

Federal Court



Cour fédérale

Date: 20230223

Docket: T-137-22

Citation: 2023 FC 261

Ottawa, Ontario, February 23, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

**DAKOTA PLAINS WAHPETON OYATE AS REPRESENTED BY
EVANGELINE TOWLE IN HER CAPACITY AS HEREDITARY CHIEF OF
DAKOTA PLAINS WAHPETON OYATE, CRAIG BLACKSMITH AND
ALVIN SMOKE IN THEIR CAPACITY AS REPRESENTATIVE
DAKOTA PLAINS WAHPETON OYATE COUNCIL MEMBERS**

Applicants

and

DONALD RAYMOND SMOKE

Respondent

SUPPLEMENTARY JUDGMENT AND REASONS

[1] Following the issuance of the Judgment and Reasons in *Dakota Plains Wahpeton Oyate First Nation v Smoke*, 2022 FC 1743 [Judgment], I allowed the parties to make written submissions on costs.

[2] In the Judgment, I granted costs in favour of the Respondent, Donald Smoke. I concluded the Applicants, Evangeline Towle, Craig Blacksmith, and Alvin Smoke, did not have the authority to bring the judicial review Application in the name of Dakota Plains Wahpeton Oyate First Nation [DPFN]. As such, I held Evangeline Towle, Craig Blacksmith, and Alvin Smoke, rather than DPFN, would be responsible for costs.

[3] Having considered the parties' written submissions, these are my Reasons on costs.

I. Applicants' Submissions on Costs

[4] The Applicants argue the Application was a governance dispute and submit the parties should bear their own costs. In support of this position, they rely upon the following comments of Justice Grammond in *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paragraph 27:

- In First Nations governance cases, as in other cases, an award of costs is in the trial judge's discretion, which must be exercised after taking all relevant factors into consideration;
- The imbalance between the financial resources of an applicant and those of the First Nation, or a party whose legal fees are paid by the First Nation, is a relevant factor;
- Taken in isolation, however, the resource imbalance is not a sufficient factor to justify an award of costs on a solicitor-client basis;
- The fact that an application contributed to clarify the interpretation of a First Nation's laws or governance framework may be taken into account when making a costs award; but not every application falls in that category.

[5] The Applicants submit this is an appropriate case for the Court to decline the award of costs, as this Application was a governance dispute that raised issues of public interest for DPFN (*Twinn v Sawridge First Nation*, 2017 FC 407 at para 131; *Cowessess First Nation No 73 v Pelletier*, 2017 FC 859).

[6] The Applicants object to the Respondent's request for solicitor-client costs and argue there was no outrageous, reprehensible, or scandalous conduct that would merit such an award. The Applicants' also ask the Court to consider that they proceeded expeditiously in getting the matter to a hearing. The Applicants allege the Respondent delayed the proceeding by filing motions and cross-examining their witnesses.

[7] The Applicants submit the Application was filed in good faith and a significant cost award would impoverish them.

II. Respondent's Submissions on Costs

[8] The Respondent requests costs on a solicitor-client basis against the Applicants on a joint and severable basis in the amount of \$161,264.91. The Respondent argues costs on a solicitor-client basis are appropriate where a party has displayed reprehensible, scandalous, or outrageous behaviour (*Microsoft Corporation v 9038-3746 Quebec Inc*, 2007 FC 659 at para 16).

[9] Alternatively, the Respondent requests a lump sum cost award of \$80,632.45, pursuant to Rule 400(4) of the *Federal Courts Rules*, SOR/98-106.

[10] The Respondent disagrees with the Applicants' characterization of the Application as a governance dispute. The Respondent argues that the Applicants, by their own conduct, intentionally attempted to flout DPFN hereditary custom and the rule of law. The Respondent submits the Application was not brought in good faith on behalf of DPFN, but rather by a selfish desire of the Applicants to change the governance structure of the Nation. The Respondent points out that the community was disrupted by the Applicants' actions, including being placed into third-party management while the Application proceeded.

[11] The Respondent highlights the following findings in the Judgment that question the conduct of the Applicants:

- Producing no supporting evidence for their custom other than the two December 2021 BCRs they signed (Judgment at paras 56 and 66);
- Producing no evidence of broad consensus of the governance role of the Youth, Women's, and Elders Councils (Judgment at paras 66 and 72);
- Producing inconsistent evidence of their purported custom (Judgment at para 69);
- Failing to cross-examine the Respondent's affiants on their Affidavit evidence as it related to the DPFN hereditary custom (Judgment at paras 47 and 48);
- Making veiled and wholly without merit accusations of fraud and failing to cross-examine the Respondent in relation to that claim (Judgment at para 97);
- Making baseless accusations about the late Chief Orville Smoke's mental capacity (Judgment at para 98);

- Inappropriately bringing the claim ostensibly on behalf of DPFN (Judgment at para 109); and
- Not taking less disruptive methods to elicit change in DPFN governance (Judgment at para 112).

[12] The Respondent submits there is a clear public interest in discouraging this kind of conduct.

III. Analysis

[13] The purpose of an award of costs is threefold: “providing compensation, promoting settlement and deterring abusive behaviour” (*Air Canada v Thibodeau*, 2007 FCA 115 at para 24).

[14] Rule 400(1) of the *Federal Courts Rules* provides that the Court retains full discretion over the amount and allocation of costs.

[15] Although the Applicants characterize the Application as a “genuine” governance dispute, as noted in the Judgment, I was not convinced that it was a genuine dispute. I concluded that the Applicants’ challenge to the Respondent’s claim to be the Hereditary Chief of DPFN was not supported by other community members. There was no evidence of a genuine conflict on the hereditary practices of DPFN. Accordingly, I would not characterize the Application as a true governance dispute that was brought in the public interest of members of DPFN.

[16] Having said this, while I was critical of the Applicants' motivation and their conduct in challenging the Respondent becoming the Hereditary Chief, I would not characterize their conduct as so egregious as to warrant costs on a solicitor-client basis or on an elevated lump sum basis.

[17] In my view, the overriding factor in considering costs in this case is the imbalance in the financial resources between the individual Applicants and those of the Respondent. I note that the Respondent, as the person who controls DPFN, is in a position to have his legal costs reimbursed by the First Nation (*Shotclose v Stoney First Nation*, 2011 FC 1051 at para 18).

[18] Furthermore, while the Respondent is entitled to costs, the amount should not be such that it will impoverish the Applicants, recognizing that the Judgment may impact their employment status with DPFN.

[19] I also note that cost awards in other Indigenous governance matters have tended to be in the range of \$2,500.00 to \$5,000.00 (see *McCallum v Peter Ballantyne Cree Nation*, 2019 FC 898; *Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144; *Whitstone v Onion Lake Cree Nation*, 2022 FC 399; *Duckworth v Caldwell First Nation*, 2021 FC 648; *Halcrow v Kapawe'no First Nation*, 2021 FC 219; *Anderson v Nekaneet First Nation*, 2021 FC 843).

[20] In the exercise of my discretion, I award lump sum costs to the Respondent, Donald Smoke, in the all-inclusive amount of five thousand dollars (\$5,000.00) to be paid jointly and severally by the Applicants, Evangeline Towle, Craig Blacksmith, and Alvin Smoke.

JUDGMENT IN T-137-22

THIS COURT'S JUDGMENT is that Donald Smoke is entitled to costs to be paid jointly and severally by Evangeline Towle, Craig Blacksmith, and Alvin Smoke in the all-inclusive sum of five thousand dollars (\$5,000.00).

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-137-22

STYLE OF CAUSE: DAKOTA PLAINS WAHPETON OYATE ET AL v
DONALD RAYMOND SMOKE

SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
THIS COURT'S JUDGMENT IN 2022 FC 1743

**SUPPLEMENTARY
JUDGMENT AND REASONS:** MCDONALD J.

DATED: FEBRUARY 23, 2023

WRITTEN SUBMISSIONS BY:

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