

21/11; [2011] VSC 270

## SUPREME COURT OF VICTORIA

***R v LUBIK (No 2)***

Robson J

11 October 2010; 20 June 2011

**CRIMINAL LAW – APPLICATION BY ACCUSED FOR CERTIFICATES FROM THE APPEAL COSTS FUND – APPLICATION FOR CERTIFICATE FOR DAYS ADJOURNED BY COURT TO CONSIDER RULINGS SOUGHT BY THE ACCUSED ON THE ADMISSION OF EVIDENCE – JURISDICTION TO GRANT CERTIFICATE ENLIVENED – IN THE COURT’S DISCRETION CERTIFICATE REFUSED: APPEAL COSTS ACT 1998, S17.**

L. applied for certificates under the *Appeal Costs Act* 1998 ('Act') in respect of days when the court adjourned to consider rulings sought by L. on the admission of evidence.

**HELD:** Certificates awarded in respect of certain days but not in relation to those days when the Court adjourned to consider the rulings sought by L.

1. The application of s17 of the Act is a two stage process. The first stage is to determine whether the Court's jurisdiction to grant a certificate is enlivened. The second stage is, if the Court's jurisdiction is enlivened, the exercise of the Court's discretion as to whether or not to grant a certificate.

2. A further condition of the court's jurisdiction being enlivened is that the Court may only grant an indemnity certificate if it is satisfied that—

- (a) it is inappropriate to make an order for costs against any party or any other person; and
- (b) the reason for the adjournment was as set out in subsection (1)(b).

3. Whilst the adjourned days on which the Court reserved to consider the rulings sought by L. were not attributable in any way to the act, neglect or fault of L. or his legal practitioners, the "act" referred to in the Act must be an act other than counsel making proper submissions on behalf of his client during the normal course of the trial. Whilst it is not necessary to fully characterise what is involved in an "act" for the purpose of the Act, it does not cover L.'s application for a ruling.

4. Accordingly, a certificate was granted in the case of all the adjourned days save for those adjourned to consider the rulings sought by L. The adjournment on those occasions were a readily foreseeable consequence of the extensive submissions made on behalf of L. about the exclusion of certain evidence. L. should have readily anticipated that the court would require time to consider the lengthy and detailed issues raised and make the rulings sought of the Court. His expenses for those days were not an expense that should be thrown on the appeal costs fund. It was an expense that L. should have expected to incur. It was not an expense that had been thrown onto him through the actions of others for which he should have been compensated.

**ROBSON J:**

1. Mr Lubik applies<sup>[1]</sup> for an indemnity certificate under the *Appeal Costs Act* 1998<sup>[2]</sup> for several days when Mr Lubik's trial was adjourned.

2. Section 17 *Appeal Costs Act* 1998 provides:

(1) If—

(a) the hearing of any criminal proceeding is adjourned; and

(b) the reason for the adjournment was not attributable in any way to the act, neglect or fault of a party accused or convicted of an offence to which the proceeding relates (whether that party is an accused, appellant or respondent in the proceeding), or that party's legal practitioner—that party may apply to the court for, and the court may grant, an indemnity certificate in respect of that party's own costs of the adjournment for the day on which the adjournment is granted and, if appropriate, the next day on which the court sits.

(2) The court may only grant an indemnity certificate under subsection (1) if it is satisfied that—

(a) it is inappropriate to make an order for costs against any party or any other person; and

(b) the reason for the adjournment was as set out in subsection (1)(b).

(3) A party granted an indemnity certificate under subsection (1) is entitled to be paid by the Board,

on an application made to it by that party in the approved form and on proof being provided by that party of the costs that have been incurred, an amount equal to that party's own costs of the adjournment, to the maximum, if any, specified under subsection (5), in respect of the day or days referred to in the indemnity certificate, that the Board considers to have been reasonably incurred and that have not been ordered to be paid by any other party.

(4) For the purposes of this section, a criminal proceeding is deemed to have been adjourned if the court hearing the proceeding, the informant or the Director or Public Prosecutions (as the case may be) notifies the party accused or convicted of an offence (whether that party is an accused, appellant or respondent in the proceeding) to which the proceeding relates or their legal practitioner that a date has been fixed for the hearing of the proceeding, and the proceeding is not listed for hearing on that day.

(5) The Attorney-General may, by order published in the Government Gazette, specify the maximum amount payable by the Board for each day in respect of which an indemnity certificate has been granted under this section.

(6) An order made under subsection (5)—

(a) may be of general or limited application;

(b) may differ according to differences in time, place or circumstance.

### THE ADJOURNMENTS – PRE-TRIAL

3. The pre-trial argument in the matter of the *R v Lubik* began on 30 September and continued on 4, 5, 7, 8, 11 and 15 October 2010. Beginning on Monday 4 October 2010 and continuing through the pre-trial period, submissions were made by both parties as to the inclusion or exclusion of certain evidence. On Wednesday 6 October 2010, I had a personal commitment that compelled my absence and the pre-trial argument was adjourned for the whole day. On Monday 11 October 2010, the parties concluded their submissions. I reserved my decision in relation to the evidentiary arguments, and the Court was adjourned *sine die*. The adjournment included a half day on Monday 11 October, and all of Tuesday 12 October, Wednesday 13 October and Thursday 14 October 2010. The Court was reconvened at 10.30am on Friday 15 October 2010 when I handed down my decision in relation to the inclusion and exclusion of evidence during the trial proper.

### THE TRIAL ADJOURNMENTS

4. The trial proper began on Monday 18 October 2010 and continued on 19, 20, 21, 22, 25, 26, 27, 28, 29 October, and 3, 4, 5 November 2010. On Thursday 28 October the defence concluded their submissions at the end of the morning session. I adjourned the court to the following day in order to be able to prepare the charge I would give to the jury. On Friday 29 October I began my charge. Given that there was an upcoming long weekend, however, I thought it best to hold over my charge as to the evidence until the following week so it could be fresh in the mind of the jury when they retired to consider their verdict. On Friday 29 October the Court was adjourned at lunch until the following Wednesday, 3 November 2010. Tuesday 2 November was a public holiday.

### THE APPLICATION

5. Mr Lindner foreshadowed<sup>[3]</sup> that he would be making an application for an Appeal Cost Fund certificate in relation to the pre-trial adjournments. During the trial,<sup>[4]</sup> Mr Lindner raised the issue of the certificates again. At this time he notified the Court that he was making an application for certificates to cover dates during both the pre-trial and trial periods. At this time, Mr Lindner did not make an application for a certificate for the day of adjournment of my personal commitment,<sup>[5]</sup> during pre-trial. I believe this was merely an oversight by Mr Lindner. I have therefore considered his application as including that date. Therefore, the dates for which Mr Lindner is applying for an appeal costs certificate are:

- (1) 06 October 2010
- (2) 11 October 2010 (half day)
- (3) 12 October 2010
- (4) 13 October 2010
- (5) 14 October 2010
- (6) 28 October 2010 (half day)
- (7) 29 October 2010 (half day)
- (8) 01 November 2010

### REASON FOR ADJOURNMENTS

6. The reasons for the above adjournments are:

- (1) 06 October 2010 - Personal commitment;
- (2) 11 October 2010 (half day) - Adjourned pending ruling in relation to applications regarding evidence;
- (3) 12 October 2010 - Adjourned pending ruling in relation to applications regarding evidence;
- (4) 13 October 2010 - Adjourned pending ruling in relation to applications regarding evidence;
- (5) 14 October 2010 - Adjourned pending ruling in relation to applications regarding evidence;
- (6) 28 October 2010 (half day) - Preparing charge to the jury;
- (7) 29 October 2010 (half day) - Adjourned for the convenience of the jury;
- (8) 01 November 2010 - Adjourned for the convenience of the jury.

### **APPLICATION OF THE ACT**

7. The application of s17 is a two stage process. The first stage is to determine whether my jurisdiction to grant a certificate is enlivened. The second stage is, if my jurisdiction is enlivened, the exercise of my discretion as to whether or not to grant a certificate.

8. Mr Lindner submits that the enlivening issue is whether or not the adjournment is attributable in any way to the act, neglect, or fault of the party accused. He states that s17 is triggered by the adjournment of the Court as a result of an application by either the prosecution or by the court itself where a matter is adjourned. Section 17 is not triggered where the defence seeks an adjournment.

9. Mr Lindner contends that days where the court did not sit for reasons unrelated to the case are obvious examples of when the certificate should be awarded. He gave Monday 1 November as an example of this. I would also include Wednesday 6 October in that characterisation. Mr Lindner acknowledges that the issue was 'a bit more of a grey area' where the Court was adjourned so that the Court could consider its rulings on preliminary matters, as happened on 11-14 October. He pointed out that during such adjournments, when it was unknown how long a ruling would take to deliver, counsel had to be available to return to court at any time. This means counsel is on call, but not actually in court at that time. For these reasons, Mr Lindner states that the adjournments outlined above were not attributable to the accused.

10. A further condition of the court's jurisdiction being enlivened is that the Court may only grant an indemnity certificate<sup>[6]</sup> if it is satisfied that—

- (a) it is inappropriate to make an order for costs against any party or any other person; and
- (b) the reason for the adjournment was as set out in subsection (1)(b).

11. I find that in all instances where a certificate is sought it is inappropriate to make an order for costs against any party or any other person.

12. I find that the adjourned days on which I reserved to consider the rulings sought by Mr Lubik were not attributable in any way to the act, neglect or fault of Mr Lubik accused or his legal practitioners. The reason for the adjournment was the extensive nature of the rulings sought by Mr Lubik. It might be said, therefore, that the adjournment was due in some way to his act in making those applications. In my view, however, the "act" referred to in the Act must be an act other than counsel making proper submissions on behalf of his client during the normal course of the trial. It is not necessary for me to fully characterise what is involved in an "act" for the purpose of the Act save that it does not cover Mr Lubik's application for a ruling.

13. In all other instances, I find that the adjournments were not due in any way to the act, neglect or fault of Mr Lubik or his legal practitioners.

14. Accordingly, in all instances I find that my discretion to grant a certificate has been enlivened.

15. The Crown did not seek to make any submissions with regards to the Appeal Cost Fund certificates.

### **THE COURT'S DISCRETION**

16. In my discretion, I will grant a certificate in the case of all the adjourned days save for those adjourned to consider the rulings sought by Mr Lubik.<sup>[7]</sup> I find that the adjournment on those occasions were a readily foreseeable consequence of the extensive submissions made on

behalf of the accused about the exclusion of certain evidence. The accused should have readily anticipated that the court would require time to consider the lengthy and detailed issues raised and make the rulings sought of the Court. In my view, his expenses for those days are not an expense that should be thrown on the appeal costs fund. It is an expense that an accused should expect to incur. In my view, it is not an expense that has been thrown onto him through the actions of others for which he should be compensated.

**CONCLUSION**

17. In this case, I find that appeal cost fund certificates should be awarded for the following dates:

- (1) 06 October 2010
- (2) 28 October 2010 (half day)
- (3) 29 October 2010 (half day)
- (4) 01 November 2010.

---

[1] Application made 11 October 2011.

[2] Section 17.

[3] 11 October 2010.

[4] 29 October 2010.

[5] Wednesday 6 October 2010.

[6] Under subsection (1).

[7] 11-14 October 2010.

**APPEARANCES:** For the Crown: Mr D Brown with Ms D Karamicov, counsel. Office of Public Prosecutions.  
For the accused Lubik: Mr WB Lindner, counsel. Lewenberg and Lewenberg, solicitors.

---