COURT OF APPEAL OF YUKON

Citation: *Dawson (Town of the City of) v. Carey*, 2014 YKCA 3

Date: 20140117
Docket: 12-YU705

Between:

The Town of the City of Dawson

Appellant
(Plaintiff)

Darrell Carey

Respondent
(Defendant)

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Groberman

On appeal from: An order of the Supreme Court of Yukon, dated July 18, 2012 (*Dawson (Town of the City of) v. Carey*, 2012 YKSC 59, Whitehorse No. 10-A0040)

Oral Reasons for Judgment

Counsel for the Appellant:	E.E. Vanderburgh
Counsel for the Respondent:	T.L. Robertson, QC J.A. Morris
Place and Date of Hearing:	Vancouver, British Columbia January 14, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 17, 2014

Summary:

The defendant miner removed trees located within his placer mining claims on roads owned and occupied by the Town. The Town successfully sued for trespass. The trial judge denied the Town its costs, primarily on the basis that it had filed a new written argument on the day of the trial. The trial judge characterized the case as one of "trial by ambush". The Town appealed from the denial of costs. Held: Appeal allowed; Town awarded partial costs of the trial. There was an inadequate basis for the judge's apparent finding that the Town had "ambushed" the defendant in the sense of seeking to gain a tactical advantage through late delivery of an argument. The foundation for the judge's denial of all costs was not made out. Nonetheless, the judge's concern for the integrity of the case management process was well-founded, and the plaintiff should suffer some costs consequences for its late delivery of the argument. Plaintiff denied costs in respect of certain steps in the litigation.

[1] **GROBERMAN J.A.:** This is an appeal by the Town of the City of Dawson (the "Town") from the trial judge's costs order at the conclusion of a trespass action. Although the Town was successful in the action, the judge ordered that each party bear its own costs. He did so based on his view that the Town was guilty of a "blatant abuse of case management practice".

[2] The judge suggested that the Town's pleadings were deficient, and also concluded that it had engaged in "trial by ambush". He was critical of the Town's counsel, and considered that counsel's conduct of the case was worthy of censure. In the result, he deprived the Town of the costs to which it ordinarily would have been entitled.

[3] For reasons that follow, I am of the view that the judge was influenced in his costs order by an erroneous conclusion with respect to the law of pleadings, and on an unreasonable finding that counsel for the Town had deliberately concealed an argument in order to gain a tactical advantage. While the trial judge had discretion to penalize the Town for its failure to fully respect the case management process, his order was disproportionate to the gravity of the Town's conduct and must be modified.

Background to the Action

[4] Mr. Carey is the holder of placer mining claims within the boundaries of the Town. Portions of the mining claims are traversed by two municipal roads – Dome Road and Mary McLeod Road.

[5] In the course of his mining operations, Mr. Carey removed trees from the road right of ways. The Town alleged that the removals were unlawful, and commenced an action in trespass. Mr. Carey defended the action. While a number of defences were raised in the initial statement of defence, the issues were narrowed considerably by the date of trial. The defences ultimately raised by Mr. Carey included a contention that, as the holder of placer mining claims and a water use licence, he was entitled to cut the trees. He also argued that the Town's rights over the roads were limited ones, and did not entitle it to sue him in trespass.

The Case Management and Trial Proceedings

[6] In Yukon, the Supreme Court employs a comprehensive system of active case management designed to narrow and clarify the issues, and to promote settlements and efficient trials. Rule 1(7) of the *Supreme Court of Yukon Rules* provides for mandatory case management conferences for civil claims. Rule 1(8) describes the broad powers of a case management judge, and sets out the objectives of case management:

> 1 (8) The court must further the object of these rules by actively managing proceedings, and, for that purpose, may do any or all of the following:
>
> (a) encourage the parties to co-operate with each other in the conduct of the proceeding;
>
> (b) identify the issues at an early stage;
>
> (c) decide promptly which issues need full investigation and trial and which may be disposed of summarily under these rules;
>
> (d) decide the order in which issues are to be resolved;
>
> (e) encourage the parties to use alternative dispute resolution procedures the court considers appropriate, and facilitate the use of those procedures;
>
> (f) help the parties to settle the whole or part of the proceeding by using judicial settlement conferences;

> (g) set realistic timetables or otherwise control the progress of the proceeding;
>
> (h) consider whether the likely benefits of taking a particular step justify the cost of taking it;
>
> (i) deal with as many aspects of the proceeding on the same occasion as is reasonably practicable;
>
> (j) make use of technology, including telephone conferencing and video conferencing;
>
> (k) give directions to ensure that the proceeding proceeds quickly and efficiently; and
>
> (l) make any other orders and give any other directions the court considers appropriate.

[7] In this case, the judge held five case management conferences. In September 2011, the court made a trial management order by consent requiring the parties to file outlines of facts and issues and to provide copies of case law by January, 2012.

[8] The Town filed its final amended statement of claim (which had been presented at the September trial management conference) in mid-October 2011. In accordance with the September order, it provided its outline to Mr. Carey on January 6, 2012. Mr. Carey filed the final version of his statement of defence only on January 11, 2012. He provided his outline to the Town on January 13, 2012, as contemplated by the trial management order. A final case management conference took place on January 25, 2012, and the trial took place on April 10, 2012.

[9] The case management process was, for the most part, very successful in narrowing the issues and providing for an efficient trial process. What had initially been expected to be a 5-day trial was, in the end, scheduled for a single day. Two agreed statements of fact were filed, and the parties agreed that it would not be necessary to call *viva voce* evidence.

[10] Notwithstanding the extensive case management, considerable preparation work was done in the last few days leading up to the trial. The agreed statements of fact, for example, were only produced in the week before trial, with the second of those statements being finalized only on the morning of trial.

[11] An unanticipated issue arose at the outset of the trial. Counsel for the plaintiff handed up a comprehensive written argument which had not been previously provided to the defendant. While it was, for the most part, simply an elaboration of the outline previously delivered, it referenced s. 18(1) of the *Placer Mining Act*, S.Y. 2003, c. 13, a section not familiar to counsel for the defendant. That section prohibits a person from entering lands that are owned or lawfully occupied by others for mining purposes until the person has posted security satisfactory to the mining recorder. The section was of considerable moment for the action.

[12] Counsel for the defendant chose not to apply for an adjournment, but requested and was granted the right to provide further written argument concerning the statutory provision.

The Costs Judgment

[13] Ultimately, the judge found that the trespass allegations were made out, and, in reasons indexed as 2012 YKSC 56, gave judgment in favour of the Town. In separate reasons released the following day (2012 YKSC 59), the judge denied the Town its costs. The judge was critical of counsel for the Town for not having pleaded s. 18(1) of the *Placer Mining Act*, and for providing his full written argument and authorities only at the opening of the trial.

[14] The judge addressed at considerable length the issue of whether the Town's failure to plead s. 18(1) was a breach of the *Rules*. He referred to *Fuller v. Schaff*, 2009 YKSC 22, a case in which the defendant had failed to plead affirmative defences (and the material facts upon which those defences depended). While it is not clear that the judge ultimately made a ruling on the issue, it is apparent that he was of the view that the Town ought to have pleaded s. 18(1).

[15] More importantly, the judge found that counsel had "ambushed" the defence with a new argument:

> [34] Although I ultimately agreed with the s. 18(1) argument, I nevertheless find that counsel for the City did indeed "ambush" counsel for the Miner, particularly in the context of the case management that had been carried out.

> The case management had gone exceedingly well up to the point of trial, and counsel had cooperated extensively to bring a complex factual and legal matter to court. Counsel for the City ought to know, after two years of managing every aspect of the case, that it was wholly inappropriate and unfair to raise the s. 18(1) defence at the last minute and catch his fellow counsel by complete surprise.
>
> [35] The fair and proper procedure would have been to raise the new issue of s. 18(1) or the request to file a new argument at case management, so that each party could prepare arguments to address the new issue. Counsel for the City unfortunately chose the old trial by ambush technique, which is always difficult to deal with fairly on the morning of the trial. On the one hand, the court is always receptive to further written submissions and case law. On the other hand, counsel faced with new written submissions must weigh the cost of requesting an adjournment and preparing for a new hearing date, as opposed to completing the case in the timeline and cost expected by his client.
>
> [36] In my view, the only fair way to address this blatant abuse of case management practice is to consider a remedy in court costs.
>
> [37] In the normal course, costs would follow the event pursuant to Rule 60(9) and the City would recover its costs and reasonable disbursements from the Miner, unless the Court otherwise orders. I am ordering otherwise in this case. There shall be no costs payable to either party and each party shall be responsible for their legal fees and disbursements.
>
> [38] In fairness to the City, I point out Rule 60(36) provides that the Court can disallow a lawyer's fees and disbursements between a lawyer and his or her client where they were incurred without reasonable cause, or as a result of delay, neglect or some other fault.

Analysis – The Pleadings

[16] The s. 18(1) issue arose in the context of Mr. Cary's contention that he had statutory authority to enter on the Town's lands and remove trees from them. The question of whether the Town was required to plead s 18(1) can only be answered in the context of the detailed pleadings and the Rules.

[17] In his original statement of defence, Mr. Carey pleaded the provisions of the *Placer Mining Act* only in general terms:

> 9. The Defendant has the right subject to the provisions of the [*Placer Mining*] *Act* to enter, locate prospect and mine for gold on the Claims including those lands comprising the Dome Road and further has the right to cut down timber and excavate the land in pursuit of its mineral rights ....

[18] The defendant did not set out the source of his alleged rights, but it is reasonably clear that his intent was to allege that his rights arose out of the *Placer Mining Act* itself. Two provisions of the *Act* would seem to be implicated, ss. 18(1) and s. 48

> 18(1) No person shall enter on for mining purposes or shall mine on lands owned or lawfully occupied by another person until adequate security is given, to the satisfaction of a mining recorder, for any loss or damage that may be thereby caused.
>
> ...
>
> 48(1) Every person who receives a grant of a claim ...
>
> (b) may cut timber, not otherwise acquired, for their own use and for any purpose incidental and necessary to the operation of their claim,
>
> (c) has the exclusive right to enter on their claim for the miner-like working of it ...

[19] While the statement of defence would have been more complete had it specifically referenced those sections, the general reference to "the provisions of the *Placer Mining Act*" provided adequate notice to the plaintiff of the statutory basis for the defence.

[20] The Town did not file a reply to the statement of defence. In my view, no reply was needed. Rules 23(5), (6) and (7) are apposite:

> 23 (5) Where no reply to a statement of defence, to a statement of defence to a counterclaim, or to a subsequent pleading is delivered within the time allowed, the pleadings are closed and material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.
>
> (6) Where no reply to a statement of defence is delivered, a joinder of issue on that defence is implied.
>
> (7) No reply that is a simple joinder of issue shall be filed or delivered.

[21] Mr. Carey's statement of defence simply stated that he had the right to enter the lands and cut trees, and referenced the *Placer Mining Act.* The Town's response would simply have been a denial, and filing a reply to make that denial would arguably have violated Rule 23(7). Rule 23(5) deemed the denial to have been made, and Rule 23(6) provided that issue was implicitly joined.

[22] Mr. Carey amended his statement of defence after he received the Town's outline of facts and issues. Paragraph 9 of the original statement of defence remained virtually unchanged. A further paragraph stated:

> 15. In further answer to the whole of the Further Amended Statement of Claim, the Defendant states that he has complied with the Act ...

[23] While it would undoubtedly have been more helpful had the defendant particularized his actions in complying with the *Act*, I would take para. 15 as sufficient to plead compliance with s. 18(1) of the *Act.*

[24] Again, the plaintiff was not required to file a reply simply denying that the defendant had complied with the statute.

[25] The trial judge appears to have considered the pleading of s. 18(1) as akin to the pleading of affirmative defences. As *Fuller v. Schaff* indicates, a defendant must plead affirmative defences as well as the material facts supporting those defences. On the other hand, where a defendant has pleaded defences, the plaintiff is not required to file a reply simply denying that the defences are made out.

[26] In short, if there was any deficiency in the pleadings, it lay in the defendant's failure to refer to specific provisions of the statute. The plaintiff's decision not to file a reply was consistent with the *Rules*. The trial judge ought to have found that the plaintiff was in compliance with the *Rules* despite not having filed a reply.

Respect for the Case Management Process

[27] The trial judge was critical of the Town's counsel's disregard of the case management process. He expressed considerable frustration at counsel's decision to file a comprehensive argument and book of authorities at the outset of the hearing. He characterized this as "trial by ambush".

[28] There is, in my view, some difficulty in the trial judge's characterization of the Town`s counsel's conduct as "a blatant abuse of case management practice". While I acknowledge that a major purpose of the case management process is to define the issues and ensure that the parties are prepared to argue the case when it comes

to trial, the problems in this case did not arise solely by virtue of the Town's counsel's conduct.

[29] As I have indicated, the pleadings did not, even at the date of trial, particularize the statutory provisions that the defendant relied on. Rather, he simply alleged that he had statutory rights, and that he had complied with the requirements of the statute. It was not until the defendant filed his outline of facts and law on January 13, 2012 that he specifically referenced s. 48 of the *Placer Mining Act*. By that time, the plaintiff had already filed its outline.

[30] Section 18(1) of the *Placer Mining Act* is not an obscure provision of Yukon law. It seems to me that Mr. Carey, as a person undertaking placer mining, and as a person who contended that he had complied with all statutory requirements, should have been well aware of the section. Counsel pleading the statute should also, it seems to me, have looked at the provisions of the statute that dealt with rights of entry. While I do not doubt the trial judge's observation that trial counsel for the defendant was taken by surprise by the existence of s. 18(1), I express considerable doubt as to whether it was reasonable for him to have been in that position.

[31] That said, counsel for the plaintiff ought to have read the defendant's outline prior to the final case management conference on January 25, 2012, and, in light of the defendant's reliance on s. 48, ought to have noted that live issues existed with respect to s. 18(1) of the *Act*.

[32] Paragraph 3 of the trial management order of September 7, 2011 was as follows:

> 3. The Plaintiff will produce an Outline of facts and issues along with copies of the case law to the Defendant and the Court, on or before Friday, January 6, 2012.

[33] While the order did not expressly prohibit the plaintiff from supplementing the outline and the case law on the day of trial, the objective of the order was clear – it was to ensure that all issues were clear to both parties well in advance of the hearing. Once it became apparent that it needed to address the s. 18(1) issue, the

Town ought to have sought permission to revise its outline or file a supplemental outline. Simply waiting until the opening of trial to mention the section was not an acceptable alternative.

[34] The trial judge's finding that the plaintiff resorted to "trial by ambush" suggests that he was of the view that counsel deliberately sought a tactical advantage by failing to mention s. 18(1) until the morning of trial. I do not think that the record supports such a finding.

[35] The plaintiff's written argument with respect to the s. 18(1) issue indicates that its counsel became aware of s. 18(1) "close to the date of trial". There is nothing in the material to suggest that that is incorrect. Because the trial judge did not seek any submissions on costs, counsel was not challenged on that issue, and had no opportunity to defend himself against allegations of deliberate impropriety.

[36] The Town could not reasonably have hoped to gain any tactical advantage by waiting until the morning of trial to disclose the s. 18(1) argument. The argument was not complicated or nuanced, and defence counsel would not have required a lengthy period to deal with it. Further, the Town faced the risk that the argument would require the parties to call evidence or (as happened) file additional material. Such eventualities would have delayed the trial of the plaintiff's claim.

[37] It was not reasonable for the trial judge to conclude that the late filing of the argument was a calculated decision aimed at gaining a tactical advantage. Indeed, the most reasonable conclusion from the record might have been that counsel for the plaintiff simply engaged in late trial preparation. The late delivery of the argument did, to some extent, undermine the goals of case management, but it did not constitute an egregious assault on the case management process.

[38] The trial judge based his costs order on the proposition that that the plaintiff ignored the case management process for its own advantage. He also seems to have been of the view that the plaintiff ought to have pleaded s. 18(1). Neither of

those propositions was sound, and they could not form the foundation for the order denying the plaintiff all of its costs.

[39] That does not mean that the plaintiff's late delivery of its written argument should have no costs consequences. The case management process in Yukon is critical to the smooth and efficient operation of the courts and I agree with the judge that any acts or omissions that tend to undermine it should be treated seriously. In the circumstances of this case, it is appropriate to depart from the usual rule that the successful party at trial is entitled to all of its costs.

[40] The costs order should be amended so that the plaintiff is denied certain costs that are related to its late delivery of its argument. In this case, the plaintiff:

> (1) failed to identify and raise the s. 18(1) issue at the January 25, 2012 case management conference;
>
> (2) failed to advise defendant's counsel of the s. 18(1) issue when it first became aware of it shortly before trial;
>
> (3) failed to raise the s. 18(1) issue during final discussions regarding the second agreed statement of fact; and
>
> (4) waited until the morning of trial to provide an elaborate written argument and some of the case law that it was relying on.

[41] These acts and omissions were disruptive to the trial process and were not in keeping with the goals of the case management system. That said, the trial judge erred in characterizing them as "blatant abuses" and in suggesting that they were deliberate attacks on the system.

[42] I accept that the reduction in the costs awarded must reflect the court's disapproval of conduct that undermines the goals of case management and must be significant enough to deter such conduct in the future. That said, a disproportionately harsh penalty is not called for.

[43] I would modify the costs order of the trial judge by granting the plaintiff party and party costs on scale B, except that the plaintiff:

a) should not recover fees or disbursements for preparation for and attendance at the final case management conference on January 25, 2012;

b) should not recover fees or disbursements for preparing the written argument and book of authorities presented at the opening of the trial;

c) should recover fees for preparation and attendance for only ½ day of trial rather than 1 day; and

d) should not recover fees or disbursements for preparing the written response on the s. 18(1) issue that was filed on May 7, 2012.

[44] The parties have enjoyed mixed success on this appeal, and each should bear his or its own costs of the appeal.

[45] **CHIASSON J.A.**: I agree.

[46] **D. SMITH J.A.**: I agree.

[47] **CHIASSON J.A.**: The appeal is allowed to the extent referred to in the judgment of Mr. Justice Groberman.

"The Honourable Mr. Justice Groberman"