

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

-and-

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

Respondents

FACTUM
(Motions of November 25-26, 2019)

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**SUBMISSIONS ON COSTS OF NISHNAWBE ASKI NATION
(Motions of November 25-26, 2019)**

PART I – OVERVIEW

A. Introduction

1. These submissions on costs are made pursuant to the order of the honourable Justice Favel dated November 29, 2019, and his further oral Direction of December 30, 2019.
2. Canada brought a motion to stay an order of the Canadian Human Rights Tribunal (“the Tribunal”) dated September 6, 2019. The motion was devoid of merit. Nishnawbe Aski Nation (“NAN”) and all other Respondents were successful in opposing the motion. NAN is seeking costs against Canada on a solicitor-client basis plus disbursements or, in the alternative, a lump sum of 50% of legal fees plus disbursements. NAN asks that no costs be awarded against it.

3. Additionally, NAN supported a motion brought by the Caring Society in response to Canada's motion. This motion, though ultimately unsuccessful, was not devoid of merit. It raised a genuine issue about the most expeditious process for arriving at a final determination on an issue of public importance: compensation for victims of state-perpetrated human rights violations. NAN asks that no costs be awarded against it in relation to the Caring Society's motion.

4. Furthermore, the motion by the Caring Society did not necessitate production of further materials or work by counsel for NAN above and beyond what was required to respond to Canada's motion, with the exception of a small amount of time dedicated to conducting additional research, seeking client instructions, and drafting one paragraph of written submissions.¹ A reasonable estimate is that of all the hours spent by counsel for NAN, a maximum of 5-10% was necessitated by the motion brought by the Caring Society, while 90-95% was required to respond to Canada's motion.

B. The Facts

5. NAN was a Respondent on two motions brought in the context of an Application for Judicial Review filed by Canada in which Canada is asking this honourable Court to review a decision on compensation by the Canadian Human Rights Tribunal ("the Tribunal") dated September 6, 2019. The Tribunal ordered that maximum compensation be paid to certain First Nations individuals who were victims of wilful and reckless discrimination by Canada in on-reserve First Nations child welfare and improper application of Jordan's Principle. It specified that no payment would be made until Canada consulted with the parties and all parties had the

¹ See para 26 of NAN's Written Submissions on the Motions, found at Tab 2 of NAN's Motion Record, p. 30.

opportunity to return to the Tribunal with recommendations regarding a compensation process.² The only operative part of the order, therefore, was for Canada to consult with the parties.³

6. NAN opposed Canada's motion to stay the Tribunal's order pending judicial review. Canada alleged three types of irreparable harm would occur if the Tribunal's September 6th order were not stayed: (1) there would be conflicting decisions due to the Tribunal's retention of jurisdiction while the Federal Court proceeds with its judicial review; (2) there would be unwarranted devotion of resources to establishing and implementing the compensation process; and (3) there would be unrecoverable loss of compensation paid out to individuals during the course of the judicial review.⁴

7. This honourable Court found that all alleged harm was speculative in nature and therefore dismissed the motion.⁵ None of the alleged harms described above related to the only operable part of the Tribunal's September 6th order, i.e. the order for Canada to consult with the parties on a compensation process. The alleged harms had only to do with situations that could arise once the Tribunal issues its subsequent order on a compensation process.

8. NAN supported the Caring Society's motion for the Court to exercise its discretion pursuant to s. 50(1)(b) of the *Federal Court Act* and hold the judicial review in abeyance until the Tribunal issues its further order on compensation. The Caring Society's motion was brought in

² *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 (CanLII), at paras 244-245, 269, 277, Book of Authorities ("BOA") at Tab 1.

³ *Attorney General of Canada v First Nations Child and Family Caring Society et al.*, 2019 FC 1529, at para 31, BOA Tab 2.

⁴ *Ibid.*, at para 19.

⁵ *Ibid.*, at para 24

response to Canada's motion, and the same material was used on both motions. These motions were heard together on November 25-26, 2019. Both motions were unsuccessful.

9. By way of order dated November 29, 2019, the honourable Justice Favel directed the parties to make submissions on costs by December 31, 2019. By way of oral Direction in response to a request by NAN, Justice Favel graciously extended the deadline by one week.

PART II – STATEMENT OF THE POINTS IN ISSUE

10. The only issue in question is what an appropriate costs order is on the motions heard on November 25-26, 2019.

PART III - SUBMISSIONS

A. Overview of the Law

11. Costs awards are governed by Rules 400-422 of the *Federal Court Rules*, SOR/98-106. The presiding judge has full discretion regarding costs, and this discretion is to be exercised according to certain principles governing costs awards. In the recent decision of *Whalen v. Fort McMurray No. 468 First Nation*, Justice Grammond provided a succinct overview of these principles.⁶

12. One goal of costs awards is indemnification of the successful party. The other is a policy goal of providing incentives to parties to “make rational use of scarce judicial resources”, including by discouraging frivolous or vexatious lawsuits. Generally, costs awards are made against the losing party to the successful party, but this is not an absolute rule, particularly in public interest litigation.⁷

⁶ *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 1119, at paras 2-11 [*Whalen*], BOA Tab 3.

⁷ *Whalen* at paras 3-4, 7, 22, citing in part to *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371, especially at paras 22-26, BOA Tab 4.

13. The default mechanism for determining quantum of costs awards is Tariff B of the *Federal Court Rules*.⁸ This honourable Court has recognized, however, that application of the tariff usually results in costs awards significantly lower than the costs actually incurred by the successful party.⁹ Thus using Tariff B can result in a failure of meeting the objective of “making a reasonable contribution to the costs of litigation.”¹⁰

14. Another alternative to using Tariff B is to award costs on a solicitor-client basis. Such awards are made in “exceptional circumstances.”¹¹ Such awards might be granted where a party’s conduct was “reprehensible, scandalous or outrageous” or when “justified by reasons of public interest.”¹² When a matter is brought that is *devoid* of merit (which is not necessarily the same as a position eventually found to be without merit), solicitor-client costs may be justified.¹³ As with lump sum awards (discussed below), awards on a solicitor-client basis also further the objectives of the *Federal Court Rules* set out in Rule 3.

15. Increasingly, this Court has used lump sum costs awards as an alternative to using Tariff B. This is done pursuant to Rule 400(4). As the Federal Court of Appeal has explained, lump sum awards “further the objectives of the *Federal Courts Rules* of securing ‘the most just, expeditious and least expensive determination’ of proceedings (Rule 3)” by saving parties time and money.¹⁴

⁸ Note that the adjusted value for “B” in the formula is currently 1.5: <https://www.fct-cf.gc.ca/en/pages/law-and-practice/court-costs/unit-value---tariff-b>

⁹ *Whalen* at paras 8-9; *Federal Court Rules*, Tariff B

¹⁰ *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 (CanLII), at para 13 [*Nova Chemicals*], BOA Tab 5.

¹¹ *Whalen*, at para 10.

¹² *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 (CanLII), [2010] 2 SCR 453, at para 67 (also cited in *Whalen*, at para 13), BOA Tab 7.

¹³ *Whalen*, at paras 14-15.

¹⁴ *Nova Chemicals*, at para 11.

16. Lump sum awards may be appropriate in matters ranging from simple to especially complex. The Court should have regard to the circumstances of the case and the objectives underlying costs to determine an appropriate lump sum award. There is a well-established practice of making lump sum awards in the amount of 25%-50% of actual legal fees plus disbursements.¹⁵

17. Rule 400(3) sets out factors the Court may consider when making costs awards. These include, but are not limited to, the following: the result of the proceeding; the importance and complexity of the issues; the amount of work; whether the public interest in having the proceeding litigated justifies a particular award of costs; and whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution.

B. Solicitor-Client Costs Are Warranted Against Canada

18. Canada's motion was frivolous, in that it was devoid of merit. Canada dragged the Respondents to court on a motion that had no reasonable prospect of success, in an attempt to stall and derail proceedings before the Tribunal and escape a simple but critical obligation to consult with the other parties. Canada's submissions suggested that, if the Tribunal's order were not stayed, Canada would have to expend an exorbitant amount of resources to set up a complex structure to support compensation payments, and would make compensation payments it would not be able to recover at a later point even if Canada is successful on the judicial review. Yet Canada's own witness readily acknowledged that there are no compensation payments to be made at this point in the process.¹⁶ With no requirement to set up a compensation structure or make compensation payments, Canada's submissions regarding harm were completely devoid of merit.

¹⁵ *Nova Chemicals* at paras 2, 11-12, 17, 26; see also *Loblaws Inc. v. Columbia Insurance Company, the Pampered Chef Ltd, and Pampered Chef – Canada Corp*, 2019 FC 1434, at paras 15, 44 [*Loblaws*], BOA Tab 6.

¹⁶ *Ibid.*, at para 22.

19. The alleged harm emphasized by Canada relates to actions that the Tribunal's order specifically states are not to be taken before further order of the Tribunal. The Tribunal's order does not require imminent compensation payments. This clear and obvious reality was confirmed by this honourable Court.

20. The effect of granting a stay would have been to relieve Canada from its obligation to consult with the parties regarding a compensation process. This was an issue of significant public importance. It engages both the issue of vindication for those whose human rights have been violated and the issue of the relationship between Canada and First Nations. The issue on the motion to stay was thus of significant importance to NAN, which represents the interests of 49 First Nations in what is now northern Ontario. The victims of Canada's wilful and reckless discrimination include members of NAN First Nations.

21. As a result of Canada's conduct, including through bringing the motion to stay, the Tribunal has had to extend a timeline it had initially set out with the intention of ensuring timely compensation for victims of human rights violations.

22. For these reasons, NAN seeks costs on a solicitor-client basis from Canada. Specifically, NAN seeks an order that Canada pay costs covering 90% of the hours spent by counsel for NAN on the motions (representing the reasonable approximate percentage of hours that cannot be attributed to the motion brought by the Caring Society) as well as disbursements. This amounts to \$32,767.49. Such an award would serve the twin goals of indemnification and discouraging frivolous claims.

23. Though Canada was successful in opposing the Caring Society's motion, which NAN supported, this is an appropriate case for the Court to decline to award costs to Canada in relation

to the Caring Society's motion. While the Caring Society's motion was ultimately unsuccessful, it cannot be said that it was of little merit. It raised a genuine issue of public interest – specifically, the most expeditious and just way to arrive at a final determination on the issue of compensation. The Caring Society's motion was brought in response to Canada's motion, it raised issues of public interest, and both the Caring Society and the Respondents who supported the motion were acting in a public interest role. For these reasons, it is appropriate to not award costs to Canada in relation to the Caring Society's motion, including to not award costs against NAN.

24. The Bill of Costs filed with this affidavit outlines the actual costs, the costs at 50%, the costs at 90%, as well as an estimate of what a costs award might look like with reference to Tariff B. It additionally details the disbursements related to traveling to Ottawa from Toronto for cross-examinations and the hearing of the motions, as well as accommodations while in Ottawa for these purposes.

C. In the Alternative, A Lump Sum Award Against Canada is Appropriate

25. In the alternative, should this Court find that Canada's motion was not devoid of merit but merely of little merit, NAN seeks a lump sum award of \$20,018.83, representing 50% of its legal fees plus disbursements. Such an award would achieve the twin goals of indemnification and discouraging suits with little merit.¹⁷

D. Conclusion

26. Considering the purposes which costs awards are intended to serve, Rule 3, pertinent factors listed at Rule 400(3), and the circumstances of this case, NAN submits it is appropriate for the Court to grant costs awards against Canada to NAN on a solicitor-client basis or, in the alternative, in a lump sum representing 50% of legal fees plus disbursements.

¹⁷ *Whalen*, at paras 25, 30, 32.

27. NAN and the other Respondents were successful in opposing Canada's motion to stay, which had no – or at best little – reasonable prospect of success. Canada's motion was frivolous, unnecessary, or at best brought out of "excessive caution" (R. 400(3)(k)). While Canada's motion did not raise overly complex issues, a significant amount of time had to be spent to respond thoroughly to the motion, including by reviewing lengthy affidavits and conducting relevant research. In this public interest litigation, NAN is not acting for personal or financial gain, and there is undoubtedly an imbalance between NAN's financial means and the financial means of the Government of Canada.

PART IV: ORDER SOUGHT

28. NAN seeks an order of costs against Canada to NAN on a solicitor-client basis for 90% of its counsel fees on the two motions plus disbursements, for total of \$32,767.49. In the alternative, NAN seeks an order of costs against Canada of a lump sum of \$20,018.83, representing 50% of counsel fees plus disbursements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, this 7th day of January 2020.



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PART V: LIST OF AUTHORITIES

1. *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39.
2. *Attorney General of Canada v First Nations Child and Family Caring Society et al.*, 2019 FC 1529.
3. *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119.
4. *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [2003] 3 SCR 371.
5. *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25.
6. *Loblaws Inc. v Columbia Insurance Company, the Pampered Chef Ltd., and Pampered Chef—Canada Corp*, 2019 FC 1434.
7. *Quebec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453.

APPENDIX A**Federal Courts Rules, SOR/98-106****General principle**

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

PART 11**Costs****Awarding of Costs Between Parties****Discretionary powers of Court**

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Crown

(2) Costs may be awarded to or against the Crown.

Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

- (a) the result of the proceeding;
- (b) the amounts claimed and the amounts recovered;
- (c) the importance and complexity of the issues;
- (d) the apportionment of liability;
- (e) any written offer to settle;
- (f) any offer to contribute made under rule 421;
- (g) the amount of work;
- (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;
- (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(k) whether any step in the proceeding was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(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;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

(n.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the litigation, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute in the proceeding; and

(o) any other matter that it considers relevant.

Tariff B

(4) The 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.

Directions re assessment

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

Further discretion of Court

(6) Notwithstanding any other provision of these Rules, the Court may

(a) award or refuse costs in respect of a particular issue or step in a proceeding;

(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;

(c) award all or part of costs on a solicitor-and-client basis; or

(d) award costs against a successful party.

Award and payment of costs

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

Costs of motion

401 (1) The Court may award costs of a motion in an amount fixed by the Court.

Costs payable forthwith

(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.

Costs of discontinuance or abandonment

402 Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

Motion for directions

403 (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,

(a) by serving and filing a notice of motion within 30 days after judgment has been pronounced; or

(b) in a motion for judgment under subsection 394(2).

Motion after judgment

(2) A motion may be brought under paragraph (1)(a) whether or not the judgment included an order concerning costs.

Same judge or prothonotary

(3) A motion under paragraph (1)(a) shall be brought before the judge or prothonotary who signed the judgment.

Liability of solicitor for costs

404 (1) Where costs in a proceeding are incurred improperly or without reasonable cause or are wasted by undue delay or other misconduct or default, the Court may make an order against any solicitor whom it considers to be responsible, whether personally or through a servant or agent,

(a) directing the solicitor personally pay the costs of a party to the proceeding; or

(b) disallowing the costs between the solicitor and the solicitor's client.

Show cause by solicitor

(2) No order under subsection (1) shall be made against a solicitor unless the solicitor has been given an opportunity to be heard.

Notice to client

(3) The Court may order that notice of an order against a solicitor made under subsection (1) be given to the solicitor's client in a manner specified by the Court.

Assessment of Costs

Assessment by assessment officer

405 Costs shall be assessed by an assessment officer.

Obtaining appointment

406 (1) A party who is entitled to costs may obtain a notice of appointment for assessment by filing a bill of costs, a copy of the order or other document giving rise to the party's entitlement to costs and any reasons, including dissenting reasons, given in respect of that order.

Notice of appointment

(2) A notice of appointment for assessment and the bill of costs to be assessed shall be served on every other interested party at least 10 days before the date fixed for the assessment.

Assessment according to Tariff B

407 Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

Directions

408 (1) An assessment officer may direct the production of books and documents and give directions for the conduct of an assessment.

Set-off of costs

(2) Where parties are liable to pay costs to each other, an assessment officer may adjust those costs by way of set-off.

Costs of assessment

(3) An assessment officer may assess and allow, or refuse to allow, the costs of an assessment to either party.

Factors in assessing costs

409 In assessing costs, an assessment officer may consider the factors referred to in subsection 400(3).

Costs of amendment

410 (1) Unless the Court orders otherwise, the costs occasioned by an amendment to a pleading made without leave shall be borne by the party making the amendment.

Costs of motion to extend time

(2) Unless the Court orders otherwise, the costs of a motion for an extension of time shall be borne by the party bringing the motion.

Costs of abandoned motion

411 The costs of a motion that is abandoned or deemed to be abandoned may be assessed on the filing of

- (a) the notice of motion, together with an affidavit stating that the notice was not filed within the prescribed time or that the moving party did not appear at the hearing of the motion; or
- (b) where a notice of abandonment was served, the notice of abandonment.

Costs of discontinued proceeding

412 The costs of a proceeding that is discontinued may be assessed on the filing of the notice of discontinuance.

Accounts of solicitor for Crown

413 (1) Where requested by the Attorney General of Canada, a prothonotary shall assess any costs payable by the Crown to a solicitor acting for the Crown in a proceeding.

Existing rights

(2) Subsection (1) shall not be construed so as to prejudice any rights between a solicitor and a client in respect of the recovery of the solicitor's costs in any competent court.

Review of assessment

414 A party who is dissatisfied with an assessment of an assessment officer who is not a judge may, within 10 days after the assessment, serve and file a notice of motion to request that a judge of the Federal Court review the award of costs.

Security for Costs Application

415 Rules 416 to 418 apply, with such modifications as are necessary, to parties bringing and defending counterclaims and third party claims, to applicants and respondents in an application and to appellants and respondents in an appeal.

Where security available

416 (1) Where, on the motion of a defendant, it appears to the Court that

- (a) the plaintiff is ordinarily resident outside Canada,
- (b) the plaintiff is a corporation, an unincorporated association or a nominal plaintiff and there is reason to believe that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant if ordered to do so,

(c) the plaintiff has not provided an address in the statement of claim, or has provided an incorrect address therein, and has not satisfied the Court that the omission or misstatement was made innocently and without intention to deceive,

(d) the plaintiff has changed address during the course of the proceeding with a view to evading the consequences of the litigation,

(e) the plaintiff has another proceeding for the same relief pending elsewhere,

(f) the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part,

(g) there is reason to believe that the action is frivolous and vexatious and the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant, if ordered to do so, or

(h) an Act of Parliament entitles the defendant to security for costs,

the Court may order the plaintiff to give security for the defendant's costs.

Staging

(2) The Court may order that security for the costs of a defendant be given in stages, as costs are incurred.

Further steps

(3) Unless the Court orders otherwise, until the security required by an order under subsection (1) or (2) has been given, the plaintiff may not take any further step in the action, other than an appeal from that order.

Party temporarily resident in Canada

(4) A party ordinarily resident outside Canada may be ordered to give security for costs, notwithstanding that the party may be temporarily resident in Canada.

Voluntary payment into court

(5) In the absence of an order under subsection (1), a plaintiff may, at any time after filing a statement of claim, pay an amount into court as security for the defendant's costs and give notice of the payment to the defendant.

Increase in security

(6) The Court may, on the motion of a defendant, order a plaintiff who has paid an amount into court under subsection (5) to pay in an additional amount as security for the defendant's costs.

Grounds for refusing security

417 The Court may refuse to order that security for costs be given under any of paragraphs 416(1)(a) to (g) if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit.

How security to be given

418 Where a person is required under these Rules or an Act of Parliament to give security for costs or for any other purpose, unless otherwise ordered by the Court or required by that Act, the person may do so

(a) by paying the required amount into court; or

(b) by filing a bond for the required amount that has been approved by an order of the Court.

Offer to Settle

Application to other proceedings

419 Rules 420 and 421 apply, with such modifications as are necessary, to parties bringing and defending counterclaims and third party claims, to applicants and respondents in an application and to appellants and respondents in an appeal.

Consequences of failure to accept plaintiff's offer

420 (1) Unless otherwise ordered by the Court and subject to subsection (3), where a plaintiff makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and costs calculated at double that rate, but not double disbursements, after that date.

Consequences of failure to accept defendant's offer

(2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle,

(a) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment; or

(b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.

Conditions

(3) Subsections (1) and (2) do not apply unless the offer to settle

(a) is made at least 14 days before the commencement of the hearing or trial; and

(b) is not withdrawn and does not expire before the commencement of the hearing or trial.

Offers without costs

420.1 (1) In circumstances where a written offer to settle does not provide for the settlement of the issue of costs, if a party requests the Court to consider rule 420, the Court, in ascertaining whether the judgment granted is more or less favourable than the offer to settle, shall not have regard to costs awarded in the judgment or that would otherwise be awarded.

Application to court

(2) For greater certainty, if a written offer to settle that does not provide for the settlement of the issue of costs is accepted, a party to the offer may apply to the Court for an order determining costs.

Offer to contribute

421 Subsection 420(2) applies to a third party, or to one of two or more defendants who are alleged to be jointly and severally liable to the plaintiff in respect of a claim, who makes a written offer to other defendants or third parties to contribute toward a settlement of the claim.

Disclosure of offer to Court

422 No communication respecting an offer to settle or offer to contribute shall be made to the Court, other than to a case management judge or prothonotary assigned under rule 383(c) or to a judge or prothonotary at a pre-trial conference, until all questions of liability and the relief to be granted, other than costs, have been determined.

TARIFF B (Rules 400 and 407)

Counsel Fees and Disbursements Allowable on Assessment

Bill of costs

1 (1) A party seeking an assessment of costs in accordance with this Tariff shall prepare and file a bill of costs.

Content of bill of costs

(2) A bill of costs shall indicate the assessable service, the column and the number of units sought in accordance with the table to this Tariff and, where the service is based on a number of hours, shall indicate the number of hours claimed and be supported by evidence thereof.

Disbursements

(3) A bill of costs shall include disbursements, including

- (a) payments to witnesses under Tariff A; and
- (b) any service, sales, use or consumption taxes paid or payable on counsel fees or disbursements allowed under this Tariff.

Evidence of disbursements

(4) No disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party.

Calculation

2 (1) On an assessment, the assessment officer shall determine assessable costs by applying the formula

$$A \times B + C$$

Where **A** is

- (a) the number of units allocated to each assessable service, or
- (b) where the service is based on a number of hours, the number of units allocated to that service multiplied by the number of hours;

B

is the unit value as established in section 3 and adjusted in accordance with section 4; and

C

is the amount of assessable disbursements.

Fractional amounts

- (2) On an assessment, an assessment officer shall not allocate to a service a number of units that includes a fraction.

Unit value

3 The unit value as at January 1, 1998 is \$100.

Adjustment of unit value

4 (1) On April 1 in each year, the Chief Justices of the Court of Appeal and the Federal Court, in consultation with one another, shall adjust the unit value by multiplying it by the amount determined by the formula

$$A/B \times 100$$

where

A

is the Consumer Price Index for all items for Canada, as published by Statistics Canada under the authority of the *Statistics Act*, in respect of December of the preceding year; and

B

is the Consumer Price Index for all items for Canada, as published by Statistics Canada under the authority of the *Statistics Act*, in respect of December 1994.

Rounding of result

- (2) Where a calculation under subsection (1) results in an amount that is not evenly divisible by 10, the resulting amount shall be

(a) where it is less than 100, rounded to the next higher amount that is evenly divisible by 10; and

(b) where it is greater than 100, rounded to the next lower amount that is evenly divisible by 10.

Communication of adjusted unit value

(3) The Chief Justices shall without delay communicate adjustments to the unit value made under subsection (1) to their respective courts and to their assessment officers.

ATTORNEY GENERAL OF CANADA

-and-

**FIRST NATIONS CHILD AND FAMILY CARING
SOCIETY OF CANADA ET AL.**

Applicant

Respondents

Court File No.: T-1621-19

FEDERAL COURT

FACTUM

(Re Costs – Motions of November 25-26, 2019)

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