Federal Court  Cour fédérale

Date: 20170919

Docket: T-1254-16

Citation: 2017 FC 859

Toronto, Ontario, September 19, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

COWESSESS FIRST NATION NO. 73

Applicant

and

GARY PELLETIER, STAN DELORME, PATRICK REDWOOD, CAROL LAVALLEE, MALCOLM DELORME, CURTIS LERAT AND TERRENCE LAVALLEE

Respondents

ORDER AND REASONS

I. Background

[1] This is a motion under Rule 397 of the *Federal Courts Rules*, SOR/98-106 [Rules] for reconsideration of a costs order made by this Court on July 18, 2017.

[2] This motion arises in the context of an application brought by Cowessess First Nation No. 73 [Cowessess] for judicial review of a decision of the Cowessess First Nation Election Appeal Tribunal's [Tribunal] decision on an election matter.

[3] Cowessess named as Respondents the three candidates disqualified by the Tribunal and the three candidates with the next-highest number of votes. These Respondents either supported or took no position on the application.

[4] The Respondent Terrence Lavallee was the individual who brought the appeal before the Tribunal resulting in the disqualification at issue in Cowessess' application. Because Mr. Lavallee was not named by Cowessess as a Respondent, he brought a motion before Justice Roy to be added as a party. Justice Roy held that Mr. Lavallee was a necessary party to the application and that, because the named Respondents either supported or took no position on the application, Mr. Lavallee's participation was needed to ensure appropriate debate of the issues (*Cowessess First Nation No. 73 v Pelletier*, 2016 FC 1127 at para 8 [*Cowessess* 2016]). Justice Roy further found at paragraph 8 of *Cowessess* 2016 that the application had been "deliberately constructed by the applicant in order to exclude the person who initiated the appeal to leave as respondents those who will not oppose the judicial review application".

[5] In the same motion that led to *Cowessess* 2016, Mr. Lavallee also sought an extension of time before Justice Roy to commence his own application for judicial review of the Tribunal's decision. Justice Roy held that Mr. Lavallee had not demonstrated the potential merit of the proposed application, noting that the relief requested by Mr. Lavallee — a disqualification of the

seven councillors and a new election — flew in the face of the *Cowessess First Nation No. 73 Custom Election Act* [*Cowessess Election Act*] (see para 13 of *Cowessess* 2016).

[6] Cowessess' subsequent judicial review application was heard before me on March 3, 2017. I agreed at that time, at the request of counsel, to consider submissions on costs after the release of my decision on the merits.

[7] My decision dated July 18, 2017 (*Cowessess First Nation No. 73 v Pelletier*, 2017 FC 692) [Decision] allowed Cowessess' application. In the Decision, I rejected Mr. Lavallee's preliminary argument that Cowessess had no standing to bring the application. I then held in favour of Cowessess, finding that the Tribunal rendered an unreasonable decision with respect to the Cowessess election process. However, I inadvertently overlooked the request to hear costs submissions. Rather, I ordered costs in favour of the successful party, without having invited submissions from the parties.

[8] In an August 22, 2017 letter, counsel for Cowessess requested that the Court clarify whether costs were payable by all the Respondents or only Mr. Lavallee. The following day, counsel for Mr. Lavallee responded that an opportunity to speak to costs had not been provided and requested the opportunity to do so.

[9] Counsel for Cowessess responded on August 25, 2017, writing that since the time for the appeal of the judgment had expired, this Court was *functus officio*. Cowessess argued that the only live issues before the Court were (a) the quantum of costs and (b) whether costs should be

borne by all Respondents, or just Mr. Lavallee (Cowessess later clarified that it sought direction on these matters under Rule 403).

[10] As a result, I scheduled a teleconference with the parties and invited further written submissions to respond to and elaborate on the costs issues raised in the exchange of letters. During the teleconference, it was agreed that in the spirt of Rule 3 and an efficient resolution, the matter would be treated as a motion for reconsideration under Rule 397, along with Rules 32 (hearing by teleconference) and 55 (variance of the normal requirement for a formal motion for reconsideration).

II. Positions of the Parties

[11] Mr. Lavallee requests that, despite Cowessess' success on its application, no costs be awarded against him personally and that, to the contrary, his costs be paid on a solicitor-client basis by Cowessess. Mr. Lavallee argues that he was a critical part of the judicial review: Justice Roy's order in *Cowessess* 2016 adding him as a party confirmed that it was necessary to have someone defend Cowessess' election and appeal processes — and that he participated in the application despite having no personal interest in its outcome. Mr. Lavallee argues that an award of costs against him would deter others from taking up these kinds of issues in the public interest, urging the Court to focus on the important process of judicial review in the context of First Nations governance.

[12] Mr. Lavallee relies upon *Bellegarde v Poitras*, 2009 FC 1212 [*Bellegarde*], in which a First Nation was ordered to pay the costs of the parties challenging and defending the decision of

its administrative body (in *Bellegarde*, the First Nation was not itself a party to the judicial review). Mr. Lavallee also relies upon *Vogel v Brazeau (Municipal District No 77)*, [1996] AJ No 319 [*Vogel*], being a case where the unsuccessful party in an election dispute was awarded solicitor-client costs.

[13] Cowessess first argues that this Court does not have jurisdiction under Rule 397 to "reverse" its costs order (*Bayer Inc v Fresenius Kabi Canada Ltd*, 2016 FC 970 at para 11 and *Halford v Seed Hawk Inc*, 2004 FC 455). Instead, Cowessess seeks the Court's direction under Rule 403, arguing that the costs ordered should be borne solely by Mr. Lavallee as he had sought to be added to an application where the remaining Respondents took no position. Cowessess further argues that being a necessary party to a proceeding does not shield that party from ordinary adverse cost consequences; to the contrary, necessary parties should expect to pay costs if unsuccessful. Mr. Lavallee was ultimately found a necessary party through his motion to be added to the application — brought on his own initiative — with full knowledge of the risk that a costs award might be made against him.

[14] Cowessess also disputes that Mr. Lavallee did not have an interest in the outcome of the appeal before the Tribunal or Cowessess' application, noting that Mr. Lavallee was a candidate for the position of Chief and would have benefited if the Tribunal had ordered a new election. Indeed, Mr. Lavallee requested that a new election be ordered both in his judicial review materials before Justice Roy, and once again in this application even after Justice Roy observed that such relief "flew in the face" of the *Cowessess Election Act*. Finally, Cowessess argues that Mr. Lavallee raised unmeritorious arguments that did not enhance the process of judicial review.

III. Analysis

A. *Power to Reconsider under Rule 397*

[15] Rule 397 provides as follows:

Motion to reconsider	**Réexamen**
397 (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	397 (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :
(a) the order does not accord with any reasons given for it; or	a) l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;
(b) a matter that should have been dealt with has been overlooked or accidentally omitted.	b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.
Mistakes	**Erreurs**
(2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.	(2) Les fautes de transcription, les erreurs et les omissions contenues dans les ordonnances peuvent être corrigées à tout moment par la Cour.

[16] Generally, a Court that has heard and decided a matter is *functus officio*: it has no jurisdiction to revisit its decision (*Chandler v Assn of Architects (Alberta)*, [1989] 2 SCR 848

(SCC) at 860, 1989 CarswellAlta 160 (WL Can) at para 75). However, Rule 397 provides a very narrow exception to this rule (*Taker v Canada (Attorney General)*, 2012 FCA 83 at para 5). The reconsideration power is limited to correcting small oversights, inconsistencies, or mistakes (*Yeager v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 258 at para 9). It is sometimes called the "slip rule" because it allows the Court to correct minor errors in a final decision (*Canada Doctors for Refugee Care v Canada (Attorney General)*, 2015 FC 149 at para 11).

[17] I do not accept Cowessess' argument that this Court lacks jurisdiction under Rule 397 to "reverse" its costs order. The Federal Court of Appeal [FCA] wrote in *Sauve v Canada (Attorney General)*, 2015 FCA 59 that "[m]otions for reconsideration cannot be used to reverse what has already been ordered unless the order does not accord with the reasons given for it, or a matter which the judge should have dealt with has been overlooked or accidentally omitted" (at para 9, emphasis added). In this case, a matter (entertaining costs submissions) was overlooked or accidentally omitted, within the meaning of Rule 397(1)(b), when I inadvertently issued the Decision that included a costs order, without having heard the parties' submissions on costs as had been agreed at the hearing.

[18] In *Pelletier v Canada (Attorney General)*, 2006 FCA 418, the FCA noted in *obiter* that where a request for costs is made but not dealt with in a judgment, the proper course is a motion to reconsider under Rule 397 (at para 9). Indeed, in *Hornepayne First Nation v Medeiros*, 2015 FC 411 [*Hornepayne*], Justice LeBlanc reconsidered and heard submissions on the issue of costs

in a case where a motion had been granted without costs on the Court's mistaken assumption that costs had not been sought.

[19] I am therefore satisfied that Rule 397 permits this Court in these circumstances to reconsider the matter of costs based on the parties' submissions, and that the jurisprudence of the Federal Court of Appeal [FCA] supports this interpretation given its own practice and commentary, including in:

a) *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 237: the FCA reconsidered and varied its order of costs on the basis that it had "overlooked" Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, which provides that costs will not be awarded on an application under those rules except where there are special reasons (at paras 20-21);

b) *Ollenberger v R*, 2013 FCA 108: the FCA amended a costs order on a motion to reconsider to include the applicant's costs before this Court (at paras 1-2);

c) *Ratiopharm Inc. v. Wyeth and Wyeth Canada*, 2007 FCA 361: the FCA reconsidered a judgment that failed to address costs on a related application, writing that it had "no difficulty concluding that our failure to deal with the issue of costs on the [related] application is clearly an oversight on our part" and amending its Judgment accordingly (at para 9); and

d) *Novopharm Ltd v Janssen-Ortho Inc.*, 2007 FCA 105: Justice Sharlow of the FCA wrote that the matter of costs had been "inadvertently overlooked" and that if the

> Respondent had moved for a reconsideration such a motion would have been granted (at paras 4-6).

[20] In short, this is a situation where a costs order may be properly reconsidered under Rule 397(1)(b) as a result of the Court's oversight, as has been done in the past in similar circumstances. Indeed, to preclude the Court's ability to reconsider on the basis of *functus officio* in these circumstances would be to defeat the legislator's objective of including Rule 397 in the Rules.

B. *Analysis of Costs*

[21] The general rule is that costs "follow the event", meaning that costs are awarded to the successful party (see *MacFarlane v Day & Ross Inc*, 2014 FCA 199 at para 6; *Coldwater Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, 2016 FC 816 at para 16 [*Coldwater*]).

[22] However, Rule 400(1) grants the Court "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". Rule 400(3) provides a list of factors the Court may consider in exercising its discretion, including the catch-all provision set out in Rule 400(3)(o): "any matter the Court considers relevant". Also among the various factors is Rule 400(3)(h): "whether the public interest in having the proceeding litigated justifies a particular award of costs".

[23] To engage the public interest, the matter must raise an issue that is novel or otherwise extends beyond the immediate interests of the parties (*Coldwater* at para 16). In *Hornepayne*, for instance, this Court denied the successful party its costs on the basis of what was "in the interests of justice and of the [First Nation] community as a whole" (at para 6).

[24] In the First Nations context, it is sometimes argued that the First Nation should pay the unsuccessful applicant's costs because judicial review applications in such communities further the public interest. For instance, in *Coutlee v Lower Nicola Indian Band*, 2015 FC 1305 [*Coutlee*], this Court held that the application for judicial review resolved an important governance question (at para 24). This Court found it fair and just for the Band to make a contribution to the applicant's costs, even though the Band was the successful party. In *Coutlee* at paragraph 23, Justice Campbell referred to the decision of Justice Mandamin in *Knebush v Maygard*, 2014 FC 1247, who noted:

> [59] There is also the question of the imbalance between an individual member of a First Nation who brings a judicial review to have a First Nation's laws be observed and the respondents who are the governing body of the First Nation. Such respondents, usually chiefs and councillors, are in a position to have their legal costs reimbursed by the First Nation. If a judicial review application properly addresses a question of the First Nation's law, it seems to me that, on the basis of public interest, individual applicants may be similarly entitled to look to the First Nation for costs.

[25] An award of no costs can also be used to reward a losing party that acted reasonably or penalize a successful party whose conduct deserves some sanction. For example, a no costs award can recognize that the application was reasonable, even if the applicant did not succeed (see *Jacko v Cold Lake First Nations*, 2014 FC 1108 at para 77; *Meeches v Assiniboine*,

2016 FC 427 at para 43). Conversely, in *Gagnon v Bell*, 2016 FC 1222, Justice Annis refused to award costs to the successful respondent (the Aroland First Nation Council) because it had ignored the complaints of the applicants and thus contributed to the initiation of the proceedings (at paras 79-80).

[26] Having considered the applicable law and the submissions of the parties, I find that the fairest determination in these circumstances is that each party should bear its own costs. Although Justice Roy granted Mr. Lavallee's motion to be added as a necessary party, I am not persuaded that his participation in this application was solely in the public interest. This is evidenced by his request before this Court for a new election after having been clearly advised by Justice Roy in *Cowessess* 2016 that such relief ran contrary to the *Cowessess Election Act* (as excerpted above at paragraph 5). Despite this direction from the Court, Mr. Lavallee pursued the same relief again in this application.

[27] *Bellegarde* does not entitle Mr. Lavallee to have his costs paid by Cowessess on a solicitor-client basis. In fact, I recently relied on *Bellegarde* in *Chief Paul Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835 [*Michel*]. In that case, I ordered that the respondent's costs be paid by the applicant under the ordinary tariff, and that the respondent's remaining costs be payable by the First Nation even though it was not a party to the application. The facts in *Bellegarde* and *Michel* are distinguishable from those in this application — in those cases, the successful party sought and received its costs.

[28] Furthermore, *Vogel* does not assist Mr. Lavallee in the manner he asserts. In *Vogel*, the Alberta Court of Queen's Bench granted the unsuccessful applicant his full indemnity costs because the election at issue, while valid, was "carried out in a most careless manner" (at para 17). The Court's award of costs was meant to sanction the respondent's blameworthy pre-litigation conduct (see *Pillar Resource Services Inc v PrimeWest Energy Inc*, 2017 ABCA 19 at para 92).

[29] Mr. Lavallee is not in the same position as the unsuccessful applicant in *Vogel*. There, the applicant raised legitimate defects in the election process. Here, Mr. Lavallee prolonged this application by defending the same questionable arguments he put before the Tribunal in his election appeal. To order that his costs now be paid by Cowessess would encourage members of this First Nation (or others) to pursue and defend petitions or election appeals, whether or not they have merit, believing that the cost of doing so will be fully underwritten by the First Nation regardless of the outcome.

[30] Even though Mr. Lavallee was found to be a necessary party, the choice remained with him from that point in time until the hearing of the application to concede one or more of the disputed issues, as the other named Respondents had effectively done by supporting or taking no position in the litigation (as described above at paragraph 3). Mr. Lavallee decided not to concede anything. A party must always evaluate the strength of its case, knowing that costs consequences flow from litigation and the risks it entails.

[31] However, as mentioned at paragraph 7 of these Reasons, Mr. Lavallee did advance the preliminary issue of Cowessess' standing to bring the application. Although I rejected Mr. Lavallee's argument that Cowessess had no standing, he did raise an important legal question that would likely not have been determined without his participation in the litigation. Indeed, I held at paragraph 33 of my Decision that Cowessess' standing arose from the very particular factual circumstances before the Court. Mr. Lavallee therefore served a useful role in providing arguments as to why Cowessess might not have had standing, and thus assisted the Court as the Respondent, ensuring there was "effectual and complete" debate (see *Cowessess* 2016 at para 8).

[32] I am satisfied upon reconsideration and having heard the submissions that were overlooked upon release of my Decision, that the costs award originally made in favour of Cowesses should be amended to provide that no costs are payable based on the Rule 400 factors and jurisprudence considered above. My Reasons accompanying the Judgment dated July 18, 2017 (which cannot be varied under Rule 397) should therefore be read in conjunction with this Order and Reasons.

ORDER in T-1254-16

THIS COURT ORDERS that

1. My Judgment dated July 18, 2017, after reconsideration pursuant to Rule 397(1)(b), is amended.

2. No costs are awarded on the application. Each party shall pay their own costs.

3. My July 18, 2017 Reasons are to be read in in conjunction with this Order and Reasons.

4. There are no costs awarded with respect to the underlying motion for reconsideration.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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