

Federal Court



Cour fédérale

Date: 20230707

Docket: T-95-22

Citation: 2023 FC 931

Ottawa, Ontario, July 7, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

RICHARD SHANKS

Applicant

and

SALT RIVER FIRST NATION #195

Respondent

SUPPLEMENTARY JUDGMENT AND REASONS

[1] In *Shanks v Salt River First Nation #195*, 2023 FC 690 [Judgment], the Applicant Richard Shanks, as the successful party, was awarded costs. In the Judgment, I concluded that the Salt River First Nation [SRFN] band council resolution [BCR] which excluded Mr. Shanks from receiving a per capita distribution [PCD] payment from Treaty settlement funds was unreasonable.

[2] Having considered the post-Judgment written submissions from the parties, the following are my Reasons on costs.

I. Applicant's Submissions on Costs

[3] Mr. Shanks seeks solicitor-client costs of \$32,608.84 or an elevated lump sum costs award in the amount of \$19,565.31 (being 60% of his costs). He argues that solicitor-client costs are justified as he is a public interest litigant and he advanced this judicial review Application for the benefit of other SRFN members who were excluded from PCD payments.

[4] Mr. Shanks claims the Judgment provides clarity on the jurisdiction of the Federal Court to review decisions of First Nations governments. He also claims the Judgment confirmed that historic discriminatory practices cannot be relied upon by First Nations to justify present day discriminatory practices.

[5] In the alternative to solicitor-client costs, Mr. Shanks seeks elevated lump sum costs of 60% of his actual costs. In support, he relies upon *Garner v Union Bar First Nation*, 2021 FC 657 [*Garner*] where in awarding 50% lump sum costs, Justice Manson found that the Chief/Nation engaged in “an exercise of careless power” in removing the applicant from the band list, resulting in exclusion from various band-related entitlements (at para 57).

[6] As in *Garner*, Mr. Shanks argues lump sum costs are warranted as the SRFN BCR to disentitle him to the benefit of the PCD payments was not founded on evidence or law. He

argues that the arbitrariness and unreasonableness of SRFN's decision to exclude certain band members from these benefits should be sanctioned by increased costs.

[7] Finally, Mr. Shanks raises the financial imbalance between himself and SRFN as a factor justifying an increase in the award of costs.

II. Respondent's Submissions on Costs

[8] SRFN argues there are no special circumstances that warrant a departure from the default costs provided for in Rule 407 of the *Federal Courts Rules*, SOR/98-106 [Rules]. Based upon Column III of Tariff B, SRFN says the appropriate award of costs is \$4,290.00.

[9] According to SRFN, solicitor-client costs are not appropriate as there is no evidence that SRFN engaged in conduct that could be considered reprehensible, scandalous, or outrageous. The mere fact that an application raises issues that are important to a community does not, itself, warrant solicitor-client costs (*McCallum v Canoe Lake Cree First Nation*, 2022 FC 969 at para 128 [*Canoe Lake*]).

[10] Further, SRFN argues the Application did not raise broad issues of public interest, as the Judgment was only in relation to one SRFN BCR to authorize a PCD payment.

[11] SRFN submits that elevated lump sum costs are not appropriate in this case and there are no factors that justify departure from Column III of Tariff B. SRFN asserts that both *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 [*Whalen*] and *Canoe Lake*, are

distinguishable as in those cases there were extensive records, with numerous affidavits and cross-examinations whereas this Application was a relatively straight-forward judicial review.

[12] Finally, SRFN asserts a resource imbalance between the parties is not sufficient to justify solicitor-client costs in the First Nations governance context (*Whalen* at para 27).

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 *Rules* provides that the Court retains full discretion over the amount and allocation of costs.

[15] Solicitor-client costs can be justified in the public interest when the case “raise[s] an issue that is novel or otherwise extends beyond the immediate interests of the parties” (*Bird v Peter Ballantyne Cree Nation*, 2023 FC 431 at para 14, citing *Cowessess First Nation No 73 v Pelletier*, 2017 FC 859 at para 23). The issues raised “must also have a significant and widespread societal impact” (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 140).

[16] Here, I would not characterize the issues raised by Mr. Shanks as being solely in the public interest, as he also had a direct personal interest in the outcome (*McCallum v Peter*

Ballantyne Cree Nation, 2019 FC 898 at para 109 [*McCallum*]). Accordingly, “public interest” does not justify an award of solicitor-client costs in this case.

[17] In general, with respect to the motivation of SRFN in enacting this BCR, while perhaps misguided, I would not characterize the conduct as “reprehensible, scandalous, or outrageous” such as to justify an increase in costs.

[18] Further, while the judicial review Application involved only one BCR, I would not characterize the Application as straight-forward. In considering the context surrounding the BCR, it was necessary to consider the various trust-related agreements, as well as SRFN laws and policies. This supports a slightly higher than default cost award.

[19] Finally, I take guidance from the cost awards in other governance matters that have tended to be in the range of \$2,500.00 to \$5,000.00 (see *McCallum*; *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 these circumstances and in the exercise of my discretion, I award lump sum costs to the Applicant, Richard Shanks, in the all-inclusive amount of five thousand dollars (\$5,000.00) to be paid by SRFN.

JUDGMENT IN T-95-22

THIS COURT'S JUDGMENT is that Richard Shanks is entitled to costs to be paid by Salt River First Nation #195 in the all-inclusive sum of five thousand dollars (\$5,000.00).

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-95-22

STYLE OF CAUSE: SHANKS v SALT RIVER FIRST NATION #195

SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO THIS COURT'S JUDGMENT IN 2023 FC 690

SUPPLEMENTARY JUDGMENT AND REASONS: MCDONALD J.

DATED: JULY 7, 2023

WRITTEN SUBMISSIONS BY:

Ian Knapp
John G. M. Foster

FOR THE APPLICANT

K. Colleen Verville, K.C.

FOR THE RESPONDENT

SOLICITORS OF RECORD:

MACKENZIE FUJISAWA LLP
Barristers & Solicitors
Vancouver, British Columbia

FOR THE APPLICANT

MLT Aikins LLP
Edmonton, Alberta

FOR THE RESPONDENT