

CANADA / JUDGMENT

Michetti v. Veach

2023 BCSC 726

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 726 Michetti v. Veach IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Michetti v. Veach, 2023 BCSC 726 Date: 20230502 Docket: S229113 Registry: Vancouver Between: Lorraine Michetti Petitioner And Danielle Veach and The Village of Pouce Coupe Respondents Before: The Honourable Justice Branch Supplemental Reasons for Judgment on Costs Counsel for Petitioner: N. Baker K. Ho Counsel for Respondent, Danielle Veach: M. Voell R. Vallance Counsel for the Respondent, Village of Pouce Coupe: S. Manhas Written Submissions Received: February 9, 2023, March 13, 14 and 22, 2023 Place and Date of Judgment: Vancouver, B.C. May 2, 2023 Table of Contents Introduction. 3 Legal Principles. 3 Case Law.. 5 Analysis. 8 Conclusion. 12

Introduction

- [1] I issued my decision resolving this local election dispute in reasons reported at Michetti v. Veach, 2023 BCSC 43 (the "Reasons"). These supplementary reasons address the issue of costs arising from that decision. I rely on the facts and definitions set out in the Reasons, supplemented by the following additional facts.
- [2] By e-mail dated December 1, 2022, following the first day of the hearing of the petition, and after hearing Mr. Wall's evidence, Mrs. Veach proposed a consent dismissal of the petition in exchange for payment of \$8,000 in costs and disbursements to Mrs. Veach (the "Offer"). The Offer was rejected by Ms. Michetti on December 2, 2022.
- [3] Ms. Michetti's petition was dismissed. She seeks an order that both parties bear their own costs. The respondent, Village of Pouce Coupe, seeks costs against Ms. Michetti. The respondent Mrs. Veach goes further, requesting special costs, or alternatively, increased costs or double costs. Legal Principles
- [4] Section 156 of the Local Government Act, R.S.B.C. 2015, c. 1 [LGA] sets out the court's discretion on costs on this type of application: Legal costs of application 156 (1) If the court declares that a candidate is not qualified to hold office or that an election is invalid, the costs, within the meaning of the Supreme Court Civil Rules, of the persons who made the application under section 153 must be paid promptly by the municipality or regional district for which the election was held.

- (2) The court may order that costs to be paid under subsection (1) may be recovered by the municipality or regional district from any other person as directed by the court in the same manner as a judgment of the Supreme Court.
- (3) Except as provided in subsection (1), the costs of an application are in the discretion of the court. [Emphasis added.]
- [5] This issue falls to be determined under s. 156(3).
- [6] Ms. Michetti argues that given that the statutory provision simply provides for the exercise of a broad discretion, the ordinary presumption that costs follow the event does not apply. The respondents argue that there is nothing about s. 156(3) that suggests that the legislature was intending that there be a deviation from the ordinary rule.
- [7] In terms of the request for special costs, these are awarded to rebuke "reprehensible conduct" in the course of litigation. Reprehensible conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court's view deserves reproof or rebuke: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at paras. 8-11.
- [8] Increased costs pursuant to Section 2(4.1) and 2(4.2) of Appendix B to the Rules may be awarded where, as a result of "unusual circumstances", an award at the normal scale would be "grossly inadequate or unjust". The purpose of increased costs is indemnification, not punishment: *Henderson v. Myler*, 2022 BCSC 1530 at paras. 86-88. Increased costs have been awarded against parties who:
- a) raise issues that unnecessarily made the proceeding more complex than it otherwise ought to have been;
 - b) present evidence that was unnecessarily lengthy, uninformative and irrelevant, which needlessly and significantly prolonged the matter; and
 - c) conduct their case in a manner "designed to protract and unnecessarily complicate each step of the litigation process, thereby driving up the costs to the defendants and consuming the maximum amount of court time and resources". *Henderson* at paras. 89.
- [9] More generally, factors that can support an increased costs award include:
- a) misconduct by the unsuccessful party in the litigation;
 - b) the serious nature of the allegations;
 - c) the complexity or difficulty of the issues in the litigation; and
 - d) the importance of the litigation to the parties or to the development of the law. *Nouhi v Pourtaghi*, 2023 BCSC 306 at para. 113 (citing *Kemp v. Coastal Health Authority*, 2016 BCSC 1541 at para. 27)

- [10] In terms of the ability to adjust costs in light of an offer to settle, Rule 9-1(4) Supreme Court Civil Rules, BC Reg 168/2009 (the "Rules") allows the Court to consider an offer when exercising its discretion in relation to costs. Rule 9-1(5) sets out options available to the court, which include the power to award double costs for some or all of the steps in the litigation. In determining the appropriate order, Rule 9-1(6) instructs the Court to consider:
- a) whether the offer ought reasonably to have been accepted;
 - b) the relationship between the terms of settlement offered and the final judgment of the courts;
 - c) the relative financial circumstances of the parties; and
 - d) any other factor the court considers appropriate. Case Law
- [11] There are a limited number of cases that have considered costs requests in the context of election challenges.
- [12] In *Friesen v. Hammell*, 2002 BCSC 1103, the court considered a petition brought by individual voters under the Elections Act, R.S.B.C. 1996, c. 106, alleging that the petitioners had been induced to vote for the NDP by "fraudulent means". The petition was unsuccessful, but the court ordered that the parties bear their own costs. While fraud was alleged, this was not itself a basis to award costs, as Humphries J. observed:
- [32] On another level, the case turned on a narrow point -- whether fraud had been proven within the meaning of the Election Act. Fraud is a serious allegation; however that is the word used in the statute under which the petition was brought
- [34] I am of the view that this particular proceeding can be characterized as public interest litigation. This is based upon the history of the issue before the court, the nature of the issue, and the nature of the evidence I heard. I do not mean to say that every petition under this section is public interest litigation.
- [35] In all of these circumstances, including the long delay in bringing this application, and considering the factors set out in the cases reviewed above, I am persuaded that the parties should bear their own costs
- [13] In *Forsyth v. Fraser*, 2013 ABQB 557, the Alberta Court of Queen's Bench (as it then was) considered an application for a judicial recount brought by the unsuccessful candidate. Specifically, the court's costs consideration was made pursuant to s. 148.1(1) of the Election Act, R.S.A. 2000, c. E-1, which provided as follows: 148.1(1) If a recount is conducted or an appeal is heard under this Part, the court may direct
- (a) that the parties bear their own costs, or
 - (b) that costs be paid to one or more of the parties by any or all of the following:
 - (i) the applicant; (ii) one or more of the candidates; (iii) the Crown in right of Alberta.

- (2) Costs must be determined in accordance with the Alberta Rules of Court and the practice and procedure of the Court of Queen's Bench or the Court of Appeal, as the case may be.
- [14] The court ordered that the Crown pay the costs of the other parties. There had been no suggestion of fraud or corruption in Forsyth:
- [15] [30] In sum, while I acknowledge that there is a personal element to making an application for a judicial recount, the overriding factor is one of public interest in ensuring public confidence in a fair and transparent electoral system. In the case at bar the margin of victory was quite close, there was no evidence that Ms. Fraser was taking the process lightly, and the application did not appear to be motivated by anything other than a desire to ensure the voting record accurately reflected the ballots cast for each candidate. This is a proper case for payment of costs by the Crown, pursuant to s 148.1(1)(b)(iii) of the Act. In *Wrzesnewskyj v. Attorney General (Canada) (Costs)*, 2012 ONSC 3718, the Ontario Superior Court considered costs in respect of a successful application by the runner-up candidate that led to an election being declared null and void. In declining to award costs in favour of any party, the court observed at para. 9 that:
- [9] This was a matter of public interest and of general concern. It is part of the collective responsibility of all Canadian citizens to bring such matters into the public sphere. It is a fact that coming to court can be expensive. In this case, there was no suggestion that those involved did not have the necessary resources available to them.
- [16] The case was appealed to the Supreme Court of Canada (indexed at 2012 SCC 55), but the costs issue in relation to the lower court proceedings was not addressed in the Court's reasons. The Supreme Court of Canada allowed the appeal, restoring the election, but expressly provided that "there will be no award of costs". The court noted that there had been no allegation of fraud or wrongdoing: para. 2.
- [17] In *Todd v. Coleridge*, 2009 BCSC 688, the court held that the public interest required that the office in question be declared vacant and a new election held. The court granted the petitioner Mr. Todd his costs from the City of White Rock pursuant to s. 146(1) of the Local Government Act, R.S.B.C. 1996, c. 323 (as repealed by the LGA, s. 156(2) (para. 38)). At the time, the costs provision read as follows: Costs of an Application 146 (1) If the court declares that a candidate is not qualified to hold office or that an election is invalid, the costs, within the meaning of the Supreme Court Civil Rules, of the persons who made the application under section 143 must be paid promptly by the municipality or regional district for which the election was held.
- (2) The court may order that costs to be paid under subsection (1) may be recovered by the municipality or regional district from any other person as directed by the court in the same manner as a judgment of the Supreme Court.
- (3) Except as provided in subsection (1), the costs of an application are in the discretion of the court. [Emphasis added.]

[18] Most recently, in *Hrasko v. Williams*, 2023 BCSC 198 Justice Hardwick applied the general rule that costs should follow the event noting at para. 60 that "[c]osts are awardable at the discretion of the hearing judge". In that case, an unsuccessful candidate for trustee of an improvement district challenged an election based on flaws in the decision to accept certain absentee ballots. The applicant candidate was successful, and the court ordered that he was entitled to his costs. The *Hrasko* proceeding, however, was brought under a different provision of the LGA (s. 684) which did not have a specific costs provision associated with it, unlike the present case. As such, the court applied the general Rule 14-1(9): para. 61.

Analysis

[19] Ms. Michetti argues that there should be no costs award against her given that:

- a) there is no presumption that costs should follow the event in the particular statutory costs provision at issue;
- b) Ms. Michetti worked closely and collaboratively with opposing counsel and the Court to ensure that the proceeding could be heard in short order, and did nothing to unnecessarily prolong the proceeding or prevent it from being heard in a timely fashion; and
- c) it was in the interest of all residents of the Village that the election be subject to judicial consideration.

[20] I accept that Ms. Michetti worked collaboratively and effectively to bring the matter forward. However, I find that in the present case, Ms. Michetti was driven more by a personal interest than a pure public interest, more so than was the situation in the other cases cited by Ms. Michetti: *Wrzesnewskyj* at paras. 7-9; *Forsyth* at paras. 30, 49. This is illustrated by the fact that she sought an order making her mayor, rather than simply nullifying the election. This is particularly telling, as there were other candidates in the race. It was also clear from the evidence presented that this battle was quite personal, rather than flowing from high-level governance concerns.

[21] Further more, Mrs. Veach's resources are quite limited, making the pain that would be associated with having to bear her own costs notwithstanding her success more challenging than appears to have been the situation for the successful parties in *Friesen* and *Wrzesnewskyj*.

[22] *Forsyth* is also distinguishable in that that case related to a request for the court's assistance in ensuring that the vote counting process was fair, rather than requesting an adjudication on the bona fides of an alleged attack on a particular candidate.

[23] I find that the at least the allegation that the cinnamon buns and coffee could have served as an unlawful inducement was quite weak. The weakness of this argument is a further factor supporting an award of costs in favour of Mrs. Veach.

- [24] I also agree with Mrs. Veach that failing to use the costs rule as an appropriate deterrent in this case could unduly encourage losing candidates to advance attacks on the campaigns of their rivals without a proper basis.
- [25] In sum, I find that costs should follow the event, but should only be payable by Ms. Michetti to Mrs. Veach.
- [26] In relation to the Village, it did not appear at the hearing in a truly adversarial role and limited its submissions to the question of remedy. Specifically, the Village was neutral as to whether or not Ms. Michetti had established a contravention necessary to set aside the election. The Court never had to consider the question of remedy, so the potential outcome of that issue remains unknown, making it impossible to know if the Village would have been successful on the one point on which it expressed its position.
- [27] I confirm that as a result of my findings above, it is not necessary for me to finally resolve whether or not the usual rule that costs follow the event is necessarily embedded in the applicable statutory language, as I would have reached the same conclusion even if my discretion was less controlled than would be the case under the Rules. That said, had it been necessary, I would have preferred the view that the court does indeed have a somewhat wider latitude here than is available under the Rules. The legislature was aware of the language necessary to specifically incorporate the Rules into a costs determination. In relation to the costs of a judicial recount, s. 150(5) specifically references the Rules stating:
- (5) In relation to subsection (3), the court may order that the costs be determined in the same manner as costs within the meaning of the Supreme Court Civil Rules. [Emphasis added.]
- [28] Furthermore, the legislature was also aware as to how to make the statutory language more directive, even apart from the Rules. In relation to applications to set aside bylaws, the applicable statutory costs provision states:
- (2) On an application under subsection (1), the Supreme Court may (a) set aside all or part of the municipal instrument for illegality, and (b) award costs for or against the municipality according to the result of the application. [Emphasis added.]
- [29] Again however, whether the discretion is controlled or uncontrolled by the usual rule that costs follow the event, I find that it is appropriate in the circumstances to award costs payable by Ms. Michetti to Mrs. Veach.
- [30] Turning to Mrs. Veach's special costs request, she says that they should be paid to her on the basis that Ms. Michetti made and maintained serious allegations against Mrs. Veach, including an allegation that Mrs. Veach committed offences and made "serious fraudulent misrepresentations". Mrs. Veach argues that the allegations were wholly unsubstantiated on the evidence known to the petitioner prior to commencing the proceeding. She notes that the court did not find the necessary mens rea to sustain the alleged statutory violations.

- [31] However, an unsuccessful claim of fraud "does not inexorably lead to the conclusion that the unsuccessful party should be held liable" for special costs: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 42; *Friesen* at para. 30-35. There must be something more, such as where the fraud allegations were "unwarranted and completely unfounded", *Mayer* at para. 18.
- [32] I do not find that Ms. Michetti's allegations met this standard, nor was her conduct reprehensible. The witnesses she called were clearly upset by Mrs. Veach's alleged comments. The discovery available to Ms. Michetti in advance of the hearing was limited, and each of her witnesses made concessions during cross-examination that I expect caught Ms. Michetti off guard. Ms. Michetti was at the mercy of her witnesses' testimonial performance because she was not at the events where the alleged wrongful conduct took place. Perhaps Ms. Michetti placed too much faith in the power of Mr. Wall and Mr. Hingley's testimony, but such an error in judgment does not justify a special costs award on its own.
- [33] I also note that the Court did find that Mrs. Veach misspoke regarding one of the allegations, such that the legal determination turned on whether she had the requisite mens rea. The mere fact that the petitioner was unable to establish mens rea is not enough to trigger a special costs award. Mens rea can be notoriously difficult to establish. Similarly, the mere fact that no voter expressly declared that they were induced to vote for Mrs. Veach was not fatal to Ms. Michetti's argument. Given the right to voter secrecy, courts are relatively forgiving in terms of the evidence necessary to establish this requirement.
- [34] In sum, I am unable to say that Ms. Michetti's allegations were "obviously unfounded", "recklessly made" or "made out of malice": *Roussy v. Savage*, 2020 BCSC 487 at para. 19.
- [35] As for the increased costs request, Mrs. Veach does represent that there will be a "large disparity" between the party and party costs award and Mrs. Veach's reasonable legal fees: *380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 ("*Ron Perrick Law Corp.*") at para. 36. I agree that the allegations were serious, complex and important: *Ron Perrick Law Corp* at para. 37. However, I do not find that Ms. Michetti raised issues that unnecessarily made the proceeding more complex than it otherwise ought to have been; did not present evidence at trial that was unnecessarily lengthy, uninformative and irrelevant; nor conducted her case in a manner designed to protract and unnecessarily complicate each step of the litigation process. As such, I do not find a basis to make an increased costs award.
- [36] In terms of whether Mrs. Veach's Offer supports a partial double costs award, I find that it was not unreasonable for Ms. Michetti to reject same given that it came so late in the day, in the midst of the proceedings: *B.L.S. v. D.J.S.*, 2022 BCSC 764 at para 86-87. Furthermore, the Offer was not much more than a nuisance value proposal: *Aujla v. Kaila*, 2011 BCSC 466 at para. 11. While Mr. Wall's evidence heard earlier that day was problematic for Ms. Michetti, I cannot say that it necessarily dealt a fatal blow to Ms. Michetti's arguments such that the Offer should have been accepted. While Mr. Wall likely underperformed Ms. Michetti's

expectation, it was possible that Mrs. Veach's witnesses might similarly underperform. The Offer was made on December 1, 2022 before Mrs. Veach testified and before Ms. Michetti had an opportunity to cross-examine her. Mrs. Veach's cross-examination did not conclude until December 5, 2022.

Conclusion

[37] Mrs. Veach will each have her costs at Scale C from Ms. Michetti. The Village will bear its own costs. "The Honourable Mr. Justice Branch"

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