Federal Court  Cour fédérale

Date: 20200908

Docket: T-430-18

Citation: 2020 FC 888

BETWEEN:

‘NAMGIS FIRST NATION

Applicant

and

MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, MARINE HARVEST CANADA INC. AND CERMAQ CANADA LTD.

Respondents

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This is an assessment of costs pursuant to a Judgment of the Federal Court dated February 4, 2019, wherein the application for judicial review was granted with costs. At paragraph 5 of the Judgment the Court states:

> 5. ‘Namgis shall have its costs assessed pursuant to Rule 400(5) subject to this Court’s direction that:

(a) All costs shall be assessed in accordance with Tariff B, Column III;

(b) The assessed costs shall be payable by the Minister to ‘Namgis.

(c) All costs pertaining to T-744-18 shall be excluded.

[2] This assessment of costs is also pursuant to an Order of the Federal Court dated March 23, 2018, wherein the Applicant’s motion for an interlocutory injunction was dismissed with costs in the cause. As the judicial review was decided in the Applicant’s favour, it entitles the Applicant to costs for this motion as well.

[3] On October 22, 2019, the Applicant filed a Bill of Costs.

[4] On November 18, 2019, the Assessment Officer issued the following direction:

> Having reviewed ‘Namgis First Nation’s Bill of Costs, filed on October 22, 2019, it has been determined that this is an assessment which may be dealt with by way of written submissions.
>
> Therefore, it is directed that:
>
> a) the ‘Namgis First Nation may serve and file all materials (if it has not already done so) including the bill of costs, supporting affidavits and written submissions together with a copy of the direction by December 20, 2019;
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> b) the Minister of Fisheries, Oceans and the Canadian Coast Guard may serve and file any reply materials by February 7, 2020;
>
> c) the ‘Namgis First Nation may serve and file any rebuttal materials by March 13, 2019.

[5] Throughout my Reasons for Assessment, ‘Namgis First Nation will be referred to as “the Applicant” and the Minister of Fisheries, Oceans and the Canadian Coast Guard will be referred to as “the Minister”.

[6] Subsequent to the direction dated November 18, 2019, the Applicant’s costs material was filed on December 3, 2019; the Minister’s reply material was filed on February 7, 2020; and the Applicant’s rebuttal material was filed on March 12, 2020.

[7] A review of the court record indicates that no further material was received by the court registry and no request was made by either party to the Assessment Officer to provide additional material after the filing of the Applicant’s rebuttal material on March 12, 2020.

II. Preliminary Issue

[8] Before assessing the costs of the Applicant, there is an issue regarding the Applicant’s claims for assessable services and disbursements related to the expert affidavits of Dr. Fred Kibenge, Dr. Martin Krkosek and Dr. Richard Routledge (collectively the ‘Namgis Expert Affidavits), which I will address as a preliminary issue. The issue pertains to an Assessment Officer’s authority under Part 11 of the *Federal Courts Rules*, SOR/98-106 *(FCR)* to allow costs related to expert services which have been deemed to be inadmissible by the Court.

[9] ‘Namgis Expert Affidavits were filed in relation to the Applicant’s motion for an interlocutory injunction and also in relation to the judicial review proceeding. The ‘Namgis Expert Affidavits filed in relation to the Applicant’s motion for an interlocutory injunction were:

- Affidavit of Dr. Richard Routledge, affirmed on February 27, 2018;
- Affidavit of Dr. Fred Kibenge, affirmed on March 6, 2018;
- Affidavit of Dr. Martin Krkosek, affirmed on March 7, 2018;
- Affidavit of Dr. Fred Kibenge, affirmed on March 19, 2018;

[10] The 'Namgis Expert Affidavits filed in relation to the Applicant's judicial review proceeding were:

- Affidavit of Dr. Richard Routledge, affirmed on May 14, 2018;
- Affidavit of Dr. Fred Kibenge, affirmed on May 14, 2018;
- Affidavit of Dr. Martin Krkosek, affirmed on May 14, 2018;
- Affidavit of Dr. Fred Kibenge, affirmed on July 24, 2018.

A. *Relevant passages from the Court's decisions dated February 4, 2019 and March 23, 2018*

[11] At paragraph 237 of the Judgment and Reasons dated February 4, 2019, the Court states:

> 237. In my view, the Krkosek Affidavit does not provide helpful background information. It does not summarize the evidence that was before the decision-maker nor is it necessary for the Court to understand the issues relevant to the judicial review. It is not a non-argumentative orienting statement. And, although the scientific debate at the heart of these applications is no doubt complex, this affidavit is not reviewing in a neutral and uncontroversial way the evidence that was before the Delegate. Rather, the affidavit provides new information, speaks to the merits of the mater decided by the Delegate; engages in the interpretation of the evidence; and challenges the reasonableness and scientific validity of the PRV Policy and the reconsideration decision.

[12] At paragraph 240 of the Judgment and Reasons dated February 4, 2019, the Court states:

> 240. Indeed, in its written submissions responding to the motion to strike, 'Namgis describes the Krkosek Affidavit as "an explanation of how a flawed decision-making process can affect an outcome, and should be addressed as such as part of arguing the application on the merits." In my view, this and similar arguments tend to conflate the purposes of the exceptions to the general rule precluding admission of evidence that was not before the decision-maker with a challenge to the reasonableness of the decision on its merits based on extrinsic evidence. The evidence is not admissible for the latter purpose, and 'Namgis is not challenging the decision-making process as such.

[13] At paragraphs 248 and 249 of the Judgment and Reasons dated February 4, 2019, the Court states:

> 248. I agree with the Respondents that Dr. Kibenge's critique of DFO's scientific and decision-making processes do not amount to helpful background information. Like the Krkosek Affidavit, it does not summarize or review in a neutral and uncontroversial way the evidence that was before the Delegate. Nor is it necessary for the Court to understand the issues relevant to the judicial review. It does not provide evidence to demonstrate the existence of a critical gap in the record that could not be demonstrated based on the record itself.
>
> 249. Nothing in the Kibenge Affidavit supports 'Namgis' allegation that the decision to adopt and maintain the PRV Policy was done with a view to improperly further the interests of the aquaculture industry. It does not establish an ulterior motive. And while Dr. Kibenge characterizes DFO's underlying science and DFO's assessment of other science as amounting to misrepresentations, minimizations and omissions, I am not persuaded that his evidence establishes bad faith on the part of the decision-maker, the Delegate, or on the part of DFO's scientists in providing advice to the Delegate. Rather, these terms are used by Dr. Kibenge as part of a critique of the approach taken by DFO to the science. However, DFO's weighing or assessment the science, or any failure to assess other science, goes to the merits of the decision, it does not establish bad faith.

[14] At paragraph 260 of the Judgment and Reasons dated February 4, 2019, the Court states:

> 260. Upon review of the Routledge Affidavit, I conclude that it is premised on the affiant's own interpretation of the logic and rational of the PRV Policy. And, like the prior affidavits, Dr. Routledge states repeatedly that insufficient reasons were given to support DFO's conclusions, and opines on the weight given to certain factors by DFO. In my view, the Routledge Affidavit not only speaks to the merits of the matter before the Delegate, it reweighs and reconsiders the evidence, addresses evidence Dr. Routledge believes should have been considered by DFO, and speaks to the affiant's opinion of the sufficiency of the Delegate's reasons. In effect, the Routledge Affidavit seeks to step into the shoes of the Delegate and re-make the decision as the affiant deems appropriate. The Routledge Affidavit addresses many of the same issues and concerns as did the prior two affidavits and, for the same reasons, it is not admissible under any of the exceptions.

[15] At paragraphs 265, 266 and 267 of the Judgment and Reasons dated February 4, 2019, the Court states:

> 265. The admission of the 'Namgis Expert Affidavits would have the effect of transforming the judicial review, intended to be a summary process, into a trial *de novo* on the merits of the science, taking the Court out of its proper role and becoming a forum for fact finding on the merits. And while 'Namgis puts the 'Namgis Expert Affidavits forward on the basis of the exceptions to the rule precluding the admission of evidence that was not before the decision-maker, in reality this is little more than a cloaked attack on the science underlying the decision under review and seeking to provide the Court with an assessment of the evidence that differs from that made by the Delegate and DFO (*Canadian Tire Corp* at paras 11–13; *Blaney v British Columbia (Minister of Agriculture Food and Fisheries)*, 2005 BCSC 283 at para 34). And, in response to the 'Namgis Expert Affidavits, the Minister filed the Garver and Hyatt Affidavits, Marine Harvest filed the expert affidavits of Dr. Siah, Dr. Kent and Dr. Farrell, and Cermaq filed the expert affidavit of Dr. Noakes. 'Namgis then sought to file the Kibenge Supplemental Affidavit, prompting the Minister to seek to file the Garver Supplemental Affidavit, all of which speak to the specifics of the attacked underlying science. Moreover, there were cross-examinations on these affidavits, which again delved into and challenged the underlying science and/or DFO's treatment of it.

> 266. And, while opinion evidence of a properly qualified expert may be admissible if it is relevant, necessary to assist the Court, and not subject to any exclusionary rule, the 'Namgis Expert Affidavits in this matter do not meet those qualifications. Even if they might contain useful factual information, it is so intertwined with unnecessary opinion evidence that it cannot realistically be severed. Accordingly, based on all of these concerns, the 'Namgis Expert Affidavits in whole have been struck (*Alberta Wilderness Assn v Canada (Minister of Environment)*, 2009 FC 710 at para 34). In the result, the responding expert evidence is unnecessary and is also struck out. That is, the Garver and Hyatt Affidavits filed by the Minister, the Marine Harvest Expert Affidavits (Drs. Siah, Kent and Farrell), as well as the affidavit of Dr. Noakes filed by Cermaq, are all struck as inadmissible. Further, the motions of 'Namgis seeking to file the Kiberge [sic] Supplemental Affidavit and of the Minister seeking to file the Garver Supplemental Affidavit, are denied.
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> 267. In summary, the 'Namgis Expert Affidavits do not fall within any of the exceptions to the rule precluding the admission of evidence that was not before the decision-maker and, therefore, they are not admissible. And, even if they were admissible solely for the purpose of establishing bad faith, having carefully reviewed the 'Namgis Expert Affidavits and the other evidence, I do not agree with 'Namgis' view that the 'Namgis Expert Affidavits establish that DFO has repeatedly acted inconsistently with its statutory purpose with such reckless disregard that the absence of good faith can be deduced and bad faith presumed. Nor that these Affidavits demonstrate that DFO acted improperly to promote the interests of the aquaculture industry.

[16] At paragraph 400 of the Judgment and Reasons dated February 4, 2019, the Court states:

> 400. I also agree with the Minister that, in essence, 'Namgis made unfounded allegations of unethical behaviour on the part of counsel for the Minister to ground a claim of breach of procedural fairness, which claim I have found to lack merit. I have also found that the 'Namgis Expert Affidavits, which it submits demonstrate the Minister's bad faith, to be inadmissible and, even if they were admissible, that they do not establish bad faith. I agree with the Minister and Cermaq that those bad faith allegations added significant procedural steps and costs to the applications. However, while this approach by 'Namgis may have been ill advised, it was open to it. That said, it is not apparent to me why 'Namgis required three expert affidavits which are based on the

> same instructions and largely cover the same ground. Finally, I would note that, as I have observed above, the bifurcation of 'Namgis' case between T-430-18 and T-744-18 was unnecessary.

[17] Concerning the Applicant's motion for an interlocutory injunction, the Court stated the following at paragraph 64 of the Reasons for Order and Order dated March 23, 2018:

> 64. In his reply affidavit of March 19, 2018, Dr. Kibenge challenged the Marine Harvest test results for PRV. While I allowed this evidence to be considered, I gave it limited weight in reaching my decision.

[18] At paragraph 93 of the Reasons for Order and Order dated March 23, 2018, the Court states:

> 93. Based on the evidence before the Court, I have no difficulty in finding that the Applicant has established a serious risk of irreparable harm on a number of fronts: the complete lack of consultation by the Minister in respect of this transfer of Atlantic salmon into the Asserted Territory, notwithstanding a previous acknowledgement of a strong claim to Aboriginal fishing rights in that territory; evidence of the salmon fishery being of fundamental importance to the Applicant's culture and way of life; that fishery being at serious risk, given the depleted wild salmon populations in the Asserted Territory; and the recent science establishing the connection between PRV and HSMI and the resulting risk of disease and mortality. All of this is proof of a real and non-speculative likelihood of irreparable harm to the Applicant.

B. *Applicant's Costs Material*

[19] The Applicant has submitted that the disbursements related to the 'Namgis Expert Affidavits are reasonable and that the principles for assessing expert disbursements were met, as established in *Alliedsignal Inc. v. Dupont Canada Inc*, [1998] F.C.J. No. 625. At paragraphs 13, 14 and 15 of the Applicant's Written Submissions On Costs, it is submitted:

13. Below, 'Namgis sets out the principles for assessing expert disbursements, and addresses each of Strickland J.'s queries in turn. It submits that the reasonableness of its expert disbursements is established.

(iii) General principles for assessing expert disbursements

14. In *Alliedsignal Inc.*, the Assessment Officer established guidelines to assist in determining whether expert disbursements are allowable:

(a) the hiring of an expert must, in the circumstances existing at the time, be prudent and reasonable representation of the client;

(b) the hiring of an expert must not constitute a "blank cheque" for an award; and

(c) what reliance was placed on the expert's testimony by the trial judge?[15]

(iv) The hiring of 'Namgis' experts was "prudent and reasonable"

15. 'Namgis states that the hiring of its experts meets the "prudent and reasonable" requirement under *Alliedsignal Inc.* primarily for three reasons:

(a) the three experts were engaged on distinct grounds;

(b) the motion for injunction and judicial review application engaged scientific issues which required expert evidence; and

(c) Dr. Kibenge's particular expertise is uniquely suited to this case.

[20] The Applicant's submissions have also raised the issue of litigating in hindsight and referred to the jurisprudence - *Alix v. Canada*, 2015 FC 1238, at paragraph 9; *Rachalex Holdings Inc. v. 921410 Ontario Ltd.*, 2010 FC 585, at paragraph 19; and *Truehope Nutritional Support Limited v. Canada*, 2013 FC 1153, at paragraph 111, in support of this argument. At paragraph 16 of the Applicant's Written Submissions On Costs, it is submitted:

> 16. Further, as Johanne Parent, Assess. Off. has held, expert costs are not to "be assessed in hindsight but considering the circumstances existing at the time [they] were made."[16] In other words, "[w]hether or not the [expert report] was necessary to the final outcome of [a] file should not be considered in hindsight.[17]

[21] With regards to the Court's uncertainty as to the reasonableness of the disbursements related to the 'Namgis Expert Affidavits, the Applicant has submitted that the expert services were requisitioned from three different experts because each expert has training in a different discipline. In addition, it was submitted that two of the experts worked *pro bono*. At paragraphs 24 and 25 of the Applicant's Written Submissions On Costs, it is submitted:

> 24. Additionally, two of the three experts – Drs. Krkosek and Routledge – agreed to work *pro bono*, i.e. without charging any expert fees.[27] Accordingly, the only expert costs at issue (other than disbursements associated with Dr. Krkosek's travel to Vancouver, which amount to $3,298.23; Dr. Routledge lives in the Vancouver area and did not incur travel costs)[28] are those of Dr. Kibenge, which total $59,717.96.[29]
>
> 25. Dr. Kibenge's fees related to his preparation of four separate expert reports (two on 'Namgis' motion and two on its judicial review application).[30]

[22] At paragraphs 36 and 37 of the Applicant's Written Submissions On Costs, it is submitted:

> 36. First, the question in this assessment is not whether 'Namgis is entitled to its disbursements. As set out above, that question has already been decided in its favour in both the motion and the application. Rather, the question is that of their reasonableness and, in that regard, the passage from *Rachalex Holdings* noted above emphasizes that reasonableness is not to be assessed in hindsight (i.e. it does not, in and of itself, operate to prejudice 'Namgis that Strickland J. did not ultimately admit the affidavits).

> 37. Second, notwithstanding Strickland J.'s decision not to admit the evidence, it was still of clear utility to the Court: in the case of the motion for injunction, the evidence was admitted over Canada's objections,[53] and Manson J. commented, *inter alia*, that 'Namgis had "established a serious risk of irreparable harm on a number of fronts … [including] the recent science establishing the connection between PRV and HSMI and the resulting risk of disease and mortality."[54]

C. *The Minister's Reply*

[23] The Minister has submitted in reply that the Applicant's reliance on "inadmissible extrinsic evidence" unnecessarily complicated the proceeding and added substantial time to it. The Minister has submitted that at paragraph 400 of the Court's Judgment and Reasons dated February 4, 2019, the Applicant's expert affidavits were found to be inadmissible. The Minister has submitted that the costs claimed by the Applicant for the expert affidavits are not reasonable and should be refused and in support of this argument has cited paragraphs 95 to 101 of *Truehope Nutritional Support Limited v. Canada*, 2013 FC 1153, wherein the Assessment Officer stated the following:

> 95. Concerning relevance and admissibility, in *Carruthers v Canada*, [1982] F.C.J. No. 235, the Court held:
>
> In cases in which experts are called by both parties and they give conflicting opinions, the Court has to choose the opinion of one of the experts as preferable to the other, unless the Court chooses to reject both opinions and substitute its own based on the evidence, but the fact that one expert's report is rejected, or not accepted in full, would not justify non-payment of his fees for the preparation of same, unless the Court finds that the requisitioning of such a report was entirely unnecessary or the contents useless.... (emphasis added)
>
> 96. Referring to *Carruthers*, at paragraph 51 of *Merck & Co v Canada (Minister of Health)*, 2007 FC 312, (Merck) the Assessment Officer held:

Since the Federal Court ruled that most of the evidence attached to the Affidavit of Frank Tassone was "unnecessary" and that "most of it was inadmissible," it is my opinion that the Apotex Respondent should not be entitled to claim these expert fees in their entirety. For these reasons and considering the proposition expressed in *Grace M. Carlile, supra,* that "a result of zero dollars would be absurd", I exercise my discretion and allow a reduced amount of $500.00 for the associated expert fees of Frank Tassone.

97. The Assessment Officer appears to allow a reduced amount due to the fact that the Court did not find the evidence entirely inadmissible. On the review of the Assessment Officer's decision, at paragraphs 31 and 32 of *Merck & Co v Apotex Inc*, 2007 FC 1035, (*Merck Review*) the Court held:

> The assessment officer himself noted in paragraph [12] of his reasons that, at paragraphs [60] and [61] of his reasons, Justice Mosley found that it was improper for Apotex to use the Tassone affidavit to submit evidence, that Apotex made no real effort to explain how most of the material annexed to that affidavit would be relevant and admissible and that it was unnecessary and excessive to "dump" the U.S. Trial evidence into the record by the use of the Tassone affidavit. He ruled that most of the material under cover of the Tassone affidavit was inadmissible and he strongly discouraged "any repetition of this practice".
>
> In light of Justice Mosley's comments I consider the assessment officer's reliance on *Carlile v Canada (Minister of National Revenue)* in this context, a decision of a fellow assessment officer, to be ill-founded and the resulting amount allowed for the disbursement to Mr. Tassone to be so unreasonable that an error in principle must have been the cause. In the result, I would reduce the assessed costs by $500.00 to nil on this account. (emphasis added)

98. In Merck & Co., the Court noted that Justice Mosley found the affidavit to be unnecessary and excessive. Therefore, even though not all of the material under cover of the Tassone Affidavit was inadmissible, the Court reduced the assessed amount to nil. I find this to be consistent with the Court’s finding of necessity in Carruthers (supra).

99. In the matter before me, the Court found the evidence of Dr. Silverstone to be irrelevant and inadmissible and, following the findings in Carruthers and Merck & Co. (supra), the disbursements claimed for the services of Dr. Silverstone are not allowed.

100. At paragraph 132 of the Applicants' Memorandum, counsel submits:

> If it is accepted that there should be no costs allowed for Dr. Silverstone, then in addition to his expert fees, the following costs should be also disallowed:
>
> a. Item 8 concerning Dr. Silverstone;
>
> b. Item 9 concerning Dr. Silverstone;
>
> c. $1322.50 for transcripts (Potts Aff. Ex BB p. 325);
>
> d. The part of the copying and tabs for the affidavits which is attributable to Dr. Silverstone' affidavit (Potts Aff. pp. 92-3, Ex. Z 265-8, 270);
>
> e. The part of the Respondents' Record and courier charges attributable to Dr. Silverstone's affidavit.

The Respondents submitted no rebuttal concerning these points.

101. Having found that the disbursement for Dr. Silverstone's expert fees could not be allowed, I also find that the fees and disbursements associated with the cross-examination of Dr. Silverstone, the disbursements related to the duplication service and filing of his affidavit should not be allowed. This being the circumstance, the amounts claimed under Item 8 and Item 9 for the cross-examination of Dr. Silverstone on August 5-7, 2009 and the disbursement of $1,322.50, for the transcript of the cross-examination of Dr. Silverstone are not allowed. Further, the amounts of $140.59 and $86.46 respectively for the duplication and courier changes associated with the Affidavits of Dr. Silverstone are not allowed.

[24] In addition, the Minister made submissions regarding the Applicant's unfounded allegations of bad faith normally warranting a reduction of costs or an elevated award of costs to the opposing party. In support of this argument the Minister provided citations from *Air Canada v. Toronto Port Authority*, 2010 FC 1335, at paragraph 17; *Jane Hamilton v. Open Window Bakery Limited*, 2004 SCC 9, at paragraph 26; and *Magnotta Winery Corp. v. Vintners Quality Alliance,* 2001 FCT 1421, from paragraphs 69 to 71. In addition, at paragraphs 29 and 30 of the Minister's Written Submissions, it is submitted:

> 29. In addition, this Court has deviated from the normal course of awarding costs where a party had made unfounded allegations of bad faith.[14] The consequences of allegations of this nature include a reduction in costs. For example, in *Ridell v Canada (Chief Electoral Officer)*[15], this Court noted:
>
> > Now, the respondent Gauthier's counsel advanced certain preliminary objections one of which was effective and many of which were simply objectionable. Among the latter are those which imputed malice, bad faith, dishonesty, and unethical behaviour on the part of the applicant, all without a scintilla of evidence. Although Mr. Gauthier was importuned out of the blue with little notice, he cannot expect to be awarded a full measure of costs when his counsel takes such an approach.[18]
> > [Emphasis Added]
>
> 30. In T-430-18, the unfounded allegations of bad faith and the expense required to have expert witnesses give evidence are relevant for the purposes of determining the appropriate award of costs.

D. *Applicant's Rebuttal*

[25] The Applicant has submitted in rebuttal that the Minister has attempted to relitigate the issue of the Applicant's entitlement to costs; has not referred to proper legal principles; and has

selectively cited passages from the Court's Judgment and Reasons dated February 4, 2019. At paragraphs 11, 12 and 13 of the Applicant's Reply Submissions On Costs, it is submitted:

> 11. In this case, the question of 'Namgis' entitlement to costs has already been expressly decided in 'Namgis' favour by both Manson J.[6] and Strickland J.[7] The Minister nonetheless attempts to relitigate the issue of entitlement by selectively citing passages from Strickland J.'s decision in which she was critical of aspects of 'Namgis' overall litigation strategy in determining whether to order costs in favor of 'Namgis.
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> 12. However, Strickland J. ultimately concluded 'Namgis' strategy was "open to it", and awarded it costs at Tariff B, Column 3 as successful applicant, to be determined via this assessment process.[8] The Minister cannot reopen the issue of entitlement to costs here, and an assessment officer is without jurisdiction to do so: *Pelletier* at para. 7.
>
> 13. Accordingly, 'Namgis maintains the position set out in its submissions in chief at paras. 10-39. The Minister indeed makes no attempt to question the reasonableness of the expert disbursements as at the time they were incurred (i.e. whether experts were necessary in the case, or whether they covered distinct grounds, the concern of Strickland J. that 'Namgis has now addressed in its submissions in chief at paras. 19-25). Accordingly, the only relevant evidence and argument on this central issue are those provided by 'Namgis.

[26] In reply to the Minister's submissions regarding the Applicant's unfounded allegations of bad faith, at paragraphs 8, 9 and 10 of the Applicant's Reply Submissions On Costs, it is submitted:

> 8. Further, at para. 29 of his submissions, the Minister relies on the *Ridell* case to suggest that 'Namgis' entitlement to costs may be modified during the assessment process.
>
> 9. In reply, this position again urges the assessment officer to act beyond the jurisdiction associated with assessments under Rule 405. *Ridell* stands for the proposition that the Court, in hearing the merits of a matter, has the discretion to reduce costs awarded to a party depending on conduct and positions taken during the litigation. Indeed, the paragraph in *Ridell* following the one the

> Minister cites in his submissions makes clear that, during a motion to strike, the Court in that case decided that a party was entitled to "only two-thirds of his taxed party-and-party costs (in view of counsel's extravagant and unproved allegations)".[3]
>
> 10. In contrast, again, during an assessment the only question is the reasonableness of costs incurred, not the party's entitlement to costs.[4] In *Pelletier*, the Federal Court of Appeal confirmed the jurisdiction to assess under Rule 405 as follows: "[w]ithout costs, there can, of course, be no assessment … Under section 405, an assessment officer 'assesses' costs, which assumes that costs have been awarded."[5]

[27] Further to the Applicant's reference to paragraph 7 of *Pelletier v. Canada*, 2006 FCA 41, in the paragraph 10 of the Reply Submissions On Costs, the Court states:

> 7. Since the very purpose of a motion under section 403 is to request that directions be given to an assessment officer, it goes without saying that the party bringing the motion must be entitled to costs. Without costs, there can, of course, be no assessment. Section 403 can only be interpreted in light of an assessment officer's duties. Under section 405, an assessment officer "assesses" costs, which assumes that costs have been awarded. Section 406 provides that an officer does this at the request of "a party who is entitled to costs", which again presupposes that an order for costs was made in favour of that party. Under section 407, the officer assesses the costs in accordance with column III of the table to Tariff B "unless the Court orders otherwise." Section 409 provides that "[i]n assessing costs, an assessment officer may consider the factors referred to in subsection 400(3)." In short, the duty of an assessment officer is to assess costs, not award them. An officer cannot go beyond, or contradict, the order that the judge has made. If the judge gives a direction to the officer under section 403, the officer must comply with it.

E. *Analysis*

[28] As noted earlier in these reasons, at paragraph 14 of the Applicant's Written Submissions On Costs, reference was made to *Alliedsignal Inc. v. Dupont Canada Inc*, [1998] F.C.J. No. 625,

wherein the Assessment Officer established a guideline of three questions to assist in determining whether expert disbursements are allowable. I believe that Applicant has sufficiently answered questions (a) and (b) but it is the Applicant's answer to question (c) which has raised some concerns. Question (c) states:

> (c) what reliance was placed on the expert's testimony by the trial judge?

[29] The Applicant's response to question (c) states:

> (c) Dr. Kibenge's particular expertise is uniquely suited to this case.

[30] In addition, at paragraph 37 of the Applicant's Written Submissions On Costs, it is submitted:

> 37. Second, notwithstanding Strickland J.'s decision not to admit the evidence, it was still of clear utility to the Court: in the case of the motion for injunction, the evidence was admitted over Canada's objections,[53] and Manson J. commented, *inter alia,* that 'Namgis had "established a serious risk of irreparable harm on a number of fronts … [including] the recent science establishing the connection between PRV and HSMI and the resulting risk of disease and mortality."[54]

[31] The Applicant's response to question (c) does not address "what reliance was placed on the expert's testimony" by the Court at the judicial review hearing. The judicial review hearing, which as the final hearing for this file, would be the procedural equivalent to a trial, which is stated in question (c) of *Alliedsignal*. At paragraph 266 of the Judgment and Reasons dated February 4, 2019, the Court states the following regarding the 'Namgis Expert Affidavits:

> 266. And, while opinion evidence of a properly qualified expert may be admissible if it is relevant, necessary to assist the Court,

> and not subject to any exclusionary rule, the 'Namgis Expert Affidavits in this matter do not meet those qualifications. Even if they might contain useful factual information, it is so intertwined with unnecessary opinion evidence that it cannot realistically be severed. Accordingly, based on all of these concerns, the 'Namgis Expert Affidavits in whole have been struck (*Alberta Wilderness Assn v Canada (Minister of Environment)*, 2009 FC 710 at para 34). […]

[32] Based on the Court's finding above, I have determined that question (c) has not been sufficiently answered by the Applicant in the context of the Court's reliance on the experts' testimony for the judicial review hearing and therefore the guideline established in *Alliedsignal* to assist in determining whether expert disbursements are allowable has not been fully met. It is noted though, that the Court did utilize and refer to the 'Namgis Expert Affidavits in the Reasons for Order and Order dated March 23, 2018, related to the Applicant's motion for an interlocutory injunction.

[33] The Applicant also raised the issue of litigating in hindsight and referred to the jurisprudence of *Rachalex* and *Truehope.* It is important to note that both of these cases dealt with evidence which was deemed to be partially admissible. This fact distinguishes *Rachalex* and *Truehope* from this particular file as all of the 'Namgis Expert Affidavits were deemed to be totally inadmissible by the Court for the judicial review proceeding.

[34] In addition to the *Truehope* citations provided by both of the parties, paragraph 94 in this decision speaks to the issue of hindsight:

> 94. Concerning the Respondents' "hindsight argument", I find that the matter before me may be distinguished from *Abbott Laboratories Limited v Canada (Minister of Health)*, 2009 FC 399. In *Abbott* the Assessment Officer found that, as a result of the

> motion to dismiss, "the parties had to be fully prepared to proceed on both the motion to dismiss and the application on its merits". In *Abbott* there is no indication that the Court found the expert evidence inadmissible. On the other hand, I am faced with a finding by the Court that the evidence of Dr. Silverstone is irrelevant and inadmissible. Given this finding, it is necessary to determine the effect of the inadmissibility finding and not simply allow the disbursements based on the premise that the parties had to be fully prepared to proceed.

[35] Further to the aforementioned jurisprudence, at paragraph 266 of the Judgment and Reasons, dated February 4, 2019, the Court refers to paragraph 34 of *Alberta Wilderness Assn v. Canada*, 2009 FC 710, wherein the Court states the following:

> 34. I do not find that Dr. Boyce's expert opinion on the issues before the Court, including the issue of "critical habitat," is necessary in the sense that without it, the Court could not appreciate the technical nature of the issues before it, which is how necessity is defined in *Mohan.* Further, the Supreme Court in *Mohan* directs that the necessity requirement is to be interpreted strictly where an expert provides an opinion on the "ultimate issue." The Boyce affidavit notably includes explicit opinion evidence on the ultimate issue at paragraphs 10, 18, 24 and 27. The statements in these paragraphs go well beyond a description of the evidence before the decision-maker, or helpful background information; their inadmissibility in this proceeding is obvious. The remainder of Dr. Boyce's affidavit contains factual information which arguably constitutes helpful background information on graduate work supervised by Dr. Boyce, which was then relied upon by the respondent in preparing the Greater Sage-Grouse Recovery Strategy. However, in my view, this factual information is so intertwined with unnecessary opinion evidence that it cannot realistically be severed and its admission would prejudice the respondent. As was the case in *Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association,* 2006 FCA 56, the entirety of the contentious affidavit should be struck. Accordingly, the respondent's motion with respect to the Boyce affidavit is granted and it is struck in its entirety.

[36] My review of *Rachalex*, *Truehope* and *Alberta Wilderness Assn*, in conjunction with the Court's Judgment and Reasons dated February 4, 2019, indicate that while a party must prepare their litigation without the laden of hindsight, there is a risk regarding a party's potential claim for costs. The jurisprudence appears to indicate that a party may be entitled to indemnification for expert services which were deemed to be partially admissible by the Court and conversely, it appears that a party is not entitled to indemnification for expert services which were deemed to be totally inadmissible by the Court.

[37] In *Pelletier*, which was cited by the Applicant, the Court states that an Assessment Officer's duty is to "assess costs, not award them." It is important to note that the *Pelletier* decision was related to a case wherein a party had filed a motion pursuant to Rule 403 of the *FCR* for the Court to provide directions on costs to an Assessment Officer. My review of the court record indicates that no such motion was submitted by either party for this particular file. This being noted, even without a direction from the Court pursuant to Rule 403, an Assessment Officer still cannot go beyond, or contradict an order that the Court has made. In *Carruthers v. Canada*, [1982] F.C.J. No. 235, which is referred to in *Truehope*, the Court states:

> In the judgment under appeal, no special direction was sought or made respecting costs, which were not spoken to. Had this been done, I would no doubt at the time have made a special direction with respect to the costs of Mr. Bowman of Price Waterhouse. The fact that in the reasons for judgment I indicated a preference for the approach to evaluation of the shares by Mr. Dalgleish, defendant's expert, and in fact based my decision on an earlier report of Mr. Clayton made for the defendant, should notice considered as detracting from the usefulness of Mr. Bowman's report, nor is it any reflection on his competence. In cases in which experts are called by both parties and they give conflicting opinions, the Court has to choose the opinion of one of the experts as preferable to the other, unless the Court chooses to reject both opinions and substitute its own based on the evidence, but the fact that one

> expert's report is rejected, or not accepted in full, would not justify non-payment of his fees for the preparation of same, unless the Court finds that the requisitioning of such a report was entirely unnecessary or the contents useless. That was not the case here, where an intricate and difficult question of evaluation of shares was involved, in which the assistance of accounting experts was valuable and necessary. […]

[38] There is no dispute that the Applicant has been awarded costs by the Court and is therefore entitled to claim costs for this particular file, the question to be answered is to what extent, if any, do the awards of costs on this file extend to the 'Namgis Expert Affidavits. As an Assessment Officer my role is to determine the reasonableness of the claims made within a Bill of Costs and if these claims are allowable based on the particulars of a given file, including the Court decision(s); the parameters of Part 11 and Tariffs A and B of the *FCR*; and any jurisprudence that may have been established surrounding assessments of costs and in particular, assessments of costs determined by an Assessment Officer. Although there was no obligation on the parties to file a motion pursuant to Rule 403 of the *FCR* for the Court to provide directions on costs to an Assessment Officer, it may have been helpful in assessing the costs for this particular file.

F. *Additional Jurisprudence*

[39] In *Mapeze Inc. v. Destination Ontario Inc*., 2006 FC 25, at paragraph 13, the Court states**:**

> 13. Given that the volume and the form of evidence available during motions and at trials are significantly different, a motions judge should not assume the role of a trial judge by resolving the issues between the parties on a motion for summary judgment. In MacNeil Estate, supra, at paragraphs 36-38, the Federal Court of Appeal recognized that the party responding to a summary

> judgment motion is only required to put its best foot forward by setting out facts showing that there is a genuine issue for trial. The Federal Court of Appeal also referred to Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161 at 173-174 with approval wherein the Ontario Court of Appeal stated that the motions judge's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. The tasks of evaluating credibility, weighing evidence and drawing factual inferences are reserved for the trial judge.

[40] In *Boily v. Canada*, 2019 FC 323, at paragraphs 72 and 73, the Court states:

> 72. I appreciate that Mr. Boily has now incurred costs pertaining to his two motions to strike and to the preparation of the two Rosenblum reports. But these are unfortunately part of the consequences of having opted to file an expert report containing inadmissible evidence.
>
> IV. Conclusion
>
> 73. For the foregoing reasons, Mr. Boily's appeal is dismissed. If Mr. Boily was unsatisfied with Justice Gagné's decision confirming that the First Rosenblum Report was struck in its entirety, rather than only striking the inadmissible parts, the proper recourse would have been an appeal of this judgment. Prothonotary Tabib committed no reviewable error in granting the Defendant's motion and in striking the Second Rosenblum Report. Nor has she made a palpable or overriding error in finding that, in the circumstances, Mr. Boily's actions amounted to an abuse of process.

G. *Determination*

[41] Upon my review of the parties' costs material, Part 11 and Tariffs A and B of the *FCR*, the aforementioned jurisprudence and the Court's Judgment and Reasons dated February 4, 2019 and the Reasons for Order and Order dated March 23, 2018, I have determined that I only have the authority to assess the claims for costs for the 'Namgis Expert Affidavits which are related to

the Applicant's motion for an interlocutory injunction and not in relation to the judicial review proceeding.

[42] The Applicant has submitted that a party needs to prepare their case without the laden of hindsight and that there is an obligation to provide evidence to support any arguments that are made, and cited *Lukacs v. Swoop Inc.*, 2019 FCA 145, at paragraph 18, wherein the Court states:

> 18. Fourth, one cannot plead allegations without having at least some evidence behind the allegations. Making bald, conclusory allegations in a pleading, such as a motion for leave to appeal, without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at para. 5; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301 at para. 34; *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198, 335 D.L.R. (4th) 312; *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, [2016] 1 F.C.R. 446 at para. 153. A legal proceeding, such as a motion for leave to appeal "is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at para. 4 (F.C.A.).

[43] Further to the Applicant's submissions and the decision in *Lukacs*, the Court accepted the 'Namgis Expert Affidavits as evidence in relation to the Applicant's motion for an interlocutory injunction but conversely the expert affidavits were found to be inadmissible by the Court in relation to the judicial review proceeding. The decision in *Mapeze* illuminates how the threshold for evidence for a motion and a trial, or for this particular file a judicial review, can be different, which helps to explain how the same and/or similar evidence on this file was acceptable for an interlocutory motion, yet deemed to be inadmissible for the judicial review proceeding.

[44] The decisions in *Truehope* and in particular *Carruthers* and *Merck & Co v. Apotex Inc*, 2007 FC 1035, as they were rendered by the Court, support the premise that expert material which has been deemed to be partially admissible may be entitled to some level of indemnification but expert material which has been deemed to be totally inadmissible by the Court appears to be excluded from indemnification, even though overall costs for an interlocutory or final hearing was awarded to the party that submitted the inadmissible material.

[45] The Court's Judgment and Reasons dated February 4, 2019, found that "it was open to" the Applicant to file the 'Namgis Expert Affidavits but these expert affidavits were also found to be inadmissible. The Applicant incurred costs related to the 'Namgis Expert Affidavits but as is stated in *Boily*, it is "unfortunately part of the consequences of having opted to file an expert report containing inadmissible evidence".

[46] As noted earlier in these reasons, the Minister made submissions regarding the Applicant's unfounded allegations of bad faith and requested that no costs be allowed for the 'Namgis Expert Affidavits, as they were found to be inadmissible by the Court. Further to my determination that I do not have the authority to assess the claims for costs for the 'Namgis Expert Affidavits which are related to the judicial review proceeding, it has consequently addressed the Respondent's request and therefore it will not require further consideration in this assessment of costs.

[47] This being said, it is noted that the 'Namgis Expert Affidavits were not deemed to be inadmissible within the Court's Reasons for Order and Order dated March 23, 2018, in relation

to the Applicant's motion for an interlocutory injunction and that they were utilized and referred to by the Court within the decision. Therefore, the 'Namgis Expert Affidavits were admissible for the Applicant's motion for an interlocutory injunction but were inadmissible for the judicial review proceeding, which will allow for a partial indemnification of the Applicant's costs in relation to the expert services which were requisitioned from Dr. Fred Kibenge, Dr. Martin Krkosek and Dr. Richard Routledge.

[48] As a result of my determination, the assessable services and disbursements related to the 'Namgis Expert Affidavits can be assessed and allowed in relation to the Applicant's motion for an interlocutory injunction but will be disallowed in relation to the judicial review proceeding.

III. Assessable Services

[49] The Applicant has claimed $22,950.00 in assessable services.

A. *Items 1, 10, 11 and 26*

[50] Concerning Items 1, 10, 11 and 26, these Items were not specifically addressed in the Minister's costs material, other than the Minister's general overview of the Applicant's assessment of costs. At paragraph 3 of the Minister's Written Submissions, it is submitted:

> 3. In the absence of information that permits a proper assessment of costs, an award of costs, commensurate with the award made in a parallel proceeding that was not complicated by unnecessary procedural steps and expert affidavits, is appropriate.

[51] In *Dahl v. Canada*, 2007 FC 192, at paragraph 2, the Assessment Officer states:

> 2. Effectively, the absence of any relevant representations by the Plaintiff, which could assist me in identifying issues and making a decision, leaves the bill of costs unopposed. My view, often expressed in comparable circumstances, is that the *Federal Courts Rules* do not contemplate a litigant benefiting by an assessment officer stepping away from a position of neutrality to act as the litigant's advocate in challenging given items in a bill of costs. However, the assessment officer cannot certify unlawful items, i.e. those outside the authority of the judgment and the Tariff. I examined each item claimed in the bill of costs and the supporting materials within those parameters. Certain items warrant my intervention as a function of my expressed parameters above and given what I perceive as general opposition to the bill of costs.

[52] Utilizing *Dahl* as a guideline, the Applicant's costs material was reviewed in conjunction with the court record and I find the amounts claimed to be reasonable and they are allowed as claimed. The claims are allowed as follows: 5 units for Item 1; 5 units for Item 10; 2 units for Item 11 and 4 units for Item 26, for a cumulative total of 16 units.

[53] The Minister has made specific submissions regarding the remaining Items contained in the Applicant's Bill of Costs, which will be addressed below.

B. *Item 3*

[54] Concerning Item 3, the Applicant has claimed 5 units related to the amendment of the Applicant's Notice of Application filed on May 7, 2018. Item 3 states the following in Tariff B of the *FCR*:

> Amendment of documents, where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party.

[55] At paragraph 35 of the Minister's Written Submissions, it is submitted:

> 35. In addition to the above, with respect to the Bill of Costs filed by the Applicant, the Respondent respectively requests that the following items be reduced or not allowed:
>
> a) Item 3 – as found by the application judge, the amount claimed for amendments to the notice of application in T-430-18 were not necessary and are therefore not allowable.

[56] At paragraph 15 of the Applicant's Reply Submissions On Costs, it is submitted:

> 15. In reply, Strickland J. made no such finding, and Item 3 is allowable. The paragraphs cited by the Minister (342, 459, and 400) are those in which Strickland J. stated that 'Namgis "split its case" by: (i) bringing a separate judicial review in T-744-18; and (ii) making consequential amendments to address the issues in that matter to its notice of application in T-430-18. However, as noted above, these comments ought not be read to disentitle 'Namgis from claiming costs in T-430-18 because Strickland J. ultimately ordered that 'Namgis was entitled to them. The Minister also does not account for Rule 302, which directs that judicial review applications "shall be limited to a single order in respect of which relief is sought".

[57] In *Balinsky v. Canada*, 2004 FCA 123, at paragraph 7, the Assessment Officer states:

> 7. The Appellants claimed for item 3 (the amendment to their notice of application for judicial review flowing from the interlocutory events noted above in the Federal Court). My rationale above for disallowing costs associated with the interlocutory events in the Federal Court is not applicable here, but I will disallow item 3 in these circumstances because it is intended to address amendment of documents necessitated by an amended document "of another party" [my emphasis]. In the Federal Court, the genesis of the Appellants' amendment was not an amended document from any of the Respondents, but rather resulted from a series of motions.

[58] Upon my review of the parties' costs material, Tariff B of the *FCR*, the aforementioned jurisprudence and the Court's Judgment and Reasons dated February 4, 2019, I find that I do not have authority to allow Item 3 in this circumstance. While I agree with the Applicant's submissions that there does not appear to be anything in the Court's Judgment and Reasons dated February 4, 2019, precluding costs from being assessed for the Amended Notice of Application, as submitted by the Minister, the wording of Item 3 makes it clear that costs can be sought "where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party". [Underline added for emphasis.] The Applicant's Amended Notice of Application filed on May 7, 2018 was not necessitated by the filing of a document by another party, as a result, the Applicant's claim for 5 units for Item 3 is disallowed.

C. *Items 5 and 6*

[59] Concerning Item 5, the Applicant has claimed 7 units related to the preparation and filing of the Applicant's motion for an interlocutory injunction, which was dismissed with costs in the cause. In addition, the Applicant has claimed 29 units for Item 6 for the appearance at the hearing for the motion.

[60] At paragraphs 3 and 4 of the Applicant's Written Submissions On Costs, it is submitted:

> 3. On March 23, 2018, Mason J. dismissed a motion for interlocutory injunction brought by 'Namgis in T-430-18, but expressly ordered "[c]osts in the cause."[1] Sitting as a motions judge, Manson J. possessed the discretion to do so pursuant to Rule 401(1).[2] That exercise of discretion on costs by a motions judge is final, and cannot be overridden on this assessment.[3]
>
> 4. The phrase "costs in the cause" is itself "a convenient manner of referring to the costs of proceedings before the successful party has been ascertained" and "is synonymous with

> 'costs in the action' and 'costs to the successful party in the cause.'"[4] Here, 'Namgis was the ultimately successful party in T-430-18, and is therefore entitled to its costs of the motion for interlocutory injunction pursuant to Manson J.'s order of costs in the cause.

[61] At paragraphs 23, 24 and 25 of the Minister's Written Submissions, it is submitted:

> 23. 'Namgis is not entitled to costs for its motion for injunctive relief. While costs in the cause flowed from the Order of this Court following the motion, 'Namgis sought to enjoin the Minister from issuing the March 23, 2018 transfer licence to Marine Harvest.
>
> 24. The March 23, 2018 transfer licence was the 'cause' in T-744-18, not in T-430-18. The application judge found that the March 23, 2018 transfer license did not trigger the duty to consult. She dismissed the application and made no award of costs. As 'Namgis was not the successful party in the 'cause', it is not entitled to costs for its motion for injunctive relief.
>
> 25. The Respondent respectfully requests a reduction in the units claimed in the Applicant's Bill of Costs for Item 5 and that amount claimed for Item 6 be not allowed.

[62] At paragraph 35 b) of the Minister's Written Submissions, it is submitted:

> b) Items 5 – the units claimed should be reduced as the application judge denied the Applicant's Rule 312 motion and the motion to strike the Applicant's affidavits was successful.[30]

[63] At paragraphs 4 and 5 of the Applicant's Reply Submissions On Costs, it is submitted:

> 4. At paras. 23-25 of his submissions, the Minister submits that 'Namgis is not entitled to "costs in the cause" in relation to the order made in the unsuccessful motion before Manson J. The Minister instead takes the position that "the cause" referred to by Manson J. in his order was actually the judicial review proceeding in T-744-18 that did not exist at the time of Manson J.'s order, in which 'Namgis was unsuccessful and no costs were awarded to any party.

> 5. In reply, “the cause” is indisputably T-430-18, i.e. the application that ‘Namgis eventually succeeded on, and under which ‘Namgis brought the injunction motion. One need look no further than the style of cause in Manson J.’s decision, which identifies the relevant Court File Number as T-430-18.[1] In short, the Minister’s position is untenable.

[64] In *Enterprise Rent-A-Car Co. v. Singer*, [1999] F.C.J. No. 1687, the Court states:

> 6. The new Rule 401(1) gives discretion to the Trial Judge in determining the appropriate award for costs on a motion. This new Rule displaces the rule in Toronto Dominion Bank, as Mr. Justice Rothstein explained in AIC Ltd. v. Infinity Investment Counsel Ltd., (1998) 148 F.T.R. 240. A judge now has the discretion to award the costs of a motion to either party, regardless of the outcome of the main matter.

[65] In *Pelletier v. Canada*, 2006 FCA 418, at paragraph 7, the Court states:

> 7. Section 409 provides that "[i]n assessing costs, an assessment officer may consider the factors referred to in subsection 400(3)." In short, the duty of an assessment officer is to assess costs, not award them. An officer cannot go beyond, or contradict, the order that the judge has made. If the judge gives a direction to the officer under section 403, the officer must comply with it.

[66] Upon my review of the parties’ costs material, Part 11 of the *FCR*, the aforementioned jurisprudence and the Court’s Reasons for Order and Order dated March 23, 2018 and the Judgment and Reasons dated February 4, 2019, I find that I do not have the authority to disallow the Applicant’s costs for Item 6, as it would contradict the Court’s Order dated March 23, 2018, which awarded costs in the cause. The Applicant was the successful party in the judicial review proceeding and is entitled to costs for the Applicant’s motion for an interlocutory injunction. In the absence of another Court order quashing the award of costs on file T-430-18 or providing

directions on costs to an Assessment Officer pursuant to Rule 403 of the *FCR*, I am bound by the Court's Order dated March 23, 2018. In *Marshall v. Canada*, 2006 FC 1017, at paragraph 3(ii), the Assessment Officer states:

> 3(ii). A judge of the Federal Court exercised his jurisdiction under Rule 400(1) to award costs to the Defendant. An assessment officer carrying out an assessment of costs under the Rules and Tariff has no jurisdiction to vacate or vary that result. Rather, the role of the assessment officer is essentially to arrive at a dollar value for said award of costs within the parameters of the Rules and Tariff.

[67] Utilizing *Marshall* as a guideline, the Applicant's claims for Items 5 and 6 will be assessed. Upon my review the parties' costs material in conjunction with the court record and taking into the consideration the Court's disposition of the motion, I have determined that 5 units will be allowed for Item 5 and 29 units will be allowed for Item 6.

D. *Items 8 and 9*

[68] Concerning Item 8, the Applicant has claimed 5 units related to the preparation for an examination, including examinations for discovery, on affidavits, and in aid of execution; and 47 units have been claimed under Item 9 for the Applicant's attendance at examinations. Further to my determination earlier in these reasons that I do not have the authority to assess the claims for costs for the 'Namgis Expert Affidavits that are related to the judicial review proceeding, the expert affidavits of Dr. Fred Kibenge, Dr. Martin Krkosek and Dr. Richard Routledge will be excluded from my assessment of costs for Items 8 and 9 if they pertain to the judicial review proceeding. Only the costs for the expert affidavits of Dr. Fred Kibenge, Dr. Martin Krkosek and

Dr. Richard Routledge which pertain to the Applicant's motion for an interlocutory injunction will be assessed for Items 8 and 9.

[69] At paragraph 49 of the Reasons for Order and Order dated March 23, 2018, the Court states the following:

> 49. Due to the urgent nature of this motion, cross-examinations were not conducted on any of the affidavits filed, including those summarized below.

[70] In addition, at paragraph 266 of the Judgment and Reasons dated February 4, 2019, the Court states the following:

> 266. And, while opinion evidence of a properly qualified expert may be admissible if it is relevant, necessary to assist the Court, and not subject to any exclusionary rule, the 'Namgis Expert Affidavits in this matter do not meet those qualifications. Even if they might contain useful factual information, it is so intertwined with unnecessary opinion evidence that it cannot realistically be severed. Accordingly, based on all of these concerns, the 'Namgis Expert Affidavits in whole have been struck (*Alberta Wilderness Assn v Canada (Minister of Environment)*, 2009 FC 710 at para 34). In the result, the responding expert evidence is unnecessary and is also struck out. That is, the Garver and Hyatt Affidavits filed by the Minister, the Marine Harvest Expert Affidavits (Drs. Siah, Kent and Farrell), as well as the affidavit of Dr. Noakes filed by Cermaq, are all struck as inadmissible. Further, the motions of 'Namgis seeking to file the Kiberge [sic] Supplemental Affidavit and of the Minister seeking to file the Garver Supplemental Affidavit, are denied.

[71] Further to the Court finding the 'Namgis Expert Affidavits to be inadmissible for the judicial review proceeding, it also found the responding expert affidavits to be unnecessary and they were struck out as being inadmissible for the judicial review proceeding. As the responding expert affidavits were filed in response to the 'Namgis Expert Affidavits, it follows that the

Applicant's costs associated with the responding expert affidavits should also be excluded from the assessment of costs. At paragraph 101 of *Truehope*, the Assessment Officer stated the following:

> 101. Having found that the disbursement for Dr. Silverstone's expert fees could not be allowed, I also find that the fees and disbursements associated with the cross-examination of Dr. Silverstone, the disbursements related to the duplication service and filing of his affidavit should not be allowed. This being the circumstance, the amounts claimed under Item 8 and Item 9 for the cross-examination of Dr. Silverstone on August 5-7, 2009 and the disbursement of $1,322.50, for the transcript of the cross-examination of Dr. Silverstone are not allowed. Further, the amounts of $140.59 and $86.46 respectively for the duplication and courier changes associated with the Affidavits of Dr. Silverstone are not allowed.

[72] Further to my earlier determination regarding the 'Namgis Expert Affidavits and utilizing *Truehope* as a guideline, the Applicant's costs associated with the responding expert affidavits of Kyle Garver, Kim Hyatt, Ahmed Siah, Michael Kent, Anthony Farrell and Donald Noakes, will not be included in the assessment of costs for Items 8 and 9.

[73] The Applicant's remaining claims related to the cross-examinations of Respondents' affiants - Andrew Thomson, Todd Johansson and Vincent Erenst, which are in relation to the judicial review proceeding and were not found to be inadmissible by the Court, will be assessed for costs. As noted earlier in these reasons, there were no cross-examinations conducted in relation to the Applicant's motion for an interlocutory injunction as per paragraph 49 of the Court's Reasons for Order and Order dated March 23, 2018. Upon my review of the parties' costs material in conjunction with the court record and taking into consideration the excluded

expert affidavits, I have determined that 2 units will be allowed for Item 8 and 21 units will be allowed for Item 9.

E. *Item 13*

[74] Concerning Item 13, the Applicant's Bill of Costs has a clerical error wherein Item 13 is listed as Item 12. Further to my review of the Bill of Costs and the parties' costs material in conjunction with the court record, it is clear that Applicant's claims are intended for Item 13. I have corrected the clerical error in the Applicant's Bill of Costs and the claims listed under Item 12 will be assessed under Item 13.

[75] The Applicant has claimed 4 units for Item 13(a) and 4 units for Item 13(b) for hearing preparation before and during the judicial review hearing. At paragraph 35 c) of the Minister's Written Submissions, it is submitted that the number of units should be reduced as the judicial review hearing for T-430-18 was two days and not four days as claimed by the Applicant. At paragraphs 18 and 19 of the Applicant's Reply Submissions on Costs, it is agreed that the judicial review hearing took two days and that two units should be subtracted from Item 13(b). Further to my review of the parties' cost material in conjunction with the court record, I have determined that 4 units will be allowed for Item 13(a) and 2 units will be allowed for Item 13(b).

F. *Item 14*

[76] The Applicant has claimed 36 units for the first counsel fees for the judicial review hearing. At paragraph 35 d) of the Minister's written submissions it is submitted that the number

of units should be reduced as the judicial review hearing for T-430-18 was only two days. At paragraphs 18 and 19 of the Applicant's Reply Submissions On Costs, it is agreed that the judicial review hearing was only two days, but that the overall unit calculation for Item 14 is still correct at 36 units. Further to my review of the parties' cost material in conjunction with the court record, I have determined that 36 units will be allowed for Item 14.

[77] 115 units have been allowed for the Applicant's assessable services for a total amount of $17,250.00.

IV. Disbursements

[78] The Applicant has claimed $92,791.76 in disbursements.

A. *Expert Reports and related expenses*

[79] The Applicant has claimed $63,016.19 for expert affidavits and related expenses. These costs are related to the expert services of Dr. Frederick Kibenge. Further to my determination earlier in these reasons that I do not have the authority to assess the claims for costs for the 'Namgis Expert Affidavits that are related to the judicial review proceeding, only the costs pertaining to Dr. Frederick Kibenge's expert services requisitioned for the Applicant's motion for an interlocutory injunction will be assessed. The Court's Reasons for Order and Order pertaining to the aforementioned motion was rendered on March 23, 2018, therefore any claims for expenses after this date will be excluded from my assessment of this disbursement.

[80] Exhibit F of the Affidavit of Camilla Arrica, affirmed on December 2, 2019, contains the expenses related to Dr. Frederick Kibenge's expert services, such as the consultation fees, travel and accommodation expenses. The itemized listing of the various types of expenses on page 44 of the Affidavit of Camilla Arrica, indicates that there are only consultation fees which occurred prior to March 23, 2018. On page 55 of the Affidavit of Camilla Arrica, there is a document called "Time effort on Namgis First Nation case (File No. V47108)", which has an itemized listing of the dates and the amount time spent working on this file by Dr. Frederick Kibenge.

[81] At paragraph 26 of the Minister's Written Submissions, it is submitted:

> 26. Costs for expert reports claimed by 'Namgis are not reasonable and this Court should refuse to award these claimed disbursements. The application judge outlined in her reasons for judgment that the expert affidavits were inadmissible and the allegations they claimed to support added significant procedural steps and costs to the application.

[82] At paragraph 34 of the Minister's Written Submissions, it is submitted:

> 34. In the circumstances, the Respondent respectfully requests that this Court not allow the unjustified disbursements claimed for experts in the amount of $63,016.19. The Respondent also requests a reductions [sic] in the units claimed in the Applicant's Bill of Costs for Items 8 and 9.

[83] At paragraphs 8, 9 and 10 of the Applicant's Reply Submissions on Costs, it is submitted:

> 8. Further, at para. 29 of his submissions, the Minister relies on the *Ridell* case to suggest that 'Namgis' entitlement to costs may be modified during the assessment process.
>
> 9. In reply, this position again urges the assessment officer to act beyond the jurisdiction associated with assessments under Rule 405. *Ridell* stands for the proposition that the Court, in hearing the merits of a matter, has the discretion to reduce costs awarded to a

> party depending on conduct and positions taken during the litigation. Indeed, the paragraph in *Ridell* following the one the Minister cites in his submissions makes clear that, during a motion to strike, the Court in that case decided that a party was entitled to "only two-thirds of his taxed party-and-party costs (in view of counsel's extravagant and unproved allegations)".[3]
>
> 10. In contrast, again, during an assessment the only question is the reasonableness of costs incurred, not the party's entitlement to costs.[4] In *Pelletier*, the Federal Court of Appeal confirmed the jurisdiction to assess under Rule 405 as follows: "[w]ithout costs, there can, of course, be no assessment … Under section 405, an assessment officer 'assesses' costs, which assumes that costs have been awarded."[5]

[84] Further to the parties' costs submissions, earlier in these reasons I determined that the Applicant's claims for costs for the 'Namgis Expert Affidavits could be assessed in relation to the Applicant's motion for an interlocutory injunction, therefore the Applicant is entitled to some indemnification in relation to the expert services of Dr. Frederick Kibenge. Further to the Minister's concerns as to the reasonableness of the Applicant's claim, I have reviewed Exhibit F of the Affidavit of Camilla Arrica thoroughly in conjunction with the court record. In addition, I have taken note that the Applicant's judicial review proceeding was commenced on March 6, 2018 and that Applicant's motion for an interlocutory injunction was filed with the court registry shortly thereafter on March 9, 2018. The court record therefore reflects that the expert services of Dr. Frederick Kibenge were being performed prior to the commencement of the Applicant's judicial review proceeding. Further to my review of this disbursement, I will allow the items listed at Exhibit F from January 11, 2018 to March 18, 2018. The disbursement for the expert reports and related expenses is allowed for a total amount of $27,754.13.

B. *Printing costs*

[85] The Applicant has claimed $21,892.32 for printing costs. At paragraphs 40, 41 and 42 of the Applicant's Written Submissions On Costs, it is submitted:

> 40. At para. 402, Strickland J. also questioned whether 'Namgis' claim for printing costs was reasonable.
>
> 41. After further reviewing records and isolating costs related only to T-430-18 to the extent possible, 'Namgis now claims $21, 892.32 in printing-related costs, after taking into account certain discounts provided, based on a rate of 25 cents per page for in-house printing.[57] The Court has recently found the rate of 25 cents per page to be reasonable.[58]
>
> 42. To further reasonably defray printing costs, 'Namgis sought and received permission from the Court to file only a single paper copy of its application record, alongside two copies on USB drives. In so doing, 'Namgis saved approximately $1,606 in printing costs.[59]

[86] At paragraphs 18 to 22 of the Affidavit of Camilla Arrica, affirmed on December 2, 2019, it states:

> 18. Printing for T-430-18 was handled by Gowling WLG (Canada) LLP in-house. Printing costs for T-430-18 were charged to the same internal matter number as printing costs for T-744-18, a related application for judicial review between the same parties (except Cermaq Canada Ltd., who was not a party to T-744-18), but heard by the Court consecutively to T-430-18.
>
> 19. Gowling WLG (Canada) LLP charges $0.25/page as a base rate for printing costs. 'Namgis was charged that base rate for certain print jobs, received discounts for others (for which it was charged 10% of the base rate), and others were fully written off.
>
> 20. After taking those discounts and write-offs into account, 'Namgis incurred $31,728 in printing costs. A spreadsheet detailing these printing costs, including discounts and/or write-offs, is attached as Exhibit "I". That spreadsheet includes two key columns: "Billed Amt" (the printing cost 'Namgis was charged); and "Base Amt" (the cost of a particular printing job at the $0.25/page base rate). If 'Namgis had been charged $0.25/page for all of its printing costs, it would have incurred $62,117.75 in printing costs, as displayed at the last page of Exhibit "I".

> 21. I have reviewed digital copies of documents filed by all parties in T-430-18 and T-744-18. By my count, the parties filed approximately 19,051 pages in T-430-18 and 8,528 pages in T-744-18, for a total of 25,579 pages. T-430-18 accounts for approximately 69% of that page count.
>
> 22. Based on this review of the file and calculation, I estimate that 'Namgis incurred 69% of those printing costs in T-430-18, resulting in a total expense of approximately $21,892.32.

[87] At paragraph 36 of the Minister's Written Submissions, it is submitted:

> 36. With respect to the disbursements claimed, the Applicant has not addressed the application judge's concerns. Costs for photocopying claimed are not sufficiently detailed and may not be reasonable. There is no separation of the printing costs incurred in T-430-18 from T-744-18. Nor is there any means to differentiate between the printing for service and filing and the unnecessary expert affidavits, and related transcripts.[31]

[88] At paragraphs 16 and 17 of the Applicant's Reply Submissions On Costs, it is submitted:

> 16. At para. 36 of his submissions, the Minister states that 'Namgis has not addressed Strickland J.'s concerns that certain of its disbursements were not sufficiently detailed for her to set the quantum of costs in her reasons.
>
> 17. In reply, 'Namgis relies upon its submissions in chief at paras. 8 and 40-44, and directs the assessment officer to the Arrica Affidavit (filed concurrently with 'Namgis' submissions in chief) at paras. 16-36, which set out in detail the methodology by which 'Namgis has addressed Strickland J.'s concerns in this regard.

[89] Further to the parties' costs submissions, Exhibit I of the Affidavit of Camilla Arrica, affirmed on December 2, 2019, contains an itemized joint listing of the photocopying expenditures for files T-430-18 and T-744-18. As noted by the Court in the Judgment and Reasons dated February 4, 2019, at paragraph 402 and in the Minister's submissions, it is

difficult to determine the quantum of costs that is reasonable to allow from the listing of printing expenses at Exhibit I, as the printing costs for T-430-18 and T-744-18 are comingled together and the listing only specifies the date of the transaction and the dollar amount but not which document was printed. It is appreciated that the affiant (Camilla Arrica) attempted to recalculate the printing expenditures and provided an estimated amount for reimbursement but this does not clarify which documents were printed. As a result, it is not clear as to whether or not there are printing expenditures listed for documents for which I have determined that I do not have the authority to include in this assessment of costs or printing for motions for which costs were not awarded by the Court to the Applicant. In *Merck & Co. v. Apotex*, 2008 FCA 371, at paragraph 14, the Court states:

> 14. In view of the limited material available to assessment officers, determining what expenses are "reasonable" is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers.

[90] Utilizing *Merck & Co. v. Apotex*, 2008 FCA 371, as a guideline, I attempted to review the listing of printing expenditures in conjunction the court record to try to determine a reasonable quantum of costs to allow. The timeline for the printing expenditures does seem to coincide with some of the documents on the court record which should be excluded from reimbursement, as a result I have reduced the Applicant's claim for printing to account for this. Further to my review of this disbursement, I have determined that $20,000.00 is a reasonable amount to allow for the Applicant's printing costs.

C. *Miscellaneous expenses*

[91] The Applicant has claimed $7,883.25 for miscellaneous expenses (filing, transcript and other similar fees; legal research; and counsel travel and incidentals).

[92] At paragraph 44 of the Applicant's Written Submission on Costs, it is submitted:

> 44. 'Namgis also claims miscellaneous disbursements: filing, transcript, and other similar fees;[60] legal research fees;[61] and counsel travel and travel incidentals to [sic] necessary to travel to 'Namgis' primary community of Alert Bay (where its Chief and Council sits), which is located some 430km from Vancouver and requires travel by air, road, and ferry.[62]

[93] At paragraphs 37 and 38 of the Minister's Written Submissions, it is submitted:

> 37. With respect to the disbursement claimed following the bifurcation, most of the disbursement claimed are not particularized and therefore cannot be assessed for reasonableness.[32] In addition, amounts claimed for transcripts of examination of experts should not be allowed.
>
> 38. The Applicant seeks costs for disbursements in the amount of $2,307.33 for the time period preceding the bifurcation of the applications. However, the most recent of these claimed disbursements was incurred on November 11, 2017, well before the commencement of the litigation on March 6, 2018 and therefore may not be reasonable.[33]

[94] At paragraph 3 of the Applicant's Reply Submissions On Costs, it is submitted:

> 3. Accordingly, subject to a minor clarification associated with 'Namgis' Bill of Costs regarding the total amount of hearing days this matter occupied, the Minister's submissions do not affect 'Namgis' position on costs and disbursements in its submissions in chief.

[95] At paragraphs 16 and 17 of the Applicant's Reply Submissions On Costs, it is submitted:

> 16. At para. 36 of his submissions, the Minister states that 'Namgis has not addressed Strickland J.'s concerns that certain of its disbursements were not sufficiently detailed for her to set the quantum of costs in her reasons.
>
> 17. In reply, 'Namgis relies upon its submissions in chief at paras. 8 and 40-44, and directs the assessment officer to the Arrica Affidavit (filed concurrently with 'Namgis' submissions in chief) at paras. 16-36, which set out in detail the methodology by which 'Namgis has addressed Strickland J.'s concerns in this regard.

[96] Paragraph 30 of the Affidavit of Camilla Arrica, affirmed on December 2, 2019, states that Exhibit J contains invoices between the period of October 31, 2017 and March 14, 2018, which are specifically for file T-430-18. The invoices are for the following disbursements: I. filing, transcript, and other similar fees: $148.60; II. legal research: $928.90; and III. counsel travel and travel incidentals: $1,229.83, for a total of $2,307.33. As I noted earlier in these reasons, I have taken note that the Applicant's judicial review proceeding was commenced on March 6, 2018 and that Applicant's motion for an interlocutory injunction was filed with the court registry shortly thereafter on March 9, 2018. The court record therefore reflects that legal services were being performed prior to the commencement of the Applicant's judicial review proceeding. This being said, the internal invoices from Gowling WLG, which are attached to Exhibit J do not specify which specific disbursements are being claimed as miscellaneous expenses, as the actual total of the invoices from October 31, 2017 and March 14, 2018 is $4,466.63 but only $2,307.33 is being claimed for this period of time. While the amount being claimed is less than the invoices presented, it does not necessarily indicate that the claims for expenses are warranted and/or reasonable for reimbursement.

[97] Utilizing the aforementioned decision in *Merck & Co. v. Apotex*, 2008 FCA 371, as a guideline and further to my review of the parties' costs material and my detailed review of the invoices in conjunction with the court record, I have assessed and allowed the disbursements from the period of October 31, 2017 and March 14, 2018, as follows: I. filing, transcript, and other similar fees: $100.00, for the filing fees for the Notice of Application and the Requisition for Hearing; II. legal research: $928.90; and III. counsel travel and travel incidentals: $1,181.12, for a total of $2,210.02.

[98] Paragraph 28 of the Affidavit of Camilla Arrica, affirmed on December 2, 2019, states that Exhibit J also contains invoices between the period of March 15, 2018 and February 2019, which are a comingling of expenses for files T-430-18 and T-744-18. The invoices are for the following disbursements: I. filing, transcript, and other similar fees: $7,696.81; II. legal research: $1,026.81; and III. counsel travel and travel incidentals: $2,428.22 for a total of $11,151.84. The Applicant reduced the total amount by 50% to reflect the dollar amount of the invoices for file T-430-18 only, for a total of $5,575.92. Similar to the invoices for the time period prior to March 15, 2018, the internal invoices from Gowling WLG, which are attached to Exhibit J do not specify which specific disbursements are being claimed as miscellaneous expenses, as the actual total of the invoices from March 15, 2018 to February 2019 is $148,174.66 but only $5,575.92 is being claimed during this period of time. As previously stated in these reasons, while the amount being claimed is less than the invoices presented, it does not necessarily indicate that the claims for expenses are warranted and/or reasonable for reimbursement.

[99] Once again, I have utilized *Merck & Co. v. Apotex*, 2008 FCA 371, as a guideline and further to my review of the parties' costs material and my detailed review of the invoices in conjunction with the court record, I have assessed and allowed the disbursements as follows: concerning I. filing, transcript, and other similar fees; it appears that this disbursement was for the requisitioning of transcripts related to ten different cross-examinations, as per paragraph 32 of the Affidavit of Camilla Arrica, affirmed on December 2, 2019. Further to my determination earlier in these reasons that I do not have the authority to assess the claims for costs for the 'Namgis Expert Affidavits which are related to the judicial review proceeding and also the responding expert affidavits which were filed by the Respondents, only the transcripts of cross-examinations for the Respondents' affiants - Todd Johansson, Vincent Erenst and Andrew Thomson were assessed for costs. I reviewed the Applicant's invoices thoroughly and I could only locate transcription expenses related to the cross-examinations of Andrew Thomson and Kyle Garver which totals $1,722.40. The assessed amount of $1,722.40 reduced by 50% to represent the amount for file T-430-18 only, as the expenses were co-mingled with those of file T-744-18, leaves an amount of $861.20, which is the final amount allowed for this disbursement.

[100] Concerning the disbursements for II. legal research: $1,026.81 – this amount is supported in the Applicant's invoices. The assessed amount of $1,026.81 reduced by 50% to represent the amount for file T-430-18 only, as the expenses were co-mingled with those of file T-744-18, leaves an amount of $513.41, which is the final amount allowed for this disbursement.

[101] Concerning III. counsel travel and travel incidentals, there were items listed for meals, taxis and car rentals which did not provide any dates or details as to their necessity and as a

result they were disallowed. This left a remaining balance of $1,372.96 for the invoices that I was able to adequately assess. The assessed amount of $1,372.96 reduced by 50% to represent the amount for file T-430-18 only, as the expenses were co-mingled with those of file T-744-18, leaves an amount of $686.48, which is the final amount allowed for this disbursement.

[102] Therefore, the total amount allowed for the miscellaneous expenses from March 15, 2018 and February 2019 is $2,061.09.

[103] The cumulative total for all of the miscellaneous expenses is $4,271.11.

[104] The total amount allowed for the Applicant's disbursements is $52,025.24.

V. Conclusion

[105] For the above reasons, the Applicant's Bill of Costs has been assessed and allowed in the total amount of $69,275.24. A Certificate of Assessment will be issued for $69,275.24, payable by the Minister of Fisheries, Oceans and the Canadian Coast Guard to 'Namgis First Nation.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
September 8, 2020

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-430-18
STYLE OF CAUSE:	'NAMGIS FIRST NATION v MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD INC. AND CERMAQ CANADA LTD.

MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	SEPTEMBER 8, 2020

WRITTEN SUBMISSIONS BY:

Paul Seaman Keith Brown	FOR THE APPLICANT
Gwen MacIsaac	FOR THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

SOLICITORS OF RECORD:

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