Federal Court  Cour fédérale

**Date: 20230927**

**Docket: T-2069-19**

**Citation: 2023 FC 1298**

**Ottawa, Ontario, September 27, 2023**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**JEFFREY G. EWERT**

**Plaintiff**

**and**

**HIS MAJESTY THE KING IN RIGHT OF CANADA**

**Defendant**

## ORDER AND REASONS (COSTS)

## I. Overview

[1] On August 1, 2023, I allowed Jeffrey Ewert's action against the Crown in part, awarding damages in the amount of $7,500 as a remedy for the breach of his rights under sections 2(*a*) and 8 of the *Canadian Charter of Rights and Freedoms*: *Ewert v Canada*, 2023 FC 1054 [Trial Judgment]. The parties were unable to reach agreement on costs and made written submissions in accordance with my judgment. These are my reasons for awarding Mr. Ewert the sum of $800.00 in disbursement costs.

## II. The Parties' Submissions

[2] The principal disagreement between the parties in their costs submissions pertains to the treatment of an offer to settle made by the Crown dated October 19, 2022, and conveyed to Mr. Ewert on November 2, 2022, in the inclusive amount of $20,000 [October 19 Offer]. The October 19 Offer was made more than 14 days before the commencement of trial in February 2023, was not withdrawn before the commencement of trial and did not expire before the commencement of trial.

[3] The Crown argues its October 19 Offer meets the conditions in Rule 420(3) of the *Federal Courts Rules*, SOR/98-106, and that the Court should therefore apply Rule 420(2)(*a*):

| **Consequences of failure to accept defendant's offer** | **Conséquences de la non-acceptation de l'offre du défendeur** |
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| **420 (2)** Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle, | **420 (2)** Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante : |

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| **(a)** if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment; […] | **a)** si le demandeur obtient un jugement moins avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit, par la suite et jusqu'à la date du jugement au double de ces dépens mais non au double des débours; |

[4] On this basis, the Crown asks the Court to award it $24,736 in doubled fees for trial preparation and conduct, plus $371.08 in disbursements, for a total of $25,107.08. I note that the Crown's calculations do not account for costs to Mr. Ewert to the date of the offer, which would include about half of Mr. Ewert's claimed disbursements, and would offset the Crown's claim to some degree, even on the Crown's arguments.

[5] Mr. Ewert seeks his disbursements incurred in pursuing the action, in the total amount of $1,720.12. He submits the Court should not apply Rule 420(2)(*a*), making essentially three arguments. First, he points to the Court's conclusions regarding the need for vindication and deterrence, particularly given the continued conduct of Correctional Services Canada [CSC] and the correctional context: Trial Judgment at paras 162–176. He submits that settlement of prior complaints and actions arising from similar *Charter* breaches apparently did not achieve the function of deterrence, and says he concluded that "establishing jurisprudence on the matter before the Court might better serve the function of deterrence when coupled with an award of damages."

[6] Second, Mr. Ewert states that a further offer to settle made during trial had the effect of withdrawing the October 19 Offer, and argues that the Crown can therefore not rely on the offer for purposes of Rule 420.

[7] Third, Mr. Ewert asserts it would be unfair for the Crown to be able to rely on settlement offers in this case in the context of costs, while he was unable to refer to the prior settlements in making submissions on damages. He argues this would allow the Crown to "claw back" costs and undermine the function of *Charter* damages.

## III. General Principles

[8] The Court has "full discretionary power" over the amount, allocation, and recipient of a costs award, including costs for or against the Crown: Rule 400(1)–(2). In exercising that discretion, the Court may consider various factors, including the result of the proceeding, the amounts claimed and recovered, the importance and complexity of the issues, "any written offer to settle," the public interest in having the proceeding litigated, a party's failure to admit anything they should have admitted, and "any other matter that it considers relevant": Rule 400(3)(*a*)–(*c*), (*e*), (*h*), (*j*), (*o*). The Court's discretion on costs includes the discretion to award or refuse costs in respect of particular issues, or to award costs against a successful party, notwithstanding any other provision of the Rules: Rule 400(6).

[9] The costs consequences of failing to accept a settlement offer set out in Rule 420 are an important aspect of the Court's discretion on costs. The risk of facing those consequences promotes settlement, encouraging the parties to avoid the costs of litigation through a mutually

acceptable resolution of the issues in dispute: *Leuthold v Canadian Broadcasting Corporation*, 2014 FCA 174 at para 11; *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at para 36. As a result, although Rule 420 provides that the double-costs rule applies "[u]nless otherwise ordered by the Court," departure from Rule 420 should "not occur lightly": *Michaels v Unitop Spolka Z Organiczona Odpowiedzialnoscia*, 2020 FC 1031 at para 5.

[10] At the same time, encouraging settlement is only one of the purposes of a costs award. As the Supreme Court of Canada has held, other purposes include the indemnification or compensation of a successful party for the expenses incurred in the vindication of their rights, preventing abusive or frivolous litigation, encouraging fairness and efficiency in the justice system, and promoting access to justice: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paras 19–30; *Sherman v Canada (Minister of National Revenue)*, 2003 FCA 202 at para 46.

## IV. Analysis

[11] I agree with the Crown that its October 19 Offer meets the requirements of Rule 420(3). Contrary to Mr. Ewert's second argument, the fact that a further offer was made during trial does not affect the Crown's ability to rely on the offer for purposes of Rule 420. Rule 420(3)(*b*) provides that an offer must not be withdrawn or expire "before the commencement of the hearing or trial" [emphasis added]. The October 19 Offer meets this requirement. Indeed, on its face, the offer only remained "in effect" (*i.e.*, was only open for acceptance) until the commencement of trial. It therefore expired when the trial started and could not be accepted by Mr. Ewert during trial, regardless of whether a later offer was made during trial or not.

[12] I also agree with the Crown that the existence of a *Charter* claim, even a successful one, does not in itself preclude the application of Rule 420. Nor does the fact that Mr. Ewert is an inmate, impecunious, or a self-represented litigant in itself preclude the application of the Rule: see *Lill c Canada*, 2022 CF 781 at paras 12–14; *Leuthold* at para 12. At the same time, the Supreme Court has recognized that, as part of the goal of promoting access to justice, in "special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles": *Okanagan Indian Band* at para 27.

[13] Although Rule 420 might typically apply as contended by the Crown, I conclude that in the particular circumstances of this case, I should order otherwise.

[14] The particular circumstances leading me to this conclusion involve the prior history of proceedings between the same two parties in respect of similar allegations pertaining to searches of Mr. Ewert's medicine bundle. As set out in my Trial Judgment, Mr. Ewert brought a grievance with respect to a search of his medicine bundle in November 2006, which was resolved in his favour: Trial Judgment at para 79. A complaint to the Canadian Human Rights Commission with respect to this and another search was settled between the parties, as were two later actions in this Court with respect to further searches: Trial Judgment at paras 162–164.

[15] As Mr. Ewert argues, these settlements with respect to four prior searches did not appear to have a deterrent effect on CSC's conduct, at least to the extent of preventing the unconstitutional search that was the subject of this action. To the contrary, not only did CSC

search Mr. Ewert's medicine bundle in a manner that unjustifiably violated his freedom of religion, but the Crown's primary defence at trial was that CSC's policies permitted just such a search: Trial Judgment at paras 64–81.

[16] In such circumstances, it is understandable that Mr. Ewert concluded that a decision of the Court was necessary despite the Crown again offering to settle the matter through payment of a reasonable amount. Notably, and not surprisingly, the October 19 Offer is expressly made "without any admission" on the part of the Crown. Had Mr. Ewert accepted that offer, he would again be in the situation where at least some within CSC considered—as the Crown's formal position was at trial—that they were entitled to search his medicine bundle in his absence simply because he happened not to be present or because CSC decided to conduct the search in a location where he could not be present.

[17] Further, if such a further search occurred and Mr. Ewert again sought a legal remedy for the breach of his *Charter* rights, he would again have been in a position, as he was in this action, of being unable to refer to the amount of the earlier settlement in discussing the importance of deterrence and the appropriate quantum of damages. To the contrary, the Crown would no doubt have—as they did strenuously in this litigation—insisted that the settlement amounts were subject to privilege and could not be disclosed to the Court. This is not to say that the Crown's position on privilege was either inappropriate or legally incorrect. It is simply to say that it informs the Court's assessment of the consequences of Mr. Ewert's decision not to accept the Crown's offer.

[18] Considering these particular and unusual circumstances of the history of past settlements, the issues at stake in this proceeding, and the positions taken, I conclude Mr. Ewert should be awarded his recoverable disbursements and not required to pay the Crown's costs, despite the Crown's October 19 Offer.

[19] I note that in reaching this conclusion, I am drawing no adverse conclusions whatsoever about the conduct of counsel for the Crown, who conducted their defence of Mr. Ewert's action in a manner which was no doubt in accordance with their client's instructions, and which appropriately recognized that Mr. Ewert was an incarcerated lay litigant, including through assisting with various logistical and production issues.

[20] As for the disbursements claimed by Mr. Ewert:

- Despite the Crown's submissions, the Court will not disallow Mr. Ewert's claim for disbursements in its entirety on the basis that he has not filed invoices for his expenses. It appears Mr. Ewert understood the Court's order regarding the length of submissions to preclude filing such invoices, and volunteered to file same. Given the circumstances, the information provided regarding the claimed disbursements, and the amounts claimed, the Court does not consider it in the interests of justice to require further proof that the disbursements were incurred.

- I agree with the Crown that disbursements associated with motions on which no costs were awarded cannot be recovered now as costs of the action, as the Court cannot revisit or alter earlier costs awards: *Ciba-Geigy Canada Ltd v Novopharm Ltd*, 1999 CanLII 9253 (FC) at para 32. Mr. Ewert's motion for an injunction was dismissed without costs,

despite the Crown's request for costs as the successful party: *Ewert v Canada*, 2021 FC 1132 at para 38. Mr. Ewert's unopposed motion to file an amended witness list was similarly granted without an order as to costs by order dated September 26, 2022. A number of Mr. Ewert's claimed disbursement items appear to arise from these motions and will not be allowed.

- I also agree with the Crown that disbursements associated with Mr. Ewert's access to information requests are not recoverable in the context of this litigation, and that Mr. Ewert's claims for a numbering stamp and computer repair are not recoverable disbursements. I will disallow these amounts.

[21] I will allow amounts associated with the Statement of Claim, recoverable interlocutory steps including in particular the pretrial conference memorandum, and documents associated with trial. In the circumstances, I will also allow, on a partial and rounded basis, certain disbursements for printing and paper costs that might ordinarily be considered as part of "overhead" included in legal fees. On this basis, I calculate Mr. Ewert's total recoverable disbursements to be approximately $800, and I will award that amount.

## V. Confidentiality of Submissions

[22] The Crown asks that Mr. Ewert's costs submissions of August 15, 2023, be sealed as they disclose information protected by settlement privilege related to offers other than the October 19 Offer, and earlier settlement amounts. I disagree that settlement privilege applies to offers made in this proceeding other than the October 19 Offer. Indeed, Rule 400(3)(*e*) expressly

permits the Court to consider "any written offer to settle" even if it is not a Rule 420 offer. Oral offers to settle might arguably be considered as a relevant matter under Rule 400(*o*). However, I do not propose to decide this latter issue for the sole purpose of determining the Crown's request for sealing.

[23] Although Mr. Ewert did not reveal the amount of the prior settlement offers, some of his submissions, combined with the known information about the Crown's October 19 Offer, might reveal information about the size of those prior settlements or the oral offer. Mr. Ewert's submission of August 15, 2023 will therefore be sealed. The Court will arrange for a public version of those submissions to be put on the Court file with redaction of the following passages: (i) in paragraph 12, the second sentence; (ii) in paragraph 13, from the word "they" to the end of the paragraph; (iii) in paragraph 15, the first seven words; (iv) in paragraph 17, the third line and the first 11 words of the fourth line; (v) in paragraph 20, from the word "was" to the end of the first sentence.

**ORDER IN T-2069-19**

**THIS COURT ORDERS that**

1. The plaintiff is awarded his disbursement costs of this action in the amount of $800.00.
2. The plaintiff's costs submission dated August 15, 2023, shall be sealed in the Court file and not made available to the public except on further order of the Court. A public version of that submission in accordance with the Court's reasons will be placed in the Court file.

"Nicholas McHaffie"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2069-19 |
| **STYLE OF CAUSE:** | JEFFREY G EWERT v HIS MAJESTY THE KING IN RIGHT OF CANADA |

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

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| **ORDER AND REASONS:** | MCHAFFIE J. |
| **DATED:** | SEPTEMBER 27, 2023 |

**WRITTEN REPRESENTATIONS BY:**

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| Jeffrey G. Ewert | ON HIS OWN BEHALF |
| Dominique Guimond | FOR THE DEFENDANT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Montreal, Quebec | FOR THE DEFENDANT |