Federal Court Cour fédérale

Date: 20230912

Docket: T-904-23

Citation: 2023 FC 1227

Ottawa, Ontario, September 12, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

NEKANEET FIRST NATION, CHIEF CAROLYN WAHOBIN, COUNCILLOR ROBERTA FRANCIS, AND COUNCILLOR CHRISTINE MOSQUITO

Applicants

and

ALENA LOUISON, COUNCILLOR WESLEY DANIEL, AND SHAUNA BUFFALOCALF

Respondents

ORDER AND REASONS AS TO COSTS

[1] These are my reasons for awarding costs in the amount of $5,000 in this application for judicial review regarding the governance of Nekaneet First Nation. In so doing, I am dismissing the successful applicants' request for elevated costs, and both parties' requests that their costs be paid by the First Nation.

[2] The individual applicants were recently elected to the Government of Nekaneet First Nation. A group of members of the First Nation then issued a declaration, purportedly pursuant to the *Nekaneet Constitution*, removing the individual applicants and calling a new election. The individual applicants, together with the First Nation, applied for judicial review of this declaration. While the respondent Shauna Buffalocalf was not initially named in the style of cause, she was added as a respondent, as she initiated the election appeal that gave rise to the dispute that eventually led to the issuance of the declaration.

[3] For the reasons indexed as 2023 FC 897, I allowed the application and held that the declaration was of no force or effect, as it was not issued in compliance with the conditions set in the Constitution. The parties have now had the opportunity to file submissions regarding costs.

I. The Parties' Positions

[4] The applicants seek costs against Ms. Buffalocalf in the amount of $30,000. They argue that this elevated lump sum is justified by Ms. Buffalocalf's conduct in the proceedings as well as her refusal of an offer to settle the matter.

[5] Moreover, the applicants ask me to declare that their own costs may be paid by the First Nation, in spite of section 16.04 of the *Nekaneet Governance Act*, which prohibits the use of Nekaneet Funds to pay legal fees in certain matters related to elections.

[6] Ms. Buffalocalf, on her part, argues that her legal fees and those of the applicants should be reimbursed in full by Nekaneet First Nation, because the application raised issues of public

interest and because there is an imbalance between the financial resources of the parties. Implicit in her position is that she denies that she should be ordered to pay costs, despite the fact that the application was decided against her.

[7] The applicants do not seek costs against Mr. Daniel.

II. Costs against the First Nation and Use of First Nation Funds

[8] I will first address the parties' submissions regarding the use of First Nation funds to cover their costs. The parties are in agreement that First Nation funds may be used for this purpose. They diverge with respect to who should benefit from those funds: the applicants want only their own costs covered, while Ms. Buffalocalf would like both parties' costs to be assumed by the First Nation.

[9] Rule 400 of the *Federal Courts Rules*, SOR/98-106, gives me "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." In the exercise of this discretion, the principles laid out by the members of Nekaneet in their Constitution are a highly relevant factor. Moreover, I am not bound by the agreement of the parties on certain issues.

A. *Section 16.04 of the* Nekaneet Governance Act

[10] The *Nekaneet Governance Act* sends a strong message that election and removal disputes are essentially private matters that should not be funded by the First Nation. Section 16.04 reads as follows:

> 16.04 A Chief or Councillor shall not use Nekaneet funds to pay for any legal fees in response to any of the following Applications made to the Nekaneet Appeal Body or to the Federal Court:
>
> (a) An Election challenge; or
>
> (b) Where the subject of the proceedings is an Application to remove specific member(s) of the Nekaneet Government or the entire Government from office due to an alleged contravention of Legislation by such person(s).

[11] The applicants submit that the present matter does not come within section 16.04, because it is not an "application" as defined by section 1.01 of the *Nekaneet Governance Act* and because the applicants initiated the proceeding, rather than responding to an application. I do not agree that the *Nekaneet Governance Act* should be given such a literal interpretation.

[12] It seems clear that the *Nekaneet Governance Act* is based on the view that the costs of proceedings related to a person's right to hold office, whether in relation to an election or a removal, should be borne by the individuals concerned and not by the First Nation. Implicit in section 16.04 is the idea that the First Nation has no interest—in the legal sense—in who is chosen to hold office. In other words, the First Nation should not take sides in such disputes and should not provide funding to the parties, or to one of them.

[13] Given section 16.04's overarching purpose, it makes little sense to read it in a literal manner that would cover only cases where the chief and councillors are respondents in this Court. The drafters of the *Nekaneet Governance Act* obviously did not turn their minds to the full range of procedural permutations that may arise in First Nations governance matters. For example, pursuant to a literal reading, a chief whose election is challenged could not use Nekaneet funds to respond to the challenge before the Nekaneet Appeal Body, but, upon losing, could then use such funds to bring an application for judicial review in this Court. The better view is that section 16.04 prohibits those who have effective access to Nekaneet Funds to use them for personal purposes, namely, to pay for their legal fees in election or removal matters.

[14] In this case, the underlying dispute is a challenge to the election of Chief Wahobin. The purported use of section 8.07 of the *Nekaneet Constitution* transformed this dispute in an attempt to remove the Chief and all councillors. In both aspects, it is in substance a kind of dispute contemplated by section 16.04.

[15] For these reasons, I will not issue the declaration sought by the applicants. Moreover, section 16.04 is a weighty factor that I must consider in my award of costs.

[16] I would add that the fact that Nekaneet First Nation is named as an applicant cannot serve to side-step the prohibition in section 16.04. One could query whether the First Nation is a proper party to this proceeding. As I explain below, this matter does not involve the public interest. The parties have not explained how the legal rights of the First Nation, as opposed to those of the

individual applicants, are affected by the decision under review. As the parties have not raised this issue, I will not discuss it further.

B. *Public Interest*

[17] Both parties, each from its own perspective, asserted that the present matter involves the public interest. In my view, this is not a reason for requiring Nekaneet First Nation to pay the full legal costs of the parties, or one of them.

[18] While I acknowledge that this Court has sometimes ordered a First Nation to pay the costs of one or both parties in a governance dispute, section 16.04 of the *Nekaneet Governance Act* sounds a significant note of caution. Section 16.04 is based on the premise that Nekaneet members consider election and removal disputes as private matters that should not be publicly funded. Given this, the parties bear a heavy burden to show that the matter involves the public interest. The mere fact that the existence of the dispute hampers the daily functioning of the First Nation does not involve the public interest in the relevant sense.

[19] I have not been persuaded that this matter is anything other than a dispute among two slates of candidates vying for control of the Council. Ms. Buffalocalf is a former councillor who ran for re-election. Based on the information contained in the record, I understand that her side lost the majority on the Council at the last election. In my view, it is immaterial that she is challenging the election of the chief and not that of a councillor or that she may or may not decide to run if the position of chief becomes vacant. Likewise, Ms. Buffalocalf's assertion that she is acting on behalf of the 148 signatories of the April 26, 2023 declaration is tantamount to

saying that a candidate is acting on behalf of all the citizens who voted for them. This does not mean that Ms. Buffalocalf is a public interest litigant.

[20] In the same fashion, the individual applicants were acting to protect their own positions on the Council. Their eventual success, taken in isolation, does not mean that they were acting in the public interest.

[21] It is true that section 8.07 of the *Nekaneet Constitution* is a somewhat unique provision with dramatic consequences. My judgment on the merits of this matter may have contributed to clarifying certain issues regarding its interpretation or application. In light of section 16.04 of the *Nekaneet Governance Act*, however, this is not sufficient to make this case a matter of public interest that would call for a special award of costs.

C. *Resource Imbalance*

[22] The imbalance in resources between individual litigants and those who effectively control the use of First Nation funds may sometimes justify an increased award of costs: *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paragraphs 21–27. Ms. Buffalocalf relies on this principle to seek an award of costs against the First Nation.

[23] However, in this case, section 16.04 corrects the resource imbalance. Each side will have to use their personal funds to pay their legal fees.

[24] To summarize, I see no reason for ordering Nekaneet First Nation to pay Ms. Buffalocalf's costs, or the costs of both parties.

III. Costs against Ms. Buffalocalf

[25] This brings us back to the default rule whereby costs follow the event or, in other words, that the losing party is condemned to pay costs to the prevailing party. The applicants are seeking costs in the amount of $30,000 against Ms. Buffalocalf, which is more than what the application of the Tariff would yield. They base their request on several grounds that I will review below. Ms. Buffalocalf disputes certain of the arguments put forward by the applicants, but does not put forward an alternative position to her request that her full costs be reimbursed by the First Nation.

A. *Litigation Conduct*

[26] The applicants argue that increased costs should be awarded because certain aspects of Ms. Buffalocalf's conduct during the proceedings were improper or had the effect of unnecessarily lengthening the proceedings.

[27] I disagree. Both parties engaged in what I would call tactical behaviour, and a certain degree of animosity between then was noticeable. In the end, however, the parties focused on the main substantive issue and the matter was resolved within two months. As I explained in *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at paragraphs 18–20, the assessment

of costs should not become a detailed autopsy of the proceeding. Here, the parties did not do anything that would warrant elevated costs.

B. *Complexity of the Proceeding*

[28] The applicants also argue that the matter was complex and that it required a substantial amount of work on an urgent basis. Again, I do not find that this warrants elevated costs. It is true that the matter was put under special management and that the applicants sought interlocutory relief. However, the issues were not overly complex and eventually boiled down to interpreting the relevant provisions of the *Nekaneet Constitution*.

C. *Rule 420*

[29] On May 24, 2023, the applicants made an offer to settle to Ms. Buffalocalf. Pursuant to this offer, Ms. Buffalocalf would either consent to a judgment to the effect that the April 26, 2023 declaration is of no force or effect, or withdraw her notice of appearance. In both cases, the applicants would seek no costs from Ms. Buffalocalf, but would ask the Court to declare that their own costs could be paid by the First Nation (and allow Ms. Buffalocalf to make a similar demand).

[30] To be considered under rule 420, an offer to settle must contain an element of compromise: *Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2017 FCA 96 at paragraph 87 [*Venngo*]. Here, the offer required a complete capitulation on Ms. Buffalocalf's part. The only arguable compromise pertained to costs. However, in *Venngo*, at paragraph 90, the Federal Court

of Appeal appears to suggest that a compromise related to costs would not satisfy the requirements of rule 420.

[31] Moreover, cases dealing with commercial disputes may not provide the most useful guidance. Where the claim is for damages, it is often the case that the amount awarded is lower than the amount claimed. It is easier to compromise on the amount of damages than on the validity of an administrative decision, which is often an all-or-nothing issue.

[32] If rule 420 were applied in cases like the present one, each party to an application for judicial review could double the costs by the expedient of making an offer to settle that, in essence, would require the other party to surrender completely. I do not see what purpose would be achieved by encouraging such a practice.

D. *Public Interest*

[33] The applicants argue that they are entitled to elevated costs from Ms. Buffalocalf because they acted in the public interest in seeking to have the Declaration invalidated. As I mentioned above, however, I view this matter essentially as a dispute between opposing groups of candidates, rather than a public interest matter. It does not assist the prevailing party to claim that, in retrospect, they were acting in the public interest because the Court rejected the other party's position. I do not consider this as a factor relevant to the assessment of costs in this case.

E. *Summary*

[34] The applicants have failed to persuade me that the circumstances of the case require an elevated award of costs against Ms. Buffalocalf. Rather, in light of the circumstances, I am of the view that a modest award of costs, in the amount of $5,000, is just and appropriate.

IV. Disposition

[35] For the foregoing reasons, Ms. Buffalocalf will be ordered to pay $5,000 in costs to the three individual applicants jointly. I will not issue an order authorizing the individual applicants to seek reimbursement of their legal fees from Nekaneet First Nation.

ORDER in file T-904-23

THIS COURT ORDERS that:

1. The respondent Shauna Buffalocalf is ordered to pay the applicants Carolyn Wahobin, Roberta Francis and Christine Mosquito the amount of $5,000 in costs, inclusive of disbursement and taxes.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-904-23
STYLE OF CAUSE:	NEKANEET FIRST NATION, CHIEF CAROLYN WAHOBIN, COUNCILLOR ROBERTA FRANCIS, AND COUNCILLOR CHRISTINE MOSQUITO v ALENA LOUISON, COUNCILLOR WESLEY DANIEL, AND SHAUNA BUFFALOCALF

WRITTEN SUBMISSIONS ON COSTS CONSIDERED IN OTTAWA, ONTARIO, PURSUANT TO JUDGMENT 2023 FC 897.

ORDER AND REASONS:	GRAMMOND J.
DATED:	SEPTEMBER 12, 2023

APPEARANCES:

Nathan Xiao-Phillips Mervin Phillips	FOR THE APPLICANTS
Jeffrey M. Howe Jamie Cockburn	FOR THE RESPONDENT SHAUNA BUFFALOCALF
Adam Touet Sharmi Jaggi	FOR THE RESPONDENT WESLEY DANIEL

SOLICITORS OF RECORD:

Phillips & Co. Regina, Saskatchewan	FOR THE APPLICANTS
Howe Legal PC Regina, Saskatchewan	FOR THE RESPONDENT SHAUNA BUFFALOCALF
W Law LLP Saskatoon, Saskatchewan	FOR THE RESPONDENT WESLEY DANIEL