

Federal Court



Cour fédérale

Date: 20210630

Docket: T-677-20

Citation: 2021 FC 695

Ottawa, Ontario, June 30, 2021

**PRESENT:** The Associate Chief Justice Gagné

**BETWEEN:**

**MICHAEL JOHN DOHERTY, NILS ROBERT EK, RICHARD WILLIAM ROBERT DELVE, CHRISTIAN RYDICH BRUHN, PHILIP ALEXANDER MCBRIDE, LINDSAY DAVID JAMIESON, DAVID CAMERON MAYHEW, MARK ROY NICHOL AND PETER CRAIG MINUK**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**ORDER AND REASONS**

[1] On February 9th, 2021, the Court dismissed the Applicants' motion for an injunction staying the operation of the *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*, SOR/2020-96 [the Regulations]. As a result, the Court granted costs to the Respondent, the Attorney General of Canada.

[2] On May 14, 2021, this Court dismissed the Applicants' motion under Rule 302 of the *Federal Courts Rules*, SOR/98-106 for leave of the Court to pursue judicial review of more than one order or decision in respect of which relief is sought. Again, the Court granted costs to the Respondent, the Attorney General of Canada.

[3] The Applicants subsequently sought leave to file written submissions asking the Court to revisit its costs orders. They argue that, as public interest litigants, they should not be required to pay costs to the Respondent.

[4] The Respondent opposes the Applicants' request and, for the following reasons, disagrees that they are public interest litigants: 1) the Applicants have a substantial personal and proprietary interest in the outcome of the litigation; and, 2) the Applicants engaged in frivolous and abusive conduct in the course of their injunction motion.

#### I. Issues

[5] The only issue raised by this motion is whether the Applicants are public interest litigants and whether the Court should exercise its discretion not to award costs to the Respondent.

#### II. Analysis

[6] The starting point for this analysis is Rule 400 of the *Federal Courts Rules*: "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."

[7] Rule 400(3) lists factors that may be considered when awarding costs. The Applicants emphasize the factor found at Rule 400(3)(h) – that is “whether the public interest in having the proceeding litigated justifies a particular award of costs”. As they see a public interest in the litigation they commenced, they want to be relieved from costs payment.

[8] In *Mcewing v Canada (Attorney General)*, 2013 FC 953 at paragraphs 13-14 and *Calwell Fishing Ltd v Canada*, 2016 FC 1140 at paragraph 11, the Court identified five factors or indicia used for identifying public interest litigants:

1. The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
2. The party requesting relief has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if they have an interest, it clearly does not justify the proceeding economically.
3. The issues have not been previously determined by a court in a proceeding against the other party in the litigation.
4. The other party has a clearly superior capacity to bear the costs of the proceeding.
5. The party seeking relief has not engaged in vexatious, frivolous or abusive conduct.

[9] The Respondents take the position that the Applicants do not satisfy factors two or five from the above list. In my view, the Respondent’s arguments on factor two are dispositive of this request.

[10] I agree with the Respondent that the Applicants have a substantial personal and proprietary interest in the outcome of this litigation. The sworn affidavits in support of the

injunction motion focused on the personal impact of the impugned Regulations. In fact, the Court notes the following in its injunction decision:

[32] For their arguments on irreparable harm, the Applicants refer to the many affidavits before this Court from individuals speaking to their personal experiences with firearm ownership. Many individual affiants recount the ways in which the Regulations have personally affected them by prohibiting firearms they formerly used. Such impacts include business decline, infringement of Aboriginal Rights, loss of a valued pastime such as sport shooting or hunting, loss of skill-building opportunities, psychological turmoil associated with the perspective of criminal sanction, loss of sustenance hunting, and finally, the loss of a so-called “gun culture”.

*(Canadian Coalition for Firearm Rights v Canada (Attorney General), 2021 FC 130 [CCFR]).*

[11] The Applicants argue that there is a much larger public interest in this litigation than their personal interests. This is shown, according to the Applicants, by the many attendees at the injunction hearing and by the fact that non-parties have asked to intervene in the ongoing challenge to the Regulations. Further, their personal and proprietary interests would not economically justify this proceeding. The Applicants are private individuals affected by the Regulations and although each individual applicant may own one or more firearms prohibited by the Regulations, the value of their firearms is insignificant compared to the costs of this litigation.

[12] I do not deny there is a large and shared interest in the outcome of this proceeding, in addition to the Applicants’ personal and proprietary interests. The Applicants challenge the constitutionality of the Regulations. Their injunction motion was an interlocutory attempt to gain relief from allegedly unconstitutional Regulations. It plainly extended beyond the immediate

interests of the Applicants as it would have relieved all firearm owners and firearm businesses from the impact of the Regulations had the motion been successful.

[13] In *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at paragraph 27, the Supreme Court did note that, “[i]n special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This 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.”

[14] In *Arctos Holding Inc v Canada (Attorney General)*, 2018 FC 365 [*Arctos*], Justice Ahmed found that the application before him contained a mix of public and private interests. As in the case before me, the applicants in *Arctos* argued that they were public interest litigants within the meaning of Rule 400(3)(h) of the *Federal Courts Rules*. They were challenging Parks Canada’s decision to consolidate leases of lots of land in Banff National Park. However, they were also owners of businesses negatively impacted by the decision. In addition to their application for judicial review, they had challenged the developer that planned to develop on the consolidated lots for reasons that had nothing to do with Banff’s population target, which was the public interest that the applicants relied upon. Justice Ahmed held that:

[34] ... I find that the Applicants’ in this case have a mix of both private and public interest in the matter at hand, and thus they cannot be considered true public interest litigants. While the presence of private interests are not dispositive of a party claiming to be a public interest litigant (see, for example, *Calwell Fishing Ltd. v. Canada*, 2016 FC 1140 at para 49), I find that in the case at bar, *Arctos* had substantial private interests in bringing forward this litigation.

[15] Revisiting the affidavits filed for their injunction motion demonstrates that the Applicants in this matter also have substantial private interests. The Applicants deposed that the Regulations prohibit firearms they use thereby affecting their sport shooting, hunting, and family bonding. In that sense, the Applicants “were decidedly not motivated by altruism” (*Gordon v Canada*, 2019 FC 1348 at para 3).

[16] Although the Applicants argue that the value of their firearms does not justify the costs of the proceeding, it is apparent from their affidavits that the “value” of their firearms is not purely economic. In fact, the Applicants argued that they met the test for irreparable harm to support their injunction proceeding precisely because the loss of their pastimes could not be quantified or cured through damages (*CCFR* at paras 31-32, 50-51). I therefore cannot accept the Applicants’ position that their personal interests do not justify the costs of this proceeding because, according to them, their pastimes are invaluable.

[17] Although the Applicants were unsuccessful in convincing the Court that, without the benefit of an injunction, they would suffer irreparable harm, they were successful in demonstrating that they are personally invested in the outcome of this litigation because of their proprietary and personal interests.

### III. Conclusion

[18] For these reasons, the Applicants’ requests to revisit the costs awards – for the injunction decision and the Rule 302 decision – are dismissed. I do not agree that the Applicants are pure

public interest litigants. They have a substantial personal and proprietary interest, which is firmly established in the record before the Court on the injunction motion.

[19] This, however, should not prevent the Applicants from asking for special or reduced cost awards in future procedural steps, to account for the fact that the Respondent has a clearly superior capacity to bear the costs of the proceeding.

**ORDER in T-677-20**

**THIS COURT ORDERS that:**

1. The Applicants' requests are denied;
2. No costs are granted.

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"Jocelyne Gagné"  
Associate Chief Justice



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

**DOCKET:** T-677-20

**STYLE OF CAUSE:** MICHAEL JOHN DOHERTY, NILS ROBERT EK,  
RICHARD WILLIAM ROBERT DELVE, CHRISTIAN  
RYDICH BRUHN, PHILIP ALEXANDER MCBRIDE,  
LINDSAY DAVID JAMIESON, DAVID CAMERON  
MAYHEW, MARK ROY NICHOL and PETER CRAIG  
MINUK v ATTORNEY GENERAL OF CANADA

**SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT  
TO THIS COURT'S ORDER AND REASONS (INJUNCTION) IN 2021 FC 130 AND  
THIS COURT'S ORDER AND REASONS (R302) IN 2021 FC 447**

**ORDER AND REASONS:** GAGNÉ A.C.J.

**DATED:** JUNE 30, 2021

**WRITTEN SUBMISSIONS BY:**

Arkadi Bouchelev FOR THE APPLICANTS

James Gorham FOR THE RESPONDENT

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