SUPREME COURT OF YUKON

Citation: *AB v Yukon (Government of)*, 2023 YKSC 34

Date: 20230616
S.C. No. 21-A0024
Registry: Whitehorse

BETWEEN:

A.B.,
C.D., BY THEIR LITIGATION GUARDIAN A.B.

PLAINTIFFS

AND

THE GOVERNMENT OF YUKON (DEPARTMENT OF EDUCATION)

DEFENDANT

AND

THE YUKON ASSOCIATION OF EDUCATIONAL PROFESSIONALS

INTERVENOR

It is prohibited to publish any information that could disclose the identity of either of the plaintiffs, or any information relating to C.D.'s gender, age, medical diagnosis or symptoms related thereto.

Before Justice E.M. Campbell

Appearing on their own behalf	A.B.
Counsel for the Defendant	Amy Porteous
Counsel for the Intervenor	Shaunagh Stikeman

REASONS FOR DECISION

INTRODUCTION

[1] The plaintiffs filed a statement of claim alleging that the Department of Education of the Government of Yukon ("Yukon") discriminates against students with disabilities who have special educational needs through its decisions, actions, policies and

practices or lack thereof in the provision of and access to education in the Yukon contrary to s. 15 of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the "*Charter*"). The plaintiffs also claim Yukon's actions are in breach of their right to life, liberty and security protected by s. 7 of the *Charter.* The plaintiffs seek a number of declaratory and injunctive reliefs with respect to Yukon's alleged *Charter* breaches. The plaintiffs also seek to invalidate an alleged unwritten policy of Yukon. They claim this policy unreasonably and illegally restricts access to Individual Education Plans ("IEPs"). Additionally, they claim it unreasonably and illegally deprives students on IEPs of the possibility of obtaining a Dogwood Diploma, which is awarded to students who have successfully completed all high school graduation requirements.

[2] A few applications have been heard and decided since the filing of the statement of claim. The plaintiffs, who have public interest standing, seek interim costs (i.e. costs of the proceedings to date in this matter) at a rate of full indemnity payable forthwith, in any event of the cause. In the alternative, they seek special costs, payable forthwith, in any event of the cause, of their successful application for anonymization of the proceeding and publication ban as well as of the application to strike they successfully defended. They also seek special costs of this application.

[3] Yukon does not dispute the plaintiffs are entitled to costs of the application to strike, payable forthwith and in any event of the cause, but on a party and party costs basis. Yukon opposes an award of interim costs or special costs to the plaintiffs. It also takes the position that no costs should be awarded on this application and on the plaintiffs' application for anonymization and publication ban order.

[4] I find the plaintiffs do not meet the test for an award of interim costs or the test for an award of special costs based on public interest litigation. In addition, the conduct of the defendant does not reach a level that warrants an award of special costs to the plaintiffs. However, I find that costs are payable to the plaintiffs for the application for anonymization and publication ban order that the defendant opposed, at least in part, as well as for the application to strike the plaintiffs successfully defended. As the costs orders were made after the amendments to the *Rules of Court* of the Supreme Court of Yukon (the "*Rules of Court*") came into effect, I am of the view, the new tariff applies. In addition, I find this is an appropriate case to exercise my discretion to fix lump sum costs instead of proceeding with an assessment and assigning units. Costs are fixed at $8,000 plus GST for the two applications. The applications were discrete enough that costs are payable forthwith, in any event of the cause. No separate costs award is made with respect to this application because the steps taken by the plaintiffs for the assessment of costs for the two applications were considered in determining the lump sum costs awarded to them.

ANALYSIS

a) The plaintiffs do not meet the test for an award of interim costs

Positions of the parties

[5] The plaintiffs seek an award of interim costs at a rate of full indemnity for legal expenses incurred to date in bringing this matter before the Court.

[6] The plaintiffs acknowledge the Court must give effect to the *Rules of Court* where they apply but submit it retains a residual discretion to award costs, such as interim costs, where the *Rules of Court* do not contemplate them. The plaintiffs submit they

meet the test for interim costs, that such an order is appropriate in the circumstances, and that it would allow them to pursue this litigation.

[7] The plaintiffs submit they are bringing this systemic *Charter* challenge not only for themselves but for a vulnerable minority group (children with disabilities who have special educational needs and their families) to create standard based reform to avoid the need for other individual plaintiffs, who do not have the means to do so, to start their own litigation.

[8] The plaintiffs submit that in a public interest case like this one, where vulnerability and a clear imbalance exists between the resources available to the opposing parties, the Court should exercise its inherent jurisdiction and award costs that reflect the actual costs of pursuing this litigation.

[9] According to the plaintiffs, an award of interim costs would encourage efficient conduct of this litigation by the parties and promote access to justice for litigants, like them, who may not otherwise be able to pursue their meritorious claims due to factors beyond their control.

[10] The plaintiffs submit they have reached the maximum number of discounted rate and *pro bono* hours their counsel can afford to provide them; they have not been able to find another legal counsel or law firm willing to take on this matter on a *pro bono* basis or at a reduced rate; and they cannot otherwise afford to retain counsel to represent them in this legally and factually complex *Charter* case.

[11] Also, the families who could benefit from this litigation do not have the financial means to help support this litigation or start litigation on their own; and the two not-for-

profit organizations they contacted are unable to take on this litigation or help them financially.

[12] The plaintiffs state that while they may be able to manage the document discovery stage of this proceeding, as self-represented litigants, with punctual professional legal advice, the adult plaintiff neither has time, as a full-time working parent of a child with disabilities who have special educational needs, nor the legal expertise and skills to take this action through trial. The plaintiffs submit that without a costs order reflective of the true costs of bringing this litigation, they may be face with the difficult decision of abandoning this public interest litigation. The plaintiffs submit that, considering their personal and family situation, they should not be expected to take on debts nor to have to organize fundraising events to finance this important *Charter* litigation.

[13] The plaintiffs submit the significant societal impact of this litigation in the territory and the defendant's reprehensible conduct also militate in favour of awarding them interim special costs.

[14] The defendant argues the plaintiffs do not meet the test for interim costs. The defendant submits there are many public interest litigations across the country, and they do not automatically qualify for or lead to an award of interim costs. The defendant submits interim costs are only awarded in very limited circumstances that do not apply in this case.

[15] The defendant does not deny that this litigation has been expensive to date and that it is difficult to pursue this type of litigation. However, the defendant submits that one of the threshold criteria for an award of interim costs is not whether the plaintiffs can

conveniently bring this litigation or whether it would be difficult for them to move it forward, but whether they cannot genuinely afford to continue this litigation and there are no other realistic options of proceeding with the case.

[16] The defendant submits the evidence reveals the adult plaintiff is gainfully employed and makes a substantial income. The defendant adds there is no evidence of any debts, nor any evidence that the adult plaintiff contacted financial institutions to obtain a loan or individual funders, who the plaintiffs state will benefit from this litigation, for contributions. The defendant also submits the plaintiffs only contacted a few legal firms for help whereas there are many outside firms with lawyers who are licensed to practice in the Yukon.

Analysis

[17] The general rule is that costs are awarded to the successful party on a party and party basis upon the conclusion of the proceeding unless the court orders that they be assessed as special costs, increased costs, or awards a lump sum (*Rule* 60(1), (9), (12), and (13) of the *Rules of Court*).

[18] While the *Rules of Court* do not specifically contemplate an award of interim costs, both parties agree the court has residual discretion to award interim costs when warranted. The same reasoning applies to an award of special costs based on public interest litigation, which I will discuss later in these reasons.

[19] The test to determine whether an award of interim costs is warranted was set out by the Supreme Court of Canada in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 (“*Okanagan*”) at para. 40:

…

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.

[20] All three requirements must be established before an order of interim costs (or advanced costs) may be granted (*Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 ("*Little Sisters*") at para. 37).

[21] In addition, in *Little Sisters* at para. 36, the majority of the Supreme Court of Canada cautioned that: "public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established".

[22] The majority also stated at para. 5 that: "[The] Court's *ratio* in *Okanagan* applies only to those few situations where a court would be participating in an injustice -- against the litigant personally and against the public generally -- if it did not order advance costs to allow the litigant to proceed."

[23] The majority added that access to justice is not the paramount consideration in determining interim costs and that concerns for access to justice, while an important

concern for the courts, must be considered along the other important factors that are relevant to the applicable test.

[24] In *Anderson v Alberta*, 2022 SCC 6 at para. 21, the Supreme Court of Canada stated that, while access to justice is an important policy consideration, in *Okanagan*, the Court did not seek to create a parallel system of funding based on access to justice concerns:

> … Indeed, as this Court explained in *Little Sisters*, at para. 5, notwithstanding obstacles to access to justice such as underfunded and overwhelmed legal aid programs and growing instances of self-representation, the Court in *Okanagan* "did not seek to create a parallel system of legal aid or a court-managed comprehensive program". Rather, *Okanagan* applies to those rare instances where a court would be "participating in an injustice -- against the litigant personally and against the public generally" -- by declining to exercise its discretion to order advance costs (*Little Sisters*, at para. 5). To award advance costs outside those instances would amount to "imprudent and inappropriate judicial overreach" (*Little Sisters*, at para. 44).

[25] Also, issues of public importance will not automatically entitle a litigant to preferential treatment with respects to costs, and not every case of public interest will satisfy the test (*Little Sisters* at paras. 35 and 39).

[26] As stated earlier, the plaintiffs have public interest standing to pursue their action against Yukon, which raises important issues regarding the provision of and access to equal education for students with disabilities who have special educational needs in the territory. However, this does not automatically entitle them to an award of interim costs.

[27] The first requirement for an award of interim costs is that the plaintiffs must establish they cannot afford to pay for the litigation and no other realistic option exists for bringing the issues to trial.

[28] In *Little Sisters* at para. 40, the majority of the Supreme Court of Canada described what an applicant must demonstrate to meet this requirement:

> Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or "protective orders") can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, at para. 76. We agree with this nuanced approach.

[29] I accept that prior to initiating this legal action, the plaintiffs negotiated and concluded an arrangement with a Yukon lawyer, who agreed to take on and pursue their case. The agreement included a fair amount of *pro bono* hours, which the plaintiffs thought would be sufficient to take this matter to trial, if necessary. However, the amount of legal work required to bring the anonymization and publication ban

application; to defend the motion to strike, including to establish the plaintiffs' public interest standing, which was contested; and to amend their statement of claim, as required, drained those hours by the early stage of document discovery. The adult plaintiff filed a notice of self-representation as a result of their Yukon lawyer reaching the maximum number of reduced rates and *pro bono* hours he could reasonably afford to offer them.

[30] I am also prepared to accept the following information provided by the adult plaintiff during oral submissions:

(a) Two law firms from outside the territory, have been consulted and have provided *pro bono* help on discrete issues, from time to time, since the beginning of this action. However, while these law firms are prepared to continue to help on discrete legal issues (for no more than a few hours a month), they have told the adult plaintiff they do not have the capacity to take on this file.

(b) The adult plaintiff contacted three bigger law firms in British Columbia that indicated they could not represent the plaintiffs in this litigation due to a conflict of interest arising from the fact they represent or provide legal advice to Yukon in other matters.

(c) There is one standing offer for *pro bono* legal help but only on appeal.

(d) Neither of the two not-for-profit organizations (or their respective national parent organizations) that sought to participate in this action, through The Yukon Association of Educational Professionals' (the "YAEP") intervention, have the financial means to take on or help finance this

> litigation. While the YAEP communicated to the plaintiffs they would not have taken this litigation on their own, the adult plaintiff did not directly discuss the issue of financial help with counsel for the YAEP.

[31] However, even with this additional information, I find the plaintiffs do not meet the first requirement of the test for interim costs.

[32] First, the evidence reveals the adult plaintiff is gainfully employed and makes a good income. I understand the plaintiffs' personal and family circumstances may make it more difficult and challenging to finance this *Charter* litigation, which no one disputes is costly. However, other than inquiring whether the two not-for-profit organizations, that have indicated an interest in intervening in this matter, could provide financial help, there is no evidence the adult plaintiff looked into the availability of public or private funding programs designed to assist various groups in taking legal action. Also, there is no evidence the adult plaintiff contacted financial institutions for options to finance this litigation.

[33] In addition, the reference in the adult plaintiff's affidavit to an undisclosed amount of money raised under the banner of the Yukon Right to Learn Coalition, which may have been used in whole or in part to fund this litigation, is insufficient to conclude the plaintiffs have exhausted their fundraising options. In addition, it is unclear how much money was and/or still is at the plaintiffs' disposal to fund this litigation through that banner.

[34] I am not prepared, without supporting evidence, to accept the adult plaintiff's general assertion or opinion that other Yukon families in similar situations cannot afford to help support this litigation financially because they have to fund private tutors and

other specialists to compensate for Yukon's alleged discriminatory conduct. Further, I am not prepared to accept, without supporting evidence, that the "many other lawsuits launched by families of students with disabilities taking place before the court" and involving "issues surrounding special education in the territory" limits the adult plaintiff's ability to fundraise, the capacity of not-for-profit organizations to assist and reduces the availability of legal counsel for cases like this one. I note the existence of other lawsuits raising issues surrounding special education in the territory, as asserted generally by the adult plaintiff at para. 25 of their affidavit, is a factor to consider in determining whether to award interim costs to pursue this litigation.

[35] Second, the small number of outside law firms the plaintiffs have contacted so far do not lead to the conclusion that legal representation at a viable rate or on a *pro bono* basis is unavailable to them.

[36] Third, I note the YAEP, whose position appears to align generally with that of the plaintiffs on the educational and equality rights issues, is represented by counsel and has been granted permission to intervene and make submissions at trial. Also, the YAEP is seeking permission to adduce evidence, including expert evidence, at trial. Additionally, while the two not-for-profit organizations contacted by the plaintiffs may not be able to help financially, they have nonetheless stated an interest in intervening through the YAEP. However, there is no evidence before me of discussions between the plaintiffs and the YAEP on how their participation could impact the way the plaintiffs may be able to bring this matter forward and the cost implications for the plaintiffs.

[37] As a result, I find the plaintiffs have not established the first part of the test (i.e. that they genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial).

[38] Considering all three parts of the test must be met for an award of interim costs, I do not find it necessary to weigh in on the other parts of the test.

b) The plaintiffs do not meet the test for public interest special costs and the conduct of the defendant does not warrant an award of special costs

[39] In the alternative, the plaintiffs seek special costs of: their successful application for anonymization of the proceeding and a publication ban; the application to strike they successfully defended; and of this application for costs.

Positions of the parties

[40] The plaintiffs submit they are entitled to special costs based on public interest litigation and/or based on the defendant's conduct.

[41] The adult plaintiff submits that awarding special costs as a lump sum based on the summary of actual costs they filed would be fair and appropriate. The adult plaintiff states they expended a lot of time, effort and money to bring this public interest lawsuit forward, and awarding less than special costs would have the effect of deterring future litigants from pursuing important *Charter* challenges, such as this one.

[42] The plaintiffs submit that, contrary to what Yukon argues, this is a matter of significant societal impact and importance for equality and educational rights of children, and more particularly of children with disabilities, in the Yukon. Also, the fact the Office of the Auditor General of Canada specifically attempted to measure how the Department of Education was serving students with disabilities is of significance. The

plaintiffs contend that much of the information regarding the societal impact of the issues raised in this litigation are in the hands of the defendant, which limits the plaintiffs' ability to demonstrate the real and wide ranging negative societal impact of the defendant's conduct. The plaintiffs submit the defendant has chosen to ignore the scope of the impact that its decisions, actions and policies have had on students with disabilities who have special educational needs across the territory.

[43] The plaintiffs submit they are not seeking damages and have no financial interests in the outcome of this matter. In addition, the plaintiffs argue they are bringing this litigation for others because the child plaintiff will have graduated high school by the time this proceeding concludes. Therefore, they will not personally benefit from any changes brought by this litigation.

[44] In addition, the plaintiffs submit the defendant's pre-litigation conduct and its conduct so far in this litigation warrant an award of special costs. The plaintiffs submit the defendant's lack of timely response to their reasonable inquiries, as well as its clear lack of cooperation and interest in either moving this case forward or resolving this matter outside of court should also factor into the court's determination.

[45] The plaintiffs argue the defendant has a history of foot dragging and of taking unreasonable positions that it only abandons after the plaintiffs have been forced to unnecessarily expand resources in bringing those issues before the court for decision. The plaintiffs contend the defendant's actions have caused persistent delays that are damaging not only to the plaintiffs, but also to Yukon students with disabilities who have special educational needs, who are, while this litigation is slowed down by the actions of the defendant, aging out of the public school system. The plaintiffs submit that costs are

an appropriate tool to deter delay tactics, such as the ones employed by the defendant in this case, especially when the other party is a litigant with limited resources, where it is known *Charter* litigations are expensive.

[46] Finally, the plaintiffs submit the difficulties they have encountered through: their experience with the defendant's education system, their inability to access special educational policies, and the lack of implementation of the agreement they had reached with the defendant after filing an Education Appeal Tribunal proceeding, form part of the defendant's reprehensible pre-litigation conduct the Court should consider in determining whether to award special costs.

[47] The defendant argues the plaintiffs do not meet the test for an award of special costs based on public interest litigation.

[48] The defendant concedes this case raises important issues. However, the defendant submits this is not the type of truly exceptional cases with widespread societal impact for which special costs may be awarded, partly because this is not a case that could potentially impact every Canadian, it is a case that relates to a specific group of Yukoners and their families. The defendant also argues the plaintiffs have not established they are impecunious as required.

[49] The defendant concedes that pre-litigation conduct may, in some circumstances, be considered in determining whether an award of special costs is appropriate. However, the defendant argues its conduct, either pre-litigation or since the litigation started, does not give rise to an award of special costs. The defendant argues its actions were not scandalous, outrageous or reprehensible.

Analysis

i) Special costs based on public interest litigation

[50] As stated earlier, while the *Rules of Court* do not specifically contemplate an award of special costs based on public interest litigation, the parties agree this Court has residual discretion to award them.

[51] An award of special costs based on public interest litigation is exceptional and discretionary (*British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 ("*Council of Canadians with Disabilities*") at para. 119, referring to *Carter v Canada (Attorney General)*, 2015 SCC 5 ("*Carter*") at paras. 137 and 140).

[52] Two criteria must be met for an award of special costs:

> 1 the case must involve matters of public interest that have a "significant and widespread societal impact" and are "truly exceptional"; and
>
> 2. the plaintiff must show that it has no personal, proprietary or pecuniary interest that would justify the proceedings on economic grounds, and that it would not have been possible to effectively pursue the litigation in question with private funding.

(*Council of Canadians with Disabilities* at para. 119, citing *Carter* at para. 140)

[53] I find the plaintiffs do not meet the second criteria of the test. While the plaintiffs do not seek damages, they have a personal interest in, at least, part of the litigation before the court that would justify the proceedings on economic grounds. The child plaintiff is still of school age and will continue to be for several years. Part of the litigation is aimed at the school facilities the child attends and at the education the child receives. I am not prepared to assume that the litigation will not conclude before the

child is no longer of school age or that by the time it concludes it will be too late to have an impact on the child's educational experience or outcome. Further, I am not prepared to assume that the plaintiffs are pursuing this litigation solely for the benefit of others. At this point, if the plaintiffs' allegations are substantiated and if they are successful, the litigation will have an impact on the child's educational experience and on their family, including A.B.

[54] Therefore, the plaintiffs do not meet the test for an award of special costs based on public interest litigation. As a result, I do not find it necessary to weigh in on the other criteria of the test.

ii) Special costs based on the conduct of the defendant

[55] Rule 60(1.1) specifically contemplates that the court may award special costs "when a party's conduct is reprehensible, scandalous or outrageous and the circumstances call for a rebuke."

[56] Special costs are punitive in nature. They encompass an element of deterrence. They are a tool at the disposal of the courts when they find a need to dissociate themselves from the misconduct of a party (*Mayer v Osborne Contracting Ltd*, 2011 BCSC 914 ("*Mayer*") at paras. 8-9, citing *Garcia v Crestbrook Forest Industries Ltd*, 1994 CanLII 2570 (BCCA)).

[57] Special costs are also intended "to substantially indemnify a party for costs to which he or she has been put" due to the reprehensible conduct of the other party (*Golden Hill Ventures Limited Partnership v Ross Mining Limited and Norman Ross*, 2012 YKSC 18 at para. 10).

[58] Nonetheless, an award of special costs is to be used sparingly (*KAM v BMM,* 2018 YKSC 14 at para. 96).

[59] In certain circumstances, courts have recognized that pre-litigation conduct may be considered in the exercise of the court's discretion to award special costs (*Steen v Islamic Republic of Iran*, 2011 ONSC 6464 ("*Steen*") at paras. 57-58).

[60] The plaintiffs filed two cases in support of their position that the defendant's pre-litigation conduct warrants an award of special costs.

[61] In *Steen*, Corrick J. found it appropriate to consider egregious pre-litigation conduct, which consisted of the kidnapping for ransom of the two plaintiffs who were held in "unspeakably inhumane and brutal conditions" in awarding special costs against the defendant (para. 1). Corrick J. agreed that, in the exercise of the court's discretion in awarding costs, a judge could consider that the defendants' pre-litigation conduct provoked the litigation.

[62] In *Hatch v Muskoka (District Municipality)* (HCJ), 1990 CanLII 6861 (ON SC) ("*Hatch*"), the applicant successfully applied to quash the respondent's by-law that improperly rescinded her appointment to the Land Division Committee. Hogg DCJ found that the respondent had deprived the applicant of natural justice in passing in haste, during an *in-camera* hearing, the by-law at issue without giving the applicant any specifics as to the nature of the complaints against her, notice of the respondent's meeting or the opportunity to give her side of the story. Hogg DCJ found that the respondent had acted in a high-handed, arbitrary and improper manner, and that, as such, its actions fell within the scope of pre-litigation conduct that called for an award of special costs.

[63] The plaintiffs argue the pre-litigation conduct of the defendant was reprehensible and warrants an award of special costs because it left the plaintiffs no choice but to commence this *Charter* litigation. The plaintiffs allege and state that:

(a) In the fall of 2019, the adult plaintiff commenced an appeal with the Education Appeal Tribunal after the Department of Education had failed for many years to provide adequate accommodation for the child plaintiff who is a student in need of individualized support.

(b) The adult plaintiff withdrew their appeal after reaching an agreement with the Department of Education that centered on the child plaintiff's IEP and related assessments. The agreement included an understanding that high school graduation was an appropriate long-term goal for the child plaintiff. According to the plaintiffs, the Department of Education failed to fulfill their agreement.

(c) Also, one of the grounds of appeal was the inaccessibility of The Department's special education policy(ies). The adult plaintiff states that, as part of the appeal process, the Department of Education provided documents, which the adult plaintiff thought was the policy(ies) they had been unable to obtain previously. However, after the agreement was signed and the appeal withdrawn, the Department of Education stated, in relation to another matter, that the said policy did not exist, thereby perpetuating its practice of miscommunication and misinformation regarding special education in the territory.

(d) The Department's failure to fulfill its obligations under the agreement and the Department's continued miscommunication and lack of action regarding special education in the territory forced the plaintiffs to start this extensive *Charter* litigation.

[64] In addition, the plaintiffs allege and state that the following conduct of the defendant, since the filing of the statement of claim, warrants an award of special costs:

(a) The defendant has consistently delayed and slowed down this action to the detriment of the plaintiffs whose *Charter* litigation is time sensitive. The plaintiffs specifically point out that:

- The defendant took ten (10) weeks to communicate to them it was not prepared to consent to an order for anonymization of the proceeding and redactions of personal information of the child plaintiff.
- The defendant delayed, for an extensive period of time, the filing of a meaningful statement of defence thus depriving the plaintiffs from knowing and obtaining Yukon's position on the serious issues they raised.
- The number of interim issues that have arisen because of the defendant's positions and lack of engagement in this litigation has had an effect similar to a stay of proceeding.

(b) The defendant has taken unreasonable initial positions on issues throughout this proceeding that it did not pursue after the plaintiffs were

forced to expend unnecessary time and resources in seeking that they be determined by the court. The plaintiffs state:

- The defendant argued in its written outline, but did not advance in oral submissions at the application for anonymization and publication ban, that the plaintiffs did not provide sufficient evidence to explain how disclosure of all the information relating to the child plaintiff's medical diagnosis, symptoms, difficulties, age, gender, and name would meaningfully strike at the individual's biographical core in a manner that threatens their integrity.
- The defendant took the position that costs of the application to strike should be apportioned between the parties based on the mixed results, before conceding, after this application was filed, that costs should be awarded to the plaintiffs who were substantially successful in defending the application.

[65] The issue with the plaintiffs' argument regarding the defendant's reprehensible pre-litigation conduct is that it is based on allegations that have yet to be proven. In *Steen* and *Hatch*, final findings of facts had been made by the courts with respect to the pre-litigation conduct of the defendants (respondents) before the costs orders were made.

[66] This is not to say the plaintiffs' allegations are not founded. However, at this stage of the proceedings, I do not have a complete picture or a full factual matrix with respect to the interactions between the parties or the alleged conduct of the defendant,

which is at the center of this litigation. At this stage of the proceedings, the conduct of the defendant, that it has not admitted in its statement of defence, remains to be proven.

[67] Based on the partial record before me, the nature of this application, and the stage of the proceedings, it would be inappropriate for me to make findings of facts regarding the pre-litigation conduct of the defendant.

[68] In addition, while I agree the defendant has taken an adversarial position at every stage of this proceeding so far, and has not displayed much cooperation in moving this case forward; the defendant has not initiated frivolous applications, and its actions, even in the context of a *Charter* litigation, where, as is often the case, there is an imbalance between the resources of the state and that of the private litigant, cannot be qualified as reprehensible, scandalous or outrageous, and calling for a rebuke.

[69] Therefore, I am of the view that special costs are not warranted.

c) Costs of the application for anonymization and publication ban are payable to the plaintiffs

[70] The defendant argues costs of the application for anonymization and publication ban should not be awarded to the plaintiffs because it did not oppose it. The defendant states it took no position and a hearing would have been required in any event. In addition, the defendant submits its decision not to consent to the proposed redactions or publication ban order sought by the plaintiffs forced them to narrow their very broad request.

[71] The plaintiffs seek costs of the anonymization and publication ban application, which, they submit, was both reasonable and necessary to protect the identity of the child plaintiff in this matter.

[72] The plaintiffs submit an award of costs of that application against Yukon is appropriate for a number of reasons. First, the plaintiffs submit that Yukon failed to respond in a timely manner to correspondence from plaintiffs' counsel requesting that Yukon consent to an order regarding the anonymization of the pleadings and redactions\publication ban in this matter. The plaintiffs submit 10 weeks passed before Yukon finally communicated to plaintiff's counsel it was not prepared to consent to the application. Plaintiffs' counsel then had to take several steps, including contacting the media, preparing and filing written materials and caselaw in support of the plaintiffs' application, as well as preparing for and attending an oral hearing. In addition, the plaintiffs argue the defendant advanced unreasonable arguments in its written outline opposing the granting of the relief sought by the plaintiffs that it did not raise in oral submissions at the hearing. Instead, the defendant simply requested, in an unspecified manner, that the Court exercise caution in considering the plaintiffs' application. The plaintiffs add the fact the media did not attend the hearing nor oppose their application reveals the position advanced by the defendant was unreasonable.

[73] The plaintiffs submit they were the successful party to this application and are entitled to an award of costs payable forthwith, in any event of the cause.

[74] I agree that costs of the application for anonymization and publication ban order are payable to the plaintiffs who were successful on that application. While the defendant stated at the outset of the hearing it was taking no position on the application, it effectively opposed, at least part of it, by arguing that an order for anonymization was not necessary and may not be granted if the court were inclined to grant a publication ban order. In the end, I determined that both orders were required in this case. I am of

the view the position the defendant took with respect to this application required more extensive written and oral submissions on the part of the plaintiffs.

[75] Costs awarded on interlocutory applications are usually not recoverable until the conclusion of the litigation. However, the discrete nature of this application justifies an order for costs payable forthwith, in any event of the cause (*Wright v Yukon (Director of Public Safety and Investigations)*, 2022 YKSC 38 ("*Wright*") at paras. 9 and 13).

d) Fixing costs of the application to strike and of the application for anonymization and publication ban

[76] The parties agree that costs of the application to strike are owed to the plaintiffs, payable forthwith, in any event of the cause.

[77] I found that costs of the application for anonymization of the proceeding and publication ban are owed to the plaintiffs payable forthwith, in any event of the cause.

[78] In addition, I determined that neither interim costs nor special costs were warranted.

[79] Based on the *Rules of Court*, costs should therefore be assessed as party and party costs. However, the parties disagree on the applicable tariff (which was amended on October 31, 2022) and on the scale on which party and party costs should be assessed. In addition, the plaintiffs are seeking costs of this application. This raises the question of whether a separate award of costs is warranted for this application or whether the steps taken by the plaintiffs to have their costs assessed should be considered when assessing costs under the two substantive applications?

Positions of the parties

[80] The defendant submits there was an order for costs made at the time the decision on the application for anonymization and publication ban was made. As that

decision was issued prior to the coming into force of the new tariff, the old tariff should apply. The defendant acknowledges the decision on the application to strike was issued after the new tariff came into effect. However, since it was argued before the new tariff came into effect, the defendant submits the old tariff should apply.

[81] The defendant submits that costs under Scale A for the application for anonymization and publication ban, and under Scale B for the application to strike are appropriate. The defendant submits the first application was a matter that was of little or less than ordinary difficulty. The issue to decide was straightforward and simply required the application of an established legal test to the facts before the Court.

[82] The defendant also submits the application to strike was a matter of ordinary difficulty. The defendant argues the application was based on relatively straightforward questions, such as whether the plaintiffs met the test for public interest standing, whether some of the issues raised in the statement of claim should proceed by way of a petition rather than an action, and whether certain paragraphs were incoherent or constituted arguments or evidence.

[83] While the defendant acknowledges it raised many issues on its application to strike, given the multitude of questions included in the statement of claim, it contends the number of issues raised in that application is more properly addressed through the number of units to be awarded than through the appropriate Scale.

[84] Finally, the defendant submits a separate award of costs for this application is neither warranted nor appropriate because Appendix B provides for the allowance of units for the steps the plaintiffs took for the assessment of their costs on the substantive applications.

[85] The plaintiffs submit that no order of costs was made before the new tariff came into force. Therefore, the new tariff applies to the assessment of costs for all applications.

[86] The plaintiffs also seek that the scale of costs be fixed at a rate of 1.5 times the value of Scale C for matters of more than ordinary difficulty considering the public interest nature of their *Charter* litigation as well as the number and complexity of the issues raised. On that basis, the plaintiffs seek $8,400 plus GST for the application for anonymization and publication ban order; and $29,700 plus GST for the application to strike.

[87] In addition, the plaintiffs submit the persistent lack of cooperation of the defendant has forced them to file yet another application, this time for the determination of their costs. Therefore, an award of costs of this application is warranted. In addition, the plaintiffs state they did not include any units in the Bill of Costs for the assessment of costs of the application to strike or the application for anonymization and publication ban.

Analysis

i) Assessment of costs or lump sum award

[88] I have reviewed the Bill of Costs provided by the plaintiffs. While counsel for Yukon voiced some general concerns at the hearing with respect to the number of units claimed, the parties did not provide detailed arguments regarding the number of units that should be granted for each admissible step or activity for each application, as most of the arguments revolved around the type of costs that should be awarded and related issues.

[89] I do not find it would serve the interest of justice to go back to the parties to request specific submissions on fixing costs as the plaintiffs are now self-represented and further submissions would cause further delays. Therefore, instead of proceeding with an assessment and assigning units, I have decided to exercise my discretion under Rule 60(1.3) to fix lump sum costs for both applications inclusive of disbursements. In doing so, I find it appropriate to include and consider steps taken by the plaintiffs for the assessment of costs for each of the applications for which costs were awarded, as opposed to determining whether a separate award of costs is warranted for this application.

[90] The overriding principle in fixing lump sum costs is reasonableness. As stated by Duncan CJ in *Frost v Blake*, 2021 YKSC 62 ("*Frost*") at para. 42:

> The overriding principle is reasonableness. Courts have repeatedly stressed that in fixing lump sum costs they are not following a mathematical approach of multiplying the number of hours spent by an hourly rate.

[91] The principles underlying the *Rules of Court* as well as the purposes of cost awards (to indemnify, to a certain extent, the successful party; "to sanction or discourage inappropriate behaviour by litigants in their conduct of the proceeding"; and "to encourage settlement" – *Frost* at para. 18) are also relevant considerations.

[92] I am also of the view that the public interest nature of this *Charter* litigation is a relevant consideration in fixing lump sum costs. While, as stated earlier, the plaintiffs have a personal interest in, at least, part of the outcome of this litigation, I concluded, in the context of the application to strike, that they have public interest standing to advance this case involving a systemic *Charter* challenge, not only for themselves but also for others (*Frost* at paras. 41 and 42).

[93] In addition, the applicable tariff and appropriate scale on which party and party costs would be assessed provides some guidance in determining a reasonable lump sum costs award (*Frost* at para. 43).

ii) Applicable tariff

[94] On October 31, 2022, amendments to the *Rules of Court,* including amendments to the costs tariff, which is set out in Appendix B to the *Rules of Court*, came into effect. The amounts under the amended tariff are higher than under the previous *Rules of Court*. Under the previous *Rules of Court*, the amounts were as follows: Scale A: $60, Scale B: $110, Scale C: $170. Under the new *Rules of Court*, the amounts are as follows: Scale A: $70, Scale B: $130 and Scale C: $200.

[95] The relevant transitional provisions of the new *Rules of Court* specify that Appendix B of the previous *Rules of Court* applies to:

> 10 …
>
> (a) orders for costs made before the updated Rules come into force;
>
> ….
>
> (d) all assessments related to those orders, settlements and costs.

[96] The relevant transitional provisions of the new *Rules of Court* also specify that Appendix B of the new *Rules of Court* applies to:

> 11 …
>
> (a) orders for costs made on or after the date the updated Rules come into force;
>
> ….
>
> (d) all assessments related to those orders, settlement and costs.

[97] I am of the view the wording of the transitional provisions is clear. As I stated in *Cheng v Glencore plc*, 2022 YKSC 59 at paras. 72-73, it means that Appendix B of the new *Rules of Court* applies to costs orders made on or after October 31, 2022, whereas Appendix B of the previous *Rules of Court* continues to apply to costs orders made prior to October 31, 2022. This interpretation ensures consistency between the application of the rule guiding the award of costs (Rule 60) and the assessment of costs.

[98] As a result, the new tariff applies to the order for costs for the application to strike because my decision on that application was issued on December 8, 2022, after the amendments came into force.

[99] I am also of the view the new tariff applies to the application for anonymization and publication ban. Even though that application was decided before the coming into force of the new *Rules of Court,* the wording used at the conclusion of my decision reveals no order for costs was made at the time, contrary to the situation in *Wright,* since I invited the parties to make submissions, if necessary, on an award of costs for that application. Either party was at liberty to bring the matter back before me to determine whether an award of costs was appropriate for that application prior to the coming into force of the new *Rules of Court*, if they wished. They did not. In addition, I am of the view Yukon implicitly recognized I did not make an order for costs at the time I issued my decision granting anonymization of the proceeding and a publication ban because it argued on this application that it should not be ordered to pay costs for the application for anonymization and publication ban order. The order for costs for the application for anonymization and publication ban order is part of my decision on this application.

iii) Scale of costs

[100] The Court may take into consideration the following considerations in fixing the appropriate scale under which costs will be assessed:

> (i) whether a difficult issue of law, fact or construction is involved;
>
> (ii) whether an issue is of importance to a class or body of persons, or is of general interests;
>
> (iii) whether the result of the proceeding effectively determines the rights and obligations between the parties beyond the relief that was actually granted or denied

(Appendix B - s. 2(c))

[101] I am of the view that the application for anonymization and publication ban order was a matter of ordinary difficulty. The issues raised in that application were straightforward. The test to apply with respect to anonymization and publication ban orders is well established. The application primarily required the application of the law to the facts. However, the participation of a third party, a media outlet, required discussions between counsel for the plaintiffs and counsel for the media to arrive at a proposal that addressed the concerns of the media with respect to the scope of the publication ban sought in this case. As a result, I find this application was a matter of ordinary difficulty and falls under Scale B.

[102] I am also of the view that the application to strike falls under Scale B. The defendant recognizes its application to strike raised a multitude of issues. While some of the issues raised by the defendant were not particularly difficult to address, two arguments raised by Yukon were legally more complex. First, whether the plaintiffs as litigants with private interest standing could bring a systemic challenge under s. 15 of

the *Charter* or whether they were confined to pleading facts related solely to their own personal experiences. Second, whether a litigant with private interest standing on parts of the litigation could also be granted public interest standing.

[103] I recognize the multitude of issues raised by the defendant required that counsel for the plaintiffs prepare lengthy written submissions in response. I also recognize that the more complex legal issues required consideration of a broader array of caselaw than usual. However, in my view, these factors are not sufficient to raise this application above a matter of ordinary difficulty. I am of the view that Scale B remains appropriate.

iv) Lump sum costs

[104] Considering the straightforward legal nature of the issues raised in the application for anonymization of the proceeding and publication ban order; the involvement, even though limited, of the media; the affidavit, outline and caselaw filed for the application; the correspondence between the parties on this issue; the attendance of the parties at case management conferences to discuss timeline and process; the one-hour hearing for the application; the court attendance for the oral decision; and the steps taken by the plaintiffs for an order for costs and assessment of costs; in light of the considerations mentioned at paras. 88 to 93 of these reasons, I fix the lump sum costs at $2,500 plus GST.

[105] Considering the nature and multitude of issues raised by the application to strike, the extent of the written submissions and caselaw required to respond to the application, the attendance at case management conferences regarding timeline and process, the preparation for and attendance at the half day hearing of the application, and the steps taken by the plaintiffs to have their costs assessed, in light of the public

interest aspect of this litigation and other considerations mentioned at paras. 88 to 93 of theses reasons, I am of the view that lump sum costs of $5,500 plus GST are appropriate.

CONCLUSION

[106] Lump sum costs of $8,000 plus GST are payable to the plaintiffs, forthwith, in any event of the cause for the two applications (application for anonymization of the proceeding and a publication ban order, and application to strike).

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CAMPBELL J.