Federal Court of Appeal  Cour d'appel fédérale

Date: 20160208

Docket: A-541-14

Citation: 2016 FCA 39

CORAM: **PELLETIER J.A.**
STRATAS J.A.
GLEASON J.A.

BETWEEN:

ROCCO GALATI,
CONSTITUTIONAL RIGHTS CENTRE INC.

Appellants

and

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

Respondents

Heard at Toronto, Ontario, on January 11, 2016.

Judgment delivered at Ottawa, Ontario, on February 8, 2016.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GLEASON J.A.
CONCURRING REASONS BY: STRATAS J.A.

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Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Galati, on his own behalf, and the Constitutional Rights Center (CRC) appeal from the costs portion of the Federal Court's decision, reported as 2014 FC 1088, dismissing their application for various heads of relief in relation to the appointment of Mr. Justice Marc Nadon, a judge of the Federal Court of Appeal, to the Supreme Court of Canada. The Federal Court

denied their motions for solicitor-client costs and made a single award of costs in favour of both appellants fixed on a lump sum basis at $5,000. Mr. Galati and the CRC appeal from that decision arguing that they have a constitutional right to solicitor-client costs. They also argue that the Federal Court should have awarded them such costs pursuant to its discretionary power pursuant to Rule 400 of the Federal Courts Rules, SOR/98-106.

[2] For the reasons which follow, I would dismiss the appeal.

I. FACTS

[3] On or before October 3, 2013, the Governor in Council appointed Justice Marc Nadon, a former advocate of Quebec and a member of the Federal Court of Appeal, to the Supreme Court of Canada to occupy one of the three seats on the Supreme Court which are reserved for persons appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province": see section 6 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (the *Act*). It was known at the time that there was an issue about the eligibility of judges of the Federal Courts to occupy those seats, as evidenced by the fact that, at the same time as he announced his intention to appoint Justice Nadon to the Supreme Court, Prime Minister Harper released legal opinions prepared at the Government's request, all of which held that such an appointment did not contravene section 6 of the *Act*.

[4] Mr. Galati and the CRC did not share this view and on Monday October 7, 2013, they filed a joint notice of application in the Federal Court (the Joint Application) in which they sought various heads of relief, on the ground that a judge of the Federal Court or the Federal Court of Appeal was ineligible, by the terms of section 6 of the *Act*, to be appointed to one of the

three "Quebec" seats on the Supreme Court. They sought to have Justice Nadon's appointment set aside.

[5] Perhaps because of the Joint Application, perhaps because of the concerns of the Quebec Bench and Bar which prompted the Governor in Council to seek out legal opinions in the first place, the Governor in Council referred the interpretation of sections 5 and 6, as well as its proposed amendments to the *Act*, to the Supreme Court (the Reference) which ultimately ruled that *former* advocates of Quebec, including any former Quebec advocate appointed to one of the Federal Courts, were ineligible to occupy one of the "Quebec" seats on the Supreme Court. Justice Nadon's appointment to the Supreme Court was held to be invalid: see *Supreme Court Act* ss.5 and 6, 2014 SCC 21.

[6] Following the issuance of the Joint Application on October 3, 2013, a case management conference was held before Mr. Justice Zinn, and was adjourned to October 24, 2013.

[7] When the case management conference resumed, an order was made setting a timeline for the filing of materials as well as a hearing date for the Attorney General's motion for a stay of the Joint Application pending the disposition of the Reference, a motion which Mr. Galati and the CRC (sometimes referred to as the Joint Applicants) intended to oppose.

[8] After carefully considering the Attorney General's motion for a stay (for a period of 7.6 hours, in Mr. Galati's case), the Joint Applicants eventually consented to a stay of the Joint

Application in exchange for the Attorney General's undertaking not to oppose their application for intervener status in the Reference.

[9] Mr. Galati and the CRC were granted intervener status and appeared at the hearing of the Reference.

[10] Following the release of the Supreme Court's decision, a further case management conference was held where, by agreement of the parties, it was ordered that the final disposition of the Joint Application and the question of costs would proceed by way of written submissions.

[11] In that context, both the Joint Applicants filed 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.

[12] Mr. Galati argued for an award of costs in his favour calculated on the basis of 56.4 hours of service at an hourly rate of $800, plus disbursements in the amount of $638, for a total award (including tax) of $51,706. The CRC claimed costs of $16,769 based on 14.55 hours of service by its counsel, Mr. Slansky, at an hourly rate of $800. In argument, Mr. Galati acknowledged

that his regular hourly rate is not $800 as his clientele do not have the means to pay such an exalted rate. He advised that $800 per hour is the rate for substantial indemnity pursuant to Part 1 of Tariff A of the Ontario *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, for lawyers of his year of call and experience.

[13] The Attorney General opposed Mr. Galati's and the CRC's motions and filed a cross motion seeking the dismissal of the Joint Application. On the question of costs, the Attorney General argued that since, as of the date of the argument, no judgment had been rendered in the Joint Application, there was no successful party and therefore no basis for an order for costs. In any event, the Attorney General argued that there was no constitutional right to costs. If an order of costs were to be made, having regard to the factors mentioned in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106, it should be a single award assessed on Column III of Tariff B.

II. THE DECISION UNDER APPEAL

[14] In its decision, the Federal Court noted that Mr. Galati and the CRC provided no authority for the proposition that there was a constitutional right to solicitor-client costs in the circumstances described in their motions. Such authority as there was consisted of a Tax Court of Canada case, *Lee v. Canada (Minister of National Revenue)*, [1991] T.C.J. No. 243, in which it was held that there was no constitutional right to an award of costs, let alone solicitor-client costs. The Federal Court agreed with the position taken by the Tax Court of Canada as to the absence of a constitutional right to costs. Furthermore, having regard to the principles governing the award of solicitor-client costs, there was no basis for making an order of that nature in this case since there was no conduct on the part of the respondents which would justify such an

award, nor were there any other circumstances which would justify the highest award of costs: Reasons, paragraph 12.

[15] That said, the Federal Court accepted that "but for the applicants commencing this application, it was unlikely that the Reference would have occurred." In the end result, even though the Federal Court dismissed the application, it awarded Mr. Galati and the CRC costs jointly in the amount of $5,000 because "one could argue that the applicants have done Canada a service and should not be out-of-pocket in so doing:" see Reasons at paragraph 13.

III. ISSUES

[16] Mr. Galati and the CRC raise two issues. The first is that the Federal Court Judge erred in failing to analyze their claim that, in the case of public interest litigation which satisfies the test they propose, there is a constitutional requirement that a successful litigant be awarded his solicitor-client costs because the failure to do so is a breach of the constitutional right to a fair and impartial judiciary. The second issue is that, even if there is no constitutional right to solicitor-client costs, the Federal Court judge erred in failing to award them such costs in the circumstances of this case.

[17] In the alternative, Mr. Galati argues that the Federal Court's reasons are unintelligible for purposes of appellate review. Having conducted such an appellate review, I find no merit to this allegation.

IV. STANDARD OF REVIEW

[18] Costs are within the discretion of the presiding judge: see Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 (the *Rules*). As such, an award of costs is a discretionary decision, reviewable on a highly deferential standard, unless it can be shown that the Court erred in law in making the award of costs it did: see *Turmel v. Canada (Attorney General)*, 2016 FCA 9, at paragraphs 11-12.

V. DISPOSITION

[19] Since Mr. Galati and the CRC criticize the Federal Court for not analyzing their claim to solicitor client costs, I am required to step outside the four corners of the Federal Court's decision to do that which the Joint Applicants ask us to do.

[20] The first point to be disposed of is the hourly rate used by the Mr. Galati and the CRC in their respective claims for costs. Their claim to be entitled to the substantial indemnity rate of $800 which apparently would apply to these counsel under the Ontario *Rules of Civil Procedure* is puzzling. Mr. Galati and Mr. Slansky are both experienced counsel who presumably know that the costs of litigation conducted in the Federal Courts are awarded in accordance with the *Federal Courts Rules*. They would also presumably know that the *Federal Courts Rules* do not provide for an hourly rate benchmark (other than an amount per unit of service as described in the Tariff) such as the *Rules of Civil Procedure* apparently do. Given this knowledge, it is surprising that Mr. Galati would seek an order of costs in excess of what he would have billed a client for the same services.

[21] As a self-represented litigant, the best Mr. Galati could hope for, under the Federal Courts Rules and the jurisprudence on self-represented litigants is to recover his regular hourly rate: see *Thibodeau v. Air Canada*, 2007 FCA 115, [2007] F.C.J. No. 404, at paragraph 24.

[22] I might add that a claim for solicitor-client costs by a self-represented litigant is an oxymoron. A self-represented litigant, by definition, has no counsel and therefore no out-of-pocket expenses for which full indemnity is appropriate.

[23] As for the CRC, its claim for solicitor-client costs would be limited to its actual out-of-pocket expense for legal fees. If, as appears to be the case given Mr. Slansky's request that any costs awarded be paid to him personally, counsel is acting *pro bono*, then the same considerations apply. Any award of solicitor-client costs would be limited to Mr. Slansky's regular hourly rate. One is left to wonder why experienced counsel before the Federal Courts would seek costs calculated on a basis other than that provided by the *Federal Courts Rules*.

[24] This appeal raises two questions: is there such an entitlement to solicitor client costs (on any basis) and, if there is, do the Joint Applicants satisfy the conditions applicable to the award of such costs?

[25] Both Mr. Galati and the CRC raise, in slightly different ways, the issue of the economic imbalance between litigants who challenge legislative or executive action on constitutional grounds. The government has the full resources of the state available to it to defend its position while challengers who act in the public interest must rely on private resources and the goodwill

of *pro bono* counsel to advance their case. The former Court Challenges Programme was designed to deal with this imbalance but has been cancelled.

[26] The Supreme Court has recognized this gap but has declined to close it by judicial fiat. In *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at paragraph 4, the Supreme Court held that "[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being." This position was re-affirmed in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (*Carter*)at paragraph 137, where the Court dealt with an argument much like the one made by the Joint Applicants but in the context of the Court's normal discretionary power to award costs. There, the Supreme Court held that an award of special costs in public interest litigation would be justified if certain conditions were met. The first is that the issues raised must be truly exceptional, having significant and widespread societal impact. Secondly, not only must the litigants must have no personal financial interest in the litigation, they must show that it would not have been possible to effectively pursue the litigation with private funding: see *Carter* at paragraph 140.

[27] The Joint Applicants have modified this test by substituting for the requirement that the litigation have widespread societal impact, the condition that the litigation must go to the "architecture of the Constitution". They also make explicit the requirement that the applicants must be successful in the litigation. Before addressing the question of the Joint Applicants' right to solicitor client costs, whether pursuant to the Constitution or otherwise, it makes sense to see if the Joint Applicants satisfy the conditions for the award of such costs.

[28] The difficulty confronting the Joint Applicants is that they were not successful in their application. The Federal Court found that the Joint Application "was derailed and supplanted by the Reference": see Reasons at paragraph 12. It was therefore dismissed for mootness. Mr. Galati and the CRC take the position that because the Reference produced the result which they sought in the Joint Application, they were successful and entitled therefore to their solicitor client costs. It doesn't work that way. The fact that their application apparently set in motion a series of events which led to the conclusion which they hoped to achieve in their application does not make them successful litigants. It may make them successful politically or in the popular press, but that is a different matter. They can only claim costs in relation to the judicial treatment of the Joint Application which, as noted, was dismissed. To hold otherwise would be to create something in the nature of a finder's fee for constitutional litigation.

[29] To the extent the right to solicitor client costs accrues only to successful litigants, the Joint Applicants do not satisfy that test. Given this finding, it is not necessary for me to examine the other elements of the test which Mr. Galati and the CRC propose other than to comment that it is far from obvious that the interpretation of sections 5 and 6 of the *Act* goes to the "architecture of the Constitution".

[30] Turning now to the Joint Applicants entitlement to special costs pursuant to the Federal Court's discretion over the award of costs, and applying the *Carter* principles, I find that the applicants do not meet that test either. As I pointed out above, the Joint Application was not successful and that leads to the same conclusion in this scenario as in the previous scenario. Be that as it may, Mr. Galati and the CRC make much of the exceptional nature of the issues raised

by the Joint Application. There is no doubt that the issues raised were of significant importance, particularly to the members of the Federal Courts, but the interpretation of sections 5 and 6 of the *Act* did not have widespread societal impact. When the partisan political overlay is stripped away, this was a lawyer's issue with very limited consequences beyond legal circles. It certainly did not go to the "architecture of the Constitution".

[31] But, more importantly, the reason for which the claim for solicitor client costs ought to fail, and, in my view, does fail, is that it fails to meet the second criterion identified by the Court, namely that it would not have been possible to effectively pursue the litigation with private means. This refers to the litigation as it actually unfolded, not as it might have unfolded. As it actually unfolded, the Joint Application required some office time and a small number of attendances for a combined total of 71 hours of Mr. Galati's and Mr. Slansky's time. While this is not trivial, it is not an insuperable burden for two lawyers with busy practices. Furthermore, the burden on Mr. Galati and Mr. Slansky, to the extent that he was acting pro bono, has been relieved by the Federal Court's exceptional award of costs of $5,000, even though they were unsuccessful, so that they might not be out of pocket.

[32] For these reasons, then, the Joint Applicants have not shown that they come within the class of litigants who might be awarded solicitor client costs in public interest constitutional litigation, whether by right or through the exercise of the Court's discretion. It is therefore unnecessary for me to deal with the argument as to constitutional entitlement as it does not arise on these facts. That said, it sometimes occurs that a party makes an argument that is so

scandalous that it deserves to be condemned, whether it arises on the facts of the case or not. This is such a case.

[33] The following passages from Mr. Galati's memorandum of fact and law encapsulates the argument which was made in this case:

> With respect to the Respondent's position that the right to solicitor-client costs has no nexus to a fair and independent judiciary, the Appellant (Rocco Galati) states that in such cases, which involve nothing but protecting the integrity of the constitution, constitutionally offensive legislation, or Executive action violating the "architecture of the constitution", it has everything to do with a fair and independent judiciary. While the state apparatus is fully and amply funded to defend such violations, and a citizen who gets no personal benefit, per se, from upholding the integrity, structure and dictates of the Constitution, **in successfully** challenging such constitutional violations, to be denied his solicitor-client costs doing so can only lead to one conclusion in fact and in perception.
>
> That conclusion is that any Court siding with the state on such cases cannot be said to be "fair or independent" in the least sense, in fact, and in perception, that Court would be, in fact and in perception, 'in bed' with the state Respondents.
>
> Mr. Galati's memorandum of fact and law at paragraphs 20-22 (emphasis in the original).

[34] It is important to understand what is being said here. Mr. Galati and the CRC state as a fact that a Court which, having agreed that certain government action was inconsistent with the Constitution and having therefore set it aside, will nonetheless be seen to be, and will in fact be, "in bed" with the government if it fails to award the successful applicant its solicitor client costs. The tie-in to the Constitution is that this collusion deprives the affected litigant of its constitutionally protected right to a fair and independent judiciary.

[35] To be "in bed" with someone is to collude with that person. I do not understand how one could hope to protect the right to a fair and independent judiciary by accusing courts of colluding

with the government if they don't give the applicant its solicitor client costs. The entire Court system, it seems, must be alleged to be actually or potentially acting in bad faith in order to instill public confidence in the fairness and independence of the judiciary. This is reminiscent of the gonzo logic of the Vietnam War era in which entire villages had to be destroyed in order to save them from the enemy. The fact that this argument is made in support of an unjustified monetary claim leads to the question "Whose interest is being served here?" Certainly not the administration of justice's. This argument deserves to be condemned without reservation.

[36] In the circumstances, I am of the view that the Federal Court committed no error justifying our intervention and that even when, particularly when, the Joint Applicants' arguments are analyzed, this appeal should be dismissed with costs. The Attorney General seeks total costs in the amount of $1,000. In the circumstances, that is more than reasonable. I would therefore dismiss the appeal with one set of costs to the Attorney General fixed at $1,000, all inclusive.

"J.D. Denis Pelletier"

J.A.

"I agree
Gleason J.A."

STRATAS J.A. (Concurring reasons)

[37] I fully agree with my colleague's reasons and concur with his proposed disposition of this appeal. I wish to add a couple of other observations.

[38] At one point in his oral submissions, Mr. Galati submitted that, like government lawyers, judges are paid by the government and so if in circumstances such as these we do not order the government to pay private sector lawyers like him, the court would appear to be biased.

[39] The appearance of bias is to be assessed by the informed, reasonable person viewing the matter realistically and practically: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at page 394. That person would be aware of a number of things. Judges' impartiality is secured by guarantees of security of tenure and remuneration until retirement or age 75: *Constitution Act, 1867*, 30 & 31 Vict., c. 3, sections 99-100. A long string of Supreme Court cases from *Valente v. The Queen*, [1985] 2 S.C.R. 673 to *Provincial Court Judges' Assn. (New Brunswick) v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286 has developed exacting requirements to ensure that the judiciary remains fully independent from government while judicial remuneration is set. And there are many cases where judges, paid by government, have condemned government misconduct and have ordered government to do something against its will.

[40] In light of this, the informed, reasonable person viewing the matter realistically and practically would never think that judges are predisposed to the government just because the government pays them and does not pay others. This sort of submission can unfairly affect the

legitimacy and public perception of the court. An officer of the court should never make such a submission. See *Es-Sayyid v. Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 at paragraph 50; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at paragraph 113.

[41] In this case, the Federal Court exercised its discretion in the appellants' favour, awarding them $5,000 in costs for work done in starting a constitutional challenge that soon became moot. This is more than what other litigants doing the same amount of work would receive under the applicable law: *Federal Courts Rules*, R.S.C. 1985, c. F-7, Rule 400 and Tariff B.

[42] The appellants now come to this Court. They ask us to order that the government respondents—*i.e.*, the taxpayers—pay them $800 an hour, an amount they admit exceeds the rate they normally charge their clients. In his memorandum (at paragraph 15), Mr. Galati submits that if we do not make that order, we will be acting in "breach of the unwritten constitutional imperatives to the Rule of Law and Constitutionalism."

[43] The constitutional principle of the rule of law, enshrined in the preamble to the Canadian Charter of Rights and Freedoms, is not an empty vessel to be filled with whatever one might wish from time to time. Rather, it has a specific, limited content in the area of constitutional law. See, *e.g.*, *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 FCA 49, [2005] 2 S.C.R. 473 at paragraph 58. See also the previous cases in which we have reminded Mr. Galati of the doctrinal limits to this principle: *Yeager v. Day*, 2013 FCA 258, 453 N.R. 385 at paragraph 13; *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114, 372 D.L.R. (4th) 567 at paragraph 15; *Austria v. Canada (Citizenship and Immigration)*, 2014 FCA 191, 377 D.L.R. (4th) 151 at

paragraphs 71-74; *Toussaint v. Canada (Citizenship and Immigration)*, 2011 FCA 146, [2013] 1 F.C.R. 3 at paragraph 60.

[44] In rare circumstances of proven need, a party can obtain an interim costs award (*British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371) or state funding for counsel (*e.g., R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)), in both cases on the basis of rates much lower than those sought here.

[45] But a constitutional right for lawyers acting as public interest litigants to collect pay and bonuses from the public purse in the amount of $800 an hour? I don't see that in the text of the Constitution or by necessary implication from it. Nor does the Supreme Court see it: *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38 at paragraph 35; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 at paragraphs 139-141. I also reject the appellants' submission that some principle sitting invisibly alongside the visible text of our Constitution somehow springs up to entitle them to $800 an hour.

[46] The record discloses no inability on the part of the appellants at the outset of this litigation or even now to ask for donations to their cause. In this case, the appellants chose to proceed with their litigation, with no reasonable expectation of receiving more than the normal level of costs under Rule 400 and Tariff B of the *Federal Courts Rules*. And as I have said, in the circumstances of this case the Federal Court gave them even a little more than that.

[47] Like my colleague, I agree that there are no grounds for setting aside the costs order of the Federal Court and I would dismiss the appeal with costs in the amount of $1,000. Had the respondents asked for more, I would have granted more.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-541-14
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CONCURRED IN BY:	GLEASON J.A.
CONCURRING REASONS BY:	STRATAS J.A.
DATED:	FEBRUARY 8, 2016

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