Federal Court  Cour fédérale

Date: 20240726

Dockets: T-2546-22, T-2536-22

Citation: 2024 FC 1191

Ottawa, Ontario, July 26, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

TERRINA BELLEGARDE and JOELLEN HAYWAHE

Applicants

and

SCOTT EASHAPPIE, SHAWN SPENCER, TAMARA THOMSON and CARRY THE KETTLE FIRST NATION

Respondents

SUPPLEMENTAL JUDGMENT AND REASONS

I. Overview

[1] In *Bellegarde v Carry the Kettle First Nation*, 2024 FC 699 [*Bellegarde*], I granted Ms. Bellegarde's and Ms. Haywahe's applications for judicial review of their removal from office as councillors of Carry the Kettle First Nation [CTKFN].

[2] I also ordered counsel to provide costs submissions. This Supplemental Judgment and Reasons addresses the issue of costs.

II. Parties' Submissions

A. *The Submissions of Ms. Bellegarde and Ms. Haywahe*

[3] The Applicants seek an order for solicitor-client costs in an amount of $113,068.81 (inclusive of disbursements) or in the alternative, a lump sum cost award of $75,000.

[4] The Applicants argue that the Respondents did not have quorum to remove them from office and have relentlessly defended their actions including by placing themselves in contempt (*Bellegarde v Carry the Kettle First Nation*, 2024 FC 48 at para 91). Moreover, they have not provided any evidence that they personally paid for the litigation, but it can instead be presumed that all of their legal costs were paid by CTKFN (*Knebush v Maygard*, 2014 FC 1247 at para 67; *Papequash v Brass*, 2018 FC 325 at para 2).

[5] The Applicants also argue that the Respondents delayed the proceedings by bringing a failed jurisdictional motion which the Court held was an abuse of process (*Bellegarde* at para 87), and by taking many steps to stymie the Applicants' access to justice. The egregious and reprehensible conduct of the Respondents justifies solicitor-client costs (*Red Pheasant First Nation v Whitford*, 2023 FCA 29 at para 52 [*Red Pheasant*]).

[6] Relying on *Shotclose v Stoney First Nation*, 2011 FC 1051 at paragraph 18 [*Shotclose*], the Applicants argue that when a Chief and councillors have their legal costs paid by the First Nation, the applicant's cost should also be paid on the same basis (see also *Red Pheasant* at para 69; *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at para 27 [*Whalen*]).

[7] Moreover, the Applicants argue that this case presents the same factual elements as those present in *Shotclose* (at para 9), and which justify an award of solicitor-client costs:

a) That the application was brought in the interests of all of the members of the community, to have their chosen leaders remain on Council;

b) The issues were complex and included conflicting evidence as to what constituted custom, whether the tribunal was properly constituted and whether quorum was present;

c) That the conduct of the Respondents and their legal counsel tended to unnecessarily lengthen the duration of the proceedings;

d) That steps taken by the Respondents in the proceeding were improper, vexatious or unnecessary, notably the jurisdictional motion was an abuse of process;

e) The amount of work required to prepare for the hearing, considering that it dealt with two separate removals and lengthy jurisdictional submissions; and

f) That the application was wholly successful.

[8] Finally, the Applicants argue that the questions in this case were of public interest which justify elevated costs (*Anderson v Nekaneet First Nation*, 2021 FC 843 at para 95).

B. *The Respondents' Submissions*

[9] CTKFN argues that no award of costs on a solicitor-client or an elevated lump sum basis should be awarded to the Applicants. CTKFN submits that there was no conduct on the part of

the Respondents that would rise to the level necessary to justify such award, and that the Applicants were equally responsible for the proceedings being necessary at all.

[10] Particularly, CTKFN argues that the Respondents are not entirely or solely responsible for the delays because the Applicants have asked for numerous extensions of time, many of which were consented to by the Respondents. Moreover, CTKFN submits that the Applicants are equally responsible for the litigation as they failed to participate in the Special Meeting as required under the CTKFN *Cega-Kin Nakoda Oyate Custom Election Act* [*Election Act*], and failed to demonstrate that participation in the Special Meeting would have been fruitless and that litigation was inevitable.

[11] CTKFN argues that the Respondent's conduct was not "reprehensible, scandalous or outrageous" such as to justify solicitor-client costs and that the litigation was not solely brought in the public interest (*Whalen* at para 13).

[12] Moreover, while some of the facts in *Shotclose*, as relied upon by the Applicants, do support their assertion that costs on a solicitor-client scale could be awarded, the key facts in *Shotclose* are distinguishable. Indeed, in that case, the issue related to voting rights and, contrary to this case: (a) the application was brought in the interest of all members; (b) the application was complex and included conflicting evidence on what constituted custom; (c) the application was unduly lengthened, with improper and vexatious steps taken by the respondents; (d) a written offer to settle was ignored; (e) the application was wholly successful; and (f) the

respondent and their counsel made inappropriate and sarcastic comments in the media regarding opposing counsel.

[13] CTKFN argues that the egregious behaviour in *Shotclose* is not present in this case. CTKFN argues that the Respondents had a valid reason for taking the actions that resulted in the judicial review, did not make derogatory public statements against the other side, nor did they unduly delay the proceedings. Moreover, in *Shotclose*, there were no alternatives to judicial review, whereas in this case, the Applicants had a recourse in the Special Meeting, which they failed to attend.

[14] Finally, CTKFN argues that while in *Shotclose*, the judicial review was found to have been for the benefit of the public interest and therefore also justified an award of solicitor-client costs (*Shotclose* at paras 9, 16), not all applications against First Nations are deemed to be in the public interest. In this case, the Applicants' application does not rise to that level because the issues raised will not have large societal impacts.

[15] CTKFN therefore submits that costs should be allowed pursuant to Tariff B, or alternatively a lump sum on an elevated basis of approximately 40% of the actual costs (*Whalen* at para 8).

III. Analysis

[16] Rule 400 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] provides that the application judge has full discretion when awarding costs, including to award solicitor-client costs or a lump

sum amount. As stated by Justice Favel in *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 1492 at paragraph 23 [*McCarthy*]: "[t]his discretion must be exercised judicially. The exercise of awarding costs involves an inescapable risk of arbitrariness and roughness on the part of the Court (*Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842, aff'd 2013 FCA 220 at para 9). This risk is tempered by the applicable legal principles."

[17] The parties have all relied on Rule 400 of the *Rules* and some of the same case law in making their arguments on costs. The legal principles are not contested. The parties also do not dispute the general rule that costs in the normal course are awarded to the successful party and that the Applicants were successful in this case.

[18] The scale of costs is the only issue disputed in this case. In my view, the Applicants have discharged their burden to demonstrate that an amount of costs pursuant to Tariff B would be inappropriate and that a lump sum in costs should be awarded. However, I reject the Applicants' submissions that costs on a solicitor-client basis are warranted.

[19] As acknowledged by the Respondents, many of the facts noted by the Court in *Shotclose* are present in this case. In my view, and with the positions taken by the Respondents regarding the jurisdiction of this Court and the application of the *Election Act* (including quorum and the constitution of the Tribunal), the application was also brought in the public interest and the decision will have a large societal impact on CTKFN. The issues were complex, which required extensive evidentiary and legal argumentation.

[20] I do not accept the Respondent's arguments that *Shotclose* should not apply in this case. I do accept, however, that there were no official offers to settle in this case, no disparaging comments made by the Respondents or their counsel, and that the delays are attributable at least in part to the Applicants. Nevertheless, even in the absence of these factual elements in this case, solicitor-client costs may still be justified.

[21] Moreover, the Respondents' arguments in defending their legal positions, including their interpretation of the *Election Act* were, to be polite, "creative" (*Bellegarde v Carry the Kettle First Nation*, 2023 FC 129 at para 28) and eventually dismissed by the Court, and in the case of the jurisdictional motion, was found to be an abuse of process. These factors could lead to an award of solicitor-client costs.

[22] However, the Applicants' failure to participate in the Special Meeting provided under the *Election Act* and their failure to raise issues of procedural fairness at that time (including allegations of bias), as well as the Court's ruling that their behaviour is not beyond reproach (*Bellegarde* at para 151), are important factors to take into consideration. In my view, those factors are sufficient to dismiss the Applicants' request for solicitor-client costs, and instead grant a lump sum.

[23] Balancing the factors noted above and the findings of fact made by the Court on the parties' behaviour in *Bellegarde*, the Applicants have demonstrated that their position was ultimately vindicated and that, on the basis of the facts equally found in *Shotclose* to justify an award of solicitor-client costs, a lump sum award of costs is justified in this case. Indeed, while

the conduct of the Applicants is not without reproach and is a reason to deny their request for solicitor-client costs, the behaviour of the Respondents in these proceedings, including their "creative" interpretation of the *Election Act* and their jurisdictional motion which was found to be an abuse of process, are sufficiently egregious to warrant the awarding of a lump sum in costs.

[24] In terms of evidence required to award a lump sum in costs, Justice Favel in *McCarthy* at paragraph 32 (citing *Shirt v Saddle Lake Cree Nation*, 2022 FC 321 at para 33), held that evidence of the actual legal costs is not necessary. However, the Court may rely on a Bill of Costs or similar evidence of fees and expenses provided by the parties (*Whalen* at para 33).

[25] Taking into account the legal principles set out above, the submissions of the parties, including the summary of fees and expenses submitted by the Applicants, and the discretion afforded to the Court under Rule 400 of the *Rules*, I order that CTKFN pay lump sum costs to the Applicants in the sum of $75,000.00, inclusive of disbursements and taxes. This is a reasonable amount, when considering all of the circumstances of this matter as set out above.

[26] A lump sum award of $75,000.00 (inclusive of disbursements and taxes), fairly compensates the Applicants for their costs, while also recognizing that the Applicants are partly responsible for the necessity to proceed with litigation.

IV. Conclusion

[27] In light of the above, I am exercising my discretion to award lump sum costs to the Applicants in an amount of $75,000.00 (inclusive of disbursements and taxes).

JUDGMENT in T-2546-22 and T-2536-22

THIS COURT ORDERS that lump sum costs be awarded to the Applicants, together and in the total amount of $75,000.00, inclusive of disbursements and taxes, to be paid forthwith by the Respondents.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2546-22, T-2536-22
STYLE OF CAUSE:	TERRINA BELLEGARDE and JOELLEN HAYWAHE v SCOTT EASHAPPIE, SHAWN SPENCER, TAMARA THOMSON and CARRY THE KETTLE FIRST NATION
SUPPLEMENTAL JUDGMENT AND REASONS:	RÉGIMBALD J.
DATED:	JULY 26, 2024

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