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Costs to the Respondent: Discouraging Habeas Corpus Applications

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Case Commented On: *Voisey v Canada (Attorney General)*, 2016 ABQB 316 (CanLII)

In *Voisey v Canada (Attorney General)*, 2016 ABQB 316, Justice Crighton of the Alberta Court of Queen's Bench rejected an application for *habeas corpus* and awarded $1000 in costs to the respondent. Mr. Voisey, a federal prison inmate, tested positive for drug use and was subsequently involuntarily transferred from a minimum to a medium security prison. He challenged the transfer based on several grounds, alleging it violated sections 1, 7, 12 and 15 of the *Charter* (at para 10), it was unreasonable because he was not violent, it was based on unproven suspicion, and he should have received the least restrictive measures possible (at para 20). The court found that all his claims were meritless, though it did acknowledge that a few of them met the minimum threshold of being "legitimate grounds" for claiming his reclassification was arbitrary. The court concluded, following Justice Shelley in *Rain v Canada (Parole Board)*, 2015 ABQB 747 that the respondent "incurred significant expenditure for no valid purpose. That makes this a case where a substantial cost award is justified." (at para 34) It awarded $1000 in costs against Mr. Voisey, to be paid in $5 increments out of his biweekly paycheques of $15, and the remainder to be payable immediately upon his release.

This case raises questions about the fairness and effectiveness of awarding costs against self-represented inmates on unsuccessful *habeas corpus* applications. Should a self-represented inmate be responsible for costs when he brings an unintentionally ill-conceived challenge against a decision affecting his liberty? Should the rules for costs apply where liberty, not money, is at stake? Or should inmates, as Mr. Voisey himself put it, "not be forced to pay costs for enforcing [their] rights" (at para 29)? Will a costs award against an inmate be effective at discouraging other inmates from making unmeritorious applications? Although Justice Crighton applied the *Alberta Rules of Court* and relied on precedent in awarding costs against Mr. Voisey, the unusually high amount of costs cannot be completely explained using the *Rules* and case law. It is possible that the higher amount is due to Mr. Voisey's conduct in court. However, even if this is true, it is not clear that costs awards are a fair or effective way to deal with vexatious self-represented inmates on unsuccessful *habeas corpus* applications because the rules of costs contemplate represented litigants, not self-represented ones.

In a civil action involving a represented litigant where money, not liberty, was at issue, the court's award of costs in *Voisey* would have been entirely reasonable. The *Alberta Rules of Court*, Alta Reg 124/2010 direct that the successful party to an application is entitled to a costs award against the unsuccessful party (*Rule* 10.29(1)). The *Rules* outline the criteria the Court may consider when contemplating a costs award. These include "the conduct of a party that tended to shorten the action," conduct by either party that "lengthened or delayed the action," as well as whether an application or some part of it was "unnecessary, improper or a mistake" (*Rule* 10.33 1(f), (2)(a), and (2)(d)). Justice Crighton noted that the *Rules* also contemplate an increased award of costs in complex matters (at para 31; Schedule C, Column 1, s 8 of the *Rules*). Aspects of Mr. Voisey's conduct certainly meet these criteria. He submitted

"voluminous" and "not particularly well focused" materials (at para 31). The unfocused nature of his application presumably prolonged the amount of time the Court and the Respondent required to properly understand his complaint, and so may have lengthened the action as in *Rule* 10.33 (1)(f) and (2)(a). The extraneous portions of his "meritless" (at para 34) application were also unnecessary, as in *Rule* (2)(d). Although Mr. Voisey's conduct meets criteria in the *Rules* that justify a higher costs award, he is in a situation where his liberty is at stake and he has very few legal resources at his disposal. As a self-represented litigant, he cannot be expected to draft materials with the same clarity as a lawyer, and so applying the Rules to him as they would be applied to a represented litigant seems unfair.

However, it is important to note that Justice Crighton's decision did not only follow the *Alberta Rules of Court*, but also relied on Alberta precedent for awarding costs against an unsuccessful self-represented *habeas corpus* applicant. Even so, the costs awarded in *Voisey* exceed the costs awarded in the preceding case, *Rain.* In *Rain v Canada*, the inmate was ordered to pay $500 in costs after the court declined jurisdiction and found Mr. Rain's application was neither reasoned nor well argued. But *Rain* can be distinguished from *Voisey*. The *Rain* court declined jurisdiction because there were other avenues of resolution and there was no deprivation of liberty. Conversely, the *Voisey* court took jurisdiction and held that Mr. Voisey's transfer from a minimum to a medium security facility did constitute a deprivation of liberty. Although Justice Crighton ruled that Mr. Voisey's application was "entirely unsuccessful," she found some of his grounds for the complaint legitimate, though weak (at para 32). Mr. Voisey's claim met more of the criteria required for a successful habeas corpus application than did Mr. Rain's. Yet Mr. Voisey was ordered to pay double Mr. Rain's costs. Given that parts of Mr. Voisey's claim were legitimate, the higher costs award may be due to the aspects of his conduct that were objectionable under the *Alberta Rules of Court*. But as discussed above, the *Rules* are not designed for people like Mr. Voisey who challenge a limitation on their liberty without representation.

In New Brunswick, where the *Rules of Court* (NB Reg 82-73, Rule 59.02) outline similar criteria for a costs award, courts also order costs against self-represented inmates who unsuccessfully apply for *habeas corpus*. However, even this precedent does not fully explain the high costs award in *Voisey*. Two of the NB cases do mention aspects of the applicants' conduct, but they do not expressly link the nature of the conduct to the costs. Firstly, in *Wood v Canada (Atlantic Institution)*, 2014 NBQB 135 (*Wood*) the court held that there was no deprivation of liberty but that the inmate did raise legitimate grounds for his complaint, and costs were $750. The *Wood* court noted, "the applicant conducted himself in a respectful manner and mounted thoughtful arguments" (at para 67). Secondly, in *Bird v Canada (National Parole Board)*, 2007 NBQB 96 (*Bird*) the court declined jurisdiction because the inmate had not exhausted alternative remedies, and costs were $950. The applicant in *Bird* asked for a number of strange forms of relief that could be characterized as improper (Rule 59.02(g)), such as "change of name, relief from taxation, forgiveness from God, title to land, title to and the right to occupy the Rodd Inn" (at para 31). Lastly, in *Cain v. Canada (Attorney General)*, 2011 NBQB 47 (*Cain*) the court declined jurisdiction, and costs were $1000. The *Cain* court did not discuss whether or not the applicant's conduct affected the costs award. In contrast to all of these, the court in *Voisey* not only took jurisdiction over the case but ruled that there was a deprivation of liberty and some grounds for the complaint were legitimate. In other words, Mr. Voisey's argument was better than in any of the cases above, but the costs ordered against him were the same amount as in *Cain*, where the court declined to even take jurisdiction. Therefore, even in comparison to NB cases, $1000 still seems an unusually high award of costs.

It seems likely that Mr. Voisey received a higher costs award partially due to aspects of his conduct: his application was difficult to read, and his arguments were generally weak. If this is true, the question becomes whether or not imposing costs on inmates for ill-conceived *habeas corpus* applications is an effective way to discourage further unmeritorious actions. Understandably, courts wish to deal with as few badly drafted applications as possible. As the court in *Wood* notes, *habeas corpus* applications have a wide scope of review, which means there is very little disincentive for inmates to challenge administrative decisions affecting their liberty (at para 66). The threat of costs, from the court's perspective, may be the only thing keeping *habeas corpus* applications to a manageable number. Indeed, in a normal civil action, the purpose of a costs award is to discourage vexatious litigation. The threat of being financially penalized should make those without a good argument think twice about wasting the court's time and taxpayers' money.

However, the logic of discouraging vexatious litigation through costs may not apply to inmates. First, inmates may not be aware of the way courts react to meritless habeas corpus applications. Their access to information is limited to whatever materials are available in prison libraries, and they cannot use the Internet or read CanLII. They are typical of self-represented litigants in that they struggle to navigate a complicated, unfamiliar procedural forum; their conduct may not reflect a desire to be vexatious, just an unfamiliarity with the legal system. Second, even if inmates did have access to cases, courts often use language that is difficult for a layperson to comprehend. Many inmates have not completed high school and do not have the skills necessary to wade through legal jargon. Even simple phrases such as "costs to the respondents" are opaque and confusing for those unfamiliar with legal language; to the untrained reader, it is not even clear whether the phrase means the respondents must pay costs or will be receiving costs. Third, inmates who must represent themselves because they cannot afford a lawyer have no way of knowing how to formulate and write a good *habeas corpus* application, and the steepest of costs awards will not help to enlighten them. Last, most civil proceedings involve situations where money, rather than liberty, is at stake. Using a costs award to discourage unnecessary litigation over money between represented parties is one thing, but using a costs award to discourage a *habeas corpus* claim involving a self-represented litigant amounts to financially penalizing Mr. Voisey's attempted enforcement of his own human rights, which seems unnecessarily severe.

Another factor that should perhaps give courts pause about awarding costs against inmates is their severely reduced ability to pay. Indeed, Mr. Voisey advised the court that he earns $15 every two weeks, and now he must pay costs at a rate of $5 out of each paycheque: 1/3 of his entire income. In addition, the remainder of his costs will be payable immediately upon his release. Prison inmates often experience poverty, so it is unlikely he currently has the funds to pay the rest of his costs or will have them when he is released at the end of his 34-month sentence. In order to pay the rest of his costs, he will need to find a job—another difficult task for a recently released inmate because of the stigma of a criminal record. By reducing his current income and requiring him to pay the remainder of his debt immediately upon release, this costs award may prevent Mr. Voisey and other inmates in similar situations from successfully reintegrating into society and may also make them more likely to reoffend.

Justice Crighton's decision to award $1000 in costs to the respondent cannot be fully explained either by reference to the Alberta Rules of Court or to case law in Alberta and New Brunswick. The decision as to costs seems targeted to discourage *habeas corpus* litigation that uses court time ineffectively. But given the importance of the liberty interest at stake, inmates' lack of access to information and representation, and inmates' doubtful capacity to actually pay a costs award, perhaps costs are not an effective way of discouraging frivolous *habeas corpus* applications. A more effective solution would be to ensure that inmates are able to access representation so that they are not responsible for drafting their own documents. If inmates had access to legal counsel, they would be able to both protect their liberty when necessary and refrain from burdening the court with vexatious litigation, enforcing their rights while also ensuring that only coherent complaints receive time in court.