Federal Court  Cour fédérale

Date: 20140305

Docket: T-1204-12

Citation: 2014 FC 213

Ottawa, Ontario, March 5, 2014

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

BLAINE COMMANDANT, DARREL BRUCE DECAIRE, GEORGE FRANCIS DECAIRE, ELIZABETH BELLA ROBERTS, SCOTT SAHANATIEN, LAWRENCE SCHELL, NEIL SCHELL, RONALD STRENGTH, CALVIN WHITE AND MICHAEL DEWASHA

Applicants

and

BILL HAY, SHIRLEY HAY, DAN STOCK AND STUART LANE

Respondents

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a Wahta Mohawk First Nation (First Nation) governance dispute.

[2] The salient features of the dispute are as follows: as a result of an election in March 2011 the government of the First Nation was composed of Chief Blaine Commandant, an Applicant in the present Application, and four Councillors who are the Respondents in the present Application; in October 2011, by a vote of the four Councillors pursuant to the *Election Rules and Regulations* approved January 8, 2011 (*Election Regulations*) Chief Commandant was relieved of his office because he failed to attend three consecutive Council meetings; Mr. Commandant did not contest the Councillors' decision by way of judicial review nor was a by-election held as required by the *Election Regulations* to fill the office of Chief because of uncertainty as to who in the First Nation membership would be eligible to vote; in June, 2012, pursuant to the *Election Regulations*, by a Petition vote of 50 plus one of the voters who voted in the March 2011 election the Councillors were relieved of their offices; nevertheless, the Councillors did not adhere to the vote with the result that on June 21, 2012 the present Application was commenced to challenge their jurisdiction to remain in office.

[3] Despite intense disagreement that played out over many months bringing the Application to hearing, in the end a settlement was reached. At a point early in the hearing of the present Application, with my encouragement, the parties agreed to work with their Counsel to find a just solution, by consent. After many hours of effort the solution was found. Attached, as an APPENDIX to these reasons, is the Settlement Agreement (Agreement) reached. To the real credit of the parties, the settlement was not accomplished by mediation; it was accomplished by good faith negotiation.

[4] Given that the Agreement was accomplished, no findings were made on the merits of the Application. At the hearing the terms of the Agreement were read into the record, one term being that "the Application will be dismissed with costs to be determined by the Court". For clarification, it is agreed that the Agreement misstates this fact in the phrase "the application is dismissed with costs payable to the Respondents to be determined by the Court". The point of difference is that whether any costs are payable is within my discretion.

[5] Pursuant to the Agreement, by the present Reasons for Order and Order the Application is dismissed and the outstanding issue of costs is addressed. During the motions history of the present Application, two orders were made deferring a decision on costs pending the outcome of the Application, and one order was made for "costs in the cause". Since the Application concluded in a settlement, I find that consideration of the orders merges into the present Reasons for Order and Order.

[6] Upon reaching the Agreement, Counsel for the Applicants stated that the Applicants were not requesting an order for costs. However, Counsel for the Respondents stated that the Respondents request that costs be awarded in their favour.

I. The Test to be Applied on the Costs Issue

[7] In *Randall v. Caldwell First Nation of Point Pelee*, 2006 FC 1054 (*Randall)* at paragraphs 14, 21 and 22, Prothonotary Lafrenière states a caution which I find applies in the present case:

> The result of the proceeding usually carries significant weight because, as a general rule, costs should follow the event: *Merck &*

> *Co. v. Novopharm Ltd.* (1998), 82 C.P.R. (3d) 457 (F.C.T.D.) at 464. Where success has been fairly evenly divided, however, there should normally be no order as to costs: *Lubrizol Corp. v. Imperial Oil Ltd.* (1996), 67 C.P.R. (3d) 1 (F.C.A.) at 25.
>
> […]
>
> The Court must also be mindful about the chilling effect of awarding costs against a party after the conclusion of a mediation. It is now widely accepted that dispute resolution conferences have a significant role to play in the litigation process. A mediated settlement can produce solutions that exceed those available through the courts. Its success is contingent, however, upon the parties buying in to the process.
>
> The litigation between the Claimants and the Band Council brought a number of festering issues to a head, and resulted in negotiated settlement that will no doubt contribute to a better environment and understanding in the community, to the credit of all parties.
>
> [Emphasis added]

I believe that the message communicated in the caution is that the benefit of a settlement will be lost if a costs award is made because the contention which the settlement resolved will most certainly continue. This is so because the award will be perceived as a win in a result where there is to be no winner and no loser.

[8] In the decision in *Mohawk of Akwensasne v. Canada (Minister of Human Resources and Social Development)*, 2010 FC 754, (*Mohawk of Akwensasne*), Justice Lemieux quotes Prothonotary Lafrenière's caution with approval, but, nevertheless, at paragraph 12 confirms that, as a general rule, even where a litigation settlement is reached, an award of costs might be made under certain circumstances:

> However, costs can be awarded on the basis of the conduct of the parties during the course of the litigation such as: (1) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (2) whether a party properly pursued or defended

> its case or a particular allegation or issue; (3) whether a party exaggerated its claim or raised a baseless defence; and (4) whether a party properly conceded issues or abandoned allegations during discoveries.

In my opinion, the general rule might easily be applied in the settlement of a commercial dispute, for example, but, as a practical matter, it is extremely difficult to fairly apply in the settlement of a First Nation's governance dispute.

[9] A unique factor, which militates towards the settlement of a First Nations governance dispute, is motivation to adhere to the cultural value that balance must be restored to the community. Thus, given the application of this higher principle, to maintain a dispute beyond a settlement reached by a request for costs is counter-indicated because the governance dispute just settled is, in fact, not settled and balance will not be achieved.

[10] Thus, because of the unique nature of a First Nations governance dispute, in my opinion where a settlement is reached, whether by mediation or direct negotiation, each party should bear their own costs unless a clear serious reason exists to ground an award for costs. As found in *Mohawk of Akwensasne* a serious reason can be found across a range: unreasonable actions and mistakes made in the course of litigation at one end to unacceptable reprehensible behaviour at the other.

II. The Test Applied to the Present Costs Dispute

[11] While the Applicants make no request for costs, the Respondents request an award of costs on a full indemnity basis in the amount of $531,236.44 grounded on an allegation of unacceptable

reprehensible behaviour in conducting the litigation on the part of Counsel for the Applicants, acting on the instructions of the Applicants.

[12] Governance disputes in all communities are strong: there is much at stake. Thus, each party to a dispute is willing to invest time, energy, and money in a bid to succeed. However, realistic choices must be made in the approach taken to a particular issue. It might at first seem worthwhile to invest heavily in maintaining a particular position on a particular issue with little or no calm reflection on whether the inflated cost of doing so leads to the conclusion that it is not worth maintaining the position. Of course, the party that takes a hard position is most usually met with hard resistance. And so the fight goes on, and so does the extraordinary expense of it. Often the welfare of the community as a whole is lost as a consideration in the choices made. In my view, prior to the Agreement, this was the experience on both sides of the present dispute, and, in my experience, there is nothing unusual about it.

[13] On the basis of the costs arguments presented, I find that there are three relevant circumstances upon which to make findings.

A. *The claims*

[14] The Respondents' principal costs argument arises from the claims for relief advanced by the Applicants in the present Application:

> (i) a declaration in the nature of a writ of *quo warranto* declaring that the respondents have ceased to be Councillors of the Wahta Mohawks Band;
>
> (ii) an order that a prompt by-election to elect a Chief and Councillors for the Wahta Mohawks Band be held at which election

> the applicant Blaine Commandant shall be at liberty to stand for election as Chief;
>
> (iii) an order for costs; and
>
> (iv) such further or other order as to this Honourable Court appears just.

[15] As mentioned above, given the outcome of the Petition vote, and given that the Councillors did not adhere to the vote, it is readily apparent that the primary objective of the Application was to have the Court declare that, by the vote, the Councillors lost jurisdiction to govern. In response to the Application the onus was on the Respondent Councillors to establish that the Petition vote could not be relied upon to ground an order for removal. To achieve this result the Respondents alleged irregularities in the Petition process. Thus, the straightforward focus of the Application was on the quality of the Petition vote.

[16] However, the claims of the Application went beyond the removal of the Respondents. As mentioned, a by-election was not held to fill the vacant office of Chief as required by the *Election Regulations*. It appears that, if the Applicants were successful on the *quo warranto* claim, the purpose of the second claim was to require a by-election election to be held, not only to fill their offices, but to fill the vacant office of Chief as well. However, in making the second claim for relief, it is also readily apparent that a primary objective of the Application was to provide an opportunity for Mr. Commandant to regain his position as Chief by attempting a review and rectification of his removal as Chief, which was a decision that he did not contest by judicial review.

[17] The Application was prepared and filed by Mr. Schindler who preceded present Counsel for the Applicants. With respect to attempting to engage a review of Mr. Commandant's removal, the

grounds, which rely on Mr. Commandant's affidavit filed in support of the Application, read as follows:

> 6. The applicant Blaine Commandant was continuously the Chief of the Wahta Mohawks from 1999 until 27th October 2011. On this latter date the respondents, acting as Council of the Wahta Mohawks, declared the office of Chief to be vacant by reason of the Chief having missed three consecutive meetings of Council.
>
> 6. [sic] The applicant Blaine Commandant had just cause for missing the three meetings and was given no notice of the proposed resolution of the Council declaring the office of Chief to be vacant.
>
> 7. The applicant Blaine Commandant did not seek judicial review of the purported declaration that his office was vacant at the time as he could not work with the current Council and their removal from office was a pre-requisite for his seeking re-instatement or re-election as Chief of the Wahta Mohawks.
>
> 8. The applicants rely on the provisions of sections 18 (1) and 18.1 of the *Federal Courts Act*.

Mr. Commandant's affidavit of June 15, 2012 filed in support of the Application gives a clear picture of his interests in participating in the Application:

> 38. Acting as if the declaration that my office as Chief was vacated was valid, the respondents acting as the Council of the Wahta Mohawks advised the community in newsletters in January and February 2012 that an election for Chief would be held on 21st April 2012 but subsequently, on 12th April 2012, after nominations were closed, advised the community that the proposed election was cancelled, with setting a date for a new election.
>
> 39. As a result, with the purported vacancy of the office of Chief and given the public petition recalling the four Councillors, there is no elected member of the community left who can take responsibility for the affairs of the community pending a by-election for Chief and councillors.
>
> 40. I am willing to take on this responsibility pending the required bye-election [sic] and wish to have the option of standing for election as Chief at the bye-election [sic]. For this reason, I am providing this

> affidavit in support of an application for a declaration that the offices of the four Councillors elected in March 2011 are vacant and that my purported removal from office by reason of the motion of 27th October 2011 is of no force and effect and requring [sic] a new election for Chief and Council to be called as soon as the election rules permit, together with interim relief enjoining the four councillors and the administrator appointed by them from exercising any of the powers of their respective positions and clothing me with the sole authority to administer the affairs of the Wahta Mohawks pending the hearing of the application.

[18] Indeed, in support of Mr. Commandant's interests, on July 10, 2012, Mr. Schindler filed a motion for injunctive relief claiming as follows:

> (i) an interlocutory injunction restraining the respondents from exercising any powers as Councillors of the Wahta Mohawks Band pending the hearing of the within application or the holding of the by-election to elect a Chief and Councillors for the Wahta Mohawks Band sought by the applicants;
>
> (ii) a mandatory injunction that pending the hearing of the application or the said by-election the applicant Blaine Commandant shall have and exercise, to the exclusion of all other persons, all of the powers of the Chief and Council of the Wahta Mohawks Band;
>
> (iii) In the alternative, an order for an expedited hearing of the within application under Rule 385.

[19] Indeed, once retained to replace Mr. Schindler, present Counsel for the Applicants maintained the positions taken by Mr. Schindler. In the Applicants' Memorandum of Fact and Law dated February 28, 2013 with respect to the merits of the Application, the claims for relief stated in the Application are advanced in argument, including the following:

> 61. Breaches of procedural fairness must be reviewed on a standard of correctness.
>
> *Basil v. Lower Nicola Indian Band*, [2009] F.C.J. No. 902, (Tremblay-Lamer. J.), para. 37 ("Basil").

> 62. It is, accordingly, submitted that this Court should consider whether it was correct to declare vacant the office of Chief without according to Chief Commandant the requisites of fairness. The Court should also consider whether it was correct to cancel the special bi-election [sic] in order to conduct a review of the blood quantum requirements of the *Citizenship Code*. Both of these questions involve the application of the *January 2011 Election Regulations*.

[20] However, just prior to the hearing of the present Application, Counsel for the Applicants gave the following notice to the Court and Counsel for the Respondents by letter dated October 10, 2013:

> This matter is scheduled to be heard on Tuesday, October 15, 2013 and Wednesday, October 16, 2013. Please be advised that the Applicants will only be seeking the relief as outlined in the Notice of Application, namely a declaration in the nature of a writ of quo warranto. While the other issues raised in the Applicants' factum are important background to the relief sought, no other relief will be requested other than that described above.

On October 11th, a follow-up notice was given:

> Further to my letter of yesterday, for clarity purposes, please be advised that the Applicants will only be seeking the relief as outlined in the Notice of Application, namely a declaration in the nature of a writ of quo warranto and an order that a prompt by-election to elect a Chief and Councillors for the Wahta Mohawks Band be held. My apologies for any confusion.

In her affidavit on the issue of costs affirmed January 15, 2014, Ms. Hensell, Counsel for the Applicants, makes the following statement to explain the second notice:

> 20. During the course of the Application our clients agreed not to pursue the issue of Mr. Commandant's eligibility to run for the position of Chief. Minor changes such as this in the relief being sought are normal occurrences in the course of litigation and did not represent a change in position by our clients in their Application.

[21] Given the history of importance of the standing claim to the present Application, in particular with respect to Mr. Commandant's objective, I do not accept that the abandonment of the claim is a "minor change".

[22] There are serious unresolved problems with the claims advanced by Mr. Schindler and maintained by present Counsel for the Applicants.

[23] Without approval of the Court, by Rule 302 of the *Federal Courts Rules*, a judicial review Application is limited to addressing a single decision or action. However, in the present Application there are many interlocking claims for relief involving a number of discrete decisions and actions: the Councillors' removal of Mr. Commandant from office; Mr. Commandant's failure to address his removal by judicial review; the Councillors' failure to call a by-election to fill the office of Chief; the holding of the Petition vote; the outcome of the Petition vote; the Councillors' disregard of the Petition vote; and Mr. Commandant's quest to regain office despite the bar from doing so presented by the *Election Regulations*.

[24] Under the *Federal Courts Act* the Court has jurisdiction pursuant to s. 18 (1)(a) to determine the Councillors' authority to remain in office, and pursuant to s. 18.1 (3)(a) to order a by-election in appropriate circumstances. However, the Court has no jurisdiction to order that Mr. Commandant be "at liberty to stand" (the standing claim) for election. The qualification of a person to run in a Wahta Mohawk First Nation election is governed exclusively by the First Nation's *Election Regulations*. Furthermore, pursuant to Article II (f) of the *Election Regulations*, because Mr. Commandant had

been removed from the office of Chief in October 2011, he could not qualify to run for office for three years from the time of his removal from office.

[25] Present Counsel for the Applicants and Counsel for the Respondents should have immediately recognized the problems with the claims advanced by Mr. Schindler. Apparently this did not occur because neither took action to address them during the long course of the litigation by way of limiting the claims, including withdrawal of the standing claim by the Applicants, or a motion to strike the standing claim by the Respondents.

[26] In my opinion, the conduct of the present Application by both sides inflated the cost of maintaining the litigation well beyond normal and what I consider to be reasonable limits, and I find that both sides are equally responsible for this outcome.

[27] Nevertheless, I accept Counsel for the Respondents' argument that a great deal of effort went into challenging Mr. Commandant's effort to regain his position as Chief. I find that the introduction of this objective was a mistake on the part of the Applicants and its abandonment does not correct the mistake. Coincidentally, the mistake is named in *Mohawk of Akwensasne*, as quoted above, as a circumstance which might warrant an order for costs: "whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue". Therefore, I find that a clear and serious reason exists to award costs to provide a measure of indemnity to the Respondents for their costs wasted on this issue.

B. *Conflict of interest*

[28] The second costs issue arises from an alleged fear of conflict of interest advanced by the Respondents. The fear was generated by the fact that Mr. Schindler had acted for the First Nation in the past, and since he filed the present Application, and was acting for the Applicants against the existing First Nations government, confidential information he attained as Counsel for the First Nation might be misused in litigating the Application. Despite earnest assurances to alleviate this concern given by Mr. Schindler, and by present Counsel for the Applicants who replaced Mr. Schindler, the Respondents continued to press the issue hard.

[29] Prothonotary Milczynski finally terminated the intense litigation on the issue in a without prejudice order dated February 4, 2013 in which no findings were made with respect to whether a conflict of interest in fact and law existed, or the relevance of the alleged fear to the present Application. Without such findings, in my opinion it is not possible to attribute blame to the Applicants for strongly resisting the Respondents' adamant position. I find no clear serious reason to award costs on this issue.

C. *Willingness to mediate*

[30] With respect to the failure to reach an agreement on having the Application mediated at an early phase, no blame can be levelled resulting in a costs award. There is a time for mediation when the parties are comfortable engaging in the process. While this Court fully supports mediation at the first opportunity, if it cannot be engaged then, the hope remains with the Court that it will be engaged later when the parties are ready.

[31] Experience has taught that, at a particular moment in time, the parties to a governance dispute might be willing to sit down and settle their differences. That moment must be carefully chosen to reach a settlement. Climbing the courthouse steps to attend a hearing usually sharpens the senses to the reality that someone else, a judge, who does not know what each litigant knows, is about to decide what the parties might have decided for themselves prior to that moment. Usually the fear of losing a dispute rather than the hope of winning comes clearly into focus. Also, hearing a reminder that only the power of good faith, rather than recrimination, will achieve a just result works to open a passage out of the litigation that has for so long been a punishing reality. These forces create the opportune time to find a self-made solution. In the present case this was the experience at the hearing of the Application.

[32] I find no clear serious reason to award costs on this issue.

III. Costs Award

[33] As an element of the Respondents' argument on the issue of costs, Counsel for the Respondents has provided a Bill of Costs dated November 21, 2013 which states allowable costs claimed pursuant to Column V of Tariff B of the *Federal Courts Rules*, and also "full", "substantial", and "partial" indemnity costs claimed in responding to all the issues raised in the Application. Upon reviewing the Bill of Costs, I make three findings: only the "partial" indemnity costs claimed are reasonable in the amount of $224,080; addressing the complications arising from the Applicants' objective of providing an opportunity for Mr. Commandant to regain his position as Chief generated approximately half of the Respondents' claimed indemnity costs; and, therefore, indemnity costs of $112,040 are potentially attributable to the standing claim issue. Given my

finding that both sides are equally responsible for inflating the cost of the litigation, I find that a lump sum award in favour of the Respondents in the amount of $56,020 is fair and just.

IV. Conclusion

[34] It is my sincere hope that this decision on costs will end the present litigation. I encourage both the Applicants and the Respondents to focus on the future which they have so carefully crafted in reaching the very important Agreement terminating the Application. In this effort, I wish them success.

APPENDIX

SETTLEMENT AGREEMENT

WHEREAS the Applicants, Blaine Commandant, Darrel Bruce DeCaire, George Francis Decaire, Elizabeth Bella Roberts, Scott Sahanatien, Lawrence Schell, Neil Schell, Ronald Strength, Calvin White, and Michael Dewasha, brought an application against the Respondents, Bill Hay, Shirley Hay, Dan Stock, and Stuart Lane, for:

(a) a declaration in the nature of a writ of quo warranto declaring that the respondents have ceased to be Councillors of the Wahta Mohawk Band;
(b) an Order that a prompt by-election to elect a Chief and Councillors for the Wahta Mohawks Band be held at which election the Applicant, Blaine Commandant shall be at liberty to stand for election as Chief; and
(c) an Order for costs.

AND WHEREAS the Applicant, Blaine Commandant, agrees and accepts that the Respondents, Bill Hay, Shirley Hay, Dan Stock, and Stuart Lane, correctly and properly applied the Wahta Mohawk Election Rules and Regulations in connection hereto.

AND WHEREAS the parties hereto, therefore, have agreed to settle this application on the following terms:

1. The application is dismissed with costs payable to the Respondents to be determined by the Court.

2. Blaine Commandant agrees that through proper application of the Wahta Mohawk Election Rules and Regulations he cannot run for the elected positions of either Chief or Councillor for the Wahta Mohawk for a period of three (3) years from the date in which he was declared to have vacated his office, namely November 24, 2011.

3. The Respondents, Bill Hay, Shirley Hay, Dan Stock, and Stuart Lane agree that the Wahta Mohawk Election Rules and Regulations require a general election to be held at the end of March 2014, and further agree that all members who meet the eligibility criteria under the Wahta Mohawk Election Rules and Regulations will be entitled to run in that election.

IN WITNESS WHEREOF the parties have signed this Settlement Agreement by their own hand or by that of their duly authorized legal representative this 16th day of October, 2013.

[Signatures omitted]

ORDER

THIS COURT ORDERS that, by consent, the Application is dismissed.

THIS COURT FURTHER ORDERS an award of costs in favour of the Respondents in the amount of $56,020.

No award of costs is granted with respect to the motion for costs.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1204-12
STYLE OF CAUSE:	BLAINE COMMANDANT, DARREL BRUCE DECAIRE, GEORGE FRANCIS DECAIRE, ELIZABETH BELLA ROBERTS, SCOTT SAHANATIEN, LAWRENCE SCHELL, NEIL SCHELL, RONALD STRENGTH, CALVIN WHITE AND MICHAEL DEWASHA v BILL HAY, SHIRLEY HAY, DAN STOCK AND STUART LANE
PLACE OF HEARING:	**TORONTO, ONTARIO**
DATE OF HEARING:	**OCTOBER 15 AND 16, 2013**
REASONS FOR ORDER AND ORDER:	CAMPBELL J.
DATED:	MARCH 5, 2014

APPEARANCES:

Sarah Clarke	FOR THE APPLICANTS
Philip Healey	FOR THE RESPONDENTS

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