

CANADA / JUDGMENT

Servatius v. Alberni School District No. 70

2020 BCSC 424

COURT

Supreme Court of British Columbia

DECIDED

20 March 2020

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2020 BCSC 424 Servatius v. Alberni School District No. 70 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Servatius v. Alberni School District No. 70, 2020 BCSC 424 Date: 20200320 Docket: S79991 Registry: Nanaimo Between: Candice Servatius Petitioner And Board of Education of School District No. 70 (Alberni) Attorney General of British Columbia Respondents And Nuuchah-nulth Tribal Council Intervenor Publication Restriction: The given names of the petitioner's children shall not be published in any document or broadcast or transmitted in any way. This publication restriction applies indefinitely unless otherwise ordered. These reasons for judgment comply with the publication restriction. Corrected Judgment: The text of the judgment was corrected at paragraphs 1 and 2 on 25 March 2020. Before: The Honourable Mr. Justice Thompson Reasons for Judgment on Costs Counsel for the Petitioner: J. Cameron J. Kitchen Counsel for the Respondent, Board of Education of School District No. 70 (Alberni): R. Sieg R. Amit Counsel for the Respondent, Attorney General of British Columbia: K. Webber K. Chewka Counsel for the Intervenor, Nuuchah-nulth Tribal Council: A. Walkem, Q.C. Written Submissions Received: March 13, 2020 Place and Date of Judgment: Nanaimo, B.C. March 20, 2020

- [1] The petitioner, Candice Servatius, is an evangelical Christian. Her nine-year-old daughter and seven-year-old son were present at demonstrations of Indigenous smudging and prayer in a Port Alberni elementary school. The petitioner applied for a declaration that these events interfered with religious freedoms guaranteed by the Charter of Rights, and an order enjoining further events of this nature in School District No. 70 (Alberni). Section 8 of the Constitutional Question Act, R.S.B.C. 1996, c. 68, brought the Attorney General of British Columbia into the proceedings. The Nuuchah-nulth Tribal Council was granted intervenor status. I concluded that neither the Nuuchah-nulth smudging in her children's classrooms nor the prayer said by the hoop dancer at the school assembly interfered with the ability of the petitioner or her children to act in accordance with their religious beliefs. My reasons are indexed at 2020 BCSC 15.

- [2] The usual costs order in this case would see the petitioner pay the School District's costs. The petitioner argues that this is public interest litigation and the circumstances support an order that each party ought to bear their own costs. The School District seeks its costs, contending that a departure from the usual order is not warranted. The Attorney General and the Nuuchahnulth Tribal Council do not seek costs.
- [3] Litigation involving the public interest may justify the exercise of discretion to depart from the ordinary rule that costs follow the event. However, persons who bring a proceeding to vindicate their perception of the public interest are not necessarily insulated from costs awards. Factors that guide the exercise of discretion were referred to by Mr. Justice Bauman (as he then was) in *MacDonald v. University of British Columbia*, 2004 BCSC 412 at para. 13:
- a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
 - b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
 - c) The issues have not been previously determined by a court in a proceeding against the same defendant.
 - d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
 - e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct. While these factors were described as "useful" in *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368 at para. 8, Hall J.A. carried on to say that "the overarching question is still whether the normal rule is unsuitable" on the facts of the particular case.
- [4] The petitioner has the burden of showing that this is not a suitable case to apply the normal costs rule. Although the case ultimately turned on findings of fact, the litigation raised issues of general public interest including the public interest served by the resolution of issues that might otherwise constrain demonstrations of Indigenous culture and spirituality in schools. The petitioner has not engaged in any vexatious, frivolous or abusive conduct. I am mindful that while the petitioner's means may be limited, the resources available to the School District are scarce. This is a close call, but on balance, considering all of the circumstances, I think this is an appropriate case to exercise my discretion to order that each litigant bear their own costs. "Thompson J."

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