS)

Introduction

[1] This is a decision on costs of the unsuccessful preliminary application to strike the appellant's notice of appeal by the respondent Yukon government on the basis that it was received out of time. The application was dismissed with costs to the appellant in any event of the cause payable forthwith. Counsel are unable to agree on whether those costs should be special costs, increased fixed costs, or party and party costs.

[2] The underlying appeal was brought as a result of a partially unfulfilled access to information request for data about various caribou herds in the Yukon. The Information and Privacy Commissioner ("IPC") on review of the Yukon government's refusal of the request made certain recommendations for disclosure, some of which the Yukon

government declined to follow. The April 19, 2021 letter sent by the Yukon government in response to the IPC's recommendations, a copy of which was received by the appellant, was found to be ambiguous as it did not clearly state a refusal to follow the recommendations, it requested more unspecified time for a substantive response due to the recent election, and stated they would be providing more information about the IPC recommendations (*Maraj v Commissioner of the Yukon Territory*, 2022 YKSC 3 at para. 24 ("reasons on the application to strike")). Although the letter set out that it was notice of a refusal to accept the recommendations under s. 58 of *Access to Information and Protection of Privacy Act*, SY 2018, c9 ("*ATIPP Act*"), it failed to advise the self-represented appellant of her right to appeal as required by s. 59 of the *ATIPP Act*, which sets out the time limit of 30 days' written notice of an appeal to the public body.

[3] The appellant says she is entitled to special costs or increased fixed costs because of the respondent's unacceptable conduct: specifically, their argument that the appeal was filed out of time after the respondent sent an ambiguous and incomplete letter they say triggered the appeal period, in the context of litigation under the *ATIPP Act*, the stated purpose of which is to make public bodies more accountable to the public. The appellant also argues this case meets the two-part test set out in *Carter v Canada (Attorney General)*, 2015 SCC 5 ("*Carter*") at para. 140, for public interest litigation – (1) truly exceptional with widespread societal impact and (2) evidence the plaintiff could not effectively pursue the litigation with private funding and has no personal, proprietary, or pecuniary interest in the litigation. The appellant says the public interest nature of the litigation also entitles them to special costs.

[4] The respondent says their conduct does not meet the standard of reprehensible, scandalous, or outrageous conduct deserving of rebuke, thereby justifying special costs. They also say the application had merit and the *Carter* test for public interest litigation is not met. Party and party costs at Scale B (ordinary difficulty) are appropriate.

Issue

[5] The issue is whether the context and circumstances of this case justify an award of special costs or increased fixed costs to the appellant.

Analysis

[6] As a preliminary comment, both counsel made reference in their written submissions to certain aspects of the underlying application, that were not necessary for me to consider in the application to strike. These points included reference to reasons provided by the Yukon government to the IPC for refusing to disclose the data in December 2019 and May 2020, before the refusal letter of April 19, 2021; and both parties reference certain personal circumstances of the appellant and her motivation for the request and the appeal. Some of the arguments as well, such as the appellant's public interest litigation argument, require a determination of the entire appeal, not the preliminary application. I will not be relying on those arguments, as there was insufficient evidence in the context of the application to assess them.

[7] I agree with the respondent Yukon government that this is not a case for special costs. First, the circumstances do not meet the two-part *Carter* test of public interest litigation entitling the appellant to special costs. The case is not one that is truly exceptional and of widespread societal interest. The fact that there are few *ATIPP Act* decisions in this jurisdiction does not make this one truly exceptional. The question in

this preliminary application, which is what is relevant to this costs decision, is a narrow procedural point related to the timing of the provision of written notice of the appeal. As the case law provided by the respondent demonstrates, the type of cases that are truly exceptional for the purpose of special costs are limited and do not include preliminary applications such as this. Secondly, there is insufficient evidence for me at this stage to decide if the appellant has no pecuniary or economic interest in this matter and whether she can effectively pursue the litigation with private funds (although she appears to be doing so).

[8] The appellant also argues the respondent's conduct warrants special costs. Again, I agree with the respondent that their conduct does not rise to the level of seriousness required for an award of special costs. The circumstances noted in *Mayer v Osborne Contracting Ltd*, 2011 BCSC 914, relied on by the appellant, require: pursuing a claim or application known to be devoid of merit; that the party be reckless with the truth and initiate the application for improper motives, including imposing a financial burden on the opposing party; or the party brings the application frivolously and without foundation.

[9] As I indicated in the reasons on the application to strike, the respondent's conduct in bringing this application was not beyond reproach. While there was an insufficient basis for a successful application, it was not so completely devoid of merit to meet the standard set out in the jurisprudence. The fact that the letter relied on by the Yukon government to trigger the appeal notice period was found to be ambiguous and inconclusive, means there was more than one possible interpretation and thus a plausible argument for the Yukon government. There was no evidence of improper

motives by the Yukon government in bringing this application. The Yukon government was not reckless with the truth, nor was the application to strike completely frivolous or without foundation. It was ill-advised and weak on the merits but that does not meet the standard described in the jurisprudence. The respondent's conduct does not warrant special costs.

[10] However, there are reasons to award more than party and party costs in this case. Those reasons are already set out in the decision in the application to strike in paragraphs 26, 32, 36 and 37. They are:

- a. The content of the letter allowed for a good faith interpretation taken by the self-represented appellant that there was more information and conversations to come from the Yukon government about their decision after the new government settled in, so it was not an outright refusal.
- b. The letter did not include the statutory requirement of advising the appellant of her appeal rights.
- c. The notice of appeal was filed in Court within the required time period.
- d. The timing of the notice to the respondent was not prejudicial to them.
- e. The Yukon government attempted to rely on a technicality to end a legitimate process of considering the provision of government information to a citizen in the context of legislation with a stated purpose of keeping public bodies accountable.

[11] These circumstances are sufficiently unusual to warrant an increased fixed costs award pursuant to Schedule 3 of Appendix B of the *Rules of Court* of the Supreme Court of Yukon. Generally, an application to strike an entire claim on the basis of a

technicality, where the merits of the technicality are questionable, should be considered very carefully, especially when brought as a preliminary application and not as an alternative argument at the hearing on the merits.

Conclusion

[12] As a result, I award the fixed cost amount of \$7,000 plus GST to the appellant in this matter.

DUNCAN C.J.