Focus CIVIL LITIGATION

Another blow for litigation 'Hail Mary'

Activist groups seeking advance costs will find it even more of a longshot after recent B.C. ruling


Evan Cooke
Kristen Balcom

MILLA1974 / ISTOCKPHOTO.COM

In rare circumstances, our superior courts may exercise their inherent jurisdiction to grant "advance costs" to public interest litigants prior to the final disposition of a case. Justice Carol Ross' Jan. 28 decision in *Douglas Lake Cattle Co. v. Nicola Valley Fish and Game Club* [2015] B.C.J. No. 138 has expanded the small body of law in this area.

Litigants should view interlocutory applications for advance costs as a litigation "Hail Mary," and should know that meagre resources can be wasted bringing an application with little prospect of success. From a policy perspective, advance costs are not a substitute for legal aid or other funding schemes designed to assist impecunious litigants with generic disputes. Orders are only available where, among other things, the issues are "bigger" than the individual litigant. Public interest litigants must recognize that no order for advance costs made against a non-government opponent has been upheld.

In *Douglas Lake*, a group of activists brought an advance-costs application against a land owner in relation to certain property rights. The application failed, and while an advance-costs order against a private sector litigant remains possible, Justice Ross' decision narrowed the path to such an order.

The ongoing dispute in *Douglas Lake* centres around two lakes located within the boundaries of the Douglas Lake Ranch. The ranch has for decades been stocking the lakes with fish superior to those in the region's thousands of accessible lakes. The Fish and Game Club is seeking a declaration that the public has rights to fish in the two lakes. Eventually, the court will have to decide issues of ownership of riparian areas and stocked fish within engineered lakes, among other things.

> …Justice Ross found the fishing club had failed to establish a genuine inability to fund the litigation with no other realistic option for bringing the issues to trial.
>
> **Evan Cooke and Kristen Balcom**
> Borden Ladner Gervais

Faced with an application for advance costs, the authors argued that the club had failed to prove impecuniosity, and had failed to establish that these issues were important to Canadians more generally. These arguments, which were ultimately successful, arose from the test established in *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] S.C.J. No. 76. There, the Supreme Court confirmed that a litigant seeking advance costs must demonstrate: 1) a genuine inability to fund the litigation with no other realistic option for bringing the issues to trial; 2) that the claim is prima facie meritorious and it would be contrary to the interests of justice for the litigant's impecuniosity to prevent the case from proceeding; and 3) the issues raised transcend the individual litigant's interests, are of public importance, and have not been resolved in previous cases.

The SCC refined its own test in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)* [2007] S.C.J. No. 2, where it was noted that advance costs are available only in situations where a court would be participating in an injustice against the litigant and the public generally by failing to award advance costs. The decision confirmed that such awards are exceptional and should only be awarded as a last resort.

Examples of prior cases that "transcended the individual litigant's interests" include the aforementioned *Okanagan Indian Band* case, where advance costs were ordered against the Crown to allow a First Nation to litigate the scope of aboriginal logging rights, and *R. v. Caron* [2011] S.C.J. No. 5, where advance costs were ordered against the province of Alberta to assist a French Albertan fight an attempt to force him into a unilingual court process, a case that would impact language rights across the country.

Justice Ross in *Douglas Lake* found that the fishing club had not established that the issues transcended their interests, and had not demonstrated how the facts and laws in issue had broader application. More significantly, Justice Ross found the fishing club had failed to establish a genuine inability to fund the litigation with no other realistic option for bringing the issues to trial.

It was on this issue of financial capacity where the *Douglas Lake* case becomes noteworthy. The authors argued that the club, a registered society under B.C.'s *Society Act*, was operating in a manner akin to an under-capitalized shell company. The club had not adduced any evidence as to the capacity of its members to personally fund the litigation, and the club had taken the position that privacy law prevented the ranch from demanding information about the personal financial circumstances of club members. The *Douglas Lake* decision suggests that groups who advance activist litigation through an impecunious legal entity will have difficulty obtaining an advance-costs award without also establishing that the individuals behind the group cannot themselves fund the group's litigation.

Although Justice Ross did not foreclose the possibility that an advance-costs award might be made against a private litigant, she noted that there was no special relationship between the ranch and the fishing club to suggest that the litigation was of any benefit to the former. Although uncertainty lingers, this decision should provide some comfort to resource sector participants and other entities that might be targeted by activist litigants.

Evan Cooke is a partner at Borden Ladner Gervais in Vancouver and regional head of BLG's municipal law and expropriation law practice groups. He can be reached at ecooke@blg.com. Kristen Balcom is an associate and practises in the areas of environmental, municipal, and insurance law. She can be reached at kbalcom@blg.com.

Plaintiffs: Undue process, expense and delay prevent fair resolution

Continued from page 12

Labrosse found in her favour because the defendants had already made a unilateral and fundamental change to the terms of her employment prior to visiting her, and the plaintiff was not provided with reasonable notice of this change. This recent case shows a willingness of courts to determine more complex cases, such as disputed claims of constructive dismissal, by way of summary judgment motions.

The Supreme Court properly explained the growing importance of these motions in *Hryniak*: "Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result."

Plaintiffs want their day in court. Whether it is by way of a trial or a motion, they want to be able to explain the events that led them to start a claim, and they want their matter to be decided by an unbiased third party. Motions for summary judgment are becoming the best way for them to achieve this goal.

The traditional trial no longer offers the benefits it once did to plaintiffs. What was once a fair and relatively expeditious way of resolving a matter has moved so far outside the realm of attainability that many who would otherwise benefit from such a system avoid it altogether. With the quickly expanding summary judgment precedents, especially within employment law, it is clear that these motions have begun replacing the traditional trials in an effort to restore a legal model that has been arguably taken off course and no longer offers the same access to justice to those who seek it out.

Karine Dion is an associate lawyer in the employment and labour law groups at Nelligan O'Brien Payne (www.nelligan.ca). She can be reached at 613-231-8369 or by e-mail at karine.dion@nelligan.ca.