Federal Court  Cour fédérale

Date: 20181002

Docket: T-1856-16

Citation: 2018 FC 977

Ottawa, Ontario, October 2, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CLARENCE PAPEQUASH, CLINTON KEY AND GLENN PAPEQUASH

Applicants

and

RODNEY BRASS, DAVID COTE, MYRNA O'SOUP, COLLEEN BRASS, DALE BRASS, FERLYN BRASS, JESSE BRASS, JOSEPH BRASS, MELODY BRASS, ROBERT BRASS, SHANNON BRASS, SHIRLEY BRASS, ANGELA DESJARLAIS, GILDA DOKUCHIE-CRANE, KENNETH HATHER, SIDNEY KESHANE, ALLAN O'SOUP, FERNIE O'SOUP, GLEN O'SOUP, IVY O'SOUP, MARLENE BRASS, PERCY O'SOUP, MARCELLA PELLETIER, BURKE RATTE AND KEY FIRST NATION

Respondents

SUPPLEMENTARY JUDGMENT AND REASONS

[1] These are my reasons in support of an award of costs payable to the Applicants in accordance with my previous decision in this matter: see *Papequash et al v Brass et al*, 2018 FC 325, 290 ACWS (3d) 249.

[2] Subsequent to my liability decision, Key First Nation terminated its retainer with Stéphanie C. Lavallée and retained the services of its present counsel, Lynda K. Troup. With leave of the Court, Ms. Troup filed a further submission seeking an Order that the Key First Nation recover its costs from the so-called "at fault" Respondents. The authority to make such an Order is said to be found in the broad discretion afforded by Rule 400 of the *Federal Courts Rules*, SOR/98-106. The situation, it is further argued, is analogous to cases where *Bullock* or *Sanderson* orders have been made requiring an unsuccessful defendant to indemnify a successful defendant for costs payable to a plaintiff.

[3] I do not accept that this is a case where Key First Nation should recover its costs from the other Respondents. All of the Respondents acted in concert with a single counsel presumably in accordance with the direction and approval of the Band throughout the proceeding. A recognition that a party should be permitted to turn against co-litigants whose interests were throughout wholly aligned at the end of a jointly represented unsuccessful proceeding would create serious mischief. *Sanderson* and *Bullock* orders are appropriate in cases where co-defendants have distinct and separately advanced interests and where those interests do not coincide. The Key First Nation is the author of its own predicament. It had the means to appreciate the conflict it was in vis-à-vis the members of the Band and it elected to pursue a joint legal strategy that ignored that broader interest. It must now accept the financial consequences of so acting. If the

Band is now unhappy with the legal representation it received or with the amount of its legal fees it has the means to seek independent recourse.

[4] The Applicants advanced their initial claim to costs on a solicitor/client scale in the amount of $171,449.70 (inclusive of $10,673.53 in disbursements). They also requested a joint and several award payable by the Respondents and by their legal counsel, Stephanie Lavallée. By letter dated August 2, 2018, counsel for the Applicants, Nathan Phillips, advised that they were no longer seeking costs against Key First Nation but only against the personal Respondents. This change in position was prompted by a change in leadership following a recent Band election.

[5] The claim against the Respondents' counsel is brought under Rule 404(1) of the *Federal Courts Rules*, SOR/98-106, based on assertions of improper and unprofessional conduct that unnecessarily ran up the Applicants' legal costs and wasted the Court's time.

[6] There is no doubt that Ms. Lavallée's conduct in this case left something to be desired. She frequently failed to fulfil the professional obligations owed to the Court and to opposing counsel. Some of that conduct I attribute to inexperience but some of it reflects a lack of professionalism in the form of a failure to respect the Rules of the Court and opposing counsel. A recent letter written by Ms. Lavallée to the Court alleging unfairness is also factually incorrect and improper. That said, the Court file contains accusatory and over-the-top correspondence from both sides asserting various forms of misconduct. Some of this correspondence was sent to the Court for no apparent judicial purpose but, rather, to embarrass the opposite parties and their

counsel. This problem is well-reflected in a Direction issued by Prothonotary Martha Milczynski on May 15, 2017 containing the following admonition:

> […] Upon conducting the case management teleconference on May 2nd, the parties appeared to have resolved the motion and submitted a draft order, including further changes to be made to the proposed affidavits. A short time later, however, each began writing to the Court complaining of the other's conduct and that of their clients. Counsel for the Respondent wrote that her clients were rescinding their consent for the resolution of the Applicants' motion. Accordingly, the motion for leave to file the Applicants' now revised affidavits remains outstanding. The Respondents have also indicated that to the extent leave is granted to any of the Applicants' revised affidavits, they may seek leave to file sur-reply. Unfortunately, despite attempts to reach a resolution through the case management process (discussions on April 20, May 2 and 15, 2017); the parties seem determined to proceed with the motions. In addition, and more unfortunately they are proceeding with acrimony, in a manner that is marked by a lack of courtesy and that result in the expenditure of significant time and resources, both of their clients and of the Court.

[7] I have no doubt whatsoever that most of the case management conferences conducted in this proceeding (some 12 in all) resulted from a failure by counsel to work cooperatively. This resulted in much wasted effort by the Court to resolve disagreements that should have been resolved by agreement. Problems also arose around the content of the affidavits filed by both sides which were often replete with scandalous, improper, and irrelevant assertions. There is no place in a fact affidavit for *ad hominem* attacks or disparaging opinions on the character of opposing parties or their counsel. The net result of all of the unnecessary interlocutory activity on this file is, unfortunately, the imposition of a significant financial burden on the members of the Key First Nation, whose interests appear to have been largely ignored.

[8] Notwithstanding the above concerns, I am not satisfied that the Applicants have met the heavy burden for having costs awarded against the Respondents' counsel and I decline to make such an award. I am also not satisfied that the Applicants ought to recover the entirety of their solicitor/client costs. Some of the responsibility for the procedural lapses and unnecessary steps taken in the proceeding rests with the Applicants and their counsel and they ought not to be rewarded for it.

[9] This is, however, an appropriate case to assess costs at the upper end of Column V. The Applicants were found to have egregiously contravened the *First Nations Elections Act*, SC 2014, c 5 and they repeatedly frustrated the Court's process.

[10] I am also of the view that a substantial indemnity for costs is usually justified where individual members of a First Nation assume the substantial risk of challenging a Band election. If successful, they ought not to be left significantly out-of-pocket for assuming a responsibility that benefits all of the members of their community. That said, costs are never payable for unnecessary or excessive steps taken and must always bear a relationship to the complexity of the case. Despite all of the largely unnecessary wrangling engaged in by the parties and their counsel, this was not a complicated case. The matter turned on evidence directed at corrupt election practices which was then applied to settled legal principles.

[11] At the Court's request, the Applicants presented a Bill of Costs based on Column V of the Tariff. Somewhat surprisingly the amount claimed under the Tariff came to $161,380.85

(inclusive of disbursements of $8,211.84). This figure is approximately 94% of the solicitor/client claim and, in my view, is substantially inflated.

[12] To the extent that Orders were issued during case management, Prothonotary Milczynski has already either expressly or implicitly resolved the issue of costs. Some of the Orders that the Court issued have already dealt with costs and cannot be revisited now. Most of the case management Directions and Orders on the file are, however, silent concerning costs. That is, in fact, the norm for matters dealt with in case management, which are almost always resolved on consensus and where costs are rarely requested or given. In such cases, the presumption arising from the Court's silence is that no costs are payable. I would add that the Court's Tariff makes no provision for simply preparing for and attending case management meetings. I have accordingly removed all of the amounts claimed for preparations and attendances for case management.

[13] To the extent that there may be amounts outstanding from earlier Orders of the Prothonotary, they may be enforced by the Applicants in the usual way (eg. see Order of July 26, 2017, awarding costs of $8,500.00).

[14] As far as I can tell, there is only one Order issued by the case management Prothonotary where the issue of costs was left to the discretion of the application Judge (see the Order of May 25, 2017). For that motion, costs are allowed in the amount of $3,500.00. All of the remaining amounts claimed for motions are disallowed.

[15] The claims to prepare eight Directions to Attend are too high. I have reduced the value of those claims from $5,950.00 to $1,500.00.

[16] I reject the claim to amend the Notice of Application. That step does not appear to have been necessitated by an amendment to any pleading by the Respondents and was seemingly done on consent and without costs.

[17] I reject the claim to costs for the motion to strike the Respondents' costs submission on the basis of its length. That motion was unnecessary as the Court dealt with it without the need for a motion. I also deny the claim for costs for unsuccessfully pursuing relief under Rule 404.

[18] I reduce the amounts claimed to prepare the Applicants for cross-examination to five units each.

[19] I disallow the claims to a second counsel fee except for the hearing on the merits (including preparation) which I allow in the amount of $2,000.00.

[20] I disallow the claims to counsel fees arising on motions for the reasons previously given. A first counsel fee for attending and preparing for the application is allowed in the amount of $3,500.00.

[21] Disbursements are allowed in the amount of $7,500.00.

[22] In the result, costs assessed at the high end of Column V and disbursements in the total amount of $86,170.00 are awarded to the Applicants payable jointly and severally by the personal Respondents, namely Rodney Brass, Angela Desjarlais, Sidney Keshane and Glen O'Soup.

[23] It is not for the Court to ignore the current position of the Applicants to withdraw their claim to costs against Key First Nation. That is their prerogative. However, nothing in these reasons should be taken to interfere with the rights, if any, of the personal Respondents to claim indemnity for their exposure to costs from Key First Nation.

JUDGMENT IN T-1856-16

THIS COURT'S JUDGMENT is that the Applicants are awarded their costs payable by the Respondents Rodney Brass, Glen M. O'Soup, Angela Desjarlais and Sidney Keshane jointly and severally in the all-inclusive amount of $86,170.00.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1856-16
STYLE OF CAUSE:	CLARENCE PAPEQUASH, CLINTON KEY AND GLENN PAPEQUASH v RODNEY BRASS, DAVID COTE, MYRNA O'SOUP, COLLEEN BRASS, DALE BRASS, FERLYN BRASS, JESSE BRASS, JOSEPH BRASS, MELODY BRASS, ROBERT BRASS, SHANNON BRASS, SHIRLEY BRASS, ANGELA DESJARLAIS, GILDA DOKUCHIE-CRANE, KENNETH HATHER, SIDNEY KESHANE, ALLAN O'SOUP, FERNIE O'SOUP, GLEN O'SOUP, IVY O'SOUP, MARLENE BRASS, PERCY O'SOUP, MARCELLA PELLETIER, BURKE RATTE AND KEY FIRST NATION

SUBMISSIONS IN WRITING CONSIDERED AT OTTAWA, ONTARIO

SUPPLEMENTARY JUDGMENT AND REASONS:	BARNES J.
DATED:	OCTOBER 2, 2018

WRITTEN REPRESENTATIONS BY:

Nathan Phillips Mervin Phillips	FOR THE APPLICANTS
Stephanie C. Lavallée Donald E. Worme	FOR THE RESPONDENTS RODNEY BRASS, DAVID COTE, MYRNA O'SOUP, COLLEEN BRASS, DALE BRASS, FERLYN BRASS, JESSE BRASS, JOSEPH BRASS, MELODY BRASS, ROBERT BRASS, SHANNON BRASS, SHIRLEY BRASS, ANGELA DESJARLAIS, GILDA DOKUCHIE-CRANE, KENNETH HATHER, SIDNEY KESHANE, ALLAN O'SOUP, FERNIE O'SOUP, GLEN O'SOUP, IVY O'SOUP,

MARLENE BRASS, PERCY O'SOUP,
MARCELLA PELLETIER, BURKE RATTE

Lynda K. Troup — FOR THE RESPONDENT KEY FIRST NATION

SOLICITORS OF RECORD:

Phillips & Co.
Regina, SK — FOR THE APPLICANTS

Semaganis Worme Legal
Saskatoon, SK — FOR THE RESPONDENTS RODNEY BRASS, DAVID COTE, MYRNA O'SOUP, COLLEEN BRASS, DALE BRASS, FERLYN BRASS, JESSE BRASS, JOSEPH BRASS, MELODY BRASS, ROBERT BRASS, SHANNON BRASS, SHIRLEY BRASS, ANGELA DESJARLAIS, GILDA DOKUCHIE-CRANE, KENNETH HATHER, SIDNEY KESHANE, ALLAN O'SOUP, FERNIE O'SOUP, GLEN O'SOUP, IVY O'SOUP, MARLENE BRASS, PERCY O'SOUP, MARCELLA PELLETIER, BURKE RATTE

Thompson Dorfman Sweatman LLP
Winnipeg, MB — FOR THE RESPONDENT KEY FIRST NATION