IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fleming v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development),* 2025 BCSC 1032

Date: 20250605
Docket: S1813609
Registry: Vancouver

Between:

Ronald Gordon Fleming and Love Bros. & Lee Ltd.

Plaintiffs

And

His Majesty the King in Right of the Province of British Columbia (as represented by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, as it was then known)

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice E. McDonald

Reasons for Judgment - Costs of Adjournment Application

Counsel for the Plaintiffs:	J.M. Young D. Crimeni
Counsel for Defendant:	M.J.J. Wagner M.K. Shergill
Written Submissions of the Plaintiff:	October 21, 2024 November 5, 2024
Written Submissions of the Defendant:	October 31, 2024
Place and Date of Judgment:	Vancouver, B.C. June 5, 2025

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Introduction

[1] This application respecting the costs arises in the context of a class action proceeding certified pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[2] On October 9, 2024, I heard the plaintiffs' application to adjourn the common issues trial that was scheduled to commence on October 15, 2024 (the "Adjournment Application"). The plaintiffs' adjournment request was opposed by the defendant.

[3] However, on October 9, 2024, I granted the adjournment for the reasons indexed at 2024 BCSC 2371 (the "Adjournment Reasons"). During the Adjournment Application, the defendant requested the opportunity to make submissions on costs and I granted that request. The parties subsequently provided their respective written submissions on costs.

[4] These are my reasons in respect of awarding costs for the Adjournment Application.

Background

[5] In the Adjournment Reasons, I set out the background of the Adjournment Application. I will only repeat the parts of the background that are relevant to the issue of costs.

[6] Again, at the time of the Adjournment Application, the trial was scheduled to commence on October 15, 2024.

[7] While preparing witnesses for trial, the plaintiffs' counsel discovered that:

a) A witnesses, Mr. Ellis, the current president of the Guide Outfitters Association of British Columbia ("GOABC") had some potentially relevant documents. On September 26, 2024, the plaintiffs' counsel received 372

documents from Mr. Ellis and began reviewing those documents for purposes of listing them.

b) The former president of the GOABC might also have relevant documents related to the claim. During the weekend before the Adjournment Application, the plaintiffs' counsel spoke to that person's surviving spouse before receiving approximately 6,000 documents and expecting delivery of electronic devices containing potentially relevant information.

[8] In seeking the adjournment, the plaintiffs raised a variety of concerns and the defendant, in opposing the adjournment, submitted that with respect to the recently obtained documents, they could have been discovered earlier had the plaintiffs used reasonable diligence.

[9] I adjourned the trial for the reasons that I explained and noted the adjournment would allow time for the parties to reach a document agreement and to avoid being surprised by documents at trial, something the defendant submitted was a particular concern.

The Law

[10] Section 37 of the *CPA* is the provision that provides for costs in a class proceeding:

> **Costs**
>
> 37(1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.
>
> (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
>
> > (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
> >
> > (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the

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> purpose of delay or increasing costs or for any other improper purpose, or
>
> (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
>
> (3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.
>
> (4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

[11] The legislature deliberately and expressly adopted a "no costs" regime under the *CPA* to promote the objective of access to justice: *Lewis v. WestJet Airlines*, 2023 BCSC 1921 at para. 96 [*Lewis*].

[12] Steps in a class proceeding following certification are "immune from cost awards" unless one or more of the circumstances set out in s. 37(2) of the *CPA* are present: *Lewis* at paras. 96-97.

[13] The circumstances that might attract costs arise where the court considers that:

- there is vexatious, frivolous or abusive conduct by a party (s. 37(2)(a), *CPA*);
- there is an improper or unnecessary application or other step taken to delay or increase costs or any other improper purpose (s. 37(2)(b), *CPA*); or
- there are exceptional circumstances making it unjust to deprive the successful party of costs (s. 37(2)(c), *CPA*).

[14] The court's inherent jurisdiction does not permit the court to ignore the statutory provisions in s. 37(2) and order costs on some other basis, such as, for the purpose of "levelling the playing field": *Rumley v. British Columbia*, 2002 BCSC 1100 at para. 9.

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The Analysis

[15] The plaintiffs submit that costs for the Adjournment Application should not be awarded given that this is a class proceeding governed by s. 37(2) of the *CPA*. The plaintiffs further submit that none of the exceptional circumstances apply.

[16] In the alternative, the plaintiffs submit that if the court concludes that the exceptional circumstances in s. 37(2)(a) or (b) apply, they militate in favour of granting costs to the plaintiffs. The plaintiff submit that since the reasons for seeking the adjournment are attributable to the defendant failing to properly list and produce documents, those are exceptional circumstances that justify a cost award to the plaintiff as the successful party.

[17] The defendant submits that since the plaintiffs sought a last-minute adjournment of the trial attributable mainly to their failure to diligently prepare for trial, the defendant should be awarded its costs thrown away.

[18] No party disputes that s. 37 of the *CPA* imposes a presumptively no-cost regime on this class proceeding. However, the defendant submits that s. 37 merely preserves, and does not ouster, this court's inherent jurisdiction respecting costs. More specifically, the defendant submits that by providing a list of exceptional circumstances in s. 37(2), the legislature has "re-conferred" discretion respecting costs under s. 37(3).

[19] The defendant referred me to a number of authorities, such as *0116064 B.C. Ltd. v. Alio Gold Inc.*, 2020 BCSC 1214 at para. 54 [*Alio*], *Bolin v. Lylick*, 2018 BCCA 127 [*Bolin*] and *Kjos v. Miron-Monette*, 2023 BCSC 510 [*Kjos*], that potentially support the position that s. 37 of the *CPA* does not preclude the court from awarding costs thrown away in the present case. I have reviewed the decisions cited by both parties.

[20] In *Alio*, the decision to award costs payable under s. 37(2)(b) was the result of the court's conclusion that the pleading amendment application was unnecessary and not timely since the issue should have been addressed earlier. In other words,

the circumstances were found to fall within one of the statutory exceptions in s. 37. Neither *Bolin* nor *Kjos* involved a consideration of costs applicable in a class action proceeding or of s. 37 of the *CPA*. I find the cases cited by the defendant are of limited assistance.

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[21] Ultimately, I was taken to no authority where a court has concluded that the usual principles for awarding costs thrown away in non-class action proceedings provide the type of exceptional circumstance that is necessary to depart from the presumptive no-cost regime established by the *CPA*. Had the legislature intended to include costs thrown away as result of an adjournment application as an applicable exceptional circumstance, I would expect the language in s. 37(2) to set that out.

[22] In my view, the only basis to award costs respecting the plaintiffs' adjournment application would be for me to find that one of the exceptional circumstances provided by s. 37(2) have been established. As the plaintiffs, not the defendant, succeeded on the adjournment application, s. 37(2)(c) clearly has no application.

[23] Pursuant to s. 37(2)(a), "at any time the court considers there has been "vexatious, frivolous or abusive conduct", the court may award costs to a party. The defendant submits that the plaintiffs' conduct, for example, by not preparing their potential witnesses and seeking documents from such witnesses earlier, amounts to vexatious, frivolous or abusive conduct.

[24] However, I do not agree that by meeting with witnesses and learning of the existence of additional documents when they did, the plaintiffs' conduct should be characterized as blameworthy in the sense of being vexatious, frivolous or abusive. On the evidence, I find no basis to conclude that the plaintiffs' conduct in seeking the adjournment was deliberately intended to cloud the real issues, derail the proceeding or to otherwise be vexatious, frivolous or abusive.

[25] I have kept in mind that not long before the hearing of the plaintiffs' Adjournment Application, the plaintiffs opposed the defendant's submission that – in

the event the class definition was amended - the trial should be adjourned. Ultimately, I dismissed both the plaintiffs' application to amend the class definition and the defendant's request to adjourn the trial.

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[26] In later adjourning the common issues trial, I accepted the plaintiffs' evidence that sometime in the short interval between my decision on their application to amend the class definition and their subsequent Adjournment Application, and while they were interviewing witnesses in preparation for trial, they learned of a significant number of additional documents that had to be reviewed and potentially listed. As I previously noted, each side blames the other for the failure to produce and list these documents. Nevertheless, for the reasons I explained, I granted the plaintiffs' request to adjourn the common issues trial.

[27] Pursuant to s. 37(2)(b), "at any time the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose", the court may award costs to a party. The defendant had various reasons for opposing the Adjournment Application. However, for the reasons I explained, the defendant's submissions did not convince me that the Adjournment Application should be dismissed.

[28] I do not find that the plaintiffs' Adjournment Application was unnecessary or that its purpose was to delay or increase costs. I also do not find any other improper purpose animating the plaintiffs' Adjournment Application.

[29] In granting the adjournment, I accepted the plaintiffs' explanations for why they were seeking to adjourn the common issues trial. The plaintiffs' counsel did not submit that the adjournment was solely because the plaintiffs realized they could not prove their case. That submission was just one of the submissions made in support of the Adjournment Application.

[30] In granting the plaintiffs' adjournment request, I noted that the defendant was concerned that the parties had not reached a document agreement and the defendant had concerns about being surprised by documents at trial. I found that an

adjournment would allow the documents to be reviewed and potentially listed and further, that the parties could attempt to reach a document agreement for use at trial. I also found that the plaintiffs had exercised reasonable diligence in prosecuting the claim.

[31] Finally, the defendant raises an issue with respect to potential third-party funding of this class action proceeding and the defendant submits that this provides a basis for awarding costs. In my view, the existence of a third-party funder has not been established on the evidence before me. I agree that the issue of third-party funding is speculative and at this point, such an allegation is not an appropriate basis to award costs against the plaintiffs.

Conclusion

[32] Therefore, for the reasons explained, I conclude that there are no costs awarded respecting the plaintiffs' successful Adjournment Application.

"E. McDonald J."

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