Federal Court  Cour fédérale

Date: 20121005

Dockets: T-616-12
T-619-12
T-620-12
T-621-12
T-633-12
T-634-12
T-635-12

Citation: 2012 FC 1172

Ottawa, Ontario, October 5, 2012

PRESENT: Madam Prothonotary Aronovitch

BETWEEN:

T-616-12

LEEANNE BIELLI

Applicant

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), URMA ELLIS (RETURNING OFFICER FOR DON VALLEY EAST), JOE DANIEL, YASMIN RATANSI, MARY TRAPANI HYNES, AKIL SADIKALI, RYAN KIDD

Respondents

AND BETWEEN:

T-619-12

SANDRA MCEWING AND BILL KERR

Applicants

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), JOHANNA GAIL DENESIUK (RETURNING OFFICER FOR WINNIPEG SOUTH CENTRE), JOYCE BATEMAN, ANITA NEVILLE, DENNIS LEWYCKY, JOSHUA MCNEIL, LYNDON B. FROESE, MATT HENDERSON

Respondents

AND BETWEEN:

T-620-12

KAY BURKHART

Applicant

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), DIANNE CELESTINE ZIMMERMAN (RETURNING OFFICER FOR SASKATOON-ROSETOWN-BIGGAR), KELLY BLOCK, LEE REANEY, VICKI STRELIOFF, NETTIE WIEBE

Respondents

AND BETWEEN:

T-621-12

JEFF REID

Applicant

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THECHIEF ELECTORAL OFFICER), LAUREL DUPONT (RETURNING OFFICER FOR ELMWOOD-TRANSCONA), JIM MALOWAY, ILONA NIEMCZYK, LAWRENCE TOET, ELLEN YOUNG

Respondents

AND BETWEEN:

T-633-12

KEN FERANCE AND PEGGY WALSH CRAIG

Applicants

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), DIANNE JAMES MALLORY (RETURNING OFFICER FOR NIPISSING-TIMISKAMING), JAY ASPIN, SCOTT EDWARD DALEY, RONA ECKERT, ANTHONY ROTA

Respondents

AND BETWEEN:

T-634-12

YVONNE KAFKA

Applicant

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), ALEXANDER GORDON (RETURNING OFFICER FOR VANCOUVER ISLAND NORTH), JOHN DUNCAN, MIKE HOLLAND, RONNA-RAE LEONARD, SUE MOEN, FRANK MARTIN, JASON DRAPER

Respondents

AND BETWEEN:

T-635-12

THOMAS JOHN PARLEE

Applicant

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), SUSAN J. EDELMAN (RETURNING OFFICER FOR YUKON), RYAN LEEF, LARRY BAGNELL, KEVIN BARR, JOHN STREICKER

Respondents

REASONS FOR ORDER AND ORDER

Introduction

[1] These reasons deal with motions brought by the respondent Members of Parliament seeking orders requiring the applicants in the underlying proceedings to post security for costs in the total amount of $260,409.00. The applicants are nine individual electors who have commenced seven applications under the *Canada Elections Act* to contest the results of the 41st General Election in the electoral districts of Don Valley East, Winnipeg South Centre, Saskatoon-Rosetown-Biggar, Elmwood-Transcona, Nipissing-Timiskaming, Vancouver Island North, and Yukon.

[2] The applicants say that in the days leading up to the May 2, 2011 federal election, they received live or automated ("robo") calls some of which were represented to be made on behalf of Elections Canada, misdirecting them to non-existent polling stations, or that were of an abusive or harassing nature. On that basis, they have commenced applications under section 524(1)(b) of the *Canadian Elections Act*, S.C. 2000, c.9 seeking to annul the election results in the above ridings due to "irregularities, fraud, or corrupt or illegal practices that affected the outcome of the elections."

[3] The parties seeking an increase in security for costs are the seven candidates of the Conservative Party of Canada ("CPC") who were elected in those ridings and are current sitting Members of Parliament ("MPs"). The other respondents to these applications include three unsuccessful candidates of the New Democratic Party (NDP) in the affected ridings. The three NDP respondents, while named respondents, support the applications, and have also filed submissions to oppose the present motions for increased security for costs and, in concert with the applicants, ask that the motions be denied.

[4] To date, the applicants have each posted a mandatory $1,000 for security for costs as required by the *Elections Act*. The *Act* gives the Court discretion to increase that amount where the Court deems it just to do so. Given the complexity and scope of this litigation and their mounting litigation expenses, the respondent MPs take the view that the amount of the mandatory security for costs put up by the applicants to date is inadequate, and ask the Court to exercise its discretion to increase the amount of security to be posted to over $260,000. More specifically, the MPs are requesting an increase of $33,987.00 in one application, and $37,737.00 in the six others, for a total of $260,409.00

Summary of the Findings of the Court

[5] For the reasons that follow, I decline to exercise my discretion to increase the security for costs already posted by the applicants, as I do not consider it just in the circumstances. In essence, the respondent MPs have failed to raise grounds or bring to bear evidence that would justify any further payment of security for costs, let alone in the amount requested.

The Motions for Enhanced Security for Costs

[6] In support of each of their motions, the respondent MPs have filed as evidence the virtually identical affidavit of Dan Hilton, Executive Director of the Conservative Party of Canada. Mr. Hilton stresses that the applicants are asking the Court to nullify election results in their ridings, thereby seeking "the most extreme remedy available under the *Canada Elections Act*". He makes the point that the respondent MPs are obliged to defend against these applications, at great expense, as evidenced by the bills of costs attached to each of Mr. Hamilton's affidavits attesting to the

litigation costs incurred to date by each of the MPs. It is these sums that are being sought by the respective MPs by way of an increase in the amount of security to be paid by the applicants.

[7] Mr. Hilton provides excerpts and screenshots from the website and blog of the Council of Canadians (Council) to demonstrate the Council's pledges of support for the applicants in these proceedings, including soliciting donations from the public to fund the applicants' legal action. He points to a newsletter where the Council itself states that the legal bills for these proceedings would reach $240,000 by the end of June 2012, thereby demonstrating the high cost of the proceedings.

[8] Also attached to Mr. Hilton's affidavit is an article published by the applicants' law firm, which confirms that the Council has supported the applications by fundraising to cover their legal costs, and further by agreeing to indemnify the applicants for their litigation costs should their applications be unsuccessful.

[9] The Respondent MPs rely on the following factors to justify their "modest request": the applications were brought more than 10 months after the impugned elections; the applications allege fraud, which would normally warrant an award of costs on a "substantial indemnity scale"; the evidentiary record will be extensive; defending against the allegations has already proved costly; and the hearing will last at least three days.

[10] According to the respondent MPs, the legislator and drafters of the provision would have had just these factors, and the very circumstances of this case in mind as warranting an increase in security for costs under s.526 (2) of the *Elections Act*. That is, respondents such as the MPs who are constrained from raising funds by campaign finance legislation, who must defend a protracted and

costly court challenge that may result in the ultimate penalty of unseating them, brought on by parties that have an obvious funding and fundraising advantage, including assurances that they will ultimately be indemnified for their costs.

[11] In his submissions to the Court, counsel for the respondent MPs disputes the "public interest" character of the underlying applications. He characterizes this litigation as a "zero-sum" situation, with extreme consequences for the MPs should they be unsuccessful. He emphasizes the costs of the litigation to the MPs, and points to the applicants' ability to raise funds in contrast with the MPs' inability to do so given the limitations imposed on the MPs by s.404 of the *Elections Act*. Counsel maintains that the fact that the applicants are well funded makes access to justice a moot issue in this case, and shows that there is no reason to exempt the applicants from having to post increased security for costs.

[12] Even if the present litigation may be said to be a public interest case, argue the respondent MPs, it should not override other considerations and the applicants should not thereby receive preferential treatment when it comes to the determination of costs: *Khalil v. Canada*, 2007 FC 1184, 324 F.T.R. 168 at para. 10; *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, 2002 FCA 515, [2002] F.C.J. No. 1795 at para. 10; *League for Human Rights of B'nai Brith Canada v. Canada*, 2012 FC 234, [2012] F.C.J. No. 279 at para. 14.

[13] For their part, the applicants argue that it would be unjust in the circumstances to order increased security for costs payable by the applicants, principally because it would be contrary to the purposes of the *Elections Act*. They say that to do so would impede their access to justice by deterring, or effectively preventing individual voters from seeking to defend their democratic right

to vote free of interference or uncompromised by fraudulent electoral practices. Given that the *Elections Act* entitles "any" elector eligible to vote in an electoral district to contest the outcome of the election in that district, it can not be, say the applicants, that only wealthy voters were contemplated to have the benefit of the legislation.

[14] Essentially the same argument is made on behalf of the NDP candidates who oppose this motion. They argue that it is the collective responsibility of Canadians that applications such as these be heard on the merits and without being encumbered by onerous cost orders: *Wrzesnewskyj v. Canada (Attorney General)*, 2012 ONSC 3718, [2012] O.J. No. 3002 at para 9.

[15] The applicants argue as well that at the end of the day, litigation costs are often not awarded against public interest litigants, and that the logic underlying this approach should carry over to security for costs. They emphasize that costs in public interest cases not only are not always awarded to the successful party, in certain cases of particular public importance, they have been awarded to the unsuccessful claimant: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at paras. 20, 39 [*Okanagan*]; *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484 at para. 222, cited in *Mitchikanibikok Inik v. Canada (Indian Affairs and Northern Development)*, 2010 FC 910, [2010] F.C.J. No. 1113 at para. 6; *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1, cited in *Okanagan*, above, at paras. 29-30.

[16] Despite s.525 (3) of the *Elections Act*, which states that applications such as this are to be dealt with "without delay and in a summary way", the respondent MPs have filed motion after motion, causing significant delays and adding to the costs of the litigation. The present motion for

security for costs, say the applicants, is no different, and the respondent MPs should not be rewarded for their conduct.

[17] On the question of funding advantages, the applicants stress that the respondent MPs already benefit from a significant funding advantage in the form of tax benefits for contributions to the Conservative Party of Canada, which can then be used to fund their legal fees. As such, the applicants will end up paying as much as 300% more than the respondent MPs in the course of this litigation. The applicants, on the other hand, are funding the litigation with the support of the Council and cannot access the same tax benefits. To increase their security for costs would further exacerbate this inequity.

Reasons for and Findings of the Court

[18] Sections 526 (1) and (2) of the *Elections Act*, provide as follows:

Security, service of application	Cautionnement et signification
526. (1) An application must be accompanied by security for costs in the amount of $1,000, and must be served on the Attorney General of Canada, the Chief Electoral Officer, the returning officer of the electoral district in question and all the candidates in that electoral district.	**526.** (1) La requête est accompagnée d'un cautionnement pour frais de 1 000 $ et est signifiée au procureur général du Canada, au directeur général des élections, au directeur du scrutin de la circonscription en cause et aux candidats de celle-ci.
Increase of security	Majoration du cautionnement
(2) The court may, if it considers it just, increase the amount of the security.	(2) Le tribunal peut, s'il l'estime indiqué, majorer le montant du cautionnement.

[19] The mandatory amount of $1,000.00 which must be paid at the time of filing bears no relationship to the costs of litigation. Presumably, it is meant to deter frivolous or vexatious complaints. That question does not arise here as it has already been determined by this Court. In *Bielli v. Canada (AG)*, 2012 FC 916, [2012] F.C.J. No. 971, my sister Prothonotary Milczynski held that far from being frivolous, vexatious, or an obvious abuse, the underlying applications raise serious issues about the integrity of the democratic process in Canada that compel judicial scrutiny in order that public confidence in the electoral process be maintained. Given the findings of the Court, there can be no need for further safeguards by way of increased security to guard against unmeritorious proceedings.

[20] The parties agree that this is a case of first impression. Section 526 (2) of the *Elections Act* does not set out criteria to be taken into account in determining what is "just" in the circumstances. To my knowledge, that provision of the statute has not received judicial consideration. In the circumstances, an examination of the basic purpose of security for costs orders more generally is warranted and instructive.

[21] The principal reason for security for costs is not to fund litigation, or to correct a disparity of funding between litigants. The purpose of such orders is to ensure that any likely award of costs made against a litigant at the conclusion of a proceeding can be effectively recovered by the party defending or responding to the litigation, in this case the MPs. In other words, in this case, it would be to secure the MPs' ability to recover any costs that may be ordered against the applicants at the conclusion of this litigation.

[22] This primary purpose of security for costs was unambiguously stated by the Court of Appeal of British Columbia (BCCA) in *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 25 B.C.A.C. 95, 76 B.C.L.R. (2d) 231 at para. 19 [*Fat Mel's Restaurant*] and was recently reaffirmed by the same Court in *Guinea Golden Mines G.G.M.-S.A.R.L. v. Cassidy Gold Corp.*, 2006 BCCA 200, 225 B.C.A.C. 99 at para. 9:

> It is appropriate to start with the question of what is the purpose of an order for security for costs. In *Island Research & Development Corp. v. Boeing Co.* (January 3, 1991), Doc. Vancouver C902161 (S.C.), Spencer J. said (at p. 3):
>
> > The purpose of security for costs is to protect a defendant from the likelihood that in the event of its success it will be unable to recover its costs from the plaintiff. The plaintiff is not to be permitted a free ride on an unlikely claim at the defendants' expense. The factors to be considered in achieving a just balance between the defendants' right to protection and the plaintiffs' right to advance a potential claim for adjudication include the chance of the claim's success, the anticipated level of cost in conducting the action and the prospect of the plaintiffs ever having assets from which to pay the defendants' costs if the claim fails."
> >
> > [emphasis added]

[23] More recently, in *Residents & Ratepayers of Central Saanich Society v. Central Saanich (District)*, 2011 BCCA 340, 21 B.C.L.R. (5th) 33 at para. 13 [*Saanich*] the British Columbia Court of Appeal applied this rationale in the case of public interest litigants. In *Saanich*, the Court was called upon to consider whether the nature of the litigation in that case could be invoked to preclude public interest litigants from having to put up security. Without deciding the question, and while acknowledging that there may be cases where it might be inappropriate to do so, the Court in that case did find it appropriate to order security for costs to be paid by public interest litigants while reiterating the underlying rationale for security for costs as follows at paragraph 15:

> "There is a presumption in favour of granting security for costs if there is a serious question as to whether recovery may be difficult."
>
> [emphasis added, references omitted]

[24] As stated by the Court in *Fat Mel's Restaurant*. and reiterated more generally in the jurisprudence, the application of the rationale for security for costs must take into account a balance of interests. Thus, while access to the courts by legitimate litigants ought not to be unduly constrained, there is an interest in protecting against frivolous or abusive claims by litigants from whom costs may not be recoverable. That balance comes into play however, only when there is reason to think that there are insufficient assets to satisfy a potential costs order, or where there are other factors to suggest that the recovery of costs will be difficult, or not possible. These are the factors that raise the presumption in favour of security for costs which then have to be balanced with other interests, most importantly, the interest of maintaining access to justice and to the courts. No such factors have been alleged or proven in this case.

[25] The MPs rely on the strength of their evidence and argue that the applicants have failed to adduce any evidence, but most importantly evidence of their impecuniosity, or lack of funds, such that posting additional security for costs would effectively stop them from continuing this litigation. According to the respondent MPs, the only question for the Court in augmenting the security for costs already provided is whether such a payment, if ordered by the Court, would effectively terminate this proceeding. They say that in the absence of evidence that the applicants cannot afford to pay security for costs, and that to do so would hobble their ability to proceed with the litigation, the Court must find that additional security for costs is warranted, especially in light of the increments to the security for costs requested by the MPs which they characterize as modest.

[26] The argument, though ably presented, is a reversal of the onus of proof in these motions. It is the moving parties, the respondent MPs, that bear the onus of adducing evidence that addresses the purposes of security for costs, evidence that would tend to show that the MPs are at risk of not

being able to recover their costs if awarded against the applicants. The evidence adduced by the MPs, in fact, is to the contrary. The applicants are well and fully funded, to the point of an apparent indemnity of the applicants' costs incurred in this litigation. In my view, the MPs' own evidence obviates the necessity for any increase in security for costs.

Conclusion

[27] In sum, the respondent MPs have failed to allege proper and relevant grounds or to adduce evidence to support a claim for an increase in the payment of security for costs by the applicants. The Court has no basis to conclude that any increase in security for costs is warranted, or just, in the circumstances.

[28] As noted above, the purpose of requiring security for costs is not to fund litigation. Neither the high stakes of the litigation, nor an alleged disparity of funding between litigants are grounds for ordering security to be posted. The necessity for such a request is made out only where it can be demonstrated that the applicants have insufficient assets to cover an order for costs, or where other factors are present to suggest that the recovery of costs from the applicants will be difficult, or unlikely. None of these factors are present in this case. Indeed the respondent MPs' own evidence is to the contrary.

THIS COURT ORDERS that:

1. The respondent MPs' motions for an order increasing the security for costs to be posted by the applicants, on a near indemnity scale, for a total of $260,409.00 are hereby denied.

2. Having heard the submissions of the parties on costs, and finding that these motions have unnecessarily delayed and encumbered these proceedings, it is further ordered that the costs of these motions shall be paid by the respondent MPs to the applicants, in any event of the cause.

"R. Aronovitch"
Prothonotary