
CANADA / JUDGMENT

Envirocon Environmental Services, ULC v. Suen

2020 BCCA 201

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 201 Envirocon Environmental Services, ULC v. Suen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Envirocon Environmental Services, ULC v. Suen,

2020 BCCA 201

Date: 20200717

Docket: CA45533

Between:

Envirocon Environmental Services, ULC

Appellant

(Petitioner)

And

Brian Suen and British Columbia Human Rights Tribunal

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Goepel

Supplementary Reasons to Envirocon Environmental Services ULC v. Suen,
2019 BCCA 46.

Counsel for the Appellant:

B.I. Hillis

Counsel for the Respondent, Brian Suen:

F.G. Wynne

Place and Date of Hearing:

Vancouver, British Columbia

November 27, 2018

Place and Date of Judgment:

Vancouver, British Columbia

February 5, 2019

Written Submissions Received:

April 27, May 13,

June 8, 22, and 29, 2020

Date of Supplementary Reasons:

July 17, 2020

Supplementary Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Stromberg-Stein

The Honourable Mr. Justice Goepel

Summary:

Application to reopen an appeal on the issue of costs in the Supreme Court of British Columbia. An employer appealed the dismissal of its judicial review application from a decision of the Human Rights Tribunal denying its application to dismiss a former employee's complaint on a preliminary basis. The Tribunal held there were two bases on which the complaint might succeed. However, on appeal, the employer challenged only one of those bases; that appeal was successful. The formal order entered to give effect to this Court's decision awarded appeal costs to the employer but was silent with respect to Supreme Court costs. When counsel for the parties agreed to the terms of that order they believed the employer was entitled to Supreme Court costs

even though there was no recital to that effect in the order. Later, the former employee raised the absence of such a recital as a bar to the employer having those costs assessed. The employer then applied to reopen the appeal. The former employee took the position the Court had no jurisdiction to reopen. Held: Appeal reopened; the parties to bear their own costs in the Supreme Court and of this application. Rule 50(b) of the Court of Appeal Rules permits the Court to consider a costs issue that should have been adjudicated earlier. The employer did not achieve on appeal the position it advanced from the start. In the end, success in the Supreme Court was divided.

Supplementary Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] In reasons for judgment indexed as 2019 BCCA 46, this Court allowed an appeal by Envirocon Environmental Services, ULC from the order of a judge of the Supreme Court of British Columbia dismissing its petition for judicial review of a decision of the British Columbia Human Rights Tribunal. The order entered to give effect to those reasons awarded Envirocon costs of the appeal but was silent with respect to Supreme Court costs.
- [2] Over a year later, Envirocon applied to reopen the appeal for the purpose of seeking Supreme Court costs. The respondent, Brian Suen, opposed that application. This Court agreed to reopen the appeal and directed the parties to file submissions on the merits of Envirocon's request for Supreme Court costs.
- [3] For the reasons that follow, I have concluded the parties should bear their own costs in the Supreme Court and in connection with this application. In addition, I will explain why we reopened the appeal.

Factual Background

- [4] Mr. Suen alleged Envirocon discriminated against him in the area of employment on the basis of "family status", in violation of the Human Rights Code, R.S.B.C. 1996, c. 210. Envirocon applied to have Mr. Suen's complaint dismissed on a preliminary basis, i.e., without a full hearing. In dismissing that application, the Tribunal held there were two bases on which Mr. Suen might succeed: (i) direct discrimination; and (ii) indirect or adverse affect discrimination. Envirocon then filed a petition in the Supreme Court of British Columbia seeking judicial review of the Tribunal's decision. It sought an order quashing the Tribunal's decision and dismissing Mr. Suen's complaint in its entirety or, alternatively, remitting the matter to the Tribunal for reconsideration. A chambers judge dismissed the petition and awarded Mr. Suen costs.
- [5] Envirocon appealed the chambers judge's order to this Court. In its notice of appeal, it sought to have the chambers judge's order set aside, the Tribunal's decision quashed, and Mr. Suen's complaint dismissed in its entirety, or, alternatively, the matter remitted to the Tribunal for reconsideration. In addition, it sought costs in its favour throughout the

proceedings. In its factum on the appeal, Envirocon did not distinguish between the direct and adverse affect discrimination aspects of the Tribunal's decision and sought the principal and alternative relief set out in its notice of appeal. In his factum, Mr. Suen sought an order that the appeal be dismissed with costs throughout in his favour or, alternatively, that the matter be remitted to the Tribunal with directions from this Court.

- [6] At the hearing of the appeal, Envirocon no longer sought to have Mr. Suen's complaint dismissed in its entirety. For the first time, it accepted there would be a hearing on the direct discrimination aspect of that complaint. As a result, Envirocon limited its submissions to seeking an order quashing the adverse effect discrimination aspect of the Tribunal's decision.
- [7] On February 5, 2019, this Court released its reasons for judgment. It found that the Tribunal erred in permitting the adverse effect discrimination aspect of Mr. Suen's complaint to proceed. In the final paragraph of those reasons I stated:
- [36] I would allow this appeal, set aside the chambers judge's order, quash the Tribunal's decision declining to dismiss the adverse affect discrimination aspect of Mr. Suen's complaint, and remit the matter to the Tribunal for further proceedings consistent with these reasons.
- [8] In keeping with the Court's usual practice, our reasons were silent on costs. That practice is set out in the Costs (Civil Practice Directive, 30 May 2013), which reads:

The purpose of this practice directive is to explain the Court of Appeal's practice and the parties' responsibilities with respect to awards of costs. An award of costs in the Court of Appeal is governed by s. 23 of the Court of Appeal Act which reads:

Costs

23 Unless the court or a justice otherwise orders, the party who is successful on an appeal is entitled to costs of the appeal including the costs of all applications made in the appeal.

The Court of Appeal does not usually refer to costs in reasons for judgment. Section 23 of the Act presumes that a successful party is entitled to costs. When preparing a court order arising from an appeal, the successful party must insert a term for costs in the final order. Court forms provided in the Court of Appeal Rules all contain a direction for costs.

If the parties cannot agree on costs, any party may send a letter to the Registrar with copies to all parties, indicating the desire to address the question of costs and briefly summarising the dispute. The parties may set out a proposed schedule for submissions in the letter or the Registrar will arrange a timetable for those submissions.

When the issue of costs is raised at the hearing before the Registrar to settle the order, the Registrar may settle the dispute by reference to s. 23 of the Act or may refer the issue to the division which heard the appeal. The Registrar will not assess a bill of costs in the absence of a costs term included in the order. If a party has mistakenly entered an order without a direction for costs, it is permissible to apply pursuant to the slip rule (r. 50) to amend the order and provide for costs.

Counsel are reminded of the particular provisions for costs in s. 37 of the Class Proceedings Act.

[9] By virtue of this Court's long-standing practice in non-criminal matters, Envirocon, as the successful party, was responsible for drafting the order to give effect to this Court's reasons: *Carrier Lumber Ltd. v. Joe Martin & Sons Ltd.*, 2004 BCCA 450 at para. 1, 33 B.C.L.R. (4th) 322. Following release of those reasons, Envirocon's counsel sent counsel for Mr. Suen and the Tribunal an email in which he stated, in part:

Attached is the proposed form of order. I trust it will meet your approval. It mirrors the language of para. 36 of the Court's reasons and proceeds on the basis of the Court of Appeal Act (s. 23) and the applicable civil practice directive on the matter of costs.

The draft order contained the following recital with respect to costs:

AND THIS COURT FURTHER ORDERS that the Appellant do recover the costs of the appeal and throughout this proceeding from the Respondent, Brian Suen, promptly after assessment.

[10] Mr. Suen's counsel responded stating, among other things:

The costs term should read "the appellant do recover the costs of the appeal from the respondent promptly after assessment." See the registry's form 23 for example.

Form 23 provides:

AND THIS COURT FURTHER ORDERS that [insert name of successful party on the appeal] do recover the costs of the appeal from [insert name of unsuccessful party] promptly after assessment.

[11] Envirocon's counsel responded:

I can make that change and will ensure that you and [counsel for the Human Rights Tribunal] receive the updated form of order with your requested revisions incorporated.

Note that my client's position remains that it is the usual rule which applies. When an appeal is allowed, the appellant is entitled to costs in both the Court of Appeal and the court below. See, for instance, *Urban Communications Inc. v. BCNET Networking Society*, 2015 BCCA 412, *Murphy v. Murphy*, 2007 BCCA 591, *Win Sun Produce v. Albert Fisher Canada*, 1999 BCCA 94 and *British Columbia (Director of Civil Forfeiture) v. Hyland*, 2010 BCCA 219.

[12] The order, approved as to form by all counsel, was entered on February 12, 2019. The operative recitals in that order read:

THIS COURT ORDERS that the appeal is allowed;

AND THIS COURT FURTHER ORDERS that the Chambers Judge's Order be set aside;

AND THIS COURT FURTHER ORDERS that the decision of the Respondent British Columbia Human Rights Tribunal dated October 19, 2017 declining to dismiss the adverse effect discrimination aspect of the Respondent Brian Suen's complaint be quashed;

AND THIS COURT FURTHER ORDERS that the matter be remitted to the Respondent British Columbia Human Rights Tribunal for further proceedings consistent with the reasons of this Court dated February 5, 2019; and

AND THIS COURT FURTHER ORDERS that the Appellant do recover the costs of the appeal from the Respondent Brian Suen promptly after assessment.

[13] Envirocon and Mr. Suen agreed to have this Court's registrar assess the costs of the appeal and the judicial review on the basis of written submissions. Envirocon provided draft bills setting out the costs it sought to recover. Mr. Suen's primary position on the assessment was that Envirocon ought to face cost sanctions for waiting until the hearing of the appeal to narrow the scope of its challenge to the Tribunal's decision. He submitted Envirocon should either be deprived of costs throughout, or have its appeal costs reduced by 50%. Mr. Suen challenged some of the items claimed by Envirocon and provided his own draft bills setting out the costs he considered were recoverable by Envirocon in both courts.

[14] The registrar issued his costs reasons on May 30, 2019. He reduced the appeal costs claimed by Envirocon but declined to assess its costs on the judicial review. With respect to the latter, he stated:

Supreme Court Costs: I see that the parties have included a bill of costs relating to the petition proceedings in the Supreme Court of British Columbia and would invite me to assess those costs. Even if I had jurisdiction to do so, which is unlikely, I would refer the assessment of those costs to a Registrar of the Supreme Court.

[15] The parties took steps to have an officer of the Supreme Court of British Columbia assess Envirocon's costs on the judicial review. Just prior to that assessment hearing, Mr. Suen took the position this Court's order did not entitle Envirocon to recover those costs. On January 9, 2020, a Supreme Court master held he did not have jurisdiction to assess Supreme Court costs and that entitlement to those costs needed to be determined by the division that heard the appeal. He further held that Mr. Suen was entitled to costs of the assessment application in the cause, subject to this Court's judgment.

[16] Following the master's decision, Envirocon's counsel wrote to this Court's registrar seeking directions with respect to raising the issue of Supreme Court costs before the division that heard the appeal. He stated he and Mr. Suen's counsel were of the view it would be appropriate for the division to deal with that matter in writing. The registrar advised the parties it was necessary for Envirocon to apply to reopen the appeal and set a schedule for

filing submissions. After considering those submissions, we agreed to reopen the appeal to consider the issue of Supreme Court costs and, through the registrar, directed the parties to file further submissions.

Analysis

Can/Should the Appeal Be Reopened?

- [17] Mr. Suen contends this Court has no jurisdiction to reopen this appeal because an order was entered following a hearing on the merits. His position is that the common-law doctrine of *functus officio* precludes this Court from amending its order. Under that doctrine, an entered order can be changed in only two circumstances, i.e., "where there has been a slip in drawing it up", or "where there has been error in expressing the manifest intention of the court": *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186 at 188; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at 860.
- [18] Mr. Suen cites one authority in support of his position: *R. v. Widdifield*, 2016 BCCA 412. In that case, this Court released reasons for judgment dismissing a conviction appeal. Those reasons addressed the merits of all the grounds of appeal that had been advanced. Several weeks after the order dismissing the appeal was entered, Mr. Widdifield applied to reopen the appeal to raise a new ground. In quashing that application, this Court held it "has no jurisdiction to reopen an appeal that has been heard on the merits where an order dismissing the conviction appeal has been entered": at para. 22.
- [19] The present case is distinguishable. Unlike *Widdifield*, we did not address the merits of all the issues raised by the parties on the appeal. More importantly, as discussed below, there is a body of jurisprudence grounded in this Court's rules that deals with when an order can be amended to address costs.
- [20] Mr. Suen further submits the so-called "usual rule" that a successful appellant is entitled to costs both in this Court and the court below, as reflected in *Murphy v. Murphy*, 2007 BCCA 591 at para. 3, 72 B.C.L.R. (4th) 324, does not justify reopening because that rule does not apply in the circumstances of this case. In effect, Mr. Suen says reopening should be denied because Envirocon's request for Supreme Court costs is bound to fail. However, based on the submissions filed on the reopening application, we could not conclude that Envirocon's request was so devoid of merit that no purpose would be served by permitting further submissions.
- [21] Last, Mr. Suen submits, in effect, that Envirocon is estopped from seeking Supreme Court costs because the agreed upon entered order is silent in that regard. In his reopening submissions, Mr. Suen states:

It was never intended by the Respondent or agreed between the parties that the Appellant should be entitled to Supreme Court costs given the nature and outcome of this appeal as described above. To the contrary, the Respondent objected to such a term when proposed by the Appellant, and the Appellant subsequently agreed to the current order limited to costs of the appeal only.

This, however, does not accurately reflect what occurred in connection with the entry of the order and fails to take into account what happened afterwards.

[22] It is clear from the correspondence between counsel that when the terms of the order were discussed, Envirocon's counsel was of the view his client was entitled to Supreme Court costs even though the order was silent in that regard. He communicated that view to Mr. Suen's counsel who did not say otherwise. If, at that time, Mr. Suen's counsel had been of the contrary view, then I would have expected him to so advise Envirocon's counsel. Had Mr. Suen's counsel done so, then, as provided for by the Costs practice directive, we would have determined that issue prior to the order being entered.

[23] A further indication that Mr. Suen's counsel did not consider the absence of a Supreme Court costs recital in the order fatal to Envirocon's position is the fact that he submitted a draft bill with respect to those costs at the assessment hearing before this Court's registrar. However, absent such a recital, the registrar properly held he lacked jurisdiction to assess those costs. For the same reason, the Supreme Court master also properly held he did not have jurisdiction to assess those costs.

[24] I turn now to the authorities that discuss reopening an appeal to address costs, none of which were cited by the parties. Those authorities focus on what is now Rule 50 of the Court of Appeal Rules, which reads:

At any time, the court or a justice may

- (a) correct an error in an order that arose from a clerical mistake or from any other accidental slip or omission, or
- (b) amend an order to provide for any matter that should have been but was not adjudicated.

[25] In *Kenmar Inns Ltd. v. Letroy* (1994), 100 B.C.L.R. (2d) 323 (C.A.), this Court, in its original reasons, allowed an appeal by Letroy and remitted the matter to the Supreme Court of British Columbia for an assessment of damages. In those reasons, the Court awarded Letroy costs of the appeal and ordered that costs of further proceedings in the Supreme Court be assessed by that Court: (1993), 86 B.C.L.R. (2d) 167 (C.A.) at paras. 37-40. Although in its *factum* Letroy had sought an order remitting costs of the first trial for determination, this Court did not address that issue. The entered order, drafted by Letroy's counsel, did not contain a recital dealing with the costs of the first trial. Later, Letroy applied to amend the order to deal with those costs. It relied on what was then Rule 23(1) of the Court of Appeal Rules, which provided:

The court may

- (a) correct a clerical mistake in an order that arose thorough an accidental slip or omission, or
 - (b) amend an order to provide for any matter that should have been but was not provided in the order, or to express its intent better.
- [26] Justice Southin held that the omission was not a clerical mistake caught by s. 23(1)(a) and, therefore, the question was whether it was a matter "that should have been but was not provided in the order": para. 23. She concluded it was and granted the amendment. In doing so, she stated:
- [50] It would, in truth, be a poor legal system in which a litigant loses the costs which are rightfully his, or which at least deserve to be considered again, because his counsel who had, so to speak, the last clear chance, failed when he drew up the order to take it.
- [27] In 374787 B.C. Ltd. v. Dion, 2002 BCCA 429, 4 B.C.L.R. (4th) 45, this Court in its original reasons dismissed an appeal taken by Dion but said nothing with respect to costs: 2002 BCCA 297 at paras. 10-13. At the hearing the company was represented by its president, Mr. Zazkis. Following the appeal, Mr. Zazkis drafted an order that was silent as to costs because he was mistakenly of the view that s. 23 of the Court of Appeal Act obviated the need to mention costs expressly. That order was approved by Dion's counsel and entered. In allowing the company's application to amend the order to include a recital awarding it appeal costs, Justice K.J. Smith, after setting out the passage from Kenmar Inns quoted above, stated:
- [19] In my opinion, those comments are apt in the present case, although the circumstances are not identical. The respondent ought not to lose costs that it would be entitled to as of course because its representative - not a lawyer - omitted, under a mistaken view of the procedural law, to include an express order for costs when he drew up the judgment. That is particularly so here, where the other party was represented by a lawyer who knew that Mr. Zazkis intended to obtain an order for costs; who knew that Mr. Zazkis believed that s. 23 of the Act was the governing authority; who must have at least suspected that Mr. Zazkis believed that s. 23 meant that he did not have to set out an express order for costs; who, after objecting that the proposed draft judgment was not in proper form, was invited by Mr. Zazkis to point out any specific errors of form; and who, when presented with the second draft, which omitted any reference to costs, said nothing and simply endorsed it with his approval.
- [28] In Carrier Lumber Ltd., Carrier Lumber had earlier succeeded on its appeal from the order of a Supreme Court judge setting aside an arbitral award in its favour. In its factum, Carrier Lumber sought costs in both courts. However, in its original reasons this Court did not address costs: 2004 BCCA 26 at para. 38, 23 B.C.L.R. (4th) 136. The order entered awarded Carrier Lumber appeal costs only. Later, on the basis of Rule 50(b), this Court amended the order to award Carrier Lumber Supreme Court costs. In doing so, Southin J.A. stated that although the wording of Rule 50(b) was "slightly different" than that of former Rule 23(1)(b), "the differences are not significant": para. 8.

- [29] In *Lam v. Sumner Estate*, 2008 BCCA 50, 251 B.C.A.C. 177, this Court in its original reasons dismissed an appeal taken by Sumner Estate but said nothing with respect to costs: 2006 BCCA 427, 231 B.C.A.C. 48 at paras. 15-18. The order was drafted by Lam's counsel who overlooked including an award of appeal costs in his client's favour. In granting Lam's application to amend the order to include a costs award, Justice K.C. Mackenzie said this:
- [3] The appellant submits that [374787 B.C. Ltd. v. Dion], in para. 14, limits the Court's discretion to cases of mistake and not inadvertence as occurred here. The Court in *Dion* relied on [Kenmar Inns Ltd. v. LeTroy], where the discretion is more broadly stated by Southin J.A. at para. 50. In our view, *Dion* is simply a particular application of the broader discretion which is sufficient to extend to counsel's inadvertence here. The appellant also submits that the one year's delay in applying to amend the order is untimely. We are not satisfied that the delay is so lengthy as to deprive the respondent of a remedy in the absence of clear prejudice to the appellant from delay.
- [30] Last, in *Falvai v. Falvai*, 2009 BCCA 387 at paras. 2, 6, 73 R.F.L. (6th) 52, this Court amended an order to award appeal costs to the successful appellant. Although the appellant had sought appeal costs in her factum, this Court did not address that issue in its original reasons: 2008 BCCA 503 at para. 46, 86 B.C.L.R. (4th) 47. The appellant's counsel failed to include such a recital in the order because he mistakenly understood his client would automatically receive those costs by operation of s. 23 of the Court of Appeal Act.
- [31] Returning to the present case, it is clear that when this Court's order was entered and for some time thereafter, both counsel believed Envirocon was entitled to Supreme Court costs even though the order was silent in that regard. It was not until just prior to the assessment hearing before the Supreme Court master that Mr. Suen's counsel took the position that the absence of such a recital precluded Envirocon from assessing and recovering those costs.
- [32] It would be unfair to deny Envirocon the opportunity to have this Court consider its entitlement to Supreme Court costs because when the order was entered both counsel, to use a colloquialism, "dropped the ball". If Envirocon is entitled to those costs, then this Court has, by virtue of Rule 50(b), authority to amend its order accordingly.
- [33] It is for these reasons that we agreed to reopen the appeal to consider the issue of Supreme Court costs.

Is Envirocon Entitled to Supreme Court Costs?

- [34] Envirocon submits it is entitled to Supreme Court costs because of its success on the appeal. In its written submissions, it states its position as follows:
7. The Usual Rule holds that when an appeal is allowed and judgment is granted in an appellant's favour on the substantive issues, the appellant is entitled to costs in both this Court and in the court below: *Murphy v. Murphy*, 2007 BCCA 591, at para. 3. It is well-established that a successful party includes one who achieves "substantial success", and "substantial success" does not require success on all issues: *Canadian Centre for Bio-Ethical*

Reform v. South Coast British Columbia Transportation Authority, 2018 BCCA 440 at paras. 5-6.

[Emphasis in original.]

- [35] Mr. Suen submits the most appropriate outcome is for each party to bear their own costs. He relies principally on the fact that at the hearing of this appeal Envirocon changed its position and no longer sought to have the Tribunal's decision quashed in its entirety.
- [36] In my view, Envirocon overstates the "usual rule" in relation to a successful appellant's entitlement to costs in the court appealed from. That rule requires consideration of what was in dispute at first instance and on appeal, including the outcomes sought by parties.
- [37] In the passage from Murphy that Envirocon relies on, this Court stated:
- [3] The usual rule is that when an appeal is allowed and judgment is granted in an appellant's favour on the substantive issues, the appellant is entitled to costs in both this Court and in the court below: *Win Sun Produce Co. v. Albert Fisher Canada Ltd.*, 1999 BCCA 94. There is no reason why this rule should not be followed with respect to the issue of child support.
- [38] In that case, Mr. Murphy successfully applied in the Supreme Court to vary his child and spousal support obligations. This Court allowed Mrs. Murphy's appeal, set aside the Supreme Court order, dismissed Mr. Murphy's application to vary child support, and remitted the issue of spousal support for a rehearing. Later, the Court awarded Mrs. Murphy Supreme Court costs, in part, because the order she obtained on the child support issue on appeal was the order she had sought in the first instance.
- [39] In *Win Sun Produce Co. Ltd. v. Albert Fisher Canada Ltd.*, 1999 BCCA 94, a trial judge dismissed Win Sun Produce's claim and allowed Albert Fisher Canada's counterclaim. This Court allowed Win Sun Produce's appeal on both matters and awarded it damages. In applying the "usual rule" to award Win Sun Produce the costs of the trial, this Court stated that, "the plaintiff, having been entirely unsuccessful at trial, was entirely successful on appeal": at para. 1.
- [40] More recently, in *Urban Communications Inc. v. BCNET Networking Society*, 2015 BCCA 412, 80 B.C.L.R. (5th) 184, the Court stated:
- [6] The jurisprudence from this Court confirms that a party who is successful on appeal in achieving the position it has advanced from the start of the action is generally entitled to its costs throughout the proceedings at both the trial and appeal level. See *Gecho v. BCCA Insurance Corp.* (1997), 42 B.C.L.R. (3d) 200 at para. 6 and *Tri-Minerals Inc. v. Mineral Hill Industries Ltd.*, 2005 BCCA 383 at paras. 1-3.

[Emphasis added.]

See also: *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2017 BCCA 176 at para. 15, 98 B.C.L.R. (5th) 265; *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 181, 25 B.C.L.R. (6th) 316.

- [41] In the present case, when Envirocon filed its petition for judicial review it sought to quash the Tribunal's decision in its entirety. Its initial objective was to prevent that complaint from going forward to a full hearing. However, on appeal Envirocon abandoned its challenge to the direct discrimination aspect of the Tribunal's decision and accepted there would be a hearing on that question. Consequently, it cannot be said that by obtaining an order from this Court quashing the adverse effect discrimination aspect of the Tribunal's decision Envirocon achieved the position it advanced from the start.
- [42] Envirocon's reliance on the discussion concerning "substantial success" in *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 440, 18 B.C.L.R. (6th) 375, is also misplaced. It says because it was successful on the appeal it ultimately pursued, it should be regarded as having been substantially successful on the judicial review application. However, as discussed above, the order Envirocon sought from this Court was different from that which it sought from the Supreme Court.
- [43] The issue in *Canadian Centre for Bio-Ethical Reform* was a decision by the South Coast British Columbia Transportation Authority ("Translink") to deny the Canadian Centre for Bio-Ethical Reform ("CCBR") advertising space on its buses. The CCBR filed a petition for judicial review in the Supreme Court of British Columbia seeking to have that decision quashed. That petition was dismissed with costs being awarded to Translink; the CCBR appealed. This Court allowed the appeal, set aside the impugned decision, and remitted the CCBR's request to buy advertising space to Translink for reconsideration. The Court did not accede to the CCBR's submission that an order in the nature of mandamus should issue requiring Translink to accept its advertisement.
- [44] Following the release of this Court's reasons for judgment, the parties disagreed on whether the CCBR was entitled to costs, both in this Court and the Supreme Court. The CCBR's position was that it should be awarded costs in both courts; Translink's position was that the parties should bear their own costs, on the basis that success was divided in both courts. Translink placed particular emphasis on the fact that this Court did not order Translink to accept the CCBR's advertisement.
- [45] This Court awarded the CCBR costs in both courts on the basis it had achieved "substantial success" on the appeal by obtaining an order quashing Translink's refusal to sell it advertising space. That this Court did not accede to every one of the CCBR's arguments did not diminish its level of success to below "substantial". As the cases the Court cited in its reasons for allowing the CCBR's appeal indicate, only in exceptional circumstances will a court that allows a judicial review application do other than remit the matter for reconsideration: 2018 BCCA 344 at para. 60, 13 B.C.L.R. (6th) 325.

- [46] Here, it is clear that Envirocon did not achieve on appeal the position it advanced at the outset. In the end, it succeeded in quashing only one of the two bases on which the Tribunal rested its decision. This Court's judgment in *Reid v. Reid*, 2017 BCCA 191, 96 B.C.L.R. (5th) 49, provides guidance in this situation. In its initial judgment, the Court allowed Ms. Reid's appeal in part and said, "[i]n light of the success of Ms. Reid, she should have her costs in the trial court and on appeal: 2017 BCCA 73 at para. 134, 95 B.C.L.R. (5th) 30. Mr. Reid subsequently asked the Court to reconsider costs. The Court confirmed its award of appeal costs, but altered its trial costs award, stating:
- [14] As we have indicated, it is our view that Ms. Reid was the substantially successful party on the appeal. We are not, however, persuaded that the same can be said with respect to the issues at trial. The situation at trial was substantially more complex than the situation on appeal. Some complicated and time-consuming issues raised by Ms. Reid at trial were not pursued on appeal. Further, there were several difficult factual issues canvassed at trial which were decided adversely to Ms. Reid. Therefore, we are not of the view that Ms. Reid was substantially successful at trial.
- [15] In light of Ms. Reid's success on appeal, however, we are also not convinced that Mr. Reid should be characterized as having met with substantial success on the issues canvassed at trial. Rather, we are of the view that ultimate success with respect to the issues at trial was divided. But for an offer to settle, which we will consider, the appropriate disposition of trial costs would be for each party to bear their own costs.

[Emphasis added.]

- [47] Since, in the present case, ultimate success in the Supreme Court was divided, Envirocon and Mr. Suen should bear their own costs in that Court.

Costs of this Application

- [48] Envirocon submits that regardless of what order this Court makes with respect to Supreme Court costs, Mr. Suen or his counsel should bear the costs of this application. Envirocon says Mr. Suen's objections to its request for Supreme Court costs have been made in "bad faith", particularly since, when the terms of the order were agreed upon, Envirocon put Mr. Suen on notice that its position was that the "usual rule" applied to Supreme Court costs. Further, Envirocon says the failure to object to the "usual rule" when the order was drafted and the fact that an objection was not taken until just prior to the assessment hearing before the master, evince a "blatant attempt by Mr. Suen and/or his counsel to avoid paying costs." Envirocon seeks to have Mr. Suen's counsel pay costs personally on the basis that his "conduct has unreasonably caused costs to be incurred and time to be wasted by virtue of his undue delay in raising his objections to the form of Order or the application of the Usual Rule."

[49] I reject the aspersions Envirocon casts on the conduct of Mr. Suen and his counsel. As I stated above in connection with reopening this appeal, both counsel bear some responsibility for the fact that the issue of Supreme Court costs was not properly addressed before this Court's order was entered. Counsel should have realized then that unless there was a recital in that order awarding Supreme Court costs, those costs could neither be assessed nor recovered. They should also have understood how the "usual rule" is applied. Accordingly, the parties should bear their own costs of this application.

Disposition

[50] I would make no order with respect to Supreme Court costs or the costs of this application.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

I AGREE:

"The Honourable Mr. Justice Goepel"

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Prepared on 27 October 2026 · Esheria