SUPREME COURT OF YUKON

Citation: *Atkinson* v. *McMillan and Liard First Nation,* 2010 YKSC 13

Date: 20100317
Docket S.C. No.: 07-A0044
Registry: Whitehorse

BETWEEN:

CARSON ATKINSON

Plaintiff

AND:

LIARD McMILLAN and LIARD FIRST NATION

Defendants

Before: Mr. Justice L.F. Gower

Appearances:
Zebedee Brown — Counsel for the Plaintiff
David Sutherland — Counsel for the Defendants

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is a multi-faceted application by the defendants which begins with a request that I reconsider the decision I made on costs in my Reasons for Judgment which were filed December 15, 2009, and cited as 2009 YKSC 81.

[2] If I were to reopen the issue of costs, the defendants seek further relief: specifically, that costs be awarded to them; that the plaintiff disclose any financial support that he received for the litigation to counsel for the defendants for the purpose of a further argument on the issue of costs; and that the Court consider information filed

at a judicial settlement conference prior to the trial. Those are the principal areas of relief sought.

[3] I have characterized the application to reconsider my decision on costs as the threshold issue. In that regard I quote from the annotated *B.C. Practice*, Issue 58, a publication by McLaughlin & Taylor, at page 41-43:

> "Whether to set aside (or reopen) the judgment is wholly within the discretion of the trial judge who pronounced it. The fundamental consideration is that no miscarriage of justice should occur, although there must be a proper basis for the exercise of the discretion: *Sykes* v. *Sykes* (1995) 6 BCLR (3d) 296 (C.A.). The applicant is required to satisfy the court on a balance of probabilities that a miscarriage of justice would occur without a rehearing and that the evidence or argument that the applicant wishes to present would have changed the result of the trial: *Hodgkinson* v. *Hodgkinson* 2004 BCSC 1630."

Later in that same publication there is a summary of the principles governing reopening a judgment before formal entry. Included among those points in that summary are the following:

1. It is not the purpose of the discretion to reopen to make available to a litigant an alternative method of appeal.

2. The discretion to reopen may be properly exercised where the trial judge is satisfied that the original judgment is in error because it overlooked or misconstrued material evidence or misapplied the law.

3. This power must be “exercised sparingly” to avoid fraud and abuse of process.

4. The underlying rationale for the unfettered discretion is to prevent a miscarriage of justice.

5. In general, reconsideration of an issue is not an alternative to an appeal.

> 6. The burden of persuasion rests with the applicant, who must show that a miscarriage of justice would probably occur unless the issue is reconsidered and decided in his favour.

[4] In the *Law of Costs*, 2nd edition, Volume 1, by Mark Orkin, at page 2-56, Mr. Orkin writes:

> "[A] successful party has no legal right to costs but only a reasonable expectation of receiving them, subject to the court's discretion in that regard. It has been said that costs should follow the result, and only in a rare case should a successful party be deprived of costs. However, the court has an inherent jurisdiction with respect to costs, including the discretion to refuse or limit the amount of costs recoverable from an unsuccessful party. The discretion must be exercised only if the interests of justice require it, and then only for very good reason."

Later, at page 2-57, he continues:

> "The discretion of the court to deprive a successful litigant of his or her costs is a discretion which must be exercised judicially and upon proper material connected with the case, or having relation to the subject-matter of the action. In exercising this discretion the judge may consider the conduct of the party *not merely during the course of the litigation but also prior to and leading up to or contributing to it.*" (emphasis added)

And still later on that same page:

> "The discretion of the trial judge to exempt an unsuccessful party from the payment of costs is unfettered provided that it is exercised judicially…."

Still later in that same text at page 2-60:

> "[A] successful party may be disentitled to all or part of his or her costs if the party has not been free from fault, for example, if he or she has been guilty of … unfair dealings, or

> unreasonable behaviour during or leading up to the litigation …."

Still later at page 2-64:

> "Similarly, a successful defendant has been deprived of his costs where he was in a sense, responsible for the litigation through the careless handling of his own affairs, … or where the defendant was guilty of unfair treatment."

So, those are the general principles.

[5] I heard arguments from counsel both on February 17th, for over an hour, when this matter was initially raised on an application by the plaintiff to issue an order following my Reasons for Judgment. I directed that counsel for the defendants file a notice of application to reopen, as that was the application that he had made orally on February 17th, and the matter was adjourned to today's date. I have now had a chance to read the Chambers Brief filed by counsel for the defendants on February 17th, as well as the plaintiff's Chambers Record filed March 10, 2010. Today, I heard over two and a half hours of submissions and I have had an opportunity to deliberate on this matter for about an hour.

[6] As I understand it, one of the main reasons that the defendants feel my reasons for ordering that each party bear their own costs was in error and should be reconsidered is because I did not give sufficient attention to the fact that the plaintiff made no demand for an apology from the defendants, that he made no effort to correct the misapprehension contained in the press release or the radio interview, that he made no complaint about the press release or the radio interview, and essentially remained silent until launching this defamation action.

[7] The problem I have with that submission is that, as counsel for the plaintiff fairly pointed out, at the two-day summary trial there was a good deal of evidence before me as to the history of dealings between the parties. In particular, the fact that the plaintiff had not contradicted the Premier's announcement or requested an apology, correction or clarification, or retraction of any kind from the defendants, was something that was clearly noted in the written submissions of the defendants' counsel at that trial. So, in that sense, I conclude that what the defendants' counsel is asking me to do is to reconsider my ruling on that issue in relation to those facts and circumstances and, in my view, that would be inappropriate, given the principles which apply to the issue of reopening.

[8] The second issue which counsel for the defendants has raised as being potentially relevant to a further consideration of costs is the question of whether the tort of maintenance is available to the defendants as against the Yukon Teachers' Association. The argument seems to be that there is a suspicion, or perhaps more than a suspicion, perhaps reasonable grounds, to believe that the plaintiff was funded in this litigation by the Yukon Teachers' Association, and that because of that financial support the plaintiff was more inclined to simply "run" with the litigation, as opposed to considering some form of settlement or some alternative resolution, short of going to trial.

[9] I have a problem with that submission and in addressing it, I do not wish to pre-judge the question of maintenance, because that issue has not been fully argued, but it has been raised as a potential reason for reopening. So, in that sense, I feel compelled

to at least address the question of maintenance in a *prima facie* way as to whether it can stand as a reason or a ground for reopening.

[10] A good place to begin in that regard is the case of *American Home Assurance Co.* v. *Brett Pontiac Buick GMC Ltd.*, [1992] N.S.J. No. 378. In that case at para. 9, the Court quotes from the well-known text, *Fleming on Torts*, 7th edition, at p. 595:

> "Today few litigants bring or defend suits on their own; most are championed either by insurers or trade unions. These practices have become perfectly acceptable, especially when the latter are prepared to pay the cost of the other side in case they lose. The law has adjusted itself to this reality."

I pause to note that I do not understand the author of that text to be saying that the preparedness to pay the costs of the other side is a pre-condition for an entity such as a trade union to be supporting a litigant. In any event, the Court of Appeal continues, at para. 10, to say:

> “A person who is not a stranger to an action, one who has a legitimate and genuine business interest in it, has every right to participate in, or maintain, proceedings to protect his or her interests.”

[10] There does not seem to be any dispute that the Yukon Teachers’ Association had a “legitimate interest” in the claim to vindicate the plaintiff’s reputation, as those were the express words used by counsel for the defendants in his letter to opposing counsel dated February 3, 2010.

[11] The reason I have a problem with the submissions made by defence counsel on this issue of maintenance is that there seems to be an assumption that if the Yukon Teachers’ Association did finance the plaintiff’s litigation, that that would inevitably lead

to the conclusion that they ought to pay costs and/or that the plaintiff should at least pay the defendants' costs. That conclusion seems to be based, again, on the premise that the plaintiff, because of his assumed support by the Yukon Teachers' Association, was more inclined to run out the litigation to the fullest extent, as opposed to considering some other form of resolution. That is a premise which I find is based on nothing more than pure speculation. In that sense, I am not persuaded that, even if it was determined that the Yukon Teachers' Association funded the plaintiff: (a) the defendants would have grounds to successfully argue the tort of maintenance, and (b) it would make any difference to me at the end of the day as to my initial decision that each party should bear their own costs. I make those conclusions looking at the issue of maintenance from a *prima facie* point of view. In other words, are there *prima facie* grounds which might cause me to reconsider my decision on costs such that the result would have changed? I am not satisfied that the defendants have met their onus in that regard.

[12] In terms of the procedural argument that was raised by defendants' counsel, that I made my ruling on costs without giving the defendants an opportunity to be heard, I have two answers. The first one is that the evidentiary basis for my decision was before me. I had the history of the parties, and the issue of communication back and forth between the parties was one which was fully and fairly canvassed at the trial. The second thing I would say is that over the course of two days now, and some three and a half hours of argument, I have heard further reasons as to why I should reopen and reconsider. The very fact that I am now considering the defendants' application to reopen is in a sense a revisiting of the costs issue, and I am satisfied that I have had an opportunity to exercise my discretion in that regard in a judicial fashion.

[13] In conclusion, the defendants' application on the threshold issue is dismissed. As a result, there is no further need to consider the applications for financial disclosure or to open up the settlement conference material.

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GOWER J.