Association des Parents ayants droit de Yellowknife et al. v. *Attorney General of the Northwest Territories et al.*, 2014 NWTSC 25

Date: 2014 03 28
Docket: S 1 CV 2005 000108
Docket: S 1 CV 2008 000133

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ASSOCIATION DES PARENTS AYANT DROIT DE YELLOWKNIFE, LA GARDERIE PLEIN SOLEIL, YVONNE CAREEN, CLAUDE ST-PIERRE and FÉDÉRATION FRANCO-TÉNOISE

Plaintiffs

- and -

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES and COMMISSIONER OF THE NORTHWEST TERRITORIES

Defendants

BETWEEN:

COMMISSION SCOLAIRE FRANCOPHONE, TERRITOIRES DU NORD-OUEST, CATHERINE BOULANGER and CHRISTIAN GIRARD

Plaintiffs

- and -

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES and COMMISSIONER OF THE NORTHWEST TERRITORIES

Defendants

- and -

FÉDÉRATION NATIONALE DES CONSEILS SCOLAIRES FRANCOPHONES DU CANADA

Intervener

REASONS FOR JUDGMENT (COSTS)

(I) INTRODUCTION

[1] On June 1, 2012, this Court rendered decisions in two cases involving the scope of the obligations of the Government of the Northwest Territories (GNWT) in implementing section 23 of the *Canadian Charter of Rights and Freedoms* (the

Charter): *Association des parents ayants droit de Yellowknife et al.* v. *Attorney General of the Northwest Territories et al.*, 2012 NWTSC 43cor.l ("the Yellowknife case"); and *Commission scolaire francophone Territoires du Nord-Ouest et al.* v. *Attorney General of the Northwest Territories et al.*, 2012 NWTSC 44 ("the Hay River case"). As part of these decisions, the Plaintiffs were granted solicitor and client costs. The decisions were appealed by the Defendants. The Defendants also filed a motion for a stay of execution of the two decisions.

[2] In August 2012, the Plaintiffs sent the Defendants an invoice for each of these cases, listing the fees and disbursements that they were claiming as costs. In October 2012, the Defendants notified the Plaintiffs that they were taking issue with certain aspects of the invoices. On December 5, 2012, the Plaintiffs filed a motion requesting that the Court fix the amount of costs.

[3] In February 2013, the Plaintiffs contacted the Court registry to have a date set for the hearing of their motion. The Defendants advised the Registry that, in their view, it would be premature to set a hearing date, given that the decision granting the costs was under appeal and was the subject of an application to stay its execution.

[4] For the reasons set out in a Note to the Parties dated February 14, 2013, I refused to set a hearing date until the Court of Appeal had made a decision regarding the motion for a stay of execution.

[5] On July 3, 2013, the Court of Appeal for the Northwest Territories granted a stay of execution for all aspects of the decisions except the order as to costs: *Attorney General of the Northwest Territories* v. *Association des Parents ayant droit de Yellowknife*, 2013 NWTCA 03. Once this decision was rendered, I set a hearing date for the motion to fix the amount of costs.

[6] The hearing took place on November 18, 2013. The hearing lasted a full day and highlighted the parties' highly divergent points of view regarding the very nature of the motion, the legal framework governing it, the reasonableness of the fees claimed and the admissibility of certain disbursements.

[7] The Plaintiffs filed, for each of these cases, a detailed affidavit by Nadia Benjelloun, a legal assistant from their firm. These affidavits included a large number of supporting documents that provide explanations for the fees and disbursements claimed by the Plaintiffs. The Plaintiffs also filed other affidavits, including one sworn by Nicole Garner on November 12, 2013, and various documents providing further details about, and in some cases corrections to, the information contained in Ms. Benjelloun's affidavits.

[8] The Defendants also filed certain documents, such as letters that they had sent to the Plaintiffs explaining their objections to various aspects of the invoices.

[9] On the basis of the adjustments explained in Ms. Garner's affidavit (the addition of invoice #195180, which had been forgotten in the invoicing summary prepared by Ms. Benjelloun, and the exclusion of invoice #190721, which the Plaintiffs agreed to withdraw), the Plaintiffs are claiming $557,992.28 in costs for the Yellowknife case. For the Hay River case, Ms. Garner has also made adjustments to the amount initially claimed. She states that an amount of $12,000.00 must be taken out to take into account an interlocutory motion for which an order of costs was made against the Plaintiffs. She also states that an amount of $175.00 must be excluded because it was billed by mistake. The total claimed for the Hay River case is therefore $730,728.71. The costs claimed for both cases add up to $1,288,720.99.

[10] On October 1, 2013, the Defendants made a payment of $800,000.00 to the Plaintiffs. They argue that this amount is more than sufficient to cover the fees, disbursements and interest in both cases.

[11] The parties are asking this Court to fix an overall amount that would cover all of the costs, disbursements and interest, including any costs associated with this motion.

(II) PRELIMINARY REMARKS

[12] In their submissions, the parties raise various questions of law regarding costs. There are a few general points to be made before addressing these issues.

1. Procedural considerations

[13] Normally, the taxation of costs is not carried out by the Court. The *Rules of the Supreme Court of the Northwest Territories*, R-010-96 (the *Rules of the Court*), set out that the taxation of costs is done by a taxation officer (Rules 668-669). The Court only becomes involved in the process if the taxation officer decides to refer a question arising on a taxation to the Court for determination (Rule 673), or if a party decides to appeal the decision of a taxation officer (Rule 693).

[14] In this case, the Plaintiffs filed a motion asking the Court to fix the costs when the Defendants objected to the invoices that were submitted to them. The Plaintiffs take the position that the Defendants refused to pay the costs. They are also critical of the Defendants' failure to seek a taxation of the costs.

[15] The Defendants, on the other hand, underscore that they had a responsibility to ensure that the costs claimed were appropriate and justified, especially

considering that those costs will be paid out of public funds. They note that the Plaintiffs did not provide any answer to their objections or to their settlement offers; instead, they chose to immediately bring the matter before the Court.

[16] Setting aside the parties' criticisms of one another regarding who should have done what and when, neither party objects to having the Court now fix the amount of the costs. To my knowledge, the Defendants have never insisted on having the issue submitted to a taxation officer before the motion is heard by this Court.

[17] The difference between the costs claimed and what the Defendants consider reasonable is significant. Some of the Defendants' objections raise questions of law. On the whole, the issue of the amount of the costs is highly contentious, as were all of the proceedings in these cases. If a taxation had been conducted by a taxation officer, it is likely that the taxation officer's decision would have been appealed regardless of the outcome.

[18] In the circumstances, I conclude that it is appropriate for this Court to deal with this motion even if there never was a taxation by a taxation officer. But I do want to point out that this is a highly unusual way of proceeding. In the vast majority of cases, the Court would be very reluctant to allow the parties to bypass the normal procedure for the taxation of costs.

2. The legal framework governing the motion

[19] The Plaintiffs state that the general principles applicable to costs do not apply in this case. They submit that the Court should not approach this motion as though it were a taxation. Instead, they argue that because the costs were granted as a remedy under subsection 24(1) of the *Charter*, the Court is not bound by the general rules governing costs in the *Rules of the Court* or in the case law. The Plaintiffs state that the Court has almost unlimited discretion to fix costs that are awarded under the *Charter*. They argue that it is even open to the Court to make the costs punitive in nature by setting an amount that goes beyond the costs actually incurred by the Plaintiffs in this dispute.

[20] In support of this claim, the Plaintiffs rely in particular on *Commission Scolaire Francophone du Yukon No.23* v. *Attorney General of the Yukon Territory*, 2011 YKSC 80. Since this motion was heard, that decision was overturned by the Court of Appeal for Yukon. *Commission scolaire francophone du Yukon no. 23* v. *Yukon (Procureure générale)* 2014 YKCA 4. In any event, I do not consider that decision to be particularly relevant because, in that case, solicitor and client costs were ordered in a specific context, including findings by the trial judge that the defendant had acted in bad faith in several respects. That is not the case here.

[21] I agree with the Plaintiffs' submission that the *Charter* grants the Court special powers when it comes to costs. Normally, solicitor and client costs can only be granted if the Court finds that a party has acted in bad faith or engaged in reprehensible conduct in the litigation.

[22] In *Charter* litigation, however, the case law recognizes that solicitor and client costs may be awarded to a party as a remedy under subsection 24(1) following the violation of a constitutional right, even if the other party has not acted in bad faith.

[23] I will not repeat here the reasons why I awarded solicitor and client costs in these cases; my reasons are set out in the judgments rendered in both cases: *Association des parents ayants droit de Yellowknife et al.* v. *Attorney General of the Northwest Territories et al.*, *supra*, paragraphs 807-19; and *Commission scolaire francophone Territoires du Nord-Ouest et al.* v. *Attorney General of the Northwest Territories et al.*, *supra*, paragraphs 849-57. I will simply note that it was primarily as a remedial measure that I awarded solicitor and client costs to the Plaintiffs, although in the Hay River case, I also held that the Defendants' conduct regarding the adoption of the ministerial directive needed to be sanctioned.

[24] There is no doubt that the *Charter* gives the courts exceptional powers with regard to costs. It bestows upon the courts a much broader discretion to award solicitor and client costs than what is usually the case. However, in my view, once these costs have been awarded, they remain governed by the rules of general application. The remedial measure allowed by the *Charter* is the awarding of solicitor and client costs in circumstances in which they could not be awarded according to the usual rules. However, the amount of these costs remains subject to the principles set out in the *Rules of the Court* and the case law.

[25] Accordingly, I am of the view that the fact that the costs were awarded under subsection 24(1) of the *Charter* has no bearing on their amount. It changes neither the nature and scope of this motion nor the legal framework governing the process for fixing the amount. The general principles apply the same way as they would had the costs been awarded in litigation unrelated to the *Charter*.

(III) ANALYSIS

1. General principles governing costs

[26] The *Rules of the Court* establish the legal framework that governs costs in the Northwest Territories. Certain Rules establish the general principles and guidelines (Rules 641-52); others cover specific situations, such as the consequences of an offer to settle (Rules 201-203), contingency agreements (Rules 657-663), and security for costs (Rules 630-640).

[27] Other principles are drawn from the case law. Obviously the case law from other jurisdictions must be considered with a degree of caution, as the applicable rules sometimes vary from one jurisdiction to another. However, some principles are of general application.

[28] Traditionally, the sole purpose of costs was compensation, in whole or in part, for the successful party in a dispute. However, courts are increasingly recognizing that compensation is not their only objective. Other factors, including access to justice, must also be taken into consideration: *British Columbia (Minister of Forests)* v. *Okanagan Indian Band* [2003] 3 S.C.R. 371, pages 389-91.

[29] Another important principle is that the compensation that a party may obtain through a costs order is not without limits: even armed with an order awarding solicitor and client costs, a party may generally only recover those costs that were reasonably incurred in the course of the dispute. The courts will rarely compel one party to compensate the other for costs considered useless, frivolous or exaggerated, even if they have been incurred in connection with the litigation.

[30] Rule 641 of the *Rules of the Court* incorporates this reasonableness requirement in its definition of costs. In that Rule, costs are described as including "all reasonable and proper expenses that a party has paid or become liable to pay for the purpose of carrying on (. . .) a proceeding".

[31] It follows that even a party that has obtained an order awarding solicitor and client costs does not always recover all of the costs it has incurred:

> The commonly accepted view is that solicitor-and-client costs as between party and party are intended to be complete indemnification for all costs (fees and disbursements) reasonable necessary for the proper presentation of the case. If the client instructs the solicitor to take certain steps which are not necessary for the case itself then the client is responsible for payment, not the opposite party. Hence, solicitor-and-client costs may approach complete indemnification for what the client actually pays but it does not necessarily do so.

Camillus Eng. Consultants Ltd. v. *Village of Fort Simpson*, 2005 NWTSC 25, at paragraph 41.

[32] Analyzing the reasonableness of costs may involve a variety of aspects: the hourly rate charged by counsel, the steps and procedures undertaken with respect to the litigation, the number of hours dedicated to certain tasks, or the distribution of the work among the various counsel and other professionals who worked on the file: *Envoy Relocation Services Inc.* v. *Canada (Attorney General)*, 2013 ONSC 2622, paragraphs 142-52.

[33] With these governing principles in mind, I now turn to the specific issues raised by the parties. They involve, on the one hand, the amount of the fees claimed and, on the other hand, certain aspects of the disbursements.

2. The amount of the fees

[34] The Defendants are seeking a significant reduction in the amount of the fees claimed by the Plaintiffs. They argue that some of these fees are simply ineligible to be considered costs, while others need to be excluded because what is being claimed is unreasonable.

(a) The final invoices

[35] The fees claimed by the Plaintiffs include two [TRANSLATION] "final invoices". These are the result of an agreement reached by the Plaintiffs and their counsel during the proceedings. The agreement has been filed in evidence as an exhibit attached to the affidavit of Nicole Garner sworn on November 12, 2013.

[36] In their oral and written representations, the Plaintiffs explained in greater detail the circumstances resulting in this agreement and provided further information about other agreements entered into by the Plaintiffs and their counsel in the course of the proceedings. The affidavits of Ms. Benjelloun also address these to some extent. However, the initial legal services agreement between the Plaintiffs and their counsel has not been filed in evidence.

[37] Counsel for the Plaintiffs explained that under the initial agreement, the billing rate was $200.00/hour. These fees, as well as any disbursements, were to be billed monthly, and were payable within 30 days.

[38] The Plaintiffs benefitted from funding from federal programs designed to help parties assert their rights before the courts. For a certain period, a part of the fees ($150.00/hour) was covered by this grant. The CSFTN-O was billed for the difference between the grant and the agreed-upon hourly rate. The Association des parents ayants droit de Yellowknife (APADY) was unable to pay the difference between the hourly rate and the grant. Counsel apparently agreed to bill the difference once the trial had concluded.

[39] About halfway through the trial, in November 2010, counsel for the Plaintiffs were summonsed by their clients. The CSFTN-O informed them that they were no longer able to pay them. That is when the new agreement was reached. The document was signed in February 2011, but according to the submissions of counsel for the Plaintiffs, this document formalizes an agreement that was in fact reached during the trial. However, at paragraph 7 of her affidavit filed in the Yellowknife case, Ms. Benjelloun states that the billing method

changed in June 2011 because the CSFTN-O had informed the firm that it was unable to pay. In her affidavit for the Hay River case, at paragraph 3, she states that the change in billing methods occurred in December 2011. The least that can be said is that the evidence regarding the timing of the new agreement is far from clear.

[40] Other aspects of the evidence regarding the various agreements entered into at different times between the Plaintiffs and their counsel leave much to be desired. The affidavits of Ms. Benjelloun do not provide the details of the initial agreement, such as the hourly rate and billing frequency. In a case in which the costs are in dispute, it would have been preferable to have all of the information about the various agreements between the Plaintiffs and their counsel filed in evidence and not merely conveyed to the Court through the submissions of counsel.

[41] With respect to the agreement signed in February 2011, it is clear that it changed the billing frequency. Counsel agreed that they would not issue the next invoice until several months later, in July 2011. If I have correctly understood the explanations provided during the submissions, this was to allow the CSFTN-O to receive the funds for its operating budget for the following year before receiving the next invoice. The CSFTN-O agreed to pay a minimum of $100,000.00 of this invoice within 30 days of receiving it and to make it a priority to cover the balance if the funds were available to do so. The following invoice was to be issued on July 1, 2012. According to the agreement, disbursements would continue to be billed monthly and be payable within 30 days. These aspects of the new agreement are uncontroversial.

[42] What is controversial is the aspect of the agreement that changes the hourly billing rate retroactively. The relevant clauses read as follows:

> [TRANSLATION]
>
> **Final invoices**
>
> 4. Once the two cases, including any appeals, have concluded, and taking into account the complexity of the files, their duration, the long period of time that counsel was required to spend away from their Regina office, the impact on their regular law practice and the risk assumed by Miller Thompson LLP, it is agreed that Miller Thompson LLP will submit two final invoices. The final invoices will include the following amounts:
>
> (a) for [the Hay River file], Miller Thompson LLP will issue a final invoice at a rate $50/hour above the regular hourly rate for all of the hours spent on the file since the beginning, including any appeals; and
>
> (b) for [the Yellowknife file], Miller Thompson LLP will issue a final invoice at a rate $50/hour above the regular hourly rate for all of the

> hours spent on the APADY file since the beginning, including any appeals. Moreover, because the APADY lacked the financial means to pay more than the $150/hour allocated by the Court Challenges Program of Canada at the time and because Miller Thompson LLP agreed to wait until the end of the trial before issuing its final invoice at the full rate, Miller Thompson will claim in that invoice the difference between the rate of $150/hour and the regular hourly rate plus $50/hour.
>
> 5. The two final invoices will only be issued to the CSF TNO and the APADY if the Court awards costs. It is agreed that the two final invoices will be paid in priority from any costs awarded in favour of the CSF TNO and the APADY.
>
> 6. In the event that the CSF TNO is unsuccessful in its attempt to obtain an expansion of the two schools in the two above-mentioned files and costs are not awarded in its favour, Miller Thompson LLP agrees not to invoice for $50,000 in counsel time dedicated to the files.
>
> 7. In the event that the CSF TNO is not awarded sufficient costs in the two cases to pay in full the two final invoices mentioned at paragraph 4 of this agreement, Miller Thompson LLP agrees to reduce the amount of the two final invoices to the amount equivalent to the costs awarded to the CSF TNO and the APADY payable by the GNWT.

[43] This aspect of the agreement is directly linked to the outcome of the trial, both for the amount due and as to whether it is payable. Paragraph 5 sets out that the mark-up will only be billed if the Court awards costs to the Plaintiffs. Paragraph 7 sets out that it will only be payable up to the amount of costs awarded.

[44] The Defendants raise several objections to the inclusion of the final invoices in the amount of costs.

[45] First, they state that these invoices constitute a risk-based premium and that the case law does not permit these to be included in the costs payable by another party. Second, they state that including these invoices in the costs would contravene the principle of compensation since, under the agreement, the CSFTN-O would never have to pay them. Furthermore, the Defendants claim that in light of the wording of the agreement itself, the premium is based on items for which counsel may not, under the *Rules of the Court*, receive compensation.

[46] The Plaintiffs argue that the CSFTN-O was free to enter into this agreement with its counsel and that it was legitimate for the parties to decide to raise counsel fees to take into account not only the risk assumed by their firm but also the complexity of the file and the other factors described in the agreement. They submit that the Court should uphold this agreement and apply the marked-up hourly rate in fixing the amount of costs.

[47] The Plaintiffs cite case law dealing with the validity of contingency agreements and risk-based premiums in the context of such premiums between counsel and client. The issue here, however, is not whether such an agreement is valid between counsel and client. The issue is whether the resulting premium can be included in the amount payable by the other party in the context of an order for solicitor-client costs.

[48] The Defendants, relying on *Walker* v. *Ritchie*, [2006] 2 S.C.R. 428, submit first that the mark-up in fees cannot be included in the amount of costs because it is a premium based solely on risk. I am not persuaded that the mark-up of the hourly rate constitutes a premium based solely on risk that would violate the principles set out in *Walker*. In his book *The Law of Costs*, author Mark Orkin notes that while *Walker* rejects the inclusion of risk-based premiums in costs, it does not completely eliminate the possibility of including a premium in the calculation of costs:

> Although as a result of the Supreme Court's decision in Walker v. Ritchie the concept of a risk-based premium appears to be dead, a broader-based premium lives on.

M. Orkin, *The Law of Costs*, 2nd edition, page 2.330.5

[49] Here, the agreement alludes to the risk assumed by the law firm, but also to the complexity of the file and the Plaintiffs' lack of financial resources. In his book, Orkin lists various factors that have led courts to accept the inclusion of premiums in the calculation of costs. These factors include the recognition that it is in the public interest for legitimate cases to be heard regardless of whether the complainants have the financial means to pursue them. This consideration is one of the reasons that have led courts to accept the inclusion of premiums in the costs. The complexity of the file, the responsibility taken on by counsel and the quality and expertise of the legal services rendered are also factors that have been taken into account by the courts: *The Law of Costs*, *supra*, pages 3-329 to 3-330.5.

[50] Another factor distinguishing this case from *Walker* is that in the latter, the Plaintiffs were not awarded substantial indemnity costs for the whole of the file. The costs order that they received was mixed: it included partial indemnity costs (equivalent to costs calculated, in the Northwest Territories, according to the scale provided in Schedule A to the *Rules of the Court*) for part of the file, and substantial indemnity costs (equivalent to solicitor and client costs in the terminology used in the Northwest Territories) for another part of the file.

[51] Orkin notes the distinction between the two types of costs when it comes to the possibility of including a premium:

> A premium may be awarded when the court has ordered substantial indemnity costs, but not when the award is on the partial indemnity scale.

The Law of Costs, *supra*, page 2-330.1.

[52] The Defendants' second objection is that the final invoices cannot be included in the costs because the agreement states that the invoices will only be issued in the event that costs are awarded and will only be payable if the costs award is sufficient to cover them. In other words, these are invoices that the CSFTN-O will never have to pay itself. Accordingly, the Defendants submit that including them in the costs violates the fundamental principle of indemnification.

[53] There is no doubt that the principle of indemnification is important in the area of costs. However, as I noted above at Paragraph 49, indemnification is not the only factor to consider. Access to justice and the importance of enabling parties with limited financial means to assert their rights are also important considerations.

[54] An important objective underlying the principle of indemnification is ensuring that costs are not used to enrich the party obtaining them. Here, the purpose of the agreement is not to enrich the CSFTN-O. Rather, its purpose was to ensure that counsel for the CSFTN-O received compensation that reflected the fact that they continued to represent their clients despite the fact that the latter no longer had the means to pay them regularly.

[55] In practical terms, once they had been notified that the CSFTN-O no longer had the means to continue to pay them, counsel for the Plaintiffs found themselves in a difficult situation, both professionally and ethically. They could hardly withdraw from the case in the middle of the trial. This would have caused irreparable harm to their client, not to mention the position in which it would have left the Court.

[56] Moreover, if the billing system had not been modified, interest would have accumulated on the unpaid monthly invoices. It is understandable that the parties wished to avoid this.

[57] The purpose of this agreement was not to enrich the CSFTN-O unduly at the Defendants' expense; rather, its purpose was to find a solution that would allow counsel for the Plaintiffs to continue working on the file while retaining the possibility of being fairly compensated in light of all the circumstances, including the complexity of the case and the fact that they would not be paid within the same timeframe as before. In my view, such an agreement was necessary to provide the Plaintiffs with ongoing access to justice and a real opportunity to assert their rights.

[58] Applying an overly rigid and technical approach in this type of situation would likely mean that individuals and organizations of limited means would not be able to assert their rights effectively. For example, in cases involving constitutional rights, clients of limited means might well be prevented from asserting their rights against governments, which have considerable resources at their disposal. The Court cannot ignore these factors in exercising its discretion with respect to costs.

[59] I am therefore not persuaded that the general principles governing costs represent an obstacle to the implementation of the agreement signed on February 11, 2011. However, in my view, there is one insurmountable obstacle to the inclusion of these final invoices *at this stage*: that obstacle is the very wording of the agreement.

[60] Paragraph 4 of the agreement sets out that the final invoices will be rendered once the cases, *including any appeals*, have concluded. However, the appeals have yet to conclude.

[61] The Plaintiffs are asking this Court to uphold the agreement and include the amounts in the costs that are payable now. However, the wording of the agreement is unequivocal. I fail to see on what basis the invoices reflecting the marked up hourly rate could be issued now or how the Court could include them in the total costs at this stage. The Plaintiffs and their counsel opted to specify at what point in the proceedings the mark-up would be billed. They cannot now ask this Court to give effect to one aspect of the agreement while ignoring another aspect. This is not a case of an ambiguous clause requiring interpretation. Paragraph 4 of the agreement is unambiguous.

[62] For these reasons, I do not think that the $50.00/hour mark-up set out in the agreement signed on February 11, 2011, can be added to the claimable fees, at this stage, as costs. In my view, this mark-up can potentially be claimed [TRANSLATION] “[o]nce the two cases, including any appeals, have concluded”, as stated in the agreement.

[63] However, in my view, the amount in the Yellowknife case corresponding to the difference between the amount covered by the federal grant and the hourly rate agreed upon originally can be included in the costs payable now. Although the parties agreed to include this amount in the final invoice, it strikes me as unfair to exclude it given that it corresponds to work performed at the originally agreed-upon hourly rate, which was supposed to be payable at the end of the trial. I consider it appropriate to include that amount in the costs payable at this stage.

[64] I will therefore exclude from the fees the amount corresponding to the mark-up of $50.00/hour mentioned at paragraph 4 of the agreement signed in

February 2011. In the Yellowknife case, this represents an amount of $78,322.50, and in the Hay River case, an amount of $97,197.50.

(b) The amount corresponding to the funding granted through court challenges programs

[65] The Plaintiffs received grants from federal programs, namely, the Court Challenges Program and, later, the Language Rights Support Program (LRSP).

[66] The Defendants are relying on the principle of indemnification in support of their argument that the costs should not include these grants, given that the Plaintiffs did not have to cover these amounts.

[67] I disagree. In the agreements that it signed with the officials responsible for these programs, the CSFTN-O commits to reimbursing the LRSP should it obtain an order awarding costs. I assume that the CSFTN-O will respect this commitment.

[68] As I mentioned above, while the principle of indemnification is an important one in the area of costs, it is not the only factor that requires consideration:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexatious litigation and to discourage unnecessary steps. More recently, the Ontario Court of Appeal has added access to justice as a fifth consideration. As well, it has been said, costs can be an instrument of policy. For example, making Charter litigation accessible to ordinary citizens has been recognized as a legitimate and important policy objective which can be advanced by an order of costs made payable forthwith. The Supreme Court of Canada underlined the function of costs as an instrument of public policy when it wrote that 'it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice'.

The Law of Costs, *supra*, pages 2-58.1 to 2-58.2.

[69] In my view, including in the costs the amount of a grant that will be repaid to the program in question does not conflict with the general principles governing costs awards. To the extent that a program like the LRSP helps parties assert their language rights before the courts when they would not otherwise have the financial means to do so, it is entirely appropriate to make the reimbursement of such grants possible through an order of costs.

[70] In my view, the amount of costs must include the fees that were covered by these grant programs.

(c) The interlocutory motions

[71] There were several interlocutory motions in these cases. The Defendants submit that the fees relating to some of these motions should be excluded from the costs payable to the Plaintiffs.

[72] The Plaintiffs now acknowledge that they are not entitled to costs for their motion to amend an order because, that motion failed, and costs for it were actually awarded to the Defendants: *Commission Scolaire Francophone, Territoires du Nord-Ouest et al.* v. *Attorney General of the Northwest Territories (No.5)*, 2009 NWTSC 43, and *Commission Scolaire Francophone, Territoires du Nord-Ouest et al.* v. *Attorney General of the Northwest Territories (No.6)*, 2009 NWTSC 53. In her affidavit, Ms. Garner states that the amount that should be deducted because of this is $12,000.00. The Defendants submit in their factum that the total amount of fees that should be deducted with respect to this motion is considerably higher, at least $29,100.00.

[73] I have reviewed the relevant invoices (#189872, #190470, #190960, #191525, and #192078). The descriptions corresponding to each amount billed, in some instances, refer to work relating to more than one thing. It is no easy task to isolate and identify the exact number of hours and amounts relating to the motion, as opposed to other aspects of the case. As was stated in the decision on the motion and the decision on costs, the circumstances leading up to the filing of the motion were unusual, and they continued to evolve to a great extent after the motion was filed. In light of all of this, in my view, the amount proposed by Ms. Garner in her affidavit is a reasonable amount to deduct from the fees relating to this interlocutory motion.

[74] For all of the other interlocutory motions but one, the costs were left to the discretion of the trial judge: *Commission Scolaire Francophone, Territoires du Nord-Ouest et al.* v. *Attorney General of the Northwest Territories (No.4)*, 2008 NWTSC 76. Having awarded the Plaintiffs their solicitor and client costs following the trial, I see no reason to exclude the costs relating to the interlocutory motions, even those in which the Plaintiffs were unsuccessful. On the subjects central to those interlocutory motions (the expansion of the two schools and the validity of the ministerial directive), they were ultimately successful at trial. In my view, it is fair to treat the costs of the interlocutory motions, in the usual course, in the same way as the costs of the trial proceedings.

[75] The final interlocutory motion that I must consider from a costs perspective is the very first one filed in the Hay River case, which was heard on June 24, 2008. The Plaintiffs filed a motion for an interlocutory injunction. In support of this motion, they filed a certain number of affidavits. The Defendants wanted to

cross-examine the affiants before the motion was heard. The Plaintiffs tried to prevent the Defendants from conducting the cross-examinations, pleading the urgency of the situation. In a decision rendered orally, I refused to prevent the cross-examination. Nothing was said in that decision regarding costs: *Commission scolaire francophone* c. *Procureur général des Territoires du Nord-Ouest*, 2008 CSTN-O 47.

[76] The right to cross-examine on an affidavit is fundamental and is provided for under the *Rules of the Court*. To prevent the Defendants from exercising this fundamental right, the Plaintiffs pleaded urgency. But the urgency resulted in part from their choice of timing in launching the proceedings. In the circumstances, I am of the view that the motion to prevent the cross-examination should not have been filed and that the related costs should be deducted. The Defendants submit that the amount that should be attributed to that motion is $18,000.00. I consider that amount to be too high. The work billed prior to the hearing of that motion did not relate solely to the attempt to prevent the cross-examination. Having reviewed the relevant invoice (#185459), I consider it more reasonable to reduce the fees by $8,000.00 in relation to this motion.

(d) The reduction in fees to take into account the issues in which the Plaintiffs were unsuccessful

[77] The Defendants argue that there should be an overall reduction of 10% of the fees claimed to take into account those aspects of the case in which the Plaintiffs were unsuccessful. I disagree with this submission. In my decision to award solicitor and client costs, I took into account all of the issues raised in these cases and the final outcome. The Plaintiffs were successful on most points. While they did not succeed on certain issues, none of these was frivolous or vexatious. I do not consider an overall reduction in fees to be justified in the circumstances.

(e) The reasonableness of certain fees

[78] The Defendants are asking the Court to take a step back and consider the reasonableness of the invoices filed by the Plaintiffs in light of the circumstances. They submit that the fees billed are unreasonable in many respects.

[79] The Defendants note in particular that both counsel for the Plaintiffs participated in the preparation of most of the witnesses, that certain tasks could have been delegated, and that some of the fees are related to the internal management of the CSFTN-O as opposed to the litigation itself.

[80] It is true that in determining the amount of costs to be paid, the Court must take a step back and consider the reasonableness of the fees: *Envoy Relocation*

Services v. *Canada (Attorney General)*, *supra*. On the other hand, this exercise is not meant to involve a microscopic dissection of the work of counsel.

[81] First, it should be noted that one of the Plaintiffs' counsel, Mr. Lepage, agreed to work for much less than his usual rate (see for example *Kilrich Industries Ltd.* v. *Halotier*, 2008 YKCA 4).

[82] With respect to the Defendants' allegations of duplication of work or its misdistribution between the Plaintiffs' two counsel, I note that the lawyer who worked with Mr. Lepage on these files was, at the time of the trial, quite junior. It was not unreasonable, in the circumstances, for both of them to participate in the preparation of most of the witnesses.

[83] I also disagree with the Defendants' claim that part of the fees were related to work unconnected to the litigation and dealing primarily with the internal management of the CSFTN-O. The issues raised in the litigation were to a great extent indissociable from the internal management issues. The best example is that of the CSFTN-O's admissions policy, which was at the heart of the debate over the validity of the ministerial directive. The work related to the review of the admissions policy, and the possibility that such a review might settle at least part of the dispute between the parties, was in fact closely related to the litigation.

[84] The Defendants also draw the Court's attention to paragraph 653(*c*) of the *Rules of the Court*, which provides that one of the factors to be considered in calculating counsel fees is the fund out of which the costs are payable. They submit that because the costs in this case will be paid out of the public purse, an additional reduction is appropriate in fixing the amount of costs.

[85] I cannot accept this argument. To do so would provide governments with a shield that would allow them to mitigate or escape part of the consequences of a costs order. It is true that governments should not be treated as bottomless wells with unlimited resources. However, once a government has made the decision to commit public funds to litigation before the courts, it cannot expect to escape the consequences faced by any other party who is ultimately ordered to pay solicitor and client costs.

[86] In my view, in a case such as this one, in which solicitor and client costs are awarded as a remedy for the violation of a constitutional right by a government, it would be utterly inconsistent to reduce the amount of costs on the basis that they must be paid out by that government.

[87] Finally, I also take into account the evidence filed and concessions made regarding certain errors in the documents filed with Ms. Benjelloun's affidavits, which required certain adjustments.

[88] In the Yellowknife case, in addition to the adjustments already made by Ms. Garner, an amount of $78,322.50 must be deducted from the costs. For the reasons referred to at Paragraphs 60 to 64, this amount, which represents the part of the final invoice that corresponds to the retroactive mark-up of the rate by $50.00/hour, is not payable at this stage.

[89] In the Hay River case, in addition to the adjustments already made by Ms. Garner, the following amounts must be excluded:

(1) $97,197.50 (the amount corresponding to the retroactive mark-up of the rate by $50.00/hour)

(2) $8,000.00 (for the interlocutory motion whose purpose was to prevent the cross-examination on affidavit);

(3) $12,000.00 (the motion in which costs were awarded to the Defendants).

3. Disbursements

(a) General comments

[90] The Defendants are challenging several of the amounts claimed by the Plaintiffs as disbursements. In their view, some of the disbursements are inadmissible, while others are unreasonable. They are seeking a reduction of $57,978.00 in the disbursements in the Hay River case and a reduction of $1,618.18 in the disbursements in the Yellowknife case.

[91] I have carefully examined the documents filed in evidence through Ms. Benjelloun's two affidavits. In my view, several of the Defendants' objections are unjustified.

[92] It is true that, in some cases, certain supporting documents are missing, such as those for certain hotel fees. Some invoices merely identify the CSFTN-O without indicating the name of the person who occupied the room. However, the proceedings were spread out over several months, several of the witnesses called were not residents of Yellowknife, and there is no doubt that hotel and meal fees were paid. These expenses do not appear to be unreasonable at first glance, given the circumstances. It seems clear that some individuals paid these fees and were reimbursed, while in other cases, the CSFTN-O was billed directly. In other cases, individuals may have paid for hotel rooms used by others and been subsequently reimbursed.

[93] There is a clear example of this in the disbursements claimed for the Yellowknife case, which is one of the items being challenged by the Defendants. It

is an amount of $613.38 reimbursed to Yvonne Careen for hotel fees in January 2009. The Defendants submit that this amount is inadmissible because Ms. Careen lives in Yellowknife. However, another document in the same exhibit attached to Ms. Benjelloun's affidavit shows that the amount relates to a hotel bill for Mr. Lepage that was paid by Ms. Careen. There is a handwritten note on the hotel bill that says, [TRANSLATION] "paid by Yvonne Careen - reimburse Yvonne". This amount is related to hotel fees for Mr. Lepage, not for Ms. Careen.

[94] In light of all the circumstances and the number of witnesses who were required to stay in hotels and order restaurant meals during this trial, I will not exclude this type of disbursement merely because the supporting documents do not indicate exactly for whom the expenses were incurred.

[95] However, in my calculations, I did exclude those disbursements that were clearly inadmissible fees, such as towing fees ($157.50), or those erroneously claimed twice, such as Lynn Carrière's invoice dated April 6 ($478.80).

[96] I have not excluded the disbursements corresponding to the salary of Valérie Gamache, who was hired by the Plaintiffs to perform work relating to the answers to the undertakings resulting from the examinations for discovery. These expenses are directly related to the litigation and cannot be considered ordinary office expenses. It is not surprising that a small organization with limited staff had to hire additional staff to be able to perform this type of work, which falls well outside the scope of its normal functions.

[97] I have also considered the Defendants' specific objections regarding the admissibility of certain types of disbursements. My findings are contained in the paragraphs that follow.

(b) Mr. Lavigne's fees

[98] Mr. Lavigne was a factual witness, but his testimony was very important to the Plaintiffs. He held the position of Superintendent of the CSFTN-O during a key period for the purposes of the litigation. At the time of the trial, Mr. Lavigne was running a consulting business. Counsel for the Plaintiffs spent a lot of time with him to prepare the case. Mr. Lavigne charged consulting fees to the CSFTN-O for all of the hours he had to spend on this file, not only for the time he spent testifying but also for time spent in preparation. His fees came to $10,581.00 in total.

[99] I recognize that Mr. Lavigne was an important witness and that counsel for the Plaintiffs needed his help to review all of the documents and the background to the case. They may not have benefitted from the same level of cooperation if they had not agreed to compensate him for the time that he was not able to dedicate to

his own business. In my view, some of these fees can be recovered under disbursements.

[100] However, that total amount seems disproportionate, especially compared with the disbursements related to the testimony of the experts witnesses. I will therefore deduct $7,000.00 from the amount claimed for this item.

(c) Dr. Denis's fees

[101] The Defendants are seeking a reduction in the disbursements claimed for Dr. Denis. They submit that they are clearly unreasonable, especially when compared with the fees of Dr. Landry, the second expert, whose testimony was even longer.

[102] I disagree. Dr. Landry specializes in the subjects dealt with in his expert testimony. It is also clear from the documentation that he was also involved in a similar case in the Yukon, in which he testified on similar issues.

[103] Dr. Denis's testimony dealt with a novel issue in the trial involving the right to admission and the ministerial directive. In the circumstances, I do not find it surprising that his total fees are higher than those charged by Dr. Landry.

(d) Expenses relating to Sophie Call

[104] There is no reason to exclude the expenses for the time that Sophie Call had to spend in Yellowknife during the trial. The Hay River trial took place in Yellowknife on consent of both parties. Ms. Call was the principal of École Boréale, which was central to the dispute in the Hay River case. It is entirely understandable that she was in Yellowknife for the whole trial to instruct counsel, as opposed to being there only for the days when she was called as a witness. The CSFTN-O is entitled to compensation for the expenses incurred to allow Ms. Call to be in Yellowknife for the duration of the trial.

(e) The *per diem* for Michael St John

[105] The Defendants are challenging the *per diem* claimed for Mr. St John, noting that he is the only witness for whom a *per diem* is being claimed. Mr. St John had to travel to Yellowknife to testify at the trial. His travel and accommodation expenses are admissible disbursements. The disbursements could also include his meal expenses. However, there is no reason to treat him differently from the other witnesses. The Plaintiffs were not required to reimburse his expenses on the basis of a fixed *per diem*, rather than reimbursing the expenses he actually incurred. I will therefore deduct the amount of $737.70 from the total disbursements allocated.

(f) Translation costs

[106] The Defendants are challenging the claim relating to the translation work performed by Kelly Renner on the grounds that she worked in the law firm engaged by the Plaintiffs and that the value of her work should be considered included in the firm's legal fees.

[107] Ms. Renner's affidavit specifies that she is employed by the firm as a legal assistant, not as a translator. She has training in translation and does freelance work in that field in addition to her employment with the law firm. She performed the translation work in these cases as a freelance translator. The translation charges may therefore, in my view, be claimed as disbursements.

(g) Cost of substitute teachers

[108] The Defendants claim that the costs incurred by the CSFTN-O for substitute teachers because several teachers had to testify at the trial must be excluded from the disbursements because it is ultimately the GNWT that covers these costs. They submit that it would be unfair for the GNWT to have to pay for this twice.

[109] This submission cannot stand. The CSFTN-O's entire budget comes from the government. If the Defendants' argument relating to the cost of hiring substitute teachers were to prevail, it would essentially be applicable to every disbursement incurred by the CSFTN-O.

4. Conclusion regarding total amount of costs

[110] For the reasons above, I find that the amount claimed by the Plaintiffs as solicitor and client costs must be reduced. The amounts mentioned at Paragraphs 88 and 89 ($78,322.50 for the Yellowknife case and $117,197.50 for the Hay River case) must be deducted. I am also of the view that a further reduction of $8,374.00 is justified for inadmissible or excessive disbursements, as explained above. The total amount to exclude is therefore $203,894.00.

[111] The total amount of the Plaintiffs' claim, taking into account the adjustments explained in Ms. Garner's affidavit, is $1,288,720.00. Once this amount has been subtracted from the amount mentioned in the previous Paragraph, the costs payable for the two cases amount to $1,084,826.00. As the Defendants have already made a payment of $800,000, the balance owing is $284,826.00.

(IV) Interest

[112] The Plaintiffs are also claiming interest calculated at a rate of 3% on the amount due as of July 1, 2012.

[113] Under subsection 56(4) of the *Judicature Act*, S.N.W.T. 1988 c. J-l, a party is not entitled to prejudgment interest on an award of costs. However, section 56.1, which deals with post-judgment interest, does not exclude costs from its application. Moreover, section 56.2 grants the courts a general discretion with respect to awarding prejudgment and post-judgment interest. Neither the right to interest nor the right to have it calculated according to a particular rate is absolute.

[114] I set out the chronology of events above at Paragraphs 1 to 10 and I will not repeat it here. One year and nine months have passed since the Plaintiffs were awarded solicitor and client costs. They did not receive the Defendants' partial payment until October 2013, more than one year after the decision and about three months after the Court of Appeal refused to grant the Defendants a stay of execution with respect to the costs.

[115] I recognize that the Defendants had a responsibility to ensure that the costs, which were to be paid from public funds, included only reasonable and admissible amounts. I also recognize that certain aspects of the costs claimed raised genuine issues. However, it has always been clear that, quite apart from the challenged amounts, the Plaintiffs were entitled to a significant amount in costs. There was nothing to prevent the Defendants from making a partial payment well before October 2013.

[116] On the other hand, the Plaintiffs seem to have adopted a rather rigid approach to the situation. They did not make a counter-offer or provide the Defendants with any additional information after certain aspects of the costs were called into question. They simply chose to bring the matter before the Court. It was unreasonable to ask that the motion to fix the amount of costs proceed before the Court of Appeal had rendered a decision on the application for a stay of execution.

[117] In light of all of this, I am of the view that the Plaintiffs are entitled to interest on the amount owing to them since June 2012, but I will exercise my discretion under section 56.2 of the *Judicature Act* and calculate the interest at a rate somewhat lower than the prime rate.

[118] I will therefore calculate the interest at an annual rate of 2.5%. For the period from July 1, 2012, to October 1, 2013 (a period of one year and three months), this rate will apply to the amount of $1,084,826.00. The interest for that period therefore amounts to $33,900.81. For the period from October 1, 2013, to April 1, 2014 (a period of six months), it will apply to the amount of $284,826.00. The interest for that period therefore amounts to $3,560.33. The total interest owed is therefore $37,461.14.

(V) The costs of this motion

[119] In this motion, success is divided to some extent, as I have agreed with the Defendants in some respects. However, the Plaintiffs were successful in many respects. It should also be taken into consideration that regarding the significant amounts included in the final invoices, I have not decided in the Defendants' favour; I merely have held that the amounts cannot, under the agreement signed in February 2011, be claimed at this time.

[120] In light of all of the circumstances, the way the motion has been handled by the parties does not justify, in my view, an award of solicitor and client costs. However, I do not consider the amount set out in the scales of the *Rules of the Court* appropriate either. I will therefore fix the costs of this motion at $5,000.00 in favour of the Plaintiffs.

(VI) CONCLUSION

[121] I find that, for the two cases, the Plaintiffs are entitled to the following:

(1) $1,084,826.00 in costs;

(2) $37,461.14 in interest until April 1, 2014; and

(3) $5,000.00 for the costs of this motion.

The total amount payable to the Plaintiffs is therefore $1,127,287.14. Because an amount of $800,000.00 has already been paid to them, the balance owing by the Defendants is $327,287.14. I order that this amount be paid within 14 days of the filing of these reasons.

[signed]
L.A. Charbonneau
J.S.C.

Dated at Yellowknife this 28th day of March 2014

Counsel for the Plaintiffs: Roger J.F. Lepage
Francis Poulin

Counsel for the Defendants: Guy Régimbald

This document is an unofficial English translation of the Reasons of Judgment of the Honourable Justice L.A. Charbonneau dated March 28, 2014. This document is placed on the Court file for information only.

Docket: S 1 CV 2005 000108
Docket: S 1 CV 2008 000133

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

ASSOCIATION DES PARENTS AYANTS DROIT DE YELLOWKNIFE, LA GARDERIE PLEIN SOLEIL, YVONNE CAREEN, CLAUDE ST-PIERRE and FÉDÉRATION FRANCO-TÉNOISE

Plaintiffs

- and -

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES and COMMISSIONER OF THE NORTHWEST TERRITORIES

Defendants

BETWEEN:

COMMISSION SCOLAIRE FRANCOPHONE, TERRITOIRES DU NORD-OUEST, CATHERINE BOULANGER and CHRISTIAN GIRARD

Plaintiffs

- and -

ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES and COMMISSIONER OF THE NORTHWEST TERRITORIES

Defendants

- and -

FÉDÉRATION NATIONALE DES CONSEILS SCOLAIRES FRANCOPHONES DU CANADA

Intervener

REASONS FOR JUDGMENT (COSTS)
THE HONOURABLE JUSTICE L.A. CHARBONNEAU