In the Court of Appeal of Alberta

Citation: Boyd v JBS Foods Canada Inc., 2015 ABCA 191

Date: 20150605
Docket: 1401-0234-AC
Registry: Calgary

Between:

Larry Boyd

Applicant
(Respondent)

- and -

JBS Foods Canada Inc.
(as successor to XL Foods Ltd.)

Respondent
(Appellant)

- and –

The Workers' Compensation Board of Alberta
and Appeals Commission for Alberta Workers' Compensation

Respondents
(Respondents)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment Regarding Costs

Costs re Application to Dismiss Appeal Summarily

Memorandum of Judgment Regarding Costs

The Majority:

[1] The respondent brought an application before three judges to dismiss summarily the appellant's appeal. The complaints of the respondent were procedural, not lack of merit. The application failed, and the appeal continues. See 2015 ABCA 120 for the details.

[2] Now the successful appellant wants higher costs than usual, but the respondent who lost the application will only concede the bottom column (scale) of party-party costs.

[3] Full-indemnity costs are reserved for serious situations, such as bad misconduct, or certain exceptional circumstances. Nothing here approaches that level.

[4] However, the lowest column of party-party costs is also too low. In the first place, that is for suits with less than $50,000 in issue. It is often asserted that it covers all cases where there is no specified sum of money directly and expressly in issue. But if there is any truth to that, Schedule C (and hence that gloss) only governs an assessment officer, not a judge or master. Schedule C is not a standard or starting point. A judge or master need not use it at all. It is a default only in the sense that the assessment officer is to use it if the judge is silent.

[5] For a judge, what is indirectly in issue is also relevant. See Rr 10.31(3) and 10.33(1)(c).

[6] If the appeal succeeded, the respondent's premiums would go up substantially, presumably each year. And if the appeal succeeded, the appellant would again get the compensation payments which had been terminated by the Board. Normally such payments are calculated at a rate of 90% of net taxable income (to a ceiling). Such restored payments could go on indefinitely, so the present value would be high. The Rules base Court of Appeal costs on what is in issue in the court or tribunal under appeal, not on the value of the particular issue under appeal.

[7] We consider this appeal to have some importance. The parties' arguments have already demonstrated some complexity.

[8] The respondent correctly states one proposition. Ordinarily costs would not be enhanced just because the losing party had advanced a proposition for which no authority could be found, pro or con. However, that is only one corner of the costs issues here.

[9] The respondent applied to dismiss the appeal summarily. Such applications are rare in Canada, and authority to do that on any grounds is sparse. Cases actually summarily dismissing are rarer, and usually based on some obvious flaw like an appeal in the wrong court, or without the necessary permission to appeal. Or some are based on appeal papers which are clearly re-litigation, or simple gibberish. Courts of Appeal do not encourage such summary applications, especially as they rarely save anyone time or money. Here the respondent's application has done the opposite.

[10] An important reason to increase costs is that the total work of the appellant has almost been doubled by the respondent. This motion has entailed almost all the work and procedures of a full appeal.

[11] Someone who files an appeal knows approximately how much work his lawyer will have to do, and approximately what amount of costs he or she will recover if the appeal succeeds. No appellant could have predicted that he or she would have been out of pocket for work about equal to that for a full appeal, yet still be at square one or two, after all this time.

[12] On top of everything else, the fees for applications (motions) in Schedule C are modest. They contemplate procedural points on simple probably uncontested facts, not a preliminary hearing about the right to appeal based on the history of the proceedings below. Applications to three judges used to be more common, because then many procedural points could only be so decided. More and more applications have been transferred to the jurisdiction of one judge in the last decade or so. But Schedule C has not been altered to reflect that.

[13] The application to dismiss the appeal was based on a theory that the appellant lacked standing of some kind. But the appellant had been a named party and was seriously and directly affected. It was no mere cat's paw, officious bystander, or recreational litigant.

[14] Though there is no serious litigation misconduct here, there is some degree of unfounded imputation. The respondent's application materials alleged that by appealing, the appellant had sprung some sort of an ambush upon the respondent. But the facts were closer to the opposite. The respondent had not complained when the Workers' Compensation Board's counsel had argued in the Court of Queen's Bench. Then once the appellant appealed, the respondent contended that the Board had not validly argued in the Court of Queen's Bench. Therefore the Court of Appeal should now regard the Board as a non-party, and so regard all the appellant's similar arguments to the Court of Appeal as never having been made below. So argued the respondent to us. Since that objection was first raised in the Court of Appeal, it was too late for the Board or the appellant to cure that. That late argument was unfair.

[15] In any event, the respondent's argument to our application panel was very technical.

[16] For all those reasons, there should be some enhancement of the party-party costs payable for the failed summary application. They will be computed on column 4 of Schedule C. To avoid more debate, we fix a lump sum of $900 as the costs (fee) for the present costs application. Reasonable disbursements will be added, for all steps.

[17] Those costs are payable whatever may be the later result of this appeal.

Written submissions filed April 10 and 20, 2015

Memorandum filed at Calgary, Alberta
this 5th day of June, 2015

Côté J.A.

Wakeling J.A.

Fraser, C.J.A. (dissenting):

[18] I have reviewed the majority judgment. However, I respectfully find no reason why this Court should deviate from awarding normal costs.

[19] For applications such as this one, where no monetary amount is at issue, costs are normally assessed under Column 1 of Schedule C: see Rule 1(4) of Schedule C, *Alberta Rules of Court*; ***Freyberg v Fletcher Challenge Oil and Gas Inc.***, 2006 ABCA 260 at para 14, 397 AR 235 [***Freyberg***]; ***Louw v Hamelin-Chandler***, 2012 ABQB 52 at para 26, [2012] AJ No 99 [***Louw***]; ***Lum v Alberta Dental Association and College***, 2015 ABQB 276 at para 7 [***Lum***], citing ***Sussman v College of Alberta Psychologists***, 2010 ABCA 356, 502 AR 64. That remains the appropriate column if we are to consider the application on its own, independent of the issues pending in the appeal proper.

[20] Nor is the default rule necessarily displaced simply because larger sums of money are indirectly at stake: Stevenson and Côté, *Alberta Civil Procedure Handbook* (Edmonton: Juriliber, 2015) at 14-163 to 14-164. Concerns about increases to the employer's premiums and compensation payments resulting from a successful appeal are considerations properly addressed in the appeal itself. They are entirely extrinsic to this application and do not affect its monetary value for the purpose of costs calculations.

[21] In my view, nothing in this application warrants deviating from standard party-and-party costs.

[22] There is certainly no basis for a full indemnity costs award, as the employer suggests. There were no special circumstances justifying such an award, nor was there any serious litigation misconduct by either of the parties: see ***Quebec (Attorney General) v Lacombe***, 2010 SCC 38 at para 67, [2010] 2 SCR 453. Although Boyd's argument was ultimately rejected, it was not devoid of merit. Even if it had been, that would not justify costs on a solicitor-client basis: ***Young v Young***, [1993] 4 SCR 3 at 134, 108 DLR (4th) 193; ***Western Grain Cleaning and Processing Ltd. v L.C. Taylor & Co. Ltd.***, 2005 MBCA 68 at para 35, 254 DLR (4th) 454; ***Minas Basin Holdings Ltd. v Paul Bryant Enterprises Ltd.***, 2010 NSCA 17 at para 40, 289 NSR (2d) 26.

[23] Nor do I agree that an award of enhanced costs is justified. Courts have discretion to displace the default rule under Rule 1(4) of Schedule C on the basis of the factors enumerated in Rule 10.33(1) and as otherwise set out in the case law: see, for example, ***Louw***, *supra* at para 27. Often a non-monetary application will attract costs higher than Column 1 on the grounds that the matter at issue is particularly complex or of general importance to the public: ***International Association of Machinists and Aerospace Workers, Local Lodge No. 99 v Finning International Inc.***, 2006 ABQB 594 at para 15; ***Lum***, *supra* at para 25. Enhanced costs may also be awarded where the outcome was of particular importance to the parties themselves: ***Freyberg***, *supra* at para 29; ***RIC New Brunswick Inc. v Telecommunications Research Laboratories,*** 2011 ABCA 10 at para 8, 502 AR 96.

[24] None of these scenarios exist in the present case. The core issue raised by Boyd's application was, as the majority notes, a technical one: whether the employer could properly appeal the Court of Queen's Bench decision after electing not to participate in those proceedings. It involved a narrow point of law and little factual complexity. And while the employer emphasized that the issue nonetheless resulted in extensive legal research, there is no evidence that the level of work involved approximated that of a full appeal. Indeed, the only thing it illustrates clearly is that Boyd's application was in no way obvious or frivolous.

[25] While we ultimately found that the employer was not precluded from appealing the Queen's Bench decision on its merits, it does not follow that the employer should be entitled to enhanced costs for its success. Boyd brought his application in good faith and should not be punished simply because some might characterize it as being misconceived: ***Louw***, *supra* at para 28; ***Blaze Energy Ltd v Imperial Oil Resources***, 2014 ABQB 509 at para 51.

[26] Finally, Boyd's application and any costs arising from it are related to the employer's choice not to appear in the proceedings at the Court of Queen's Bench. The employer made a strategic decision to allow the Workers' Compensation Board to defend its action at Queen's Bench. Once the Board lost, then, and only then, did the employer step in to appeal. Ultimately, it was this last step with which Boyd took issue. His argument was not that the employer necessarily needed to argue its case on judicial review before the Court of Queen's Bench; rather, it was that the employer should not be able to appeal to this Court where it chooses not to participate below. Accordingly, there is no merit to the suggestion that Boyd acted unfairly or somehow ambushed the employer by applying to dismiss summarily the employer's appeal since there was no issue to raise prior to the employer's decision to appeal the Queen's Bench judgment to this Court.

[27] The employer is entitled to its normal costs for its success in this application. But no more than that. Therefore, I would have allowed the employer's costs computed under Column 1 of Schedule C.

Written submissions filed April 10 and 20, 2015

Memorandum filed at Calgary, Alberta
this 5th day of June, 2015

Fraser C.J.A.

Appearances:

J.R. Carpenter
for the Applicant (Respondent) Larry Boyd

B.P. Kaliel, Q.C.
E.L. Johnson
for the Respondent (Appellant) JBS Foods Canada Inc.

R.C. Goltz
for the Respondent Workers' Compensation Board

J. Williamson
for the Respondent Appeal's Commission for Alberta Workers' Compensation