Federal Court  Cour fédérale

Date: 20211214

Docket: T-340-21
T-341-21
T-366-21
T-480-21

Citation: 2021 FC 1408

Ottawa, Ontario, December 14, 2021

PRESENT: THE CHIEF JUSTICE

Docket: T-340-21

BETWEEN:

BARBARA SPENCER, SABRY BELHOUCHET, BLAIN GOWING, DENNIS WARD, REID NEHRING, CINDY CRANE, DENISE THOMSON, NORMAN THOMSON, JORDAN HAMMOND, AND MICHEL LAFONTAINE

Applicants

and

CANADA (MINISTER OF HEALTH) AND THE ATTORNEY GENERAL OF CANADA

Respondents

Docket: T-341-21

AND BETWEEN:

DOMINIC COLVIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-366-21

AND BETWEEN:

STEVEN DUESING AND NICOLE MATHIS

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-480-21

AND BETWEEN:

REBEL NEWS NETWORK LTD AND KEEAN BEXTE

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. **Introduction**

[1] These reasons and the accompanying Order concern the costs claimed in relation to these four Applications. In the Applications, the Applicants challenged various measures the federal government imposed on non-exempt air travellers returning to Canada in the initial months of 2020 [the **Impugned Measures**]. Those measures included requirements that non-exempt individuals be tested for COVID-19 upon their arrival in Canada and then stay at either a government approved accommodation [**GAA**] or a designated quarantine facility for 24-72 hours while they awaited the results of that test.

[2] In my decision on the merits, I concluded that the impugned measures did not violate any of sections 6(1), 7, 8, 9, 10(b), 11(d), 11(e) or 12 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 [the ***Charter***]: *Spencer v Canada (Health)*, 2021 FC 621 [***Spencer***]. However, I found that the manner in which the Impugned Measures were *implemented* with respect to the Applicant Nicole Mathis violated her rights under sections 9 and 10(b) of the *Charter*.

[3] I also concluded that the Orders containing the Impugned Measures were (i) within the jurisdiction of the federal government; (ii) within authority of the Administrator in Council; and (iii) not unreasonable. Finally, I concluded that the Impugned Measures do not contravene section 1(a) of the *Canadian Bill of Rights*, SC 1960, c 44.

[4] After dismissing these Applications, I encouraged the parties to reach an agreement regarding costs, failing which to provide submissions reflecting the conclusions summarized above. Ultimately, the only agreement reached was between the Respondents and the Applicants in Court file T-480-21. Accordingly, my reasons below will not address that Application. Likewise, given that the Respondents do not seek costs against the two Applicants in Court file T-366-21, none will be granted and it is unnecessary to further address that Application.

[5] Consequently, these reasons are confined to the costs sought against the Applicants in Court files T-340-21 [the **Spencer Applicants**] and T-341-21 [Mr. Colvin].

II. **Overview of the Parties' Submissions**

A. *The Respondents*

[6] The Respondents begin by requesting an award of lump sum costs. They justify that approach by alluding to the significant time and cost that would be associated with the taxation process. As a reference point, they prepared a Bill of Costs calculated largely in accordance with the high end of Column III in Tariff B of the *Federal Courts Rules*, SOR/98-106 [the **Rules**]. The Respondents support this approach by noting the complexity of the issues and the work required to address three applications together. This yielded a total amount of $27,511.69, which is comprised of fees of $25,350.00 and disbursements of $2,161.69.

[7] The Respondents maintain that each of the three Applicant groups in respect of who an agreement as to costs was not reached would normally be responsible for one third of

$27,511.69, namely approximately $9,000. However, as I have noted, they do not seek any costs against the Applicants in Court file T-366-21.

[8] Having regard to the various factors discussed below, particularly the complete success they achieved against the Spencer Applicants, the Respondents request an award of lump sum costs of $3,500 against those Applicants.

[9] Insofar as Mr. Colvin is concerned, the Respondents request lump sum costs of $7,000, in addition to the $500 he was previously ordered to pay in any event of the cause. The Respondents appear to have two principal justifications for seeking this higher amount from him, relative to what they are seeking from the Spencer Applicants. First, they note that he informed the Court that he intended to use the outcome of his Application to fight a $3,000 ticket he was issued under the *Contraventions Act*, SC 1992, c 47 [the ***Contraventions Act***]. In addition, they allude to certain conduct that unnecessarily lengthened the proceeding.

B. *The Spencer Applicants and Mr. Colvin*

[10] The Spencer Applicants were represented by the Justice Centre for Constitutional Freedoms, which describes itself as a non-profit public interest firm providing free representation to protect the *Charter* rights and freedoms of all Canadians. These Applicants requested the Court to exercise its discretion under section 400 of the Rules and not award any costs against them. In the alternative, they requested that costs be awarded pursuant to Column I of Tariff B of the Rules.

[11] In support of their position, the Spencer Applicants submitted that the issues they raised were novel and of broad public interest, their personal interests in the Applications were very limited and access to justice would be facilitated by refraining from ordering costs against unsuccessful defendants in these types of cases. They added that the federal government has superior capacity to bear the costs of these Applications and that they had not engaged in any vexatious, frivolous or abusive conduct.

[12] Mr. Colvin adopts the submissions of the Spencer Applicants. He adds that he had no pecuniary interest in his proceeding and that awarding costs in such a proceeding would discourage challenges under the *Charter* that are in the public interest. In the event that the Court determines that these proceedings do not meet the test for public interest litigation, Mr. Colvin maintains that he should nevertheless not be required to pay costs because of the novel and important nature of the issues he raised.

III. **Assessment**

A. *General principles*

[13] The general principles applicable in determining cost awards were recently summarized in *Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186 at paras 19–35 [***Allergan***]. In recognition of the fact that some of those principles are not applicable to the present proceedings, the parties are specifically referred to paragraphs 19–25 and 28–30 of that decision. For the present purposes, it will suffice to reiterate that: (i) the Court has broad discretion over costs; (ii) the successful party is ordinarily entitled to have its costs; (iii) the default level of costs in this Court is the mid-point

of Column III of Tariff B; and (iv) the Court has increasingly been granting lump sum awards in recent years.

[14] It is relevant to add that the Federal Courts Rules Committee decided in 2016 that the amount recoverable under Tariff B should be increased by approximately 25%. In the intervening period, it has advanced its work on proposed amendments that are expected to be pre-published for public comment in 2022, in Part I of the *Canada Gazette*.

B. *Analysis of the relevant factors in these proceedings*

[15] At the outset, I agree with the Respondents that an award of lump sum costs would be appropriate, given the significant time and expense that would otherwise be associated with the taxation process. Considering the complexity of the proceedings, I also agree that the starting point for my assessment should be an amount that approximately equates to costs calculated in accordance with the upper end of Column III of Tariff B. I have confirmed that the use of this reference point would yield a total amount of fees in excess of $25,350 and disbursements in excess of $2,161.69, for an overall sum in excess of $27,511.69. This equates to more than $9,000 for each of the three groups of Applicants, before adjusting for the relevant factors in this proceeding.

[16] I consider those factors to be (i) the result of the proceeding; (ii) the importance and complexity of the issues; (iii) the extent to which there was a public interest dimension to the proceedings; and (iv) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding.

(1) The result of the proceeding

[17] The Respondents prevailed in respect of all of the issues raised by the Spencer Applicants and by Mr. Colvin. Accordingly, this factor weighs significantly in favour of awarding the Respondents the full costs to which they would ordinarily be entitled to recover from those Applicants.

(2) The importance and complexity of the issues

[18] The Spencer Applicants raised important and somewhat complex issues with respect to sections 6, 7, 9 and 10(b) of the *Charter*. This is a consideration that weighs in favour of reducing the costs that would otherwise be awarded against them.

[19] Mr. Colvin also raised important issues with respect to sections 6, 7 and 9 of the *Charter*. This weighs in favour of reducing the costs that would otherwise be awarded against him. However, I consider it to be appropriate to take into account that one of the arguments he advanced in relation to section 6 was meritless. I will return to this in Part III.B.(4) below.

[20] In addition, Mr. Colvin raised an important issue concerning the reasonableness of one of the Orders that promulgated the Impugned Measures. However, once again, he also raised additional arguments that were meritless and unsupported. I will address those arguments in Part III.B.(4) below

(3) The extent to which there was a public interest dimension to the proceedings

[21] The Spencer Applicants and Mr. Colvin rely heavily on this factor in support of their position that the Court should award no costs against them in this proceeding.

[22] The Respondents accept that the Applications in these proceedings raised issues of importance that went beyond the interests of the parties involved. However, they take issue with the Applicants' suggestion that they did not have a significant personal interest in the outcome of the proceedings. In this regard, they state that several of the Applicants were outside Canada when their Applications were filed. (Those Applicants were Mr. Colvin and several of the Spencer Applicants.) Consequently, they had a very real personal interest in the outcome of their Applications. Indeed, two Spencer Applicants remained outside Canada at the time of the decision on the merits in these proceedings. Another Spencer Applicant, Ms. Thompson, returned to Canada early to avoid having to stay at a GAA. Nevertheless, she continued to have an interest in assisting her spouse to avoid having to stay at a GAA upon his return to the country: *Spencer*, above, at para 15.

[23] In addition, Mr. Colvin's counsel noted during the hearing that "the determinations made on his Application 'are going to be germane to the defence of'" the $3,000 ticket he received under the *Contraventions Act*: *Spencer*, above, at para 18.

[24] Having regard to the considerations discussed above, I agree with the Respondents that the Spencer Applicants and Mr. Colvin should be considered to have had a mix of public and

private interests in the outcome of their Applications. In my view, the public interest portion of these mixed motives weighs in favour of a meaningful reduction of the costs that would otherwise be awarded against the Spencer Applicants. The same is true, although to a lesser degree, for Mr. Colvin.

[25] Notwithstanding the foregoing, it is also relevant to keep in mind that none of the Applicants provided any evidence regarding their inability to pay a cost award. This is particularly relevant given that (i) the Respondents have significantly reduced the level of costs that they are claiming; (ii) those costs will be divided among many Applicants; and (iii) the Respondents' starting point (Column III of the Tariff) is widely recognized to contemplate a level of recovery that is substantially below the actual costs incurred by parties in proceedings before the Court.

(4) Any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding

[26] The Respondents submit that the Applicants did nothing to winnow down the issues raised in their respective Applications. This is despite the fact that the Ontario Superior Court of Justice found that a similar challenge in respect of section 6 of the *Charter* did not raise a serious issue to be tried, and that a similar challenge in respect of section 12 of the *Charter* was "frivolous": *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 2117 at paras 38–39.

[27] The Spencer Applicants threw the proverbial "kitchen sink" at the Court by alleging breaches of seven different sections of the *Charter* as well as a violation of section 503 of the *Criminal Code*, RSC 1985, c C-46 [the ***Criminal Code***]. In my decision on the merits, I found their arguments with respect to section 11 of the *Charter* to be "without merit": *Spencer*, above, at para 194. I reached a similar finding with respect to their arguments under section 12: *Spencer*, above, at paras 202–205. I also found that section 503 of the *Criminal Code* had "no application in the present context": *Spencer*, above, at para 200.

[28] The arguments advanced by the Spencer Applicants with respect to these three issues served to unnecessarily lengthen the proceedings. This is precisely the type of conduct that cost awards can and ought to be used to deter: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 25; *Air Canada v Thibodeau*, 2007 FCA 115 at para 24.

[29] The same is true with respect to the manner in which Mr. Colvin's counsel conducted himself at several points. For example, at one point in his submissions regarding section 6 of the *Charter*, he equated "the threat of being arbitrarily detained at a GAA" to "deportation from Canada to a country where one would face torture or the death penalty": *Spencer*, above, at paras 78–79. On another occasion, he advanced meritless and unsupported allegations concerning the evidence adduced by the Respondents' affiants. In this regard, he alleged that the evidence was "unequivocally flawed for numerous reasons including: hearsay, argumentative, political spin, unbalanced, one-sided and non-probative statements at almost every paragraph": *Spencer*, above, at para 262. Overall, I found that Mr. Colvin's counsel unnecessarily lengthened the duration of the proceedings to a material degree.

[30] Having regard to all of the foregoing, the conduct of the Spencer Applicants and Mr. Colvin weighs in favour of meaningfully increasing the costs that would otherwise be awarded against them. This is particularly so for Mr. Colvin.

IV. **Conclusion**

[31] In summary, I consider that it is appropriate to award lump sum costs in these proceedings. I also consider the Respondents' starting point of $27,000 to be reasonable. This is because the complexity of the issues raised in these proceedings merits a non-trivial increase of the usual starting point in assessing costs, namely the mid-point of Column III of Tariff B.

[32] In addition, I consider it reasonable to notionally divide $27,000 equally between each of the three groups of Applicants in respect of whom an agreement as to costs was not reached. This yields a general starting reference point of $9,000 per Applicant group, although I will reiterate that the Respondent is not seeking any costs against the Applicants in Court file T-366-21, and that therefore none will be awarded.

[33] For the Spencer Applicants, the Respondents' complete success in respect of the issues raised in Court file T-340-21 weighs in favour of making a lump sum award of $9,000. The Spencer Applicants' conduct in raising meritless arguments with respect to sections 11 and 12 of the *Charter*, as well as with respect to section 503 of the *Criminal Code*, also weighs in favour of imposing a significant cost award against these Applicants. However, to the extent that these Applicants were motivated in part by public interest considerations and raised important issues, I consider it appropriate to discount the award that would otherwise be made against them. Among

other things, such a discount would generally advance the Court's objective of facilitating access to justice.

[34] In my view, the discount reflected in the lump sum amount of $3,500 being sought against the Spencer Applicants would achieve an appropriate, and indeed a generous, balancing of these considerations.

[35] Turning to Mr. Colvin, the Respondents' complete success in respect of the issues he raised weighs in favour of making a lump sum award of $9,000. In addition, certain conduct of his counsel that served to unnecessarily lengthen these proceedings weighs in favour of imposing a significant cost award against him. In my view, the weight that these two factors merit is roughly equivalent to what they merit vis-à-vis the Spencer Applicants.

[36] As with the Spencer Applicants, I consider it appropriate to reduce the costs that would otherwise be awarded against Mr. Colvin, to reflect the public interest aspect and importance of the issues he raised. However, to the extent that he appears to have had more of a private interest than the Spencer Applicants, the award made against him should be discounted less than the award made against the Spencer Applicants. In my view, the discount of $2,000 that is implicit in the lump sum amount of $7,000 being sought against Mr. Colvin is fair and reasonable in the circumstances.

[37] I recognize that the amount being sought against Mr. Colvin is double what is being sought against the Spencer Applicants. In my view, part of this differential can be justified by the

fact that he expressed an intention to avail himself of the determinations made in these proceedings in defending the $3,000 ticket he received under the *Contraventions Act*. In other words, he had a greater private interest in bringing his Application than the Spencer Applicants had in bringing theirs.

[38] The Respondents have not offered an explanation that would account for the remainder of the differential between the lump sum amounts they seek from the Spencer Applicants and from Mr. Colvin, respectively. Regardless of what their rationale may have been, I consider that the remaining differential can be attributed to the Respondents' generosity vis-à-vis the Spencer Applicants. In my view, the Respondents could reasonably have sought more than they are seeking from those Applicants. Their generosity in refraining from doing so should not deprive them of the full amount of the costs to which they are entitled to recover from Mr. Colvin.

ORDER in T-340-21; T-341-21; T-366-21; T-480-21

THIS COURT'S ORDER is that:

1. The Applicants in Court file T-340-21 shall pay to the Respondents lump sum costs of $3,500.00.

2. The Applicant in Court file T-341-21 shall pay to the Respondents lump sum costs of $7,000.00, plus an additional $500 that he was previously ordered to pay in any event of the cause.

3. Given that Respondents did not seek costs against the Applicants in Court file T-366-21, none will be ordered.

4. The Applicants in Court file T-480-21 shall pay costs as agreed between them and the Respondents.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-340-21
STYLE OF CAUSE:	BARBARA SPENCER, SABRY BELHOUCHET, BLAIN GOWING, DENNIS WARD, REID NEHRING, CINDY CRANE, DENISE THOMSON, NORMAN THOMSON, JORDAN HAMMOND, AND MICHEL LAFONTAINE v CANADA (MINISTER OF HEALTH) AND, THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-341-21
STYLE OF CAUSE:	DOMINIC COLVIN v THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-366-21
STYLE OF CAUSE:	STEVEN DUESING AND NICOLE MATHIS v THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-480-21
STYLE OF CAUSE:	REBEL NEWS NETWORK LTD AND KEEAN BEXTE v ATTORNEY GENERAL OF CANADA

SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO THIS COURT'S JUDGMENT IN 2021 FC 621

ORDER AND REASONS:	CRAMPTON C.J.
DATED:	DECEMBER 14, 2021

WRITTEN SUBMISSIONS BY:

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