IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Latifi v. The TDL Group Corp.,*
2024 BCSC 1659

Date: 20240906
Docket: S198150
Registry: Vancouver

Between:

Samir Latifi

Plaintiff

And

The TDL Group Corp.

Defendant

Before: The Honourable Madam Justice Sharma

Reasons for Judgment on Costs

Counsel for the Plaintiff:	D. Klein A. Klein C. Neszo
Counsel for the Defendant:	R. Kwinter R. Reinertson J. Hutchinson
Written Submissions from the Plaintiff:	July 30, 2024
Written Submissions from the Defendant:	July 16, 2024 August 9 and 20, 2024
Place and Date of Judgment:	Vancouver, B.C. September 6, 2024

[1] This judgement addresses costs arising from my judgment issued on May 15, 2024, indexed at *Latifi v. The TDL Group Corp.*, 2024 BCSC 832 (the "*Judgment*"). The opening paragraphs of the *Judgement* sets out the background:

> [1] This judgment addresses two applications, which were heard together. The plaintiff seeks certification of a class action, and the defendant seeks to have the action summarily dismissed.
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> [2] The plaintiff, who was employed at a Tim Hortons restaurant, seeks to certify a class of "all persons who are or were employees at a Tim Hortons restaurant in Canada". The defendant in this action is the corporate body that owns Tim Hortons, and is the franchisor for Tim Hortons restaurants in Canada.
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> [3] The action concerns a "no hire" or "no poach" clause contained in the license agreement governing Tim Hortons restaurants operated by franchisees (the "License Agreement"). The clause prevents franchisees from employing or seeking to employ anyone from another Tim Hortons franchise without the written approval of the defendant.
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> [4] The original claim sought a number of orders that the impugned clause violated the Competition Act, R.S.C. 1985, c. C-34, but in judgment issued in November 2021, most of those claims were struck: *Latifi v. TDL Group Corp.,* 2021 BCSC 2183 [*2021 RFJ*]. What remains is the aspect of the claim of civil conspiracy based on paramount purpose, and the tort of unlawful means insofar as it corresponds to the claim of paramount purpose civil conspiracy (*2021 RFJ* at para. 129).
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> …
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> [7] For the reasons explained in this judgment, I am persuaded that there are no genuine issues for trial in this action, and therefore summary judgment is appropriate.

[2] Because I concluded that there was no genuine issues for trial, and the action should be struck, I did not address certification (para. 128).

[3] The *Judgment* did not address the issue of costs. In response to a proposal by the parties to provide written submissions, I directed that they do so. Those submissions were provided, and this judgement addresses those submissions.

[4] Rule 14-1(9) of the *Supreme Court Civil Rules* provides that costs of a proceeding must be awarded to a successful party unless the court otherwise orders. In the same vein, R. 14-1(12)(a) states that unless the court otherwise orders, where an application is granted, the party who brought the application is entitled to costs of that application.

[5] Courts have stated that Rule 14 creates a strong presumption that costs will follow an event absent special considerations: *Wingrave v. Pure Painters Inc*., 2018 BCSC 166 at para. 2; and *Briante v. Vancouver Island Health Authority*, 2017 BCCA 148 at para. 198. The party seeking to have the court exercise its discretion to depart from the normal rule bears an onus which has been described as being substantial: *Briante* at para. 198.

[6] While the plaintiff took no position on this issue, the defendant submits that these costs are not under the umbrella of s. 37(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. That section states that costs are not awarded to any party for an application for certification under ss. 2(2) or (3). Section 1 of the legislation defines a class proceeding to mean a proceeding that is certified as a class proceeding.

[7] I agree with the defendant. The Court of Appeal has confirmed that a proceeding is not a class proceeding until certified: *British Columbia v. Apotex Inc.*, 2020 BCCA 186 at para. 11. Thus, a number of other cases have confirmed that section 37 of the *CPA* does not apply to applications determined prior to certification: *Apotex* at para. 9; *Fairhurst v. De Beers Canada Inc.*, 2012 BCSC 45 at para. 6, aff'd 2012 BCCA 257; G*reat Canadian Gaming Corporation v. British Columbia Lottery Corporation*, 2018 BCSC 370 at para. 9; *The Consumers' Association of Canada v. Coca-Cola Bottling Company et al,* 2007 BCCA 356 at para. 12; and *Smith et al v. Canada (Attorney General) et al*, 2006 BCCA 407 at paras. 2, 6.

[8] It was recently confirmed that the same approach applies even where the parties have agreed that judgment on an application to strike a claim as disclosing no cause of action would be determinative of s. 4(1)(a) of the *CPA*, which is the "cause of action" element to the certification test: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2023 BCCA 136 at paras. 3, 6–8, 10. The Court of Appeal did not accept the defendants' invitation in that case to treat the application to strike as a "bifurcated" certification application such that s. 37 would apply.

[9] The plaintiff submits this Court should exercise its discretion and order each party bear their own costs. He points to the factors set out in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282. In *Giles*, the Court of Appeal stated that in addition to indemnifying a successful litigant, costs awards are meant to: deter frivolous actions or defences; encourage conduct that reduces the duration and expense of litigation; encourage litigants to settle where possible; and, provide a windowing function by requiring litigants to make a careful assessment of the strength or lack thereof of their cases (para. 74).

[10] In general, courts have typically accepted two situations where costs might not be ordered against an unsuccessful party. The first is where litigation has a public nature and the court focusses on the broader implications or benefits flowing to the public at large from the litigation. The second is where the litigation is novel. The plaintiff relies on both grounds to support his position that costs ought not to be awarded against him.

[11] With regard to litigation characterized as having a broader, public nature, the comments from *MacDonald v. University of British Columbia,* 2004 BCSC 412 are helpful. The court stated ordering costs against an unsuccessful party might be appropriate on public-interest grounds in the following situations (at para. 13, quoting from *Harris v. Canada*, [2002] 2 F.C. 484 (T.D.):

> (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.
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> (c) The issues have not been previously determined by a court in a proceeding against the same defendant.
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> (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.

See also *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368 at para. 8.

[12] The primary focus of the parties' submissions were on the grounds identified above in paragraph (a) and (b). Although I do not believe I had evidence on this point, I am prepared to accept that ground (d) probably supports the plaintiff's position.

[13] The plaintiff points out that litigation need not be concerned with constitutional issues to be a matter of public interest. The test may be satisfied where a matter involves a difficult legal question of first impression and the significance of a decision extends beyond the immediate interests of the parties: *Benoit v. Strathcona (Regional District)*, 2019 BCSC 362 at para. 121. Even where a party was not a public interest litigant, where the court interprets for the first-time environmental legislation, it was considered in the public interest not to award costs to the successful party: *Sutcliffe v. Ontario (Minister of Environment)*, 191 O.A.C. 370, 2004 CanLII 34994 (O.N.C.A.).

[14] The plaintiff argues that the issues in this case had significant implications because it dealt with employment mobility, which he asserts is a fundamental value in society. He submits that the public has a strong interest in maintaining unhampered employee mobility. In support of his position that these factors justify the case being seen as one of a larger public interest justifying a departure from the normal rule regarding costs, he refers to:

a) cases with commentary along the lines that no-hire clauses exert "undue pressure or control over ambitious and performing employees" by suppressing mobility and wage growth: *Irving Consumer Products Inc. v. Perreault*, 2023 QCCS 1106 at para. 9.

b) the Competition Bureau's expressing the view that a "no-hire clause" does restrict mobility;

c) Expert evidence he adduced, discussed in the *Judgment*, and judgment on the application to strike: *Latifi v. TDL Group Corp.,* 2021 BCSC 2183.

d) when the case was filed in 2019, no-hire clauses did not run afoul of the *Competition Act* but it was amended in June 2023 making it an offence for an employer to agree with another to institute no-hire clause.

[15] I note all these propositions were tenets of the plaintiff's allegations about the broad impact of the no-hire clause. As such, those are not facts but untested propositions as they relate to this litigation. They are closely aligned with the case as pleaded before most claims were struck. It is not clear to me that a purported civil conspiracy between the defendant and its franchisees does raise a broad public interest.

[16] The defendant emphasizes that the parties had agreed to bear their own costs with regard to its application to strike the claim as disclosing no cause of action. Before the defendant largely succeeded in that application, the plaintiff might have been able to describe his case as possibly raising broad public issues about employment mobility in the fast food industry because his claim relied heavily on the alleged impact of no-hire clauses, including the one contained in the defendant's contract with its franchisees. However, most claims were struck, and all that remained was the aspect of the claim of civil conspiracy based on paramount purpose, and the tort of unlawful means insofar as it corresponds to the claim of paramount purpose civil conspiracy.

[17] I agree with the defendant that the state of that law is not in flux, nor uncertain, and no novel issue arose. In *Pryzk v. Hamilton Retirement Group Ltd. (c.o.b. Court at Rushdale)*, 2021 ONCA 267 at para. 35, cited with approval in *Parmar v. Tribe Management Inc.*, 2023 BCSC 88 at para. 13, novelty was described as a situation where existing law was inadequate, and an unsuccessful party could not have expected to fail on the issue. I agree that does not describe the nature of the claim in this case.

[18] Even if I am wrong about the potential for this case to be one of broad public interest, I find the following comments of Justice Russell are apt. In *Coca-Cola Bottling*, she found that the litigation had a public-interest element and yet declined

to order no costs against the plaintiff association. At para. 25, she stated, “I do not think it would be wise to establish a principle that any person bringing a proceeding out of a *bona fide* concern to vindicate his or her perception of the public interest should be insulated from the award of costs in all cases". Her decision was upheld by the Court of Appeal: 2007 BCCA 356, leave to appeal to SCC ref'd 2007 CanLII 66731.

[19] The plaintiff asserts that his interest in the proceeding was not purely financial, pointing out that if he was only advancing his personal interest, he likely would have been restricted to a small claims action. However, that could describe many putative class actions. It is well-known that the broad purpose of class actions include improving access to justice, judicial economy, and behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 27. Accordingly, if costs were not awarded against an unsuccessful plaintiff in a purported class action on that basis, that has the potential to essentially extend the impact of section 37 to applications brought before certification.

[20] For all those reasons, given the strong presumption that costs are awarded to a successful party, I decline to depart from the usual rule. In my view, there was no aspect of this case that was novel, complicated, or attracted the type of broad public interest that justifies departing from the normal rule. The defendant is entitled to its costs.

“Sharma J.”