

Federal Court



Cour fédérale

**Date: 20141120**

**Docket: T-1657-13**

**Citation: 2014 FC 1088**

**Ottawa, Ontario, November 20, 2014**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**ROCCO GALATI, AND  
CONSTITUTIONAL RIGHTS CENTRE INC.**

**Applicants**

**and**

**THE RIGHT HONOURABLE STEPHEN HARPER,  
HIS EXCELLENCY THE RIGHT HONOURABLE  
GOVERNOR GENERAL DAVID JOHNSTON,  
THE HONOURABLE JUSTICE MARC NADON,  
JUDGE OF THE FEDERAL COURT OF APPEAL,  
THE ATTORNEY GENERAL OF CANADA, AND  
THE MINISTER OF JUSTICE**

**Respondents**

**ORDER AND REASONS**

[1] The within application was filed October 7, 2013, seeking “declaratory, prerogative and injunctive relief, from the decision, made October 3rd, 2013, to appoint and ‘swear in’ (Administering of oath) the Honourable Justice Marc Nadon, a Judge of the Federal Court of

Appeal to the Supreme Court of Canada pursuant to the requirements of ss. 4(2), 6, 10 and 11 of the *Supreme Court Act of Canada* and s. 41(d) and 42(d) of the *Constitution Act, 1982*.”

[2] On October 22, 2013, the Governor in Council referred two questions to the Supreme Court of Canada relating to the challenged appointment of Justice Nadon to the Supreme Court [the Reference]. On motion by the Attorney General of Canada, this application was stayed on consent, by Order dated November 12, 2013, pending the release of the decision of the Supreme Court on the Reference. Both applicants applied to the Supreme Court of Canada for leave to intervene in the Reference and for costs. Mr. Galati requested that his costs be on a solicitor-client basis. Leave to intervene was granted but no order was made as to costs.

[3] The applicants sought and were granted a further stay of this application. Following the appointment of Justice Gascon to the Supreme Court, a case management conference was held following which, on agreement of the parties, an Order issued on August 25, 2014, that “the final disposition of this application, including costs, shall be conducted by way of written submissions from the parties.”

[4] Each applicant filed identical motions seeking:

- a) A declaration that where a private citizen brings a constitutional challenge to legislation and/or executive action, going to the “architecture of the Constitution”, from which he/she derives no personal benefit, per se, and is successful on the constitutional challenge, that he/she is entitled to solicitor-client costs of those proceedings, as to deny those costs constitutes a breach of the constitutional right to a fair and independent judiciary;
- b) That the Applicant be granted leave to issue a notice of discontinuance in the within application;

- c) that the Applicant be granted his solicitor-client costs of the within application, including the within motion; and
- d) Such further order and/or direction as this Court deems just.

[5] Mr. Galati, a barrister and solicitor, but acting on his own behalf, has provided a Statement of Account showing 56.4 hours of services at an hourly rate of \$800 and disbursements of \$638.00, for a total bill of costs, including tax of \$51,706.54.

[6] The Constitutional Rights Centre Inc. has provided a Statement of Account for work done by Paul Slansky, a barrister and solicitor, showing 14.55 hours of services at an hourly rate of \$800, for a total bill of cost, including tax of \$16,769.20.

[7] The respondents submit that these bills of costs are excessive and unwarranted given that the application was stayed at such an early stage. I agree. As one example, Mr. Galati's claim for 7.6 hours to "review, research, Attorney General's motion for stay" in light of the Reference is excessive and unwarranted.

[8] The respondents filed a cross-motion for an order dismissing the application. In response to the request for costs, the respondents submit that as there has been no judgment and no successful party, there should be no costs awarded. In the alternative, they submit that there is no constitutional right to costs in Canada and, "having regard to the factors set out in Rule 400(3), the purposes of costs would be well-served by a single award of costs, assessed according to Column III."

[9] The applicants have provided no authority for the proposition that “where a private citizen brings a constitutional challenge to legislation and/or executive action, going to the ‘architecture of the Constitution’, from which he/she derives no personal benefit, per se, and is successful on the constitutional challenge, that he/she is entitled to solicitor-client costs of those proceedings, as to deny those costs constitutes a breach of the constitutional right to a fair and independent judiciary.”

[10] The respondents point to a decision of the Tax Court of Canada in *Lee v Canada (Minister of National Revenue – MNR)*, [1991] TCJ No 243, wherein it was stated that:

There is no constitutional right to an award of costs. Moreover, there is no specific Charter Right that is infringed by the failure of a Court to award costs. Any attempt to impose such a requirement through jurisprudence would amount to an excess of jurisdiction. The role of this Court is confined to the determination of constitutional challenges to existing legislation.

[11] Although not binding on me, I agree with the observations of the Tax Court Judge. Moreover, there is no justification in these circumstances to an award of solicitor-client costs. Indeed, the Supreme Court of Canada in a decision cited by the applicants, *Mackin v New Brunswick*, [2002] 1 SCR 405, a case that did involve judicial independence, reversed the award of solicitor-client costs made by the Court of Appeal and substituted an award of party and party costs only. The Supreme Court specifically stated that “solicitor-client costs are not appropriate in this case.”

[12] I agree with the respondents that considering Rule 400(3), there is no just basis to award the applicants solicitor-client costs. Such an award is exceptional: *Chretien v Canada*

*(Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, 2011 FCA 53 at para 3. There is no conduct of the respondents in this application that warrants such an award; nor is there any other circumstance that makes this a case warranting the highest award of costs. Although the application would have involved complex issues of law and have been of importance to the judicial system and the constitution of Canada, the application was derailed and supplanted by the Reference. As such, very little work needed to be done on the application by the applicants. The mere filing of it appears to have had the desired result.

[13] However, I accept that but for the applicants commencing this application, it was unlikely that the Reference would have occurred. At the time the application was filed, there was no apparent objection made to the appointment of Justice Nadon on constitutional grounds by any person or government. To that extent, one could argue that the applicants have done Canada a service and should not be out-of-pocket in so doing.

[14] There is no longer any *lis* between these parties, and the application will be dismissed; however, I am of the view that the applicants are entitled to a single award of costs.

[15] In these circumstances, it makes little sense to refer the costs to a taxing officer – it would not be an appropriate use of judicial resources. Recognizing that an award of costs is a matter of discretion, and considering the factors set out in Rule 400(3), I will order a single award of costs to the applicants, fixed on a lump sum basis in the amount of \$5000.

**ORDER**

**IT IS HEREBY ORDERED THAT** this application is dismissed, and the applicants are awarded a single award of costs, fixed on a lump sum basis in the amount of \$5000.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1657-13

**STYLE OF CAUSE:** ROCCO GALATI ET AL v THE RIGHT HONOURABLE  
STEPHEN HARPER ET AL

**MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES**

**ORDER AND REASONS OF THE HONOURABLE MR. JUSTICE ZINN**

**DATED:** NOVEMBER 20, 2014

**WRITTEN REPRESENTATIONS BY:**

Rocco Galati FOR THE APPLICANT  
ROCCO GALATI

Paul Slansky FOR THE APPLICANT  
CONSTITUTIONAL RIGHTS CENTRE INC.

Paul J. Evraire / Andrew Law FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

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