Federal Court  Cour fédérale

Date: 20130916

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

Citation: 2013 FC 953

Ottawa, Ontario, September 16, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

T-616-12

LEANNE 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 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
(THE CHIEF 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

[1] The Court issued judgment on May 23, 2013 in files T-619-12, T-620-12, T-621-12, T-633-12, T-634-12 and T-635-12 dismissing applications to annul the results of the 2011 General Election in six ridings won by the respondent Members of Parliament Joyce Bateman, Kelly Block, Lawrence Toet, Jay Aspin, John Duncan and Ryan Leef.

[2] In addition to dismissing the applications, the Court awarded the respondent Members of Parliament costs for the hearing in an amount to be fixed in accordance with the directions given in the reasons for judgment and awarded the applicants costs for the motions in which they were successful on a solicitor and client basis. The other responding parties were to bear their own costs.

[3] A seventh application, in file T-616-12, was dismissed on October 26, 2012 with costs reserved to the applications judge upon the disposition of the other applications.

[4] In the Reasons for Judgment (2013 FC 525) the Court made the following comments pertaining to the question of costs:

> 259 The right of citizen electors to seek to annul election results that they reasonably believe to be tainted by fraud is, in my view, a matter of high public interest and analogous to *Charter* litigation. A concern that has frequently been raised is that such litigation should not be beyond the reach of the ordinary citizen. The courts have gone so far as to require that a portion of the costs of such cases be paid by the opposing successful parties: *M v H*, [1996] OJ No 2597 (QL) (Ct J (Gen Div)) at paras 17, 30; *Lavigne*, above, at para 106.
>
> 260 I am mindful of the fact that in this instance the applicants have received guarantees of indemnification by a non-governmental organization which has been raising funds for that purpose. But it is also apparent that the respondent MPs are supported by the resources of the party to which they belong, resources which are underwritten by taxpayers.
>
> 261 These proceedings have had partisan overtones from the outset. That was particularly evident in the submissions of the respondent MPs. In reviewing the procedural history and

> the evidence and considering the arguments advanced by the parties at the hearing, it has seemed to me that the applicants sought to achieve and hold the high ground of promoting the integrity of the electoral process while the respondent MPs engaged in trench warfare in an effort to prevent this case from coming to a hearing on the merits.
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> 262 Despite the obvious public interest in getting to the bottom of the allegations, the CPC made little effort to assist with the investigation at the outset despite early requests. I note that counsel for the CPC was informed while the election was taking place that the calls about polling station changes were improper. While it was begrudgingly conceded during oral argument that what occurred was "absolutely outrageous", the record indicates that the stance taken by the respondent MPs from the outset was to block these proceedings by any means.
>
> 263 The preliminary stages were marked by numerous objections to the evidence adduced by the applicants. The respondent MPs sought to strike the applications on the ground that they were frivolous and vexatious, to have them dismissed as champertous and to require excessive security for costs, in transparent attempts to derail this case.
>
> 264 There have been interlocutory decisions made by the case management prothonotaries during the proceedings with related costs awards. The applicants are, in my view, entitled to be awarded costs on each of the pre-hearing motions in which they have been successful on a solicitor and client basis to be paid jointly and severally by the respondent MPs. This applies also to the champerty motion and the motion to exclude the Graves evidence which was brought initially in relation to the Don Valley East application and then deemed to apply to each of the other applications.
>
> 265 Apart from the motion costs, and with the above considerations in mind, I am inclined to order a modest fixed amount for the costs of the hearing. Absent an agreement as to the amount, the respondent MPs may make written submissions limited to ten pages within thirty days of the date of this judgment. The applicants will then have fifteen days in which to respond and the respondent MPs another five days to reply. I will then award a fixed sum in an amount I consider appropriate given the foregoing comments. The other respondents will bear their own costs.

[5] The respondent Members of Parliament submit that they should be awarded compensation in the amount of $120,000 based on the lowest tariff rate, or $60,000 if based on one-half of the lowest tariff rate, for the costs of preparing and filing written submissions, and the cost of two lawyers preparing for one week and attending at court. They also seek disbursements of $235,907.56. The largest part of the claim for disbursements relates to payment for the services of an expert witness, Dr. Ruth Corbin, in the amount of $166,363.79. The bulk of this would have been

incurred prior to the hearing. Disbursements claimed for the hearing, without further explanation, are $54,202.35. The balance relates to travel and accommodation costs prior to the hearing ($9,134.84), cross examination transcripts ($6,064.71), delivery costs ($112.49) and a driver's license search ($29.38).

[6] Noting that the applicants have not served any submissions concerning their costs on the motions with respect to which they were successful, the respondent Members of Parliament submit that their costs ought to be awarded and offset against the costs to be awarded to the applicants on a solicitor and client basis for their success on the motions. The Court has no basis at present, apart from the amount of time spent on the motions at the hearing, upon which to determine what those costs may be.

[7] The applicants submit that in making a determination as to costs, access to justice should be the Court's paramount consideration, recognizing the public interest nature of the case and the principle that the ability of citizens to bring such matters before the courts should not be deterred. They ask that the Court consider whether, in light of its findings of fact in this matter and the fundamental constitutional issue at stake, this is an appropriate case for the Court to decline to award any costs. In the alternative, the applicants submit, that should the Court remain inclined to award "a modest fixed amount for the cost of the hearing" the amount should be small and considered modest from the point of view of individual citizens so as not to deter electors from seeking to defend their democratic franchise.

[8] With respect to the quantum of costs proposed by the respondent Members of Parliament, the applicants submit that the amounts claimed are unjustified and inconsistent with the modest fixed amount yardstick. By their calculation, total legal fees under the Column I of Tariff B guidelines would be no more than $7,995. Any award for disbursements should exclude the $54, 202.35 claimed for "hearing costs" and the entire amount claimed as expert witness costs in light of the Court's findings with regard to the nature and presentation of Dr. Corbin's evidence and the lack of any detailed account upon which the reasonableness of the claim could be assessed.

[9] As stated by Justice Paul Perell of the Ontario Superior Court of Justice in *Incredible Electronics Inc v Canada (Attorney General)*, [2006] 80 OR (3d) 723 [*Incredible Electronics*] at para 63:

> As a matter of general principle, costs compensate the successful litigant for the expense to which he or she has been put by the suit having been improperly resisted or improperly brought: Ryan v. McGregor, [1925] O.J. No. 126, 58 O.L.R. 213 (App. Div.). The court's discretion to award costs is designed to further three fundamental purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings: British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76; Fong v. Chan (1999), 46 O.R. (3d) 330, [1999] O.J. No. 4600 (C.A.); Fellowes, McNeil v. Kansa General International Insurance Co. (1997), 37 O.R. (3d) 464, [1997] O.J. No. 5130 (Gen. Div.); Skidmore v. Blackmore, [1995] B.C.J. No. 305, 122 D.L.R. (4th) 330 (C.A.).

[10] This is not a case in which the applications were improperly brought or where the applicants engaged in inappropriate behaviour in their conduct of the proceedings. In contrast, as noted above, I found that the respondent MPs "engaged in trench warfare in an effort to prevent this case from

coming to a hearing on the merits" and adopted a stance aimed at blocking the applications "by any means". Settlement was not at any time a realistic outcome in light of the nature of the allegations and the evidence that attempts had been made by parties unknown to interfere with the democratic process.

[11] The Supreme Court has affirmed the importance of access to justice in public interest cases and the duty of the courts to craft costs orders that support and promote this goal. As stated by Justice Lebel for the majority in *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71, [2003] 3 SCR 371, [2003] SCJ No 76 (QL), at para 27, courts should exercise the power to award costs in a manner that:

> …helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

[12] Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, confers full discretionary power on the Court to determine the amount and allocation of costs. Rule 400(3) provides a list of factors the Court may consider in awarding costs, including: the result of the proceeding; the importance and complexity of the issues, the amount of work involved; whether the public interest in having the proceedings litigated justifies a particular award of costs; and any conduct that tended to unnecessarily lengthen the duration of the proceeding. Rule 400(4) allows the Court to award a lump sum in lieu of, or in addition to, any assessed costs. Rule 400(6)(*c*) provides that the Court's discretion includes the power to "award all or part of costs on a solicitor-and-client basis."

[13] Criteria for determining the circumstances where costs should not be awarded against a person who commences public interest litigation were identified by the Ontario Law Reform

Commission in its *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989):

> a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
> b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
> c) The issues have not been previously determined by a court in a proceeding against the same defendant.
> d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
> e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[14] These factors have been approved in a number of Canadian jurisdictions including the Federal Court: see *Harris v Canada*, 2001 FCT 1408 at para 222; *Guide Outfitters Association v British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368 at para 8; *Miller v Boxall*, 2007 SKQB 9 at para 5; *Hastings Park Conservancy v Vancouver (City)*, 2007 BCSC 147 at para 4; *Victoria (City) v Adams*, 2009 BCCA 563 [*Victoria (City)*] at para 185; *R v Griffin*, 2009 ABQB 696 at para 183; *Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)* [2011] FCJ No 587 (QL) (TD) at para 3.11, appeal allowed in part but not on the question of costs, 2012 FCA 40 *Georgia Strait Alliance*.

[15] In the *Georgia Strait Alliance* decision, Justice James Russell concluded at paragraph 3.14 that an order for costs on a solicitor and client basis was justified because of the "unjustifiably evasive and obstructive approach" undertaken by the respondents in the case that "unnecessarily lengthened and complicated the proceedings". Similarly, in this matter I concluded that an order for costs on a solicitor and client basis against the respondent Members of Parliament was justified

because of the manner in which they had defended against the applications including the bringing of motions that unnecessarily lengthened and complicated the proceedings.

[16] Adapting the principled approach set out in the Ontario Law Reform Commission report to any case in which the court was being asked to depart from the normal rules as to costs, the British Columbia Court of Appeal distilled the test into four elements at paragraph 188 of *Victoria (City),* above:

> 1. The case involves matters of public importance that transcend the immediate interests of the named parties, and which [had] not been previously resolved;
> 2. The [claimant] has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
> 3. [The party opposing the claimant] has a superior capacity to bear the cost of the proceeding; and
> 4. The [claimant] has not conducted the litigation in an abusive, vexatious or frivolous manner.

[17] According to Perell J. in *Incredible Electronics,* above, where a litigant is seeking relief from adverse costs liability these factors should be resolved by a single question namely, whether the party is a genuine public interest litigant. Justice Perell stated at paragraph 83:

> In my opinion, in the case at bar, the proposition that public interest litigation requires special treatment should guide the exercise of my discretion. Put differently, in my opinion, the applicants should not be subject to the normal two-way costs regime if they can satisfy the court that they are special interest litigants.

[18] I am satisfied that the applicants in this matter were genuine public interest litigants motivated by a higher purpose. These proceedings fell squarely within the criteria endorsed by in *Harris* and the other decisions cited above. The applications involved issues, the importance of which extended beyond the immediate interests of the parties involved. The applicants had no

personal, proprietary or pecuniary interest in the outcome that would have justified the proceedings economically. They stood to gain nothing other than the vindication of their electoral rights. The issues had not been previously determined by a court in proceedings against the same defendants and the applicants did not engage in vexatious, frivolous or abusive conduct. This was not a case of unwarranted election challenges. There was a factual foundation, albeit one which I ultimately found fell short of meeting the statutory threshold required to annul the election results in their ridings.

[19] The question of whether the applicants or the respondent MPs have a clearly superior capacity to bear the costs of the proceedings is a neutral factor in this matter. Much was made of the involvement of a third party organization, the Council of Canadians, in raising funds to indemnify the applicants from an adverse costs award. As I noted, however, at para 260 of the Reasons for Judgment, it was also apparent that the respondent Members of Parliament were supported by the extensive resources of the political party to which they belong - resources which are underwritten by Canadian taxpayers. That argument was not challenged during the hearing nor was anything provided to me in the costs submissions to call it into question.

[20] The respondent Members of Parliament are, therefore, in a position analogous to that of government respondents and defendants who have not been awarded costs in cases where they have been successful in the result. See for example *Harrison v University of British of Columbia*, [1986] BCJ No 2201 (QL), 30 DLR (4th) 206 (SC), additional reasons on costs [1986] BCJ No 1172 (QL), [1987] 2 WWR 378 (SC), rev'd [1988] BCJ No 13 (QL), 21 BCLR (2d) 145 (CA), aff'd [1990] 3 SCR 451, [1990] SCJ No 123 (QL); *Canadian Foundation for Children, Youth and the Law v*

Canada (Attorney General), 2004 SCC 4, [2004] 1 SCR 76; *Sierra Club of Western Canada v British Columbia (Attorney General)*, [1991] BCJ No 2613 (QL), 83 DLR (4th) 708 (SC).

[21] This is not a case such as *Opitz v Wrzesnewskyj*, 2012 SCC 55, [2012] SCJ No 55 (QL) [*Opitz*], where a losing candidate challenged an election result based on clerical errors in voter registration. In that case, the parties bore their own costs at first instance and on the appeal. Here, the allegations were far more serious, being of electoral fraud. It would be incongruous, in my view, to impose a greater burden upon the applicants who stepped forward to present those allegations, than that considered appropriate in a contest between two candidates in which the challenger had clear personal interests, including an economic interest, in the outcome.

[22] The applicants have argued that to impose any significant measure of costs against them would have a chilling effect on electors who might be the victims of voter fraud in the future. I agree. The fact that a third party has stepped forward to indemnify the applicants in this case can not be counted upon as a solution for any case that might arise again. The respondent Members of Parliament had the financial support of a major political party to conduct an aggressive no holds barred defence against the applications and are not in jeopardy of absorbing the costs themselves. I note also that Parliament has seen fit to fix a modest amount ($1,000) as the security for costs to be paid when an election challenge is filed to discourage nuisance applications.

[23] I do not accept the respondent MPs' contention that a ruling that unsuccessful applicants should be relieved of the obligation to pay costs would clearly increase the "litigation margin", of which the Supreme Court warned in *Opitz*, with a resulting decrease of confidence by the public in

the finality of elections. The *Canada Elections Act*, LC 2000 c.9 provides a mechanism in s 531(1) for the early dismissal of applications that are "vexatious, frivolous or not made in good faith".

[24] Having considered the matter further, I have reached the conclusion that the "modest fixed amount for the costs of the hearing" that should be awarded the respondent MPs is the amount paid into court for the seven applications, $7,000, plus disbursements of $6,206. I make no award for the other costs incurred by the respondent MPs in preparation for and conduct of the hearing.

[25] In their reply submissions, the respondent MPs noted that it was to be expected that their much higher costs on a lower scale and the applicants' much lower costs on a higher (solicitor client) scale would roughly balance each other. That was the Court's intent. Given the conclusions reached above, there is no longer any need to consider the award of solicitor and client costs to the applicants for their success on the motions.

ORDER

THIS COURT ORDERS that:

1. the respondent Members of Parliament are awarded costs of $7,000 for the hearing and disbursements of $6,206.
2. the amounts paid into court by the applicants may be released to the respondent Members of Parliament in partial payment of the costs award; and
3. the Court will not determine an amount of costs to be paid on a solicitor and client basis to the applicants for their success on the motions in this matter.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-616-12, T-619-12 (T-620-12, T-621-12, T-633-12, T-634-12, T-635-12)
STYLE OF CAUSE:	LEEANNE BIELLI and ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), URMA ELLIS (RETURNING OFFICER FOR DON VALLEY EAST), JOE DANIEL, YASMIN RATANSI, MARY TRANPANI HYNES, AKIL SADIKALI, RYAN KIDD
AND BETWEEN:	SANDRA MCEWING AND BILL KERR 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
AND BETWEEN	KAY BURKHART 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

AND BETWEEN

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AND BETWEEN

KEN FERANCE
AND PEGGY WALSH

and

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AND BETWEEN

YVONNE KAFKA

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

AND BETWEEN	THOMAS JOHN PARLEE
	and
	ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), SUSAN J. ELELMAN (RETURNING OFFICER FOR YUKON), RYAN LEEF, LARRY BAGNELL, KEVIN BARR, JOHN STREICKER
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 25, 2013 (costs submissions in writing)
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	September 16, 2013

APPEARANCES:

Steven Shrybman Peter Engelmann Benjamin Piper	FOR THE APPLICANTS
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Arthur Hamilton Ted Frankel Jeremy Martin	FOR THE RESPONDENT (Responding Parliamentarians)
W. Thomas Barlow Nick Shkordoff	FOR THE RESPONDENT (Responding Market Group Inc)

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