Federal Court  Cour fédérale

Date: 20240806

Docket: T-1437-22

Citation: 2024 FC 1226

Ottawa, Ontario, August 6, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SHANNON BRASS

Applicant

and

CLINTON KEY AND
THE KEY FIRST NATION

Respondents

ORDER AND REASONS (as to costs)

[1] In a Judgment issued on February 26, 2024 (*Brass v Key First Nation*, 2024 FC 304), the Court found that the applicant, Mr. Shannon Brass, did not meet the requirements of the *First Nations Elections Act*, SC 2014, c 5 [*FNEA*] in his challenge of the election of Mr. Clinton Key as Chief of the Key First Nation. As a result, the application made pursuant to section 31 of the *FNEA* was dismissed.

[2] The issue of costs was left in abeyance to allow the parties to hopefully reach an agreement. That was not to be. Thus, the Court ordered that submissions as to costs were to be made no later than March 18, 2024.

[3] However, prior to the deadline, a Notice of Change of Solicitor was served and filed with the Registry in Edmonton by a new counsel acting on behalf of four councillors of the Key First Nation who claimed to be representing the Key First Nation. The Notice of Change of Solicitor was challenged. Submissions as to costs had already been made on behalf of the Key First Nation by its counsel of record throughout the proceedings, Alberta Counsel. The other two parties also served and filed their submissions by the stated deadline.

[4] A case management conference call was held shortly thereafter. On March 27, 2024, the Court issued a Direction, the purpose of which was to set a framework for the litigation of the issue of who rightfully was acting on behalf of the Key First Nation at this stage of the proceedings. Affidavits, cross-examination on affidavits and extensive submissions were made and the Court carefully reviewed the matter.

[5] An order was issued on July 9, 2024 (*Brass v Key First Nation*, 2024 FC 1074). It concluded that the counsel of record on behalf of the Key First Nation must continue to be Alberta Counsel. The Court allowed until July 15 for possible observations or comments by the parties; if none were to be forthcoming, the Court stated that the matter of costs was to be decided on the basis of the written submissions made on or before March 18, 2024. This is the Order which addresses the issue on the basis of the written submissions filed by Ms. Orlagh

O'Kelly on behalf of Shannon Brass, Mr. Brian G. Anslow on behalf of Clinton Key and Mr. Ed Picard on behalf of the Key First Nation.

I. Shannon Brass

[6] Ms. O'Kelly submits that, in spite of being unsuccessful in his application, Shannon Brass should nevertheless be awarded costs in the amount of $5,000. In the alternative, there should not be any costs awarded. In the further alternative, there should be a fixed amount "based on precedent of this Court and/or sent to assessment to determine the appropriate quantum".

[7] It is submitted that the applicant acted in good faith and in the public interest. Given that the Court found a contravention of s 16 of the *FNEA* (although not sufficient to set aside the election of Chief Key pursuant to s 35 of the *FNEA*), the applicant submits that that constitutes "divided success". He contends that the matter was complex, having to investigate and gather evidence.

[8] Mr. Brass, through his counsel, takes issue with the way the case was litigated by the respondents: Mr. Key is said to have insisted on in-person examinations while the cross-examinations conducted on behalf of Mr. Brass were by video conference "wherever practicable". Moreover, Mr. Key sought to introduce affidavit evidence very late in the process, with the result that the matter had to be dealt with at the beginning of the hearing, which resulted in more time being required to complete the hearing. Mr. Key's counsel did not abide by the

Rules of the Federal Courts concerning the format of printed documents, thus surpassing the page limit and causing prejudice to the applicant.

[9] In the event that the Court is inclined to award an elevated lump sum on party and party costs, Mr. Brass requests that the matter of the quantum of costs be sent to an assessment officer so that the accounts be appropriately scrutinized. Finally, the applicant submits that he has a limited capacity to pay.

II. Mr. Clinton Key

[10] Mr. Key favours the award of a lump sum in order to avoid prolonging the dispute through an assessment process.

[11] According to Rule 407, the default rule, the costs would be calculated to be $47,837. That is well short, argues Mr. Key, of the amount of $236,000 (plus taxes and disbursements), as reviewed by a review officer of the Alberta Court (Ms. O'Kelly argues that it is of little value).

[12] It is argued that the consideration of the factors under Rule 400(3) should bring the amount higher:

- the result of the proceeding favours Mr. Key;
- the importance and complexity suggest a departure from the default rule. Elections are by nature important to the elected officials, but also to the First Nation, especially one, like the Key First Nation, where elections have been remarkably

litigious. First Nation elections are said to be complex because of the considerable case law which has emerged in the last few years;

- a considerable amount of work by counsel was needed, especially in view of the applicant's attempt to rely on more affidavit evidence that he was eventually able to muster. Furthermore, allegations improperly made resulted in more work being needed by counsel. More than 570 hours of counsel work, 450 emails, and 6,000 pages of printing and photocopying were required;
- the case was of high public interest to the members of the Key First Nation;
- 11 affidavits, some of them filed unnecessarily by the applicant, lengthened the duration of the proceedings because some had to be withdrawn or the affiants did not attend the cross-examination; and
- the applicant did not have direct knowledge of alleged incidents of contravention of the *FNEA*.

[13] Mr. Key acknowledges that a portion of the legal fees he encountered were covered by a Key First Nation insurance policy.

[14] It is noted that in the case of *Papequash v Brass*, 2018 FC 977 [*Papequash*], my colleague Mr. Justice Robert Barnes ordered the payment of costs in the amount of $86,170, based on costs in the high end of Column V of the Tariff. Clinton Key also refers to the case of *Red Pheasant First Nation v Whitford*, 2023 FCA 29, where the high end of Column IV was considered the starting point with the trial court choosing to exercise its discretion to increase the amount to a lump sum of $325,000 (from legal fees of $570,000 sought by the successful

respondents). The respondent referred the Court to paragraph 58 from the Court of Appeal decision:

> [58] Here, having determined that "the complexity and difficulty of this case is such that the starting point for a cost award is… the high end of the fourth column under Tariff B", the Federal Court exercised its discretion to award a lump sum in excess of its "starting point" but less than the respondents' claim for solicitor-client costs. In doing so, the Federal Court said it had regard to the parties' submissions, the jurisprudence, "the factors noted in these Reasons", and the amount of the respondents' costs computed on a solicitor-and-client basis. In the exercise of its discretion, the Federal Court chose an amount approximately $100,000 more than the Tariff, but less than 60% of the claimed solicitor-and-client costs. Mr. Wuttunee and Mr. Nicotine have not persuaded me that, having stated that it had regard to the respondents' bill of costs, the Federal Court did not consider the reasonableness of those costs.

That, suggests Clinton Key, supports his claim for an increased costs award in a contested First Nation election.

[15] As a result, Mr. Key submits that the high end of either Column IV or V generate fees of $63,546 and $81,574 respectively. The disbursements of $4,283.84 are to be added.

[16] Despite offering submissions using the high end of Columns IV and V, Mr. Key submits in the final analysis "that directing an assessment of costs would prolong this divisive litigation" (Costs submissions, para 31), yet he claims a lump sum of $94,400 from the applicant. That amount in fact represents 40% of costs calculated on the solicitor-client basis.

[17] In the alternative, that same amount, $94,400, could be ordered payable jointly and severally by Shannon Brass and the Key First Nation. The only justification advanced by Mr. Key is that "this litigation will hopefully assist future elections for the Key First Nation" (Costs

submissions, para 32). Counsel does not explain how a successful party, the Key First Nation, could benefit from the unsuccessful challenge to the election of its Chief. Indeed, the events that followed the Court's Judgment of February last, when four councillors sought to act on behalf of the Key First Nation, do not immediately justify such optimism.

III. The Key First Nation

[18] As pointed out earlier, Alberta Counsel continues to act on behalf of the Key First Nation on the matter of costs.

[19] Alberta Counsel acted for the Key First Nation in this litigation because the applicant made allegations about numerous technical irregularities concerning the electoral process which resulted in the election of Clinton Key as Chief at the election held on June 12, 2022. These allegations of technical irregularities were not pursued at the hearing of this matter. It is only on the morning of the hearing that, finally, it was conceded that the applicant did not have evidence to advance his claim of technical irregularities having taken place. It remains that counsel for the Key First Nation took part in every step of the proceedings, including the cross-examinations of affiants and the hearing before the Court.

[20] The Key First Nation reminds the Court of the principles applying to costs in the context of an election of a councillor of a first nation as usefully summarized by my colleague Justice Grammond in *Whalen v Fort McMurray No 48 First Nation*, 2019 FC 1119 [*Whalen*], at paras 2 to 11.

[21] The respondent argues, on the basis of *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*], at paras 136 to 139, that this case is far from qualifying as one of the "rare and exceptional" ones where costs could be awarded to an unsuccessful plaintiff or for that plaintiff to be insulated from the costs consequences of his behaviour.

[22] The respondent concedes, rightly in my view, that this is not a case for solicitor-client costs, as these are reserved for cases of reprehensible or scandalous conduct. The mere fact, in the view of the respondent, that the case was largely based on nefarious characterizations and innuendos does not suffice. Rather, the appropriate basis is party-and-party.

[23] Nevertheless, it is argued that Rule 407 is not appropriate and that an enhanced costs award, under Column V of the Tariff, should constitute the proper basis. The Key First Nation proposes the following factors:

- the application was dismissed and the respondents prevailed;
- the issues were complex and broad-ranging;
- the amount of work required by counsel was considerable. Alberta Counsel states that 460 billable hours were dedicated to this work, which includes time spent on procedural motions, including the one made by Clinton Key which was disposed of in the Judgment of February 26, 2024 (paras 5 to 30); and
- this case was unduly lengthened, with 11 affidavits originally offered, four of which were withdrawn and two of the affiants were not available for cross-examination. Furthermore, allegations made never rose to the level of evidence, but were rather in the nature of innuendo, suspicion and hearsay.

[24] The Key First Nation argues that it is entitled to costs having been separately named as respondent, together with Chief Clinton Key. Both respondents had to be represented by separate counsel.

[25] Alberta Counsel submits three draft bills of costs:

- Column V: $85,276.36
- Column IV: $67,426.36
- Column III: $49,397.86

These amounts are inclusive of GST and disbursements.

IV. Analysis

[26] We begin with the principles that govern the awarding of costs in our Court in the context of litigation involving elections in First Nations. Justice Grammond provided in *Whalen* a useful summary of the principles. Despite their length, I believe the reproduction of the relevant paragraphs will assist in focusing the attention:

> [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.
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> [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.
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> [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. …
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> [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.
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> [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. …
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> [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. … 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.
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> [emphasis added]

[27] Complex litigation is not to be confused with protracted litigation. This was protracted litigation. There is not much complexity in making allegations of irregularities in an election. The gathering of evidence may be fastidious, but it is not a complex endeavour. As the Court pointed out in its Judgment on the merits, the evidence submitted did not support a conclusion that there was evidence sufficient to set aside the contested election. Indeed, various allegations of technical irregularities were not even pursued at trial. The applicant could, and should, have declared much earlier that he was not pursuing allegations involving the Key First Nation. These

were costs thrown away as it was evident that the case clearly lacked evidence of the alleged irregularities.

[28] Similarly, the evidence of misconduct was, in the end, in the nature of suspicion, innuendo and speculation. As is often said, the balance of probabilities is satisfied by evidence that must be sufficiently clear, convincing and cogent (*F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41; *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56, [2016] 2 SCR 720). That was not the case here. The Court fails to see how this case could qualify as rare and exceptional such that it could be said to be of public importance. We are quite far from raising constitutional issues of high public interest, or something equivalent. As was repeated in *Carter* (*supra*), "(c)ourts should not seek on their own to bring an alternative and extensive legal aid system into being" (taken from *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38, at para 44). The applicant chose to pursue a matter that, in the end, was unmeritorious for lack of evidence that was clear, convincing and cogent. This case is rather part of the continuous acrimony between factions in this First Nation.

[29] It follows that the general principles that apply to costs matters govern. Costs follow the event. Thus, the respondents are entitled to costs as the successful parties. We are speaking in terms of a "reasonable contribution" to the costs they unfortunately had to incur to defend the case against them. Costs in the *Papequash* (*supra*) case, involving another election in the Key First Nation, were assessed at $86,170. As noted by the Court of Appeal in *Nova Chemicals*

Corporation v Dow Chemical Company, 2017 FCA 25, counsel can properly advise clients about potential liability as to costs where these are predictable and consistent.

[30] On the other hand, this is not a case where costs based on a solicitor-client basis are warranted. I find no basis to conclude that there is a level of reprehensible, scandalous conduct on the part of the applicant. Conversely, the respondents defended the case in a vigorous manner which was, by and large, commensurate with the case put to them by the applicant. The case being protracted, it resulted in the parties dedicating not insignificant resources. But it would be unfair to conclude that the case was made protracted only on the part of the applicant.

[31] I am not convinced that departing from Column III of the Tariff is justified in the circumstances. Clinton Key and the Key First Nation refer to some of the factors listed at Rule 400(3) of the Rules of the Court. In my view, the case was not complex. It most probably could have been shortened, yet the respondents are in part responsible for its length, including Mr. Clinton's motion, heard at trial, in a futile attempt to add an affidavit well after affidavit evidence had been submitted, and to be granted leave to cross-examine two witnesses. As a result, I decline to consider going beyond Column III in the assessment of appropriate costs.

[32] Counsel for Clinton Key claims that costs calculated under Column III could amount to close to $48,000, without a draft bill of costs. It is unfortunate that a draft bill of costs was not submitted. Counsel for the Key First Nation submits a draft bill of costs under Column III amounting to more than $49,000. That is a bit surprising in view of the fact that it was Clinton Key who appears to have carried a significant portion of the load. Counsel for Shannon Brass

requested that the quantum of costs issue, if the Court is minded to impose costs on a party and party basis, be sent to a Federal Court assessment officer for review. This is appropriate in view of the amounts that have been represented. I note that the draft bill of costs submitted by Alberta Counsel seems to seek the maximum number of units allowable for assessable services. Given the time and complexity of the case, as well as the factors raised by the parties, that is not appropriate. The parties should supply draft bills of costs using the mid-point of the assessable services under Column III rendered in this litigation. That is the default level of costs in the Federal Court and there is no reason to depart from the default level.

[33] In my view, this case falls squarely within the parameters of Rule 407. This is a case of average and usual complexity which the parties, who are not sophisticated litigants, chose to make rather protracted. The reality is that it was only the challenge of Clinton Key's election that was litigated, not that of numerous councillors. The award of costs should provide partial indemnification which will reflect reasonable work put in defending the case. But the award should not seek to compensate as if the matter was truly complex. Moreover, the applicant chose to pursue his case against the Key First Nation in spite of having a weak case. He must now shoulder an award of costs incurred by the second respondent. As with Rule 407, the mid-point of Column III is to be used in the assessment of costs (*Allergan Inc v Sandoz Canada Inc*, 2021 FC 186, [2021] 2 FCR 357, para 25). I add for greater clarity, and to avoid undue recriminations, that, for the purpose of the assessment, where the mid-point may be uncertain, such mid-point will be:

- where the range is 4-7, it is 5;
- where the range is 2-5, it is 4;

- where the range is 3-6, it is 5; and
- where the range is 2-3, it is 2.

Appropriate and reasonable disbursements will, of course, be added, together with taxes.

ORDER in T-1437-22

THIS COURT ORDERS:

1. Costs are awarded to the respondents.

2. Each respondent will submit a bill of costs to the assessment officer. The costs are to be assessed in accordance with Rule 407. That is that the services shall be assessed according to the mid-point of Column III of the Tariff. The mid-point to be used where its determination is unclear is that defined at paragraph 33.

3. Reasonable disbursements shall also be assessed. Applicable taxes shall be added.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1437-22
STYLE OF CAUSE:	SHANNON BRASS v CLINTON KEY AND THE KEY FIRST NATION

WRITTEN SUBMISSIONS CONSIDERED AT OTTAWA, ONTARIO.

ORDER AND REASONS:	ROY J.
DATED:	AUGUST 6, 2024

WRITTEN REPRESENTATIONS BY:

Orlagh O'Kelly	FOR THE APPLICANT
Brian G. Anslow	FOR THE RESPONDENT, CLINTON KEY
Ed Picard	FOR THE RESPONDENT, THE KEY FIRST NATION

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