

Burchill v. Commissioner of the Yukon Territory
2001 YKSC 514

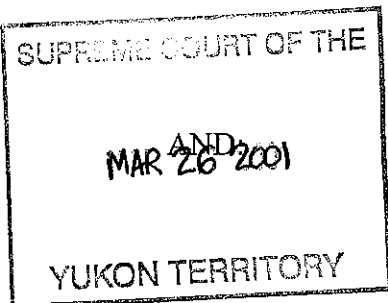
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REGISTRY: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

FRANK BURCHILL

Plaintiff



THE COMMISSIONER OF THE YUKON TERRITORY

Defendant

Maloney J.

DISPOSITION ON COSTS

[1] Some time ago I delivered written reasons for judgment in which I resolved this action in favour of the defendant. The action has been dismissed. I am now in receipt of helpful written submissions on the issue of costs.

[2] The defendant takes the position that, as the successful party, it is entitled to its costs. I quote from the defendant's written submission on this issue:

1. The general rule is that costs follow the event. It is the submission of the Defendant that there is no good reason to depart from that rule in the

circumstances of this case. The general rule is set out at Rule 57(9) of the Rules of Court under the heading "Costs to follow event"

British Columbia Annual Practice, 2001, Rule 57 with cases noted -
Tab 2

- [3] The material portion of subsection (9) of the cited rule reads:
"...costs of and incidental to a proceeding shall follow the event unless the court otherwise orders" (emphasis added).

It has long been established that there is a fundamental discretion in the court with respect to the disposition of a costs issue.

- [4] The defendants written submission continues as follows:
2. The plaintiff's claim has been unsuccessful on all grounds and the Plaintiff's action has been dismissed. The Defendant submits it is therefore entitled to its party and party costs in accordance with the general principles found in the Rules of Court and in the caselaw.

- [5] The defendant cites and relies upon the decision in *Robinson v. Lakner*, [1998] B.C.J. No. 1047 (reference to Tab 3) as follows:

...It was held that the successful defendant should have been awarded party and party costs on Scale 3, notwithstanding the financial circumstances of the Plaintiff.

[6] I now quote from the plaintiff's written submission:

2. The trial judge has always had, and continues to have, a virtually unfettered discretion to allow or not to allow costs.
3. Traditionally, the Government of Yukon has not asked for costs in cases such as this one. ...
4. Costs will not only impoverish me. They will push me deeply into debt. I have paid a terrible price for someone who thought, rightly or wrongly, that I was complying with the law with respect to delegating my legislative authorities. I have lost my job and twelve years of salary and benefits. And I have lost most of my pension for the rest of my life. ... I have nothing to look forward to but an old age living on the brink of poverty. I have lost it all. I have suffered enough. It is a sad way to end of life. ...

[7] The balance of paragraph 4 of that submission goes on to illustrate the devastating effect that an adverse ruling as to costs would have upon him. He continues:

5. The defendant has incurred virtually no costs as a result of my action. Nothing has changed in the Department of Justice as a result of my action. It has had, and will continue to have, the same number of employees and lawyers. Perhaps it has cost the Defendant approximately \$300 in photocopying costs as a result of my action against it. But that is all it has

cost the Defendant. If the Defendant were allowed costs on Scale 3, the Defendant would make a huge profit out of this action. And that would be contrary to the whole spirit of costs. Costs are to indemnify. Costs are not to enrich.

[8] The plaintiff argues that his situation can be distinguished from *Robinson v. Lakner*. I quote further from his written submission:

7. In the case of *Robinson v. Lakner* (cited by the defendant), the British Columbia Court of Appeal held that poverty was not a valid reason for denying costs. However, that decision is quite different from my case. In that case the successful defendant was represented by outside counsel. To deny the successful Defendant his costs in that case would have meant denying him part of what he was required to pay his lawyer. That would have meant a substantial loss to him. That judgment is probably unique. And, in any case, being a judgment of the British Columbia Court of Appeal, it is in no way binding on a trial judge in the Yukon Territory. That case is quite distinguishable from my case where I will be impoverished and the Defendant will realize a profit on the action even if the costs are assessed on Scale 1.

[9] I cannot help but observe that the plaintiff's very moving submissions are not entirely without merit.

[10] In the second edition of his text entitled "The Law of Costs", Mark M. Orkin, Q.C. at para. 209.12, p. 2-94 has this to say:

209.12 Party Employing Salaried Solicitor

Following the principle that "reimbursement must govern", at common law a party who is represented by a salaried solicitor and has nothing to pay to the solicitor beyond disbursements as a result of the litigation is not entitled to costs other than the disbursements so paid. ...

By operation of statute the Crown is entitled to recover party-and-party costs even though it is represented by salaried counsel. In Ontario s. 131 of the *Courts of Justice Act*, provides:

131(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a barrister or solicitor who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

[11] Subsection (1) of the above quoted s. 131 gives the Ontario court a basic and broad discretion. I quote:

131(1) *Costs* - Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the

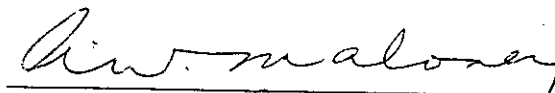
court, and the court may determine by whom and to what extent the costs shall be paid.

[12] No such statutory provision or *Rule of Practice* was cited to me as being the law of the Yukon Territory and I am not aware of any such provision. Even if there were such a statutory provision in the Yukon I would still retain my discretion as to the disposition of costs. At page 2-94.6 of his text Orkin makes reference to:

... a common law principle that follows from the concept of costs as indemnity, namely, that costs cannot be made a source of profit to a successful party.

[13] That common law principle is not necessarily varied by Rule 57 of the British Columbia Annual Practice referred to above, but rather, as I have already noted, a discretion in the court is preserved by that rule. The plaintiff quite candidly made many admissions, including and specifically with respect to his insubordination. Furthermore the plaintiff, by reason of his position in the internal hierarchy of the Department of Justice, did not have a right of appeal to an independent tribunal such as is available to other employees. His internal redress was only by way of a review by the very people who effected his termination. I have no doubt that the plaintiff himself believed in his cause and his only avenue of possible redress was to seek refuge in this Court. Under all of the circumstances, I am inclined to exercise in favour of the plaintiff the discretion vested in a trial judge.

[14] There will be no order as to costs.



Maloney J.

Frank Burchill

Appearing on his own behalf

Penelope Gawn and Monica Leask

Counsel for the Defendant