Federal Court of Appeal | Cour d'appel fédérale

Date: 20250908

Docket: A-221-23

Citation: 2025 FCA 159

CORAM: **WEBB J.A.**
BIRINGER J.A.
DAWSON D.J.C.A.

BETWEEN:

RICHARD SHANKS

Appellant

and

SALT RIVER FIRST NATION #195

Respondent

Heard at Vancouver, British Columbia, on March 5, 2025.

Judgment delivered at Ottawa, Ontario, on September 8, 2025.

REASONS FOR JUDGMENT BY: DAWSON D.J.C.A.

CONCURRED IN BY: WEBB J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

DAWSON D.J.C.A.

[1] For reasons cited *Shanks v. Salt River First Nation #195*, 2023 FC 931, the Federal Court allowed an application for judicial review brought by Richard Shanks, a member of the Salt River First Nation. The Court's judgment set aside a Band Council resolution enacted by the First Nation that purported to exclude a number of members of the First Nation from receiving

per capita distribution payments made annually from treaty settlement funds and awarded costs to Mr. Shanks. The Court sought written submissions on the issue of costs.

[2] Mr. Shanks submitted that the litigation was public interest litigation brought for the benefit of other members of the First Nation who were also excluded from per capita distribution payments. His unchallenged evidence was that he "brought this action to address discrimination that was happening to me and other band members" and that he brought an application "not to benefit myself, but to right a wrong I felt had been done to many other members of my community." He swore that he was unable to pay his lawyers' account so that he would be required to take on substantial debt. He sought solicitor-client costs in the amount of $32,608.84 or, in the alternative, elevated lump sum costs in an amount equaling 60% of his costs.

[3] Mr. Shank's application for enhanced costs was supported by his own affidavit which attached a copy of the statement of account he received from his lawyers in respect of the legal expenses he incurred in bringing the application. The account was in the total amount of $32,608.84, which represented fees in the amount of $27,370., disbursements in the amount of $1,864.23, plus GST and PST totaling $3,372.61. He also attached a bill of costs which calculated his costs pursuant to Tariff B to be $9,329.60, plus taxable disbursements in the amount of $1,900.44 for a total of $11,230.04 (exclusive of any allowance on account of taxes).

[4] The First Nation did not provide a draft bill of costs or any evidence relevant to the issue of costs. However, it argued that an appropriate award of costs under Column III of Tariff B was $4,290.

[5] For brief reasons cited as 2023 FC 931, the Federal Court concluded that Mr. Shanks was not entitled to costs assessed on a solicitor-client basis, nor was he entitled to elevated costs on a lump sum basis. Instead, recognizing that the application for judicial review was not straight-forward, and taking "guidance from the costs awarded in other governance matters that have tended to be in the range of $2500.00 to $5000.00" the Court awarded costs in the all-inclusive amount of $5,000. This is an appeal from the judgment of the Federal Court.

[6] On this appeal, Mr. Shanks argues that the Court committed errors of law when applying the correct test for assessing elevated costs. The First Nation argues that costs are "quintessentially discretionary" and that the appeal should be dismissed because the Court committed no error of law or misapprehension of material facts.

[7] I have not been persuaded that the Court erred in law in dismissing the claim for costs calculated on a solicitor-client basis. In *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 the Court considered when an award of special costs on a full indemnity basis may be available in public interest litigation. At paragraphs 140 and 141 the Court wrote:

> [140] In our view, with appropriate modifications, this test serves as a useful guide to the exercise of a judge's discretion on a motion for special costs in a case involving public interest litigants. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

> [141] Where these criteria are met, a court will have the discretion to depart from the usual rule on costs and award special costs.
>
> [Emphasis added.]

[8] The Federal Court, at paragraph 15 of its reasons, stated that for an award of solicitor-client costs to be made the case "must also have a significant and widespread societal impact". In my view, on the evidentiary record before the Court, it was open to the Federal Court to decline to exercise its discretion to award costs on a full indemnity basis.

[9] Turning to Mr. Shanks' alternate claim for elevated costs on a lump sum basis, the Court in its analysis did not specifically advert to this claim. At paragraph 16 of the Court's reasons the Court declined to "characterize the issues raised by Mr. Shanks as being solely in the public interest, as he also had a direct personal interest in the outcome" but cited this as a further reason for declining to award costs on a solicitor-client basis. No other reason was given for dismissing Mr. Shanks' claim to elevated lump sum costs.

[10] In *Carter*, in the passage quoted above, the Supreme Court was clear that not every pecuniary interest disentitles a litigant to enhanced costs. Rather, disentitlement flows from a personal or pecuniary interest that would justify bringing the proceedings on economic grounds. This principle has been recognized and applied in the jurisprudence of the Federal Court. See, for example, *MacKinnon v. Canada (Attorney General)*, 2025 FC 422 at paragraph 311.

[11] In my view, the Federal Court erred in law in finding that Mr. Shanks was not entitled to enhanced costs because he had a direct personal interest in the outcome of the litigation. Rather, the Federal Court was obliged to consider whether his pecuniary interest in having annual per capita payments reinstated to him justified bringing the application on economic grounds.

[12] The evidentiary record before the Federal Court on this point was not extensive. However, had the Federal Court considered the nature of Mr. Shanks' pecuniary interest, it would have found that in 2021 the amount of the per capita distribution paid was $800 per person (affidavit of Levi MacDonald, paragraph 12 and Exhibit C). In the absence of any evidence to the contrary, assuming the per capita distributions to approximate $800 per year, it would take in the order of 40 years for Mr. Shanks to be reimbursed for payment of his fees and disbursements. In my view, had the Court properly considered this evidence it could not have reasonably concluded that Mr. Shanks' own pecuniary interest warranted pursuing litigation so as to disentitle him from receiving enhanced costs.

[13] Mr. Shanks asks that if this Court finds error on the part of the Federal Court, the issue of costs not be remitted to the Federal Court. He submits that the issue of the assessment of costs is neither factually complex nor factually voluminous and there are no issues of credibility. Further, a referral back to the Federal Court will incur the expenditure of additional legal fees and delay. I agree. Sending the assessment of costs back to the Federal Court is neither proportionate nor an appropriate allocation of further Court resources.

[14] On the basis of Mr. Shanks' unchallenged evidence, I am satisfied that the proceeding raised an issue of importance that extended beyond the immediate interests of Mr. Shanks and the First Nation and clarified the First Nation's governance framework and the entitlement of members to annual per capita distribution payments. Mr. Shanks' interest in bringing the application did not justify the costs of bringing it and the issue had not previously been determined. The First Nation has a superior capacity to bear the costs of the proceeding and Mr. Shanks' conduct has not been vexatious, frivolous or abusive. He is entitled to elevated costs to be awarded on a lump sum basis.

[15] In *Nova Chemicals Corporation v. The Dow Chemical Company*, 2017 FCA 25, this Court wrote that increased costs in the form of lump sum awards tend to range between 25% and 50% of actual fees.

[16] In oral argument, counsel for Mr. Shanks conceded that the bill of costs put before the Federal Court erroneously claimed costs for a second day of hearing when in fact the matter was concluded in a day. The bill of costs also claimed fees for a second counsel that in my view was not warranted by the complexity of this case. Mr. Shanks' costs calculated on the basis of Tariff B would be in the order of $5,780 plus disbursements. An award of 25% of his actual fees would result in an award of costs in the order of $6,818.25, which is not materially higher than the result obtained by application of Tariff B. Accordingly, in my view an award based on 50% of the fees or $13,636.50 would provide appropriate compensation and reflect the public interest nature of the litigation.

[17] Accordingly, I would allow the appeal, set aside the judgment of the Federal Court and substitute in its stead an order that the First Nation pay to Mr. Shanks costs in the lump sum amount of $13,636.50, plus disbursements in the amount of $1,900.44, plus all applicable taxes. I would also award Mr. Shanks the costs of this appeal.

"Eleanor R. Dawson"
D.J.C.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	WEBB J.A. BIRINGER J.A.
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