

CANADA / JUDGMENT

Keizer v Radovanovic

2005 BCSC 1241

COURT

Supreme Court of British Columbia

DECIDED

30 August 2005

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2005BCSC1241

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Keizer v Radovanovic,

2005 BCSC 1241

Date: 20050830

Docket: M043042

Registry: Vancouver

Between:

STEVE KEIZER

PLAINTIFF

And

MARIJA RADOVANOVIC and DRAGAN RADOVANOVIC

DEFENDANTS

Before: District Registrar Sainty

Reasons for Decision

Counsel for the Plaintiff

R.V. Burns

Counsel for Defendants

D.P. Snelling

Date and Place of Trial/Hearing:

August 8, 2005

Vancouver, B.C.

- [1] The parties appeared before me on August 8, 2005 for an assessment of the plaintiff's costs.
- [2] The trial of this matter lasted 2 days and was heard by R.D. Wilson, J. On May 6, 2005, his Lordship ordered:

THIS COURT ORDERS that:

1. the defendants, Marija Radovanovic and Dragan Radovanovic pay to the plaintiff the sum of \$8,858.00 plus costs for a 2 day trial in accordance with Rule 66(29) of the Rules of Court plus disbursements.
- [3] The parties were in agreement with respect to the disbursements and the "costs" amount which was set out in the Plaintiff's bill of costs as \$4,800.00, in accordance with his Lordship's order being the amount allowed for a two day trial in accordance with Rule 66(29) of the Rules of Court. Only one issue was before me: Whether, on an award of costs pursuant to Rule 66(29), the plaintiff is entitled to be paid, in addition to the \$4,800.00 allowed in lieu of costs assessable under Appendix B of the Rules of Court, an additional amount representing GST and PST on such amount.
- [4] The parties agree that the plaintiff was required to pay GST and PST on the fees charged to him by his counsel.
- [5] Rule 66 of the Rules was enacted in 1998. Section (1) of that Rule provides:
 - (1) The object of this rule is to provide a speedier and less expensive determination of certain actions the trial of which can be completed within 2 days.
- [6] Costs are "fixed" pursuant to subrule (29) as follows:
 - (29) Unless the court orders otherwise or the parties consent, and subject to Rule 57 (10), the amount of costs, exclusive of disbursements, to which a party is entitled is as follows:
 - (a) if the time spent on the hearing of the trial is one day or less, \$3600;
 - (b) if the time spent on the hearing of the trial is more than one day, \$4800.
- [7] On behalf of the defendant, counsel argued that no tax should be added to the amount of the costs award as there is no provision in Rule 66 to add tax to an award of costs thereunder. He then referred me to Rule 57 of the Rules, which deals with assessments of costs. The applicable provisions of that Rule are:
 - (1) Where costs are payable to a party under these rules or by order
 - (a) by another party,

- (b) out of a fund of other parties, or
- (c) out of a fund in which the party whose costs are being assessed has a common interest with other persons,

they shall be assessed as party and party costs under Appendix B, unless the court orders that they be assessed as special costs.

(8.1) If tax is payable by a party in respect of legal services or disbursements, the registrar must, on an assessment under subrule (1) or (3), allow an additional amount to compensate for that tax, which additional amount must,

- (a) if the tax is payable in respect of legal services, be determined by multiplying the percentage rate of the tax by,
 - (i) in the case of a judgment entered on default of appearance or of pleading, the costs allowed under Item 1 or 2, as the case may be, of Schedule 1 of Appendix B,
 - (ii) in the case of a writ of execution, a garnishing order or a process in Form 51, 52 or 53, the costs allowed under Item 1 or 2, as the case may be, of Schedule 2 of Appendix B, or
 - (iii) in any other case, the monetary value of the units assessed, or
- (b) if the tax is payable in respect of disbursements, be determined by multiplying the percentage rate of the tax by the monetary value of the disbursements as assessed.

[8] Counsel argued that tax is only payable in respect of costs awarded and assessed under subrules (1) or (3) of Rule 57, not an award of costs in accordance with the provisions of Rule 66. Subrule (1) refers to assessments of costs under Appendix B and subrule (3) refers to an assessment of special costs. Neither of these subrules applies to the determination of the costs payable in this instance as those costs are fixed under Rule 66(29). Further subrules (a) (i), (ii) and (iii) of Rule 57(8.1) each specifically provide for tax to be added to costs assessed under Appendix B of the Rules. They do not, however, specifically refer to costs determined by Rule 66 or provide for tax to be added to the amounts specifically set out as the costs amounts to be awarded for trials under that Rule.

[9] Counsel then suggested that, if an assessment does not take place whereby units are assessed under Appendix B of the Rules, no tax is payable.

[10] Counsel referred me to two decisions relating to tax on the units awarded: *Borisoff v. Cooper*, [1991] B.C.J. No. 3704 (S.C.) and *Toma v. Insurance Corporation of British Columbia*, [1993] B.C.J. No. 527 (S.C.). In *Borisoff*,

Hood, J, was asked to make an order directing the registrar at the assessment of the plaintiff's party and party costs to include GST on the portion of the tariff items incurred since January 1, 1991 [the day the GST was promulgated as attaching to legal fees]. His Lordship held (in paragraphs 5 and 7 of his decision):

In British Columbia the court does not have the power to fix costs without reference to Tariffs. Under Rule 57 costs are assessed as party and party costs under Appendix B unless the court orders that they be assessed as special costs. In either event the court in "fixing costs" is limited to the Tariffs.

...

In my opinion, I am bound by the Tariffs, they have not been amended to provide for GST and I do not have the authority to make provision for them.

[11] In *Toma*, Parrett, J, heard an appeal from a decision of Master Wilson on an assessment of party and party costs. The Master held that "an expenditure by a successful litigant in payment of GST is an expense or charge necessarily or properly incurred in the conduct of a proceeding" and that "an assessing officer is compelled by Rules 57(4) and 57(8) to allow a reasonable amount for that expense or charge". In overturning the Master's decision, Parrett, J held (at pages 5 and 6):

It is my conclusion that the difficulties inherent in determining the reasonableness of GST claims and their direct relationship to legal fees preclude the possibility of treating them as allowable expenses on the current wording of the Rules. What is required here is to bring this "expense" within Rule 57(4) is not simply the characterisation of the expense but the imposition of a new procedure to enable the registrar to determine the reasonableness of the fee itself.

The creation of such procedure does not simply involve judicial "creativity" but judicial legislation.

That is not to say that I disagree with Master Wilson's assertion that, as a general proposition, a successful litigant should be entitled to claim GST payments on legal fees as an expense necessarily or properly incurred in the conduct of a proceeding, but rather that currently the Rules do not provide the machinery to put such entitlement into effect.

In conclusion, because of the intrinsic link between the G.S.T. and the legal fees themselves that cannot be properly characterized as either "disbursements" or "expenses" within the present wording of Rule 57(4).

In addition, the complications in the assessment process of allowing GST to be treated as a disbursement or an expense under the provisions of Rule 57(4) serve only to highlight the fact that the present rules, drafted as they were before the imposition of the GST, neither contemplated such an item nor provided an adequate mechanism for dealing with it.

The appeal must be allowed

[12] Counsel for the defendant also submitted that as the provisions of Rule 66 are paramount when in conflict with another of the Rules (Rule 66(4)), I should not read into the provisions of Rules 66 those of Rule 57(8.1) which provide for tax to be added to the costs assessed. He stated that had the drafters of Rule 66 had in mind that tax be added to the amounts set out in Rule 66(29), they should have provided for that explicitly.

[13] In response, counsel for the plaintiff argued his client should not be penalized by the fact that Rule 66 does not specifically provide for tax to be added to the costs amount set out in that Rule. He further submitted that if the drafters intended the amount to be inclusive of tax, they would have specifically provided for that in the Rule. He then noted that if I were inclined to agree with the submissions of counsel for the defendants, I should consider the provisions of Rule 66(5), which provides as follows:

(5) The court may dispense with compliance with the whole or any part of this rule if the court considers it just and convenient to do so.

[14] Mr. Burns suggested that it is just that I include an additional amount for tax on the amount of the costs to be awarded to the plaintiff.

[15] Finally, he submitted that:

(a) as Rule 57(8.1)(iii) provides that tax be added to the "monetary value of the units assessed", and

(b) it should be inferred that the amounts set out in Rule 66(29) (\$3,600 for a one day trial and \$4,800 for a two day trial) are the equivalent of the "monetary value of the units assessed" and are simply "assessed" under that Rule as opposed to under the tariff

therefore, tax should be added to the amounts "assessed" under Rule 66(29).

Conclusion

[16] I am unable to agree with the submissions of counsel for the plaintiff. In my view, in order to add an amount for GST and PST to the amount of the costs awarded under Rule 66(29) a specific provision in the Rules providing for that is required. As the provisions of Rule 57(8.1) do not specifically provide for tax to be added to an award of costs under Rule 66(29), I cannot exercise "judicial creativity" and allow an amount for tax on the amount allowable under Rule 66(29). This is a matter for the legislature, not for me as a registrar of this court. I also note that no "assessment" of "units" (as required under Rule 57(8.1)(iii)) occurs on an award of costs under Rule 66. The amount awarded is specified under that Rule and there is no assessment of units, both of which terms have specific meanings and consequences under the Rules.

- [17] In my opinion, had the drafters of Rule 66 meant to include an additional amount for GST and PST in an award of costs under that Rule, they would have either included an amount in the Rule specifically, or provided for an additional provision under Rule 57(8.1) referring to an additional amount for tax to be included on an award of costs under that Rule.
- [18] Accordingly, I deny the plaintiff's request that tax be added to the costs of \$4,800 set pursuant to the order of Wilson, J. As the parties were in agreement with respect to the disbursements in the amount of \$6,039.34, it follows that the plaintiff is entitled to a certificate in the total amount of \$10,839.34 (\$4,800 (costs per Rule 66(29)) + \$6,039.34 (agreed disbursement amount) = \$10,839.34).
- [19] If a certificate is required, counsel may prepare it and forward it to me for my signature.
- "District Registrar K. Sainty"

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