Federal Court  Cour fédérale

Date: 20210602

Docket: T-1274-20

Citation: 2021 FC 525

Ottawa, Ontario, June 2, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

FLOYD BERTRAND

Applicant

and

ACHO DENE KOE FIRST NATION BAND COUNCIL, CHIEF GENE HOPE, COUNCILLOR JOE BERTRAND, COUNCILLOR ROGER BERTRAND, COUNCILLOR IRENE MCLEOD, COUNCILLOR ANGUS CAPOT-BLANC, COUNCILLOR DENNIS NELSON, COUNCILLOR DENNIS MCLEOD

Respondents

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

BAND MEMBERS' ALLIANCE AND ADVOCACY ASSOCIATION OF CANADA

Intervener

ORDER AND REASONS AS TO COSTS

[1] Mr. Bertrand, who was successful in challenging the postponement of his First Nation's election and the validity of federal regulations, is now seeking costs from the First Nation and the Attorney General. I do not accept that solicitor-client costs are warranted, nor that no costs should be awarded because success was divided. Rather, I am of the view that an elevated costs award is appropriate, because the validity of the regulations was a matter of public interest. Thus, Mr. Bertrand will receive $10,000 from the First Nation and $20,000 from the Attorney General.

I. Background

[2] Acho Dene Koe First Nation sought to extend the term of office of its council and to postpone its elections. It invoked two sources of authority for this decision: its own customary law and the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84 [the Regulations]. Mr. Bertrand, a member of Acho Dene Koe, brought an application for judicial review challenging this decision. He sought an order of *certiorari* quashing the decision, an order of *mandamus* requiring Acho Dene Koe to hold an election and an order of *quo warranto* removing the current council. He also sought a declaration that section 4 of the Regulations was invalid.

[3] In my judgment dated April 1, 2021 and indexed as 2021 FC 287, I granted Mr. Bertrand's application. I found that Acho Dene Koe's election law set the term of office of its council at three years and did not provide for the council's power to extend its own term. I also found that the Regulations were *ultra vires* the powers granted to the Governor-in-Council by the

Indian Act, RSC 1985, c I-5. Nonetheless, I did not accept Mr. Bertrand's submission that the council's term of office was two years. At the hearing, Mr. Bertrand also abandoned the position, which he had earlier put forward, that Acho Dene Koe's elections were governed by the *Indian Act*.

[4] My decision with respect to remedies took into account the fact that an election was scheduled for April 26, 2021, less than four weeks after I rendered judgment. Thus, I declined to issue orders of *certiorari*, *quo warranto* and *mandamus*. Instead, I issued declarations to the effect that Acho Dene Koe's council did not have the power to extend its own term of office and that the Regulations were *ultra vires* and invalid. I reserved judgment with respect to costs.

[5] In separate proceedings, Mr. Bertrand also challenged the decision of Acho Dene Koe's electoral officer to refuse his candidacy for the position of chief for the April 26 election. In a decision indexed as 2021 FC 257, I dismissed Mr. Bertrand's motion for an interlocutory injunction to have his name added to the ballot.

II. The Parties' Submissions

[6] Mr. Bertrand seeks costs on a solicitor-client basis or, in the alternative, on an elevated scale. In a nutshell, Mr. Bertrand argues that he has limited means and that the case he initiated raised matters of great public importance. He also blames Acho Dene Koe for several aspects of its conduct during the proceedings. He provides evidence that his legal fees in this matter amounted to approximately $68,000.

[7] Acho Dene Koe, on its part, argues that no costs should be awarded because success was divided. It also impugns various aspects of Mr. Bertrand's litigation conduct as well as the fact that Mr. Bertrand took the position that Acho Dene Koe's elections were governed by the *Indian Act*. Moreover, if Mr. Bertrand obtains elevated costs because he is a public interest litigant, Acho Dene Koe asserts that only the Attorney General should bear these costs. In addition, even if it did not prevail on the merits, Acho Dene Koe seeks its costs from the Attorney General. It argues that, when postponing its election, it relied on the assurance the federal government gave by making the Regulations.

[8] The Attorney General agrees that Mr. Bertrand is entitled to costs according to the tariff, but not on an elevated scale. It provided a draft bill of costs suggesting that the application of the tariff would lead to an award of approximately $11,400. It also denies that it should have to pay costs to Acho Dene Koe.

III. Analysis

[9] I will first dispose of the parties' most extreme submissions, that costs should be awarded on a solicitor-client basis or that no costs should be awarded. I will then explain why I find that costs should be awarded in a lump sum, on an elevated scale. Lastly, I will dispose of Acho Dene Koe's request for costs against the Attorney General.

A. *Divided Success*

[10] This is not, as Acho Dene Koe contends, a case of divided success in which each party should bear its own costs.

[11] Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, establishes the basic principle that the Court has full discretion with respect to costs awards. Rule 400(3)(a) states that, in the exercise of its discretion, the Court may consider the result of the proceeding. Thus, the fact that success is divided is often grounds for declining to award costs.

[12] "Divided success," in this context, typically means that the case can conceptually be separated in a manner that each part has a different outcome. For example, where the Court deals with two motions at the same time, success is said to be divided where each party prevails with respect to one motion: *Stelpro Design Inc v Thermolec ltée*, 2019 FC 363 at paragraph 55; *Narte v Gladstone*, 2020 FC 1082 at paragraph 46. Likewise, no costs were awarded in a case where the merits of a judgment were upheld on appeal, but the appeal was allowed only with respect to one aspect of the remedy issued by the trial judge: *Wahta Mohawks v Commandant*, 2008 FCA 195 at paragraph 4.

[13] Cases where the Court accepts only a subset of the prevailing party's submissions or defences, however, are usually not considered cases of divided success. Thus, in a patent infringement action, the defendant who claims that it does not infringe the patent and that the

patent is invalid is entitled to costs if it succeeds on one of these two issues: *Raydan Manufacturing Ltd v Emmanuel Simard & Fils (1983) Inc*, 2006 FCA 293.

[14] There is no mathematical formula to distinguish cases of divided success from those where only a subset of the prevailing party's arguments are accepted. The judge who heard the matter must come to a practical appreciation of what was really at stake. The fact that both parties strategically decide to claim victory is not determinative.

[15] In this case, Mr. Bertrand was entirely successful on its challenge to the decision made by Acho Dene Koe's council on September 14, 2020 to extend its term of office for a further six months and to postpone the election. The fact that I disagreed with his submission that the term of office was two years does not mean that success was divided. Likewise, the passage of time meant that some of the relief he initially sought became irrelevant. This does not disentitle him to costs. Even where no remedy is issued, costs may be awarded to the party that is successful in principle: *Thomas v One Arrow First Nation*, 2019 FC 1663 at paragraph 45.

B. *Public Interest and Solicitor-Client Costs*

[16] Mr. Bertrand seeks to be fully indemnified for the legal costs he incurred to bring this proceeding or, in other words, that he be awarded costs on a solicitor-client basis. This, however, is not a case in which solicitor-client costs are warranted.

[17] In *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at paragraph 67, [2010] 2 SCR 453, the Supreme Court of Canada stated that solicitor-client costs are "very rarely granted" and

gave two examples of circumstances warranting such an award: (1) where a party's conduct was "reprehensible, scandalous or outrageous"; (2) where a lawsuit was brought in the public interest. Mr. Bertrand relies only on the second possibility.

[18] Not all cases involving a public interest issue will lead to costs being awarded on a solicitor-client basis. In *Carter v Canada (Attorney General)*, 2015 SCC 5 at paragraph 140, [2015] 1 SCR 331 [*Carter*], a case dealing with the validity of the prohibition of medical aid in dying, the Supreme Court of Canada held that such awards would only be made in cases having a "widespread societal impact." Even the fact that the constitutional validity of legislation is at stake is insufficient to meet this threshold: *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paragraph 274. In the latter case, three judges of the Supreme Court suggested that the exceptional award made in *Carter* reflected the length and complexity of the trial: *ibid* at paragraph 107. Briefly put, solicitor-client costs award should not become an alternative legal aid system for public interest cases: *Carter*, at paragraph 137.

[19] I do not doubt that Mr. Bertrand's application raised matters of public interest. I will return to this in the next section. However, there is no point of comparison with *Carter* or similar cases and it can hardly be said that the matter is of "widespread societal impact."

C. *Public Interest and Elevated Costs*

[20] Nevertheless, I am of the view that Mr. Bertrand is entitled to costs on an elevated basis, because his application raised matters of public interest.

[21] According to rule 400(3)(h), “the public interest in having the proceeding litigated” is a factor that may be taken into consideration in awarding costs. In *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119, I noted that First Nations governance cases may raise issues of public interest justifying an elevated award of costs, in particular where there is a resource imbalance between the parties.

[22] This is the case here. Mr. Bertrand’s application raised issues that go to the heart of Acho Dene Koe’s electoral system. Clarifying these issues benefitted all members of the First Nation. The validity of the Regulations is an issue affecting dozens of First Nations throughout Canada. From the outset, doubts were expressed as to their validity. The relatively short duration of extensions of terms in comparison to the time it usually takes to perfect an application before this Court makes the challenge even more difficult. Moreover, there is some evidence of Mr. Bertrand’s limited means.

[23] The respondents suggested that Mr. Bertrand is disentitled from elevated costs because he was pursuing a private interest. Indeed, there is no mystery that Mr. Bertrand intended to run for chief. The fact that a party is motivated by a mix of private and public interests, however, is not a bar to claiming elevated costs: *Calwell Fishing Ltd v Canada*, 2016 FC 1140 at paragraph 49; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at paragraph 139, [2007] 1 SCR 38 (Binnie and Fish JJ, dissenting on other grounds). In this case, I see nothing untoward in the fact that a candidate for public office is asking the Court to clarify important issues regarding First Nations elections. Ironically, even if Mr. Bertrand was

successful on these public interest issues, he may not, for the time being, reap the benefit of the judgment, as he was declared ineligible to run for chief.

[24] Thus, Mr. Bertrand's application raised important issues of public interest. Without diminishing the importance of the issues concerning Acho Dene Koe alone, it is obvious that the validity of the Regulations was an issue of much greater importance, as it affects First Nations throughout the country. In this context, it is appropriate that the Attorney General's share of the costs be the double of that of Acho Dene Koe. Accordingly, I will order Acho Dene Koe to pay costs in a lump sum of $10,000, and the Attorney General in a lump sum of $20,000.

D. *Litigation Conduct*

[25] Mr. Bertrand and Acho Dene Koe sought to impugn various aspects of each other's conduct during the proceedings. It may be that, to a certain extent, each party acted strategically to advance its own interests. It may be that certain accusations are intended more for a political audience. Be that as it may, I have not seen any egregious conduct that rises to a level warranting costs consequences.

E. *Acho Dene Koe's Claim Against the Attorney General*

[26] Acho Dene Koe asserts that the Attorney General should be condemned to pay its costs according to the tariff. It argues that it postponed its election based on the "assurance" provided by the Regulations and that it should not bear the burden of litigating the issue of the validity of the Regulations.

[27] Acho Dene Koe, however, does not explain how such an assurance was given, beyond the mere enactment of the Regulations, nor point to any evidence of its reliance on such an assurance. I also fail to understand how it can say that it was forced to bear the burden of litigating the validity of the Regulations. It was the Attorney General, not Acho Dene Koe, who made submissions defending the validity of the Regulations. Acho Dene Koe was involved in the proceeding to defend its own conduct. There is therefore no factual foundation for Acho Dene Koe's request.

[28] To the extent that Acho Dene Koe does not wish the public interest in litigating the validity of the Regulations to affect the amount of costs that it will be condemned to pay, the costs award I am making already takes this into consideration.

IV. Conclusion

[29] Because the matter raised issues of public interest, I am awarding Mr. Bertrand costs in a lump sum of $10,000 against Acho Dene Koe and $20,000 against the Attorney General.

ORDER in T-1274-20

THIS COURT'S JUDGMENT is that:

1. The Attorney General is condemned to pay costs to the applicant in the amount of $20,000, inclusive of taxes and disbursements.
2. Acho Dene Koe First Nation is condemned to pay costs to the applicant in the amount of $10,000, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1274-20
STYLE OF CAUSE:	FLOYD BERTRAND v ACHO DENE KOE FIRST NATION BAND COUNCIL, CHIEF GENE HOPE, COUNCILLOR JOE BERTRAND, COUNCILLOR ROGER BERTRAND, COUNCILLOR IRENE MCLEOD, COUNCILLOR ANGUS CAPOT-BLANC, COUNCILLOR DENNIS NELSON, COUNCILLOR DENNIS MCLEOD AND THE ATTORNEY GENERAL OF CANADA

MATTER CONSIDERED IN WRITING AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF *THE FEDERAL COURT RULES*

ORDER AND REASONS:	GRAMMOND J.
DATED:	JUNE 2, 2021

WRITTEN REPRESENTATIONS BY:

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