Federal Court  Cour fédérale

Date: 20240709

Docket: T-1848-11

Citation: 2024 FC 1081

Ottawa, Ontario, July 9, 2024

PRESENT: Case Management Judge Benoit M. Duchesne

BETWEEN:

MOOSOMIN FIRST NATION, and CHIEF ELLIOT KAHPEAYSEWAT, acting on his own behalf and on behalf of all past, present, future and potential members and heirs, executors and assigns of such members of MOOSOMIN FIRST NATION

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

COSTS ORDER

[1] On January 9, 2024, the Court dismissed the non-party moving party, Rath & Company's ("R&C") motion to compel answers following cross-examinations on affidavits. The motion to compel was brought within a larger, primary motion filed on March 16, 2023, by R&C, the former solicitors of record for the Plaintiffs Moosomin First Nation and the Moosomin First Nation members (together, the "Plaintiffs" or the "MFN"), against its former clients the MFN and against the Bailey Wadden & Duffy LLP ("BWD") law firm, who are the solicitors of record

retained by the MFN through its Chief and Council to the represent their interests in this action after the MFN terminated R&C's retainer.

[2] R&C has since abandoned its motion filed on March 16, 2023.

[3] This Order does not make any costs order with respect to the discontinued motion. The costs of the motion will be dealt with separately should either the Plaintiffs, the Defendant or BWD seek their costs of the discontinued motion pursuant to Rule 411(b) of the *Rules.*

[4] The Court invited the parties to the dismissed motion to compel to make submissions as to the costs of the motion in the event that they could not agree on costs by January 20, 2024. The parties could not agree on costs and filed their primary submissions in accordance with the Court's January 9, 2024, Order.

I. Principles regarding costs

[5] Costs serve a three-fold objective: to provide compensation, promote settlement and deter abusive behaviour (*Air Canada v. Thibodeau*, 2007, 2007 FCA 115, at paras. 21 and 24).

[6] Rule 400 of the *Federal Courts Rules* provides that the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

[7] Rule 401 of the *Rules* provides that the Court may award costs of a motion in an amount fixed by the Court, and that where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

[8] The costs awarded are party and party costs assessed by the Court in the exercise of its discretion pursuant to Rules 400 unless there is some reason to award costs on the solicitor and client scale. Pursuant to Rule 407, unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

[9] Solicitor-client costs are awarded only where the party's conduct has been reprehensible, scandalous or outrageous, and not simply because their case was very weak (*Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3 at 134; *Wewayakum Indian Band v. Wewayakai Indian Band*, 1999 CanLII 8839 (FCA). Litigating for business purposes such as inhibiting your competition in the same industry does not in and of itself meet the threshold for a full indemnity costs award (*Ultima Foods Inc. v. Canada (Attorney General)*, 2013 FC 238 (CanLII), at paras 13 and 14), although it may be the basis of a solicitor-client costs award (*Jazz Air LP v. Toronto Port Authority*, 2007 FC 976 (CanLII), at paras 6 and 9).

[10] In *Hutton v. Sayat*, 2024 FC 784 (CanLII), Justice Aylen explained at paragraph 6 that:

> [6] An award of costs on a solicitor-client basis is exceptional and the party seeking such costs must demonstrate that the conduct of the paying party was reprehensible, scandalous or outrageous or that such costs are justified by reason of public interest [see *Rice v New Brunswick*, 2002 SCC 13 at para 86; *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 26; *Asics Corporation v 9153-2267 Québec Inc*, 2017 FC 257 at para 80, citing *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 67]. Justice Harrington in *Microsoft Corporation v 9038-3746 Quebec Inc*, 2007 FC 659 at paragraph 16 described such conduct as follows:
>
> > "Reprehensible" behaviour is that deserving of censure or rebuke; blameworthy. "Scandalous" comes from scandal which may describe a person, thing, event or circumstance causing general public outrage or indignation. Among other things, "outrageous" behaviour is deeply shocking, unacceptable, immoral and offensive […].

[11] In the same decision, in considering the differences, if any, between a solicitor-client costs award and a full indemnity costs award, Justice Aylen referred the Court's comments in *Merck & Co v Apotex Inc*, 2002 FCT 1210 at paragraph 11, where the Court made the following comment on solicitor-client costs:

> The award of costs on a solicitor and client basis is intended to provide full indemnification of costs reasonably incurred in the course of carriage by the plaintiffs of this litigation. In fixing those costs, the Court must carefully consider the costs claimed in relation to the work reasonably required, not on the basis of hindsight with 20/20 vision of what was finally required, and not as an assessment item by item as an assessing or taxing officer would do, but sufficiently reviewed to ensure that costs awarded are reasonably incurred. [Citation omitted.]

[12] These same comments were considered by Justice Locke, as he then was, *Mediatube Corp v Bell Canada*, 2017 FC 495 at paragraph 33, where he commented that:

> In my view, the term "solicitor-and-client costs" in this Court generally contemplates the full amount of a party's necessary expenses reasonably incurred. Nothing I have seen in the plaintiffs' authorities clearly convinces me that solicitor-and-client costs, in this Court, should be construed to mean anything less.

[13] Justice Aylen then held in *Hutton* at para 16 that a solicitor-client costs award means an award of the legal fees that were reasonably incurred by the successful party. I find Justice Aylen's analysis of what constitutes solicitor-client costs instructive, and I take guidance from it.

[14] The Court may award increased costs pursuant the Tariff, or even go beyond the Tariff itself when required to achieve a reasonable outcome and where applying the Tariff would be unsatisfactory (*Ultima Foods Inc. v. Canada (Attorney General)*, 2013 FC 238 (CanLII), at para 23). This can be case when the Court determines that a reasonable award cannot be achieved

within the Tariff. In such a situation, the Court may award Tariff Column V costs and a premium of a fixed percentage of the actual costs that are in excess of the Tariff.

[15] The principles applicable to the assessment of costs are summarized in *Allergan Inc. v Sandoz Canada Inc*., 2021 FC 186 at paras 19 to 35. Those principles were further summarized by the Chief Justice in *Bell Media Inc. v Macciacchera (Smoothstreams.tv),* 2023 FC 1698, at para 15 as being that:

> (i) the Court has broad discretion over costs;
>
> (ii) the Court's discretion must be exercised in accordance with well-established principles pertaining to costs, unless the circumstances justify a different approach;
>
> (iii) the successful party is ordinarily entitled to have its costs;
>
> (iv) the Court has been trending toward granting lump sum awards in recent years, often as a percentage of actual costs incurred;
>
> (v) in intellectual property law cases, those lump sum awards have been increasingly "well in excess of" Tariff B of the Rules - typically in the range of 25%-50% of actual fees, plus reasonable disbursements; and
>
> (vi) in determining the specific amount of costs to be awarded, it is incumbent upon the Court to examine the relevant factors, including any that are listed in Rule 400(3).

[16] The Court's discretion and ability to award a lump sum of costs is dependent to a degree on the Court's ability to review the claiming party's bill of costs including dockets and disbursements to ensure that the costs claimed are appropriate, not duplicative and reasonable in light of the Rule 400(3) factors. A lump sum award of costs is not appropriate without those documents and without the information required to assess the actual costs incurred.

II. Discussion

[17] At the Court's request and direction, the parties filed their original costs submissions in January 2024 as well as additional costs submissions that contained the parties' respective dockets, invoices, and related documents relevant to their claimed costs until April 8, 2024.

[18] As required by the *Rules*, I must consider the Rule 400(3) factors in determining the costs of the motion to compel. Those factors are identified below, with my understanding of the parties and the non-parties' submissions as they relate to each of the factors in connection with the motion to compel:

a) the result of the proceeding: the responding parties were entirely successful;

b) the amounts claimed and recovered in the proceeding: this factor is not relevant to the proceeding as the issue was not one of damages or monetary recovery;

c) the importance and complexity of the issues: the issues on the motion to compel were of relative complexity and they were very important to all of the participants to the motion;

d) as there was no liability question at issue on the motion to compel, the apportionment of liability factor is not relevant;

e) offers to settle: no offers to settle appear to have been made;

f) offer to contribute: the factor is not relevant to the issues or to the motion;

g) the amount of work involved in connection with the motion:

i. Tariff-based submissions:

1) The Respondent BWD has claimed 53 Column V units at the rate of $170 per unit, plus GST at 5% for a total claim of $9,460.50, unless a lump sum approach is adopted by the Court;

2) The Plaintiffs have claimed 43 Column V units, for a total of $7,310.00 in fees, unless a lump sum approach is adopted by the Court;

3) The non-party moving party R&C argues that much of the work the Respondent BWD and the Plaintiff undertook was unnecessary considering the disposition of the motion to compel and the abandonment of the underlying removal motion. It argues with jurisprudential support that the mid-point in Column III should be used to assess costs instead of the Column V. R&C argue that BWD's costs should be limited to $1,260 plus GST per Column III of Tariff B, and that no costs ought to be awarded the Plaintiffs as their presence on the motion to compel was not necessary.

ii) Lump-sum submissions:

1) The Respondent BWD have claimed $30,912.50 as a lump sum costs award on a solicitor-client costs basis. The Respondent BWD have provided their detailed invoices of legal fees incurred on the motion to compel in support of their claimed amount.

2) The Plaintiffs have claimed $10,435.00 as a lump sum costs award on a solicitor-client basis. The Plaintiffs have provided detailed invoices

of legal fees incurred on the motion to compel in support of their claimed amount.

3) The non-party moving party R&C argues that it has not been provided with a meaningful opportunity to argue against BWD's lump sum costs submission because of the redacted copies of the invoices served upon it by BWD. In any event, R&C argues that any lump sum costs award should be no more than 25% of the reasonably incurred costs as determined by the Court in accordance with *Bauer Hockey Ltd. v. Sport Maska Inc. (CCM Hockey),* 2020 FC 862 (CanLII) and *Seedling Life Science Ventures, LLC v Pfizer Canada ULC,* 2020 FC 505, among others.

h) whether the public interest in having the proceeding litigated justifies a particular award of costs: neither party has made submissions on this point;

i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding: the Respondent BWD and Plaintiffs both submit that R&C's motion to compel was an abuse of process, unnecessary, ill-advised and wasteful. R&C submits that one must not use hindsight to determine whether a motion was legitimately brought, and that, in any event, the motion to compel and the underlying motion were brought as a result of the conduct of the Plaintiffs' new solicitors at BWD;

j) the failure by a party to admit anything that should have been admitted or to serve a request to admit: the parties' and non-parties' submissions are consistent with

their comments and position with respect to the factor identified at paragraph i) immediately above;

k) whether any step in the proceeding was (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution: the parties' and non-parties' submissions are consistent with their comments and position with respect to the factor identified at paragraph i) immediately above;

l) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily; neither party has made submissions on this issue;

m) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third-party claim, to avoid the operation of rules 292 to 299: neither party has made submissions on this issue;

n) any other matter that the Court considers relevant:

    i. BWD argues that R&C's motion to compel, as well as the underlying removal motion, constituted R&C making good on its promise to not tolerate the Plaintiffs' decision to terminate their retainer "lying down" and to create a lengthy legal dispute to wreak vengeance on its former client and on their new solicitors; and,

    ii) The moving party R&C argues the motion to compel was appropriate because the conduct that gave rise to removal motion was started by the BWD.

[19] R&C's motion to compel was based on an incorrect understanding of the applicable law with respect to the permissible scope of cross-examination, as well as an incorrect understanding of the grounds it alleged in support of its own motion for the removal of a competitor law firm

from the record for its former client. That such is the case is obvious from the substance of the motion to compel and from the questions asked and objected to. R&C's incorrect understanding of the applicable law is not the basis for a solicitor-client costs award.

[20] Regardless of whether the questions asked were intended to shed light on issues that R&C believed would advance its interests before the Court, it was clear from the questions asked that R&C was pursuing a strategy throughout the cross-examinations to demean, undermine and embarrass Ian Bailey, Evan Duffy and Joseph Wadden as lawyers and as individuals before their clients and their solicitors on the underlying motion.

[21] It was also apparent that questions were directed to topics that are quite plainly beyond this Court's jurisdiction as they veered directly into questions regarding one's understanding of indigenous culture, solicitor competence falling within the jurisdiction of the Law Society of Alberta as well as allegations of misconduct and conflict of interest that would typically be matters to be addressed by the Law Society of Alberta. Indeed, the Court had been alerted by the parties and the non-parties during a case management conference in this proceeding that R&C had lodged a complaint against BWD and/or its lawyers with the Law Society of Alberta that caused the Law Society of Alberta to make written representations by way of letter to this Court in connection with R&C's motion to compel. Again here, it is transparent that R&C was pursuing a strategy to denigrate a group of competing solicitors before their clients and before the Court by painting them as having neither the competence nor the experience to represent their clients to the best of their abilities, or, in a manner comparable to R&C's self-assessed abilities.

[22] What is perhaps of greater concern is that R&C in its costs submissions argues that its conduct and approach is justified because, "in considering the behaviour and conduct of the parties, it should not be forgotten that R&C filed its Removal Motion as a result of the conduct of Ian Bailey, Evan Duffy and Joseph Wadden (collectively "BWD") solicitors of record and officers of the Court in the within representative action". None of the conduct alleged has been substantiated before this Court and no evidence was led to show that it had been substantiated before any court or other decision-making body.

[23] R&C's argument echoes the justification that is too often argued by those engaged in abusive conduct in too many contexts, where they blame their intentionally or recklessly abusive conduct on the actions of the person against whom they have directed their ire. That R&C had not by the time of its costs' submissions come to understand that its actions and approach on its motion more generally and its questions on cross-examination were legally misguided and an abuse of process is of significant concern to the Court. That R&C then proceeded to repeat its allegations of impropriety against BWD as justification for its position on the matter of costs after the Court had dealt the allegations in the decision disposing of the motion to compel suggests strongly that R&C does not appreciate that its conduct on its motion to compel, at least, was highly inappropriate and abusive.

[24] Justice Hugessen's words as set out in *Jazz Air LP v. Toronto Port Authority*, 2007 FC 976 (CanLII), at paragraph 9 are particularly apt at this juncture:

> [9] The applicant is an affiliate of a very large corporation with apparently very deep pockets and a dominant market position which is seeking to prevent a much smaller competitor from establishing itself in an important segment of the market. **While that may be, I suppose, a legitimate business purpose the Court**

> **must make it clear that it will not allow its processes to be abused in pursuit of it.** I would fix the amount of the costs to be paid by the applicant in a total of $100,000 to be divided equally between the respondent and the interveners. (the emphasis is mine)

[25] It is my view that the questions asked during the cross-examinations and R&C's insistence in seeking to compel answers to those questions was an intentional use of the Court's processes to demean, denigrate and intimidate other lawyers from competing against them in the market of providing legal services to First Nations and indigenous persons. The Court will not allow its processes to be abused for such purposes.

[26] R&C's conduct meets the threshold of reprehensible, scandalous, and outrageous conduct described by Justice Harrington in *Microsoft Corporation v 9038-3746 Quebec Inc,* 2007 FC 659 at paragraph 16, and that a solicitor-client costs award is intended to address pursuant to Rule 400(6). A solicitor-client costs award will therefore be made.

[27] I have reviewed the invoices, dockets and supporting costs documentation submitted by BWD and by the Plaintiffs as well as R&C's comments thereon. I have also considered BWD's submitted invoices and the Plaintiffs' submitted invoices as they reflect their alternative claim for costs that is not based on the Tariff, and R&C's submissions in connection with the same. Having considered those submissions, I am not persuaded that making a cost award based on the Tariff would yield a result that meets the objectives of costs in light of the foregoing, or in consideration of the public interest in deterring conduct such as the conduct that has occurred here.

[28] R&C wrote to the Court to October 13, 2023, to seek a case management conference to schedule and fix a timetable for the briefing and argument of the motion to compel that arose

from the cross-examinations. The costs to be awarded through this Order will therefore be considered from October 13, 2023, going forward.

[29] I have reviewed the Respondent BWD's additional costs submissions and submitted invoices. I am satisfied that their reasonable legal costs incurred in connection with R&C's motion to compel began on October 13, 2024, continued to March 27, 2024, and include BWD's costs submissions. The claimed actual legal fees incurred that are included in their costs' submissions are in the amount of $30,910, excluding disbursements and GST. I exclude the docket entry of $60 for October 12, 2023, and calculate the reasonable legal fees incurred by BWD in connection with the motion to compel to be in the amount of $30,850.

[30] There are no details as to the disbursement incurred by BWD. As result, no amount will be awarded for BWD's disbursements.

[31] I have reviewed the Plaintiffs' additional costs submissions and submitted invoice. I am satisfied that their reasonable legal costs incurred in connection with R&C's motion to compel began on October 13, 2024, and continued to January 23, 2024, as reflected in the submitted invoice. The claimed actual legal fees incurred that are included in their costs' submissions are in the amount of $10,435.00, excluding disbursements and GST. I disagree with R&C that the Plaintiffs were not required to attend or to argue the motion to compel. Their interests were engaged in the motion to compel as a number of questions were directed to matters covered by solicitor-client privilege that they were entitled to defend. They were entitled to be served with the motion materials, lead evidence, and make representations on the motion. I calculate the Plaintiffs' reasonable legal fees incurred in connection with the motion to compel to be in the amount of $10,435.00.

[32] The single disbursement reflected on the submitted invoice is for search services that are not otherwise described. In the circumstances, the disbursement cannot be ordered for want of particulars. As result, no amount will be awarded for the Plaintiffs' disbursements.

[33] Proceeding on a solicitor-client costs basis, an Order will issue awarding BWD their solicitor-client costs of the motion to compel in the amount of $30,850, plus GST thereon in the amount of 5% equalling $1,542.50, for a total of $32,392.50, as well as awarding the Plaintiffs their solicitor-client costs of the motion in the amount of $10,435.00.

[34] I am also of the view that the motion to compel should not have been brought by R&C and was doomed to fail. Pursuant to Rule 401(2), the costs ordered shall be payable forthwith.

[35] Interest is also payable on this costs award. Pursuant to subsection 37(1) of the *Federal Courts Act*, RSC 1985, c. F-7, the law of the province of Alberta relating to interest on judgments is applicable. Pursuant to the *Judgment Interest Regulation*, Alta Reg 215/2011, paragraph 1(ff) and section 4 of the *Judgment Interest Act*, RSA 2000, c J-1, this costs order shall bear interest at the rate of 5.15% until fully paid.

THIS COURTS ORDERS that:

1. The non-party moving party Rath & Company shall forthwith pay Bailey Wadden & Duffy LLP their costs of the motion to compel in the amount of $32,392.50, inclusive of taxes.

2. The non-party moving party Rath & Company shall forthwith pay the Plaintiff Moosomin First Nation their costs of the motion to compel in the amount of $10,435.00, inclusive of taxes.

3. These cost awards shall bear post-judgment interest at the rate of 5.15% *per annum* from the date of issuance of this Order until fully paid.

"Benoit M. Duchesne"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1848-11
STYLE OF CAUSE:	MOOSOMIN FIRST NATION, and CHIEF ELLIOT KAHPEAYSEWAT, acting on his own behalf and on behalf of all past, present, future and potential members and heirs, executors and assigns of such members of MOOSOMIN FIRST NATION v HIS MAJESTY THE KING
PLACE OF HEARING:	OTTAWA, ONTARIO (**IN WRITING)**
DATE OF HEARING:	JULY 9, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	ASSOCIATE JUDGE DUCHESNE
DATED:	JULY 9, 2024

SOLICITORS OF RECORD:

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