COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Faculty Association of the University of British Columbia v. University of British Columbia,*** 2009 BCCA 56

Date: 20090212
Docket: CA035974

Between:

The Faculty Association of the University of British Columbia

Appellant

And

The University of British Columbia

Respondent

And

Canadian Union of Public Employees, Local 2278

Intervenor

And

Canadian Association of University Teachers

Intervenor

And

Association of Universities and Colleges of Canada

Intervenor

Before: The Honourable Madam Justice Prowse
(In Chambers)

VANCOUVER

FEB 12 2009

COURT OF APPEAL
REGISTRY

A.E. Black, Q.C.	Counsel for the Appellant
D.M. Sartison	Counsel for the Respondent
L. McGrady, Q.C.	Counsel for the Intervenor, CUPE, Local 2278
J.J. Arvay, Q.C.	Counsel for the Intervenor, CAUT
L.B. Herbst	Counsel for the Intervenor, AUCC
Place and Date of Hearing:	Vancouver, British Columbia January 14, 2009
Written Submissions Received:	January 20, 22, 23, 26, 30, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 12, 2009

Reasons for Judgment of the Honourable Madam Justice Prowse:

[1] On September 26, 2008, Mr. Justice Lowry made an order granting the Canadian Union of Public Employees, Local 2278 ("CUPE") and certain other applicants leave to intervene in this appeal between the Faculty Association of UBC (the "appellant") and the University of British Columbia ("UBC"). At that time, he declined to rule on UBC's submission that CUPE's written argument raised an issue which exceeded the acceptable bounds of argument by an Intervenor. At para. 16 of his reasons, Mr. Justice Lowry stated:

> I consider the better course is to leave the question of whether CUPE's points of argument exceed the well-established permissible limits to the hearing of the appeal or perhaps to a further application after CUPE's factum has been filed.

[2] Following that hearing, CUPE filed a factum which contained the same arguments to which UBC had earlier taken exception. As a result, prior to filing its own factum, UBC brought an application seeking to strike the impugned paragraphs of both CUPE's factum and of the factum of one of the other Intervenors. On January 14, 2009, I dismissed UBC's application. I found that UBC had misconstrued CUPE's legal argument and had failed to establish a basis for striking any part of CUPE's factum.

[3] At the conclusion of the hearing, CUPE sought its costs of the application and I invited further submissions on the issue of costs.

[4] I have now reviewed the written submissions. There appears to be little doubt that the Court has the power to award costs for, or against, Intervenors. Based on

the few authorities to which I have been referred, however, it appears that it is not the usual practice of the courts to award such costs. In *Evans Forest Products Ltd. v. British Columbia (Chief Forester)*, [1995] B.C.J. No. 1515 (B.C.S.C.), Esson, C.J.S.C. stated (at para. 6):

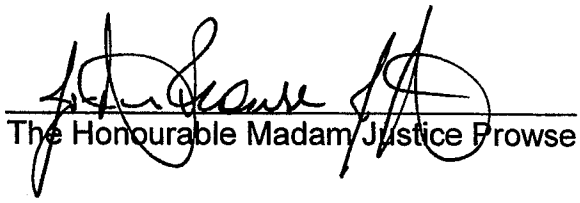
> The position of inteverners, who generally play a very minor and closely restricted role in the proceeding, is distinguishable from that of a public interest litigant which brings the proceeding. While there is no rule precluding costs being awarded to or against interveners, it has not been the practice to do so. I think that there are good practical reasons for maintaining that as the general practice although, if an intervener were to materially prolong the proceedings, costs might be awarded against it. There may also be circumstances where it would be appropriate to award costs to an intervener but I doubt such circumstances will arise in many cases.

[5] Although *Evans* dealt with an application for costs against intervenors who had unsuccessfully applied to be joined in a Supreme Court proceeding, I am satisfied the restrained approach in dealing with costs in relation to intervenors is a salutary one. In this case, however, UBC had the two options referred to by Mr. Justice Lowry for dealing with its concern that CUPE had overstepped the bounds of proper argument. It could have raised that issue in its own factum and dealt with it at the hearing of the appeal, or, it could have brought an application for a ruling prior to the hearing. It chose the latter option. In so doing, it obliged CUPE to prepare for and appear in Court to argue the point, with attendant costs.

[6] In the result, while I did not consider UBC's application to be frivolous, it was based on a fundamental misapprehension of CUPE's legal argument, which ultimately resulted in CUPE incurring unnecessary costs. In these circumstances,

where UBC made a considered choice to raise this argument in advance of the appeal, and where its application was dismissed for the reasons given, I am satisfied it is appropriate to award CUPE's its costs of the application.

[7] In the result, I would grant CUPE costs of the application, in any event of the cause, including the costs of the further written submissions on costs.



The Honourable Madam Justice Prowse