

CANADA / JUDGMENT

Gichuru v. British Columbia (Attorney General)

2020 BCCA 374

COURT

British Columbia Court of Appeal

DECIDED

22 December 2020

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2020 BCCA 374 Gichuru v. British Columbia (Attorney General)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gichuru v. British Columbia (Attorney General),

2020 BCCA 374

Date: 20201222

Docket: CA45962

Between:

Mokua Gichuru

Appellant

(Petitioner)

And

Mark Pallai and the BC Human Rights Tribunal

Respondents

(Respondents)

And

Attorney General of British Columbia

Respondent

(Pursuant to the Constitutional Question Act, R.S.B.C. 1996, c. 68)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated February 22, 2019 (Gichuru v. Pallai, 2019 BCSC 226, Vancouver Docket S104191).

The Appellant, appearing in person

(via videoconference):

M. Gichuru

Counsel for the Respondent, Attorney General of British Columbia

(via videoconference):

R. Danay

Place and Date of Hearing:

Vancouver, British Columbia

October 2, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 22, 2020

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Hunter

Summary:

The appellant had sought judicial review of a Human Rights Tribunal decision dismissing his discrimination claim. The appellant challenged the constitutionality of s. 27(1) of the Human Rights Code, and the Attorney General of BC intervened under s. 8 of the Constitutional Question Act to uphold the legislation. The chambers judge dismissed the challenge and granted costs in favour of the Attorney General against the appellant. The appellant challenges the costs award on the basis that, absent extraordinary circumstances, the Attorney General is not entitled to costs

when he intervenes under the Constitutional Question Act.

Held: Appeal allowed. Costs award in favour of the Attorney General set aside. The chambers judge erred in principle when he decided that the Attorney General's entitlement to costs should be the same as any private party seeking costs. While judges have wide discretion in awarding costs, the Attorney General is not an ordinary litigant when he intervenes under the Constitutional Question Act. The Attorney General is only nominally a party per s. 8(6) of the Constitutional Question Act; in reality, his role is that of an intervener, who are not ordinarily entitled to or liable for costs. There were no exceptional circumstances in this case that justified a departure from the usual rule.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This appeal raises for consideration the Attorney General of British Columbia's entitlement to costs when he intervenes in a proceeding under the Constitutional Question Act, R.S.B.C. 1996, c. 68 [CQA]. The chambers judge held that the Attorney General's entitlement to costs should be based on the same principles as would be applied to any private party seeking costs and awarded costs to the Attorney General. Mr. Gichuru with leave appeals. He submits that, absent extraordinary circumstances, of which there are none in this case, the Attorney General is not entitled to costs when he intervenes under the CQA.

BACKGROUND

- [2] This litigation involves a long-running dispute between Mr. Gichuru and his former landlord, Mr. Pallai. The litigation began after Mr. Gichuru emailed Mr. Pallai, complaining about noise emanating from a café in the building in which Mr. Gichuru was a tenant. A series of email exchanges between Mr. Gichuru and Mr. Pallai followed, which ultimately led to Mr. Gichuru, on August 12, 2009, filing a human rights complaint against Mr. Pallai in which he alleged racial discrimination during his tenancy contrary to s. 10 of the Human Rights Code, R.S.B.C. 1996, c. 210 [HRC].
- [3] On October 13, 2009, Mr. Pallai applied to have the complaint dismissed pursuant to s. 27(1) of the HRC. Section 27(1) gives the Human Rights Tribunal the discretion to dismiss a complaint without a hearing if a panel or member determines there is no reasonable prospect that the complainant will succeed or that proceeding would not further the purposes of the HRC.
- [4] On April 15, 2010, the Tribunal granted Mr. Pallai's application and dismissed the complaint: 2010 BCHRT 125.

- [5] On June 11, 2010, Mr. Gichuru filed a petition in the BC Supreme Court seeking judicial review of the Tribunal's decision. He sought an order quashing the summary dismissal decision on the basis that the Tribunal had breached its duty of procedural fairness and erred in law and jurisdiction.
- [6] On December 21, 2010, Mr. Pallai filed a response and supporting affidavits opposing the relief sought in the petition.
- [7] As required by s. 16 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, Mr. Gichuru served a copy of the petition on the Attorney General. The Attorney General did not file a response at that time.
- [8] The petition lay dormant for approximately four years. On July 23, 2014, Mr. Gichuru filed and served an amended petition in which, in addition to the administrative law grounds on which he had initially impugned the summary dismissal decision, he sought orders declaring that s. 27(1) of the HRC unjustifiably violated the right to equality in s. 15 of the Charter and thus was of no force and effect.
- [9] Pursuant to s. 8 of the CQA, Mr. Gichuru served the Attorney General and the Attorney General of Canada with notice of his constitutional challenge.
- [10] On October 4, 2014, counsel for the Attorney General wrote to Mr. Gichuru and advised that the Attorney General would appear at the hearing of the petition to support the constitutionality of the HRC.
- [11] On October 6, 2014, the Attorney General filed a response to the amended petition. In that response, the Attorney General took no position on the granting of orders sought by Mr. Gichuru except to the extent that they related to the constitutional challenge to s. 27(1) of the HRC. The response was silent as to costs.
- [12] On September 11, 2014, Mr. Pallai filed an application seeking security for costs against Mr. Gichuru. On October 22, 2014, Justice Fenlon (as she then was) ordered that Mr. Gichuru post security for costs in the amount of \$6,700 by October 30, 2014. However, if he consented to dismissal of the relief sought other than the constitutional challenge or if the parties agreed to a bifurcated hearing, the amount of security to be posted would be reduced to \$3,350.
- [13] Mr. Gichuru consented to an order dismissing all other relief sought in the petition other than the constitutional challenge to s. 27(1) of the HRC. On November 6, 2014, Mr. Gichuru amended his petition to strike the portions that challenged the Tribunal's decision on administrative law grounds, leaving just his constitutional challenge to the validity of s. 27(1) of the HRC.
- [14] On November 6-7, 2014, the appellant's constitutional challenge was argued in front of Justice Russell. Mr. Gichuru appeared on his own behalf. The Attorney General and Mr. Pallai were represented separately. The Tribunal did not appear at the hearing.

- [15] In his submissions, Mr. Gichuru argued that the court could take judicial notice of the fact that people from historically disadvantaged groups are far more likely to be complainants under the HRC and are therefore differentially impacted by the lack of a summary determination process. Justice Russell indicated she could not take judicial notice of that fact and Mr. Gichuru required evidence to support his proposition. Mr. Gichuru subsequently requested an adjournment to allow him to obtain this evidence. Justice Russell adjourned the hearing, and the petition went dormant for a further three-and-a-half years.
- [16] In early 2018, Mr. Gichuru sought to have the petition set down for a hearing before Justice Russell. She advised Supreme Court Scheduling that she was no longer seized of the matter, and the petition was ultimately set down before Justice Macintosh and heard on November 26-27, 2018. Once again, the Attorney General and Mr. Pallai were represented separately, and the Tribunal did not attend.
- [17] On December 3, 2018, Justice Macintosh dismissed the constitutional challenge: 2018 BCSC 2220. He held that s. 27(1) of the Code did not create a distinction based on enumerated or analogous grounds, as being a complainant before the Tribunal is not an enumerated or analogous ground of discrimination.
- [18] In regards to costs, Justice Macintosh wrote:
- [25] Costs were spoken to briefly. If the Respondents continue to seek costs, they may apply jointly to seek a single set of costs. They may apply in a letter to me through the registry. The letter is not to exceed three pages, plus any authorities relied upon. Mr. Gichuru may reply with a letter not to exceed three pages, plus any authorities.
- [19] On December 13, 2018, counsel for Mr. Pallai wrote to the court and indicated his client was seeking ordinary Scale B costs for the petition proceedings as a whole. Counsel noted that Mr. Pallai did not have an opportunity to make submissions on whether or not the single set of costs ought to be shared by the respondents. Counsel submitted that separate costs ought to be ordered under the circumstances, as Mr. Pallai and the Attorney General were represented separately throughout the proceedings, had different roles, and the appellant had a history of putting Mr. Pallai through excessive litigation.
- [20] On December 17, 2018, counsel for the Attorney General wrote to the court seeking an order that the Attorney General and Mr. Pallai each be granted their costs. In his submission, the Attorney General submitted that when Mr. Gichuru challenged the constitutional validity of the HRC, the Attorney General became a necessary party to the proceedings and, as a necessary and successful party, the Attorney General should be awarded his costs on Scale B. While acknowledging that an order of costs is discretionary, the Attorney General argued that the discretion should be exercised on a principled basis, starting with the presumption that costs follow the event. The Attorney General submitted that as the successful party in these proceedings, there were no principled reasons not to award him his separate costs.

- [21] On January 31, 2019, Mr. Gichuru wrote to the court and submitted that, absent exceptional circumstances, there is a general rule that costs are not payable to or by the Attorney General when he appears as a party under s. 8 of the CQA. He also argued that two sets of costs should not be ordered, that any costs awarded to Mr. Pallai should be limited to those incurred before the hearing of the constitutional challenge commenced or, in the alternative, on Scale A.
- [22] On February 22, 2019, Justice Macintosh released his costs reasons: 2019 BCSC 226. Justice Macintosh found that Mr. Pallai and the Attorney General were each entitled to their own separate set of costs. Regarding the Attorney General's entitlement to costs, Justice Macintosh first noted the lack of authorities:
- [11] There is little case authority directly addressing an attorney general's entitlement to receive costs. The extensive involvement of B.C.'s Attorney General exposed him to paying costs, even as only an intervenor, in *Carter v. Canada (Attorney General)*, 2012 BCSC 1587. The Canadian Encyclopedic Digest (CED (West. 4th), Vol. 15, Title 38, at para. 39) states that where the intervention of the Attorney General is a necessary and proper consequence of a motion, the moving party, on the dismissal of the motion with costs, may be ordered to pay the costs of the Attorney General. In support, the Digest cites *Semple v. Canadian National Railway* (1923), 55 O.L.R. 189 (Ont. H.C.). The point is stated in *Semple* at p. 195, but without elaboration.
- [23] Justice Macintosh then went on to conclude that the Attorney General's entitlement to costs should be based on the same principles as for any private party seeking costs: at para. 12. He noted that per Supreme Court Rule 14-1(9), the costs of a proceeding must be awarded to the successful party unless the court otherwise orders. He held that Mr. Gichuru had not discharged the onus upon him to rebut the presumption created by Rule 14-1(9): at para. 15.
- [24] Mr. Gichuru did not challenge the award of costs in favour of Mr. Pallai but sought leave to appeal the award of costs to the Attorney General. On July 25, 2019, Justice Hunter granted leave: 2019 BCCA 282.

ON APPEAL

- [25] The thrust of Mr. Gichuru's submission is that when the Attorney General intervenes under the CQA, he is making submissions in the public interest. Mr. Gichuru submits that when the Attorney General intervenes in this fashion, other than rare circumstances, he should not be liable for costs, nor should he be awarded costs.
- [26] The Attorney General submits that when the Attorney General elects to intervene in a proceeding under the CQA, the Attorney General becomes a party to the litigation and, as a party, he may be liable for or entitled to his costs as any other party. He submits costs presumptively follow the event and the chambers judge in this case properly applied those principles in awarding the Attorney General his costs.

[27] In the alternative, the Attorney General submits that Mr. Gichuru's vexatious litigation conduct justifies the challenged cost award.

DISCUSSION

[28] Cost awards are a matter of judicial discretion. This Court should not interfere with that discretion unless the trial judge made an error in principle or the cost award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[29] While judges have a wide measure of discretion in fashioning cost awards, the discretion must be exercised judicially and in accordance with established principles. Like cases should be decided in like ways. In *Briante v. Vancouver Island Health Authority*, 2017 BCCA 148, Justice Fitch set out the principles governing the exercise of a judge's discretion in ordering costs:

[201] In *Worthington*, Lambert J.A. discussed the limits of discretion in the context of an order requiring a successful defendant to pay an unsuccessful plaintiff's costs on discrete trial issues in respect of which the defendant did not prevail. In emphasizing the importance of consistency and predictability in the determination of costs within a framework of overall discretion, he said this (at p. 154):

To say that a question that is to be decided is a question within the discretion of the trial judge does not mean that the trial judge may do as he pleases. All questions of discretion must be resolved judicially

In many questions of discretion there is no right answer and no wrong answer, and those questions are questions of true discretion.

But, there are other questions of discretion where there is a right answer and a wrong answer, although the right answer is not dictated by positive and settled law. A question of discretion is one which requires more flexibility than that. Nonetheless, the administration of justice would be brought into disrepute if one judge could decide such a question one way and another judge, faced with exactly the same situation, could decide it another way. Judicial comity, common sense, and a regard for the seemly administration of justice, require that the same question should be decided in the same way each time it arises. That way, the matter becomes predictable. Guidelines for the consistent exercise of the discretion flow from the mode of exercise of the discretion by one's predecessors. In the end, a failure to exercise such a discretion in accordance with its consistent past exercise becomes a failure to exercise the discretion judicially. The discretion has become a principled discretion, as opposed to a true discretion.

[202] Although Lambert J.A. dissented in the result in *Worthington*, his reasoning can be sourced in pre-*Worthington* decisions of this Court and in its post-*Worthington* jurisprudence. For example, in *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25, leave to appeal ref'd [1988] S.C.C.A. No. 200, McLachlin J.A. (as she then was) noted that "[p]arties, in calculating the risks of proceeding with the particular action or defence,

should be able to forecast with some degree of precision what penalty they faced should they be unsuccessful". Similarly, this Court in *Gichuru*, while accepting the wide measure of discretion trial judges have in fashioning costs award, nevertheless emphasized the importance of consistency in the determination of like cases:

[100] At the outset, it is important to emphasize that in exercising the power to fix costs a judge cannot act arbitrarily or capriciously. He or she must act in a manner consistent with the Rules and the principles that have long governed such awards. In *Stiles v. B.C. (W.C.B)* (1989), 38 B.C.L.R. (2d) 307 (C.A.) at 310, Lambert J.A. articulated the limits on a judge's power to award costs:

Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

[Emphasis by Justice Fitch.]

[30] In this case, the issue of principle to be determined is whether the Attorney General should be treated like any other party when it comes to the question of costs when he appears in litigation pursuant to the CQA. To answer this question, it is necessary to first consider the role the Attorney General plays in the administration of justice.

[31] The Attorney General is the official legal advisor of the government of British Columbia. The Attorney General's statutory duties under the Attorney General Act R.S.B.C. 1996, c. 22, include responsibility for seeing "that the administration of public affairs is in accordance with law" and supervising "all matters connected with the administration of justice in British Columbia that are not within the jurisdiction of the government of Canada."

[32] There is a longstanding constitutional principle that an Attorney General is in a different position from ordinary litigants. In Westminster constitutions such as ours, subject to legislative override, rights of the public are invested in the Crown. The Attorney General, an officer of the Crown, enforces those rights. Attorneys General are thus vested with the authority, both at common law and by statute, to initiate or intervene in legal proceedings in a variety of different contexts to protect and advance the public interest as they see fit: *A.B. v. C.D.*, 2019 BCCA 297 at para. 95.

[33] The legislature has in eleven statutes specifically authorized the Attorney General to intervene in private litigation: see Appendix A. This appeal concerns an intervention made under the CQA. The relevant provisions of the CQA are as follows:

8(1) In this section:

"constitutional remedy" means a remedy under section 24(1) of the Canadian Charter of Rights and Freedoms other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;

"law" includes an enactment and an enactment within the meaning of the Interpretation Act (Canada).

(2) If in a cause, matter or other proceeding

- (a) the constitutional validity or constitutional applicability of any law is challenged, or
- (b) an application is made for a constitutional remedy,

the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

(3) If in a cause, matter or other proceeding the validity or applicability of a regulation is challenged on grounds other than the grounds referred to in subsection (2)(a), the regulation must not be held to be invalid or inapplicable until after notice of the challenge has been served on the Attorney General of British Columbia in accordance with this section.

(6) If in a cause, matter or other proceeding to which this section applies the Attorney General of British Columbia appears, the Attorney General is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

[34] Section 8(6) of the CQA holds that if the Attorney General appears in response to a notice under the CQA, he becomes a party to the proceedings and for the purpose of an appeal has the same rights as any other party. In this regard its position is different from private party interveners who can only participate in litigation with the leave of the court and who have no right to appeal: *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562

[35] Section 11(1) of the Crown Proceeding Act, R.S.B.C. 1996, c. 89, holds that in proceedings in which the government is a party, the court can make an order for costs that it may make in a proceeding between persons. The section reads:

11(1) In proceedings against the government and proceedings in which the government is a party, the rights of the parties must, subject to this Act, be as nearly as possible the same as in a proceeding between persons, and the court may

- (a) make an order, including an order as to costs, that it may make in proceedings between persons, and
- (b) otherwise give the appropriate relief that the case may require.

[36] Although the Attorney General becomes a party by operation of s. 8(6) of the CQA, his role, as noted by Justice Smith in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1996), 134 D.L.R. (4th) 286 at para. 8 (B.C.S.C.) [Little Sisters] is in reality that of an intervener. Like other interveners, the Attorney General on its own initiative becomes involved in litigation between other parties. No party compels the Attorney General to become involved. The usual rule is that interveners are neither awarded costs nor have costs awarded against them: *Harper v. Harper*, [1980] 1 S.C.R. 2 at 16; *Young v. Young*, [1993] 4 S.C.R. 3 at 138. There is a discretion to depart from the ordinary rule in the circumstance of a particular case: *Daly v. Ontario (Attorney General)* (1999), 172 D.L.R. (4th) 241 (O.N.C.A.). As the authorities make clear the usual rule applies when the Attorney General appears pursuant to the CQA.

[37] Subject to one authority to which I will later refer, the authorities arose in circumstances in which a party is seeking to claim costs from the Attorney General. *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [Children's Aid Society] arose in the context to a challenge to the Child Welfare Act, R.S.O. 1980, c. 66, under which the Ontario Children's Aid Society was granted wardship over a young child whose parents opposed a blood transfusion. The Attorney General of Ontario intervened in the proceedings in support of the legislation. Although it upheld the constitutionality of the legislation, the Ontario District Court awarded costs against the Attorney General for Ontario. The majority of the Supreme Court of Canada upheld the cost award. In doing so, however, they indicated the order was highly unusual and only in very rare cases should be permitted. In this regard, they said (at 390):

The order to award costs against an intervening Attorney General, acting as she is statutorily authorized to, in the public interest in favour of a party who raises the constitutionality of a statute, appears highly unusual, and only in very rare cases should this be permitted. Nevertheless, this case appears to have raised special and peculiar problems, and the District Court's exercise of discretion was supported by the Court of Appeal. I am loath to interfere with the exercise of their discretion in this case.

[38] In *Little Sisters*, the plaintiffs challenged the constitutionality of federal legislation. The Attorney General intervened to inform the court of the constitutional implication of certain arguments raised by the plaintiffs. The trial judge found that the Attorney General was acting in the public interest in participating in the action and there was nothing exceptional in the case that would justify departure from the usual rule that no costs should be awarded against an intervening Attorney General: at para. 9.

- [39] *Victoria (City) v. Adams*, 2008 BCSC 1363, var'd 2009 BCCA 563, concerned a challenge brought by people experiencing homelessness in Victoria against a bylaw prohibiting the erection of temporary shelters on public property. The Attorney General intervened in the proceeding and contended the claim did not fall within the scope of s. 7 of the Charter, and that in any event, any infringement was justified under s. 1 of the Charter.
- [40] The trial judge concluded the prohibition was both arbitrary and overbroad and hence not consistent with the principles of fundamental justice: 2008 BCSC 1363 at para. 5. She further concluded that the infringement was not justified under s. 1 of the Charter.
- [41] The successful parties then sought an order for special costs against both the city and the Attorney General. The Attorney General argued that its conduct was not such as to take the case out of the traditional rule that in constitutional litigation the Attorney General as intervener neither pays nor receives costs.
- [42] The trial judge concluded there was nothing in the circumstances of the case that would qualify as unusual circumstances justifying a departure from the ordinary rule: 2009 BCSC 1043 at para. 22. Accordingly, she dismissed the application for costs against the Attorney General.
- [43] In *Carter v. Canada (Attorney General)*, 2012 BCSC 886, Justice Smith, after a 21-day trial, found the Criminal Code provisions prohibiting physician-assisted death were unconstitutional. The Attorney General had intervened in the proceeding to support the legislation.
- [44] The plaintiffs then sought special costs against both the Attorney General of Canada and the Attorney General. The Attorney General submitted that, as an intervener, it should bear no responsibility for costs. In her costs reasons, the trial judge determined that the public interest nature of the case justified an award of special costs: 2012 BCSC 1587. The trial judge rejected the Attorney General's submission that the court should follow the usual practice of ordering no costs for or against interveners. She held the Attorney General liable for ten percent of the special cost award. She reasoned as follows:
- [95] In my view, the authorities do not disclose a firm rule that an Attorney General who becomes involved in constitutional litigation as of right will be immune from responsibility for costs in all but the rarest of circumstances. With the exception of *Adams*, the cases upon which the AGBC relies are dissimilar to this one. Neither *Daly*, *Evans Forest Products* nor *Faculty Assn.* involved an Attorney General intervening as of right. *Children's Aid Society* concerned an award of costs against an Attorney General in favour of parents who had unsuccessfully opposed blood transfusions for their infant child, on religious grounds. In at least one previous British Columbia case (*Polglase*), costs were awarded against an intervening Attorney General.

[96] In principle, it seems to me that the responsibility for costs should depend upon the role that the Attorney General takes in the litigation. If the Attorney General assumes the role of a party, it may be liable for costs in the same manner as a party, in the discretion of the Court.

[97] In *Adams*, the Attorney General, described as an intervenor in the style of cause and throughout the Reasons, seems to have acted like an intervenor. Although the Attorney General made submissions in that case on a number of matters, it does not appear that the Attorney conducted discovery, led significant evidence, cross-examined witnesses or otherwise took on the role of a party.

[98] The level of involvement by the AGBC in this case was very different from that in *Adams* and I am not persuaded that the AGBC should be excused from responsibility for costs.

[Emphasis in original.]

[45] A majority of this Court reversed the trial judge's decision: 2013 BCCA 435. The majority allowed the appeal on the ground that the trial judge was bound to follow the Supreme Court of Canada's decision in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, which had upheld the blanket prohibition on assisted suicide. The majority was of the view that a cost award should not have been made against the Attorney General. While acknowledging costs awards may be made against an intervenor, they held that there must be a principled reason for departing from the general practice. In the majority's view, one could not say that the limited degree of participation on the part of the Attorney General in these proceedings challenging a federal law was improper or otherwise deserving of a cost order against it.

[46] The Supreme Court of Canada upheld the trial judge's decision striking down the legislation: [2015] 1 S.C.R. 331. It also upheld her cost decision. In regard to the question of costs against the Attorney General, it stressed that the award was unusual. In that regard it said:

[146] We stress, as did the trial judge, that it will be unusual for a court to award costs against Attorneys General appearing before the court as of right. However, we see no reason to interfere with the trial judge's decision to do so in this case or with her apportionment of responsibility between the Attorney General of British Columbia and the Attorney General of Canada. The trial judge was best positioned to determine the role taken by British Columbia and the extent to which it shared carriage of the case.

[47] *Semple v. Canadian National Railway* (1923), 55 O.L.R. 189 (Ont. H.C.), the decision that the chambers judge referred to in his reasons, is the only case the Attorney General has been able to locate in which a judge has granted costs to an intervening Attorney General. *Semple* concerned an application by the defendant railway to strike out a jury notice on the basis that under the incorporating legislation no action brought against it was triable by a jury. When the motion first came on for hearing, the plaintiff raised the point that if the legislation bore the interpretation urged by the defendants, it was ultra vires the Parliament

of Canada. Therefore, notice was given to the Attorneys General of Canada and Ontario. On the return of the motion, the chambers judge held that the legislation did not bear the interpretation sought by the defendant, and he dismissed the application with costs. He further ordered that the defendant company pay the costs of the Attorney General for Ontario, whose intervention was a necessary and proper consequence of the motion launched by the defendant. No authority was cited in support of the cost order.

- [48] This Court is not bound by *Semple*. It was a case decided almost 100 years ago and, other than in this case, has never been cited as authority for the proposition that an intervening Attorney General should be entitled to costs. I would not follow it.
- [49] In my respectful view, the chambers judge's finding that the Attorney General's entitlement to costs should be based on the same principles as would be applied in the case of any other private party was an error in principle. When the Attorney General appears pursuant to the CQA, he is not an ordinary litigant: he acts to protect and advance the public interest. Absent exceptional circumstances, the Attorney General neither pays nor receives costs. While there may be circumstances in which costs might be awarded against an intervening Attorney General, the Supreme Court of Canada in both *Children's Aid Society* and *Carter* has made clear that such cases are rare and unusual. This is not such a case.
- [50] In the circumstance of this case, I find that the usual rule that the Attorney General neither pays nor receives costs should apply. The same result would have followed if Mr. Gichuru's constitutional challenge had been successful.
- [51] The Attorney General, in the alternative, argued that Mr. Gichuru's conduct of the litigation justified the award of costs. I do not agree. While there may be circumstances in which a party's conduct in a constitutional challenge might be so worthy of rebuke as to justify an award of costs in favour of the Attorney General, Mr. Gichuru's conduct in this case was not of such magnitude.

DISPOSITION

- [52] In the result, I would allow the appeal, set aside the award of costs in favour of the Attorney General, and award Mr. Gichuru the costs of the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Hunter"

APPENDIX A

This appendix summarizes the active pieces of BC legislation that allow the Attorney General to intervene in private litigation.

- Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 46.1;
- Civil Rights Protection Act, R.S.B.C. 1996, c. 49, s. 3;
- Coastal Ferry Act, S.B.C. 2003, c. 14, s. 50;
- Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 8;
- Family Law Act, S.B.C. 2011, c. 25, s. 204;
- Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, s. 16;
- Maa-nulth First Nations Final Agreement Act, S.B.C. 2007, c. 43, s. 8;
- Nisga'a Final Agreement Act, R.S.B.C. 1999, c. 2, s. 8;
- Tla'amin Final Agreement Act, S.B.C. 2013, c. 2, s. 8;
- Tsawwassen First Nation Final Agreement Act, S.B.C. 2007, c. 39, s.8; and
- Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 101.

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