Federal Court  Cour fédérale

Date: 20210720

Docket: T-2210-14

Citation: 2021 FC 766

Ottawa, Ontario, July 20, 2021

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] This is a motion by the British Columbia Civil Liberties Association [BCCLA] seeking an Order for special costs.

[2] Although the parties agreed to bring the action to a conclusion by way of a discontinuance, they left the issue of costs to be determined by way of this motion. The BCCLA is asking for a substantial indemnity for its so-called thrown-away costs. The Attorney General

of Canada [Minister] takes the position that no award of costs can or should be made in the prevailing circumstances.

I. Procedural History of this Action

[3] This action was commenced by the BCCLA on October 27, 2014. As its name suggests, the BCCLA is a non-profit advocacy group dedicated to the protection of the civil liberties of Canadians. In fulfilling that role, it is a very active public-interest litigant. It attempts to offset litigation expenses through grants and donations from various sources including trusts and private donors. When it retains outside counsel, the legal work is often done — as in this case — on a pro bono basis.

[4] The underlying action challenged the constitutional validity of certain provisions of the *National Defence Act*, RSC 1985, c N-5, that authorized the Communications Security Establishment Canada [CSE] to collect, retain and use information (including metadata) obtained incidentally from Canadians during CSE's foreign targeted surveillance activities. Although the CSE's signals intelligence mandate is directed at foreign targets and not Canadians, it is inevitable that the communications of Canadians will be intercepted in the course of its work.

[5] A central aspect of the BCCLA's claim was the argument that CSE's authority to incidentally collect and retain private information from Canadians without any type of judicial oversight was a breach of s 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]. The Minister took the position that there were sufficiently robust safeguards in place to protect

the privacy interests of Canadians such that the impugned legislative provisions were Charter-compliant.

[6] After September 2017, the action was largely held in abeyance pending the introduction and ultimately the passage into law of Bill C-59. That legislation addressed a number of matters of concern to the BCCLA and, from its perspective, largely rendered the litigation moot. It was on that basis that the BCCLA elected to discontinue the action and the Minister agreed.

[7] Despite the fact that the action was never decided on the merits, a considerable amount of legal work was incurred by both sides including the completion of the process contemplated by s 38 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA]. Between June 2013 and the hearing of this motion in Vancouver on May 6, 2021, the recorded value of legal services rendered by the BCCLA's inside and outside counsel reached almost $600,000. Incurred disbursements came to a further $58,839.88. The BCCLA seeks to recover all or a substantial percentage of those amounts as special costs payable under Rule 400 of the *Federal Courts Rules*, SOR/98-106 [Rules].

[8] The BCCLA claims some credit for spurring the passage of Bill C-59 that, it says, substantially overhauled the oversight mechanisms governing the work of the CSE. Its justification for an award of special costs is set out at paragraphs 9 and 10 of its written representations in the following way:

> 9. Whether CSE activities pursuant to this new legislation are constitutionally sound remains unclear – time will tell. However, Parliament's reform of the entire legal framework governing CSE's information gathering activities in Canada responds to this

> litigation in a proactive manner. At the same time, the Moving Party's role in advancing legal reform should be recognized. As a result of Parliament's actions, this litigation has become moot and the Moving Party can claim success in bringing the impugned provisions and activities of CSE to light and spurring legal reform to address significant constitutional concerns affecting every individual in Canada.
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> 10. The Moving Party now seeks special costs given the exceptional circumstances of this case. Special costs are appropriate based on the unique cost rules that apply to public interest litigation. This case raised issues of exceptional public importance, addressing potentially pervasive infringement of *Charter* rights. It exemplifies cases brought in the public interest, for the community as a whole and the betterment of our democratic institutions, where no person or group alone stands to benefit. But for the determination of the Moving Party, and the willingness of experienced and diligent *pro bono* counsel, this litigation could not have been brought forward.

[9] The Minister sees the case very differently and says that the BCCLA has no entitlement to special costs based on the decision in *Galati v Harper*, 2016 FCA 39, [2016] FCJ No 123 [*Galati*]. In the alternative, the Minister says that the BCCLA has not met the very high threshold for an award of special costs as established by *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

II. Legal Principles

[10] The traditional purpose of a costs award is to indemnify the party that is successful in pursuing a valid legal right or defending a claim later proven to be unfounded. In *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan Indian Band*], however, the Supreme Court of Canada [SCC] confirmed that indemnification is not the sole purpose of a costs award. The modern approach to costs awards

recognizes policy objectives that “encourage the reasonable and efficient conduct of litigation”. One of these objectives is access to justice, which has become increasingly important as public-interest litigation has become more common.

[11] In *Okanagan Indian Band*, above, in the context of awarding advanced costs, the Supreme Court of British Columbia *Rules of Court* were considered to form part of the background against which the court exercised its inherent jurisdiction to depart from the usual rule of costs in the cause.

[12] Rule 400(1) of the *Federal Courts Rules*, above, gives this Court “full discretionary power over the amount and allocation of costs”. Rule 400(3)(h) provides that the Court may consider “whether the public interest in having the proceeding litigated justifies a particular award of costs”. Rule 400(4) provides that the Court “may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs”. Finally, Rule 400(6)(d) provides that the Court may “award costs against a successful party”.

[13] The power to order costs contrary to the cause is implicit in the court’s discretionary jurisdiction as to costs, as is the power to order advanced costs before it is known which party will prevail on the merits: see *Okanagan Indian Band*, above at para 37.

[14] In cases of public importance, the traditional purpose of costs awards may be superseded to ensure litigants can access courts to determine constitutional rights and issues of broad social significance. In order to ensure that ordinary citizens are not deterred from bringing important

constitutional arguments before the court, costs may be awarded to unsuccessful parties. In *Carter*, above, a modified test for awarding advanced costs, as set out in *Okanagan Indian Band*, above, was adopted for awarding special costs in public-interest litigation:

i. First, the case must involve matters of public interest that are truly exceptional;

ii. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding.

[15] Under the first element, cases will only be "truly exceptional" if they "have a significant and widespread societal impact". The standard is high; special costs will only be awarded in "rare and exceptional" cases. Where the above test is met, it "will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim": see Carter, above at para 140. Although the costs awarded in *Carter*, above, were to the successful party, the test does not make success a determinative factor in awarding special costs. Rather, the test provides guidance to courts exercising their discretion in public-interest litigation cases.

[16] To further support that success is not an element of the test, in *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 90, [2015] 3 SCR 250, eight months after *Carter*, above, it was confirmed that "[u]nsuccessful litigants may be awarded costs in highly exceptional cases involving matters of public importance". It stands to reason that an

award of special costs can also be made when a case is effectively rendered moot by legislative change.

[17] The Minister submits that this Court is bound by the decision of *Galati*, above. According to the Minister that decision confirms that a litigant can only claim success if the case was favourably decided on the merits. On my reading of *Galati*, above, the Court did not deviate from the *Carter* test by making success on the merits a prerequisite for an award of special costs. Rather they were responding to and rejecting an argument that the joint applicants had been successful.

[18] The Court then turned to whether the joint applicants were entitled to special costs under the Federal Court's discretion and applying the *Carter* principles. They held that the joint applicants "do not meet that test either". They did go on to observe again that the joint applicants were not successful but do not go so far as to say that success on the merits was a determinative requirement for such an award. Rather, success is a relevant consideration.

III. Quantum of Costs

[19] Rule 400(1) of the Rules gives this Court "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". In *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 10, [2017] FCJ No 173, this rule was described as "the first principle in the adjudication of costs".

[20] Rule 400(4) provides that this Court "may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs". In *Nova Chemicals*, above, the Court held that lump sum awards have become increasingly common for good reason — they save parties time and money and further the objective of the Rules of securing the just, most expeditious and least expensive determination of proceedings. The Court also recognized that indemnification provided by the Tariff may be significantly inadequate in complex litigation but held that "an increased costs award cannot be justified solely on the basis that a successful party's actual fees are significantly higher than the Tariff amounts".

[21] Lump sum costs awards must be justified in relation to the circumstances of the case and costs objectives. A Bill of Costs will provide the proper starting point for the Courts exercise of discretion, however, the purpose of a lump sum award is defeated if the requesting party is required to provide a level of detail akin to that which would be required in an assessment conducted by an assessment officer.

[22] In *Nova Chemicals*, above, the Court indicated that lump sum awards typically range between 25%-50% of actual fees, but acknowledged there may be cases where a different percentage is warranted.

IV. Analysis

[23] I agree with the Minister that this litigation cannot fairly be said to have been the catalyst for the passage of Bill C-59. At most, it may have been one of the several factors that influenced those legislative changes. I also agree with the Minister that the BCCLA's action cannot be

considered to have been successful because it was never tried on the merits. At the same time, the action was not frivolous and it was not lost. The case raised serious and significant constitutional issues that might well have been resolved in favour of the BCCLA.

[24] I also would not characterize the value of the BCCLA's legal expenses as "thrown away" in the usual sense of that term. Bill C-59 did not resolve all of the legal issues raised in the BCCLA pleadings and, presumably, the case could have proceeded to trial to resolve those outstanding matters. In the end, the BCCLA decided that Bill C-59 sufficiently addressed its principal concerns and the case was ended by agreement.

[25] I accept the BCCLA's point that this action raised important issues involving the protection of the privacy interests of Canadians and the need for robust mechanisms for overseeing Canada's national security signals interception practices. The action was clearly brought in the public interest in the broadest sense because it involved practices that had the potential to affect the privacy interests of many Canadians. It was decidedly not a case where the interests of only a few Canadians were arguably at risk. The case does meet the standard described in *Carter*, above, in the sense that it had a potential to "have a significant and widespread societal impact". The limitations around government surveillance of Canadian citizens — albeit in this case incidental to a lawful national security purpose — is a matter of considerable legal significance. I am satisfied that the issues raised by the BCCLA made the case exceptional. Those issues were also not inherently likely to be raised in the context of private-interest litigation. After all, the collection of information by the CSE was not likely to come to the attention of any Canadian whose privacy interests had been compromised.

[26] I do not accept the Minister's argument that the BCCLA had a pecuniary interest in the outcome of its case. The claim was for declaratory relief and not damages. The potential that the BCCLA's counsel might benefit from an award of costs at the end of the day is neither here nor there. Indeed, as the SCC observed in *Carter*, above, in an exceptional case where a costs award is justified, it was said to be contrary to the interests of justice to expect pro bono counsel to bear the majority of the financial burden associated with pursuing the claim.

[27] The Minister also contends that the BCCLA has failed to demonstrate that the costs of the case could not have been raised from private sources. The evidence before me on this issue is considerable — albeit not without some gaps.

[28] While I am satisfied that an award of special costs is warranted here, for many reasons the claim to full indemnity for the value of the professional work recorded is not.

[29] The Minister has tendered the BCCLA's audited financial statements for the years 2013 to 2019. The most recent statement discloses revenues of slightly more than $2,000,000 and expenses of almost $1,600,000. Most of its revenues are derived from membership fees, donations, grants and investment income from a legacy trust fund[1]. The Minister points out that, over the seven years reported, the BCCLA achieved a net cash surplus of $460,282 representing an average annual surplus of $65,754. These funds, it is said, could have been applied to the costs of this litigation.

[1] The BCCLA has no legal right to access the capital of this trust but does receive the annual net income it generates.

[30] The Minister also questions the efforts by the BCCLA to raise funds to support this litigation. The evidence offered by the BCCLA describes those efforts as "significant" but they produced only about $20,000 in donations. Few details of the BCCLA campaign have been provided.

[31] The Minister challenges the claim to costs incurred in connection with the s 38 CEA application arguing that it was a separate proceeding at the conclusion of which no costs were ordered. Those steps were valued at approximately $267,000 plus related disbursements. Other challenges to the value of professional time claimed include matters related to other civil proceedings (including a related class action), media related matters, time spent pondering the significance of Bill C-59 (about $50,000), charges for an unnecessary motion and charges for duplicative work.

[32] There is considerable merit to some of the Minister's stated concerns. I am persuaded that there is no entitlement to recover costs related to the s 38 application. The time to claim those costs was at the conclusion of that proceeding or, alternatively, with an agreement that a claim to those costs would be deferred. My Order issued on December 20, 2016 made no provision for costs and it is too late to claim them now.

[33] I am also satisfied that not all of the professional time incurred by the BCCLA's inside or outside counsel is properly claimable. There are recorded tasks that appear to be duplicative, are unrelated to the action or do not fall within the confines of true legal work. For example, media

matters are not recoverable. The time spent pondering whether to drop the case undoubtedly had a legal aspect but was, otherwise, a business decision.

[34] Of further and considerable significance is the fact that the outcome of the case does not support an award approaching full indemnity. Success or the lack of it remain highly relevant considerations. On the evidence presented, I am not persuaded that this action was the catalyst for the passage of Bill C-59 thus giving rise to the issue of mootness.

[35] While I accept the Minister's position that the evidence presented does not establish that maximal efforts were made to privately fund this case, I do not agree that the BCCLA had the financial wherewithal to fully prosecute this litigation from its own resources. The BCCLA is a very active public-interest litigant with limited financial capacity. It must make regular choices about the cases to bring forward and about how to fund them. It can only resort to private sources so often and some meritorious cases do not generate much interest from donors. A decision to prosecute a case like this one is often made — as it was here — on the strength of the generosity of pro bono counsel. It is counsel who assume the greatest risk, not the parties. Cases like this are also not amenable to contingency fee arrangements because they seek only declaratory relief and not damages.

V. Conclusion

[36] Taking all of the above factors into consideration, I will award the BCCLA special costs in the amount of $175,000 and a contribution to its disbursements of $25,000. Since the Plaintiff

has achieved some success on this motion, a further sum of $5,000 is awarded as costs of the motion.

ORDER IN T-2210-14

THIS COURT ORDERS that the motion is allowed and the Plaintiff shall recover:

1. special costs in this matter of $175,000;

2. disbursements of $25,000; and

3. costs of the motion of $5,000.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2210-14
STYLE OF CAUSE:	THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION v THE ATTORNEY GENERAL OF CANADA
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APPEARANCES:

David J. Martin Sebastian Ennis	FOR THE PLAINTIFF
Donnaree Nygard Helen Park	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Martin + Associates Vancouver, BC	FOR THE PLAINTIFF
Attorney General of Canada Vancouver, BC	FOR THE DEFENDANT