Federal Court of Appeal | Cour d'appel fédérale

Date: 20230208

Dockets: A-121-22
A-126-22

Citation: 2023 FCA 29

CORAM: **LOCKE J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

Docket: A-121-22

BETWEEN:

CLINTON WUTTUNEE AND GARY NICOTINE

Appellants

and

MARY LINDA WHITFORD, ALICIA MOOSOMIN, BURKE RATTE AND RED PHEASANT FIRST NATION

Respondents

Docket: A-126-22

AND BETWEEN:

RED PHEASANT FIRST NATION

Appellant

and

MARY LINDA WHITFORD, ALICIA MOOSOMIN, BURKE RATTE, CLINTON WUTTUNEE AND GARY NICOTINE

Respondents

Heard at Toronto, Ontario, on November 30, 2022.

Judgment delivered at Ottawa, Ontario, on February 8, 2023.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: LOCKE J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

I. Background

[1] Mary Linda Whitford and Alicia Moosomin (the respondents) brought an application in the Federal Court, under section 31 of the *First Nations Election Act*, S.C. 2014, c. 5 (*FNEA*), contesting the validity of Red Pheasant First Nation's 2020 election of Chief and councillors. Red Pheasant First Nation (RPFN) was named a party to the application for the limited purpose of a potential cost award in relation to that proceeding.

[2] The Federal Court (2022 FC 436 per Justice Brown) found that Clinton Wuttunee, Gary Nicotine, and six other successful candidates in the election, as well as other individuals associated with that group, committed serious electoral fraud. The Federal Court exercised its discretion under section 35 of the *FNEA* to annul the elections of Mr. Wuttunee as Chief and Mr. Nicotine as councillor. However, despite finding six other individuals elected as councillors also committed serious electoral fraud, albeit on a lesser scale, it did not exercise its discretion to annul their elections.

[3] The respondents and Mr. Wuttunee and Mr. Nicotine appealed that decision to this Court. The respondents sought to have the election annulled in its entirety; Mr. Wuttunee and Mr. Nicotine sought to have the annulment of their elections reversed. This Court recently dismissed both appeals, in separate decisions reported as 2023 FCA 17 and 2023 FCA 18, respectively.

[4] In its decision on the merits, the Federal Court sought submissions from the parties on costs, including what all-inclusive lump sum should be awarded. Burke Ratte, the electoral officer in the election, and named in the Federal Court proceeding to facilitate discovery and source documents, sought $20,000 in costs at the end of the proceeding. He made no additional submissions and no one opposed his request. The six other individuals elected as councillors and found to have committed serious electoral fraud, but whose elections were not annulled, made no submissions on costs.

[5] The respondents sought solicitor-and-client costs against Mr. Wuttunee, Mr. Nicotine and RPFN on a joint and several basis and made detailed written costs submissions. In its written submissions, RPFN asserted it should not be liable for costs. Mr. Wuttunee and Mr. Nicotine, who represented themselves on the costs matter, asserted they should not be liable for costs or at most should be liable for $22,000 based on an overall cost award of $100,000. As the respondents were only partially successful, they said, the respondents should be liable for the remainder, suggesting their $22,000 liability might be set off against the respondents' liability.

[6] For unreported reasons dated June 2, 2022 (Reasons), the Federal Court decided a lump sum was “the most efficient and just manner in which to resolve the issues of costs at the end of this protracted, hard fought and difficult dispute, and having regard to the factors noted in these Reasons.”

[7] The Federal Court could see no reason to depart from the general rule that costs follow the event and concluded that, as unsuccessful parties, Mr. Wuttunee and Mr. Nicotine should be liable to pay costs.

[8] During the hearing on the merits, the same counsel represented RPFN and the individuals found to have committed serious electoral fraud. The Federal Court found that RPFN had paid the legal fees and disbursements of those individuals, including Mr. Wuttunee and Mr. Nicotine. In the circumstances, the Federal Court thought it appropriate that RPFN should pay the respondents’ costs.

[9] Although the respondents sought solicitor-and-client costs in excess of $570,000, the Federal Court awarded them $325,000 as an all-inclusive lump sum to be paid by Mr. Wuttunee, Mr. Nicotine and RPFN, on a joint and several basis. The Court ordered the same three to pay costs of $20,000 to Mr. Ratte. It awarded no costs to or against the other six individuals, stating that, although they sought none, it would not have awarded them costs given its finding that they committed serious electoral fraud.

[10] In separate appeals, Mr. Wuttunee and Mr. Nicotine (A-121-22) and RPFN (A-126-22) appeal that part of the costs order requiring them to pay costs to the respondents. While their grounds of appeal differ in some respects, for the reasons that follow, I am satisfied that the Federal Court made no errors warranting interference by this Court. Consequently, I would dismiss both appeals.

II. Standard of Review

[11] An award of costs is "quintessentially discretionary": *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 126. *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, confirms that the standard of review applicable on appeals of discretionary decisions of the Federal Court is that articulated by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33. Questions of law are reviewed on the standard of correctness. Findings of fact or mixed fact and law are reviewed for palpable and overriding error unless an extricable legal error can be demonstrated.

[12] Put another way, appellate Courts should interfere with costs awards only if the Court below "made an error in principle or if the costs award is plainly wrong": *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 247, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

III. Costs in the Federal Courts: *Federal Courts Rules*

[13] Rule 400(1) of the *Federal Courts Rules*, S.O.R./98-106 (Rules) expressly grants the Court "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid." Rule 400(3) sets out a non-exhaustive list of factors the Court may consider in making cost awards. Rule 400(3)(o) expressly permits the Court to consider any other matter it considers relevant. The Court is not required to state the weight afforded to any particular factor and not all factors may be relevant in a particular case.

[14] Rule 400(4) allows the Court to fix costs according to the Tariff or to award a lump sum. Rule 400(6) allows the Court to award all or part of the costs on a solicitor-and-client basis.

[15] With that background, let me turn to the appeals before us.

IV. The Appeals

A. *Appeal by Clinton Wuttunee and Gary Nicotine*

[16] Mr. Wuttunee and Mr. Nicotine assert that the Federal Court made several errors in principle. First, they assert that the Federal Court erred by failing to consider the respondents' conduct in delaying the litigation. It was an error, they say, to give that fact no weight.

[17] With respect to the public interest factor found in Rule 400(3)(h), Mr. Wuttunee and Mr. Nicotine claim the Federal Court erred by not considering their capacity to pay and balancing that against the respondents' capacity to pay, taking into account the reasonableness of

the respondents' legal fees. Moreover, they say, the Federal Court erred in relying on RPFN's financial statements "as proof of [their] financial capacity under the public interest factor". The result, they say, is that the amount of the costs award is "plainly wrong".

[18] Finally, they say the Federal Court erred in considering their acts of electoral fraud as relevant at all.

[19] I will address each of these alleged errors separately, turning first to the asserted failure to take into account the respondents' conduct that delayed the proceeding.

(1) The Federal Court did not fail to consider the respondents' conduct

[20] Mr. Wuttunee and Mr. Nicotine point to several instances in the record in which the Case Management Judge criticized the conduct of both sides. However, they say, the Case Management Judge made additional findings that the respondents' conduct unnecessarily lengthened the proceeding. They point to passages in the reasons for orders issued by the Case Management Judge. Because the Federal Court did not address these findings in the Reasons, they say, it gave those findings no weight and so erred.

[21] I disagree.

[22] Although the Federal Court did not describe the conduct of the parties in detail in its Reasons, there is no doubt that it was fully aware of the pre-hearing conduct. This conduct is

described in detail over ten pages in the reasons for the merits decision (Merits Reasons) and is referred to throughout those reasons. The Federal Court had no need to repeat it.

[23] Rather, at paragraph 23 of its Reasons, the Federal Court referred to the Merits Reasons and quoted a passage from an order of the Case Management Judge. That passage describes the conduct of the parties (other than Mr. Ratte) and their respective counsel as leaving much to be desired and showing "a shocking disregard for the principle of proportionality, as well as an unacceptable unwillingness or inability to communicate or otherwise cooperate in advancing the proceeding in an efficient manner".

[24] In the immediately following two paragraphs, the Federal Court stated that, "[t]hat said", the conduct of the individuals whose elections the respondents challenged "delayed and in many respects frustrated" the matter and that, "as outlined in the [Merits] Reasons", their positions were often without merit or authority. Examples of these findings are found at paragraphs 102, 114, 126, 131, 215, 218, 226, 229, 252, 288, 435, and 451 of the Merits Reasons. In its Reasons, the Federal Court stated the conduct of those individuals "might fairly be described as obstruction tantamount to abuse" and their strategy "was designed to frustrate the [respondents] in their search for the truth and a just determination in this proceeding".

[25] Reading paragraphs 23 to 25 of the Reasons and the Merits Reasons together, I am satisfied that the Federal Court was fully aware of all of the conduct of all parties throughout the proceeding and took all of it into account in making its determination about the effect that

conduct should have on the costs award. Our role is not to re-evaluate the weight that the Federal Court gave to that factor.

(2) The Reasons properly considered the appellants' ability to pay

[26] I turn now to the other errors asserted by Mr. Wuttunee and Mr. Nicotine. In particular, they take issue with the following two subparagraphs of the Reasons:

> [26] In addition to the foregoing assessments, including conduct per Rule 400(1), I have also considered the factors in Rule 400(3) in assessing the lump sum awarded under Rule 400(4), including:
>
> …
>
> 4) whether the public interest in having the proceeding litigated justifies a particular award of costs – given the two and a half years this case consumed, the impecuniosity of the [respondents], the uncontested affidavit that the financial statements of Red Pheasant First Nation budgeted for costs: "The total value of the claim for costs could be in the range of $250,000 and the outcome was not certain as of March 31, 2021", and that very considerable work was done by the [respondents] after that in the intervening year including the two-day hearing in January of 2022;
>
> 5) whether any step in the proceeding was (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution – the fact that then Chief Wuttunee, Councillor Gary Nicotine, and six of the seven other seven Councillors (excluding only Dana Falcon) committed serious electoral fraud in the election, when they should be been champions of and not corroders of electoral integrity.

[27] The underlined words in subparagraph 4) are found in Rule 400(3)(h). Mr. Wuttunee and Mr. Nicotine accept that First Nations governance cases can raise issues of public interest justifying an elevated costs award. They also accept that it was open to the Federal Court to

conclude that the respondents were impecunious and that the proceedings were lengthy and complex.

[28] However, Mr. Wuttunee and Mr. Nicotine assert the Federal Court did not make any finding about their ability to pay and did not consider any imbalance between their ability to pay and that of the respondents. Rather, they say, the Federal Court found that the RPFN had the financial capacity to pay the costs award based on a note to its financial statements concerning a contingent liability for costs and inappropriately attributed that capacity to them. This they say was an error.

[29] I cannot agree.

[30] As part of their costs submissions, the respondents filed evidence demonstrating their very modest financial resources. Mr. Wuttunee and Mr. Nicotine neither asserted an inability to pay nor provided any evidence to the Federal Court about their financial resources or ability to pay. In fact, they expressly stated that they would agree that a $22,000 costs award against them would be fair, suggesting some capacity to pay.

[31] While it is true that the Federal Court concluded that RPFN paid the legal fees and disbursements of the individuals whose elections were contested and of other individuals who committed serious electoral fraud, it did not attribute RPFN’s ability to pay to Mr. Wuttunee and Mr. Nicotine. As they assert, the Federal Court did not make any specific finding about their

ability to pay. However, the Federal Court cannot be faulted for failing to do so in the absence of Mr. Wuttunee or Mr. Nicotine advancing any position or evidence on that issue.

[32] I recognize that Mr. Wuttunee and Mr. Nicotine represented themselves in the costs submissions, but even self-represented litigants bear some responsibility for familiarizing themselves with the relevant law. Mr. Wuttunee and Mr. Nicotine claimed to have consulted lawyers and parts of their costs submission attribute certain statements to those lawyers.

[33] I also see no error in the Federal Court's reference to RPFN's notes to the financial statements in its consideration of the public interest factor. I understand the Federal Court's use of the verb "budget" to refer not to there being a specific budget item for costs, but rather to RPFN having a general recognition that it could be ordered to pay costs.

> (3) Pre-litigation conduct may be considered in determining the quantum of an elevated lump sum award

[34] I turn now to subparagraph 5) quoted above. It addresses Rule 400(3)(k), the text of which is repeated in the opening words: whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution.

[35] In this case, the proceeding is the application under the *FNEA* to contest the election in the Federal Court. That proceeding commenced with the issuance of the notice of application in

the Federal Court: Rule 62. Thus, I agree with Mr. Wuttunee and Mr. Nicotine that the serious electoral fraud they committed is not a step in the proceeding.

[36] However, for reasons I will explain, I do not interpret the Federal Court's statements as indicative of a conclusion that the electoral fraud itself was a step in the proceeding, despite the manner in which the Federal Court referred to the electoral fraud.

[37] I first observe that paragraph 26 immediately follows the Federal Court's discussion of conduct. Paragraph 26 opens with a statement that it is concerned with something "[i]n addition" to factors already discussed "including conduct". This reference to conduct obviously includes conduct that "tended to … unnecessarily lengthen the duration of the proceeding", a factor under Rule 400(3)(i) expressly addressed by the Federal Court in paragraphs 23 to 25 of its Reasons.

[38] Secondly, paragraph 26 states it is concerned with "the factors in Rule 400(3) in assessing the lump sum awarded under Rule 400(4)" [my emphasis].

[39] Rule 400(1) states the Court has full discretion over the amount of the costs, the allocation of costs, and who should pay them. Before paragraph 26 of its Reasons, the Federal Court had addressed all but the amount. The rationale for a lump sum award is found in paragraph 11; the Court's decision that Mr. Wuttunee and Mr. Nicotine should bear the costs is found in paragraph 14; the Court's decision to hold RPFN also liable is addressed in paragraphs 15 to 21; why the Federal Court would not award costs to those who committed electoral fraud, but whose elections it did not annul, is addressed in paragraph 19. However, the appropriate

amount of the lump sum remained to be decided. In my view, paragraph 26 is primarily concerned with that determination.

[40] As I noted earlier, the respondents submitted they should be entitled to solicitor-and-client costs. In doing so, they addressed several factors in Rule 400(3) including those in (k) and (o)—the latter concerning any other matter the Court considers relevant.

[41] The respondents' submissions in relation to Rule 400(3)(k)—whether any step in the proceeding was vexatious, improper or unnecessary—focussed entirely on steps in the proceeding, including assertions regarding false testimony, advancement of inappropriate and unmeritorious positions on motions, unfounded allegations against respondents' counsel, and the filing of irregular documents. They did not refer to electoral fraud under that factor.

[42] The Federal Court addressed conduct in the proceeding—discussed in the respondents' submissions over more than a page in relation to Rule 400(3)(i) and over three pages in relation to Rule 400(3)(k), and raised by RPFN and by Mr. Wuttunee and Mr. Nicotine in their costs submissions—in paragraphs 23 to 25, the only paragraphs in its Reasons that address conduct during the proceeding.

[43] However, the respondents' written costs submissions to the Federal Court did raise serious electoral fraud as relevant in two other contexts.

[44] First, they referenced it in relation to Rule 400(3)(o)—any other relevant matter. There they said that pre-litigation conduct may be relevant, citing *Roseau River Anishinabe First Nation v. Nelson*, 2013 FC 180 at paras. 61-76 [*Roseau River*]. In particular, the respondents' submissions stated:

> The deplorable misconduct directly caused this Notice of Application. They should be responsible for the financial cost of their misconduct.
>
> [My emphasis]

[45] Secondly, in support of their submission that they should be awarded solicitor-and-client costs, they relied on the reasons they had already outlined and that:

> The conduct of the Respondents [those elected persons who committed electoral fraud] both in relation to the election and this proceeding was reprehensible, scandalous and outrageous.
>
> [My emphasis]

[46] These two submissions taken together seem motivated by a desire both to connect the pre-litigation electoral fraud closely to the proceeding and to demonstrate that the conduct was of a nature that justified sanction through an award of solicitor-and-client costs. This interpretation is consistent with the passage from *Roseau River* the respondents cited; it is concerned with solicitor-client costs.

[47] As the Federal Court there observed, under the relevant jurisprudence, solicitor-and-client costs should be awarded only when a party has displayed reprehensible ("behaviour… deserving of censure or rebuke"), scandalous ("causing general public outrage or indignation") or

outrageous (“among other things, is deeply shocking, unacceptable, and immoral and offensive”) conduct: *Roseau River* at para. 63.

[48] Here the Federal Court did not award solicitor-and-client costs. The question then is whether the serious electoral fraud could be taken into account by the Federal Court in assessing the quantum of the lump sum award. For the reasons that follow, in the circumstances of this case, I am satisfied it could.

[49] The reference to “reprehensible, scandalous or outrageous conduct” is found in the Supreme Court of Canada’s decision in *Young v. Young*, [1993] 4 SCR 3, 108 D.L.R. (4th) 193. The Court of Appeal of British Columbia ((1990), 75 DLR (4th) 46, 50 BCLR (2d) 1) had reduced the solicitor-client costs awarded by the trial judge to one of the parties, concluding the circumstances did not justify them. On appeal, the Supreme Court said it agreed with the principles on which the Court of Appeal based its order reducing the costs awarded by the trial judge, before stating that solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties: at page 134.

[50] The Court of Appeal decision looked at other cases including *Stiles v. Workers’ Compensation Board of British Columbia* (1989), 38 B.C.L.R. (2d) 307, 16 A.C.W.S. (3d) 306 (BCCA), where Lambert J. A. stated, among other things:

> The principle which guides the decision to award solicitor-and-client costs in a contested matter… is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used.

[My emphasis]

[51] The emphasized passage in this quotation was quoted by this Court in *Bank of Nova Scotia v Fraser*, 2001 FCA 267 [*Fraser*], affirming *Bank of Nova Scotia v. Fraser*, [2000] F.C.J. No. 773, 186 F.T.R. 225. That decision dismissed a judicial review of an adjudicator's award of solicitor-and-client costs, and itself awarded solicitor-client costs against the bank. Among the factors the adjudicator relied on in support of the costs award was the bank's pre-litigation conduct in unjustly terminating Ms. Fraser, conduct the adjudicator described as "callous and cruel", "dishonest" and "intransigent and bellicose": see paragraph 20 of the Federal Court's reasons. In making its costs award, the Federal Court observed that, given the high standard on judicial review and the weak arguments advanced by the bank, "Ms. Fraser should not have been put to the expense of defending the present application.": at para. 22.

[52] In its decision to award solicitor-client costs in *Shotclose v. Stoney First Nation*, 2011 FC 1051 [*Shotclose*], the Federal Court expressly observed that the proceeding there would not have been necessary but for the decisions and actions of the Chief and Council. It stated "[a]ll of the parties could have been spared the expense of costly litigation had [the] sensible course of action been taken. The failure of the respondents to do so was a blatant attempt to remain in power": *Shotclose* at para. 10. See also *Shirt v. Saddle Lake Cree Nation*, 2022 FC 321 at para. 104.

[53] This Court also has recognized that pre-litigation conduct may be taken into account in determining whether solicitor-and-client costs should be awarded where that conduct is closely connected with the litigation. In addition to *Fraser*, see *Apotex Inc. v. Canada (Minister of*

National Health and Welfare), [2000] F.C.J. No. 1919, 194 D.L.R. (4th) (FCA) 483 at para. 12; *The Queen v. Martin*, 2015 FCA 95 at paras. 26-27, leave to appeal to SCC refused, 36479 (20 October 2015); *Merchant v. The Queen*, [1998] 3 C.T.C. 2505, 98 D.T.C. 1734 (TCC) at para. 59, aff'd 2001 FCA 19; *Lau v. The Queen*, 2003 TCC 74, aff'd 2004 FCA 10. See also *Hunt v. TD Securities Inc.* (2003), 229 DLR (4th) 609, 66 OR (3d) 481 (ONCA) at para. 123; *Oz Optics Limited v. Timbercon, Inc.*, 2012 ONCA 735 at para. 16.

[54] There is no doubt the Federal Court could have been clearer here. However, taking all of this together, I understand subparagraph 5) to reflect the Federal Court's determinations that, but for the serious electoral fraud, the first step in the proceeding would have been unnecessary and, that conduct was sufficiently closely connected with the proceeding that, if of a sufficiently culpable nature, it could be considered in assessing an appropriate lump sum.

[55] I acknowledge that the Federal Court did not expressly describe Mr. Wuttunee and Mr. Nicotine's conduct as reprehensible, scandalous or outrageous. However, it did describe vote buying as "an insidious practice that corrodes and undermines the integrity of any electoral process" (Merits Reasons at para. 11) and the use of band funds to do so as "particularly grave electoral fraud" that was "egregious" (Merits Reasons at paragraph 474). I have no doubt that the Federal Court was satisfied that "their numerous and gravely serious electoral frauds [that] corroded the integrity of the Election" (Merits Reasons at paragraph 500) could be characterized as conduct "deserving of censure or rebuke", "causing general public outrage or indignation" or "unacceptable, and immoral and offensive": Roseau River at para. 63.

[56] While the lump sum awarded by the Federal Court is less than solicitor-and-client costs, it is, as the appellants complain, an elevated award—providing what might be called substantial indemnity. That the Federal Court did not award solicitor-and-client costs does not mean that the pre-litigation conduct was not of a character that might support such an award. If such conduct can be considered in deciding on whether to award solicitor-and-client costs, it cannot be said to be irrelevant to determining whether an elevated cost award should be made.

[57] However, such conduct is only one factor. The "award of costs on a lump sum basis must be justified in relation to the circumstances of the case and the objectives underlying costs": *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 at para 15. Those objectives include contributing to the costs of the litigation, promoting settlement, and deterring abusive behaviour: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 25; and *Air Canada v. Thibodeau*, 2007 FCA 115 at para. 24.

[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.

[59] In conclusion, Mr. Wuttunee and Mr. Nicotine have not identified an error made by the Federal Court warranting interference by this Court.

B. *RPFN's Appeal*

[60] Some of the errors RPFN asserts on appeal were asserted by Mr. Wuttunee and Mr. Nicotine, and I will not address them further.

[61] Moreover, several errors asserted by RPFN amount to submissions that the Federal Court either did not take certain factors in Rule 400(3) into account or gave too little or too much weight to particular factors. Cost awards are discretionary and highly dependent on the circumstances of the case. The Federal Court is in the best position to identify and weigh the relevant factors. Accordingly, absent palpable and overriding error, this Court will not interfere with the Federal Court's determination of the factors that are relevant or the weight given to them. I see no palpable and overriding error here.

[62] However, I will address certain errors asserted by RPFN.

[63] First, RPFN asserts the Federal Court did not properly apply the public interest test in assessing costs against it in that the Court drew adverse inferences about RPFN's intentions and

motivations even though the Court acknowledged RPFN's limited role in the proceeding. This is a question of mixed fact and law and so RPFN must establish a palpable and overriding error or an extricable error of law. I see none here.

[64] I first observe that costs have even been awarded against a First Nation that did not participate in the proceeding at all: *Bellegarde v. Poitras*, 2009 FC 1212, aff'd 2011 FCA 317 [*Bellegarde*]. Here, RPFN was named a party for the sole purpose of a potential cost award against it and, as the Federal Court noted, RPFN's financial statements expressly acknowledged its contingent liability for costs. Thus, it knew it might be liable for costs despite its limited role. The Federal Court expressly invited the parties to make written cost submissions, an invitation RPFN accepted.

[65] In those submissions, RPFN acknowledged the relevance of a public interest analysis to costs, but asserted insufficient public interest in this case to warrant a costs award against it. To quote from that submission "there was no added certainty to the interpretation of First Nations governance law" and "[f]raud, forgery and corruption are not confined to a particular community or to a particular level within Canada's electoral processes."

[66] While this case may not have addressed interpretation of First Nations law, an election free of serious electoral fraud is obviously an important governance matter. Moreover, Rule 400(3)(h) expressly permits the Court to consider "the public interest in having the proceeding litigated" in "exercising its discretion under [Rule 400](1)", a discretion that includes determining who should pay the costs. The respondents sought to have the laws applicable to

RPFN's election observed, undoubtedly a matter of public interest to the RPFN community as a whole.

[67] Here, the Federal Court reviewed Federal Court jurisprudence regarding costs awards made against a First Nation in cases concerning governance. It then observed that the same counsel represented RPFN, all the individual candidates against whom allegations of electoral fraud were made, as well as another individual who committed serious electoral fraud. In doing so, said the Federal Court, RPFN "chose to make common cause against the [respondents]". The Federal Court also "had no difficulty concluding [RPFN] paid the legal fees and disbursements" of those individuals.

[68] Having come to the conclusion that RPFN had aligned itself with the individuals who committed electoral fraud, paid their costs, and made common cause with them against the respondents, and recognizing that neither RPFN nor its members is wealthy, the Federal Court stated:

> [T]he jurisprudence establishes one possible consequence of a band paying the legal fees and disbursements of elected officials alleged to have committed serious electoral fraud, is the possibility of an order that the Band pay the legal fees and disbursements of those who struggle and ultimately succeed in establishing serious electoral fraud corruption by those elected officials, as occurred here.

[69] There is ample support in the jurisprudence for that proposition: *Bellegarde*; *Knebush v. Maygard*, 2014 FC 1247; *Shotclose*; *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 1119; *Standinghorn v. Atcheynum*, 2007 FC 1137. As the Federal Court has observed, "as a practical matter, the party who controls a First Nation's council is in a position to have its

legal costs reimbursed by the First Nation": *Ojibway Nation of Saugeen v. Derose*, 2022 FC 870 at para. 11.

[70] Although RPFN complains about the adverse inferences drawn by the Federal Court, its submissions to the Federal Court did not address whether RPFN paid those legal fees and disbursements. Before us, counsel for Mr. Wuttunee and Mr. Nicotine admitted RPFN had paid their costs. I see no palpable and overriding error made by the Federal Court.

[71] Similarly, in addressing its financial resources, RPFN's cost submissions stated that it was a relatively small First Nation and that an award of costs against it would diminish its resources for its community priorities. But, RPFN provided no evidence and made no effort to explain why these considerations were not equally applicable to its decision to pay the costs of the individuals who committed serious electoral fraud, including Mr. Wuttunee and Mr. Nicotine. Neither RPFN nor any other party led any evidence that RPFN had not paid those costs or to substantiate what those costs were relative to the costs incurred by the respondents. Again, I see no palpable and overriding error in the Federal Court coming to the conclusions it did.

[72] RPFN also asserts the Federal Court erred because its costs order "contains a significant 'cutting and pasting' from the [respondents'] costs submission" that "[p]ages 11-13 in the [respondents'] submission were inserted in paragraph 26 of the Costs Order". In my view, there is no merit to this claim.

[73] Only a quotation from an affidavit providing details about the respondents' actual fees and the work done by counsel is repeated verbatim in the Reasons—in other words, evidence. Nothing is inappropriate about that, particularly where the Federal Court expressly states none of the other individuals provided any evidence of their legal costs. Reading the Reasons as a whole, no "reasonable person would conclude that the judge did not put [his] mind to the issues and decide them independently and impartially" here: *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para. 1 [*Cojocaru*].

[74] Similarly there is no merit to RPFN's assertion that "the absence of proper reasons leaves open the question of whether the Court considered 'all relevant factors' in making the [costs] order and/or… applied the correct analysis in considering the factors". Reasons need not be extensive or cover every aspect of the Court's reasoning: *Cojocaru* at para. 13. While they must be adequate, they need not address every issue in detail: *Hennessey v. Canada*, 2016 FCA 180 at para. 10. Rather, they must be read as a whole, in their overall context, including the evidentiary record, submissions made to the Court, and the presumption that judges know the law on basic points: *Canada v. Long Plain First Nation*, 2015 FCA 177, at para 143. The Federal Court described the factors it considered most relevant and why.

V. Conclusion

[75] It follows from the analysis above that I would dismiss both appeals. In accordance with the request of the parties, I would not rule on the question of costs at this time, but would allow the parties to make submissions in writing on this issue.

"K.A. Siobhan Monaghan"
J.A.

“I agree
George R. Locke J.A.”

“I agree
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-121-22 AND A-126-22

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE BROWN DATED JUNE 2, 2022, NO. T-474-20

DOCKET:	A-121-22
STYLE OF CAUSE:	CLINTON WUTTUNEE AND GARY NICOTINE v. MARY LINDA WHITFORD, ALICIA MOOSOMIN, BURKE RATTE AND RED PHEASANT FIRST NATION
AND DOCKET:	A-126-22
STYLE OF CAUSE:	RED PHEASANT FIRST NATION v. MARY LINDA WHITFORD, ALICIA MOOSOMIN, BURKE RATTE, CLINTON WUTTUNEE AND GARY NICOTINE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 30, 2022
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	LOCKE J.A. MACTAVISH J.A.
DATED:	FEBRUARY 8, 2023

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Docket: A-126-22

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