Federal Court  Cour fédérale

Date: 20190830

Docket: T-146-19

Citation: 2019 FC 1119

Vancouver, British Columbia, August 30, 2019

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

SAMANTHA WHALEN

Applicant

and

FORT MCMURRAY NO. 468 FIRST NATION

Respondent

ORDER REGARDING COSTS AND REASONS

[1] The applicant, Ms. Samantha Whalen, was elected councillor of the respondent, the Fort McMurray No. 468 First Nation [FMFN] in June 2018. In January 2019, FMFN's council purported to suspend Councillor Whalen from her duties. She then applied to this Court for judicial review. On May 24, 2019, I granted her application, but I reserved my decision as to costs. The parties have now made their submissions in this regard. Councillor Whalen asks for costs on a solicitor-client basis or, in other words, full indemnification for her legal costs. In the alternative, she asks for a lump sum or a costs award "on an elevated scale." FMFN, on its part,

denies that costs on a solicitor-client or lump sum basis are appropriate. It says that it should only be condemned to pay costs according to the Tariff set out in a schedule to the *Federal Courts Rules*, SOR/98-106. These are my reasons for awarding Councillor Whalen costs in a lump sum of $40,000.

I. Basic Principles

[2] Awarding costs to the successful party in a lawsuit is a longstanding practice of Canadian courts. In *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*], the Supreme Court of Canada analyzed the purposes of costs awards.

[3] The first and more traditional goal of costs awards is the indemnification of the successful party. The legal costs associated with successfully bringing or defending a lawsuit are considered as a form of damage that calls for compensation. By asserting a position that was found to be without merit, the losing party is seen as having wrongfully injured the successful party.

[4] Nowadays, costs awards also bear a “policy” function (*Okanagan* at paragraphs 22–26). By shifting the costs of legal proceedings to the losing party, they force litigants to “internalize” such costs, that is, to take those costs into account when making decisions regarding the conduct of a lawsuit. Thus, costs awards provide incentives to make a rational use of scarce judicial resources. This may happen in various contexts. For example, costs awards are said to favour settlements, because parties will take legal costs into consideration when they calculate the risks of going to trial. Likewise, costs awards are thought to discourage frivolous or vexatious

lawsuits, because litigants who bring such lawsuits know they will have to indemnify the defendant.

[5] Thirdly, costs awards have the potential of facilitating access to justice. Parties with little financial resources may bring a lawsuit that has a good chance of success knowing that, if they win, their costs will be borne by the other party. Costs awards, however, may also have a negative impact on access to justice, if the prospect of having to pay the other party's costs acts as a deterrent for plaintiffs who have no means of paying a costs award in addition to their own legal fees: Eric S. Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36 Queen's LJ 113. For that reason, courts have sometimes cited access to justice concerns as a basis for not awarding costs in public interest cases (*Okanagan* at paragraphs 28–30).

[6] Costs awards in this Court are governed by rules 400–422 of the *Federal Courts Rules*. As in most other Canadian jurisdictions, the cardinal principle governing costs awards is the full discretion of the trial judge: rule 400(1); *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc.*, 2002 FCA 417 at paragraph 9, [2003] 2 FC 451 [*Consorzio del Prosciutto*]. That discretion, however, must be exercised judicially, that is, according to a set of guidelines found in the rules of court or developed by the courts over time. There is good reason for a structured approach to the exercise of discretion. As Justice Donald Rennie of the Federal Court of Appeal wrote in *Nova Chemicals Corp v Dow Chemical Co*, 2017 FCA 25 at paragraph 19 [*Nova Chemicals*]: "costs must also be predictable and consistent so that counsel can properly advise and clients can make informed decisions about litigation risks."

[7] The most basic principle structuring the exercise of the discretion, which is not explicitly set out in the *Federal Courts Rules*, is that, absent other considerations, the judge should award costs to the successful party against the losing party: *Okanagan* at paragraph 20; *Federation of Canadian Municipalities v AT & T Canada Corp*, 2002 FCA 500, [2003] 3 FC 379. Rule 400(3) provides a list of other factors that we may consider when issuing a costs award.

[8] In our Court, as in most other Canadian jurisdictions, the default mechanism for assessing the amount of a costs award is a tariff: *Consorzio del Prosciutto*, at paragraph 9. Each step in the litigation process is assigned a fixed value (or a range) and the amount of costs thus depends on which steps were taken in the course of the proceedings, as well as other factors such as the duration of the hearing. Recourse to a tariff simplifies the assessment of costs and ensures a degree of consistency between similar cases. It also ensures that the amount awarded does not depend on whether the opposing party has retained cheap or expensive counsel: see, for example, *Yeti Coolers, LLC v Howsue Holdings Inc.*, 2019 FC 571 at paragraph 5.

[9] Nevertheless, it is well-known that the application of tariffs usually results in costs awards that are significantly lower than the prevailing party's actual outlays: *Nova Chemicals*, at paragraph 13. Thus, instead of providing for full indemnification, it is generally accepted that costs awards are meant to secure a "reasonable contribution" to the prevailing party's legal costs: *Nova Chemicals*, at paragraph 13; *Consorzio del Prosciutto*, at paragraphs 8–9.

[10] For cases where the tariff appears to provide inadequate compensation, courts have developed tools to offer higher costs awards. One such tool is called "solicitor-client costs,"

which is synonym for full or almost full indemnification for the successful party's legal costs and disbursements. When a party seeks solicitor-client costs, it has to disclose the fees it has paid to its lawyer as well as other disbursements (such as its experts' fees) made in furtherance of its case. As I will explain below, costs are only awarded on a solicitor-client basis in exceptional circumstances, usually to sanction a party's wrongful conduct in the course of the proceedings.

[11] More recently, this Court has awarded costs on a lump sum basis, pursuant to rule 400(4), as another manner of providing indemnification on a substantially higher scale than what flows from the application of the tariff. In *Nova Chemicals*, the Federal Court of Appeal approved the use of lump sum awards for that purpose, although it cautioned that the gap between a party's actual costs and the indemnification provided by the tariff is not, in and of itself, sufficient ground for a heightened award. Lump sum awards are also used as a way of limiting a party's liability for costs below what the tariff would entail, usually in cases where an individual with limited means was unsuccessful in a lawsuit against the government: see, for example, *Kirkpatrick v Canada (Attorney General)*, 2019 FC 196 at paragraph 52; *Lauzon v Canada (Attorney General)*, 2019 FC 245 at paragraph 72.

II. Solicitor-Client Costs

[12] Councillor Whalen seeks costs on a solicitor-client basis. I disagree. I will explain why she has not proven that the case falls into the categories in which solicitor-client costs are typically awarded. She also argues that special considerations should apply in First Nation governance cases. I will explain why, in my view, those considerations do not warrant a solicitor-client costs award, although they justify a lump sum award on an elevated scale.

A. *The Usual Categories*

[13] In *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at paragraph 67, [2010] 2 SCR 453, the Supreme Court of Canada stated that solicitor-client costs are "very rarely granted" and gave two examples of circumstances warranting such an award: (1) where a party's conduct was "reprehensible, scandalous or outrageous"; (2) where a lawsuit was brought in the public interest.

[14] The first possibility chiefly comprises cases where a party's conduct in the course of the proceedings has been reprehensible. It may also encompass cases "where the defendant has committed a deliberate and inexcusable violation of the plaintiff's rights:" *Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc*., 2011 FC 776 at paragraph 184, [2013] 1 FCR 413. However, the mere fact that a party's position was found to be without merit is not sufficient to justify an award of costs on a solicitor-client basis: *Young v Young*, [1993] 4 SCR 3 at 134.

[15] In her submissions, Councillor Whalen argues that this litigation could have been avoided had FMFN's Council informed itself about the scope of its powers under the election code. If I understand her correctly, she is arguing that FMFN's position was so devoid of merit as to justify an award of costs on a solicitor-client basis. I disagree. Obviously, I do not know what legal advice the Council obtained before purporting to suspend Councillor Whalen. Nevertheless, both parties brought a considerable volume of conflicting evidence concerning FMFN's custom and presented elaborate legal arguments. Despite the outcome, it cannot be said that the position put forward by FMFN was frivolous from the outset.

[16] Councillor Whalen also argues that the case comes under the second category of cases where solicitor-client costs have been awarded. In *Okanagan*, the Supreme Court set out criteria for awarding costs on an interim basis in public interest litigation (at paragraph 40):

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[17] In a subsequent case, the Court applied those criteria, with the necessary adaptations, to claims for solicitor-client costs in public interest litigation: *Carter v Canada (Attorney General)*, 2015 SCC 5 at paragraphs 133–143, [2015] 1 SCR 331. The Court cautioned against creating an alternative legal aid system (at paragraph 137) and noted that only cases with a "widespread societal impact" (at paragraph 140) would attract solicitor-client costs.

[18] In this case, I have no evidence that Councillor Whalen is unable to afford the costs of bringing this application for judicial review. Moreover, without minimizing the importance of this application for FMFN's good governance, I am unable to conclude that this case is of "widespread societal impact."

B. *First Nation Governance Cases*

[19] Councillor Whalen also draws my attention to a number of cases in which this Court awarded solicitor-client costs in First Nation governance disputes.

[20] In analyzing these cases, one must keep in mind the basic principle that costs awards are discretionary. An award is heavily dependent on the particular circumstances of each case. Caution must be exercised when attempting to generalize.

[21] In cases such as *Bellegarde v Poitras*, 2009 FC 1212 [*Bellegarde*], aff'd 2011 FCA 317; *Shotclose v Stoney First Nation*, 2011 FC 1051 [*Shotclose*], and *Knebush v Maygard*, 2014 FC 1247, [2015] 4 FCR 367 [*Knebush*], the Court was sensitive to the imbalance between the resources at the disposal of the parties in governance disputes: *Bellegarde*, at paragraph 8; *Shotclose*, at paragraph 18. As my colleague Justice Leonard Mandamin wrote in *Knebush*, at paragraph 59:

> There is also the question of the imbalance between an individual member of a First Nation who brings a judicial review to have a First Nation's laws be observed and the respondents who are the governing body of the First Nation. Such respondents, usually chiefs and councillors, are in a position to have their legal costs reimbursed by the First Nation. If a judicial review application properly addresses a question of the First Nation's law, it seems to me that, on the basis of public interest, individual applicants may be similarly entitled to look to the First Nation for costs.

[22] In certain cases where the application was dismissed, the Court declined to award costs against the unsuccessful applicant on the basis that the matter raised issues of public interest for

the First Nation: *Coutlee v Lower Nicola First Nation*, 2015 FC 1305; *Twinn v Sawridge First Nation*, 2017 FC 407 at paragraph 131; *Cowessess First Nation No. 73 v Pelletier*, 2017 FC 859.

[23] I do not read these cases as establishing a distinctive costs regime for First Nations governance disputes. It is apparent from the reasons of my colleagues that they took all the circumstances of each case into account and that, in most cases where costs were awarded on a solicitor-client basis, reprehensible conduct had been demonstrated: *Shotclose*, at paragraphs 9–14; see also *Roseau River Anishinabe First Nation v Nelson*, 2013 FC 180 at paragraphs 61–76.

[24] Moreover, there are many cases in which costs have been awarded on a much lower scale or according to the tariff: see, for example, *Landry v Abénaki of Wôlinak Council*, 2018 FC 1270; *Louie v Louie*, 2018 FC 550: *Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616; *Pastion v Dene Tha' First Nation*, 2018 FC 648, [2018] 4 FCR 467. It may be that the parties in those cases simply did not ask for elevated costs.

[25] Routine awards of solicitor-client costs in First Nations governance cases would also be difficult to reconcile with the Supreme Court's jurisprudence regarding costs. The Court has been adamant that costs awards should not be made in a manner that results in a parallel legal aid regime or on the basis of criteria that will always be met in entire categories of cases: *Carter*, at paragraph 137. In addition, the prospect of having to pay costs to the other party, in addition to their own costs, imposes a form of self-discipline on persons who contemplate bringing a lawsuit and discourages suits that have little merit. The full indemnification of applicants in First Nations governance cases, or even their insulation from cost consequences, would remove the incentive

to carefully assess one's chances of success and could even create an incentive in the opposite direction.

[26] I would simply add that nothing prevents a First Nation from adopting a law regulating the use of First Nation funds to pay the legal fees of parties involved in governance disputes. In addition to being a good governance practice, this would reduce the resource imbalance mentioned above.

[27] I would summarize the applicable principles as follows:

- In First Nations governance cases, as in other cases, an award of costs is in the trial judge's discretion, which must be exercised after taking all relevant factors into consideration;

- The imbalance between the financial resources of an applicant and those of the First Nation, or a party whose legal fees are paid by the First Nation, is a relevant factor;

- Taken in isolation, however, the resource imbalance is not a sufficient factor to justify an award of costs on a solicitor-client basis;

- The fact that an application contributed to clarify the interpretation of a First Nation's laws or governance framework may be taken into account when making a costs award; but not every application falls in that category.

[28] In this case, I do not think that these factors warrant an award of costs on a solicitor-client basis. However, as I explain below, they justify a lump sum award on an elevated scale.

III. Lump Sum

[29] In the alternative, Councillor Whalen asks for an increased costs award on a lump sum basis. For the following reasons, I agree with her request.

[30] As I mentioned above, the Federal Court of Appeal approved this Court's practice of awarding costs on an elevated, lump sum basis: *Nova Chemicals*. There does not appear to be a clearly-defined test or criteria to justify such awards. For example, in making such an award, the Federal Court of Appeal simply noted that the dispute involved "sophisticated, commercial parties" and that the case was entirely devoid of merit: *Sport Maska Inc. v Bauer Hockey Ltd*., 2019 FCA 204 at paragraphs 51–52. It may well be that this Court has been willing to make elevated costs awards where such parties are involved because they are presumed to have the resources to pay for them and the capacity to factor in their potential liability for costs when making strategic decisions regarding the conduct of litigation. In other words, awarding costs on an elevated scale may be appropriate where it is apparent that it will better achieve the purposes of costs awards that I have outlined above.

[31] Again, the discretion to award a lump sum must be exercised according to all relevant factors, which include the factors listed in rule 400(3), the factors I have outlined above concerning First Nations governance cases as well as whether frequent awards of lump sums in similar cases will provide incentives that are in line with the purposes of costs awards. We must

also bear in mind that First Nations across the country are different in terms of size, financial resources and many other aspects that may be relevant to the exercise of the discretion to award costs.

[32] In this case, the following factors lead me to conclude that an award of costs according to the tariff would be insufficient and that a lump sum on an elevated basis is warranted. Councillor Whalen had to seek the assistance of the Court to prevent FMFN from acting contrary to its own laws. She was entirely successful. While she does not seem to lack the resources necessary to bring this application, there remains an imbalance between her financial means and those of FMFN. Increased costs are warranted to redress this imbalance, at least in part, and to ensure that FMFN makes a substantial contribution to the legal costs that Councillor Whalen had to incur to vindicate her position. The portion of the evidence that was not contested contains enough information regarding FMFN's financial situation to allow me to conclude that it has the means to pay an elevated costs award. In particular, by its own admission, FMFN paid legal fees totalling $164,408 to defend this application. While the matter did not involve issues of "widespread societal interest" and Councillor Whalen was certainly pursuing a personal interest, my judgment may serve to clarify certain legal questions of general interest with respect to the interpretation of FMFN's Election Regulations or that of similarly-worded election codes. (See also, by way of analogy, *Papequash v Brass*, 2018 FC 977 at paragraph 10.)

[33] That brings me to the issue of the appropriate magnitude of the lump sum. In this regard, Justice Rennie in *Nova Chemicals* cautioned that a number must not be "plucked from thin air" (at paragraph 15). Yet, the exercise inevitably involves some estimation. To ensure a degree of

consistency, Justice Rennie indicated that such awards would usually fall within a range of 25%-50% of the actual legal costs of the successful party: *Nova Chemicals*, at paragraph 17.

[34] This means that the successful party must give evidence of its legal costs to support a request for a lump sum. Councillor Whalen filed statements of account from her lawyer that establish that she incurred $100,953 in legal fees. It would have been preferable to provide a more detailed account of those fees. Nevertheless, as I have heard the application, I am in a good position to gauge the complexity of the case and to assess the amount of work done by the lawyers. An extensive record was prepared by both parties. More than a dozen witnesses swore affidavits, and most if not all of them were cross-examined. Both parties prepared exhaustive memoranda dealing with a number of complex factual and legal issues. The hearing took a full day, with each party being represented by two counsels. I have no difficulty accepting $100,953 as a realistic amount. Moreover, in its submissions on costs, FMFN disclosed that it had spent $164,408 in defending this application, which makes it entirely plausible that Councillor Whalen spent about two-thirds of that amount.

[35] In the exercise of my discretion, I would award a lump sum of $40,000 to Councillor Whalen. This amounts to approximately 40% of her actual costs, which is within the range suggested by Justice Rennie in *Nova Chemicals*.

ORDER in T-146-19

THIS COURT ORDERS that

1. Costs are awarded to the applicant, payable by the respondent, in the amount of $40,000.00, inclusive of disbursement and taxes.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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