IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Mitchell v. Jackman*, 2017 NLTD(G) 178
Date: October 31, 2017
Docket: 201101G7277

BETWEEN:

JULIE MITCHELL

APPLICANT

AND:

CLYDE JACKMAN

FIRST RESPONDENT

AND:

JACQUELINE MULLETT

SECOND RESPONDENT

AND:

MARY FRANCIS

THIRD RESPONDENT

AND:

MARY HODDER

FOURTH RESPONDENT

AND:

VICTOR POWERS

FIFTH RESPONDENT

AND:

CANADIAN CIVIL LIBERTIES ASSOCIATION

FIRST INTERVENOR

AND:

ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

SECOND INTERVENOR

Before: Justice Gillian D. Butler

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: October 16, 2017

Summary:

The Applicant successfully challenged the constitutionality of the special ballot voting provisions of the *Elections Act, 1991*. This Judgment addresses the appropriate cost award.

Appearances:

William A. F. Hiscock	Appearing on behalf of the Applicant
No Appearance	On behalf of the First Respondent
No Appearance	On behalf of the Second Respondent
Andrew A. Fitzgerald	Appearing on behalf of the Third, Fourth and Fifth Respondents
No Appearance	Appearing on behalf of the First Intervenor
Ian F. Kelly, Q.C. and Daniel M. Glover	Appearing on behalf of the Second Intervenor

Authorities Cited:

CASES CONSIDERED: *Mitchell v. Jackman*, 2016 NLTD(G) 132; *Re Great Western Advertising Co. v. Rainer* (1883), 9 P.R. 494 (Ont. H.C.J.); *Delrina Corp. v. Triolet Systems Inc.* (2002), 58 O.R. (3d) 339, 156 O.A.C. 166; *Dyer Estate, Re*, 2011 NLTD(G) 131; *Roche v. Sameday Worldwide*,

2014 NLTD(G) 48; *Carter v. Canada (Attorney General)*, 2015 SCC 5; *Toronto Police Association v. Toronto Police Services Board* (2000), 97 A.C.W.S. (3d) 866, [2000] O.J. No. 2236 (Sup. Ct.); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2001] O.T.C. 193, 103 A.C.W.S. (3d) 1098 (Sup. Ct.); *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *M. v. H.* (1996), 137 D.L.R. (4th) 569 (Ont. Ct. J.); *M. v. H.* (1996), 142 D.L.R. (4th) 1 (Ont. C.A.); *Lavigne v. O.P.S.E.U.* (1987), 60 O.R. (2d) 486, 41 D.L.R. (4th) 86 (S.C.); *Canadian Newspaper Co. Ltd. v. A.G. (Canada)* (1986), 55 O.R. (2d) 737, 32 D.L.R. (4th) 292 (H.C.J.); *Carter v. Canada* (Attorney General), 2012 BCSC 1587

STATUTES CONSIDERED: *Elections Act, 1991*, S.N.L. 1992, c. E-3.1; *Judicature Act*, R.S.N.L. 1990, c. J-4; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Family Law Act*, R.S.O. 1990, c. F-3

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

TEXTS CONSIDERED: Mark M. Orkin, *The Law of Costs*, 2nd ed., vol. 1 (Toronto: Thomson Reuters, 2017); Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016)

REASONS FOR JUDGMENT

BUTLER, J.:

INTRODUCTION

[1] I will begin by summarizing the events that led to the litigation and the most relevant features of the conduct of the litigation. I will then consider the principles that should apply to an award of costs and finally, I will apply these principles to determine the appropriate costs award, if any.

[2] The Applicant was the New Democratic Party candidate for the riding of Burin-Placentia West in the 2011 Newfoundland and Labrador General Election.

The First Respondent was the Progressive Conservative Party candidate in that riding and the Second Respondent was the Liberal Party candidate. Having received a total of 2,538 votes cast (in comparison the Applicant's 2,498 votes), the First Respondent was elected to the House of Assembly as the Member for the Burin-Placentia West riding on Friday, October 14, 2011. What tipped the scales in the First Respondent's favour were the special ballot votes.

[3] On November 28, 2011 the Applicant filed an Application with the Court seeking:

a) a declaration that the Special Ballot Provisions of the *Elections Act, 1991*, S.N.L. 1992, c. E-3.1 be declared unconstitutional;

b) that the Court declare that the First Respondent was improperly elected;

c) that a new election take place in the District as soon as practical; and

d) such further relief as this cause may require.

[4] The Applicant named as Third, Fourth and Fifth Respondents, the Returning Officer and Election Clerk for the Burin-Placentia West Electoral District for the 2011 election and the Chief Executive Officer of Elections NL at the time of the 2011 General Election.

[5] On February 27, 2012, the Canadian Civil Liberties Association was granted leave to intervene on constitutional issues and in response to a notice provided pursuant to section 57 of the *Judicature Act*, R.S.N.L. 1990, c. J-4, the Attorney General filed a Notice of Intention to Participate and was added as the Second Intervenor.

[6] As a result of a subsequent General Election and the Fifth Respondent's position that the issues raised in the Originating Application were moot, I filed a

Judgment (*Mitchell v. Jackman*, 2016 NLTD (G) 132) on July 8, 2016 in which I held that the Applicant could no longer pursue the personal remedies sought in paras. (b) and (c) of her prayer for relief but confirmed that she could pursue her public interest challenge to the impugned sections of the *Elections Act, 1991* and the related claim for "such further relief as this cause may require."

[7] The matter proceeded to a hearing on February 27, 28 and March 1, 2017 and Judgment was reserved. On September 6, 2017 I filed a written Judgment in which I held that the Special Ballot Provisions of the *Elections Act, 1991* contravened the democratic right to vote guaranteed by section 3 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*") and that the section 3 infringement could not be saved by section 1 of the *Charter*. My decision made no reference to costs.

[8] The Applicant now seeks to settle the question of whether she is entitled to her costs and if so, against which Respondents or Intervenors and on what terms.

ANALYSIS

The Presumptive Rule for Costs

[9] Since my September 6, 2017 Judgment was silent on the issue of costs, counsel for the Third to Fifth Respondents asserts that "no costs can be assessed by either party" because "it is as though the judge had said that he 'saw fit to make no order as to costs'."

[10] I note however that the authority cited for these propositions is (Mark M. Orkin: *The Law of Costs*, 2nd ed., vol. 1 (Toronto: Thomson Reuters, 2017)) at para. 105.7 for which the author relies upon *Re Great Western Advertising Co. v. Rainer* (1883), 9 P.R. 494 (Ont. H.C.J.) and *Delrina Corp. v. Triolet Systems Inc.* (2002), 58 O.R. (3d) 339, 156 O.A.C. 166.

[11] However, the same footnote 82 references numerous cases to the contrary and which support the principle that where no order is made, the costs follow the event.

[12] I conclude that the reference to Orkin's, *Law of Costs* relied upon by the Third to Fifth Respondents and Second Intervenor is a statement of the common law rule. However, in this jurisdiction, it has long been established that all costs awards are in the absolute discretion of the Court which discretion is expressly subject to any relevant statutory provision or rule of court.

[13] In this particular instance, Rule 55 of the *Rules of the Supreme Court, 1986*, c. 42, Sch. D, must serve as the starting point for an award of costs. I rely specifically on the following portions of Rule 55:

> 55.02(1) **…** the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the Court, …
>
> 55.03(1) Unless the Court otherwise orders, the costs of a proceeding or of any issue of fact or law therein shall follow the event.
>
> …
>
> 55.04(2) Where paragraph (1) does not apply, the costs between parties, unless otherwise ordered, shall be determined by a taxing officer according to Column 3 of the Scale of Costs in the Appendix to this Rule.
>
> …
>
> 55.04(4) In exercising its discretion under this Rule, the Court may consider
>
> (a) the amounts claimed and the amounts recovered;
> (b) the importance of the issues;
> (c) the complexity, difficulty or novelty of the issues;
> (d) the manner in which the proceeding was conducted, including any conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding;
> (e) the failure by a party to admit anything that should have been admitted;

(f) the proportion of the services rendered prior to the date the amendment to this paragraph introducing a Scale of Costs where costs are taxed according to a column or combination of columns came into force;
(g) seniority at the bar of counsel; and
(h) any other relevant matter.

[14] Since no Newfoundland and Labrador jurisprudence was referenced in the excerpt of Orkin's text, I note para. 19 of *Dyer Estate, Re*, 2011 NLTD(G) 131, wherein my colleague Fowler, J. determined that "the rule is that where a court is silent on the issue of costs then costs will follow the event". I accept that this is implicit from Rule 55.03(1) above.

[15] I also accept that "[C]onsistent with the overriding discretion of the Court, Rule 55.03(1) does not guarantee an award of costs in favour of the successful party. It does, however, create a reasonable expectation of an award, absent a principled reason for departing from the norm" (*Roche v. Sameday Worldwide*, 2014 NLTD(G) 48, at para. 9).

The First and Second Respondents and the First Intervenor

[16] I agree with counsel for the Applicant that the First and Second Respondents (candidates) and Third to Fifth Respondents (Returning Officer, Election Clerk and Chief Executive Officer of Elections NL) were required to be given notice of a recount under section 166 of the *Elections Act, 1991* and that this is how the litigation first arose.

[17] However, the focus of the Application was subsequently converted from a recount to a challenge to the election results themselves and laterally a purely constitutional question. No adequate explanation was given for why the Applicant did not thereafter discontinue the Originating Application against the First and Second Respondents. Neither of them have participated in the litigation since the November 30, 2015 General Election and took no position on the constitutional challenge. I conclude that an award of costs against either would be inappropriate.

[18] The First Intervenor played what I would characterize as the role of a traditional intervenor in public interest constitutional litigation. A comprehensive brief was filed and able arguments were presented by counsel which supported the position maintained by the Applicant. The Applicant was successful; in these circumstances there is no support for an award of costs against the First Intervenor.

Third, Fourth and Fifth Respondents

[19] The Third, Fourth and Fifth Respondents (Election officials and Officer) participated actively throughout the history of this litigation. When the Applicant filed her January 18, 2016 Interlocutory Application seeking to have the matter placed on the pre-trial list, the Fifth Respondent filed two Affidavits in Response taking the position that the issues were moot. After my July 8, 2016 Decision was filed, the Third to Fifth Respondents vigorously defended the constitutionality of the impugned provisions of the *Elections Act, 1991*.

[20] Notwithstanding the role played and the positions taken by the Third, Fourth and Fifth Respondents, their counsel relies on section 267(3) of the *Elections Act, 1991* and asserts that each of his clients are statutorily exempt from an order as to costs. The relevant portions of the section state:

> 267.(1) The procedure governing the hearing of a matter and the provisions respecting the awarding of costs found in the *Judicature Act* and the Rules of Court apply, with the necessary changes, to election applications and the trial of them.
>
> (2) Notwithstanding subsection (1), where there is a conflict between a provision of this Part and a provision of the *Judicature Act* or the Rules of Court, the provision of this Part prevails.
>
> (3) Notwithstanding subsection (1), costs shall not be awarded against the Chief Electoral Officer or a returning officer unless he or she has failed to comply with this Act and
>
> (a) he or she was not acting in good faith; or
> (b) [Rep. by 1995 c21 s52]
> (c) he or she intended to

> (i) affect the result of the election,
> (ii) permit a person to vote whom he or she believed was not qualified to vote, or
> (iii) prevent a person from voting whom he or she believed was qualified to vote.

[21] Counsel for the Applicant however suggests that since section 267 falls within the "controverted election" Part II of the *Elections Act, 1991*, it has no application to the constitutional question which was addressed in my decision.

[22] Part II of the *Elections Act, 1991* starts at section 227 with the definitions applicable to the Part and defines an "application" or "election application" as an application described in section 228. Section 228 is set out below:

> 228.(1) An election application is one that complains
>
> (a) of an improper return of an election or improper election of a member to the House of Assembly;
>
> (b) of no return or a double return of the election of a member to the House of Assembly; or
>
> (c) of an unlawful act by a candidate not returned by which he or she is alleged to have become disqualified to sit in the House of Assembly.
>
> (2) An application that complains that an election in an electoral district is invalid because a vote has not been conducted in a polling division in the district is not an election application for the purposes of this Part provided the Chief Electoral Officer has made every reasonable effort to have the vote taken.

[23] In the absence of authority supporting the Applicant's position on the applicability of section 267, I turn to principles of statutory interpretation to determine the "meaning the legislature wished to embody in the legislative text or the purpose it sought to accomplish" in the section (Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016 at 32)).

[24] There is no ambiguity in the words of section 228(1)(a). An election application includes one that complains of an improper election of a member of the House of Assembly. Similarly, there is no ambiguity in section 267(3). It supports the well-recognized principle that, barring special circumstances, public servants are not personally liable for relief and in this specific instance, not exposed to a costs order on an "election application".

[25] Legislation must be given a broad interpretation with the words read in their entire context (Sullivan at 49 citing Driedger's modern principle). Consistent with this principle, the constitutional issue in this case related to the Applicant's complaint of the improper election of a Member to the House of Assembly on the basis of the special ballot votes received by the First Respondent. The Application was therefore an "election application" as defined in section 228(1)(a).

[26] The only ambiguity allegedly arising is from the arrangement of the legislative provisions within the *Elections Act, 1991*. However, I find no ambiguity arising from the fact that section 267 falls within the controverted elections Part of the legislation. The ideas expressed in section 228 and 267 are related and therefore naturally grouped together.

[27] Having concluded that the Application was an "election application", I conclude that section 267 applies to the determination of a costs award against the Third, Fourth and Fifth Respondents.

[28] Section 267(3) expressly provides for a statutory exemption of costs awards against the Chief Electoral Officer or a Returning Officer unless either has (i) failed to comply with the *Act* and was held; (ii) not to have acted in good faith; (iii) to have intended to affect the result of the election; (iv) to permit a person to vote whom he believed was not qualified to vote; or (v) to have prevented a person from voting who he believed was qualified to vote. There was no suggestion that either of the Third, Fourth or Fifth Respondents' actions fell in either category.

[29] While the titles of the positions held by the Third, Fourth and Fifth Respondents do not precisely match the wording of section 267(3), (i.e. Chief Electoral Officer versus Chief Executive Officer of Elections NL), the intent of the section is clear. Electoral office staff and returning officers are immune from an award of costs in litigation characterized as an election application. In the circumstances of this case, I find that section 267 bans the Applicant from a costs award against the Third, Fourth and Fifth Respondents.

The Second Intervenor

The Role Played

[30] The Attorney General for Canada or a Province is customarily a Respondent in a constitutional challenge to legislation (see example *Carter v. Canada (Attorney General)*, 2015 SCC 5). However, due in large part to the history of this litigation as described earlier herein, the Attorney General of Newfoundland and Labrador remained an Intervenor.

[31] Counsel for the Attorney General attended at and participated in the pre-hearing discovery of Lorraine Michael and took an active role on all pre-trial Applications. Specifically, I note that the Second Intervenor supported the Fifth Respondent's Application to have the issues addressed in the Originating Application declared moot as a result of the subsequent 2015 General Election.

[32] Counsel for the Attorney General not only compiled and filed the appropriate record for consideration by the Court on the constitutional challenge, but also vigorously opposed the Applicant's entitlement to *Charter* relief. No concession was made that the pre-writ Special Ballot Provisions of the *Elections Act, 1991* contravened the *Charter* but could potentially be saved by section 1 thereof. The Attorney General maintained throughout the entire proceedings that the impugned provisions were constitutionally valid.

General principles established by Jurisprudence for Costs Awards Against Intervenors

[33] Counsel for the Attorney General maintains that, as a general rule, costs are not awarded against intervenors and that this principle applies equally to *Charter* litigation (*Toronto Police Association v. Toronto Police Services Board* (2000), 97 A.C.W.S. (3d) 866, [2000] O.J. No. 2236 (Sup. Ct.)). Counsel argues that the Applicant must therefore present a compelling argument to displace this general rule.

[34] While counsel for the Attorney General recognizes that in exceptional cases costs have been awarded against intervenors (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2001] O.T.C. 193, 103 A.C.W.S. (3d) 1098 (Sup. Ct.) at para. 15), counsel maintains that there are no exceptional circumstances that would warrant a costs award against the Second Intervenor in this case. Primarily, counsel suggests that the Attorney General was "purely a public interest intervenor" as this is described in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 178. I accept that this reference speaks to the assistance which Attorney Generals provide to the courts in cases where the constitutional validity of a statute is at stake.

[35] Counsel for the Attorney General referred to multiple cases in which courts in other provinces prior to 2015 have found no reason to depart from the general rule that costs should not be awarded against public interest intervenors.

[36] While counsel recognizes that a 10 percent costs award against the Attorney General of British Columbia, as an intervenor was upheld by the Supreme Court of Canada in 2015 in *Carter*, he maintains that the *Carter* decision is distinguishable on its facts.

[37] *Carter* concerned a challenge to the criminal prohibition of physician-assisted suicide. The distinguishing features suggested by counsel for the Attorney General were that:

a) the litigation represented a complex and deeply divisive social, political and ethical issue;

b) of pressing importance to various segments of society throughout the entire country;

c) the Plaintiffs in that case had no personal, proprietary or pecuniary interest in the litigation; and

d) the Attorney General of Canada was a party/Respondent and the Province of British Columbia participated fully, assuming the role of a party instead of the traditional role of intervenor.

[38] I will return to the *Carter* decision later in this Judgment.

[39] While neither counsel referred me to either the Ontario Court of Justice decision in *M. v. H.* (1996), 137 D.L.R. (4th) 569 (Ont. Ct. J.) ("*M. v. H.* No. 1"), or the Court of Appeal decision in *M. v. H.* (1996), 142 D.L.R. (4th) 1 (Ont. C.A.) ("*M. v. H.* No. 2"), I have found these decisions of assistance to the issue I must determine.

[40] In *M. v. H.*, both the Ontario Court of Justice and the Court of Appeal addressed a constitutional challenge raised by the Plaintiff to section 29 of the *Family Law Act*, R.S.O. 1990, c. F-3 relative to spousal support applications being restricted to members of the opposite sex. The Attorney General intervened, the constitutional challenge was successful and the Court concluded that given the circumstances it was appropriate to order costs against the intervenor. In doing so the court accepted that:

1. As a general rule, intervenors appearing on constitutional cases are not liable for costs (paragraph 19); but

2. If a case raised issues of general public importance, it would be appropriate to do so; and

3. Factors for consideration would be the success of the Plaintiff, complexity of the proceeding, importance of the issue, conduct/ role of the Intervenor and the general rule that costs of a *Charter* challenge should not be borne entirely by a private citizen (paragraphs 17 and 31).

[41] At trial in *M. v. H.*, the Attorney General had filed an affidavit of a sociologist/gay rights scholar who testified at the hearing. The Attorney General participated in the argument of the constitutional issue and at one point sought an adjournment to enable it to seek instructions from the newly elected Progressive Conservative government. A factum was filed and in oral argument the Attorney General maintained the position that the *Family Law Act* did not offend the *Charter*. While it conceded a section 15 violation, counsel for the Attorney General maintained that such a violation was justified under section 1. In these circumstances the Ontario Court of Justice concluded that a costs award against the Attorney General was appropriate.

[42] The Ontario Court of Appeal upheld the costs award.

[43] On careful reading of the authorities cited by counsel, the trial and court of appeal decisions in *M. v. H.*, and Orkin's, *The Law of Costs* section 219.5 (Costs in Charter Litigation), it is clear that historically the intervenors referenced in support of the general rule against a costs award, were not the Attorney General but rather unions and public interest groups of various forms with not for profit status or otherwise. Such intervenors had an interest in the proceedings but would not be directly affected by the result.

[44] When, as is the case in this somewhat unusual litigation, the Attorney General is an intervenor, and is directly affected by the result of the constitutional challenge, I conclude that application of the general principle against an award of costs, requires consideration of other factors.

Other Factors for Consideration

[45] Firstly, Orkin's text section 219.5 provides: "Canadian courts have expressed the view that litigation involving the Canadian Charter of Rights and Freedoms should not be beyond the reach of citizens of ordinary means or, putting it another way, that a *bona fide* Charter challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (citing *Lavigne v. O.P.S.E.U.* (1987), 60 O.R. (2d) 486, 41 D.L.R. (4th) 86 (S.C.)).

[46] Further, the author confirms that "[A]ccordingly, costs have been awarded to a successful applicant, even one whose legal fees were largely paid by an interest group, the court being of the opinion in the latter case that to do so would not offend the principle that costs are an indemnity" (citing *Canadian Newspaper Co. Ltd. v. A.G. (Canada)* (1986), 55 O.R. (2d) 737, 32 D.L.R. (4th) 292 (H.C.J.)).

[47] Secondly, I have already outlined the facts of this unusual litigation and highlighted that once the Province held the subsequent 2015 General Election, the Applicant's personal interest in the litigation came to an end. Thereafter, Ms. Mitchell's Application was limited to her public interest in seeking to have the impugned sections of the *Elections Act, 1991* declared unconstitutional. She did not, similar to the Applicant in *Carter*, have a personal, proprietary or pecuniary interest in the litigation.

[48] Thirdly, like physician-assisted death (*Carter*) and/or the right of same sex partners to claim spousal support (*M. v. H.*), I would characterize pre-writ special ballot voting as an important issue and the proceedings as complex. The Application had "wider implications for the community at large and there was nothing of a frivolous nature about the challenge" (*M. v. H.* No. 1, at para. 30 citing *Canadian Newspaper*, at pages 240 - 242). There was no suggestion that to award costs in this case would open the floodgates to marginal applications (*M. v. H.* No. 1, at para. 36).

[49] Fourthly, while I received no evidence about her expenses, common sense suggests that the engagement of counsel in litigation that has been ongoing since 2011 carries significant financial consequences. There was no suggestion that the Applicant had received any public funding in her challenge.

[50] Fifthly, the Attorney General took a full participatory role in the action, attending discoveries and pre-hearing applications, supporting the Fifth Respondent's Application to have the issues raised in the Originating Application declared moot and defending the impugned provisions with two counsel engaged throughout.

[51] Finally, the Applicant herein was successful in her public interest challenge to the legislation and the Attorney General was unsuccessful in its defence of the legislation.

[52] Returning now to *Carter*, the trial judge had found the Attorney General for the Province of British Columbia liable for costs in the same manner as a party (*Carter v. Canada (Attorney General)*, 2012 BCSC 1587, at para. 96). The Court of Appeal had reversed this and ordered each party to pay their own costs.

[53] The Supreme Court of Canada in *Carter* confirmed that there "was no firm rule against" an order for costs against an Attorney General as Intervenor in a constitutional case (para. 144) and held that the trial judge had adequately explained why an award of 10 percent costs against the Province of British Columbia as intervenor was warranted. The Court cited the trial judge's findings that counsel for British Columbia had led evidence, cross-examined the Appellant's witnesses, and made written and oral submissions on most of the issues during the course of the trial as well as taking an active role in pre-trial proceedings and had therefore assumed the role of a party (para 145).

[54] On this basis I see no reason to distinguish *Carter*. In fact, I consider the role played by the Attorney General for British Columbia therein comparable to that played by the Attorney General here.

[55] As a result, I conclude that an award of costs against the Attorney General for the Province of Newfoundland and Labrador as intervenor is warranted.

Particulars of the Award of Costs versus Second Intervenor

[56] The presumptive rule is that the costs I have awarded would be taxed on a party and party basis on Column 3.

[57] I start with the proposition stated at para. 11 in *Roche*:

> 11. An award of costs is designed to indemnify a successful litigant against the cost of pursuing or defending a lawsuit. In *Petten v. E.Y.E. Marine Consultants* (1998), 179 Nfld. & P.E.I.R. 94, 88 A.C.W.S. (3d) 974 (Nfld. T.D.)), the Court stated:
>
> > 74. The underlying rationale for awarding costs in the ordinary course of things is one of indemnification. The awarding of party and party costs, of course, represents only a partial indemnity. Nevertheless, such an award is generally regarded as striking the proper balance between the burden of costs which must be borne by a potentially successful litigant and the risk of putting litigation beyond the financial reach of a potential loser. In other words, party and party costs represent the balance that is generally struck between the cost of justice and access to justice. For complete indemnity to be justified, therefore, it must appear that justice (taking into account the balancing of cost versus access) demands that result. In our system of justice, that would be the exceptional case.

[58] The rationale for solicitor and client costs encompasses the concept of chastisement of a party guilty of misconduct. On the facts before me, while the Attorney General took the role of a party and vigorously defended the impugned provisions of the *Elections Act, 1991*, I was not referred to either any misconduct on its part or any evidence of bad faith which would warrant chastisement and an award of solicitor and client costs.

[59] Counsel for the Attorney General raised other relevant considerations for the nature of any award of costs in this instance. I accept that the Applicant should not be entitled to receive any costs associated with her personal interest litigation. Therefore, her costs award is restricted to the period starting with her January 16, 2016 Application to have the matter placed on the pre-trial list and which Application led to the challenge of the issues remaining after the 2015 General Election as moot.

[60] Pursuant to Rule 55.04(2), costs are to be taxed on Column 3. I have considered the factors stated in sub paragraphs (a) – (h) of Rule 55.04(2) and I agree that the issue was both important and novel. However, there was no suggestion that the Second Intervenor unnecessarily lengthened the duration of the proceeding or had failed to admit anything that should have been conceded. I am therefore not persuaded that a higher Column is warranted.

[61] As to whether there should be fees for one or two counsel, since the Attorney General itself maintained two counsel throughout, I would have no reason to deny the Applicant her entitlement to two counsel when both appeared.

CONCLUSION

[62] I summarize the issues that I have determined as follows. Where the Attorney General of Canada or of a Province is an Intervenor on a constitutional challenge and is directly affected by the result, there is no firm rule against an order for costs (*Carter* at para. 144) and application of the general principle that intervenors should not be the subject of a costs award, requires consideration of other factors.

[63] These factors would include the following:

a) Would it have been possible for the Applicant to pursue the litigation from private sources;

b) Recognition that a *bona fide Charter* challenge is not to be discouraged by the necessity for the Applicant to bear the entire burden;

c) Whether the Applicant has a personal, proprietary or pecuniary interest in the litigation;

d) The importance of the issue and complexity of the proceedings;

e) If there are wider implications for the community at large or significant and widespread societal impact;

f) If the claim was of a frivolous nature or if the Application was successful; and

g) The position taken and role played by the Intervenor. Was it one of assistance to the Court where the constitutional validity of a statute is at stake or more akin to a full participatory role of a party.

[64] I have considered these factors at pages 15 - 16 and applied them to the facts of the case. I have concluded that the Applicant is entitled to her party and party costs as against the Second Intervenor only, to be taxed on Column 3, for the period January 16, 2016 forward only, with two counsel fees to be included on those occasions when both appeared.

[65] I am satisfied that this result is consistent with the presumptive rule expressed in Rule 55.03(1), the guidance provided by the Supreme Court of Canada in *Carter*, broad access to justice principles and the fair and just result we strive to achieve in every case.

GILLIAN D. BUTLER
Justice