

Federal Court



Cour fédérale

**Date: 20151214**

**Docket: T-2492-14**

**Citation: 2015 FC 1387**

**Ottawa, Ontario, December 14, 2015**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA  
(MINISTER OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT)**

**Applicant**

**and**

**COLD LAKE FIRST NATIONS,  
SAWRIDGE FIRST NATION,  
ATHABASCA CHIPEWYAN FIRST NATION,  
ONION LAKE CREE NATION,  
THUNDERCHILD FIRST NATION,  
THE OCHAPOWACE INDIAN BAND**

**Respondents**

**ORDER**

**UPON** motion by the Applicant for a Direction under *Federal Courts Rules, SOR/98-106, (Rules)*, Rule 400 and 403;

**AND UPON** reviewing the materials filed and hearing counsel for the parties by teleconference on Thursday, December 10, 2015;

**AND UPON** reserving decision;

**AND UPON** determining that the motion be determined for the following reasons:

[1] The Applicant moves for a Direction under *Federal Courts Rules* 400 and 403 concerning the amount of expert fees payable under my Judgment awarding costs to Sawridge First Nation [Sawridge]: see 2015 FC 1197 at para 42.

[2] The Applicant argues that the professional fees charged by the accounting expert retained by Sawridge in the amount of \$30,451.33 ought to be disallowed. This argument is based on my finding that the opinions expressed by the expert were theoretical because he had not examined Sawridge's financial statements. According to the Applicant, Sawridge's expert report was unhelpful and unnecessary. No argument is advanced that the fees charged are unreasonable *per se*.

[3] The Court has a wide discretion to allow all, some or none of an expert's fees based on the factors identified in Rule 400 and, in particular, Rule 400 (3)(n. 1).

[4] It is important to remember that the reasonableness of retaining an expert witness must be examined at the time of the engagement and not at the end of the proceeding: see *Merck & Co*

*Inc v Apotex*, 2002 FCT 842 at para 30, [2002] FCJ No 1116. The retaining party, however, is obliged to revisit the reasonableness of an expert engagement. It is not entitled to be reimbursed by the opposite party for expert fees incurred past the point where the assistance is obviously unhelpful or unnecessary. Given the importance of the issues pleaded, including their public significance, it was reasonable and prudent for Sawridge to have engaged an accounting expert at the outset of this proceeding.

[5] It is the case that expert fees may be recoverable by the successful party, at least in part, even where the witness does not testify: see *Tradition Fine Foods Ltd v Oshawa Group Ltd*, 2006 FC 93 at paras 9-10, [2006] FCJ No 120. Nevertheless, the amount of reliance placed by the Court on the evidence is an important consideration: see *AlliedSignal Inc v Dupont Canada Inc*, [1998] FCJ No 625 at para 81, 1998 CarswellNat 2126.

[6] In my view, this is not a situation where the expert fees should be disallowed. The two reports in question cannot be reasonably characterized as useless and, indeed, they provided some context to the substantive arguments advanced by Sawridge. It is only with the benefit of the Court's decision that the problem with their content came clearly into focus. It is also worth considering that the Applicant went to the trouble of retaining its own expert to address this evidence which, in turn, generated a reply. If the Applicant was moved to engage a responding expert, it must have had some concern that the evidence was potentially relevant to the issues before the Court.

[7] Having regard to the above considerations, I will allow Sawridge to recover \$20,000 of its expert's fees.

**THIS COURT ORDERS that** the expert fees claimed by the Respondent, Sawridge, will be allowed in the amount of \$20,000.

**THIS COURT FURTHER ORDERS that** there are no costs of this motion.

"R.L. Barnes"

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Judge