Federal Court Cour fédérale

Date: 20241007

Docket: T-2277-23

Citation: 2024 FC 1577

Calgary, Alberta, October 7, 2024

PRESENT: Madam Justice Go

BETWEEN:

BRYAN TOOTOOSIS

Applicant

and

DUANE ANTOINE, BRANDON FAVEL, MARLENE CHICKENESS AND POUNDMAKER CREE NATION #345 CHIEF AND COUNCIL

Respondents

COSTS ORDER AND REASONS

I. Overview

[1] Mr. Bryan Tootoosis [Applicant] is a member of the Poundmaker Cree Nation [PCN]. The Applicant sought judicial review of a decision of (now former) Chief Duane Antoine and PCN Council to suspend and then remove him from PCN Council.

[2] I granted the Applicant's application with costs and invited the parties to file submissions on costs: *Tootoosis v. Antoine*, 2024 FC 1171.

[3] The parties' positions on costs differ significantly. The Applicant requests an elevated lump sum amount of between $25,704.00 and $46,990.13, exclusive of disbursements set at $2,246.06. The Respondent asks the Court to award nominal costs in the range of $2,500.00 to $3,500.00 to be paid to the Applicant; in the alternative, all-inclusive lump sum costs in the range of $10,000.00 to $12,000.00; and in the further alternative, an award of costs calculated under Tariff B pursuant to section 400(4) and 407 of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[4] The reasons for my costs order are set out below.

II. Summary of the Guiding Principles for Costs Orders

[5] This Court has full discretionary power over the amount and allocation of costs: Rule 400(1) of the *Rules*.

[6] While the Court has broad discretion over costs, the exercise of such discretion is not made arbitrarily: *Pembina County Water Resource District v Manitoba*, 2019 FC 82 [*Pembina*], at para 20. The Court may consider the list of factors set out under Rule 400(3) and, in accordance with Rule 400(3)(h) of the *Rules*, the Court may take into account any other matter that it considers relevant: *Pembina* at para 19.

[7] In *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*], Chief Justice Crampton summarized the principal objectives underlying an award of costs as follows: "(i) provide indemnification for costs associated with successfully pursuing a valid legal right or defending an unfounded claim, (ii) penalize a party who has refused a reasonable settlement offer, and (iii) sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious:" *Allergan*, at para 19.

[8] As the Chief Justice further explained in *Allergan* at para 25, "[t]he 'default' level of costs in this Court is the mid-point of column III in Tariff B" and "[c]olumn III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for 'cases of average or usual complexity.'"

[9] In recent years, the granting of a lump sum award has become increasingly common, and is frequently preferred to the Tariff "because of its simplicity, the time and effort it saves in not having to prepare and debate the minutiae of items under the Tariff:" *Catalyst Pharmaceuticals, Inc v Canada (Attorney General)*, 2022 FC 1669 at para 21.

[10] In *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 [*Whalen*], Justice Grammond considered and rejected the notion of a distinctive costs regime for First Nations governance disputes: *Whalen* at para 23. At para 27 of *Whalen,* Justice Grammond summarized the applicable principles from the case law dealing with costs award in First Nations governance disputes:

- In First Nations governance cases, as in other cases, an award of costs is in the trial judge's discretion, which must be exercised after taking all relevant factors into consideration;
- The imbalance between the financial resources of an applicant and those of the First Nation, or a party whose legal fees are paid by the First Nation, is a relevant factor;
- Taken in isolation, however, the resource imbalance is not a sufficient factor to justify an award of costs on a solicitor-client basis;
- The fact that an application contributed to clarify the interpretation of a First Nation's laws or governance framework may be taken into account when making a costs award; but not every application falls in that category.

[11] I will apply all of the above noted guiding principles in determining the appropriate cost award in this case.

III. Analysis

A. *Should there be an elevated lump sum costs award?*

[12] The Applicant advances the following arguments to submit he is entitled to an elevated lump sum costs award:

a. First, the Respondents had their costs and their "litigation choices" covered on a full indemnity basis and the same should apply to the Applicant, citing the Federal Court of Appeal [FCA]'s decision in *Red Pheasant First Nation v Whitford*, 2023 FCA 29 [*Red Pheasant*] at para 69 and this Court's decision in *Shotclose v Stoney First Nation*, 2011 FC 1051 at para 18 [*Shotclose*] in support;

b. Second, citing *Shotclose*, the Applicant argues the following factors weigh in favour of an elevated lump sum:

    i. The application was brought in the interests of all the members of the community, to have their custom for Chief and Council removals understood and their chosen elected official maintain their office;

    ii. The issues were complex and included conflicting evidence as to what constituted custom and complexity was added at the 11th hour when the Respondents argued mootness, a mootness argument that was caused by the Respondents' unavailability for a hearing and/or insistence that the hearing take place in person on reserve;

    iii. The amount of work required to prepare for the hearing, including responding to a lengthy jurisdiction motion, which was never explicitly abandoned, despite the ruling in *Bellegarde v Carry the Kettle First Nation*, 2024 FC 699 [*Bellegarde*], involving the same legal counsel, and which was completely on point;

    iv. The litigation would not have been necessary had the parties not removed the Applicant and/or provided him with procedural fairness. Similarly, had the Chief respected the member ratification of an election code in 2014/2015, the confusion over custom law would not have ensued or been an issue before this Court;

    v. The Applicant was wholly successful; and

    vi. The Applicant made a written offer to settle on June 4, 2024;

c. Third, the case properly addressed a question of PCN's law on removals and is therefore in the public interest;

d. Fourth, there was a conspicuous imbalance of resources; and

e. Fifth, the Applicant made an offer to settle on June 4, 2024, and the Applicant's offer to settle was in response to an offer from the Respondents' demand for complete surrender –

asking for discontinuance without costs and forgoing all remuneration lost. The offer was made while the Respondents pursued their allegations against the Applicant in the Saskatchewan Court of King's Bench, and was thus made in bad faith. By contrast, the Applicant's written offer to settle was a compromise and would have made the hearing and these costs submissions unnecessary.

[13] I do not find all of the Applicant's submissions persuasive.

[14] In particular, I find both *Red Pheasant* and *Shotclose* distinguishable. In *Red Pheasant*, the FCA upheld this Court's finding that the successful candidates in the council election committed election fraud. In *Shotclose*, the Court noted, as a factor, the inappropriate manner in which counsel for the respondents conducted examinations and cross examinations of the affiants. The Court also noted other attempts by the respondents to make it more difficult for the applicants to obtain and present evidence. None of those factors are present in the case before me. That the Chief and Council's position with respect to procedural fairness was found to be without merit is also not sufficient to justify an award of costs on a solicitor-client basis.

[15] However, I agree that the Respondent's argument on mootness, which the Respondent never explicitly abandoned despite the ruling in *Bellegarde*, is a factor to be considered. So, too, is the Applicant's written offer to settle. I pause to note that the Respondent's submission is silent on the settlement offer.

[16] The Respondent further submits that the Applicant was not wholly successful and that there was "divided success." Just to recapitulate, based on the evidence before me, I rejected the Applicant's argument that the Respondents acted contrary to PCN custom to enforce his

removal. Instead, I found the Applicant failed to demonstrate that PCN's custom for removal is based on a membership vote only. I concluded that Chief and Council also have the authority to remove a councillor, based on PCN's unwritten custom.

[17] The Applicant argues this is not a case of mixed success, citing *Bertrand v Acho Dene Koe First Nation*, 2021 FC 525 [*Bertrand*] where Mr. Bertrand was unsuccessful on proving the asserted custom, but successful in the outcome. I find instructive Justice Grammond's analysis in *Bertrand* of what "divided success" means:

> [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.
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> [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.

[18] Applying the above stated analysis, I reject the Respondents' submission that there is "divided success." I also find that, irrespective of the outcome, the application does address a question of PCN's custom on removals and is therefore in the interest of all PCN members.

[19] Having said that, however, I note that the Applicant pursued an argument about the membership-based removal practice even though he had previously been part of similar removal decisions made by Chief and Council only. I note further that the Applicant's cost could have been reduced had he not advanced this argument, as the Applicant incurred significant cost in reviewing the Respondents' affidavits and examining the Respondents' affiants on the PCN's custom for removals.

[20] Taking into account all of the above factors, while I do not find the Applicant is entitled to an elevated costs award, I find the Applicant is entitled to more than nominal costs, contrary to the Respondent's position.

B. *What is the appropriate cost award?*

[21] The Applicant submits that an elevated lump sum, based on his draft Bill of Costs is appropriate. The Applicant points to the following costs awarded in similar cases:

- $25,000.00 in *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 1492, less affidavit evidence and no cross-examinations;
- $20,000.00 in *Collins v Saddle Lake Cree Nation #462*, 2023 FC 1566, less affidavit evidence and cross-examinations;
- $20,000.00 in *Shirt v Saddle Lake Cree Nation*, 2022 FC 321, removal case, less affidavit evidence, and similar issue of procedural fairness breach;

- $40,000.00 in *Whalen*, removal case, less affidavit evidence; and
- $75,000.00 in *Bellegarde*, removal case, where there was an abuse of process finding.

[22] The Applicant also contends that the lump sum award should not include disbursements, which were substantial in this case, considering the resource imbalance between the parties.

[23] The Respondent, on the other hand, submits that lump sum costs should be awarded in accordance with the line of authorities recently described in *Heron v Salt River First Nation No 195*, 2024 FC 413 and that these authorities support a range between $10,000.00 and $12,000.00. The Respondent further submits that full indemnification is not appropriate in the circumstances, and that it should not be awarded simply because it is a First Nations governance dispute.

[24] To some extent, I agree with the Respondent. As noted in *Whalen* at para 25, "costs awards should not be made in a manner that results in a parallel legal aid regime or on the basis of criteria that will always be met in entire categories of cases," citing *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 137.

[25] In terms of the appropriate magnitude of the lump sum, once again, I draw on the Court's comment in *Whalen*. At para 33, the Court cited Justice Rennie in *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 15, who cautioned against using a number that is "plucked from thin air," and that to ensure a degree of consistency, such awards would usually fall within a range of 25%-50% of the actual legal costs of the successful party: *Nova Chemicals* at para 17.

[26] Thus, taking into account all the relevant factors in this case, including the resource imbalance between the parties, the Applicant's success, and the public interest issue raised, I find it appropriate to award the Applicant $12,852.00 in costs, representing 50% of the Applicant's Column III Bill of Costs, plus disbursements of $2,246.06.

IV. Conclusion

[27] Costs are awarded to the Applicant on a lump sum basis in the amount of $15,098.06, inclusive of taxes and interest.

ORDER in T-2277-23

THIS COURT'S ORDER is that:

1. Costs and disbursements are awarded to the Applicant in the amount of $15,098.06, inclusive of taxes and interests, and are payable forthwith by the Respondents.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2277-23
STYLE OF CAUSE:	BRYAN TOOTOOSIS v DUANE ANTOINE, BRANDON FAVEL, MARLENE CHICKENESS AND POUNDMAKER CREE NATION #345 CHIEF AND COUNCIL
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	JUNE 10, 2024
COSTS ORDER AND REASONS:	GO J.
DATED:	OCTOBER 7, 2024

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