

Federal Court



Cour fédérale

**Date: 20220315**

**Docket: T-1929-19**

**Citation: 2022 FC 352**

**Vancouver, British Columbia, March 15, 2022**

**PRESENT: Case Management Judge Kathleen Ring**

**BETWEEN:**

**MARGUERITE MARY (MARGARET) BUCK  
BY HER LITIGATION GUARDIAN, ROGER JOHN BUCK,  
DOROTHY ANNE SAVARD BY HER LITIGATION GUARDIAN  
CHERYL FRANCES HANKINSON, SYLVIA M. MCGILLIS,  
FRANCES JUNE MCGILLIS, FLORENCE JOYCE L'HIRONDELLE  
BY HER LITIGATION GUARDIANS DEBORAH J. HARDY AND  
ALDON B. L'HIRONDELLE, AND MARILYN MCGILLIS**

**Plaintiffs**

**and**

**ATTORNEY GENERAL OF CANADA  
AND ENOCH CREE NATION**

**Defendants**

**REASONS FOR ORDER AND ORDER**

[1] This is a motion in writing by the Defendant, Enoch Cree Nation (Enoch), for an order requiring the Plaintiffs to post \$150,000.00, or some other amount as determined by the Court, as security for costs (the “Security”). Enoch also seeks an order that the Plaintiffs’ action is stayed until such time as the Security is posted, and permitting Enoch to satisfy the outstanding costs awards out of the Security that is posted.

[2] Enoch relies on Rule 416(1)(f) of the *Federal Courts Rules* (“Rules”) in support of its motion. Under that subrule, the Court may order a plaintiff to give security for the defendant’s costs where:

<i>f)</i> the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part,	<i>f)</i> le défendeur a obtenu une ordonnance contre le demandeur pour les dépens afférents à la même instance ou à une autre instance et ces dépens demeurent impayés en totalité ou en partie
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[3] Rule 417 provides grounds for refusing to order the provision of security if the plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit.

[4] Enoch submits that it has satisfied the requirements of Rule 416(1)(f) and therefore it is presumptively entitled to security for costs. It argues that Rule 417 is not engaged because the Plaintiffs have failed to demonstrate impecuniosity or that their claim has merit.

[5] The Plaintiffs argue that there is no legal basis for the motion because Enoch has not satisfied the requirements of Rule 416(1)(f). Even if Enoch has met the requirements of Rule 416(1)(f), the Plaintiffs say that granting this motion would be inconsistent with the underlying purposes of such a motion because it would create an immediate and insurmountable bar for the Plaintiffs to have their day in court. Further, they submit that there is no risk of non-payment to Enoch of a costs order because Enoch has several avenues available to it to enforce payment. Finally, the Plaintiffs argue that their claim has merit and therefore the motion should be dismissed.

[6] The Defendant, the Attorney General of Canada (“Canada”), takes no position on Enoch’s motion for security for costs.

[7] On this motion, the onus is initially on Enoch to meet the test for security for costs under Rule 416(1)(f). In order to be entitled to an order for security for costs pursuant to Rule 416(1)(f), a defendant does not have to satisfy any requirements other than those specifically contained in that paragraph - i.e. that “the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part”: *Stubicar v. Canada (Deputy Prime Minister)*, 2015 FC 1034 at para 9; *aff’d Stubicar v. Canada (Prime Minister)*, 2016 FCA 255; *Timm v. Canada (Attorney General)*, 2017 FC 563 at para 47. A defendant is “*prima facie*” entitled to security for costs where there is an unpaid order in favour of the defendant: *Coombs v. Canada*, 2008 FC 894.

[8] In this case, Enoch submits that three costs awards have been made against the Plaintiffs that remain unpaid and owing to Enoch and Canada. First, on July 17, 2020 Justice Strickland made a costs award of \$9,000 against the Plaintiffs as part of her Order dismissing the Plaintiffs’ motion for an interlocutory injunction. Second, an appeal of that Order by the Plaintiffs to the Federal Court of Appeal, and a further application for leave to appeal to the Supreme Court of Canada, resulted in two further costs awards payable by the Plaintiffs to the Defendants.

[9] While Enoch refers to the costs awards from the Federal Court of Appeal and the Supreme Court of Canada throughout its submissions, Enoch acknowledges that these costs awards cannot form the basis of the motion under Rule 416(1)(f) because they have not yet been assessed. Enoch’s position regarding these two costs awards is consistent with the Federal Court of Appeal’s recent decision in *Betsler-Zilevitch v. Petrochina Canada Ltd.*, 2021 FCA 76 that an order cannot be made

under Rule 416(1)(f) before the costs have been assessed. Until assessment, the costs cannot be said to “remain unpaid” within the meaning of Rule 416(1)(f).

[10] Enoch relies instead on the \$9,000 costs award made by Justice Strickland to support its motion for security for costs. Justice Strickland’s costs award provides that:

2. The Attorney General and Enoch Cree Nation are awarded costs. The Plaintiffs shall pay to the Attorney General the lump sum all-inclusive amount of \$9000 in costs. The Plaintiffs shall also pay to Enoch Cree First Nation the lump sum all-inclusive amount of \$9000 in costs.

*Buck v. Canada (Attorney General)*, 2020 FC 769

[11] The Plaintiffs argue that there is no legal basis for Enoch’s motion under Rule 416(1)(f) because Justice Strickland’s costs award is not for “costs payable forthwith”. Accordingly, there is no order against the Plaintiffs for costs in this proceeding that presently “remain unpaid in whole or in part”. The Plaintiffs submit that this Court cannot now make the costs assessed by Justice Strickland as costs payable forthwith, at the request of Enoch, as this matter has already been determined by Justice Strickland.

[12] Enoch submits that Justice Strickland’s costs award was payable immediately. It argues that since the costs award is silent as to the timing of payment, by default the costs are assumed to be payable forthwith by the Plaintiffs. As such, the \$9,000 costs award has been payable for approximately 18 months and satisfies the requirements of Rule 416(1)(f).

[13] It does not appear that this Court has previously considered the question whether an order can be made under Rule 416(1)(f) on the basis of a costs award on an interlocutory motion in the proceeding if the costs award is not specified to be payable forthwith. For the reasons that follow,

I would answer the question in the negative. In other words, I agree with the Plaintiffs' position on this issue.

[14] Enoch's position on this motion is contrary to the language and structure of the *Rules* and the jurisprudence of this Court. Turning first to the *Rules*, Rule 401(2) governs costs payable forthwith on motions. It provides that:

(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

[15] The plain wording of Rule 401(2) is that an order for costs forthwith on a motion is intended to be the exception rather than the rule: *Fluid Energy Group Ltd. v. Exaltexx Inc.*, 2020 FC 299 at para 28.

[16] The absence of a "forthwith" provision in an order indicates that Rule 401(2) is not applicable: *Culhane v. ATP Aero Training Products Inc.*, 2004 FCA 367 at para 7. In other words, costs are not payable forthwith unless the costs award specifically indicates that costs are payable "forthwith".

[17] The Federal Court has held that costs awarded on an interlocutory motion are not payable until the conclusion of the trial unless specifically ordered payable forthwith or payable forthwith after taxation: *John Stagliano, Inc. v. Elmaleh*, 2006 FC 1096 at para 8; *Aic Ltd. v. Infinity Investment Counsel Ltd.*, 1999 CanLII 7617 (FC), 163 FTR 285 at paras 21, 24 and 28.

[18] Enoch's submissions do not address the above-noted jurisprudence of this Court. Instead, Enoch relies on jurisprudence from some other Canadian jurisdictions to support its argument that

costs are payable forthwith if a costs award is silent as to the timing of payment. At most, Enoch's argument illustrates that some other jurisdictions have taken a different approach than the Federal Court to the question of when costs of motions are payable. The uneven treatment of this issue across Canadian jurisdictions is confirmed in *Orkin on the Law of Costs*, 2<sup>nd</sup> ed. (Ontario: Thomson Reuters) at ch. 4.3. The authors state that the rule in many jurisdictions has traditionally been that the costs of interlocutory proceedings are not payable until the conclusion of the litigation, but they observe that this rule has not been followed in Alberta, Nova Scotia, Ontario, and Saskatchewan.

[19] In this case, Justice Strickland did not stipulate in her costs award that the \$9000 lump sum costs were "payable forthwith" pursuant to Rule 401(2). In the absence of a "forthwith" provision, I find that the Justice Strickland's costs award was not payable forthwith. Any other interpretation of her Order would render Rule 401(2) nugatory. Accordingly, taking into account the jurisprudence of this Court, I conclude that Justice Strickland's costs award is not presently payable by the Plaintiffs, and therefore these costs cannot be said to "remain unpaid" by the Plaintiffs, as required by Rule 416(1)(f) of the *Rules*.

[20] My conclusion is consistent with the Ontario Superior Court of Justice's decision in *Fappiano v. Campbell*, 104 A.C.W.S. (3d) 701 (Ont. S.C.J.) wherein the Court dismissed the respondent's motion for security for costs brought under a provision similar to Rule 416(1)(f). Justice Steinberg observed that while there was an outstanding order for costs in the action against the applicant, the costs were not made payable forthwith. As such, he concluded at paragraph 8 that "[t]hey are not, as yet, payable as the case is not yet complete and thus paragraph number 2 [similar to Rule 416(1)(f)] does not apply".

[21] Enoch argues that prior to this motion, the Plaintiffs never suggested to Enoch that Justice Strickland's costs award was not immediately payable. Even if I accept this allegation as true, it would not affect the outcome of this motion. Enoch bears the burden to demonstrate that it has an order for costs against the Plaintiffs in this proceeding that "remain unpaid". Having regard for the wording of the costs award, together with the applicable *Rules* and jurisprudence of this Court, I conclude that Enoch has not discharged that burden.

[22] This is sufficient to dispose of Enoch's motion. There is therefore no need to consider the arguments advanced by the Plaintiffs in opposing this motion and I decline to do so.

[23] For the foregoing reasons, I conclude that Enoch's motion pursuant to Rule 416(1)(f) for security for costs must be dismissed.

[24] The Plaintiffs seek costs of this motion at an elevated level, payable forthwith by Enoch. As the Plaintiffs were successful on this motion, I find that they are entitled to their costs of the motion. Taking into account that the motion appears to raise an issue of first instance, however, I am not persuaded that the motion should not have been brought or that costs should be ordered at an elevated scale. Costs are hereby fixed in the amount of \$1,000, inclusive of disbursements and taxes, payable by Enoch to the Plaintiffs in any event of the cause, but not forthwith.

[25] By Order dated December 6, 2021, the parties were dispensed from taking further steps in the underlying action pending the disposition of two motions (including this motion) and the steps set out in the Order. At this point, the only remaining step is for the Plaintiffs to serve their response to the Defendants' requests for particulars by March 31, 2022. As this is a case managed

proceeding, the parties will be required to submit a jointly proposed timetable for next steps in the proceeding by the deadline prescribed by this Order.

**THIS COURT ORDERS that:**

1. Enoch's motion for security for costs is dismissed.
2. Costs of the motion, hereby fixed in the amount of \$1000, inclusive of disbursements and taxes, shall be paid by Enoch to the Plaintiffs in any event of the cause.
3. The parties shall submit a jointly proposed timetable for the completion of next steps in the proceeding by April 21, 2022. In the event the parties cannot agree on a timetable, the Plaintiffs shall forthwith requisition a case management conference and provide the dates and times of mutual availability of counsel for the parties.

"Kathleen Ring"  
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Case Management Judge