

CANADA / JUDGMENT

Barrie v. British Columbia

2022 BCSC 1122

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1122 Barrie v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barrie v. British Columbia,

2022 BCSC 1122

Date: 20220705

Docket: S145732

Registry: Vancouver

Between:

Carol Barrie in her own right, as Personal Representative of Andrew Barrie, Deceased, and as Executrix of the Estate of the said Andrew Barrie; Andrew Barrie Jr. by his Litigation Guardian, Carol Barrie; Mary Barrie; Craig Vallance; And Stuart Vallance

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia; Regional District of Kootenay Boundary; City of Grand Forks; Scott MacNeill; Kathy MacNeill; Jacqueline MacNeill; Jamie MacNeill; Government Entity #1; Government Entity #2; Government Entity #3; Government Entity #4; And Government Entity #5;

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:

D.K. Miura

R.W. Richardson

Counsel for the Defendant Her Majesty the Queen:

P.D. Ameerali

Place and Date of Hearing:

Vancouver, B.C.

May 4, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 5, 2022

Overview

- [1] Andrew Barrie, a Scottish national, died by drowning on July 28, 2012 while vacationing with his wife, Carol Barrie, and son, Andrew Barrie, Jr. The plaintiffs commenced a wrongful death action in 2014 for the benefit of the spouse, parent, and children of Andrew Barrie, as well as his Estate.
- [2] Her Majesty the Queen in Right of the Province of British Columbia ("the Province") is named as a defendant in these proceedings, in part as the party responsible for the Provincial Park where Andrew Barrie perished. It is alleged that the Province was an occupier of the lands, premises, and waters that are the subject of the plaintiffs' claims within the meaning of the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA].
- [3] The former defendant, the Ministry of Forests, Lands and Natural Resource Operations is the provincial ministry responsible for the stewardship and regulation of all public lands and waters in British Columbia, including, but not limited to, the regulation and enforcement of rules and standards respecting public waters and provincial parks.
- [4] The former defendant, the Ministry of Jobs, Tourism and Skills Training is the provincial ministry responsible for the promotion of tourism in British Columbia.
- [5] The Regional District of Kootenay Boundary (the "RDKB") is a provincial electoral district with control and supervision over the lands, premises, and waters that are the subject matter of this action.
- [6] Grand Forks is a city in the RDKB with control and supervision over the lands, premises, and waters that are the subject matter of this action and is located at the confluence of the Granby River and Kettle River. The City of Grand Forks is an "occupier" within the meaning of the OLA.

Background

- [7] Andrew Barrie was swept up while tubing on the Kettle River in Gilpin Grasslands Provincial Park east of Grand Forks, B.C. and died in the Cascade Falls along the river.
- [8] The plaintiffs commenced their action on July 23, 2014. Justice Groves was assigned as the case management judge.
- [9] On November 14, 2014, the plaintiffs unilaterally set a 20-day trial date of June 20, 2016, which was to be heard by a judge with a jury.
- [10] Responses to the civil claim of the several defendants, including the Province, were filed in August and September of 2015.
- [11] The initial lists of documents of the several defendants, including the Province, were produced throughout late September to early November of 2015.
- [12] At a case planning conference on November 30, 2015, Groves J. directed the parties to make their best efforts to complete their document production by the end of 2015 and to complete their examinations for discovery by the end of March 2016.
- [13] At a subsequent case planning conference on April 20, 2016, the first trial was adjourned by consent, and Groves J. ordered that "[a]ny party that intends to update a list of documents is to do so on or before May 20, 2016" and commented that the provincial government entities ("Government-entity defendants") constituted one unified defendant for discovery purposes.
- [14] On August 22, 2016, the plaintiffs set a new 20-day trial, again by a judge with a jury, commencing November 19, 2018.
- [15] On June 6, 2018, the plaintiffs sought orders that the Government-entity defendants produce further and better lists of documents.
- [16] On July 10, 2018, counsel for the plaintiffs delivered a demand letter to the Government-entity defendants pursuant to Rule 7-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. The letter demanded the production of documents respecting any warnings made to the public regarding the dangers of Cascade Falls, if not previously disclosed, and documents respecting any incidents of persons who entered the Kettle River Gorge or Cascade Falls by water regardless of injury or death, if not previously disclosed.
- [17] By letter dated October 11, 2018, the Province provided a fifth amended list of documents disclosing some additional documents related to the installation of warning signs and advised that another amended list was imminent.
- [18] At a trial management conference on October 16, 2018, the plaintiffs requested and obtained an adjournment of the trial date of November 19, 2018.
- [19] The plaintiffs then filed a motion for relief ancillary to the adjournment, including costs, which was adjourned generally, to be reset by counsel.

- [20] By letter dated October 1, 2018, the Province advised about a further 41,570 pages of new documents to come, which did not include documents in the Province's possession post-dating the July 28, 2012 death of Mr. Barrie with respect to signage or other warnings of the existence of Cascade Falls. The second document production order of Groves J. determined that archival assistance would be required and that the extended production deadline of October 15, 2018 likely could not be met.
- [21] By letter dated October 17, 2018, the Province delivered a revised schedule to its sixth amended list of documents, which pertained to document numbering.
- [22] On February 26, 2019, the Province produced a seventh amended list of documents.
- [23] On June 6, 2019, the Province filed an eighth amended list of documents.
- [24] On June 28, 2019, the Province filled a ninth amended list of documents.
- [25] The late-produced documents by the Province included:
- (a) Economic loss reports of Peter Sheldon, dated June 9, 2016 and March 23, 2018;
 - (b) The "Cascade Heritage Power Project -- Recreation and Tourism Assessment" by Catherine Berris, dated June 3, 2003;
 - (c) A Planning Study for the Cascade Power Station Restoration Project -- Prepared for Regional District of Kootenay Boundary by the Bastion Group Report, dated July 27, 1990;
 - (d) A "Ministry of Environment and Climate Change Strategy Decision Note" dated March 26, 2018; and
 - (e) An email from Jessica Spence to John Trehwitt and others respecting placement of Warning Signs dated June 21, 2018.
- [26] On July 2, 2019, the trial of the action was scheduled for 30 days to begin on April 20, 2020. The plaintiffs then filed a notice of application seeking to strike the defence of the Province, and for other ancillary orders. Their application sought orders that:
- a) The Responses to Civil Claim of the Defendants [the Province], Regional District of Kootenay Boundary and City of Grand Forks (collectively, the "Government-entity Defendants") be struck out and judgment on liability be granted to the Plaintiffs against those Defendants.
 - b) The Government-entity Defendants pay to the Plaintiffs special costs and disbursements incurred for all proceedings from the date of commencement of this Action to the date of this Order.
 - c) The Government-entity Defendants pay to the Plaintiffs a tort advance in the amount of \$250,000.

- [27] On January 6, 2020, Groves J. released written reasons for judgment on the plaintiffs' application to strike the defence of the Province, which are indexed at 2020 BCSC 10. Groves J. struck the Province's response to civil claim, granted judgment against the Province, and ordered the Province to pay special costs of the application to the plaintiffs. However, Groves J. dismissed the relief sought by the plaintiffs against the Regional District of Kootenay Boundary and the City of Grand Forks and ordered that each of those parties bear their own costs.
- [28] At a case planning conference on February 10, 2020, Groves J. ordered that the trial set for April 20, 2020 be adjourned and gave the plaintiffs leave and liberty to apply for remedies consequent to the adjournment, including a tort advance.
- [29] On February 25, 2020, the plaintiffs filed a notice of application seeking orders that:
- a) The Province pay to the plaintiffs a tort advance in the amount of \$250,000.
 - b) Alternatively, and only in the event of a successful appeal of the January 6, 2020 strike order, the Province pay special costs and disbursements incurred for all proceedings from the date of commencement of the action to the date of this order, in an amount to be further agreed upon or assessed.
- [30] In April 9, 2020, Groves J. ordered the Province to pay a tort advance in the amount of \$150,000 to the plaintiffs.
- [31] On April 22, 2021, the plaintiffs filed an amended notice of civil claim recognizing a unitary Crown and removing references to the several provincial government ministries.
- [32] On February 9, 2021, the plaintiffs filed a second amended notice of civil claim.
- [33] The Province appealed the orders of Groves J., and was, in large part successful. In the reasons for judgment for the Court of Appeal, indexed at 2021 BCCA 322 at paras.114, 121, and 124, Justice Dickson wrote:
- [114] The judge also made other inaccurate statements of fact in his January 6, 2020 reasons. For example, he stated that the Province had already been required to pay special costs due to its failure to provide documents, which it had not. Rather, in August 2017, the judge awarded the Barrie respondents costs in the cause and, in June 2018, awarded them costs in any event of the cause, which included the legal bill of a research lawyer as a disbursement. While he described the June 2018 costs award as "significant sanctions" and "somewhat punitive", he expressly declined to find the Province's conduct was reprehensible, rejected the application for special costs and warned the Province that if it turned out there were additional undisclosed documents, then special costs "might be ordered."
- [121] The judge made his discretionary determination to strike the Province's response to civil claim based in large measure on the significant erroneous factual findings I have just outlined. In exercising his discretion, he also failed to give sufficient weight to the Province's partial compliance with its disclosure obligations or the detailed explanations for

its conduct that it proffered through counsel and in affidavit form. While the judge was not bound to accept any or all of the Province's explanations, he was obliged to consider and weigh them, but he expressly did not, stating that "there is no explanation offered." Instead, he punished the Province in the most draconian manner possible, primarily because it made the voluminous second tier disclosure mandated by the June 6, 2018 order and first requested by the Barrie respondents two months earlier. He also failed to give sufficient weight to the realistic prospect that the Province would comply in future or to available lesser remedies such as special costs.

[124] The judge awarded special costs against the Province based on an erroneous factual foundation. Although the parties did not address the special costs issue should the strike order be overturned, in its amended notice of appeal the Province asks that this Court also set the special costs order aside. However, I would not disturb the special costs order. While the Province did not misconduct itself to the extent found by the judge, it approached its disclosure obligations and the applications brought by the Barrie respondents in a distinctly unsatisfactory manner. In my view, this conduct contributed significantly to the long delays in moving the litigation forward, which delay has seriously prejudiced the Barrie respondents, and it merits rebuke. Bearing in mind the Province's position when opposing an expedited appeal that any prejudice caused by the loss of the April 2020 trial date could be remedied through a costs award, as discussed at the tort advance hearing, in my view the interests of justice are best served by leaving the special costs award in place.

[34] The resulting order of the Court of Appeal provided:

IT IS ORDERED that the appeals are allowed in part;

IT IS FURTHER ORDERED that the order of Mr. Justice Groves of 9 April 2020 is set aside;

IT IS FURTHER ORDERED that the order of Mr. Justice Groves of 15 January 2020 is set aside, except for paragraph four (4), requiring the appellant to pay the respondents their special costs, and paragraph six (6), dismissing the application to strike the pleadings of the Regional District of Kootenay Boundary and the City of Grand Forks; and

IT IS FURTHER ORDERED that the appellant recovers the costs of the appeals from the respondents promptly after assessment.

[35] A memorandum issued by Justice Dickson dated January 4, 2022 stated:

With respect to Term 5 of the January 15, 2020 Striking Order, the costs order falls at this stage with the judgment on liability at Term 3 having been set aside. With the exception of the special costs order at Term 4 upheld on appeal, as stated in *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2002 BCCA 533 at para. 18, the ultimate disposition of the costs of the proceeding will be a matter for the Court below.

[36] The settled order in the Court of Appeal was entered on February 25, 2022.

[37] The Province sought the immediate payment of its costs of the appeal, and filed an appointment dated April 8, 2022 seeking \$25,280.54 for those costs. The plaintiffs settled and paid the Province's appeal costs.

Relief Sought

[38] The Plaintiffs now seek the following orders:

- (a) The Defendant Province pay to the Plaintiffs special costs and disbursements incurred for all proceedings related to the liability of the Province from the date of commencement of this Action to the date of the Strike Application before Mr. Justice Groves.
- (b) The order made January 6, 2020, that the Defendant Province pay to the Plaintiffs special costs of the previous Strike Application itself be varied to be payable forthwith.
- (c) Defendant Province pay to the Plaintiffs special costs of this continued application, also forthwith.

Discussion

(a) Applicable Supreme Court Civil Rules

[39] Rule 14-1 of the Rules addresses costs. Subrules 14-1(13) and (15) are of relevance to the present application. They provide that:

(13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

(15) The court may award costs

- (a) of a proceeding,
- (b) that relate to some particular application, step or matter in or related to the proceeding, or
- (c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[40] Rule 22-7 of the Rules concerns the effect of non-compliance. Subrules 22-7(2), 22-7(5)(d), and (g) provide that:

(2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may

- (a) set aside a proceeding, either wholly or in part,
- (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,

- (c) allow an amendment to be made under Rule 6-1,
 - (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
 - (e) make any other order it considers will further the object of these Supreme Court Civil Rules.
- (5) Without limiting any other power of the court under these Supreme Court Civil Rules, if a person, contrary to these Supreme Court Civil Rules and without lawful excuse,
- (d) refuses or neglects to answer interrogatories or to make discovery of documents,
- then

- (g) if the person is a defendant, respondent or third party, a present officer of a corporate defendant, respondent or third party or a partner in or manager of a partnership defendant, respondent or third party, the court may order the proceeding to continue as if no response to civil claim or response to petition had been filed.

(b) The Objectives of the Rules

- [41] In *Breberin v. Santos*, 2013 BCSC 560, at paras. 54-57, 61, 63 and 65, Justice Willcock discussed the principles that an order of dismissal seeks to vindicate, and the considerations that should influence the application thereof:
- [54] Where failure to comply with the Rules or failure to comply with the terms of a court order is established, the party at fault bears the onus of proving a lawful excuse for the non-compliance or non-observance: *Balaj v. Xiaogang*, 2012 BCSC 231 at para. 36 [Balaj]; *Eisele v. B.A. Blacktop Ltd. et al*, 2004 BCSC 521 at para. 15.
- [55] In this context, a "lawful excuse" is "one which, in the discretion of the judge acting judicially, is worthy of acceptance": *United Furniture Warehouse LP v. 551148 B.C. Ltd.*, 2007 BCSC 1252 at para. 24.
- [56] Because an action may be struck when the lack of production has been occasioned by negligence, the degree of negligence required should be more than moderate on a scale ranging from mere negligence to gross negligence.
- [57] Fundamental failures, such as failure to make appropriate disclosure of documents or records, must be treated as a serious default.
- [61] A self-represented litigant cannot be held to the same standards as a professional lawyer in terms of compliance with court procedures and rules. That said, a litigant who chooses to represent [themselves] cannot ignore [their] responsibilities with impunity.
- [63] When persistent conduct prevents the litigation from progressing at all, and when trial dates are lost through deliberate defaults, the failures may have an irreparable negative effect on the just determination of a case. Failing to comply with an order in a manner that causes an adjournment of trial is seriously prejudicial to the defendants.

- [65] The desire to address claims on their merits is the preeminent objective of the courts. The Rules are written with a view toward achieving that objective in a just and efficient manner. At some point non-compliance with the Rules frustrates the pursuit of a just outcome. Even in cases where a defendant has admitted liability to a plaintiff, it is just to dismiss the plaintiff's claim if it is not being diligently and fairly pursued. The civil justice system is founded upon the assumption that parties will respect court orders, will comply with the Rules and will work together to resolve the claim or bring it to trial for resolution. A just and efficient outcome will not be obtained if one party frustrates its operation.
- (c) This Court is not Functus Officio Regarding Special Costs
- [42] The plaintiffs contend that they have been deprived of any remedy for the misconduct of the Province that was remarked upon by the Court of Appeal. They assert that the order of the Court of Appeal implicitly remitted the remedial matters back to this Court, and they contend that they are now continuing the previous applications to determine appropriate lesser or alternate remedies for the alleged delicts, dilatory conduct, and omissions of the Province.
- [43] The Province contends that the plaintiffs' application is not properly before the Court and should be summarily dismissed, both because of the unusual manner in which it was filed and because of the relief it seeks in the context of this case. It contends that the plaintiffs are relying on the same material that was before both Groves J. and before the Court of Appeal, but they seek a different conclusion based on a substantially similar argument that their application is a "continuation" of two previous applications that were overturned on appeal.
- [44] The Province contends that the questions of what remedies should be granted to address the Province's previous failures and the resulting trial adjournment are settled. It says that at the appeal, the plaintiffs did not take the opportunity to advance any serious argument that a lesser remedy could or should be granted as the alternative to striking. The Province says that their efforts to argue for additional remedies should be pre-emptively dismissed on the principled application of res judicata, collateral attack, issue estoppel, or abuse of process. It contends that the limited circumstances that would permit re-litigation of an issue previously raised do not exist here. It contends that those limited circumstances include, (1) where the previous issue was not given sufficient, direct attention when it was first raised, or (2) when there is new evidence the previous court was unaware of.
- [45] In the result, the Province contends that Groves J. held a hearing on the merits and made an order dealing with the subject matter of the application. The order was entered, rendering this Court functus officio. The Province contends that to re-open the issue, the plaintiffs need to point to either an exception to the rule or to an order from the Court of Appeal remitting the issue back to the trial court.

- [46] I reject the preliminary objection by the Province. Firstly, in their February 25, 2020 application, the plaintiffs sought a remedy, in the event of a successful appeal of the January 6, 2020 order of Groves J. that the Province pay to the plaintiffs, special costs and disbursements incurred for all proceedings from the date of commencement of the action, in an amount to be further agreed upon or assessed.
- [47] That alternate remedy was not considered by either Groves J. or the Court of Appeal, as Dickson J.A. pointed out at para. 124 of her reasons for judgment. Therefore, I find that I can consider this alternate remedy, given the successful aspects of the Province's appeal.
- [48] Secondly, also at para. 124 of her reasons for judgment, Dickson J.A. noted that the long delays in moving the litigation forward, which seriously prejudiced the plaintiffs, merited rebuke. Part of Groves J.'s decision sought to address this and was overturned, leaving that address incomplete.
- [49] Based on the parameters identified in the judgment of the Court of Appeal, I do not accept that I am estopped from the reconsideration of costs or what the plaintiffs describe as "lesser remedies".
- (d) The Determination of a Special Costs Award
- [50] The Province concedes that the authorities relied upon by the plaintiffs identify the need for proportionality and a rational connection between the delict and the remedy. Despite this, they contend that an award of special costs of the entire action is not justifiable, considering the Court of Appeal's findings that the basis for that award by Groves J. is unsupportable.
- [51] The plaintiffs assert that they have repaid \$70,000 of the tort advance that had not yet been paid to the plaintiff, Carol Barrie. They also assert that the Province has demanded the return of the sum of \$80,000 that was paid to the plaintiff, Carol Barrie. The plaintiffs argue that they have settled and paid to the Province the appeal costs of \$25,280.54, and the Province is now taking the position that the plaintiffs special costs of the strike application are not payable forthwith.
- [52] The plaintiffs contend that their review of the Province's late-disclosed documents has revealed previously undisclosed knowledge of the Government-entity defendants respecting the use of the Kettle River upstream of Cascade Canyon for recreational purposes, including tubing, as well as knowledge of the level of development related to the former Cascade Dam.
- [53] The plaintiffs argue that their claim involves multiple defendants, each of whom has asserted defences that implicate the potential liability of the others. They contend that as the location of the incident is far removed from the place of trial, site visits with counsel and its experts were of limited value, conducted with incomplete or inaccurate information from the Province.

- [54] The plaintiffs say that the examinations for discovery conducted under such circumstances are likewise incomplete and must be continued to explore new evidence provided after the date of prior examinations.
- [55] They also contend that the contents of some of the documents contradict statements made by representatives of the original Government-entity defendants at prior examinations for discovery regarding warning issues and the feasibility of placing warnings along the Kettle River upstream of Cascade Falls, and that the sheer volume of newly disclosed documents combined with the inconsistencies between the documents and prior testimony effectively forces them to "re-tool" and re-start their litigation due to the late disclosure of voluminous documents by the Province.
- [56] On the evidence before the Court of Appeal, this sweeping assertion was rejected by Dickson J.A., who found at paras. 116-117:
- [116] Nor does the record support the judge's finding that the Barrie respondents would have to "completely re-tool and re-start their litigation" based on the Province's recent voluminous disclosure, as baldly asserted by their counsel. That voluminous disclosure largely responded to an issue first identified to the Province by the Barrie respondents in April 2018, namely, the existence of the old and proposed hydroelectric projects near Cascade Falls. While the new disclosure may have led to a helpful train of inquiry, justified further examination for discovery and provided fodder for cross-examination, I see no support for the finding that a complete "re-tooling" of the case was necessary and, if so, why.
- [117] Most importantly, the record does not support the judge's blanket findings that the Province did not take necessary steps to research its records and disclose documents until 2019, and that, despite the August 21, 2017 order and its verifying affidavit, it did not comply with its disclosure obligation for over 20 months thereafter. Nor does it support his blanket findings that the Province did not provide "actual final substantive document disclosure" until the summer of 2019 and "completely failed in its obligations between three and four years to abide by the Civil Rules and disclose relevant documents": at paras. 30, 34. The judge made these general statements without analysing the pleadings to identify the material facts for disclosure purposes, without apparent regard to the differing nature of the disclosure required by the August 21, 2017 and June 6, 2020 orders and without specifically referring to any of the documents listed or not listed by the Province as the litigation unfolded over time.
- [57] In *Bolin v. Lylick*, 2018 BCCA 127 at para. 19, Justice Saunders determined:
- [19] In these circumstances, there is no apparent reason to depart from the usual approach to costs in circumstances of a late adjournment; in other words, there is no apparent reason not to relieve the defendants from the prejudice of the late adjournment by an award of costs thrown away. It is to be remembered that even though the judge did not attribute fault to the plaintiff in the adjournment application, in asking for an adjournment the plaintiff was asking for an indulgence from the court that had adverse consequences for the

defendants. I would add to the order made for the adjournment a term that the defendants are entitled to their costs of trial preparation thrown away. I would not define the degree of such wasted costs in the circumstances of this case as was done, for example in *Dhillon v. Foster*, 2004 BCSC 1782, to which we have been referred, and I note further, that what fits within the waste captured by the term "costs thrown away" is properly a matter for the trial court's determination.

- [58] While "costs thrown away" is a matter for this Court to determine, I find that I am unable to do so. Without specific evidence of what the plaintiffs are forced to re-start or re-do in this litigation, there is no evidentiary basis upon which I could determine the plaintiffs' expenses that are said to have been thrown away.
- [59] I reject the plaintiffs' submission that, in effect, they must start over. I am confident that many of the steps they have taken to date, including their examinations for discovery and retention of experts, will still be of value. I am unable to accept that the money that the Court of Appeal has determined to have been inappropriately paid to the plaintiffs and their lawyers, in and of itself, warrants even one of the "lesser" remedies they seek.
- [60] In the result, I dismiss the plaintiffs' application for an order that the Province pay them special costs from the date of commencement of the plaintiffs' action to the date of the January 6, 2020 application before Groves J.
- (e) Varying the Previous Special Costs Order to be Payable Forthwith
- [61] The second order the plaintiffs seek is that the order for special costs on the application to strike the Province's defence be accelerated such that it be made payable forthwith, as were the costs awarded on the Province's largely successful appeal.
- [62] The plaintiffs contend that the special costs award for the strike application payable forthwith is the only "meaningful" lesser remedy for the discovery misconduct and incidental loss of trial date that occurred here.
- [63] The Province contends that the order made by the Court of Appeal must be perceived as taking into consideration Rule 14-1(13), which means that costs would be payable at the conclusion of the proceeding. The Province argues that the only allegedly "new" information is that the parties have satisfactorily resolved that issue. That only confirms the parties have met the expectations of the Court of Appeal. Without more, that is not a sufficient basis to vary the order, even if this Court had the jurisdiction to do so. Both Groves J. and the Court of Appeal granted the plaintiffs the special costs of the application knowing they would have to await payment at the end of trial. In the case of the latter, it confirmed that payment, knowing it had also granted costs of its own proceedings be paid more promptly (the appeal costs awarded to the Province).

- [64] I do not accept this submission, given the reasons of Groves J. dated January 6, 2020, noting that, "Any remedy, including a remedy of special costs from the moment the litigation began to date would not, in my view, be a sufficient remedy to [compensate] this plaintiff for the loss": at para. 37.
- [65] The comments of Dickson J.A., in part, at para. 124 also support the view that the special costs award was punitive in nature:
- [124] I would not disturb the special costs order. While the Province did not misconduct itself to the extent found by the judge, it approached its disclosure obligations and the applications brought by the Barrie respondents in a distinctly unsatisfactory manner. In my view, this conduct contributed significantly to the long delays in moving the litigation forward, which delay has seriously prejudiced the Barrie respondents, and it merits rebuke. Bearing in mind the Province's position when opposing an expedited appeal that any prejudice caused by the loss of the April 2020 trial date could be remedied through a costs award, as discussed at the tort advance hearing, in my view the interests of justice are best served by leaving the special costs award in place.
- [66] The Province argues that there is no "rational connection" between the severity of the delict, the effect of the delict, and the proposed remedy. It says that the only context available comes from the plaintiffs' earlier submissions, where they sought a tort advance, estimating their costs at "well over" \$75,000 in disbursements and \$250,000 in legal time on this action.
- [67] The Province contends that using those estimates, the plaintiffs would have this Court conclude that either they retain no value from the more than \$300,000 in legal work and disbursements as a result of the Province's misconduct, or that the Province's conduct was so egregious that it warrants a payment of costs equal to a substantial portion of the damages they claim from several defendants, prior to a determination on the merits.
- [68] While the relief sought by the plaintiffs before Groves J. was found to have been overreaching on the appropriate facts reviewed by the Court of Appeal, in my view, the repayment of the costs awarded to the Province by the Court of Appeal is a factor that I may consider in the event I entertain the "lesser" remedies sought by the plaintiffs.
- [69] I have reached this conclusion given the Province's position that its costs award must be paid forthwith as the result of the orders of the Court of Appeal. I find it is unfair for the Province to argue that the plaintiffs must wait until the assessment of final costs for their special costs award while the Province has already received a payment of special costs that were ordered to be payable forthwith.
- [70] I order that the Province must pay forthwith the special costs ordered by Groves J., which was not disturbed by the Court of Appeal.
- (f) Special Costs of the Continued Application to be Payable Forthwith

- [71] The third order sought by the plaintiffs is that the special costs of this "continued" application be paid forthwith. The Province thus seeks the opportunity to further address the issue of costs of this application after all other issues have been decided.
- [72] While it is my view that the Province ought to have made its submissions on this aspect of the plaintiffs' application when it was argued before me, I will permit them one week from the date of these reasons for judgment to file and serve written submissions on this aspect of the application. I will allow the plaintiffs one week thereafter to reply. In the event the Province wishes to reply to the further submissions of the plaintiffs on this aspect of the matter, they will have one week thereafter to do so.

Conclusion

- [73] I find that I am not estopped from the reconsideration of costs or what the plaintiffs describe as "lesser remedies".
- [74] However, based on the evidence before me, I am unable to determine the plaintiffs' costs thrown away, and therefore I am unable to determine the amount of their special cost entitlements.
- [75] I reject the plaintiffs' submission that they must "start-over" their litigation. Therefore, I dismiss the plaintiffs' application for an order that the Province pay them special costs from the date of commencement of the plaintiff's action to the date of the January 6, 2020 application before Groves J.
- [76] I order that the Province must pay forthwith the special costs ordered by Groves J.
- [77] The Province ought to have made its submissions on the issue of costs on this application. I permit them one week from the date of these reasons to file and serve written submissions, and the plaintiffs are permitted one week to reply. The Province is permitted one week thereafter to submit a further reply.

"The Honourable Chief Justice Hinkson"

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