CITATION: *Carroll v Alcan Gove Pty Ltd* [2008] NTMC 007

PARTIES:	JOHN CARROLL
	v
	ALCAN GOVE PTY LTD
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act
FILE NO(s):	20602018
DELIVERED ON:	18 February 2008
DELIVERED AT:	Darwin (by post to the parties' solicitors)
HEARING DATE(s):	Written Submissions
JUDGMENT OF:	Mr V M Luppino SM

CATCHWORDS:

Costs in the Court of Summary Jurisdiction – Whether Justice Regulations are repugnant to the Justices Act – When a case is "exceptional" for the purposes of regulation 14(2) – Fixing appropriate amount of costs.

Justices Act, ss 77A, 77C, 203.
Justices Regulations, r 14.

REPRESENTATION:

Counsel:

Complainant:	Mr Anderson
Defendant:	Mr O'Loughlin

Solicitors:

Complainant:	Solicitor for the NT
Defendant:	Corrs

Judgment category classification:	B
Judgment ID number:	[2008] NTMC 007
Number of paragraphs:	28

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20602018

[2008] NTMC 007

BETWEEN:

JOHN CARROLL

Complainant

AND:

ALCAN GOVE PTY LTD

Defendant

REASONS FOR DECISION

(Delivered 18 February 2008)

Mr V M Luppino SM:

1. On 11 September 2006 I sentenced the defendant in respect of a breach of section 23(4) of the *Mining Management Act*. At that time the question of costs was reserved. Owing to difficulties in arranging a mutually convenient time for counsel and the Court, the parties agreed to present their arguments on costs by written submissions.

2. A point of jurisdiction has been raised by the defendant and I will deal with that first. The defendant contends that regulation 14(2) of the *Justices Regulations* ("the Regulations") is inconsistent with s 77C of the *Justices Act* ("the Act") and is consequently invalid.

3. I set out the relevant extracts of the legislation. Firstly, the Act:-

> **77A. Power to award costs against defendant**
>
> Subject to section 77C, where the Court finds a defendant guilty of an offence, it may order the defendant to pay to the complainant such costs as it thinks fit.

77B. Costs of adjournment

Where a proceeding is adjourned, the Court may, whether or not the defendant is subsequently found guilty of the offence with which he or she is charged, make an order for costs against the party who requested the adjournment.

77C. Limitation on amount of costs

The amount that the Court may order for costs under section 77, 77A or 77B shall not exceed the amount calculated in accordance with the prescribed scale.

203. Regulations

The Administrator may make regulations, not inconsistent with this Act, prescribing all matters and things which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to this Act and in particular prescribing –

(a) the places at which the Court shall or may sit, and the constitution and holding of the Court thereat;

(b) the practice and procedure before Justices and the Court;

(c) the fees to be paid for a matter or thing required or permitted to be done under this Act and the circumstances in which such fees may be waived by the clerk;

(d) the forms to be used under this Act, including the form of any recognizance mentioned in this Act;

(e) the duties of clerks and the form of any record or account required to be kept by them, and providing for the discontinuance of any existing record or account rendered unnecessary by those regulations.

4. Secondly, the Regulations, namely:-

14. Limit on amount ordered for costs

(1) Subject to sub-regulation (2), for the purposes of section 77C of the Act, the amount that the Court may order for costs shall not exceed –

(a) for the first day of a hearing, including preparation of the case for the hearing and counsel fee – $710; and

(b) for the second or a subsequent day of the hearing – $470.

(2) The Court shall have regard to the complexity of a matter before it at the time of the hearing, and may order costs exceeding an amount referred to in subregulation (1) if, in its opinion –

(a) the circumstances of the case; or

(b) the legal issues involved in the case,

are of an exceptional nature.

(3) The Court shall not, in making an order for costs under this regulation, make an allowance for a second counsel or solicitor attending at the hearing.

5. Section 203 of the Act therefore provides for regulations *"… not inconsistent with this Act … prescribing all matters and things which by this Act are required or permitted to be prescribed …"*. Section 77C then states that the amount that the Court may allow for costs under the Act is not to exceed the amount *"… calculated in accordance with the prescribed scale"*. Regulation 14(1) fixes a rate according to the duration of the matter. That however is prefaced as being subject to regulation 14 (2) which in turn allows the Court to order costs exceeding the amount stipulated in regulation 14(1) if, having *"regard to the complexity of the matter…"*, the Court is of the opinion that the circumstances of the case or the legal issues involved *"…are of an exceptional nature"*.

6. The Act does not fix the maximum that a court may award but simply allows for a maximum to be fixed by the Regulations. There is no limitation on the regulation making power as to the method of determining such a maximum. Specifically there is nothing in the Act to require that the maximum be a finite or quantified amount. The approach taken in the Regulations is to fix a scale with two items dependant on the duration of a matter and then essentially stipulates a third item which is

simply a broad general discretion to award a further amount in specified circumstances.

7. Mr O'Loughlin, counsel for the defendant, argues that section 77C of the Act envisages that the Regulations would provide a scale and a maximum and that regulation 14(2) goes beyond this as it provides for costs that are not determinable by reference to a scale and, in lieu of a maximum, an open ended discretion is vested in the Court. He argues that despite what he submits is clear wording in section 77C of the Act which requires a maximum to be set, regulation 14(2) allows for an unlimited lump sum costs. He argues that repugnancy therefore results.

8. However, in my view an open ended discretion of itself is not inconsistent with the Act given the way that the Act, in conjunction with the Regulations, purports to fix a maximum entitlement. As I said section 77C allows the Regulations to fix a maximum apparently without restriction as to how it is calculated. Moreover, the precise wording in section 77C is that the Court may only order costs which *"… shall not exceed the amount calculated in accordance with the prescribed scale …"*. Mr O'Loughlin points out that no such scale is fixed in regulation 14(2) and therefore the approach in the Regulations is again inconsistent with the Act. I do not agree. I do not think it appropriate to look at the sub-regulations of regulation 14 individually for this purpose. The scale is contained in regulation 14 as a whole and comprises four items, namely a full day rate, a part day rate, a broad discretion to top up the amount in specified matters and a prohibition of allowances for second counsel and instructing solicitors.

9. I agree with the submission of Mr Anderson for the prosecution that nonetheless the Regulations thereby prescribe a scale. I also accept that it is not unusual for scales for costs purposes to provide guideline amounts but with a broad judicial discretion to vary from those amounts in

prescribed circumstances. Likewise, there is usually a very broad judicial discretion involved in costs matters, both in the decision to award costs and the amount which is awarded.

10. Invalidity of subordinate legislation for repugnancy requires as a minimum that there be inconsistency between the empowering Act and the subordinate legislation. In my view, no such inconsistency is demonstrated and accordingly, regulation 14 of the Regulations is valid.

11. I now turn to consider the appropriate rate to allow for costs. The prosecution claims an amount of $17,100 for professional costs and $500 for disbursements. The amount claimed for costs is said to be based on a claimed 90 hours of professional work calculated at $190 per hour. That hourly rate is said to be the Supreme Court base hourly rate at the relevant time without the addition of any amount for care and conduct. I note that the Supreme Court hourly rate was increased to $200 per hour for work done after 1 January 2006 which almost neatly spans the time period between the commission of the offence and the completion of the matter in this Court. I also note that the maximum usually allowed for care and conduct is 30% which would effectively result in an hourly rate of $260. A rate lower than the Supreme Court rate is appropriate for matters in the Court of Summary Jurisdiction. The rule of thumb which was normally applied for costs in the Court of Summary Jurisdiction is for two thirds of the amount which would be allowable if the matter was in the Supreme Court. Another comparator is the Local Court scale for civil matters which provides for a variable percentage of the Supreme Court rate depending on specified matters such as the complexity of the matter and the quantum of the claim. Broadly speaking, 80% is recognised as the appropriate percentage for matters generally in the Local Court. Overall I consider that $190 per hour is an appropriate starting point.

12. Generally the amount of costs payable pursuant to the regulation 14(1) is

only a small proportion of a party's actual costs as the scale is so outdated. Looking at the rates in regulation 14(1) broadly, it seems that only something of the order of 50% of actual costs will ever be recovered. The adequacy of the amounts stipulated in regulation 14(1) is not a relevant consideration to the determination of whether a costs order pursuant to regulation 14(2) is appropriate. It is however relevant to the issue of the rate that should be allowed and the appropriateness of the claimed rate of $190 per hour needs to be reviewed in this context. It is clear from the Act and the Regulations that it is not intended that costs under the Act would be an amount which would compensate a successful party for actual legal expenses incurred. The limitations stipulated in regulation 14(3) emphasises this. Allowing the rate claimed by the prosecution would allow for recovery of the proportion of costs incurred which would not normally be the case where matters were not apparently complex enough to warrant an order under regulation 14(2). There is nothing in the Act or the Regulations which requires the costs power to be read this way. I read regulation 14(2) as allowing for a greater amount of costs over and above that determined by reference to regulation 14(1) in matters where regulation 14(2) applies. It does not necessarily follow that a higher rate must also be utilised. The matter falls for determination based on the exercise of my discretion and in my view the low rate stipulated in regulation 14(1) is relevant to the exercise of that discretion. On that basis I consider that the appropriate hourly rate should be $95.

13. Turning now to applying this to the criteria in regulation 14(2), central to the issue is a consideration of the meaning of the word *"exceptional"* as that term is used in regulation 14(2). There is no definition in the Regulations. The generally accepted meaning of the word is that it relates to something out of the ordinary. Regulation 14(2) requires consideration of the complexity based on the circumstances of the case or the legal issues where the latter are *"exceptional"*.

14. In relation to the circumstances of the case, the prosecution submits that the following circumstances were of an exceptional nature, namely:-

    1. that the prosecution was only the fourth ever prosecution under the *Mining Management Act*;

    2. that it was only the second ever prosecution under s 23(4) of the *Mining Management Act*;

    3. that the maximum penalty was a fine of $275,000;

    4. that the circumstances giving rise to the offence and matters raised in mitigation were factually complex, that evidence was lead and tested in the course of the hearing and that factual matters remained in dispute notwithstanding the guilty plea;

    5. that the consequences of the offending behaviour were "horrendous".

15. In my view, of the foregoing items, only that item numbered 4 above can possibly be exceptional within the meaning of that word in regulation 14 (2). The remaining matters fall well short of making the matter complex and are not exceptional in my view. The number of previous prosecutions under the Acts referred to cannot impact on the complexity of this matter. Neither can the relatively high maximum penalty available. Likewise the extent of the injuries suffered by Mr Davey does not impact on the complexity of the case.

16. In terms of the relevant legal issues, the prosecution claims that the following legal issues in the case were exceptional, namely:-

    1. the extent of the defendant's culpability generally;

    2. whether the evidence of Owen Dunn was sufficient to establish in favour of the defendant, that the PVC coat would have protected Paul Davey in the circumstances of the offending behaviour, if so, to what extent; and whether this has any bearing on the defendant's culpability and if so, to what extent;

    3. whether the agreed facts and evidence established that Paul

Davey had adequate notice of the need to wear PPE2, and if so, the extent to which this had any bearing on the defendant's culpability, if any;

4. the significance of general and specific deterrence, taking into account the defendant's recent conviction for an offence against s 23(2) of the *Mining Management Act* and the financial means of the defendant;

5. the extent to which mitigating factors, such as procedures in place both before and after the event to reduce risk, required a reduction in the fine that would otherwise have been imposed on the defendant;

6. the extent to which aggravating factors, such as the failure to ensure compliance with relevant procedures, required an increase in the fine that would otherwise have been imposed on the defendant;

7. the application of *Driver v The Queen* and *Carroll v ERA* to the circumstances of the case, and in particular, whether the latter decision correctly applied ss 5(2)(a) and 17 of the *Sentencing Act*.

17. Again, noting that the complexity of the case has to be measured according to the exceptional nature of the legal issues, in my view, the matters numbered 1, 4 and 7 fail this criteria. True, they do not arise in many matters but that does not render it exceptional if complexity has to be figured in. Matters relating to culpability, deterrence, prior convictions and the application of authorities and provisions of the Sentencing Act are all routine in criminal matters. The matter in number 2 can be exceptional given that it interrelates with the complex factual issues. Although the matters numbered 3, 5 and 6 would not be exceptional standing alone, as they inter-relate with the matter numbered 2, to that extent they also can be exceptional.

18. Mr O'Loughlin submits that of all the matters identified by the prosecution as making the matter exceptional, only the matter set out in paragraph 16 above and numbered 2 can possibly be exceptional. It occurs

to me that that item interrelates with the matter in paragraph 14 and numbered 4. Mr O'Loughlin argues that as the defendant's own report was the basis of nearly all of the information which went into the précis, the defendant should therefore receive appropriate credit for cost savings which thereby resulted for the prosecution. Based on the nature and source of the material put before the Court, the assertion that the defendant has provided the bulk of the material that the prosecution relies upon is correct. That assertion has not been challenged by the prosecution. However, Mr O'Loughlin's submission that credit should be given to the defendant for this overlooks two very relevant matters. Firstly, that costs savings for the prosecution are automatically thereby built in to the claim for costs. Put simply, had it been necessary for the prosecution to commission the report, then the prosecution's claim for costs would exceed the amount currently claimed. Secondly, even with the defendant providing the report, some costs would necessarily be incurred by the prosecution in considering the report before the prosecution could agree facts based on the report.

19. I am more attracted to the point that Mr O'Loughlin makes as to the nature of the matters which were in dispute and my findings on that issue. He asserts that the prosecution failed to accede to an invitation from the defence to agree the only controversial facts. The prosecution has not challenged that assertion. The controversial facts I refer to is that set out in paragraph 16 above and there numbered 2. The failure of the prosecution to agree this made it necessary for evidence to be called and for submissions to be made. Mr O'Loughlin submits that as my findings on this issue were in favour of the defendant, the prosecution cannot then have this taken into account in its favour for the purposes of regulation 14 (2). That argument has considerable merit. In essence it is an application of the well recognised principle that costs should follow the event.

20. Mr Anderson countered by submitting that it is also relevant that despite

my findings in favour of the defendant on that issue, the evidence did not enable me to quantify the extent of the protection that the clothing would have provided. He said that I therefore concluded that the issue of the availability or use of the protective clothing was only of limited mitigating value. Nonetheless, it was relevant and it was the prosecution's refusal to accede to this view which necessitated the calling of evidence and which made the matter more protracted.

21. Mr Anderson also sought to rely on the fact that the same defendant in this matter was also the defendant in a similar earlier prosecution where the defendant consented to an award of costs against it calculated on the basis of 190 hours at $190 per hour. That the defendant has consented to a costs order in another matter is, viewed alone, irrelevant in my view. The prosecution has not put forward any reason why that consent order should be taken into account in the assessment of the costs in this matter and I disregard that.

22. I am of the view that the matter is complex for the purposes of regulation 14(2) having regard to the matters in paragraph 14 and numbered 4 and in paragraph 16 and numbered 2, 3, 5 and 6. An amount for cots in excess of the $710 which regulation 14(1) would otherwise allow is therefore appropriate.

23. Applying the forgoing to the question of quantum, the claim made is based on a total number of hours, specifically 90 hours. No breakdown or itemisation as to the nature of the work involved has been provided. I note that Mr O'Loughlin made a point of the fact that the Act and the Regulations do not provide a mechanism akin to taxation to verify and scrutinise a claim for costs. Although quite true, that does not prevent a claimant for costs from providing some detail or level of itemisation. The prosecution has provided the least possible amount of detail, i.e., a bare claim as to the total hours involved. I am left to exercise my discretion

and to determine the costs on the material provided.

24. Accepting the figure of 90 hours as a starting point, a taxation type of approach is clearly inappropriate. Some allowance is appropriate on account of the defendant having provided the detailed investigation report, but still allowing the prosecution some costs for considering the report. Given the minimal detail of the claimed costs, I can only approach the matter broadly. On that basis I attribute one third of those claimed hours, i.e., 30 hours, to the key factual dispute. I deduct 25 hours on account of the findings in relation to that factual dispute in favour of the defendant and to allow an appropriate amount for the prosecution to consider the report. The number of hours for the purpose of a cost order will therefore be 65 hours.

25. As stated above, I consider the rate of $95 per hour to be an appropriate starting point. I allow 65 hours at that rate making a total for professional costs of $6,175. The disbursement claim relates to an expert's report. $500 is sought which I consider to be very reasonable.

26. I have not allowed any allowance in favour of either party for the costs of the application for costs. In view of my order, each party should bear their own costs relative to the application.

27. Accordingly, I order the defendant to pay the costs of the prosecution fixed at $6,675.

28. I give the parties liberty to apply within 14 days as to any consequential orders which may be necessary.

Dated this 18th day of February 2008.

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Mr

V M Luppino

STIPENDIARY MAGISTRATE