

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPLICANT

-and-

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA,
ASSEMBLY OF FIRST NATIONS, CANADIAN HUMANRIGHTS COMMISSION,
CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL
and NISHNAWBE ASKI NATION**

RESPONDENTS

**COSTS SUBMISSIONS OF THE RESPONDENT,
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA**

1. These submissions are made pursuant to Justice Favel's November 29, 2019 order directing the parties to provide submissions on costs by no later than December 31, 2019.¹ The First Nations Child and Family Caring Society (the "**Caring Society**") submits that, as the successful party, it is entitled to its costs. The Caring Society further submits that this is a suitable case for making a lump sum costs award.

A. The Caring Society is entitled to its costs on the November 25-26, 2019 motions

2. It is well settled that the purpose of awarding costs to the successful party is twofold: (a) to discourage unmeritorious litigation; and (b) to partially indemnify the successful party for the costs incurred.²

3. The Caring Society was the successful party at the November 25-26, 2019 hearing. The Court heard two motions, dismissing both. The overall result of the hearing was that Canada's

¹ *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada et al*, 2019 FC 1529 at para 36 and at p 12, para 3 [*Canada v Caring Society*].

² *Pfizer Canada Inc v Novopharm Ltd*, 2010 FC 668 at para 16, per Crampton J (as he then was).

decision to seek judicial review of the Canadian Human Rights Tribunal's (the "**Tribunal**") September 6, 2019 Compensation Entitlement Order will not delay the Tribunal's determination of the Compensation Process.³

4. The Court having declined to exercise its discretion to put the judicial review into abeyance does not detract from the Caring Society's overall success at the hearing.

5. The result of the hearing is consistent with the Caring Society's submission to the Court on both motions: (a) that the Tribunal ought to be entitled to complete its work in deciding on a process to identify victims of Canada's discrimination and provide payment to them; and (b) that the proceedings ought to move expeditiously. The Caring Society took this position with the goal of getting compensation to victims, many of whom are First Nations children, as quickly as possible. The Court declined to exercise its discretion to place Canada's judicial review in abeyance, as it was of the view that the ongoing judicial review would provide an incentive for the parties to expedite good faith discussions in the Tribunal process.⁴ This is entirely in keeping with the Caring Society's objects in bringing its motion.

6. Furthermore, the Caring Society exercised due prudence in bringing forward a consolidated motion record to address both its motion and Canada's stay motion. The Caring Society's approach did not result in duplication, as it would have led the same evidence and made largely the same submissions solely in response to Canada's motion in order to address irreparable harm and the balance of convenience. Indeed, Canada has acknowledged that the Caring Society could have sought the same relief simply in response to Canada's motion.⁵ The only extra effort required related to the Caring Society filing a Notice of Motion on October 24, 2019, which in any event was of assistance to the Court and to Canada given the tight timelines in this matter, and making brief submissions regarding the applicable test.⁶

³ The terms "Compensation Entitlement Order" and "Compensation Process" have the same meaning as used in the Caring Society's November 19, 2019 factum on the merits.

⁴ *Canada v Caring Society* at para 33.

⁵ Canada reply factum filed November 21, 2019, at para 55.

⁶ Caring Society November 19, 2019 factum at paras 70-85.

7. The length of the proceedings was not materially impacted by the Caring Society's decision to bring a separate motion seeking that Canada's judicial review be put into abeyance. As such, there should be no impact on the Caring Society's entitlement to costs.

8. To the extent that Canada might argue that the Caring Society is not entitled to costs as it is represented by *pro bono* counsel,⁷ the Federal Court of Appeal has held that the fact that counsel is acting *pro bono* does not bar a costs award in that party's favour.⁸

B. This is an appropriate case for a lump sum award of costs

9. As the Federal Court of Appeal recently explained in *Sport Maska Inc v Bauer Hockey Ltd*, awarding lump sum costs as a percentage of actual costs reasonably incurred is a well-established practice when dealing with sophisticated parties. The Court of Appeal noted that such costs awards tend to range between 25% and 50% of actual fees.⁹ The Court's authority in this regard arises under Rule 400(4): "[t]he Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs."¹⁰

10. Despite this judicial review not being a commercial matter, the parties are nonetheless sophisticated. They have been engaged in litigation before the Tribunal, the Federal Court and the Federal Court of Appeal for nearly 13 years.

11. As recently explained by Southcott J. in *Loblaws Inc v Columbia Insurance Company et al*, the purpose of lump sum costs awards is "to avoid the parties incurring additional costs and time associated with a costs assessment."¹¹

12. In determining where in the 25-50% range a lump sum award should fall, the Federal Court of Appeal noted in *Sport Maska* that "the criteria under Rule 400(3) [...] remain useful beacons in the selection of a lump sum award."¹² The Caring Society submits that the relevant Rule 400(3) factors in this instance are:

⁷ Affidavit of Cindy Blackstock, affirmed October 24, 2019 at para 67.

⁸ *Roby v Canada (Attorney General)*, 2013 FCA 251 at paras 23-24.

⁹ *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at para 50.

¹⁰ *Federal Courts Rules*, SOR/98-106, Rule 400(4).

¹¹ *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 at para 8.

¹² *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at para 50.

- a. The result of the proceeding;
- c. The importance and complexity of the issues;
- g. The amount of work;
- h. Whether the public interest in having the proceeding litigated justifies a particular award of costs;
- j. The failure by a party to admit anything that should have been admitted or to serve a request to admit; and
- l. Whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily.

13. Regarding **factor (a)**, as the Caring Society noted above, it was the successful party at the November 25-26, 2019 hearing. The result ordered by the Court met both of the objectives the Caring Society set out in response to Canada's stay motion and in bringing its own motion to put the judicial review in abeyance: (a) that the Tribunal's decision-making regarding the Compensation Process could continue, reflecting the needs of First Nations children and families living in vulnerable circumstances; and (b) that the judicial review not delay compensation payments to victims. The Caring Society's efforts on its abeyance motion were not duplicative. As such, there is no justification for lowering the percentage of any lump sum costs award to reflect the Court dismissing the Caring Society's abeyance request. The record and work expended would have been virtually the same in any event. Given that "[t]he determination of a lump sum is not an exact science, but reflects the amount the Court considers to be a reasonable contribution to the successful party's actual legal fees",¹³ this Court being disinclined to grant the Caring Society's abeyance request is a neutral factor.

14. **Factors (c) and (g)**, the "importance and complexity of the issues" and the "amount of work", justifies fixing a lump sum in the middle-to-high end of the range. The legal issues at play on the November 25-26, 2019 were not complex, which points to an award at the lower end of the range. However, the factual record and context were significantly complex given the long duration and unprecedented nature of the proceedings before the Tribunal. Canada's decision to

¹³ *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 21.

file a lengthy record in support of its motion and the Caring Society's decision to file similarly lengthy materials in response were both reasonable decisions in the circumstances.

15. Also arguing for a higher amount in the range is the importance of this proceeding to the public (**factor (c)**): compensation to victims in this case is clearly of importance to the public and to the Government of Canada's pledge to implement all of the Truth and Reconciliation Commission's Calls to Action. Indeed, the matter of compensation to victims in this case was featured in both leaders' debates hosted by the Leaders' Debate Commission in the 43rd general election. The Court received a request from the Aboriginal Peoples Television Network to broadcast proceedings live, which request was granted. The Court should be able to take judicial notice of the fact that the webcast of the hearing was also carried live on CBC, CTV, and CPAC. In addition, compensation to victims was mentioned in the Throne Speech delivered on December 5, 2019,¹⁴ and has been raised in the House of Commons on multiple occasions since the November 25-26, 2019 hearing.¹⁵

16. The Caring Society submits that the low legal complexity of the proceedings nets out against the high factual complexity and high level of public importance, in favour of an amount in the middle-to-high end of the range.

17. The public interest underlying the Caring Society's participation in this litigation (**factor h**) also militates in favour of a cost award at the higher end of the range. The Tribunal's Compensation Entitlement Order will benefit tens of thousands of First Nations children and families. The Caring Society has been promoting the victims' rights to non-discrimination and compensation in this case for nearly 13 years. These families do not have standing before the Federal Court, and as such they depend on the Caring Society to continue to argue in favour of their interests. The other responding parties represent either the public interest (the Commission) or First Nations governments (Assembly of First Nations, Chiefs of Ontario, Nishnawbe Aski Nation). As a non-profit and non-political organization, the Caring Society provides expertise in First Nations children's rights and child welfare to these proceedings. Based on this expertise,

¹⁴ Canada, Parliament, *Debates of the Senate*, 43rd Parl, 1st Sess, Vol 151, No 1 (December 5, 2019) at 8.

¹⁵ Canada, Parliament, *House of Commons Debates*, 43rd Parl, 1st Sess, Vol 149, No 3 (December 9, 2019) at 144-146 [*Hoc Debates*]; *HoC Debates* Vol 149, No 5 (December 11, 2019) at 279; *HoC Debates* Vol 149, No 6 (December 12, 2019) at 398, 405-406, 408-409; *HoC Debates*, Vol 149, No 7 (December 13, 2019) at 465-466.

the Caring Society was the only party to bring a motion in response to Canada's application to stay the Tribunal's proceedings.

18. Furthermore, Canada's failure to acknowledge that the harms alleged in its motion for a stay were speculative (**factor j**), particularly after its witness admitted as much on cross-examination,¹⁶ ought to militate in favour of a costs award at the middle-to-high end of the scale.

19. If more than one set of costs is to be allowed (**factor l**), an award of costs to the Caring Society should not be reduced by the participation of other parties. The Caring Society was clearly the "lead respondent" throughout this proceeding, whether at the case management conference of October 25, 2019, the cross-examination of November 14, 2019, or the hearing of November 25-26, 2019. Its efforts simplified those required of the remaining parties, such that any further efforts by those parties ought not reduce the Caring Society's entitlement to costs.

20. As detailed in Annex "A" to the Caring Society's submission, the total legal fees that *pro bono* counsel would have charged had this matter been a paid retainer is \$47,660.58 (including HST). This is based on the hours per task listed in Annex "A", at the following hourly rates:

- a. Barbara McIsaac, Q.C. (1975 call): \$375/hour
- b. Sarah Clarke (2009 call): \$315/hour
- c. Anne Levesque (2008 call): \$315/hour
- d. David Taylor (2013 call): \$275/hour

21. The Caring Society's claim for time for three counsel for most tasks (with the exception of drafting the factum, where work was divided in order to complete the task in the short time between the receipt of transcripts on November 15, 2019 and the filing deadline of November 19, 2019) is reasonable, as Canada was represented by three counsel on this matter.

22. The range of a lump sum cost award (25%-50%) is roughly \$12,000 to \$24,000. A lump sum award of \$20,000 for legal fees is appropriate, as this constitutes a lump sum of 42% of the Caring Society's legal fees had *pro bono* counsel charged their time, which would fall in the "middle-upper" range of the spectrum.

¹⁶ November 14, 2019 cross-examination of Sony Perron at pp 15-16 (Qs 35-36) and pp 20-21 (Qs 47-51).

23. The Caring Society's disbursements are detailed in Annex "B" total \$2,881.88. These disbursements relate to the cross-examination of Sony Perron, printing associated with the November 25-26, 2019 hearing, and travel for Ms. Clarke to attend the November 25-26, 2019 hearing.

24. Accordingly, the Caring Society seeks a total costs award of \$22,881.88, in the amount of \$20,000 for legal fees and \$2,881.88 for disbursements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of January, 2020.



David P. Taylor
Sarah Clarke
Anne Levesque
Barbara A. McIsaac, Q.C.

Counsel for the Respondent,
First Nations Child and Family
Caring Society of Canada

Annex A – Legal Fees

Task	Hours	Amount
Review of Attorney General of Canada’s materials	BM: 2 hours DT: 2 hours	BM: \$750 <u>DT: \$550</u> Subtotal: \$1,300
Preparation of Caring Society’s Motion Materials	BM: 1 hour AL: 4.5 hours DT: 13 hours	BM: \$375 AL: \$1,417.50 <u>DT: \$3,575</u> Subtotal: \$5,367.50
Case Management (correspondence and Oct 25, 2019 CMC)	BM: 2 hours SC: 2 hours DT: 5.5 hours	BM: \$750 SC: \$630 <u>DT: \$1,512.50</u> Subtotal: \$2,892.50
Preparation for cross-examination of Sony Perron (incl. logistics for bilingual cross-examination)	BM: 7 hours DT: 12.5 hours	BM: \$2,625 <u>DT: \$3,437.50</u> Subtotal: \$6,035
Cross-examination of Sony Perron	BM: 2 hours DT: 2 hours	BM: \$750 <u>DT: \$550</u> Subtotal: \$1,300
Preparation of memorandum of fact and law	BM: 1 hour SC: 24.5 hours AL: 4.5 hours DT: 12.5 hours	BM: \$375 SC: \$7,717.50 AL: \$1,417.50 <u>DT: \$3,437.50</u> Subtotal: \$13,350
Preparation for hearing	BM: 3 hours SC: 4 hours DT: 2 hours	BM: \$1,125 SC: \$1,260 <u>DT: \$550</u> Subtotal: \$3,310
Attendance at hearing	BM: 8 hours SC: 8 hours DT: 8 hours	BM: \$3,000 SC: \$2,520 <u>DT: \$2,200</u> Subtotal: \$9,660
Preparation of costs submissions	BM: 1 hour SC: 1 hour DT: 3.5 hours	BM: \$375 SC: \$315 <u>DT: \$962.50</u> Subtotal: \$1,652.50

Subtotal Barbara McIsaac, Q.C. = \$10,125 (27 hours)

Subtotal Sarah Clarke = \$12,442.50 (39.5 hours)

Subtotal Anne Levesque = \$2,835 (9 hours)

Subtotal David Taylor = \$16,775 (61 hours)

Subtotal all counsel: \$42,117.50

HST at 13% = \$5,543.08

Total fees = \$47,660.58

Annex B – Disbursements

Item	Amounts claimed	Allowed
Court reporter attendance fees and transcript for cross-examination of Sony Perron	\$944.40	
Internal Printing	\$490.95	
External Printing	\$487.97	
Travel for S. Clarke to attend hearing (hotel + train)	\$895.86	
Miscellaneous	\$62.70	

Total disbursements = \$2,881.88