Federal Court  Cour fédérale

Date: 20230607

Docket: T-1185-21

Citation: 2023 FC 795

[ENGLISH TRANSLATION]

BETWEEN:

JOHN ROCK AND CHRISTELLE ROCK

Applicants

and

**CONSEIL DES INNUS DE PESSAMIT,
GÉRALD HERVIEUX, JEAN-NOËL RIVERIN
AND MARIELLE VACHON**

Respondents

REASONS FOR ASSESSMENT

AUDREY BLANCHET, Assessment Officer

[1] On July 27, 2021, the applicants, John Rock and Christelle Rock, filed a notice of application for judicial review seeking to invalidate the election of three councillors to the Betsiamites Band Council (Conseil des Innus de Pessamit) [the Council] and the Council's refusal to call by-elections.

[2] On May 16, 2022, the Court issued an order [Order] granting the respondents' motion to strike affidavits, with costs. Finally, in a judgment and reasons dated May 17, 2022 [Judgment], the Court dismissed the applicants' application for judicial review, with costs to the respondents.

[3] On June 14, 2022, the respondents initiated the process of assessing costs by filing a bill of costs claiming $16,289.82 from the applicants. On November 16, 2022, a direction was issued that provided the filing dates for documents for the assessment of costs. The following documents were then filed by the parties for this assessment: on December 16, 2022, the respondents filed written representations in support of the bill of costs; on December 23, 2022, the applicants filed written representations in response to the bill of costs; on February 22, 2023, the respondents filed a reply.

[4] These reasons therefore deal with the assessment of costs pursuant to the Order and the Judgment, in accordance with Part 11 of the *Federal Courts Rules*, SOR/98-106 [Rules] and Tariff B. In the absence of directions from the Court, costs will be assessed in accordance with column III of the table to Tariff B (rule 407).

I. Preliminary issue

A. *Determination of the level of costs*

[5] In their written representations, the respondents agree that the bill of costs should be assessed in accordance with column III of the table to Tariff B, as set out in rule 407. However, while column III provides for a range of units available for most assessable services, the

respondents argue that the upper limit of the range in column III should be allowed considering the factors set out in subrule 400(3) [factors], specifically: (a) the result of the proceeding, in that the respondents were successful both on the merits of the case and at the interlocutory stage; (g) the significant amount of work resulting from the applicants' conduct; and (i) the applicants' conduct that tended to unnecessarily lengthen the duration of the proceedings. On this last point, the respondents' arguments can be summarized as follows (respondents' written representations, paras 36–48):

- At the hearing on the application for judicial review, the applicants abandoned their challenge of the election of Council members, forcing the respondents to unnecessarily present legal arguments that proved to be superfluous.
- The respondents were required to file a motion to strike affidavits as certain paragraphs of the applicants' affidavits were inadmissible.
- The applicants presented a new legal argument in the memorandum of fact and law filed on January 11, 2022, requiring the respondents to bring a motion to file an additional affidavit pursuant to rule 312.
- The applicants submitted new legal arguments and grounds for challenges in support of their April 19, 2022, reply record, requiring the respondents to prepare a supplementary memorandum of fact and law in response to these new grounds.
- The applicants failed to request material as permitted by rule 317. Consequently, the applicants filed an application for judicial review without taking the necessary steps to support their claim.

[6] In response to the respondents' written representations, the applicants first state that [TRANSLATION] "this litigation justifies a particular award of costs because of its public interest" (paragraph 400(3)(h) of the Rules), arguing that they could not have benefited personally from this proceeding (applicants' written representations, paras 1 and 3). According to the applicants, the litigation concerned a new issue, and the Court therefore has discretion to not award costs. Further on in their written representations, they argue that the unequal power between the parties in view of their disproportionate financial resources should be considered in the assessment of

costs. Finally, the applicants argue that [TRANSLATION] “the lower scale of column III of Tariff B should be used for all the items claimed” [emphasis in original] (applicants’ written representations, para 17).

[7] In reply, the respondents reiterate that costs were already awarded to them by the Court and that [translation] “[t]his stage is therefore solely for the purpose of determining the assessment of costs” (respondents’ reply, para 2). Given that I agree with the respondents’ arguments on this point, it is worth reproducing here a relevant excerpt from *Pelletier v Canada (Attorney General),* 2006 FCA 418, [*Pelletier*]:

> [7] Under section 405, an assessment officer “assesses” costs, which assumes that costs have been awarded. Section 406 provides that an officer does this at the request of “a party who is entitled to costs”, which again presupposes that an order for costs was made in favour of that party. Under section 407, the officer assesses the costs in accordance with column III of the table to Tariff B “unless the Court orders otherwise.” Section 409 provides that “[i]n assessing costs, an assessment officer may consider the factors referred to in subrule 400(3).” In short, the duty of an assessment officer is to assess costs, not award them. An officer cannot go beyond, or contradict, the order that the judge has made. If the judge gives a direction to the officer under section 403, the officer must comply with it. [Emphasis added.]

[8] As for the issue of public interest, the respondents maintain that the applicants had in fact a personal interest in the outcome of this litigation, particularly given the withdrawal of the question concerning the interpretation of the *Code électoral concernant les élections du Conseil de bande de Betsiamites* at the hearing of the application for judicial review. They also state that neither the Judgment nor the Order mentions the issue of public interest. In this regard, the respondents correctly cite the assessment officer’s comments in *Williams (IT Essentials) v Cisco Systems, Inc.,* 2020 FCA 173 [*Williams*] at paragraph 19:

> As noted earlier in these Reasons, my review of the Court's Order dated November 25, 2019, did not disclose that the Appellant's court proceeding involved an issue of public interest or that this was a factor that the Court considered when costs were awarded to the Respondent. …

[9] Also, in *Johnson v Bell Canada*, 2009 FC 811, [*Johnson*] at paragraph 3, the assessment officer states that in the absence of any indication from the Court in its reasons for judgment that issues were dealt with in the public's name or interest, an assessment officer does not have jurisdiction to consider this factor in determining the level of costs.

[10] Therefore, in light of *Williams* and *Johnson*, and considering the fact that both the Judgment and the Order are silent on the notion of public interest, the factor set out in paragraph 400(3)(h) will not be taken into account in assessing costs.

[11] With respect to the imbalance of financial resources between the parties, an argument opposed by the respondents, the Court has already ruled that this is not a relevant factor in the assessment of costs (*Leuthold v Canadian Broadcasting Corporation*, 2014 FCA 174, at para 12). Indeed, "[i]n an award of costs, neither the ability to pay nor the difficulty of collection should be a deciding factor" (*Nike Canada Ltd. v Jane Doe*, [1999] FCJ No 1018 (FCTD) at para 11).

[12] In response to the respondents' submission that factors (a), (g) and (i) argue for an assessment of costs at the top of the scale of column III of the table to Tariff B, the applicants reply that [TRANSLATION] "the upper scale is only used against a party if it has behaved improperly before the Court" (applicants' written representations, para 16). Unfortunately, this argument fails. On the contrary, as an assessment officer, I must determine the number of units

to be allowed based on the full range of units in column III (rule 407; *Hoffman-La Roche Limited v Apotex Inc.*, 2013 FC 1265, at para 8). Moreover, the courts have repeatedly emphasized that "each item is assessable in its own circumstances and it is not necessary to use the same point throughout in the range for items as they occur in the litigation" (*Starlight v Canada*, 2001 FCT 999, at para 7). Therefore, when determining the number of units to be allocated for each assessable service, I must consider each item separately in conjunction with the characteristics of the case (*Bujnowski v the Queen*, 2010 FCA 49, at para 9; *League for Human Rights of B'nai Brith Canada v Canada*, 2012 FCA 61, at para 15). At the same time, I intend to exercise the discretion conferred on me under rule 409 and consider the factors listed above by the respondents, namely (a) the result of the proceeding; (g) the amount of work; (i) any conduct of a party that tended to unnecessarily lengthen the duration of the proceeding; and any other factors applicable to the facts in this case.

II. Assessable services

[13] The respondents are claiming $16,160 for assessable services.

A. Item 2 – Preparation and filing of all defences, replies, counterclaims or [respondents'] records and materials.

[14] The respondents are claiming 7 units under item 2 for the preparation and filing of all defences, replies, counterclaims or applicants' records and materials. However, the respondents' bill of costs and written representations are silent as to the precise nature of this claim. In their written representations in reply, the applicants argue that [TRANSLATION] "item 2 cannot in any way apply to a motion for the establishment of a timetable, a motion from the moving parties for

a case management conference, or to any other interlocutory motion" (applicants' written representations, para 25). After reviewing the court record and the recorded entries, I note that this claim does not involve any motion, conference or timetable, as argued by the applicants, but rather the preparation and filing of the respondents' memorandum of fact and law, which was filed on February 10, 2022. A supplementary memorandum of fact and law was also filed by the respondents on April 20, 2022, in response to the applicants' supplementary memorandum.

[15] In view of the above, it is therefore appropriate to determine the number of units to be allocated under item 2 given that column III of the table to Tariff B allows for the allocation of 4 to 7 units. In determining this claim, I have considered the following factors: (a) the result of the proceeding; (c) the importance and complexity of the issues; (g) the amount of work; and (i) any conduct of a party that tended to unnecessarily lengthen the duration of the proceeding.

[16] I note first of all that (a) the respondents were successful and (c) the issues were of moderate importance and complexity. I am also of the opinion that in choosing at the time of the hearing to no longer contest the election of Council members and in presenting an argument that evolved over time, the applicants caused the respondents a significant, if not additional, amount of work, as well as unnecessarily lengthening the duration of the litigation. Specifically, these actions led the respondents to (1) needlessly present 10 pages of legal arguments in support of their memorandum of fact and law; (2) bring a motion to file an additional affidavit pursuant to rule 312; and (3) prepare a supplementary memorandum of fact and law in response to the new reasons presented in support of the applicants' reply record.

[17] Therefore, in consideration of the factors set out above, the written representations of the parties, the court record, the Rules and the relevant case law, I am of the opinion that the allocation of 7 units for item 2 is justified.

B. Item 4 – Preparation and filing of an uncontested motion, including all materials.

[18] Four units are being claimed under item 4 for the preparation and filing of a motion to file an additional affidavit dated February 10, 2022, in accordance with rule 312. The applicants argue, correctly, that costs cannot be awarded given that the Court granted said motion in the absence of opposition from the applicants, without ruling on the costs associated with it (written representations of the applicants, paras 28 and 29; oral direction of April 19, 2022 (St-Louis J.)). As an assessment officer, I do not have jurisdiction to award costs. My role is limited to assessing costs that are first awarded by the Court (*Pelletier*, above and rule 405). In these circumstances, the claim under item 4 must be denied.

C. Item 5 – Preparation and filing of a contested motion, including materials and responses thereto.

[19] The respondents are claiming 7 units for the preparation and filing of a motion to strike affidavits. This motion was opposed by the applicants and allowed with costs on May 16, 2022. The applicants argue that the respondents should only be allowed 3 units for these services. Pursuant to subrule 400(3), this claim should be analyzed in light of the following factors: (a) the respondents were successful; (c) the issues were of moderate importance and complexity; and (g) the proceedings required a significant amount of work. Indeed, after reviewing the proceedings in question, I note that the motion record contains 463 pages and 15 authorities. It is

clear that considerable time was devoted to preparing this pleading. Moreover, this motion was necessary because certain paragraphs of the applicants' affidavits were inadmissible, which tended to lengthen the duration of the proceedings (paragraph 400(3)(h) of the Rules). Considering the factors listed above, I am of the opinion that the allocation of 7 units is justified.

D. Item 6 – Appearance on a motion, per hour.

[20] Under item 6, the respondents are claiming 6 units, representing 3 units per hour for a total of 2 hours, for their counsel's appearance at the hearing of the motion to strike affidavits. After reviewing the court record, the recorded entries and the Registrar's minutes, it appears that the hearing of this motion occurred on April 21, 2022, prior to the hearing of the application for judicial review, and that it took 50 minutes. I believe that an additional 10 minutes to allow counsel to settle in for the hearing is reasonable (*Nova-Biorubber Green Technologies, Inc. v Sustainable Development Technologies Canada*, 2021 FC 102 [*Nova-Biorubber*], at para 21). It is therefore appropriate to allow 3 units per hour for the appearance for this motion, for a total of 3 units.

E. Item 10 - Preparation for conference, including memorandum.

[21] The respondents are claiming 12 units under item 10 for preparation for the case management conferences held on April 13 and 20, 2022, at 6 units per conference. The applicants submit first of all that the respondents did not produce any memorandums in preparation for these conferences, [TRANSLATION] "which reduces the number of units that should be allowed" (applicants' written representations, para 34). Indeed, pursuant to

paragraph 400(3)(g) of the Rules, the amount of work performed in preparation for these conferences must be considered in determining the units to be allowed.

[22] The applicants further submit that no costs were awarded at these conferences. On this point, I cannot agree with the applicants' arguments given that costs associated with conferences are included in the costs awarded on the merits of the case and not further to an interlocutory judgment (*Boshra v Canada (Association of Professional Employees)*, 2011 FCA 278 at para 20). However, there are exceptions to this principle when conferences deal with interlocutory motions. Indeed, in *Simpson Strong-Tie Co. v Peak Innovations Inc.*, 2012 FC 63 at paragraph 30, the assessment officer noted that the key distinction between motions and conferences as interlocutory process is whether the work was part of preparation for a motion within the meaning of item 5 as opposed to work that was part of overall case management driven by the Court, part of which invariably includes the scheduling of motions. In this case, my review of the minutes prepared by the Registrar of this Court from the conferences of April 13 and 20, 2022, reveals that although those conferences touched upon the issue of motions, they essentially dealt with general case management issues. Therefore, given that costs were awarded to the respondents by final judgment, they are entitled to claim the assessable services for those conferences.

[23] Third, the applicants argue that the same issues were discussed at those conferences, [TRANSLATION] "which means that costs should be limited to only one of those conferences in order to avoid duplication" (applicants' written representations, para 37). While I am of the view that each hearing requires separate preparation time regardless of whether certain issues may have been discussed in the past, this argument by the applicants and the absence of a filed

memorandum as mentioned above weigh in favour of allowing units at the lower end of column III of the table to Tariff B, in view of the work performed by the respondents (paragraph 400(3)(g) of the Rules). Therefore, 3 units per conference are allocated, for a total of 6 units.

F. Item 11 – Attendance at conference, per hour.

[24] As for the attendance of the applicants' counsel at the conferences of April 13 and 20, 2022, the applicants are claiming 6 units, representing 3 units per hour at a rate of 1 hour per conference. According to the minutes drawn up by the Registrar of this Court, the first conference lasted 45 minutes, while the second one lasted 65 minutes. I am of the opinion that taking into account a reasonable amount of time for counsel to settle in for conferences (*Nova-Biorubber,* above), the total claim of 2 hours is reasonable. As for the number of units, column III of the table to Tariff B provides for allocating 1 to 3 units per hour. Given that the conferences were of usual complexity and that the default level of costs is the mid-point of column III of the table to Tariff B, I find it reasonable to allow 2 units per hour for a total of 4 units (*Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186 at para 25).

G. Item 13(a) – Counsel fee: preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence, preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff;

[25] The respondents are claiming 5 units for preparation for trial. According to item 13(a) of the table to Tariff B, 2 to 5 units may be allowed under column III. However, no written representations have been provided in support of this claim to justify allowing units at the upper

end of column III. After reviewing the court record and the recorded entries, I note that the respondents did not call witnesses and that there was therefore no preparation of witnesses or issuance of subpoenas. Furthermore, I am of the opinion that the applicants' decision to abandon their challenge to the election has no bearing on the determination of the level of costs to be awarded for preparation for trial given that this abandonment occurred at the beginning of the hearing and not prior to it. The evaluation is not retrospective, but rather focuses on when the work was actually performed with a view to providing the client with prudent representation (*Carlile v Canada (Minister of National Revenue – MNR)*, [1997] FCJ No 885, at para 5). Relying on *Allergan*, above, and the fact that this case is of usual complexity, I find that 3 units are appropriate.

H. Item 13(b) – Counsel fee: preparation for trial or hearing, per day in Court after the first day.

[26] Under item 13(b), the respondents are claiming 3 units for preparation for hearing on the second day of the hearing. From the outset, the applicants claim that no units should be allowed given that counsel for the respondents was in attendance for only half a day. However, [translation] "if costs are awarded … they should be limited to 2 units" (applicants' written representations, para 45). I agree with the applicants that 2 units are justified given the length of the second day of the hearing. Therefore, the respondents are allowed 2 units under item 13(b).

I. Item 14(a) – Counsel fee: to first counsel, per hour in Court;

[27] Thirty units are being claimed under item 14(a), which is equivalent to 10 hours multiplied by 3 units, for the attendance in Court of counsel for the respondents at the hearing on

April 21, 2022. The applicants argue that [TRANSLATION] "of the 10 hours of attendance claimed under item 14(a), the [respondents] are already requesting that costs for 2 hours be awarded to them for the hearing of their motion to strike affidavits under item 6, which took place … on the same day as the hearing on the merits" (applicants' written representations, para 47). The applicants are correct on this point. It appears from the Registrar's minutes that the hearing of the application for judicial review, excluding the hearing of the motion, lasted 8 hours and 23 minutes. In view of the fact that the hearing lasted more than a day, and applying *Nova-Biorubber* (above), the respondents should be compensated for a total of 9 hours. Given that the applicants are not opposing the number of units claimed under column III of the table to Tariff B, and that allowing 3 units per hour seems justified in this case, a total of 27 units are allocated under item 14(a).

J. Item 14(b) – Counsel fee: to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).

[28] In their bill of costs, the respondents are claiming 15 units as professional fees for their second counsel to attend the hearing on April 21, 2022. Item 14(b) states that fees are awarded "where Court directs". Pursuant to subsection 5.1(1) of the *Federal Courts Act*, RSC 1985, "[t]he Federal Court consists of a chief justice called the Chief Justice of the Federal Court, who is the president of the Federal Court, an associate chief justice called the Associate Chief Justice of the Federal Court and 39 other judges." As an assessment officer, I therefore do not have jurisdiction to award costs under this item (*Double Diamond Distribution Ltd. v Crocs Canada, Inc.*, 2021 FCA 47, at para 16; *Delizia Limited v Sunridge Gold Corp.*, 2018 FCA 158, at paragraph 7 (unreported, docket A-119-16); *Ade Olumide v Conservative Party of Canada*, 2016 FCA 168, at

paragraph 14 (unreported, docket A-301-15)). Since the Judgment did not expressly award these costs, the claim is denied.

K. Item 26 – Assessment of costs.

[29] Under item 26, for services performed in preparation for this assessment of costs, the respondents are claiming 6 units. The applicants submit that [TRANSLATION] "2 units should be allowed because there are no difficulties associated with the assessment of these costs" (applicants' written representations, para 55). In reality, nothing could be further from the truth. Both parties filed lengthy written representations, supported by case law, dealing with the determination of the level of applicable costs, the particular award of costs and the legitimacy of the assessable services claimed.

[30] Given the work required of the respondents at the cost assessment stage and the number of claims submitted (paragraph 400(3)(g) of the Rules), I am of the opinion that awarding 6 units is fully justified in this case.

III. Disbursements

A. *Bailiff fees*

[31] In their bill of costs, the respondents are claiming $129.82 for process service by bailiffs. However, the documents filed by the respondents do not provide any details on these disbursements. Moreover, I note that no affidavit of disbursements or any other evidence has been filed in support of this claim.

[32] In this regard, subsection 1(4) of Tariff B of the Rules states the following with regard to the burden of proof applicable to disbursements:

Evidence of disbursements	**Preuve**
(4) No disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party.	**(4)** À l'exception des droits payés au greffe, aucun débours n'est taxé ou accepté aux termes du présent tarif à moins qu'il ne soit raisonnable et que la preuve qu'il a été engagé par la partie ou est payable par elle n'est fournie par affidavit ou par l'avocat qui comparaît à la taxation.

[33] In addition to subsection 1(4) of Tariff B of the Rules, case law has also established that with respect to the assessment of disbursements, the successful party may claim disbursements that are reasonable and necessary to the litigation (*Merck & Co. v Apotex Inc.*, 2006 FC 631, at para 3). In this case, however, I was not provided with evidence that these disbursements were reasonable and necessary for the conduct of the proceeding and that they were in fact incurred by the respondents. Despite an exhaustive review of the proceedings filed in the Court record, I am unable to find any bailiff's fees incurred for the service of any proceedings in this litigation. This claim is therefore denied.

IV. Conclusion

[34] The respondents' bill of costs is assessed and allowed in the amount of $10,400. A certificate of assessment will be issued for that amount.

"Audrey Blanchet"
Assessment Officer

Ottawa, Ontario
June 7, 2023

Certified true translation
Norah Mulvihill

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	JOHN ROCK AND CHRISTELLE ROCK v LE CONSEIL DES INNUS DE PESSAMIT, GÉRALD HERVIEUX, JEAN-NOËL RIVERIN AND MARIELLE VACHON

ASSESSMENT OF COSTS CONSIDERED IN WRITING AT OTTAWA, ONTARIO, WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	AUDREY BLANCHET, Assessment Officer
DATED:	JUNE 7, 2023

WRITTEN REPRESENTATIONS BY:

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