

**COURT OF APPEAL FOR BRITISH COLUMBIA**

Citation: ***Telus v. Telecommunications Workers Union,***  
2008 BCCA 144

Date: 20080403  
Docket: CA033967

Between:

**Telus Communications Inc.,  
Tele-Mobile Company and TM Mobile Inc.**

Respondents  
(Plaintiffs)

And

**Telecommunications Workers Union, its officers, members,  
servants, agents and representatives, and John Doe, Jane Doe and other  
persons unknown to the Plaintiffs acting  
as pickets and/or attending at or near the premises of the Plaintiffs as set out  
in Schedule "A" and "B" hereto or at  
the premises of Customers of the Plaintiffs**

Appellants  
(Defendants)

Before: The Honourable Madam Justice Prowse  
The Honourable Madam Justice Newbury  
The Honourable Mr. Justice Low

D. Bobert Counsel for the Appellants

D.L. Richards Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia  
October 12, 2007

Place and Date of Judgment: Vancouver, British Columbia  
April 3, 2008

Written Reasons of the Court

**VANCOUVER**

APR - 3 2008

**COURT OF APPEAL  
REGISTRY**

**Reasons for Judgment by the Court:**

**NATURE OF APPEAL**

[1] This is an appeal from certain terms of an order made by a trial judge on March 15, 2006 in relation to contempt proceedings arising out of a protracted labour dispute, whereby he ordered two of the appellants to pay party and party costs, and nine of the appellants to pay special costs to the respondents Telus Communications Inc., Tele-Mobile Company and TM Mobile Inc. ("Telus"). The appeal is concerned primarily with paras. 16 and 17 of the order requiring the appellants to pay personally the costs awarded against them, and enjoining anyone else from either directly or indirectly paying those costs on their behalf. The trial judge's reasons for judgment may be found at 2006 BCSC 397, 26 C.P.C. (6<sup>th</sup>) 77, [2006] B.C.J. No. 559 (QL).

[2] The provisions of the order with respect to costs are paras. 15-18, which provide:

15. with respect to costs:

(a) the Plaintiffs are entitled to Special Costs of the respective contempt applications as they relate to Bridgeman, Semenech, Sterling, Adams, Wright, Curley, McWhinnie, McGuire and Walte;

(b) the Plaintiffs are entitled to Party and Party (Scale 3) costs of the respective contempt applications as they relate to Capewell and Maceluch;

16. the parties and all others, save and except the Contemptors [sic], are hereby enjoined and restrained from paying or in any way funding or contributing to the funding, either directly or indirectly, of the monetary punishment imposed, the Special Costs awarded or the Party and Party (Scale 3) costs awarded herein;

17. all costs awarded, all monetary punishment imposed and all work ordered to be performed must be paid and performed by Contemptors and not by others; and

18. the Special Costs and Party and Party costs awarded herein shall be payable forthwith after an assessment of the same before the Registrar of the Court.

[Emphasis added.]

[3] There is no appeal from that aspect of the order ordering each of the appellants to make designated donations to charities and requiring them to perform specified hours of community work service.

### **GROUND OF APPEAL**

[4] The appellants submit that the trial judge erred in ordering costs against them by failing to take into account "all of the circumstances and the totality of the proceedings". In essence, they submit that the real parties to the labour dispute and the contempt proceedings arising therefrom were Telus and the Telecommunications Workers Union ("TWU"), and that when all of the contempt proceedings were taken into account, including proceedings which had been dismissed against nine other individuals, the result was a "wash" such that costs should not have been awarded.

[5] The appellants also submit that, assuming the trial judge was justified in making an order for costs against them, he erred in including para. 16 in the order which, on its face, precludes the appellants from obtaining any direct or indirect assistance from any person or institution in paying the costs. Counsel estimated the

special costs to be in the range of \$8,000 to \$16,000 and, in one instance, as high as \$24,000.

### **BACKGROUND**

[6] The parties were unable to agree on a statement of the underlying facts giving rise to this appeal. Suffice it to say that on July 22, 2005, on application by Telus, the trial judge granted an injunction restraining certain picketing conduct by the TWU, its members, and anyone else having knowledge of the order. This order, which was not appealed, was varied nine times, the final variation being on October 13, 2005. Shortly thereafter, the labour dispute ended, and the order was dissolved on November 23, 2005.

[7] Between September 3, and November 18, 2005, approximately 71 individuals were arrested for alleged breaches of the injunction order, nine of whom were employees of Telus and 62 of whom were members or supporters of the TWU. Two of the individuals arrested were pursued for criminal contempt at the instance of the Attorney General, resulting in admissions of guilt and orders permitting them to purge their contempt by paying \$500 each to a designated charity. (See 2006 BCSC 123, [2006] B.C.J. No. 160 (QL).) The Attorney General did not pursue the other individuals for contempt – that task was left to Telus.

[8] Telus did not proceed with contempt proceedings against approximately 45 of the individuals who had been arrested (and who were subsequently released from their undertakings signed at the time of their arrest); nine individuals were found not guilty of contempt; and the 11 appellants (four of whom had not been arrested) were

found guilty of civil contempt for breaching the injunction order. The Court was not advised what became of the balance of the 71 individuals who had been arrested.

[9] Pursuant to a requisition filed by Telus on February 2, 2006, counsel made submissions with respect to the issues of penalty and costs arising from the trial judge's findings of contempt, which had been made in several separate proceedings. In his order of March 15, 2006, the trial judge ordered ten of the appellants to pay amounts ranging from \$300 to \$1,000 to designated charities and to perform 50 hours each of community work service. The eleventh appellant (Mr. Waite) was given a one month suspended sentence, was ordered to pay \$1,500 to a named charity, and was permitted to purge his contempt by providing a written apology to a named individual. The trial judge also made the order for costs that is the subject of this appeal.

[10] Thereafter, on May 9, 2006, the trial judge dismissed an application by the TWU for an order that special costs be awarded to those 44-46 individuals who had been arrested by police officers but who were released from their undertakings and not subjected to contempt proceedings. The trial judge found that no costs were payable with respect to those individuals. He granted party and party costs at scale 3 to the nine individuals who successfully defended the contempt proceedings against them. No appeal was taken from that order.

#### THE DECISION OF THE TRIAL JUDGE

[11] In the penalty and costs proceedings relating to the appellants, the trial judge dealt with each of the appellants separately by reference to their background, their

ability to pay a fine or other penalty and the individual circumstances of their acts in contempt of the injunction order. He also canvassed the range of penalties imposed in prior decisions in a labour law context. Based on the authorities provided to him, he observed (at para. 12) that "there appears to be little difference between the punishment imposed for criminal contempt and the punishment imposed for civil contempt, but incarceration is usually reserved for situations where criminal contempt has been found." He also noted that donations to a charitable organization had often been employed by the courts as an alternative to fines to "heal some of the damage" caused by the individual's contemptuous conduct. After considering all of these factors, the trial judge imposed the penalties referred to at para. 9 of our reasons, *supra*.

[12] With respect to the issue of costs, the trial judge cited numerous authorities for the proposition that "[t]he practice of awarding special costs to an applicant who has shown that an alleged contemtor was in contempt is well established in British Columbia" (at paras. 29-36). He rejected the appellants' argument (reiterated on appeal) that all of the contempt proceedings should be viewed together as one proceeding in which Telus could not be viewed as the "successful party" entitling it to an award of costs. He dealt with that submission at paras. 41 and 42 of his reasons, as follows:

Counsel for the 11 contemptors also submits that the motions for contempt and all the arrests arising out of this dispute should be viewed as one proceeding and, when viewed in totality, the Plaintiffs cannot be found to have been the "successful party" in these proceedings. Counsel for the 11 contemptors submits that the 71 arrests, the 62 motions for contempt, the 45 directed dismissals should all be taken into account when deciding whether Special Costs should

be awarded or, alternatively, in deciding how Special Costs should be calculated. The contemptors rely on the decision in ***Coulter (Guardian ad Litem of) v. Ball***, [2003] B.C.J. (Q.L.) No. 1804 (B.C.S.C.) for the proposition that special costs for only part of the proceeding may be ordered where misconduct has been "relatively isolated" not warranting an award for Special Costs for the whole of the proceeding. I am satisfied that this submission misconstrues the nature of applications for contempt.

The application is made against a particular Defendant and not all Defendants. The particular Defendant is "John Doe, Jane Doe and other Persons Unknown to the Plaintiffs Acting as Pickets and/or Attending at or Near the Premises of the Plaintiffs...or at the Premises of Customers of the Plaintiffs". Accordingly, each contemptor, while not named as a particular Defendant in the style of cause, is a separate Defendant to be treated differently. Special Costs are not awarded against all Defendants for the actions of one. Accordingly, I am satisfied that, whether or not Special Costs should be awarded against one Defendant should not depend upon the activities of all Defendants or upon whether there has been a limited number of findings of contempt.

[13] He went on to emphasize (at para. 43) that "[i]t is the individual actions of the individual contemptors that must be analyzed to ascertain whether it is appropriate to award Special Costs to deal with particular reprehensible conduct and the wilful disobedience of the Order." In the result, he concluded that special costs were warranted with respect to nine of the appellants (Robert Dean Bridgeman, John W. Semenech, George Steven Sterling, Dwight Adams, Dan Wright, Gerry Curley, Gerry McWhinnie, Ron McGuire and Robert Waite), but that only party and party costs were warranted with respect to the other two (Mark Capewell and Vera Hope Maceluch).

[14] The trial judge then elicited from counsel for the TWU the fact that the TWU would be paying any costs awarded against the appellants, but that it would not pay their fines or other penalties. It appears to have been this statement which caused

the trial judge to insert the unprecedented terms in the order which are the principal concern of the appellants on this appeal, namely, that the appellants must pay the costs orders personally and that "all others ... are hereby enjoined and restrained from paying or in any way funding or contributing to the funding, either directly or indirectly, of ... the Special Costs awarded or the Party and Party (Scale 3) costs awarded herein." The trial judge's reasons for this aspect of the order are set forth at para. 45 of his reasons for judgment:

In their submissions on behalf of the 11 contemptors, counsel states that the Union: "...will pay any special costs that may be awarded against the 11 contemptors." I am satisfied that such a payment by the Union or by any party, individual, or organization other than by those who I have ordered to pay Special Costs would be inappropriate. First, it should not be interpreted by anyone that the Union condones the activities of the contemptors. The payment of Special Costs by the Union might indicate otherwise. Second, the membership of the Union is in the neighbourhood of 15,000 members. It may be viewed by the majority of the members of the Union that it is inappropriate that those members who acted throughout the dispute in accordance with the Order should pay the costs of those who were found to have disobeyed the Order especially where some of those found in contempt are not even members of the Union. Third, the knowledge that Special Costs may be awarded after a finding of contempt has been made may well act as a disincentive for contemptuous acts in future disputes, whereas the knowledge that some other individual or organization will pay Special Costs will not provide the necessary disincentive for scandalous, outrageous and reprehensible conduct in the future.

[15] As a result of these considerations, the trial judge included paras. 16 and 17 in the order under appeal.



**DISCUSSION****1. Standard of Review**

[16] There is no dispute between the parties as to the standard of review to be applied by this Court in reviewing an order for costs. Whether or not to award costs in a particular case is essentially an exercise in discretion and, as stated by Rowles J.A., speaking for the Court in *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36, 41 B.C.L.R. (4<sup>th</sup>) 291 at para. 23: "... [t]his Court will not interfere with a discretionary order unless the chambers judge has erred in law or in principle, or the result is so plainly wrong on the facts as to work an injustice: [citations omitted]." This Court has also stated that trial judges must exercise their discretion with respect to an award of costs in a judicial manner and not arbitrarily or capriciously. (See *Stiles v. B.C. (W.C.B.)* (1989), 38 B.C.L.R. (2d) 307, 39 C.P.C. (2d) 74 (C.A.))

**2. Failure to Consider the Totality of the Proceedings**

[17] As earlier stated, the appellants submit that the real (or true) parties to the labour dispute giving rise to the injunction order and the subsequent findings of contempt against the appellants were Telus and the TWU. They also submit that the trial judge failed to recognize that Telus was not the successful party in the proceedings taken as a whole and that "the win-loss ratio with respect to findings of contempt (leaving aside the 45 directed dismissals) should have been considered a draw."

[18] We agree with the trial judge, substantially for the reasons given by him, that this submission is misguided. The various contempt proceedings against these appellants concerned their individual acts of contempt in the face of the injunction order. There was, and is, no suggestion that the TWU encouraged these individuals to defy the injunction order or was itself involved in contempt of the order. No penalty was, or could have been, imposed on the TWU in the absence of an allegation and proof that it, too, had been a party to contempt of the injunction order. It was not a party to any contempt proceedings, let alone the "real" or "true" party to those proceedings.

[19] Nor is there any legal foundation for the argument that the trial judge should have treated all of the contempt proceedings as one overall proceeding in which Telus was not the successful party. The trial judge rightly rejected this submission as being without merit. Each of these appellants was found guilty of contempt in relation to his or her individual conduct in defiance of the injunction order. Costs were awarded against each of them in relation to the specific proceedings in which each was found guilty of contempt. Those costs did not relate to the individuals against whom contempt proceedings were not pursued, or to the nine individuals who were ultimately found not guilty of contempt. The costs in relation to those individuals were dealt with in separate proceedings giving rise to a separate decision released May 9, 2006, from which no appeal has been taken. (See 2006 BCSC 739, [2006] B.C.J. No. 1041 (QL).)

[20] In summary on this point, we are satisfied that the trial judge did not err in concluding that each of the appellants should pay costs of the specific contempt proceedings in which each of them was involved.

**3. Terms Precluding Others From Paying or Contributing to Costs**

[21] Counsel agree that para. 16 of the order enjoining "all others" from "paying or in any way funding or contributing to the funding, either directly or indirectly" of the award of costs against each of the appellants is unprecedented. Counsel for Telus also acknowledges that the order could reasonably be construed as precluding the appellants from borrowing funds from friends, relatives, or financial institutions in order to pay costs, and he does not seek to uphold that aspect of the order. He submits that, to the extent para. 16 of the order may be viewed as overly broad, it could be deleted, leaving para. 17 in place to give effect to the trial judge's intent that the appellants be personally responsible for the order for costs against them. Paragraph 17 of the order provides that: "all costs awarded ... must be paid ... by Contemptors and not by others". This provision would not preclude the appellants from borrowing funds from others to pay costs, but it would preclude others from paying the costs on the appellants' behalf.

[22] We agree with the parties that the trial judge's purpose in inserting paras. 16 and 17 in this order was to hold the appellants personally responsible for the costs against them and to prevent the TWU or others from paying costs on their behalf. We are also satisfied that the trial judge inserted these provisions in the order as a

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direct result of the statement he elicited from counsel for the TWU that the TWU intended to pay the appellants' costs.

[23] Counsel for Telus submits that, insofar as the order was designed to preclude the TWU and others from paying the appellants' costs, it was justified as a proper exercise of the trial judge's discretion. In that regard, he notes that the trial judge canvassed the financial circumstances of the parties and apparently was satisfied that they were able to pay both a fine and special costs. Counsel also observes, correctly, that the court has a very broad discretion in making an award of costs and that just because an order is unprecedented, it does not follow that it is wrong.

[24] As set out in the extract from the trial judge's reasons set out at para. 14, *supra*, he gave three reasons for including paras. 16 and 17 in his order: (1) to avoid any risk that the TWU would be seen as condoning the conduct of the appellants; (2) because the majority of the union membership might consider it inappropriate for the TWU to pay the appellants' costs, particularly where some of the appellants were not members of the union; and (3) because knowledge that another individual or organization would pay special costs would not provide the necessary disincentive for scandalous, outrageous, and reprehensible conduct in the future.

[25] In our view, the reasons given by the trial judge for including paras. 16 and 17 do not withstand scrutiny and reflect errors in principle in the exercise of his discretion in the circumstances of this case.

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[26] There is no suggestion, or finding, that the TWU encouraged the appellants to breach the injunction order or that they supported the appellants' contumacious conduct. The TWU made it clear that it was not going to pay the fines or donations ordered by the court which were imposed to punish the appellants for their conduct. It was common ground that this punishment, including the hours of community work service, had to be borne solely by the individual appellants.

[27] The mere possibility that members of the union or others might interpret the payment of costs by the TWU as condoning the appellants' contumacious conduct in the face of the TWU's stated position otherwise was not a proper basis for imposing the impugned terms. Such a perception could arise in any case where it is apparent that someone is providing financial assistance to a party involved in litigation, including assistance in paying costs. Apart from situations such as those in which there is an allegation that someone is officiously intermeddling in litigation so as to give rise to the tort of maintenance (as was unsuccessfully alleged, for example, in *Young v. Young*, [1993] 4 S.C.R. 3, varying (1990), 50 B.C.L.R. (2d) 1 (C.A.), rev'g (1999), 24 R.F.L. (3d) 193 (B.C.S.C.)), it is rare for the court to direct inquiries to counsel as to who is funding the litigation, including costs. In most cases, that will be confidential, if not privileged, information of no concern to the court. In this case, the fact that counsel for the TWU disclosed that information in response to questions from the court could not, in our view, give rise to a reasoned perception that the TWU was condoning the appellants' contempt, particularly where, as here, the TWU specifically stated otherwise and the trial judge did not reject its statement. There

may be many reasons why a non-party might pay, or assist a party in paying, special costs which have nothing to do with sanctioning that party's reprehensible conduct.

[28] Nor are we persuaded that the order was justified on the basis that the majority of the union might not approve of using union funds in payment of the appellants' costs. In our view, that is a matter best left to members of the union and its executive. In any event, there was no evidence of the "majority view" of the union membership. If the membership is unhappy with this or any other action of its executive, we have no doubt it will make its views known. Again, the mere possibility that the majority of the membership might be opposed to the union paying the appellants' costs is not a principled basis for imposing the impugned terms.

[29] Finally, we are not persuaded that there was a proper basis on the facts before the court for the trial judge to draw the inference that if the TWU paid the costs of these appellants in these particular circumstances, union members and others might be encouraged to engage in contumacious or reprehensible conduct in the future. The evidence discloses that, for the most part, these appellants were law-abiding citizens who had been contributing members of society at the time they engaged in this behaviour. As a result of their conduct, seven of them were arrested, and all of them were subjected to contempt proceedings, fines, and other penalties. These penalties were commensurate with those imposed in similar cases and could reasonably be regarded as having both a punitive and deterrent effect.

[30] The principal purpose of an order of special costs in the context of contempt proceedings is not to act as a deterrent, but to provide indemnification to a private

party, such as Telus, which is put to the cost of having to pursue the contempt proceedings in circumstances where the Attorney General will not intervene. As stated by Madam Justice Southin, in supplementary reasons for the Court on costs in *Everywoman's Health Centre Soc. (1988) v. Bridges*, [1990] B.C.J. No. 2859 (QL), (1991), 54 B.C.L.R. (2d) 294 at 297 (C.A.):

As to the [special] costs awarded in the civil contempt proceedings, I see no foundation for interfering with that determination. It has long been the practice in the court below to award such costs to a successful applicant. The practice is sound. A person who obtains an order from the court is entitled to have it obeyed without further expense to himself.

Counsel for the respondents says in her written submission that the new rule as to special costs is intended to enable the court to indemnify, where appropriate, fully, or at least substantially, a party for the costs to which he or she has been put. I agree with her.

[31] A similar view was expressed by the court in *Rogers Cable T.V. Ltd. v. I.B.E.W., Local 213* (1994), 26 C.P.C. (3d) 67 (B.C.S.C.) at para. 8:

Contempt of Court is conduct which is in deliberate or wilful disobedience of a Court order and thus offends the court. Not incidentally, the action also violates a right of another which was protected by the order, but the punishment is for the insult to the court and not to compensate the complaining party. In my view therefore, were I to award special costs, it would be to recognize that as between the parties to the litigation, the conduct of the contemnor was outrageous or scandalous and to provide as close to complete indemnity as possible for the party obliged to bring on the application. In my view, where there is contempt of court, there is nothing offensive in an award of special costs which may both act as a form of chastisement to the contemnor and provide indemnity for the complainant ...

[Emphasis added.]

[32] In this case Telus will be substantially indemnified by the order for special costs, whether those costs are paid by the appellants or by the TWU. The appellants have been chastised both by the penalties imposed for contempt and by the trial judge in making it clear that the conduct of nine of the appellants was reprehensible. In our view, there was no principled basis in these circumstances for the trial judge to go further and impose conditions enjoining anyone other than the appellants from paying the costs. At that point, the order of costs became unduly punitive. The effect of the order is arguably to punish the appellants more severely than the two contemnors who were found guilty of criminal contempt and were subjected to a fine but no order as to costs.

[33] Here, the trial judge was advised by counsel that these parties had not been engaged in a labour dispute of this magnitude for over 25 years. The parties settled their dispute, and it was only at the behest of the trial judge that Telus pursued an order for costs. It did not seek an order in the terms of paras. 16 and 17. In our view, there is nothing in these facts to give rise to a real concern that members of the union would be encouraged to engage in further contumacious conduct simply because the TWU expressed a willingness to pay the costs of the appellants in this case.

[34] The only authority relied on by Telus in which a similarly unprecedented order was imposed in the context of a labour dispute is ***BC Public School Employers Assoc. v. BC Teachers Federation***, 2005 BCSC 1443, [2005] B.C.J. No. 2151 (QL). In that case, striking teachers were ordered back to work on October 6, 2005. They were found in contempt of court on October 9, 2005, but continued, thereafter,



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to breach the return to work order. The chambers judge found that the BCTF was acting through its members to commit the ongoing contempt of court and that it was using its assets to facilitate the continuing breach of the order, in part by providing strike pay. In those circumstances, the chambers judge made the following order (at paras. 7-9):

I will enjoin the BCTF and related entities (and here I am contemplating wholly-owned subsidiaries, trusts, etc, because I do not understand or know the exact mechanism that the BCTF is using to facilitate the breach of the court order, it appears that there may be funds solely in control of the BCTF) and from using their assets to further the breach of the court order of October 6, 2005.

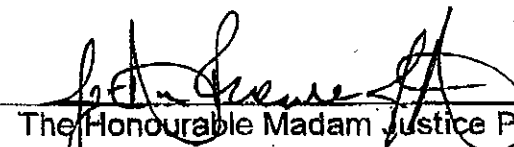
The BCTF may use assets in the ordinary course of business, which would include such things as paying rent, wages to employees and other expenses it would normally pay. It may pay legal fees.

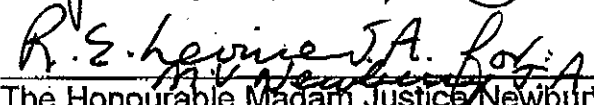
The BCTF is restrained for 30 days from directly or indirectly using its assets to facilitate breach of the court order of October 6, 2005. In particular, the BCTF is enjoined from paying amounts to its members as "strike pay" or to otherwise compensate members for loss relating to breach of the order of October 6, 2005; from providing guarantees or promises to pay to protect members from such losses; from using its books records and offices to permit third parties to facilitate continuing breach of the court order. Either party may apply to extend or shorten this order.

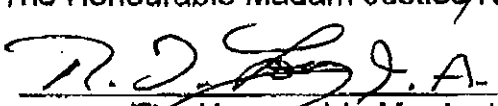
[35] The validity of the order in that case is not before us and we do not propose to comment on it since a similar order may at some point come before this Court. We observe, however, that the chambers judge in that case found that the union was using its assets to actively facilitate the breach of the return to work order; in other words, the union was a party to the breach of the order. As earlier noted, there is no suggestion in this case that the TWU was either encouraging the appellants' contumacious conduct or participating with them in the breach of the injunction order. For that reason, we do not find the **BCTF** decision of particular assistance.

**CONCLUSION**

[36] In the result, while we agree that the trial judge was justified in making orders for costs and special costs against the appellants, we conclude that the inclusion of paras. 16 and 17 in the order reflect errors in principle on the part of the trial judge in the exercise of his discretion. We would allow the appeal to the extent of setting aside these paragraphs of the order.

  
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 The Honourable Madam Justice Prowse

  
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 The Honourable Madam Justice Newbury

  
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 The Honourable Mr. Justice Low