SUPREME COURT OF YUKON

Citation: *Sidhu v Canada (Attorney General)*, 2023 YKSC 33

Date: 20230615
S.C. No. 14-A0118
Registry: Whitehorse

BETWEEN:

MANDEEP SINGH SIDHU

PLAINTIFF

AND

THE ATTORNEY GENERAL (CANADA)

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff	André Roothman
Counsel for the Defendant	Jonathan S. Gorton and Sylvie McCallum Rougerie

REASONS FOR DECISION

OVERVIEW

[1] The plaintiff, Mandeep Sidhu, brought an action against the defendant, the Attorney General of Canada. He alleged that the Royal Canadian Mounted Police targeted him because of his race, maliciously prosecuted him, and assaulted him.

[2] Mr. Sidhu's action went to trial. As part of his case, Mr. Sidhu brought an application to introduce similar fact evidence of other interactions he had with the RCMP. He argued that the pattern of interactions showed systemic racial discrimination against him and supported his claim. I largely dismissed the application.

[3] In response, the Attorney General denied that the RCMP targeted Mr. Sidhu at all, but that, because of Mr. Sidhu's own behaviour, the RCMP did develop an interest in

Mr. Sidhu. To that end the Attorney General introduced evidence that Mr. Sidhu was rude and belligerent during calls to 911 dispatchers; approached RCMP officers when they were not in uniform, accusing them of malfeasance and insulting them; and engaged in other provocative behaviour.

[4] In the end I rejected Mr. Sidhu's claims that he was racially targeted by the RCMP and accepted the Attorney General's evidence that the RCMP only began to be interested in Mr. Sidhu because of Mr. Sidhu's own actions. I therefore dismissed Mr. Sidhu's action.

[5] The Attorney General now seeks that Mr. Sidhu be rebuked for his pre-litigation behaviour. He also seeks special or increased costs. Mr. Sidhu opposes the Attorney General's application.

[6] For the reasons below, I am denying the Attorney General's request for special costs for most of the proceedings. I am, however, ordering special costs for five units of column 25 (one half-day of trial). I am also allowing increased costs for 20 units of column 25 (two days of trial), but not for the rest of the proceedings.

ISSUES

A. Should Mr. Sidhu pay special costs?

B. If not, should Mr. Sidhu pay increased costs?

ANALYSIS

A. Should Mr. Sidhu pay special costs?

[7] The Attorney General argues that Mr. Sidhu's pre-litigation behaviour towards the RCMP deserves rebuke. Moreover, Mr. Sidhu pursued claims that were meritless, which included unfounded allegations of racial *animus* and malicious prosecution.

Mr. Sidhu should, therefore, pay special costs. Mr. Sidhu submits that his pre-litigation behaviour is irrelevant to the question of costs. He also submits that all his claims had merit.

[8] I have decided special costs should not be awarded, except for a portion of the trial that dealt with an allegation of assault that occurred after Mr. Sidhu's arrest, when a police officer was transporting him to the courthouse.

Pre-Litigation Behaviour

[9] The Attorney General submits that Mr. Sidhu's behaviour before he started litigation was reprehensible. He therefore should be rebuked.

[10] Yukon courts have determined that pre-litigation conduct can be a factor in determining whether to award special costs (*Calandra v Henley*, 2009 YKCA 6 ("*Calandra*") at para. 29). However, as counsel to the Attorney General fairly points out, the Court of Appeal for British Columbia has held that pre-litigation conduct should not be considered when deciding if special costs are to be awarded (*Smithies Holdings Inc v RCV Holdings Ltd*, 2017 BCCA 177 at para. 134 ("*Smithies Holdings Inc*")).

[11] It can be argued that I should follow *Calandra*, as it is a decision of the Court of Appeal of Yukon, and is therefore binding, while *Smithies Holdings Inc* is not. I have concluded, however, that I should follow *Smithies Holdings Inc.* The court in *Calandra,* in coming to its decision, cited the Supreme Court of Yukon's decision in *Brosseuk v Aurora Mines Inc*, 2008 YKSC 18. The court in *Smithies Holdings Inc,* also considered *Brosseuk*, and determined that its conclusions were not persuasive (at paras. 100-101). Thus, the case which guided the court's determination in *Calandra* was subsequently considered, and rejected, by the Court of Appeal for British Columbia.

[12] Moreover, many of the justices appointed to the Court of Appeal of Yukon are also appointed to the Court of Appeal for British Columbia. Thus, the decisions of the Court of Appeal for British Columbia, while not binding, are highly persuasive (*R v Mulholland*, 2014 YKSC 3 at para. 4). In this case, there is no reason to depart from the decision in *Smithies Holdings Inc.* Mr. Sidhu's pre-litigation behaviour is therefore not relevant to the issue of costs.

[13] Additionally, the Attorney General seems to concede that I should follow *Smithies Holdings Inc*. He submits, not that I should award special costs against Mr. Sidhu because of his pre-trial behaviour, but that I should rebuke Mr. Sidhu for his pre-trial behaviour.

[14] The trial decision addresses Mr. Sidhu's conduct as it relates to his legal claims. It is not the court's role to police a litigant's general behaviour. I decline to issue a rebuke to Mr. Sidhu.

Whether Mr. Sidhu Pursued Meritless Claims

[15] The Attorney General submits that Mr. Sidhu should pay special costs on two bases: first, he generally advanced claims that were meritless; and second, his allegations of racial *animus* and malicious prosecution were unfounded. Mr. Sidhu submits that his claims had merit, and special costs should not be ordered.

[16] I conclude that Mr. Sidhu's claim that he was assaulted while he was being driven to the courthouse is meritless. I also conclude that Mr. Sidhu had some basis upon which to allege his other claims.

[17] Special costs may be ordered where a party has acted reprehensibly, scandalously, or outrageously (*Golden Hill Ventures Limited Partnership v Ross Mining*

Limited and Norman Ross, 2012 YKSC 18 at para. 6). They are awarded to rebuke a party for their behaviour, and to substantially indemnify the other party for the costs they have incurred (para. 10).

[18] Making baseless claims that a party knows to be untrue, is without foundation or is reckless about their truth, are all reasons to award special damages (para. 8).

[19] As well, a party that makes unfounded allegations of fraud, dishonesty, malicious prosecution or racial *animus* may also be ordered to pay special costs (para. 8; *Hamalengwa v Duncan*, 2005 CanLII 33575 (Ont CA) at para. 17).

[20] A party who makes allegations of fraud must be cautious and have some evidentiary basis for the claim. Mere belief or speculation is not enough (*Port Coquitlam Building Supplies Ltd v 494743 BC Ltd*, 2019 BCSC 540 ("*Port Coquitlam Building Supplies Ltd*") at para. 16). However, special damages are not awarded simply because the party alleging fraud or dishonesty has been unsuccessful or the case is weak (*Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 ("*Open Window Bakery Ltd"*) at para. 26; *Port Coquitlam Building Supplies Ltd* at para. 16). Rather, "it must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice." (*Cimolai v Hall*, 2007 BCCA 225 ("*Cimolai*") at para. 68, citing *Hung v Gardiner*, 2003 BCSC 285 at para. 16).

[21] *Open Window Bakery Ltd, Port Coquitlam Building Supplies Ltd*, and *Cimolai* are not about malicious prosecution or claims of racial *animus*. However, allegations of fraud and dishonesty are similar to allegations of malicious prosecution and racial *animus*: they are all serious allegations that can have significant repercussions on the

person accused of wrongdoing. Thus, the principles arising from the case law above are also applicable to allegations of malicious prosecution and racial *animus*.

[22] The question here, then, is whether Mr. Sidhu made the claims, knowing they were untrue, was reckless in making them, or made them without foundation. Given the seriousness of the claims of racial *animus* and malicious prosecution, they warrant separate analysis.

[23] I begin first with the claim that Mr. Sidhu's claims were generally meritless. Mr. Sidhu had multiple claims against the Attorney General. He alleged that the RCMP targeted him because of his race. They targeted him by conducting two arbitrary roadside stops. In addition, Mr. Sidhu claimed that the RCMP maliciously prosecuted him by charging him with uttering threats. Finally, he alleged that during his arrest, his *Canadian Charter of Human Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* rights were violated, and he was assaulted.

[24] The Attorney General's argument is, essentially, that all these claims were bound to fail. The Attorney General relies on Mr. Sidhu's evidence, and my conclusions, about one of the alleged assaults, in support of his position.

[25] This allegation concerns an incident that occurred while Mr. Sidhu was being driven to the courthouse in a police car after being arrested. He claimed that the police officer driving the car, Constable Leggett, braked suddenly, causing Mr. Sidhu to hit his head against the partition. He also claimed that Constable Leggett did this intentionally.

[26] At trial Mr. Sidhu admitted that he had embellished the injuries he got from hitting his head. Moreover, I found that Mr. Sidhu had intentionally hit his head on the partition,

and that he was not assaulted by Constable Leggett. The Attorney General submits that this is sufficient to justify an award of special costs.

[27] Mr. Sidhu's untruthfulness on this issue, and my findings that he intentionally hit his head on the partition, then blamed Constable Leggett for it, is serious. It is reprehensible behaviour deserving of censure through a special costs award.

[28] However, I am not convinced that I should award special costs for the entirety of the proceedings on this basis. This evidence was about one issue amongst multiple allegations made by Mr. Sidhu. I did not conclude that Mr. Sidhu was persistently untruthful.

[29] Rule 60(6) of the *Rules of Court* of the Supreme Court of Yukon ("*Rules of Court*") permits the court to order costs for a particular issue or part of a proceeding. I conclude that it is appropriate to award special costs on the issue of Mr. Sidhu's alleged assault by Constable Leggett in the police car.

[30] The next question is how to determine the amount of time spent on that issue. In my opinion, the special costs award should cover Constable Leggett's testimony.

[31] Constable Leggett testified for approximately half a day, or two and one-half hours. Constable Leggett's testimony was not limited to the incident in the police cruiser, so the special costs award encompasses not only his evidence about that incident, but other evidence that was relevant as well. It can therefore be argued that, in awarding special costs for the entirety of Constable Leggett's testimony, I am overcompensating the Attorney General.

[32] On the other hand, Mr. Sidhu also testified about the incident, which I am not including in the special costs award. I am also not awarding costs for preparation time for this aspect of Constable Leggett's testimony as I do not have information about that.

[33] In the end, although the award for half day special costs does not provide precise compensation to the Attorney General for Mr. Sidhu's problematic allegations, it is sufficient to both rebuke Mr. Sidhu for his conduct, and to substantially indemnify the Attorney General for his costs on this issue.

[34] The Attorney General's second submission is that Mr. Sidhu should be required to pay special costs because he advanced allegations of racial *animus* and malicious prosecution, but that, at trial, there was no evidence of malice or that Mr. Sidhu was treated differently because of his race, aside from a single comment Constable West made.

[35] The Attorney General's argument is flawed in two ways. First, it assesses the merit of the claims only from what happened at trial. Merit, however, is not assessed from what occurred at trial, but from the point of view of the plaintiff, at the time they made or maintained their claim (*Cimolai* at para. 68). Here then, the perspective is broader: I must review what underpinned the allegations throughout the proceedings.

[36] Second, counsel to the Attorney General only notes whether there was direct evidence of racial *animus.* However, circumstantial evidence also forms part of the case. The kind of racial *animus* Mr. Sidhu alleged, which is racial profiling, is in fact most frequently proven from the circumstances surrounding the police actions during the impugned incident, rather than from direct evidence (*R v Sitladeen*, 2021 ONCA 303 at para. 79).

[37] As noted in the trial decision, factors used to determine racial profiling include: inappropriate behaviour such as questioning or treatment that is harassing or vexatious; contradictory or implausible testimony offered to legitimize a police officer's actions; and differential treatment of some groups in analogous circumstances (*R v Neyazi*, 2014 ONSC 6838 at para. 198).

[38] Mr. Sidhu's argument was that the circumstantial evidence supported an inference that he was targeted because of his race. On the evidence before me, Mr. Sidhu did have a basis to pursue his claims. For instance, at one stop, the police officer stopped Mr. Sidhu only after having followed him for some time. At a second stop the same police officer performed an investigation into Mr. Sidhu's driving record. At a third stop, Mr. Sidhu had evidence that another white driver was not given a ticket for speeding, although he was. At trial, the police were able to explain their actions. However, the best method for determining whether racial *animus* influenced the police officers' decisions was likely through examination and cross-examination of the witnesses. Mr. Sidhu's allegations of racial *animus* were not unwarranted nor completely unfounded.

[39] The allegation of malicious prosecution is on a somewhat different footing. It too, was based on the premise that the RCMP was racially targeting Mr. Sidhu. Unlike the roadside stops, however, there was evidence about the motivations of the RCMP officer who brought the charges against Mr. Sidhu, in the form of emails between her, her superiors, and a Crown prosecutor. This evidence could have prompted Mr. Sidhu to reconsider whether to pursue the claim. At the same time, the documentary evidence

did not rule out racial *animus*. I cannot say that Mr. Sidhu's allegations of malicious prosecution were completely unfounded.

[40] I will therefore order special costs with regards to a half-day of court time, but I otherwise deny the Attorney General's application on this issue.

B. If not, should Mr. Sidhu pay increased costs?

[41] Counsel to the Attorney General submits that, if special costs are not awarded, then Mr. Sidhu should pay increased costs because he made the case unnecessarily complex, failed to make reasonable admissions and refused to enter into a document agreement.

[42] I do not order increased costs, except for costs related to the application to admit similar fact evidence.

Complexity of the Case

[43] I conclude that Mr. Sidhu added unnecessary complexity to the proceedings through the manner in which he brought an application to introduce similar fact evidence.

[44] Pursuant to the *Rules of Court*, increased costs at a rate of 1.5 per unit may be granted in "unusual circumstances", where costs awarded on the appropriate scale would be "inadequate or unjust" (*Rules of Court*, Appendix B, s. 2(e)).

[45] The purpose of increased costs is to indemnify the party seeking the costs, not punish the party required to pay the costs. (*National Hockey League v LA Kings Ltd* 1995 CanLII 2613 (BC CA) at para. 32). A finding of misconduct is not necessary to award increased costs.

[46] Factors that may support an award of increased costs include: positions or behaviour that add complexity to the litigation; the importance of the proceedings to a party; a party's misbehaviour which adds expenses to the party claiming costs; and the extent of the disparity between the Scale B costs calculation and the actual legal fees incurred (*Globalnet Management Solutions Inc v Aviva Insurance Company*, 2020 BCSC 1361 at para. 30).

[47] At trial, counsel for Mr. Sidhu brought an application to admit evidence of historical interactions between him and the RCMP as similar fact evidence. He argued that the evidence showed a pattern of behaviour and supported the conclusion that the RCMP had racial *animus* against him.

[48] The Attorney General now argues that, by seeking to admit evidence of historical interactions between Mr. Sidhu and the RCMP, Mr. Sidhu added complexity to the case. As I understand it, the argument is composed of two elements: first, the Attorney General argues that the evidence of historical interactions should not have been brought because they were extraneous to the case; and second, the manner in which Mr. Sidhu addressed the evidence of historical interactions led to delays and lengthened the trial.

[49] I do not agree with the Attorney General's argument that Mr. Sidhu should not have sought to introduce evidence at trial about the historical interactions.

[50] The question of whether the evidence was extraneous or relevant was a key issue in the application. While I ultimately ruled against Mr. Sidhu, the result was not self-evident. The fact he was not successful is not a reason for finding that increased costs should be imposed.

[51] Nevertheless, I do conclude that the way in which Mr. Sidhu brought the issues of the historical incidents forward increased costs and caused delays. The difficulties began with the statement of claim: it was amended three times to attempt to incorporate the historical interactions. At first the statement of claim did not mention the historical interactions at all. Mr. Sidhu's counsel subsequently filed an amended statement of claim, which included the historical interactions. The Attorney General then successfully applied to have those claims struck. Mr. Sidhu's counsel filed another amended statement of claim in which he reframed the historical interactions; and the court struck these amendments as well. With leave of the court, Mr. Sidhu filed a further amended statement of claim with new claims relating to the historical interactions.

[52] The trial was then adjourned as counsel needed more time to consider further amendments to the statement of claim and how to limit issues.

[53] Counsel to Mr. Sidhu submits that costs associated with the applications to strike can be recouped and should not be considered for the purposes of increased costs. The progress of the statement of claim shows, however, a lack of clarity about how to incorporate the historical interactions into Mr. Sidhu's claim. This lack of clarity was noted by the court in both applications to strike. At the conclusion of his decision (2019 YKSC 36) on the second application to strike, Vertes J. urged counsel to "as much as possible, … clarify the issues so as to avoid these types of conceptual and evidentiary problems" (para. 61).

[54] In January 2020, counsel to the Attorney General did seek clarification from Mr. Sidhu about the historical interactions evidence, which by then had been identified as similar fact evidence. Counsel to the Attorney General sought particulars about the

similar fact evidence Mr. Sidhu intended to introduce at trial. Mr. Sidhu's counsel did not reply.

[55] Subsequently, upon the Attorney General's request, I issued an order requiring Mr. Sidhu to provide information to the Attorney General about the similar fact evidence he sought to admit, including by identifying the historical interactions he would lead evidence on. In accordance with the order, Mr. Sidhu identified 17 incidents he intended to introduce as similar fact evidence. However, in written submissions filed shortly before the commencement of the trial, Mr. Sidhu's counsel referred to 32 incidents he intended to introduce as similar fact evidence. Additionally, once the application was decided, further discussions were needed, as Mr. Sidhu's counsel sought to admit the evidence of historical interactions as background narrative.

[56] The lack of clarity noted by the court in the first application to strike in 2016 was not resolved by Mr. Sidhu. It resulted in an application process that was drawn out and complicated. I therefore conclude that increased costs are warranted.

[57] The Attorney General seeks increased costs for the entirety of the proceedings, but I am not convinced that is appropriate. It is not clear that increased costs are necessary to compensate for the Attorney General's efforts pre-trial. I have some information about how Mr. Sidhu's actions affected the pre-trial process, but do not have submissions about whether the additional complexity means a costs award at the normal scale would be inadequate or unjust.

[58] In addition, the similar fact evidence did not affect the trial proper. Although Mr. Sidhu did refer to some of the similar fact evidence in his testimony, and it was referred to by Mr. Sidhu's counsel in final submissions, the impact on the trial overall

was minimal. Moreover, some of the similar fact evidence was properly admitted, as it was relevant to other issues.

[59] The similar fact application and subsequent discussions consumed two and one-half days of the trial, which should not have occurred. Allowing for a reasonable amount of time to hear the application, I am therefore ordering that Mr. Sidhu pay increased costs for two days of the trial (or 20 units under column 25).

Failure to Make Reasonable Admissions

[60] Counsel to the Attorney General sent Mr. Sidhu's counsel a Notice to Admit. Mr. Sidhu's counsel denied most of the statements on the grounds of irrelevance. The Attorney General now seeks that increased costs be awarded on the basis that Mr. Sidhu unreasonably denied the admissions. Mr. Sidhu submits that the denial was reasonable.

[61] I conclude that Mr. Sidhu was not unreasonable in denying the Attorney General's request to admit facts.

[62] Notices to admit are governed by Rule 31 of the *Rules of Court*. Under Rule 31(1), a party may deliver to another party a Notice to Admit. The Notice to Admit contains facts which the party is seeking that the other party admit as true. The other party then may respond by denying the truth of the fact, stating why they cannot admit the fact, or providing a reason why the admission is otherwise improper. (Rule 31(2)). Costs may be awarded against a party who unreasonably denies or refuses to admit the truth of a fact (Rule 31(4)).

[63] Failing to admit the truth of a fact may be unreasonable in the following circumstances:

> (a) the truth of the fact is subsequently proved;
>
> (b) the fact was relevant to a material issue in the case;
>
> (c) the fact was not subject to privilege;
>
> (d) the notice to admit was not otherwise improper;
>
> (e) the notice to admit was reasonably capable of evaluation within the time required for response; and
>
> (f) the refusing party had no reasonable grounds for believing that it would prevail on the matter.

(*Ceperkovic v MacDonald*, 2016 BCSC 939 ("*Ceperkovic*") at para. 38)

[64] In the case at bar, the Notice to Admit included facts related to a stop by the RCMP of Mr. Sidhu during a check stop in 2016. At the stop, Mr. Sidhu received a ticket for speeding in a construction zone. He challenged the ticket in court. The trial judge found that the road signs about whether the speed limit had changed was confusing, and acquitted Mr. Sidhu.

[65] The Attorney General sought to admit facts about the purposes for the check stop, the road signs leading to the check stop, Mr. Sidhu's speed, details about the stop itself, and about the outcome of the trial of the speeding ticket.

[66] In my opinion, the question of whether Mr. Sidhu was unreasonable in refusing to admit the facts in the Notice to Admit can be decided by examining whether Mr. Sidhu had reasonable grounds for believing he would prevail on the facts contained in the Notice to Admit. This factor addresses whether the party has a reasonable basis to dispute the fact. If there is a reason to challenge the truth of the fact at trial then that is a reasonable basis to deny the Notice to Admit (*Ceperkovic* at para. 37).

[67] The Attorney General submits that the central facts of the stop were established in the Territorial Court of Yukon, when Mr. Sidhu went to trial on the ticket. However, the trial judge's findings were purely about the road signs and whether they were sufficient to indicate that the speed limit had changed. He made no comment about many of the facts in the Notice to Admit, including about the check stop itself, Mr. Sidhu's speed, or what occurred when he was pulled over. Even with regard to the road signs, the Notice to Admit went further than the court's decision. Many of the facts in the Notice to Admit were open to dispute. Mr. Sidhu was not unreasonable for failing to admit those facts. No costs will be awarded on this basis.

Refusal to Enter into a Document Agreement

[68] I conclude that Mr. Sidhu's refusal to enter into a document agreement does not warrant an award of increased costs.

[69] The Attorney General proposed that the parties enter into a documents agreement. Mr. Sidhu refused. The Attorney General now seeks increased costs because Mr. Sidhu did not enter into the agreement. Mr. Sidhu submits that he should not be required to pay increased costs, as there was a live issue of outstanding documents immediately before the trial.

[70] It would have been preferrable had Mr. Sidhu entered into the documents agreement. The outstanding documents issue should not have prevented Mr. Sidhu from entering into the agreement. Mr. Sidhu made the request for the documents approximately six weeks before trial. Many of the requested documents were determined to already be in Mr. Sidhu's possession, some were produced, and some

could not be located. Mr. Sidhu cannot use his late request for documents as a reason to refuse to enter the agreement.

[71] Entering into the documents agreement would also have led to a more efficient trial. However, I am not convinced an award on the appropriate scale would be inadequate or unjust because Mr. Sidhu refused the agreement, and therefore do not award increased costs on this basis.

CONCLUSION

[72] I therefore deny the Attorney General's application except as follows:

(a) The plaintiff shall pay special costs for five units under column 25, or half a day of trial; and

(b) The plaintiff shall pay increased costs for 20 units under column 25, or two days of trial.

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WENCKEBACH J.