Federal Court  Cour fédérale

Date: 20190916

Docket: T-1736-14

Citation: 2019 FC 1176

Ottawa, Ontario, September 16, 2019

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

GWENDOLYN LOUISE DEEGAN AND KAZIA HIGHTON

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF NATIONAL REVENUE

Defendants

ORDER AND REASONS

[1] For the reasons that follow, no costs are awarded in this matter.

I. Background

[2] On July 22, 2019, this Court dismissed the action commenced by the Plaintiffs challenging the constitutionality of the *Canada-United States Enhanced Tax Information*

Exchange Agreement Implementation Act, S.C. 2014, c. 20, s. 99 [*Implementation Act*] and sections 263 to 269 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 [collectively "Impugned Provisions"]: *Deegan v Canada (Attorney General)*, 2019 FC 960 (CanLII) [Deegan]. The Court invited the parties to come to an agreement on costs or, absent such agreement, to make written submissions seriatim. The Plaintiffs and Defendants filed their costs submissions on August 12, 2019 and September 3, 2019 respectively.

[3] Briefly, the Impugned Provisions stem from the United States of America's [US] tax system, which taxes the worldwide income of US citizens no matter where they reside. In 2010, the US enacted the *Foreign Account Tax Compliance Act* [*FATCA*] which, among other things, requires that non-US financial institutions provide the US Internal Revenue Agency [IRS] with account information for customers who may be subject to US tax laws. To mitigate the potential negative impact of *FATCA* in Canada, the Canadian government concluded an intergovernmental agreement with the US government in 2014 [Agreement] and implemented the Agreement through the Impugned Provisions. As a result, Canadian financial institutions now are required statutorily to provide to the Canada Revenue Agency [CRA] certain information about customers whose financial account information suggests they may be "U.S. persons". This term is defined in the Agreement, reproduced as the schedule to the *Implementation Act*. The CRA then provides such information to the IRS: Deegan, supra, at paras 1-7.

[4] Procedurally, this action was lengthy and complex, spanning about five years and involving two summary trials among other steps. The original Statement of Claim was filed on August 11, 2014, and the style of cause was amended at least twice with the addition and

removal of certain Plaintiffs [Kazia Highton added June 16, 2016 and Virginia Hillis removed August 28, 2017]. The first summary trial involved the non-constitutional claims that were added to the Amended Statement of Claim filed on October 9, 2014, and concerned the legality of the disclosure of personal information of U.S. persons collected by the CRA for tax year 2014 and scheduled to be disclosed to the IRS on or about September 30, 2015: *Hillis v Canada (Attorney General)*, [2016] 2 FCR 235, 2015 FC 1082 (CanLII) [*Hillis*], at para 3. In Hillis, the Plaintiffs sought, unsuccessfully, certain declaratory and prohibitive injunctive relief from the disclosure of taxpayer information pursuant to the Impugned Provisions. The Court held that the collection and disclosure of account holder information about US reportable accounts is legally authorized in Canada. In other words, as in *Deegan*, the Defendants prevailed.

[5] The Court's denial of the relief requested, which was brought by the Plaintiffs as a summary judgment motion but ultimately heard as a summary trial, left the door open for the Plaintiffs to pursue their claim that the Impugned Provisions are *ultra vires* or inoperative because they are unconstitutional or otherwise unjustifiably infringed *Charter* rights: *Hillis*, *supra*, at para 77. Regarding the issue of costs, the Court held, in that same paragraph, that "[t]his is a case where, in view of the nature of the issues and the public interest involved in clarifying the scope of novel provisions affecting hundreds of thousands of Canadian citizens, no costs should be awarded against the losing parties."

[6] The Plaintiffs have appealed the outcome of the first summary trial and sought an injunction pending appeal. The Federal Court of Appeal [FCA] denied injunctive relief, with no costs awarded: *Hillis v Canada (Attorney General)*, A-407-15, per Rennie J.A. September 30,

2015. On further Order of the FCA, on consent, the appeal is in abeyance pending the outcome of this matter: *Hillis v Canada (Attorney General)*, A-407-15, per Dawson J.A. 06 November 2015.

[7] About two months prior to the second summary trial, the Defendants challenged the Plaintiffs' standing. The Court addressed this issue in the decision, finding "that the Plaintiffs have no standing as of right to pursue this action. There is no evidence indicating that they have, as yet, been directly affected by the Impugned Provisions, and it is speculative to say that they may be so affected in the future": *Deegan, supra,* at para 192. The Court proceeded to review the applicable law and tests regarding public interest standing, noted the "flexible, discretionary approach" taken by previous courts, and concluded that: (i) the case raises serious justiciable issues, (ii) Ms. Deegan, though not directly affected yet, is not a "mere busybody" but rather is deeply concerned about the consequences of the Impugned Provisions, and (iii) the action is a reasonable and effective way to bring the issues raised by the case before the Court; hence the Court was prepared to grant Ms. Deegan only public interest standing: *Deegan, supra*, at paras 194-208.

II. Relevant *Federal Courts Rules*

[8] Regarding the issue of costs, this Court held in *Dalfen v Bank of Montreal*, 2016 FC 1133 [Dalfen] that, "[t]he awarding of costs, including the quantum, is a matter falling within the Court's discretion (Rule 400(1); [citing] *Canada (Attorney General) v Rapiscan Systems Inc*, 2015 FCA 97 (CanLII) at para 10). In determining an award of costs, the Court is guided by the considerations found in Rule 400(3)": *Dalfen,* at para 5.

[9] Relevant Rule 400(3) factors for consideration in this matter may include:

- the result of the proceeding;
- the importance and complexity of the issues;
- the amount of work;
- whether the public interest in having the proceeding litigated justifies a particular award of costs;
- any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding.

[10] Further, Rule 400(6)(d) permits the Court to award costs against a successful party.

III. Plaintiffs' Submissions

[11] Notwithstanding the outcome of the second summary trial resulting in the dismissal of the action, the Plaintiffs submit that this is a rare instance where an award of costs to an unsuccessful litigant is appropriate. They seek an award of $86,381.73 calculated on the basis of the maximum allowable units under column V of Tariff B of the *Federal Courts Rules*. A Bill of Costs is attached to the Plaintiff's costs submissions as Schedule A [Bill of Costs]. In support of such an award, the Plaintiffs point to the extensive evidentiary record, and the substantial resources expended by both sides to produce it, including evidence: (a) by Ms. Deegan and numerous other individuals who assert they have been impacted by *FACTA* and the Impugned Provisions; (b) of the negotiations that went on between Canada and the US with respect to the implementation of *FATCA* and the conclusion of the Agreement; and (c) by experts in fields as

diverse as U.S. tax and immigration law, economics, international taxation and the sharing of tax information between countries: *Deegan, supra,* at paras 204-206.

[12] The Plaintiffs further submit that a costs award in their favour is appropriate since one of the objectives of costs awards in cases such as this one is to ensure "that ordinary citizens will have access to courts to determine constitutional rights and other issues of broad social significance": *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan Indian Band*], at para 38. The Supreme Court of Canada also held, in that same paragraph, that:

> "… public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate."

[13] The Plaintiffs argue that ordinary citizens such as the Plaintiffs should be encouraged to retain experienced counsel to obtain judicial resolution of the sort of constitutional questions engaged in this case affecting thousands of others.

[14] The Plaintiffs further submit that they do not seek special costs but rather Tariff costs. What made the costs "special" or unusual in *Okanagan Indian Band*, however, was not the amount or quantum but rather that they were interim or advance costs, "to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation", as per the cited order of the British Columbia Court of Appeal: *Okanagan Indian Band, supra*, at para 17.

[15] The Plaintiffs recognize that the *Carter* test for determining whether to exercise judicial discretion to award special costs was developed in the context of a successful public interest litigant. After noting the test set in *Okanagan Indian Band*, *supra*, and elaborated on in *Little Sisters*, *infra*, the Supreme Court adopted a modified test: *Carter v Canada (Attorney General)*, [2015] 1 SCR 331, 2015 SCC 5 [*Carter*], at paras 138-140. The test reads as follows, at para 140:

> [140] In our view, with appropriate modifications, this test serves as a useful guide to the exercise of a judge's discretion on a motion for special costs in a case involving public interest litigants. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. 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. In those rare cases, 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.

[16] The Plaintiffs submit that the *Carter* factors are relevant to the question of whether the unsuccessful Plaintiffs' should be awarded costs in this case because: (i) the action involved questions of significant public interest which had not been resolved, and affected orders of magnitude more individuals than the two, named Plaintiffs; (ii) the Plaintiffs had no proprietary or pecuniary interest in the outcome of this litigation; the issues transcended their interests and affected hundreds of thousands of others; and (iii) private funding alone was insufficient to cover the cost of the proceeding.

[17] The Plaintiffs' supporting Affidavit of Sally Yee sworn (or affirmed) August 12, 2019 [Yee Affidavit] states that Ms. Yee is a paralegal with the law firm of Arvay Finlay LLP, counsel for the Plaintiffs. The Yee Affidavit describes that the Plaintiffs provided a retainer of approximately $595,000 to cover all fees, disbursements and taxes in pursuing the proceeding until the end of the trial on the constitutional issues. Extensive fees in respect of time spent by counsel were required to be written off and hence, a large portion of the plaintiffs' counsel's time was provided on a *pro bono* basis. Ms. Yee concluded, based on her review of invoices provided to the Plaintiffs by Farris LLP and Arvay Finlay LLP, those *pro bono* efforts totalled approximately $350,000.

IV. Defendants' Submissions

[18] The Defendants' costs submissions, including the supporting Affidavit of Sheila Guy affirmed September 3, 2019 [Guy Affidavit], essentially confirm the amount of the retainer or funding for the litigation and provide additional details as to its provenance. Ms. Guy is a paralegal employed by the Department of Justice, in Vancouver, British Columbia.

[19] The Defendants submit that not all public interest litigation warrants an exceptional costs order, and this case does not rise to the level of importance required for an exceptional award of costs against a successful party. Even a no costs order is itself exceptional. I agree with the Defendants on both points.

[20] The Defendants dispute the allegation of significant *pro bono* work provided by Plaintiffs' counsel and contend there was no admissible evidence that the summary trial was not

fully funded. The Defendants object to the statements in the Yee Affidavit prefaced with the affiant having been informed of the information by the Plaintiffs' counsel, and submit that they are inadmissible since a lawyer cannot act as a witness and a lawyer at the same time: *Twinn et al v Poitras et al*, 2011 FCA 310 [*Twinn*], at paras 7-8. While I agree with the principle expressed in *Twinn*, I note that the impugned paragraphs in the Yee Affidavit are either corroborated by the Guy Affidavit (regarding the retainer amount) or supplemented by Ms. Yee's direct evidence (regarding her review of the invoices issued to the Plaintiffs). I find the Yee Affidavit, therefore, admissible on the whole.

[21] The Defendants submit that the Plaintiffs' actions, including late stage abandonment of two arguments and objection to an expert report, contributed to wasted resources or unnecessary preparation for the summary trial. The Defendants are not above reproach in this regard, however. As noted by this Court in *Deegan*, *supra*, at para 184: "…I am troubled by the timing of the Defendants' objection to the Plaintiffs' standing to bring this action. The action was commenced in 2014, and no issue was raised by the Defendants with respect to the standing of the Plaintiffs to maintain this action until the Defendants filed their memorandum of fact and law for this summary trial on November 20, 2018 - approximately two months before the commencement of the trial - after there had clearly been an enormous expenditure of resources on both sides."

[22] The Defendants agree in principle with the approach in Carter to determine whether costs should be awarded to an unsuccessful public interest litigant: *Carter*, *supra*, at paras 138-141. They disagree, however, with the Plaintiffs' application of the test. Further, they submit that the

complexity of the case does not render it sufficiently (that is, publicly) important or special to warrant an exceptional costs award in favour of the unsuccessful public interest litigant. Nor does the significance of one potential outcome (that is, the unconstitutionality of the Impugned Provisions) meet the *Okanagan Indian Band* "public importance" test: *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, 2007 SCC 2 [*Little Sisters*], at paras 64 and 66. The Defendants also argue the Plaintiffs have not met the *Carter* test of showing "that it would not have been possible to effectively pursue the litigation in question with private funding" having regard to the retainer or funding for the litigation: *Carter*, *supra*, at para 140.

[23] The Defendants dispute the alleged *pro bono* services and note the lack of details provided regarding the applicable fees and time written off, as described in the Yee Affidavit. While recognizing that some of the relevant information may be the subject of client-solicitor privilege, I agree with the Defendants that the Yee Affidavit lacks sufficient details to support the Plaintiffs' submissions regarding the *pro bono* efforts of counsel.

[24] Finally, the Defendants dispute certain items contained in the Bill of Costs as pertaining to the first summary trial, in respect of which no costs were awarded, and a motion decided in favour of the Defendants where costs were awarded against the Plaintiffs.

V. Analysis

[25] As I have noted, the parties refer to the *Carter* test for determining whether a judge's discretion should be exercised in favour of a special costs award to public interest litigants but

disagree as to its application in this case. In a decision rendered later in the same year as *Carter*, the Supreme Court of Canada again addressed the issue of a possible costs award in favour of an unsuccessful litigant in matters of public importance and held, "[i]t is not enough that a matter be of public interest or importance; to warrant costs in any event of the cause, the case must be "highly exceptional"": *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 SCR 250, 2015 SCC 46, at para 90 [*Goodwin*]. No costs were awarded to Mr. Goodwin, the unsuccessful public interest litigant, in that case.

[26] I have considered both the relevant factors in Rule 400(3) of the *Federal Courts Rules* along with the prevailing jurisprudence. I note the Defendants have been successful throughout the action including on the second summary trial. Unquestionably, the issues were complex and the work required by both sides to see the action through a second summary trial was significant. Regarding the parties' conduct and the length of the proceeding, as already noted, both sides contributed to the overall length of the action and the resources expended, not only by the parties but by the Court too.

[27] Regarding importance and whether the public interest in having the proceeding litigated justifies a particular award of costs, I note the Court was prepared to find public interest standing for only one of the Plaintiffs. Further one was removed during the proceeding and, regarding the later added Plaintiff, the Court held "it is difficult to conclude that Ms. Highton has a genuine interest or real stake in this proceeding, given that she has not filed any evidence in support of the Plaintiffs' case or participated in this proceeding in any meaningful way": *Deegan, supra*, at

para 200. Moreover, in addressing the issue of standing, the Court noted that Ms. Deegan was not directly affected yet by the Impugned Provisions: *Deegan*, *supra*, at para 200.

[28] Having regard to all the foregoing, in my view this matter does not rise to the level of being "truly exceptional" nor have the Plaintiffs demonstrated that it would not have been possible to effectively pursue the litigation in question with the private funding they had in place. Accordingly, no costs are awarded. As a consequence, I decline to comment on the Plaintiffs' Bill of Costs and the Defendants' submissions regarding same.

ORDER in T-1736-14

THIS COURT ORDERS no costs are awarded in this matter.

"Janet M. Fuhrer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1736-14
STYLE OF CAUSE:	GWENDOLYN LOUISE DEEGAN and KAZIA HIGHTON v THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF NATIONAL REVENUE

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

ORDER AND REASONS:	FUHRER, J.
DATED:	SEPTEMBER 16, 2019

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