

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230628

Dockets: A-94-22

A-97-22

A-98-22

A-121-22

A-126-22

Citation: 2023 FCA 150

**CORAM: LOCKE J.A.
MACTAVISH J.A.
MONAGHAN J.A.**

Docket: A-94-22

BETWEEN:

MARY LINDA WHITFORD and ALICIA MOOSOMIN

Appellants

and

**JASON CHAKITA, MANDY CUTHAND, LUX BENSON, DANA
FALCON, HENRY GARDIPY, SAMUEL WUTTUNEE, SHAWN
WUTTUNEE, and RED PHEASANT FIRST NATION**

Respondents

Docket: A-97-22

AND BETWEEN:

CLINTON WUTTUNEE

Appellant

and

MARY LINDA WHITFORD and ALICIA MOOSOMIN

Respondents

Docket: A-98-22

AND BETWEEN:

GARY NICOTINE

Appellant

and

MARY LINDA WHITFORD and ALICIA MOOSOMIN

Respondents

Docket: A-121-22

AND BETWEEN:

CLINTON WUTTUNEE and GARY NICOTINE

Appellants

and

**MARY LINDA WHITFORD, ALICIA MOOSOMIN,
BURKE RATTE and RED PHEASANT FIRST NATION**

Respondents

Docket: A-126-22

AND BETWEEN:

RED PHEASANT FIRST NATION

Appellant

and

**MARY LINDA WHITFORD, ALICIA MOOSOMIN,
BURKE RATTE, CLINTON WUTTUNEE and GARY
NICOTINE**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 28, 2023.

REASONS FOR ORDER BY:

LOCKE J.A.

CONCURRED IN BY:

MACTAVISH J.A.
MONAGHAN J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230628

Dockets: A-94-22

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WUTTUNEE, and RED PHEASANT FIRST NATION**

Respondents

Docket: A-97-22

AND BETWEEN:

CLINTON WUTTUNEE

Appellant

and

MARY LINDA WHITFORD and ALICIA MOOSOMIN

Respondents

Docket: A-98-22

AND BETWEEN:

GARY NICOTINE

Appellant

and

MARY LINDA WHITFORD and ALICIA MOOSOMIN

Respondents

Docket: A-121-22

AND BETWEEN:

CLINTON WUTTUNEE and GARY NICOTINE

Appellants

and

**MARY LINDA WHITFORD, ALICIA MOOSOMIN,
BURKE RATTE and RED PHEASANT FIRST NATION**

Respondents

Docket: A-126-22

AND BETWEEN:

RED PHEASANT FIRST NATION

Appellant

and

**MARY LINDA WHITFORD, ALICIA MOOSOMIN,
BURKE RATTE, CLINTON WUTTUNEE and GARY
NICOTINE**

Respondents

REASONS FOR ORDER

LOCKE J.A.

I. Background

[1] This decision concerns costs awards in respect of five appeals related to the 2020 election of the chief and councillors at the Red Pheasant First Nation (RPFN). The parties to the appeals (and to the proceedings below) can be divided into the following six groups:

1. Mary Linda Whitford and Alicia Moosomin (Whitford and Moosomin) are electors and members of the RPFN who contested the validity of the election under the *First Nation Elections Act*, S.C. 2014, c. 5 (FNEA) before the Federal Court;
2. Clinton Wuttunee and Gary Nicotine (Wuttunee and Nicotine) were successful candidates for chief and councillor, respectively, whose elections were annulled by the Federal Court for engaging in serious electoral fraud;
3. Jason Chakita, Mandy Cuthand, Lux Benson, Henry Gardipy, Samuel Wuttunee, and Shawn Wuttunee (the Other Councillors) were successful candidates for councillor whose elections were not annulled by the Federal Court despite findings that they had all engaged in serious electoral fraud;
4. Dana Falcon was a successful candidate for councillor who was found not to have committed any contraventions of the FNEA and whose election was not annulled by the Federal Court;
5. Burke Ratte was Electoral Officer for the election in issue; and
6. The RPFN itself.

[2] Two decisions by the Federal Court gave rise to the five appeals before this Court. The Federal Court's decisions concerned (i) the merits of Whitford and Moosomin's contestation of

the election, and (ii) the costs awarded in respect of the Federal Court's decision on the merits. As indicated, on the merits, the Federal Court annulled the elections of Wuttunee and Nicotine, but not of the Other Councillors or of Mr. Falcon. In its decision on costs, the Federal Court awarded Whitford and Moosomin \$325,000 as an all-inclusive lump sum to be paid jointly and severally by Wuttunee and Nicotine and the RPFN. The Federal Court also ordered the latter three to pay costs of \$20,000 to Mr. Ratte. It awarded no costs to or against the Other Councillors or Mr. Falcon.

[3] Details of the five appeals before this Court are as follows:

- A-94-22: Whitford and Moosomin appealed the Federal Court's decision not to annul all of the elections in issue (the Other Councillors, Mr. Falcon and the RPFN were all named as respondents in this appeal);
- A-97-22: Mr. Wuttunee appealed the Federal Court's decision to annul his election (Whitford and Moosomin were named as respondents in this appeal);
- A-98-22: Mr. Nicotine appealed the Federal Court's decision to annul his election (Whitford and Moosomin were named as respondents in this appeal);
- A-121-22: Wuttunee and Nicotine appealed the Federal Court's decision on costs (Whitford and Moosomin, as well as Mr. Ratte and the RPFN, were named as respondents in this appeal); and

- A-126-22: The RPFN appealed the Federal Court’s decision on costs (Whitford and Moosomin, as well as Mr. Ratte and Wuttunee and Nicotine, were named as respondents in this appeal).

[4] No party took issue with the award of costs to Mr. Ratte.

[5] This Court rendered three decisions that dismissed all five appeals, leaving the Federal Court’s decisions unchanged. In two decisions rendered on January 30, 2023, this Court dismissed Whitford and Moosomin’s appeal in A-94-22 (2023 FCA 17) and Wuttunee and Nicotine’s appeals in A-97-22 and A-98-22 (2023 FCA 18). Then, on February 8, 2023, this Court dismissed the appeals of Wuttunee and Nicotine (A-121-22) and of the RPFN (A-126-22) from the Federal Court’s decision on costs (2023 FCA 29).

[6] In its judgments, this Court invited submissions from the parties on the costs to be awarded in respect of the appeals. Submissions were received from four groups: (i) Whitford and Moosomin, (ii) Wuttunee and Nicotine, (iii) the RPFN, and (iv) the Other Councillors. The respective submissions of these groups are summarized in the following paragraphs.

II. Parties’ Submissions

A. *Overview*

[7] Whitford and Moosomin seek an all-inclusive lump sum award of costs for all of the appeals to be paid jointly and severally by Wuttunee and Nicotine and the RPFN in the amount

of \$180,000, which they say represents their disbursements plus 57% of their fees. They say this is about the same percentage of fees as was awarded by the Federal Court. In the alternative, they submit that costs are to be calculated following Tariff B of the *Federal Courts Rules*, S.O.R./98-106 (the *Rules*). Whitford and Moosomin cite offers to settle the four appeals in which they were respondents (A-97-22, A-98-22, A-121-22, and A-126-22) that they say should engage double costs as contemplated by Rule 420. They also argue that any costs calculated following Tariff B should be based on the top end of Column V thereof. They have provided bills of costs in respect of (i) A-97-22 and A-98-22, (ii) A-121-22, and (iii) A-126-22 following Tariff B that indicate the following amounts:

| Appeal | Amount Claimed |
|---------------------|-----------------------|
| A-97-22 and A-98-22 | \$76,922.42 |
| A-121-22 | \$66,908.73 |
| A-126-22 | \$32,425.64 |

[8] These bills of costs are discussed in greater detail below.

[9] For their part, Wuttunee and Nicotine are not parties to A-94-22 and make no submissions thereon. They also make no submissions regarding costs in A-126-22, although they are named respondents. They argue that the costs of A-97-22 and A-98-22 should be set at \$5,000, with the RPFN being ordered to pay. They also argue that the costs of A-121-22 should be set at \$3,500, with the RPFN being jointly and severally liable. These amounts are based on Column III of Tariff B and Rule 407 (which designates Column III as the default for the calculation of costs). Wuttunee and Nicotine do not dispute that a lump sum award of costs is appropriate. They also do not dispute that Rule 420 is engaged, though they note that the Court maintains discretion not to order double costs. Wuttunee and Nicotine also argue that the amount

of the lump sum costs award sought by Whitford and Moosomin is beyond the usual range of 25% to 50% of fees actually incurred, and that such an elevated amount is not justified.

[10] The RPFN have made submissions on costs in A-126-22, and have asked that they be considered in relation to the assessment of costs in all five appeals. The RPFN accepts that it is liable for costs in relation to A-126-22, but does not accept liability for costs in the other appeals, either because it was not a party thereto (for A-97-22, A-98-22 and A-121-22) or because it was successful (for A-94-22). The RPFN proposes an amount of \$5,645.28 for costs in A-126-22, which is based on the low end of Column I of Tariff B, and 20% of the fees and disbursements that relate to all five appeals. Like Wuttunee and Nicotine, the RPFN accepts that Rule 420 of the *Rules* is engaged, while noting that the Court maintains discretion not to order double costs.

[11] The Other Councillors seek costs in relation to A-94-22 (in which they were successful) in the all-inclusive lump sum amount \$40,235.37 (which they say represents 40% of their actual costs), to be payable jointly and severally by Whitford and Moosomin. They have also submitted a bill of costs in respect of A-94-22 based on Column III of Tariff B in the amount of \$10,194.42. The Other Councillors acknowledge that the RPFN paid the legal fees and disbursements in A-94-22.

B. *Additional Details of Submissions*

[12] This matter is unusual because of the number of interrelated appeals, and the fact that only Whitford and Moosomin were involved in all of them. Moreover, none of the parties was successful in all of the appeals in which they were involved except the Other Councillors, who

successfully defended their only appeal. Wuttunee and Nicotine were unsuccessful in all of the appeals in which they were involved. Whitford and Moosomin were successful in four of the five appeals (including both appeals on costs). Success in the appeals can be summarized as follows:

| Appeal | Successful Parties | Unsuccessful Parties |
|-------------------------|------------------------------------|-----------------------------|
| A-94-22 (on the merits) | the Other Councillors and the RPFN | Whitford and Moosomin |
| A-97-22 (on the merits) | Whitford and Moosomin | Mr. Wuttunee |
| A-98-22 (on the merits) | Whitford and Moosomin | Mr. Nicotine |
| A-121-22 (on costs) | Whitford and Moosomin | Wuttunee and Nicotine |
| A-126-22 (on costs) | Whitford and Moosomin | the RPFN |

[13] It is notable that the RPFN, which was held jointly and severally liable for costs at first instance despite not having been found to commit any wrongdoing, was unsuccessful in A-126-22 in setting aside the Federal Court's costs decision, but was successful in defending the Other Councillors in A-94-22. It was not an active party in any of the other appeals.

[14] An important part of Whitford and Moosomin's argument on costs is that they acted in the public interest in these appeals, and without a personal interest. They note that the present appeals bring greater clarity to the law relating to elections under the FNEA. Moreover, they state that because of the similarities between the FNEA and the *Canada Elections Act*, S.C. 2000, c. 9, the public interest in this Court's decision extends to the population as a whole. Whitford and Moosomin's argument is particularly important to their submission that no costs should be awarded against them in respect of A-94-22 despite their lack of success in that appeal. I accept that there is public interest in the results of the present appeals. However, this factor is less important with regard to the A-121-22 and A-126-22 appeals because they concerned only the Federal Court's award of costs.

[15] Wuttunee and Nicotine argue similarly that the public interest should be considered in any award against them in A-97-22 and A-98-22, in which they were not successful. I give this argument less force for Wuttunee and Nicotine because there is no suggestion that their motivation in making these appeals was anything other than personal. It appears that the public interest in the present appeals was not a significant consideration in their decision to proceed with their appeals.

[16] A number of interlocutory motions were addressed by the Court in the subject appeals, and these require discussion on the question of costs. The details of these motions are as follows:

| Date of Order | Judge | Motion | Disposition | Provision for Costs |
|----------------------|----------------|---|--|---|
| June 10, 2022 | Rivoalen J.A. | Informal motion by Whitford and Moosomin for case management and consolidation of A-94-22 with A-97-22 and A-98-22 | Denied request for case management but granted request to consolidate; also set timetable for further steps in the appeals | None |
| August 2, 2022 | Laskin J.A. | Motion by Wuttunee and Nicotine in A-94-22, A-97-22 and A-98-22 for stay pending appeal of the Federal Court's decision to annul their respective elections to office | Dismissed | "[C]osts of the motion are reserved to the panel hearing the consolidated appeal." |
| August 2, 2022 | Laskin J.A. | Motions by Wuttunee and Nicotine and by the RPFN in A-121-22 and A-126-22 for stay pending appeal of the Federal Court's decision on costs | Granted, subject to payment into Court of security for costs in the amount of \$7,500 for Wuttunee and Nicotine, and \$10,000 for RPFN | "[C]osts of the motion are reserved to the panel hearing the appeals in files A-121-22 and A-126-22." |
| August 29, 2022 | Pelletier J.A. | Motion to determine contents of appeal book in A-121-22 and A-126-22 | A-121-22 and A-126-22 to be heard together, with common appeal | "Each party shall bear their own costs." |

| | | | | |
|-----------------|-------------|-------------------------------------|--|----------------------------------|
| | | | book as determined in the Order | |
| October 6, 2022 | Rennie J.A. | Motion to hear all appeals together | A-121-22 and A-126-22 to be heard immediately following A-94-22, A-97-22 and A-98-22; also provisions for filing of requisitions for hearing, memoranda and joint books of authorities | “There is no order as to costs.” |

[17] All of these Orders except those of Laskin J.A. provide, either explicitly or implicitly, for no costs award. Accordingly, the only motions in respect of which it is appropriate for this Court now to consider an award of costs are the stay motions, one of which was successful (regarding A-121-22 and A-126-22 and the Federal Court’s costs award) and one of which was not (regarding A-94-22, A-98-22 and A-98-22 and annulment of Wuttunee and Nicotine’s elections). The parties involved in these two motions were not entirely the same. In the latter motion, Wuttunee and Nicotine were unsuccessful, and Whitford and Moosomin were successful. In the former motion, the successful parties were Wuttunee and Nicotine as well as the RPFN, while Whitford and Moosomin were unsuccessful. Wuttunee and Nicotine argue that the former motion (in which they were successful) required significantly more work than the latter motion. In my view, Wuttunee and Nicotine overstate the added work in the former motion. Despite the small difference in the parties involved in these two motions, and the possibility that one required more work than the other did, I would set them off against one another. I would accordingly award no costs in relation to these motions.

[18] In support of their submissions on costs, Whitford and Moosomin have sworn affidavits. Wuttunee and Nicotine object to these on the basis that this Court’s invitation to make

submissions on costs did not contemplate affidavits, and that the affidavits constitute new evidence that should not be considered absent special circumstances and leave of the Court. For its part, the RPFN does not object to the entirety of the affidavits, but it does take issue with certain parts thereof that it argues should be struck because they contain false or irrelevant statements or implications. The RPFN also submitted its own affidavit evidence (the Benson Affidavit). On March 17, 2023, I directed that all of the affidavits would be accepted and treated not as sworn evidence, but rather as unsworn support for submissions on costs. This treatment avoided the need for cross-examinations, which I concluded would be disproportionate in these circumstances. I note also that the allegedly false or irrelevant statements or implications in issue have had no effect on my view of appropriate costs in these appeals.

[19] Wuttunee and Nicotine also object to the inclusion of references that incorporate Whitford and Moosomin's submissions in other appeals. Wuttunee and Nicotine argue that these references improperly allow Whitford and Moosomin to circumvent the page limits applicable to their costs submissions. The Other Councillors make a similar objection. Relatedly, they also argue that it is improper for Whitford and Moosomin to request a global assessment for all five distinct appeals. While it is reasonable to ask that the costs of each appeal be considered separately, I see no reason not to assess costs for all of the appeals in a single set of reasons, and to consider submissions that relate to any or all of the appeals. I note that the RPFN makes submissions in A-126-22 (the only appeal in which it acted as the appellant), and asks that they be considered in relation to all of the appeals.

[20] Another important aspect of Whitford and Moosomin's defence against costs in A-94-22 is that it was the RPFN, and not the Other Councillors (the respondents therein), that paid the fees and disbursements for that appeal. The RPFN does not dispute this fact. Whitford and Moosomin argue that the Other Councillors cannot be indemnified for an expense that they did not actually incur. Whitford and Moosomin also argue that the RPFN should likewise not be indemnified because the expenses were incurred defending individuals whose acts of serious electoral fraud were not contested on appeal.

[21] Whitford and Moosomin's argument based on the RPFN paying the expenses extends to the other appeals. Whitford and Moosomin note that the \$7,500 in security for costs ordered by Laskin J.A. to be paid into Court by Wuttunee and Nicotine in respect of A-121-22 was actually included in the cheque for payment of the RPFN's security for costs in respect of A-126-22. Whitford and Moosomin argue that this is evidence that the RPFN paid at least part of Wuttunee and Nicotine's expenses. Here, the RPFN takes issue with Whitford and Moosomin's allegation. It notes that no evidence supports the allegation, and that its counsel has contradicted the allegation. The RPFN also refers to the Benson Affidavit, which states explicitly that Mr. Nicotine paid \$3,750 for his part of the security for costs.

[22] In my view, it is not necessary to conclude definitively whether the RPFN paid any expenses for Wuttunee and Nicotine in the appeals other than A-94-22. It makes no difference to my view on costs in A-121-22 and A-126-22. The same is true for the fact that the RPFN paid the expenses in A-94-22. It would be an unfair windfall for Whitford and Moosomin if they were able to avoid liability for costs in A-94-22 simply because of the nature of a financial

arrangement between the Other Councillors and the RPFN. Moreover, in the absence of evidence of an agreement with counsel that the Other Councillors had no liability for counsel fees in respect of A-94-22, they should be entitled to costs: *Armand v. Carr*, [1927] S.C.R. 348, 1927 CanLII 4; *W.H. Brady Co. v. Letraset Canada Ltd.*, 1990 CanLII 13090 (F.C.A.), [1991] 2 FC 226 at 232-233. As for A-97-22 and A-98-22, nothing in the record convinces me that RPFN directly paid Wuttunee and Nicotine's expenses in these appeals.

[23] An important part of the RPFN's costs submissions concerns the fact that Whitford and Moosomin have sued in the Saskatchewan Court of King's Bench to recover legal fees incurred by Wuttunee and Nicotine and the Other Councillors but paid by RPFN. The RPFN argues that if Whitford and Moosomin are successful in the Saskatchewan proceeding, much of the factual foundation for the appeals and for their submissions on costs will no longer exist. The RPFN argues that the Saskatchewan proceeding is a collateral attack on the proceedings before this Court and the Federal Court, and that "it would be improper for this Court to consider these circumstances" in assessing costs against the RPFN. I disagree with this argument. I need only note that any award that might eventually be made in the Saskatchewan proceeding would obviously take into account what has occurred in this Court and in the Federal Court, including the assessment of costs. It would be for the court in Saskatchewan to consider whether the Saskatchewan proceeding is a collateral attack and what amount, if any, should be recovered.

[24] As part of their submissions, Whitford and Moosomin argue that consideration should be given to the fact that they are impecunious. Wuttunee and Nicotine argue that a party's impecuniosity is not a relevant factor in the assessment of costs, and they rely on this Court's

decision in *Leuthold v. Canadian Broadcasting Corporation*, 2014 FCA 174 at para. 12 (*Leuthold*), in support of this argument. However, there is an important distinction to be drawn between an award of costs and an assessment of those costs once awarded. An award of costs determines who is liable to whom for costs, and the basis upon which costs are to be assessed. Costs may be assessed at the same time as they are awarded, or they may be assessed separately. In the present case, no award has yet been made, and this decision concerns both the award and the assessment of costs. A court has considerable discretion to consider many factors when awarding costs. Such factors are identified in Rule 400(3) of the *Rules*. However, an assessment of costs that have been awarded beforehand permits less discretion. The comment in *Leuthold* concerning impecuniosity upon which Wuttunee and Nicotine rely relates to the assessment, not the award, of costs. *Leuthold* is not an authority for treating impecuniosity as being irrelevant to the award of costs.

III. Analysis

[25] Having now set out the most important arguments made in respect of costs, and having stated a few preliminary conclusions thereon, I turn now to the award and assessment thereof in each of the appeals in issue.

A. *A-121-22 and A-126-22*

[26] It is convenient to begin with the costs appeals, A-121-22 and A-126-22, which I deal with together. As indicated above, one appeal was brought by Wuttunee and Nicotine and the other by the RPFN, and both concerned the Federal Court's decision on costs. Though the

respective appellants filed separate memoranda of fact and law, there was considerable overlap in their arguments. Whitford and Moosomin's memoranda of fact and law in the two appeals were the same, as were their submissions on costs. Accordingly, I would award a single set of costs in these two appeals to be paid jointly and severally by Wuttunee and Nicotine and the RPFN.

[27] The parties agree, and I concur, that a lump sum award of costs is appropriate in these two appeals, as well as in the others.

[28] In addition to the observations set out above, I note that I do not accept Wuttunee and Nicotine's arguments that Whitford and Moosomin engaged in conduct that lengthened the proceeding such that costs should be adjusted. The alleged conduct was in relation to interlocutory motions, and no costs related thereto will be awarded, as discussed above.

[29] In setting the amount of costs to be paid, I have considered the bills of costs that Whitford and Moosomin provided in their submissions. I accept that costs should be doubled in view Rule 420 and the settlement offers that were not accepted. However, I would allow only one set of costs (as indicated), and I would be guided by the top of Column IV of Tariff B of the *Rules* rather than the top of Column V. Moreover, I would not allow several of the amounts claimed by Whitford and Moosomin. Specifically, in light of my discussion above concerning the costs of the motions in these appeals, I would disallow all amounts related thereto. This includes all amounts under Items 5, 7, 8, 9 and 12. I would allow only the following amounts under Tariff B:

- Item 15 – Costs submissions – 9 units

- Item 19 – Memorandum of Fact and Law – 9 units
- Item 22(a) – First counsel – 3.5 hours X 4 units/hour = 14 units
- Item 22(b) – second counsel – 7 units
- Item 24 – Travel by Nathan Xiao-Phillips – 7 units
- Item 24 – Travel by Mervin C. Phillips – 7 units

[30] The sum of these amounts is 53 units, which becomes 106 units when doubled. As of April 1, 2023, the unit value of Tariff B has been increased to \$170. At \$170 per unit, this yields \$18,020. I would add the amounts claimed by Whitford and Moosomin as disbursements in the two appeals (\$2,348.73 and \$1,305.64) and arrive at a total amount of \$21,674.37. This amounts to just under 19% of the total amount of fees that Whitford and Moosomin claim to have incurred in these two appeals (\$115,215), which I find to be reasonable in the circumstances of appeals of a decision on costs.

B. *A-97-22 and A-98-22*

[31] As with the costs appeals, it is convenient to address the costs in A-97-22 and A-98-22 together. Wuttunee and Nicotine were the respective appellants in these appeals, and they relied on a single memorandum of fact and law. They also provided a single set of submissions on costs in these two appeals. The same is true for Whitford and Moosomin's memorandum of fact and law and costs submissions. As with the costs appeals, I would award a single set of costs in these two appeals. However, the RPFN was not involved in these appeals as a party, and I am not convinced that it financially supported these appeals (not directly at least). Accordingly, I would order that the costs of these appeals be paid jointly and severally by Wuttunee and Nicotine, but I

would not order that the RPFN have any liability for such costs. Despite the public interest element of these appeals, I find this consideration to be insufficient to justify ordering that the RPFN pay the costs awarded in an appeal in which it was apparently uninvolved. Moreover, I would not increase costs due to the public interest element because all of the parties involved are individuals whose resources are modest.

[32] As with the costs appeals, I have considered the bill of costs submitted by Whitford and Moosomin. Again, I would allow a single set of costs for both appeals, I would be guided by Column IV of Tariff B, and I would double costs pursuant to Rule 420. I would disallow costs related to motions. I would also disallow claims to steps that are already accounted for in the award of the costs of the costs appeals; this includes travel under item 24. I would allow only the following amounts:

- Item 15 – Costs submissions – 9 units
- Item 19 – Memorandum of Fact and Law – 9 units
- Item 22(a) – First counsel – 7.5 hours X 4 units/hour = 30 units
- Item 22(b) – second counsel – 15 units

[33] The sum of these amounts is 63 units, which becomes 126 units when doubled. At \$170 per unit, this yields \$21,420. I would add the amount claimed by Whitford and Moosomin as disbursements (\$5,002.42) and arrive at a total amount of \$26,422.42. This amounts to about 30% of the total amount of fees that Whitford and Moosomin claim to have incurred in these two appeals (\$89,100). I find this amount to be reasonable in the circumstances.

C. A-94-22

[34] If I were to assess costs in this appeal on the same bases as the other appeals, I would allow only the following amounts under Tariff B:

- Item 19 – Memorandum of Fact and Law – 9 units
- Item 22(a) – First counsel – 7.5 hours X 4 units/hour = 30 units

[35] The sum of these amounts is 39 units. At \$170 per unit, this yields \$6,630. Based on Whitford and Moosomin’s submissions, I would disallow the amounts claimed as disbursements. Despite the fact that the amount I would arrive at using this approach would be a small fraction of the total amount of expenses the Other Councillors claim were incurred, I would nevertheless reduce it. In addition to recognizing the fact that Whitford and Moosomin were clearly acting in the public interest and are impecunious, I also recognize that all of the Other Councillors were found to have engaged in serious electoral fraud. I would assess costs in this appeal at \$1,000, payable by Whitford and Moosomin to the respondents, the Other Councillors and the RPFN.

IV. Conclusion

[36] In conclusion, I would order that the costs of the present appeals be paid as follows:

1. \$21,674.37, to be paid to Whitford and Moosomin jointly and severally by Wuttunee and Nicotine and the RPFN (in respect of Court Files Nos. A-121-22 and A-126-22).
2. \$26,422.42, to be paid to Whitford and Moosomin jointly and severally by Wuttunee and Nicotine (in respect of Court Files Nos. A-97-22 and A-98-22).

3. \$1,000, to be paid to the Other Councillors and the RPFN jointly and severally by Whitford and Moosomin (in respect of Court File No. A-94-22).

“George R. Locke”

J.A.

“I agree.

Anne L. Mactavish J.A.”

“I agree.

K. A. Siobhan Monaghan J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-94-22, A-97-22, A-98-22,
A-121-22, A-126-22

DOCKET: A-94-22

STYLE OF CAUSE: MARY LINDA WHITFORD and
ALICIA MOOSOMIN v. JASON
CHAKITA, MANDY CUTHAND,
LUX BENSON, DANA FALCON,
HENRY GARDIPY, SAMUEL
WUTTUNEE, SHAWN
WUTTUNEE, and RED
PHEASANT FIRST NATION

AND DOCKET: A-97-22

STYLE OF CAUSE: CLINTON WUTTUNEE v. MARY
LINDA WHITFORD and ALICIA
MOOSOMIN

AND DOCKET: A-98-22

STYLE OF CAUSE: GARY NICOTINE v. MARY
LINDA WHITFORD and ALICIA
MOOSOMIN

AND DOCKET: A-121-22

STYLE OF CAUSE: CLINTON WUTTUNEE and
GARY NICOTINE v. MARY
LINDA WHITFORD, ALICIA
MOOSOMIN, BURKE RATTE
and RED PHEASANT FIRST
NATION

AND DOCKET: A-126-22

STYLE OF CAUSE: RED PHEASANT FIRST NATION
v. MARY LINDA WHITFORD,
ALICIA MOOSOMIN, BURKE

RATTE, CLINTON WUTTUNEE
and GARY NICOTINE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

LOCKE J.A.

CONCURRED IN BY:

**MACTAVISH J.A.
MONAGHAN J.A.**

DATED:

JUNE 28, 2023

WRITTEN REPRESENTATIONS BY:

Docket A-94-22

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