Federal Court  Cour fédérale

Date: 20231124

Docket: T-1153-22

Citation: 2023 FC 1566

Ottawa, Ontario, November 24, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

GAIL COLLINS

Applicant

and

SADDLE LAKE CREE NATION #462

Respondent

SUPPLEMENTAL JUDGMENT AND REASONS

I. Overview

[1] In *Collins v Saddle Lake Cree Nation #462*, 2023 FC 1239, I granted Ms. Collins' application for judicial review of the Saddle Lake Cree Nation #462/#125 electoral process denying her the right to vote under the still applicable Election Regulations, which exclude certain women and their descendants from voting in elections.

[2] I also ordered counsel to provide costs submissions. This Supplemental Judgment and Reasons address the issue of costs.

[3] In a companion case, *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220 [*McCarthy*], Justice Paul Favel has ordered costs in an amount of $25,000 to the applicant Ms. McCarthy (see reasons on costs: *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 1492 [*McCarthy* 2023 FC 1492]), who brought the same question to the Court in relation to the election regulations that applied to *Whitefish Lake First Nation #128*.

[4] The reasons below endorse the reasons of Justice Favel in his order on costs in *McCarthy* 2023 FC 1492.

II. Parties' Submissions

A. *Ms. Collins*

[5] Ms. Collins submits that she is presumptively entitled to costs because she was wholly successful (*Horse Lake First Nation v Napesis*, 2019 FC 414 at para 28; *Crocs Canada, Inc v Double Diamond Distribution Ltd*, 2023 FC 184 at para 1 [*Crocs Canada*]; *Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186 at para 30 [*Allergan*]).

[6] She seeks an order for a lump sum cost award of $40,000. Alternatively, she seeks taxable costs in accordance with Tariff B, pursuant to a Bill of Costs enclosed in her submissions.

[7] Ms. Collins points to the factors set out in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106 [*Rules*], and submits that in matters involving First Nations governance, costs generally warrant an amount higher than the Tariff amount (*Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119 at paras 27-28 [*Whalen*]; *Ojibway Nation of Saugeen v Derose*, 2022 FC 870 at para 11).

[8] Ms. Collins first submits that she was successful in the proceedings and that the result is not a "divided success" (*Bertrand v Acho Dene Koe First Nation*, 2021 FC 525 at paras 10-15).

[9] Second, she submits that the case had a quintessential public interest engaging the interests of band members with *Charter* protections and the continuing legacy of past discrimination.

[10] Third, the Saddle Lake Cree Nation [SLCN] repeatedly and consistently perpetuated the discrimination for decades, and the litigation should have been unnecessary. Indeed, the conduct of SLCN in this case resulted in duplicate proceedings because SLCN moved to be removed as co-respondent in *McCarthy*. In doing so, SLCN represented to the Court that Whitefish Lake First Nation #128 conducted separate elections and that in the SLCN elections, a new election code would allow Bill C-31 members to vote. That representation turned out to be untrue, leading to the current proceeding, while the matter could have been determined conclusively in *McCarthy*.

[11] Fourth, Ms. Collins argues that this case was legally complex, required significant work, evidence, research and analysis. The decision is a novel and rare application of two sections of the *Charter*, sections 25 and 28, and goes further than merely adopting the analysis of Justice Favel in *McCarthy*. The decision is more than a companion case to *McCarthy* and will have a significant impact on *Charter* jurisprudence especially regarding First Nations across what is now known as Canada. When a proceeding results in clarification of governance issues for the First Nation, this often warrants a higher level of costs for the individual applicant (*Shirt v Saddle Lake Cree Nation*, 2022 FC 321 at paras 98-107 [*Shirt 2022*]).

[12] Fifth, she argues that there is a resource imbalance between her and SLCN, which is a relevant consideration. There is power and imbalance between a band member who must use her own funds and the band who can use band funds to defend the proceeding (*Whalen* at paras 29, 32).

[13] The draft Bill of Costs provides a Column III amount of $14,450 and a Column V amount of $25,160. In light of the ranges, a lump sum costs award is appropriate (*Shirt 2022* at paras 98-1076).

B. *SLCN*

[14] SLCN also relies on Rule 400(3) of the *Rules* in its costs submissions.

[15] SLCN submits that even if the case was of “public interest”, it is not automatic that elevated costs are warranted.

[16] SLCN also submits that the constitutional challenge in this case was resolved in *McCarthy* and therefore the case was not "truly exceptional" with significant societal impact. Moreover, counsel for Ms. Collins was the same counsel as in *McCarthy* and therefore the same materials could presumably have been used and the imbalance of resources between the parties less pronounced. In addition, the fact that SLCN conceded the constitutional challenge should be a factor to reduce the amount in costs.

[17] SLCN then submits that the general principles governing costs awards note an increasing trend to award lump sums in costs (*Allergan* at paras 19, 21-22, 25). SLCN then argues that the trend is to award lump sum costs in the range of 25 to 50 percent of actual fees; but the overreaching consideration is making an award of costs that is fair and reasonable and strikes a balance between compensating the successful party and not burdening the unsuccessful party unduly (*Crocs Canada* at paras 9-10, 12).

[18] SLCN then submits that in cases involving First Nations governance, enhanced costs may be awarded where the litigation serves a public purpose or involves a constitutional question, but solicitor-client costs or even elevated costs are not automatic (*Whalen*; *McCallum v Canoe Lake Cree First Nation*, 2022 FC 969 at para 128).

[19] SLCN submits that in many other First Nation decisions involving elections, lump sums in costs were awarded closer to Tariff B calculations, such as amounts between $2,500 and $5,000 (*Shanks v Salt River First Nation #195*, 2023 FC 931 at paras 19-20; *Whitstone v Onion Lake Cree Nation*, 2022 FC 399 at para 95; *Lecoq c Peter Ballantyne Cree Nation*, 2020 FC

1144 at para 81; *Morin v Enoch Cree First Nation*, 2020 FC 696 at para 57; *Tourangeau v Smith's Landing First Nation*, 2020 FC 184 at para 70).

[20] In this case, SLCN argued that success was mixed or divided and each party should bear their own costs (*Pittman v Ashcroft First Nation*, 2022 FC 1380 at para 136). Alternatively, an award of costs of a maximum of $5,000 may be awarded.

III. Analysis

[21] Rule 400(1) of the *Rules* provides that the application judge has full discretion when awarding costs. As already stated by Justice Favel in his ruling on costs in the *McCarthy* 2023 FC 1492 case: "[t]his discretion must be exercised judicially. The exercise of awarding costs involves an inescapable risk of arbitrariness and roughness on the part of the Court (*Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842, aff'd 2013 FCA 220 at para 9). This risk is tempered by the applicable legal principles."

[22] The parties have all relied on Rule 400(3) of the *Rules* and some of the same case law in making their arguments on costs. The principles are not contested, and the current trend is for the court to award a lump sum under Rule 400(4) of the *Rules*, instead of relying on the Tariff, which is the default mechanism for awarding costs (*Whalen* at para 8).

[23] As explained in *Crocs Canada* at para 10 (citing *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 at para 15), lump sum cost awards usually fall within a range of 25% to 50% of the actual legal costs of the successful party (see also *Whalen* at para 33, citing *Nova*

Chemicals Corporation v Dow Chemical Company, 2017 FCA 25 at para 17 [*Nova*]). Therefore, "the successful party must give evidence of its legal costs to support a request for a lump sum" (*Whalen* at para 34).

[24] Applying the factors listed in Rule 400(3) of the *Rules*, costs in the normal course are awarded to the successful party. In this case, Ms. Collins, despite not obtaining the new election she requested, was largely successful on all substantive points. The fact that the entire order sought was not granted does not mean that success was "divided".

[25] I also agree with Ms. Collins that there was an imbalance of power. As an individual, she had to defray her own funds to pursue a claim against SLCN who could rely on SLCN funds.

[26] I also agree with the parties that this case involved a complicated issue of public interest involving a constitutional question. I acknowledge SLCN's argument that counsel for Ms. Collins was the same as counsel in the *McCarthy* case, and that therefore, there may have been some mitigation in costs, but I accept Ms. Collins submission that had SLCN simply participated in the *McCarthy* case instead of moving to be removed, Ms. Collins may have incurred no costs.

[27] Finally, I do not view SLCN's conduct as warranting a higher than normal costs award.

[28] In terms of evidence required to award a lump sum in costs, Justice Favel in *McCarthy* 2023 FC 1492 (citing *Shirt 2022*), held that evidence of the actual legal costs is not necessary. To be justified and not "plucked from thin air" (*Shirt 2022* at para 107, citing *Whalen* at para 33 and

Nova at para 15), the Court may rely on bill of costs calculations provided by the parties based on elevated costs of Column III and Column V of Tariff B. I agree that this is an acceptable position, subject to the Court's discretion in the matter.

[29] Taking into account the legal principles set out above, the submissions of the parties, including the draft Bill of Costs submitted by Ms. Collins, and the discretion afforded to me by Rule 400 of the *Rules*, I order that SLCN pay lump sum costs to Ms. Collins in the sum of $20,000.00, inclusive of disbursements and taxes. This is a reasonable amount, when considering all of the circumstances of this matter as set out above, especially when SLCN could have elected to participate in the *McCarthy* case instead of forcing Ms. Collins to bring this matter to the Court. This amount is to be paid forthwith.

IV. Conclusion

[30] In light of the above, I am exercising my discretion to award lump sum costs to Ms. Collins in an amount of $20,000.

JUDGMENT in T-1153-22

THIS COURT ORDERS that lump sum costs be awarded to the Applicant, payable forthwith by the Respondent, in the amount of $20,000, inclusive of disbursements and taxes.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1153-22
STYLE OF CAUSE:	GAIL COLLINS v SADDLE LAKE CREE NATION #462
SUPPLEMENTAL JUDGMENT AND REASONS:	RÉGIMBALD J.
DATED:	NOVEMBER 24, 2023

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