

Federal Court



Cour fédérale

Date: 20220316

Docket: DES-8-21

Citation: 2022 FC 353

Ottawa, Ontario, March 16, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

AMIR ATTARAN

Respondent

ORDER AND REASONS

[1] This Order responds to the request of the Respondent for costs to be paid to him arising from the discontinuance of the Application of the Attorney General of Canada [AGC] made pursuant to subsection 38.04 (1) of the *Canada Evidence Act*, R.S.C.1985, c.C-5 [CEA].

I. Background

[2] By way of brief background, on November 5, 2021 the Attorney General of Canada [AGC] filed an application pursuant to subsection 38.04(1) of the CEA [the Section 38 Application] for an order with respect to the disclosure of information. The Section 38 Application responded to a notice provided to the AGC by Immigration, Refugees and Citizenship Canada [IRCC] that sensitive or potentially injurious information, as those terms are defined in the CEA, may be disclosed by IRCC. The information at issue arose in connection with an order made by the Canadian Human Rights Tribunal [CHRT] requiring IRCC to produce certain documents to the Respondent in the context of the CHRT's consideration of a complaint.

[3] On November 9, 2021, upon consideration of the AGC's Section 38 Application, the Court issued an Order, which added and named the Respondent. On November 18, 2021, the Respondent filed a notice of appearance electronically.

[4] On January 10, 2022, Counsel for the AGC wrote to the Court noting that Counsel had engaged in informal discussions with the Respondent at the end of November 2021. Counsel for the AGC proposed that the Court convene a Case Management Conference [CMC] to discuss the next steps in the Section 38 Application.

[5] On January 10, 2022, the Court contacted the parties seeking their availability for a CMC on January 18, 19 or 20, 2022. The Respondent advised that he was not available until after February 5, 2022. He also advised that the Canadian Human Rights Commission [CHRC] should

be included in the CMC. The Court scheduled the CMC for February 28, 2022 taking into account the availability of the Applicant, Respondent, Counsel for the CHRC and the Court.

[6] On Sunday, February 27, 2022, the Respondent wrote by email to Counsel for the AGC, with a copy to the Court and Counsel for the CHRC, providing information for the purpose of the CMC. The Respondent advised that the final arguments in the CHRT proceedings, which underlie the Section 38 Application, had ended and that the documents sought to be protected in accordance with section 38 (i.e., the redacted parts of the documents produced by IRCC) had not been challenged by the Respondent. The Respondent attached other documents related to the status of the CHRT proceedings. The Respondent proposed that the AGC discontinue the Section 38 Application with costs payable to the Respondent.

[7] The Respondent's February 27, 2022 email was provided to me on Monday, February 28, 2022. The CMC was held as scheduled. Counsel for the AGC advised that she had not received the February 27, 2022 email. The Respondent then resent the email. Counsel for the AGC had a brief opportunity to read it in the course of the CMC.

[8] At the CMC, I noted, among other things and in response to the Respondent's submissions regarding the Section 38 Application, that in my view the AGC's course of action was not abusive or unnecessary, as alleged, but rather that the AGC followed the customary procedure and adhered to the provisions of the CEA to protect information pending a determination by the Court.

[9] The Respondent expressed the view that the Section 38 Application had been unnecessary. Counsel for the AGC responded that the AGC acted in accordance with the notice provided by IRCC to the AGC. However, Counsel for the AGC agreed, given the current information provided by the Respondent regarding the status of the CHRT proceeding, that the Section 38 Application was now moot.

[10] On March 2, 2022, the AGC filed a notice of discontinuance of the Section 38 Application. Counsel for the AGC also provided a letter to the Court, a copy of which was provided to the Respondent, including submissions that no costs should be awarded against the AGC given that the AGC had acted in accordance with the provisions of the CEA and had promptly sought to discontinue the Section 38 Application upon determining that it was moot.

II. The Respondent's Request for Costs

[11] On March 3, 2022, the Respondent wrote to the Court by email and reiterated his request for costs. The Respondent now argues that in accordance with Rule 402 he is entitled to costs forthwith due to the discontinuance of the Section 38 Application. He seeks \$2500 for lost time, effort and related expense to defend the Section 38 Application, which he alleges to be a “misbegotten and stillborn proceeding”. The Respondent notes that, among other things, he was required to communicate with the CHRT with respect to the adjournment of the CHRT hearings, consult with colleagues for legal advice and participate in the CMC.

[12] The Respondent also alleges that Counsel for the AGC misled the Court and breached the duty of candour by stating that the AGC was required to bring the Section 38 Application. He

calls on the Court to award costs and issue a “rebuke” to Counsel for the AGC to discourage such actions in the future.

III. No Costs Are Awarded

[13] Rule 402 of the *Federal Courts Rules* (SOR/98-106) provides:

402 Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

402 Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu’une action, une demande ou un appel fait l’objet d’un désistement ou qu’une requête est abandonnée, la partie contre laquelle l’action, la demande ou l’appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s’ils avaient été adjugés par jugement rendu en faveur de la partie.

[14] The Respondent appears to assert that he is automatically entitled to costs because the Section 38 Application was discontinued, without regard to the opening phrase in Rule 402, “unless otherwise ordered by the Court”, and without regard to the related Rules regarding costs and the jurisprudence.

[15] Rule 400(1) provides that the “the Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.” This

discretion includes whether costs should be awarded at all. Rule 400(3) sets out several non-exhaustive factors that guide the Court in exercising its discretion.

[16] It is not in dispute that self-represented litigants may be awarded costs (see, for example, *Sherman v Minister of National Revenue*, 2003 FCA 202; *Air Canada v Thibodeau*, 2007 FCA 115; *Yu v Canada (Attorney General)*, 2011 FCA 42).

[17] In such cases, the Court has the same discretion and is guided by the same factors, including the amount of time and effort invested, the complexity of the proceedings, whether public interest questions were raised, whether any abusive conduct of an opposing party warrants a punitive amount, and any other relevant factor.

[18] The Respondent's request for costs is based, to some extent, on his desire to sanction the AGC, and more particularly, Counsel for the AGC, for bringing the Section 38 Application in the first place. Contrary to the Respondent's allegations, Counsel for the AGC did not mislead the Court or breach the duty of candour owed in *ex parte* proceedings. The only *ex parte* proceeding was the AGC's initial application in writing to the Court on November 5, 2021, which is the customary practice in accordance with subsection 38.02(1) of the CEA and which was soon followed by the Court's Order of November 9, 2022 naming the Respondent. As I noted at the CMC, the AGC's Section 38 Application followed the same approach as in other cases where the AGC responds to a notice given regarding sensitive or potentially injurious information that may be disclosed.

[19] The Respondent also alleges that Counsel for the AGC misled the Court by relying on subsection 38.04(2)(b), which is a mandatory provision requiring that an application be made. The Respondent submits that the AGC was not required to bring the section 38 Application, but rather had the discretion whether to do so.

[20] The Court was not misled.

[21] The AGC filed the Section 38 Application in response to the notice provided to the AGC by IRCC. Once the CHRT issued the order to IRCC to produce documents, IRCC was required to produce the specified documents. In that context, IRCC sought to identify and protect information that IRCC believed to be sensitive or potentially injurious, as those terms are defined in the CEA. IRCC then provided the required notice to the AGC pursuant to section 38.01. Although the Respondent contends that he did not intend to challenge the information sought to be protected by IRCC, the IRCC remained subject to the CHRT's Order.

[22] The Respondent also contends that by November 26, 2021, Counsel for the AGC was aware that he did not intend to challenge the redactions to the documents produced and that the evidentiary stage of the CHRT proceedings had ended. He submits that Counsel for the AGC should have acted at that time to discontinue the Section 38 Application to avoid wasting his or the Court's time. I do not agree. As noted, IRCC was subject to CHRT's Order to produce documents. There is no information before me to suggest that the CHRT's Order had been rescinded or varied.

[23] The letter dated November 26, 2021, from Counsel for the AGC to the Respondent and to Counsel for the CHRC acknowledged that the Respondent did not take issue with the redactions to the documents produced to him, confirmed that the Section 38 Application was applicable to four documents (identified by document number), and responded to the Respondent's inquiry whether additional documents would be made subject to the section 38 Application. Counsel for the AGC confirmed that the AGC had not received any further notice from IRCC about other documents. The letter also referred to a teleconference held between the parties on November 25, 2021. However, the letter did not refer to any discussions about discontinuing the Section 38 Application.

[24] In my view, without further confirmation that that IRCC was no longer subject to the CHRT's Order, the AGC's pursuit of the Section 38 Application to protect the information from disclosure pending the determination by the Court was justified.

[25] As noted above, the Respondent sent information about the status of the CHRT proceedings to Counsel for the AGC on Sunday February 27, 2022, which was only received by Counsel upon being resent on February 28, 2022. The Respondent did not explain why he waited until the eve of the CMC to do so or to suggest that the CMC was not necessary.

[26] Contrary to the Respondent's submissions, the Court need not issue a "rebuke" to Counsel for the AGC. I reject the Respondent's allegations about the conduct of Counsel for the AGC. I do not attribute any bad faith or lack of candour to Counsel for the AGC. I do not regard the section 38 Application as unnecessary or frivolous. There is no evidence to support the view

that Counsel for the AGC should have sought to discontinue the Section 38 Application sooner. As noted above, Counsel for the AGC requested that the Court convene a CMC in early January to determine the next steps and the Court endeavoured to do so. However, the Respondent was not available at that time. Nor did the Respondent raise the issues he now raises at that time. Contrary to the Respondent's allegation, Counsel for the AGC did not chose the date for the CMC. The CMC was held at the first opportunity to accommodate the schedules of the parties and the Court.

[27] Although the Section 38 Application did require a response by the Respondent, it was not burdensome. The Section 38 Application was not complex, as it identified only four documents in a large record. As the Respondent acknowledged, he did not intend to challenge the redactions at issue. The CHRT proceedings were not held in abeyance pending the outcome of the Section 38 Application. The Respondent's response to the Section 38 Application included filing a two-line Notice of Appearance on November 18, 2021, participating in some discussions with Counsel for the AGC in November 2021, sending the email to Counsel for the AGC and to the Court with information about the status of the CHRT proceedings on Sunday February 27, 2021, participating in the CMC, which lasted less than one hour, on February 28, 2021 and his follow up correspondence with respect to seeking costs.

[28] I have not been made aware of any other cases where the Court has awarded costs on a Section 38 application.

[29] Upon considering all the circumstances, in particular that the AGC acted in accordance with the Section 38 regime, I find that the AGC should not bear any costs for doing so.

ORDER in file DES-8-21

THIS COURT ORDERS that:

1. No costs are awarded to the Respondent with respect to the discontinuance of the Section 38 Application.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: DES-8-21

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA v AMIR
ATTARAN

**INFORMAL WRITTEN SUBMISSIONS DATED MARCH 2 AND 3, 2022
CONSIDERED AT OTTAWA, ONTARIO**

REASONS FOR ORDER AND ORDER: KANE J.

DATED: MARCH 16, 2022

APPEARANCES:

Michelle Lufty FOR THE APPLICANT

Amir Attaran ON HIS OWN BEHALF

SOLICITORS OF RECORD:

Attorney General of Canada FOR THE APPLICANT
Ottawa, Ontario

None FOR THE RESPONDENT