Federal Court Cour fédérale

Date: 20220610

Dockets: T-221-19
T-1192-19

Citation: 2022 FC 870

Ottawa, Ontario, June 10, 2022

PRESENT: Mr. Justice Sébastien Grammond

Docket: T-221-19

BETWEEN:

OJIBWAY NATION OF SAUGEEN

Applicant

and

HILDA DEROSE, JOHN MACHIMITY, RON MACHIMITY SR., JOYCE MEDICINE, BETTY NECAN, DARLENE NECAN AND DESIREE JACKO

Respondents

Docket: T-1192-19

AND BETWEEN:

RON MACHIMITY SR., JOYCE MEDICINE, BETTY NECAN, DARLENE NECAN AND DESIREE JACKO

Applicants

and

OJIBWAY NATION OF SAUGEEN, AS REPRESENTED BY EDWARD MACHIMITY, VIOLET MACHIMITY, EILEEN KEESIC AND JOHN SAPAY

Respondents

ORDER AND REASONS AS TO COSTS

[1] In a judgment indexed as 2022 FC 531, I allowed one application for judicial review related to the governance of the Ojibway Nation of Saugeen [ONS] and I dismissed another application regarding the same subject matter. The successful party in both applications is now seeking costs against ONS and its former Chief and Headmen. For the following reasons, each party will bear its own costs.

I. Background

[2] The selection of ONS's Chief and Headmen is governed by a Convention that provides that these positions are life appointments, but subject to review by ONS's membership. Edward Machimity, Eileen Keesic and John Sapay were the Chief and Headmen. A group of ONS members, whom I have called the Conduct Review Proponents, took various steps to effect a change of leadership in accordance with the Convention. This culminated in a traditional gathering held in June 2019, in which ONS members removed the Machimity council and appointed some of the Conduct Review Proponents as the new Chief and Headmen.

[3] These events gave rise to two applications for judicial review. The first one, bearing file number T-221-19, was brought in February 2019 by ONS against the Conduct Review Proponents, in an attempt to enjoin various steps taken by the latter. This application was amended after the June 2019 traditional gathering to seek a declaration that the outcome of this gathering was unlawful. The second application, bearing file number T-1192-19, was brought in June 2019 by the Conduct Review Proponents, in substance to validate the outcome of the

traditional gathering. Both applications were heard together on the same evidence and raised the same issues.

[4] In my judgment on the merits, I found that the Convention provides for the removal of the Chief and Headmen by ONS's membership and that the traditional gathering was successful in effecting that result. I reserved judgment as to costs. My judgment has not been appealed and the former Chief and Headmen handed over power to the Conduct Review Proponents.

[5] The Conduct Review Proponents are now seeking costs on a solicitor-client basis, in the amount of $228,523, against ONS and Edward Machimity, Violet Machimity, Eileen Keesic and John Sapay. I note that Violet Machimity is Edward Machimity's wife, whom the latter purported to designate as his successor as life chief. Even though Violet Machimity was never a member of council, I will refer to the four individuals against whom the Conduct Review Proponents are seeking costs as the "former Chief and Headmen."

[6] As a result of my decision, counsel for ONS is no longer able to receive instructions from the former Chief and Headmen. Thus, ONS did not file any submissions regarding costs. The former Chief and Headmen retained counsel who made submissions on their behalf.

II. Analysis

A. *Principles Governing Costs Awards*

[7] Costs awards may serve three broad purposes described in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371. First, such an award may partly indemnify the successful party for the costs of defending a meritorious legal position. Second, making the losing party pay the costs of the prevailing party may provide an incentive to make better informed litigation choices, for example accepting an offer to settle. Third, in some circumstances, an award of costs may improve access to justice.

[8] Even though the usual rule is that the losing party pays the costs of the prevailing party, the Court retains "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid": rule 400(1) of the *Federal Courts Rules*, SOR/98-106. Thus, even though predictability is desirable, awarding costs remains a case-by-case exercise and must be sensitive to the particular circumstances of each case.

B. *Costs Against the First Nation*

[9] In the very particular circumstances of this case, an award of costs against ONS would not be appropriate. I am mindful that the usual rule is that costs are awarded against the losing party, and ONS lost in both applications.

[10] However, the practical outcome of my judgment is that the Conduct Review Proponents, who were successful in both applications, are now ONS's Chief and Headmen. For this reason, both parties appear to accept that the Conduct Review Proponents can now reimburse themselves for the costs of pursuing their applications. If they choose to do so, it would simply mean that both sides of the dispute would have been funded by ONS.

[11] When awarding costs in First Nations governance matters, this Court has taken notice of the fact that, as a practical matter, the party who controls a First Nation's council is in a position to have its legal costs reimbursed by the First Nation: *Shotclose v Stoney First Nation*, 2011 FC 1051 at paragraph 18 [*Shotclose*]; *Knebush v Maygard*, 2014 FC 1247 at paragraph 59, [2015] 4 FCR 367; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119 at paragraph 27 [*Whalen*].

[12] Thus, in this case, the purposes of indemnification and access to justice can be accomplished without the need for a costs award. This distinguishes the present matter from cases such as *Shotclose* and *Whalen*, where the applicant's success did not translate into control of the council.

C. *Costs Against the Former Chief and Headmen*

[13] The Conduct Review Proponents are also seeking a costs award against Edward Machimity, Violet Machimity, Eileen Keesic and John Sapay, even though they are not formally party to the applications. (The second application named ONS as a defendant, "as represented" by these four individuals, but did not name them as separate defendants.)

[14] There is no doubt that the Court has jurisdiction, in appropriate cases, to order costs against a person who is not a party to the proceeding: *Bellegarde v Poitras*, 2009 FC 1212, aff'd 2011 FCA 317 [*Bellegarde*]. Where that non-party is a First Nation, special factors may be taken into consideration. The First Nation, for example, may have already paid the legal fees of the losing party, as in *Shotclose*. The named respondents may have acted as officials of the First Nation, as in *Bellegarde*. This Court's decision may also help clarify issues related to the First Nation's governance, thus benefitting the First Nation as a whole.

[15] Where, in contrast, costs are sought against an individual or corporation who is not a party to the proceeding, a more restrained approach is in order. In *1318847 Ontario Limited v Laval Tool & Mould Ltd*, 2017 ONCA 184, the Ontario Court of Appeal held that costs may be ordered against a non-party who used a "straw person" to initiate proceedings, so as to avoid liability for costs, or in situations of abuse of process or "gross misconduct, vexatious conduct or conduct by a non-party that undermines the fair administration of justice" (at paragraph 76).

[16] This test is not met here. There is simply no evidence that the first application should have been brought by the former Chief and Headmen in their personal capacity and that they caused ONS to act as sole applicant only in order to avoid personal liability for costs. The second application was brought by the Conduct Review Proponents, who chose not to name the former Chief and Headmen as respondents in their personal capacity.

[17] Moreover, while I decided against the former Chief and Headmen and criticized several aspects of their conduct before and during the traditional gathering, I am unable to describe their

conduct as an abuse of process or other egregious situation warranting an exceptional costs award.

[18] In fact, the Conduct Review Proponents' submissions focus on the fact that the former Chief and Headmen spent more than $500,000 of ONS's funds to defend their case and received more than $700,000 in salaries and expenses while they remained in power between the traditional gathering and the decision of the Court. Costs awards, however, aim at indemnifying the successful party for part of its legal costs. They do not seek to regulate the amount of resources the losing party spent on the case. *A fortiori*, they do not allow the Court to make substantive rulings on matters that were not properly raised on the merits. The Conduct Review Proponents did not seek any remedies regarding the salaries and expenses of the former Chief and Headmen, and the parties filed no evidence in this regard. Any grievances concerning the former Chief and Headmen's use of ONS's financial resources must be dealt with in another forum.

[19] For the foregoing reasons, each party will bear its own costs. The former Chief and Headmen have sought their costs on this motion. Given the result of the applications on the merits, I decline to make such an order.

ORDER in T-221-19 and T-1192-19

THIS COURT ORDERS that:

1. Each party will bear its own costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-221-19 AND T-1192-19
DOCKET:	T-221-19
STYLE OF CAUSE:	OJIBWAY NATION OF SAUGEEN v HILDA DEROSE, JOHN MACHIMITY, RON MACHIMITY SR., JOYCE MEDICINE, BETTY NECAN, DARLENE NECAN AND DESIREE JACKO
AND DOCKET:	T-1192-19
STYLE OF CAUSE:	RON MACHIMITY SR., JOYCE MEDICINE, BETTY NECAN, DARLENE NECAN AND DESIREE JACKO v OJIBWAY NATION OF SAUGEEN, AS REPRESENTED BY EDWARD MACHIMITY, VIOLET MACHIMITY, EILEEN KEESIC AND JOHN SAPAY
PLACE OF HEARING:	MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE FEDERAL COURTS RULES
ORDER AND REASONS:	GRAMMOND J.
DATED:	JUNE 6, 2022

APPEARANCES:

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