IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fong v. British Columbia (Minister of Justice),* 2019 BCSC 1003

Date: 20190621
Docket: S111826
Registry: New Westminster

Between:

Michael Kwok Shuen Fong

Plaintiff

And

Her Majesty the Queen in Right of British Columbia as represented by The Minister of Justice for British Columbia

Defendant

Before: The Honourable Mr. Justice Blok

Ruling on Application to Reopen

Counsel for the Plaintiff:	P.G. Kent-Snowsell
Counsel for the Defendant:	O. Kowarsky A. Mallek
Counsel for the Attorney General of B.C.	P. Ameerali
Place and Dates of Hearing	New Westminster, B.C. May 31, 2019
Place and Date of Judgment:	New Westminster, B.C. June 21, 2019

I. Introduction

[1] On May 31, 2019, the Attorney General of British Columbia (the "AGBC") applied to have the Court reopen the judgment pronounced in this matter on March 1, 2019.

[2] In brief, the AGBC says that as a result of a failure to give notice under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 [*CQA*], the portion of the judgment by which *Charter* damages of $2,000 were awarded to the plaintiff is a nullity and ought to be set aside.

[3] Given the modest sum involved, all parties sensibly agreed that the situation might be remedied by vacating the award of *Charter* damages and instead increasing the award of non-pecuniary damages by the same amount. I agreed that this was an appropriate, pragmatic solution and so I made an order to that effect upon the conclusion of submissions.

[4] The parties had some minor disagreements on the law, focused on the basis by which such an order should be made, so I agreed to provide some brief reasons on that issue. These are those reasons.

II. Background

[5] On March 11, 2006, Michael Fong was injured as a result of a "hard takedown" arrest carried out by officers of the RCMP.

[6] Mr. Fong commenced this action by writ of summons filed on March 7, 2008. Counsel said this writ of summons was served on the AGBC, but not the Attorney General of Canada (the "AG Canada"). Having reviewed the court file, I note that the writ of summons was an endorsed writ and the endorsement made no mention of any *Charter* claims. An appearance was filed on behalf of Her Majesty the Queen in Right of the Province of B.C., the Minister of Public Safety and the Solicitor General of B.C. (the then-named defendants) on March 17, 2008.

[7] On May 15, 2008, Mr. Fong filed a statement of claim which, among other things, claimed breaches of his *Charter* rights and sought damages for those breaches. On November 3, 2009, a statement of defence was filed on behalf of all defendants by counsel from the (federal) Department of Justice.

[8] On August 20, 2015, the plaintiff filed a notice of civil claim in order to comply with the new format brought in by the *Supreme Court Civil Rules*. Among other things, the plaintiff alleged various *Charter* breaches and claimed "relief pursuant to s. 24 of the *Charter*".

[9] In reasons for judgment issued on March 1, 2019, I concluded that the arrest of Mr. Fong was unlawful and I awarded damages as compensation for his injuries. I also awarded $2,000 to Mr. Fong as *Charter* damages. These damages were awarded not as compensation, but as a vindication of Mr. Fong's ss. 8 and 9 *Charter* rights.

[10] Unfortunately, through all the years of this litigation and changes of counsel on both sides, no notice was given to the AGBC under the *CQA*. Counsel for the AGBC said notice was given to the AG Canada, but not to the AGBC, though I was not referred to any actual document by which notice was said to have been given to the AG Canada. Counsel for the AGBC said the judgment for *Charter* damages only came to his attention because the March 2019 reasons for judgment were posted on the Court's website.

[11] On learning of the judgment, counsel for the AGBC asked counsel for the parties not to enter the order until the issue was resolved. Since the order had not been entered, I was not *functus officio* at the time this application was heard.

III. The *Constitutional Question Act*

[12] The relevant provision in the *CQA* is s. 8:

> 8 (1) In this section:
>
> "constitutional remedy" means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;

> "law" includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.
>
> …
>
> (4) The notice must
>
> (a) be headed in the cause, matter or other proceeding,
>
> (b) state
>
> (i) the law in question, or
>
> (ii) the right or freedom alleged to be infringed or denied,
>
> (c) state the day on which the challenge or application under subsection (2) or (3) is to be argued, and
>
> (d) give particulars necessary to show the point to be argued.
>
> (5) The notice must be served at least 14 days before the day of argument unless the court authorizes a shorter notice.

IV. Discussion

A. Jurisdiction to Reopen

[13] I am satisfied that, given that the order has not been entered, I retain a discretion to reopen the trial to reconsider any aspect of the judgment. While that discretion has long been described as being “unfettered”, the Court of Appeal in *Hansra v. Hansra*, 2017 BCCA 199 [*Hansra*], made it clear that it is in fact fettered to some extent because the discretion must be exercised judicially, that is to say, in “a principled and considered way”:

> [44] It is beyond doubt that a trial judge who has pronounced reasons for judgment has the ability, before a formal order has been entered, to reopen a matter. This power is often said to involve the exercise of an "unfettered discretion". Although the word "unfettered" continues to be used in the context of reopening, the discretion to do so is in fact fettered, in the sense that, "as with any exercise of discretion, it must be exercised 'judicially', in a principled and consistent way": *Fan v. Chana*, 2011 BCCA 516 at para. 61, 345 D.L.R. (4th) 453 (per Levine J.A.). This is reflected, in particular, in

> decisions of this Court in which the discretion has been held to have been exercised improperly. In my view, the time has come to jettison the adjective "unfettered" which, by definition incorrectly describes the discretion.

[14] Generally, the discretion is to be used sparingly and only for the purpose of ensuring that a miscarriage of justice does not occur: *Clayton v. British American Securities Limited*, [1934] 3 W.W.R. 257 at 295 (B.C.C.A.); *Hansra*, at paras. 44 to 52.

B. Requirement of *CQA* Notice

[15] The *CQA* makes the giving of notice to the provincial and federal attorneys general mandatory in any case involving a challenge to the constitutional validity or constitutional applicability of any law or where an application is being made for a constitutional remedy.

[16] Although there is no prescribed form of notice, s. 8(4) of the *CQA* sets out the necessary content, requiring that the notice be headed with the style of cause of the matter and that it contain certain specific information along with “particulars necessary to show the point to be argued”. Although no form of notice is prescribed, counsel said informal versions of *CQA* notices are in common use.

C. Effect of Failing to Give *CQA* Notice

[17] In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [*Eaton*], the Supreme Court of Canada noted there were two lines of authority concerning the effect of a failure to give notice of a constitutional challenge. One line of cases favoured the view that any resulting decision is invalid, while the other said a decision rendered in the absence of notice was voidable upon a showing of prejudice. Ultimately, the court found that it did not have to resolve that debate, although the majority inclined to the view that a failure to give notice rendered a decision invalid without a showing of prejudice.

[18] In *Eaton*, the appeal court below (the Ontario Court of Appeal) had concluded that a certain statutory provision offended s. 15 of the *Charter* and, by way of remedy, read a limiting direction into the statute. The court did so on its own motion

and in the absence of the prescribed constitutional notice. In the subsequent appeal to the Supreme Court of Canada, Sopinka J., for the majority, said (at 267):

> [53] In view of the purpose of s. 109 of the *Courts of Justice Act* [the requirement for notice of a constitutional challenge], I am inclined to agree with the opinion of the New Brunswick Court of Appeal in *D.N. v. New Brunswick (Minister of Health & Community Services)*, *supra*, and Arbour J.A. dissenting in *Mandelbaum*, supra, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.
>
> [54] There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a *de facto* notice which is the equivalent of a written notice. It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.
>
> [Explanatory phrase added.]

[19] In *Saskatchewan Government Insurance v. Gorguis*, 2013 SKCA 32, an application judge declared a provision of the Saskatchewan automobile insurance scheme inoperative to the extent it conflicted with federal bankruptcy legislation. However, no notice of constitutional challenge had been given in that case. On appeal, the Saskatchewan Court of Appeal concluded that the notice provisions were mandatory and amounted to a legislated precondition to the exercise of jurisdiction to declare a law invalid (at para. 29). The judgment was set aside and the matter remitted to the court below.

[20] In other cases, the failure to give *CQA* notice or, in some cases, *proper CQA* notice, has resulted in the constitutional challenge being struck (*The Law Society of British Columbia v. Parchment*, 2018 BCSC 2246), dismissed (*Aziz v. Aziz*, 2000 BCCA 358), or adjourned so that proper notice could be given.

D. The Issue

[21] The plaintiff noted that the cases cited by the AGBC all involved challenges to legislation and so the forceful, imperative remarks found in those cases, emphasising the importance of full and proper notice, is understandable. The plaintiff said, however, that cases involving damages for breaches of an individual's *Charter* rights are quite different. Cases involving constitutional challenges to the validity of legislation involve the public interest at large, whereas claims for *Charter* damages involve individual rights only. For that reason, the plaintiff argues, there should be a more relaxed standard for *CQA* notice in cases where *Charter* damages are claimed.

[22] The plaintiff says that while no *formal CQA* notice was given in this case, *effective* notice was given by way of its pleadings, and that is good enough here.

[23] The AGBC responded by noting the *CQA* itself does not distinguish between cases involving constitutional challenges to legislation and cases involving claims for a constitutional remedy, including damages. Based on ordinary principles of statutory interpretation, there is no basis for distinguishing the two types of cases.

E. Analysis

[24] I agree that the wording of the *CQA* does not support a distinction being drawn between cases involving constitutional challenges and cases involving claims for other forms of *Charter* relief. I note, however, that in *Eaton* (see para. 54 quoted above) the Supreme Court of Canada left open the possibility of *de facto* notice being sufficient, or even that prejudice arising from the lack of notice *might* have to be shown. From this, it is reasonable to surmise that in cases involving modest or perhaps minimal consequences, for example, a finding of *de facto* notice might be more readily made.

[25] I do not have to come to a firm conclusion on that point, however, because in this case there is no reasonable basis on which I could conclude that *de facto* notice was given to the AGBC in this case. From what I can discern, the pleadings in

which *Charter* issues were raised in this case were only sent to federal counsel, not to the AGBC or to counsel acting for the AGBC, and so there was no notice whatsoever to the AGBC in this case. In these circumstances, the award of *Charter* damages could not stand.

[26] I agree with the AGBC that the Court's options were: (1) decline to vacate the award of *Charter* damages and require the parties to deal with the issue through an appeal; (2) reopen the trial to allow the AGBC to make submissions on the issue; or (3) with the consent of the parties, vary the award to delete the *Charter* damages and add the same sum to the award of non-pecuniary damages. In light of the consent that was given by all parties in this matter, the third option was the obvious choice.

[27] These, then, are the reasons why I reopened and varied the judgment.

[28] As agreed by the parties, there were no costs awarded.

"Blok J."