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2011 CarswellBC 2040, 2011 BCSC 1046

Campbell v. British Columbia (Minister of Forests)

In the matter of Section 2 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 and British Columbia Timber Sale Licence A80073 issued under the Forest Act [RSBC 1996] c. 157

Vance Robert Campbell, Marilyn James, Lola Jon Campbell, Taress Alexis and Robert Watt, Directors of the Sinixt Nation Society, Representative Body of the Sinixt Nation, on their own behalf and on behalf of the Sinixt Nation and the Sinixt Nation Society, Petitioners and Minister of Forests and Range of British Columbia and Sunshine Logging (2004) Ltd., Respondents

British Columbia Supreme Court [In Chambers]

Willcock J.

Heard: July 26, 2011
Judgment: August 2, 2011
Docket: Vancouver S107353

Proceedings: Additional reasons, 2011 CarswellBC 821, 2011 BCSC 448 (B.C. S.C. [In Chambers])

Counsel: D.M. Aaron, for Petitioners

G.R. Thompson, for Respondent, Minister of Forests and Range of British Columbia, Attorney General of British Columbia

D.L. Richards, S.D. Gutierrez, for Respondent, Sunshine Logging (2004) Ltd.

Subject: Civil Practice and Procedure; Natural Resources; Property; Public

Aboriginal law.

Administrative law.

Natural resources.

***Willcock J.*:**

1 On February 25, 2011 I dismissed the petition in these proceedings on the ground that the petitioners were without any authority advance the claims to obtain the relief sought and lacked the requisite standing to bring a

petition. The parties were given leave to address the matter of costs if that issue could not be resolved by consent.

2 The respondents, the Minister of Forest and Range of British Columbia ("the Crown") and Sunshine Logging (2004) Ltd. ("Sunshine") now apply for an order for costs. The application is brought pursuant to Rule 14-1 of the Supreme Court Civil Rules. The applicants rely, in particular, upon subrule (9):

> Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

3 Subrule (12) is inapplicable in this case.

4 The applicants say that they were successful in the result and that there can be no issue with respect to whether there has been divided success or whether the success is partial in that their application resulted in dismissal of the petitioners' proceedings in their entirety.

5 The applicants say the discretion to depart from the general rule should be exercised judicially and there must be a principled basis for denying costs to successful parties. The applicants rely upon judgment of this court in *R.L.L. v. R.L.*, [1999] B.C.J. No. 1764, where, at para. 163, Hunter J. held:

> [...] I note that the Court has a discretion in determining whether costs will follow the event. This discretion must be exercised judicially and be based on grounds connected to the case. It is improper to exercise this discretion out of a sense of fairness, out of sympathy, or by comparing the relevant economic strength of the parties.

6 The applicants also rely upon the judgment of the Court of Appeal in *Robinson v. Lakner*, [1998] B.C.J. No. 1047, where, at para. 5, Prowse J.A. for the Court held:

> Although the trial judge made reference earlier in his reasons to the fact that financial hardship in itself is not a sound basis for departing from the usual rule with respect to costs, he effectively ignored that principle in the award of costs he made. In my view, he erred in so doing.

7 In support of their separate claims to costs, the applicants rely upon the judgment of the Court of Appeal in *Forrest v. M.C.K. Properties Ltd. (B.C.C.A.)*, [1990] B.C.J. No. 1412, where, speaking for the Court, Southin J.A. held that the general rule is that defendants at trial are entitled not only to be separately represented but also, if the action fails, to separate bills of costs. That logic is, obviously, applicable as well in relation to proceedings brought by petition that are dismissed following a hearing. The applicants say that while there are exceptional cases where costs are apportioned between defendants those cases are rare and this case does not meet the test for apportionment of costs described by the Court of Appeal in *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27.

8 For its part, Sunshine says that whether or not the case involved a question of public interest it should not be deprived of its costs. It points to the judgment of Garson J. in *Husby Forest Products Ltd. v. Minister of Forests et al. (re costs)*, 2004 BCSC 734, as an example of the case where a contractor in its situation incurred costs in a similar dispute. The court in that case at para. 23 held:

> Husby is a private entity which holds a forest licence. The constitutional dispute does not really involve it in the sense that essentially the dispute is between the Crown and the Petitioner. I would not therefore deprive Husby of its costs on this basis.

9 With respect to the public interest generally, the applicants say that the law is as stated in *Sierra Club of Western Canada v. British Columbia (Chief Forester)*, [1994] B.C.J. 1713. In that case the court held at para. 49:

> I do not think it would be wise to establish a principle that any person bringing a proceeding out of a bona fide concern to vindicate his or her perception of the public interest should be insulated from an award of costs in all cases. Such a motive will always be a relevant and important factor, but it should not be considered to the exclusion of all other relevant and important factors. The Court must retain the flexibility to do justice in each case.

10 The applicants say that the courts should bear in mind that an order for costs is only partial indemnity and should be regarded as a normal incident of proceedings. A court should assume that the petitioners when they brought the claim contemplated that if they were unsuccessful they would be exposed to pay costs and that is a factor that should appropriately be born in mind by those in similar positions. They say, in short, that there is no reason to depart in this case from the general rule.

11 The respondents say the court has unfettered discretion to award costs to any party. In support of this proposition, Mr. Aaron for the respondents refers to *Landry et al. v. Bridgestone Tire Co. Ltd*, [1975] B.C.J. No. 1168. At para. 20 of that decision, Craig J. writes:

> Literally, s. 80(2) appears to give a Judge complete discretion as to costs whereas M.R. 976 does not appear to give any discretion as to costs except to the extent that a Judge may with "good cause" deprive a successful litigant of costs. Section 80(2) and M.R. 976 are not only different in meaning, but they are inconsistent. If they are inconsistent, M.R. 976 must be ignored, because the *Supreme Court Act* permits the making of Rules which are "not inconsistent with this Act".

12 In my view the logic of that decision runs counter to the argument advanced by Mr. Aaron. The s. 80(2) referred to in that case was the provision of the *Supreme Court Act* that, at that time, read as follows:

> Subject to subsection 1, a judge may, in his discretion, award or refuse to award costs to any litigant in any civil proceeding in the court.

13 The M.R. 976 referred to in the judgment was the applicable provision of the Marginal Rules. On this application, I am governed solely by the provision of the current Rules of the Supreme Court of British Columbia which, as noted above, provides that costs must be awarded to the successful party unless otherwise ordered.

14 With respect to the exercise of a discretion, the petitioners say that this litigation was undertaken in the public interest and the petitioners had no personal interest in the outcome. They are said to have been motivated by environment and constitutional concerns. They say that the case involved difficult historical, geographic and ethnographic questions. The issues were novel. The Crown and Sunshine are said to have a superior capacity to bear the costs of this litigation. The ligation was not vexatious or abusive and, last, the honour of the Crown

should cause it to act in a fashion that will not impede access to justice or the assertion of aboriginal rights, by seeking costs. In support of the latter proposition, they rely, by analogy, upon cases where aboriginal people have sought funding for litigation and they refer in particular to *Xeni Gwet'in First Nations v. British Columbia*, [2002] 4 C.N.L.R. 306 and *British Columbia (Minister of Forests) v. Jules*, 2001 BCCA 647.

15 In the *Xeni Gwet'in First Nations* case the Court of Appeal at para. 98 stated:

> This Court [...] recognized that, even absent a specific fiduciary expectation of funding in a given case between an Aboriginal party and the Crown, the honour of the Crown is still an important constitutional principle that informs the exercise of the inherent jurisdiction to award interim costs.

16 In support of their argument that costs ought not to be awarded against unsuccessful litigants engaged in public interest litigation, the petitioners refer to *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368, where the court in considering costs in public interest litigation identified the following factors for consideration:

> a) whether the proceeding involves issues, the importance of which extends beyond the immediate interests of the parties;
>
> b) whether the petitioners have a personal, proprietary or pecuniary interest in the outcome;
>
> c) whether the issues have been previously determined by a court;
>
> d) whether the defendant has a clearly superior capacity to bear the costs of the proceeding; and
>
> e) whether the plaintiff has engaged in vexatious, frivolous or abusive conduct.

17 In response to these submissions, the Crown says that the honour of the Crown is not engaged in cases where the litigants do not have status to advance an aboriginal claim and are not entitled to rights. They note that in *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, the court, after referring to the factors identified by the petitioner noted at para. 8:

> Although I consider these factors as useful ones to guide the Court in the exercise of its discretion as to costs, the overarching question is still whether the normal rule is unsuitable on the facts of this case.

Analysis

18 I find that there is no basis for apportioning costs between defendants and I accept the logic of the court in *Husby* to the effect that there is no basis for depriving Sunshine of costs arising from its involuntary involvement in a constitutional issue arising out of the exercise of its contractual rights. Sunshine is entitled to its costs.

19 I do not accept the Crown's position that the honour of the Crown was not engaged in this litigation. The petitioners through their conduct over the years have demonstrated a *bona fide* interest in advancing the claims of the Sinixt people. In my view, the honour of the Crown gives rise to an obligation to ensure that no measures are taken that will impede efforts on the part of aboriginal people to assert their rights before those rights are determined. In this case, however, no obstacle has been placed in the path of the petitioners prior to the determina-

tion of their claim. Now that it has been determined that these petitioners do not have standing to advance the claim they assert, it cannot, in my view, be said that the honour of the Crown precludes a claim for costs.

20 While there may be a public interest in the issues raised in this litigation, the petitioners sought to advance their own interests. Success in preventing the logging they sought to enjoin might, coincidently, have served an environmental end and might have been welcomed by some members of the public other than individuals claiming an interest through their association with the Sinixt. The petitioners, however, did not purport to act on behalf of non-native land owners or anyone who could not claim an ancestral association with the Sinixt.

21 This is not a case where the litigation is principally in the public interest. Further, in my view, it cannot be said to be in the public interest or an appropriate exercise of this court's discretion to refuse to award costs to a party who successfully establishes that litigants without standing have commenced a civil action and sought an injunction. For that reason, I find that the Crown in also entitled to its costs and order accordingly.

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