Federal Court | Cour fédérale

Date: 20110426

Dockets: T-1552-08, T-541-09

Ottawa, Ontario, April 26, 2011

PRESENT: The Honourable Mr. Justice Russell

Docket: T-1552-08

BETWEEN:

GEORGIA STRAIT ALLIANCE, SIERRA CLUB OF CANADA, DAVID SUZUKI FOUNDATION, DOGWOOD INITIATIVE, ENVIRONMENTAL DEFENCE CANADA, GREENPEACE CANADA, INTERNATIONAL FUND FOR ANIMAL WELFARE, RAINCOAST CONSERVATION SOCIETY, and WESTERN CANADA WILDERNESS COMMITTEE

Applicants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

Docket: T-541-09

AND BETWEEN:

DAVID SUZUKI FOUNDATION, DOGWOOD INITIATIVE, ENVIRONMENTAL DEFENCE CANADA, GREENPEACE CANADA, INTERNATIONAL FUND FOR ANIMAL WELFARE, RAINCOAST CONSERVATION SOCIETY, SIERRA CLUB OF CANADA, and

WESTERN CANADA WILDERNESS COMMITTEE

Applicants

and

THE MINISTER OF FISHERIES AND OCEANS,
THE MINISTER OF THE ENVIRONMENT

Respondents

ORDER

UPON the Court, in its judgment of December 7, 2010, remaining seized of this matter in order to deal with costs;

AND UPON reviewing the written submissions of the parties, and all materials filed, with regard to costs;

AND UPON finding, noting and concluding as follows:

1. The Applicants assert that the Consolidated Proceeding that resulted in the Court's judgment of December 7, 2010 requires an award of solicitor-and-client costs in their favour.

2. The Respondents say that this is not a case that warrants an award of solicitor-and-client costs but concede that the Applicants should be awarded costs, based on Tariff B, in the lump sum amount of $23,800.

3. The parties have agreed that if the Court is of the view that an award of solicitor-and-client costs is appropriate, then the Applicants should receive a lump sum award of $80,000.

4. The Court has concluded that a lump sum award of $80,000, representing a solicitor-and-client award is appropriate in the circumstances of this case. Generally speaking, such an award is appropriate because of:

   a. The public interest nature of the Consolidated Proceeding;

   b. The conduct of the Respondents who, the Court found, behaved in an evasive and obstructive way and unnecessarily provoked and prolonged the litigation in this case; and

   c. The nature of this application which, as a result of the Respondents' conduct, became far more complex and work-intensive than a typical judicial review application, and required an inordinate effort on the part of the Applicants to mount and present a complex test case before the Court.

5. Rule 400(1) confers full discretionary power on the Court to determine the amount and allocation of costs. Rule 400(3) provides a list of factors the Court may consider in awarding costs, including: the result of the proceeding; the importance and complexity of the issues, the amount of work involved; whether the public interest in having the proceedings litigated justifies a particular award of costs; and any conduct that tended to unnecessarily lengthen the duration of the proceeding.

6. Rule 400(4) allows the Court to award a lump some in lieu of, or in addition to, any assessed costs. This Court has held that, as a matter of policy, it should favour lump sum awards.

7. Rule 400(6)(*c*) states that the Court's discretion includes the power to "award all or part of costs on a solicitor-and-client basis." Solicitor-and-client costs are rare, and are awarded only when reasons of the public interest justify making such an order or when a party has displayed reprehensible, scandalous or outrageous conduct.

8. Solicitor-and-client costs may be awarded in public interest litigation to reflect the fact that such litigation addresses issues of general importance, and to recognize the important contribution that public interest litigants make to the development of the law.

9. Solicitor-and-client costs awards to public interest litigants may be used to address issues of access to justice. Such awards help to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

10. Finally, in situations where public interest litigants have no private or pecuniary interest in the matter before the court, solicitor-and-client costs awards may be used to address the issue of the gap between the actual costs of litigation and those costs that are recoverable under the normal Tariff.

11. As the Applicants point out, Courts have attempted to formulate an approach to public interest costs awards that considers and balances the above noted issues, while preserving the underlying discretion of judges to consider each case on its facts. This Court in *Harris v Canada*, 2001 FCT 1408, [2002] 1 C.T.C. 243 sets out five criteria that form a "principled foundation" for considering claims to costs on public interest grounds. Those criteria are:

    i. the importance of the issues extends beyond the immediate interests of the parties involved;

    ii. the applicant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if the applicant has an interest, it clearly does not justify the proceeding economically;

    iii. the issues have not been previously determined by a court in a proceeding against the same respondent;

    iv. the respondent has a clearly superior capacity to bear the costs of the proceeding;

    v. the applicant has not engaged in vexatious, frivolous or abusive conduct.

12. This principled approach set out in the *Harris* case has recently been followed in a series of public interest cost cases in British Columbia courts and I see no reason why it should not be followed in the Federal Court.

13. Applying these general principles and the principled approach to the proceedings in the present case, the Court agrees with the Applicants regarding the following conclusions:

a. First, the questions in dispute in the Consolidated Proceeding were clearly matters of general or public interest, and therefore extended beyond the immediate interests of the Applicants. The Consolidated Proceeding raised necessary questions about the scope and content of the Respondent Ministers' legal duty to protect critical habitat of endangered and threatened species. As the Court acknowledged, these questions carried national implications for all at-risk aquatic species. It was necessary to bring this Consolidated Proceeding to provide clarity regarding the Respondents' duties under SARA to provide legal protection for critical habitat of species-at-risk. Failure to address the legal uncertainties in issue would incur environmental costs by risking providing less than full protection of critical habitat for vulnerable species. Resolution of this matter will help guard against future violations of section 58 of SARA and ensure the full protection of critical habitat for species-at-risk;

b. The Applicants, nine non-profit environmental organizations from across Canada, had no personal, proprietary or pecuniary interest in the outcome of the Consolidated Proceeding. As conceded by the Respondents and confirmed by this Court, the Applicants had public interest standing in the Consolidated Proceeding. They were motivated by public interest concerns for the protection of the Northern and Southern Resident Killer Whales, as well as that of at-risk species in general, and the proper protection of their critical habitat as required under SARA. The

Applicants sought only declaratory relief confirming the legal requirements of SARA. The Judgment has not (and could not, from the outset have) produced any direct financial return;

c. The Consolidated Proceeding was a test case that sought judicial confirmation of the critical habitat protection provisions of SARA, significant aspects of which had not previously been considered by a court;

d. The Respondents have a clearly superior capacity to pay for this Consolidated Proceeding than the Applicants. The government should not be required to pay the costs of public interest litigants merely because they can, but the Respondents' superior ability to absorb the costs of this important litigation becomes a relevant consideration in light of their attempts to evade judicial confirmation of questions of national importance and, as the Court found, their having effectively forced the Applicants into litigation;

e. The Applicants' conduct and motivation in bringing these matters before the Court has been in no way vexatious or frivolous. Indeed, the Court found that the Applicants made every effort to resolve these matters without going to litigation. Further, it found the litigation to be necessary. As the Court acknowledged, the nature of species-at-risk legislation is such that only through the efforts of human champions will issues of ambiguity in, or failures to apply or enforce, the law be addressed.

14. In addition to the public interest consideration outlined above, the Court is of the view that the Respondents adopted an unjustifiably evasive and obstructive approach

to these proceedings for no other purpose than to thwart the Applicants' attempts to bring important public issues before the Court which the Respondents had failed to clarify. This has resulted in substantial and unnecessary difficulty and expense to the Applicants, and unnecessarily lengthened and complicated the proceedings.

15. I also agree with the Applicants that the following factors should also be noted:

a. Solicitor-and-client costs may be awarded when a party has displayed reprehensible, scandalous or improper conduct that is "deserving of reproof or rebuke";

b. This Court in *Van Vlymen v. Canada (Solicitor General)*, [2004] FCJ No. 1288 awarded solicitor-client costs against a party where the conduct of that party forced the other party to bring the proceedings. In *Bhatnager v. Canada(Minister of Employment & Immigration)*, [1985] 2 FC 315, this Court awarded solicitor-and-client costs to the successful party where delays in producing documents had caused additional costs;

c. In addition to the public interest justifications discussed above, it is my view that solicitor-and-client costs against the Respondents are appropriate for two reasons: first, to rebuke the Respondents for their evasive conduct, which caused and unnecessarily lengthened the Consolidated Proceeding: and second, as a form of compensation to the Applicants for having had to bring the applications and endure an unnecessarily lengthy and complicated proceeding;

d. I agree with the Applicants that the Respondents' conduct is deserving of rebuke due to the following:

i. the Respondents' conduct forced the Applicants into litigation over the Protection Statement;

ii. the Respondents exacerbated the conflict between the parties by hiding behind entirely procedural arguments and failing, despite repeated opportunities, to put forward a substantial position on the merits of the case;

iii. the Respondents failed to clearly communicate their changed position on the law following the *Nooksack Dace* decision, even when asked to do so by the Applicants; and

iv. the Respondents declined the Applicants' efforts to settle or narrow the issues before the Court prior to the hearing;

e. The Respondents, through their conduct, effectively forced the Applicants into seeking judicial review of the Protection Order Application. Indeed, the Court found that the Protection Order Application was "absolutely necessary" and "made inevitable" by the Respondents' "evasive" and" unhelpful" responses to the Applicants' efforts at clarification in March, 2009;

f. Throughout the proceeding, the Respondents resisted responding to the issues raised by the Applicants on technical grounds, or on the grounds that they failed to understand the nature of the Protection Order Application. The Respondents used this latter argument despite the fact that, through two oral interlocutory hearings, the Applicants presented their position to the Respondents;

g. The evasive conduct of the Respondents forced the Applicants to undertake an unnecessary amount of work in order to respond to procedural arguments and attempt to clarify the Respondents' position. Due to the Respondents' failure to provide a substantive position on the case, the Applicants were forced to file two subsequent sets of written arguments, which they would not have had to do if the Respondents had simply told them, *ab initio*, how they were interpreting the law. To determine the Respondents' position, the Applicants also expended considerable effort seeking the Certified Record in conducting cross-examinations on the Respondents' affidavits;

h. In September, 2009, the decision of Justice Campbell in *Environmental Defence v Canada*, 2009 FC 878 (the *Nooksack Dace* decision) confirmed that "critical habitat" under SARA is more than just geophysical place. In the Reasons for Judgment in this Consolidated Proceeding, this Court notes that a number of "confusions" regarding how the *Nooksack Dace* decision would affect the Protection Order "could have, and should have, been cleared up and addressed without the need for legal action";

i. However, the Respondents failed to clarify adequately their legal position on the Protection Order and refused to clarify their new position in light of the *Nooksack Dace* decision;

j. As this Court noted, during the hearing, the Respondents conceded that for some time they had accepted that their previous position was wrong in law, but chose not to communicate this fact clearly to the Applicants. Rather than informing

the Applicants that DFO had altered its interpretation of critical habitat, the Respondents "resisted the Protection Order Application all the way, initially provided no argument on the merits and advised the Court it had no jurisdiction to hear the application." Finally, due to "the Respondents' evasive conduct and the confusing state of the public record…the Court ha[d] to bring to the issue at hand the clarification that the Respondents have refused to provide";

k. The Applicants made genuine attempts to reach a settlement with the Respondents outside of litigation;

l. In November, 2009, after the *Nooksack Dace* case was decided, and before the Applicants began preparation of the Record, counsel for the Applicants asked the Respondents, through counsel, whether the Respondents planned to concede any of the relief sought. The Applicants made this inquiry so they could save "time, effort and pages." They also made it "out of a desire to put forward true consent positions on some of the relief pleaded by the Applicants";

m. The Respondents replied on November 23, 2009 that they "will not be conceding any of the relief that you have requested";

n. Notwithstanding their previous positions, in June, 2010, the Respondents conceded in open court that the September, 2009 *Nooksack Dace* decision had indeed required them to revise their position on the law;

o. In the seven months after the Applicants had asked, and before the Respondents conceded much of the Protection Order Application, the Applicants

had had to unnecessarily expend significant resources. In December, 2009, counsel traveled from Vancouver to Ottawa in order to conduct what they later found to have been cross-examination on the Protection Order record;

p. Unaware that the Respondents were prepared to concede much of the Protection Order Application, the Applicants also brought a contested motion challenging reductions to the Respondents' Rule 317 material;

q. Counsel for the Applicants spent many weeks needlessly researching and drafting arguments in relation to the Protection Order Application, as well as a significant amount of time preparing their presentation of what was a factually complex argument before the Court;

r. Most egregiously, however, the Respondents sat through two days of counsel for the Applicants' oral argument at the hearing, despite the fact that they had effectively accepted the Applicants' position on the Protection Order Application but had not bothered to stand up and make that fact known to the Court. Not only was this failure to admit a waste of their time, but also a waste of the Court's time and judicial resources.

ORDER

THIS COURT ORDERS that

1. The Respondents shall pay to the Applicants as costs in this matter the lump sum figure of $80,000.

"James Russell"
Judge