

Federal Court



Cour fédérale

**Date: 20110907**

**Docket: T-2085-10**

**Citation: 2011 FC 1051**

**Ottawa, Ontario, September 7, 2011**

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

**BETWEEN:**

**ROBERT SHOTCLOSE, HARVEY BAPTISTE,  
CORRINE WESLEY, MYRNA  
POWDERFACE, CINDY DANIELS and  
WANDA RIDER**

**Applicants**

**and**

**STONEY FIRST NATION, as represented by its  
Chiefs and Councillors, and BEARSPAW FIRST  
NATION, as represented by its Chiefs and  
Councillors, Chief David Bearspaw Jr.,  
Trevor Wesley, Patrick Twoyoungmen,  
Roderick Lefthand and Gordon Wildman**

**Respondents**

**REASONS FOR ORDER AND ORDER**

[1] In a judgment released on June 22, 2011, the applicants were wholly successful in this application for judicial review. At the hearing, counsel requested that I allow them the opportunity to file material and make additional submissions on the question of costs following a decision on the

merits. Accordingly, I set out a timetable for the parties to serve and file written submissions no later than July 22, 2011.

[2] Prior to that date, the respondents appealed the judgment and counsel requested an extension of time to file their submissions on costs pending the outcome of stay motions and, if successful on the motions, until the appeal was determined. That request was granted. On July 28, 2011, the stay motions were dismissed by the Order of Mr. Justice Stratas of the Federal Court of Appeal. By Direction issued on August 4, 2011, a new timetable was fixed for the service and filing of final written representations which have now been received.

[3] In the interim, an election was held in accordance with the terms of the June 22, 2011 judgment and a new Chief and Council were selected to lead the Bearspaw First Nation. Both the Stoney First Nation and the Bearspaw First Nation, as represented by their Chiefs and Councillors, have discontinued the appeal in their names. As of the date of writing, it is unclear whether the appeal will continue in the names of the former Bearspaw First Nation Chief and Councillors who are the named individual respondents to this application. In the circumstances, I see no reason to further delay my decision with respect to costs in this matter.

[4] In the June 22, 2011 judgment I found that the applicants were deprived of their voting rights and denied procedural fairness by the respondents in violation of Bearspaw custom. In granting judgment, among other things, I set aside the decision of the former Chief and Council to extend their terms of office, removed the Chief and Council from office and ordered that an election be held within 60 days.

[5] The applicants seek a lump sum award giving them full indemnity on a solicitor client basis for legal fees in the amount of \$258,850.00 and disbursements in the amount of \$22,040.55 for a total of \$280,890.25 together with an amount for their costs submissions. They have provided a Bill of Costs for their disbursements together with invoices and statements of account which include detailed counsel timesheets for their work on this application.

[6] The respondents submit that the applicants should not be entitled to elevated costs as the conduct of the respondents or their counsel has not been reprehensible, scandalous or outrageous such as to justify an exceptional award of solicitor and client costs. They argue that the issues were needlessly complicated in this proceeding by the fact that the applicants raised *Charter* grounds when it was clear that such grounds had no foundation in law or the facts.

[7] The Court may award all or part of costs on a solicitor and client basis: Rule 400 (6), *Federal Courts Rules*, SOR/98/103. While this is generally done where there has been reprehensible, scandalous and outrageous conduct during litigation, the Court's discretion is not so limited: *King v. Canada (Attorney General)* 187 FTR 160 at paragraph 2.

[8] The Court may fix costs in a lump sum or leave costs to be assessed: Rules 400 (4) (5); *Dimplex North America Ltd. v. CFM Corp* 2006 FC 1403 aff'd 2007 FCA 278. While the Court has full discretion over the amount of costs to be awarded, the relevant factors in the non-exhaustive list delineated in Rule 400(3) must be considered in deciding, not only the quantum of costs, but also their allocation and the determination of by whom such costs should be paid: *Francosteel Can. Inc. v. "African Cape" (The)*, [2003] 4 FC 284, 301 NR 313, 2003 FCA 119 at para 20.

[9] I agree with the applicants that the relevant factors here include the following:

- a. That the application was brought in the interests of all of the members of the community;
- b. The issues were complex and included conflicting evidence as to what constituted Bears paw First Nation custom;
- c. That the conduct of the respondent Bears paw Chief and Councillors and their legal counsel tended to unnecessarily lengthen the duration of the proceedings;
- d. That steps taken by the respondent Bears paw Chief and Councillors in the proceeding were improper, vexatious or unnecessary;
- e. The amount of work required to prepare for the hearing;
- f. That a written offer to settle was disregarded; and
- g. That the application was wholly successful;

[10] As I stated at the hearing, this proceeding would not have been necessary had the Chief and Council of the Bears paw First Nation followed the example of the Chiniki and Wesley First Nations and put the question of an extension of their terms of office to the membership as part of the scheduled December 2010 election. All of the parties could have been spared the expense of costly litigation had that sensible course of action been taken. The failure of the respondents to do so was a blatant attempt to remain in power.

[11] When it proved necessary for the applicants to litigate to challenge the decisions and actions of the Chief and Council, this matter could have been dealt with more quickly and at less expense.

The Court ordered an expedited hearing when the matter was first brought forward as a motion for an interim injunction. It was then placed under case management. Counsel for the Bearspaw Chief and Council thereafter repeatedly requested case management conferences, complained about the steps taken by the applicants in accordance with the Court's orders and directions and sought to suspend the ordered timelines and postpone the hearing. Unnecessary forensic evidence was filed. The respondents' efforts to file additional evidence of that nature was denied by the Court.

[12] The strategy pursued by the respondent Bearspaw Chief and Council when faced with a challenge to their actions was to prolong and delay the proceedings in an effort to entrench their position and make it more difficult to address the issues in open court. The respondents dragged their feet and made it more difficult for the applicants to obtain and present evidence such as Band Council Resolutions in a timely manner. The respondents Chief and Council controlled the documentary record and failed to produce relevant evidence and the minutes of meetings which they had conducted on and off reserve. They ridiculed the applicants for attempting to exercise their rights.

[13] I have already commented in my Reasons for Judgment on the inappropriate manner in which counsel for the respondents conducted examinations and cross examinations of the affiants. In his written submissions on costs, counsel apologizes to the Court for his conduct during the examinations and attributes it to pressures within his personal life and work environment. I accept that apology but consider, nonetheless, that the manner in which the prehearing proceedings were conducted is a relevant factor to be taken into account in determining costs.

[14] I do not accept the assertion by counsel for the respondents that some of what was said and done by him and others, including inappropriate comments to the media about the applicants and sarcastic comments to and about opposing counsel, falls within the scope of acceptable behaviour within "hard fought litigation".

[15] On February 16, 2011 the applicants offered in writing to settle the proceeding in consideration for an election being held. In my view, that offer, of which I had no knowledge prior to rendering judgment, was reasonable and would have limited the costs incurred by the parties. The relief granted on judgment clearly exceeded that described in the offer as acceptance of the offer would have allowed the former Chief and Council to remain in office pending the election. There was no response by the Chief and Council to that offer.

[16] The *Charter* issues raised by the applicants were not without foundation. The evidence in support of those grounds was essentially the same as for the other grounds presented by the applicants. In my reasons for judgment, I held that it was not necessary to deal with those issues as the matter could be determined on customary and administrative law principles. That is not to say that the *Charter* grounds advanced by the applicants were without merit.

[17] The respondents submit that affidavit evidence and taxation in the normal course is required because it is unclear to what extent the applicants' costs have already been paid by the Stoney Nation. This assertion appears to be based on rumour or speculation as there is no evidence before me that any part of the applicants' costs have been paid by the Stoney Nation. I accept the

applicants' counsel's statement that this has not occurred. In light of the detailed accounts that have been provided, I see no purpose would be achieved by requiring the additional expense of taxation.

[18] It appears clear from the record before me that the respondents' costs have been paid, thus far, on a solicitor and client basis by either the Stoney First Nation or the Bearspaw First Nation. As Justice Russel Zinn held in *Peepseekisis First Nation v. Poitras* 2009 FC 1212 at paragraph 8, there appears to be no principled reason why the applicants' costs should not also be paid on that same basis by the First Nations. See also *Standinghorne v. Sweet Grass First Nation*, 2007 FC 1137 at paragraph 56.

[19] I understand that there may be some dispute between the First Nations which make up the Stoney Nation as to whether Bearspaw or the Stoney Tribal Council is to be held accountable for these costs. That is a matter for them to determine but the applicants should not be denied relief for that reason. Accordingly, the order will go that the Bearspaw First Nation is primarily responsible to pay the costs but that all of the respondents, including the named individual respondents, are jointly and severally liable for the costs award.

[20] The Wesley First Nation was added as a respondent in the application to present its position regarding the terms of office for Chief and Councillors. It took no part in the decisions and actions that led to this litigation and is not subject to this Order other than as a member of the Stoney Tribal Council.

[21] A lump sum will be awarded of \$285, 000.00 inclusive of an amount for the submissions on costs.



**ORDER**

**IT IS THE ORDER OF THE COURT that:**

1. the applicants shall have their costs on a solicitor-client basis for the application and for matters relating to this Order for costs, fixed at a total of \$285, 000.00;
2. the applicants' costs are ordered to be paid by the Bearspaw First Nation and the Chief and Council of the Bearspaw First Nation are ordered to take all actions and steps as are necessary to ensure that payment is made forthwith;
3. in the event that any or all of the costs ordered to be paid by the Bearspaw First Nation are not so paid, the respondents are jointly and severally liable for any amount that remains unpaid; and
4. for greater certainty, the Wesley First Nation is not liable for payment of the applicants' costs except to the extent that it forms part of the Stoney First Nation and Stoney Tribal Council and the costs are authorized to be paid from common tribal funds.

“Richard G. Mosley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2085-10

**STYLE OF CAUSE:** ROBERT SHOTCLOSE, HARVEY BAPTISTE,  
CORRINE WESLEY, MYRNA POWDERFACE,  
CINDY DANIELS and WANDA RIDER

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STONEY FIRST NATION, as represented by its  
Chiefs and Councillors, and BEARSPAW FIRST  
NATION, as represented by its Chiefs and Councillors,  
Chief David Bearspaw Jr., Trevor Wesley,  
Patrick Twoyoungmen, Roderick Lefthand and  
Gordon Wildman

**PLACE OF HEARING:** Ottawa, Ontario

**REASONS FOR ORDER  
AND ORDER:** MOSLEY J.

**DATED:** September 7, 2011

**APPEARANCES:**

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Josh Jantzi

FOR THE APPLICANTS

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