Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant
(Moving Party)

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent
(Responding Party)

**COSTS SUBMISSIONS OF THE RESPONDENT,
CANADIAN TRANSPORTATION AGENCY**
(Motion for Mandatory Interlocutory Injunction)

Allan Matte
Senior Counsel
Legal Services Directorate
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec
K1A 0N9

Tel: 819.953.0611
Fax: 819.953.9269
Allan.Matte@otc-cta.gc.ca
Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca

Counsel for the Respondent,
Canadian Transportation Agency

TO: The Registrar
Federal Court of Appeal

AND TO: **SIMON LIN**
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia
V5C 6C6

Email: simonlin@evolinklaw.com

Counsel for the Applicant

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant
(Moving Party)

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent
(Responding Party)

INDEX

Court File No. A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant
(Moving Party)

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent
(Responding Party)

**COSTS SUBMISSIONS OF THE RESPONDENT,
CANADIAN TRANSPORTATION AGENCY**
(Motion for Mandatory Interlocutory Injunction)

A. Overview

1. The Applicant's motion for an interlocutory injunction has been dismissed by the Court.[1] The motion was frivolous, an abuse of process and should not have been brought. As the successful party, the Canadian Transportation Agency ("Agency") should be awarded costs.

B. The successful party is entitled to costs

2. It is a well-recognized presumption that costs should follow the event, that is, the successful party should be awarded costs unless there is reason for otherwise.[2]

3. The Agency was completely successful in defending the motion for interlocutory relief. The Court accepted that the Applicant had failed to establish a strong *prima facie* case because the statements that are the subject of the application for judicial review ("Application") are not amenable to judicial review. The Court accepted that the statements do not determine the rights of airline passengers to refunds where their flights have been cancelled as a result of the

---

[1] *Air Passenger Rights v Canada (Transportation Agency)*, 2020 FCA 92.

[2] *Stubicar v Canada*, 2020 FCA 66 at para 27; *Knebush v Maygard*, 2014 FC 1247 at para 24; *Carten & Gibbs v Canada*, 2011 FCA 48 at para 16. *See also Federal Courts Rules*, SOR/98-106, r 400(3)(a) [*Federal Courts Rules*], which provides specifically that the result of the proceeding is one of the factors that the Court may consider in exercising its discretion to award costs.

COVID-19 pandemic. The Agency also successfully argued that the Applicant is not affected by the Agency's statements, and that air passengers are not affected either.

4. In light of the Agency's complete success in defending the motion for interlocutory relief, it is submitted that the Agency would be entitled to its costs. Normally, the Agency would not seek costs in the context of a *bona fides* challenge of an Agency decision. However, this was not such a challenge.

C. The motion was devoid of merit

5. In exercising its discretion to award costs the Court may also consider whether any step in the proceeding was improper, vexatious or unnecessary.[3] Both the interim *ex parte* motion and the motion for interlocutory relief were completely devoid of merit. They should not have been brought. This factor further supports an award of costs in the Agency's favour.

6. The Applicant acknowledged in its motion materials that the statement which is the subject of the Application has no legal effect.[4] Mr. Lukacs, the directing mind of the Applicant and frequent litigant before the Courts, was even stating publicly, while pursuing the interlocutory motion, that the Agency's statement "doesn't affect the rights of passengers or obligations of airlines".[5] Put simply, the Applicant knew that the rights of passengers are not affected by the Agency's statement, and yet pursued these claims regardless. The motions appear to have been pursued more as a means to garner publicity and to protest the Agency's statements, rather than to serve any legitimate purpose. This is an abuse of the Court's process which is particularly troublesome given that it was undertaken in the context of a global pandemic when government offices are closed and the Court's resources are strained.

D. The public interest is not engaged

7. This Court has properly noted that the Applicant has not requested nor has it been granted public interest standing. A review of the motion and the Court's decision establishes that the Applicant was not acting in the public interest in bringing the motion.

---

[3] *Federal Courts Rules*, *supra* note 2 at r 400(3)(k).

[4] Memorandum of Fact and Law of the Applicant dated April 7, 2020 at paras 3, 61 and 63.

[5] Global News, "Canadian Transportation Agency clarifies statement on travel vouchers during COVID-19 pandemic" (24 April 2020), online: <https://globalnews.ca/news/6861073/cta-travel-voucher-statements/>, Affidavit of Meredith Desnoyers, sworn the 28th day of April, 2020, Exhibit "P".

8. Both parties agreed, and the Court accepted, that the Agency's statements posted on its website do not affect the rights of passengers or the obligations of air carriers. The motion therefore did not raise any issues of public interest. The Applicant cannot therefore rely on public interest as a justification for bringing the motion for interlocutory injunctive relief.

9. The Applicant argues that the motion brought about some "behavioural modification" on the part of the Agency in the form of the FAQ's issued on April 22, 2020.[6] However, the Court completely dismissed the Applicant's motion for interlocutory relief. The Court did not order the Agency to issue the FAQ's, or take any action of any form. The Applicant cannot therefore claim that the motion had any level of success that would justify a costs award.

E. The Applicant's conduct should be addressed by an award of costs

10. There are two specific aspects of the Applicant's conduct in pursuing the interim and interlocutory motions which warrant the Court's attention.

11. Firstly, the evidence filed by the Agency in response to the interlocutory motion, and the Agency's responding submissions, establish clearly that this was not an urgent matter. The Applicant pursued, first, an interim *ex parte* motion for injunctive relief, and then this interlocutory motion on notice on an expedited basis. Moreover, the Applicant did this in the context of the COVID-19 pandemic when the Agency's offices were closed and the Court had issued a general stay of proceedings. As revealed in the Agency's materials, Mr. Lukacs was, while the interlocutory motion was being aggressively pursued purportedly in the interest of air passengers, stating publicly that the rights of air passengers were not affected by the Agency's statements. Not only was the motion without merit, but the Applicant's decision to pursue the matter on an expedited basis was improper and an abuse of the Court's process.[7]

12. Secondly, the Applicant improperly moved to obtain a Certificate of Non-Attendance on the cross-examination of the Agency's affiant. This was done when the Agency made it clear

---

[6] Applicant's written representations on costs of the interlocutory injunctions motion dated June 1, 2020 at para 17.

[7] Mr. Lukacs has brought previous proceedings on an expedited basis which were then dismissed by the Court. Mr. Lukacs sought judicial review challenging the jurisdiction of the Agency to conduct an Inquiry, and then sought leave to appeal the decision which resulted from that Inquiry – *Lukacs v Canada (Transportation Agency)*, 2016 FCA 174. The application for judicial review was dismissed as moot. The Court determined that there was no reason why it should be pursued, and that the only impact of the application would be the incurring of unnecessary costs by the parties and the expenditure of unnecessary time by the Court – *Lukacs v Canada (Transportation Agency)*, 2016 FCA 227. The related appeal was dismissed on the merits - *Lukacs v Canada (Transportation Agency)*, 2016 FCA 314.

that the witness would not be attending, and the issues of whether the Applicant should be permitted to cross-examine the Agency's affiant, when the cross-examination should proceed if permitted, and the timing of submissions were a transcript to be filed, were all before the Court by way of a request for Directions. The Applicant then advised the Court that it did not intend to cross-examine the Agency's affiant and instead intended to rely on the failure to attend.[8] This establishes clearly that the Applicant never had any *bona fides* reason to cross-examine the Agency's affiant.

F. The Agency is requesting costs

13. The Agency's response to the motion does not contain a request for costs. For the reasons set out below, it is submitted that the Court retains absolute discretion to award costs to the Agency.

14. By way of these submissions, the Agency is requesting costs. The Applicant has notice of this request and a right to respond thereto. There is therefore no prejudice to the Applicant should the Court consider whether to grant the Agency costs.

15. The jurisprudence relied upon by the Applicant indicates that costs should not be awarded where they have not been requested. This is an issue of procedural fairness because a party should have notice of the claim being made against them. None of these cases apply in these circumstances.

16. In *Bolugun v Canada*[9] the Court concluded that costs should not have been awarded on an application for judicial review since none were requested either in written submissions or in the oral submissions before the Court. In *Exeter v Canada (Attorney General)*[10] it was determined that costs should not be awarded if not requested because to do so would be a breach of procedural fairness since the party against whom they are awarded would have no notice or an opportunity to respond.[11] In *Chen v Canada (Public Safety and Emergency Preparedness)*[12]

---

[8] *See* Agency's Request for Directions dated April 30, 2020, and subsequent correspondence dated April 30, 2020, May 1, 2020, and May 3, 2020, filed with the Court.

[9] 2005 FCA 350.

[10] 2013 FCA 134.

[11] *Ibid* at paras 12 and 16.

[12] 2019 FCA 170.

the Court cites the rule as stated in *Exeter*, and confirms that the rule is based on procedural fairness. However, in *Chen*, the parties had agreed on the quantum of costs which should be awarded. There was no allegation of a failure to request costs. Moreover, the Court confirmed that the discretion of the Court to award costs is unfettered.[13]

17. It follows that since the Applicant has notice of the Agency's request for costs, the Court retains the discretion to award them to the Agency.

G. The Applicant should not be awarded costs

18. The Applicant's request for costs is without merit. Firstly, the Applicant points to the Agency's failure to attend a cross-examination. However, as stated above, the Applicant's conduct in obtaining a Certificate of Non-Attendance in the circumstances warrants a strong statement from the Court condemning the Applicant's conduct, not an award of costs in its favour. Secondly the Applicant relies on its contention that the motion somehow engaged the public interest. However, there is no evidence that the Applicant was pursuing any public interest in this case.

19. The Agency seeks costs in the modest amount of $750.00 which represents the mid-range of Column III of Tariff B for a response to a contested motion.[14]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, in the Province of Ontario, this 5th day of June, 2020.

Allan Matte
Senior Counsel
Canadian Transportation Agency
Legal Services Directorate
15 Eddy Street, 19th Floor
Gatineau, Quebec K1A 0N9
Tel: (819) 953-0611 / Fax: (819) 953-9269
Email: Allan.Matte@otc-cta.gc.ca
Email: Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca
Counsel for the Respondent, Canadian Transportation Agency

[13] *Ibid* at para 62.

[14] *Federal Courts Rules*, *supra* note 2 at Tariff B, Item #5, 5 units @ $150.00 = $750.00.

Appendix A

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to May 17, 2020

Last amended on June 17, 2019

À jour au 17 mai 2020

Dernière modification le 17 juin 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Setting aside or variance

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

Effect of order

(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

Annulation

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :

a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

b) l'ordonnance a été obtenue par fraude.

Effet de l'ordonnance

(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

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;

PARTIE 11

Dépens

Adjudication des dépens entre parties

Pouvoir discrétionnaire de la Cour

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

La Couronne

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

Facteurs à prendre en compte

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

a) le résultat de l'instance;

b) les sommes réclamées et les sommes recouvrées;

c) l'importance et la complexité des questions en litige;

d) le partage de la responsabilité;

e) toute offre écrite de règlement;

f) toute offre de contribution faite en vertu de la règle 421;

g) la charge de travail;

(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.

h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) le nombre, la complexité ou la nature technique des questions en litige,

(iii) la somme en litige;

o) toute autre question qu'elle juge pertinente.

Tarif B

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

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 × 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.

TARIF B

(règles 400 et 407)

Honoraires des avocats et débours qui peuvent être acceptés aux fins de la taxation des frais

Mémoire de frais

1 (1) La partie qui demande la taxation des frais selon le présent tarif prépare et dépose un mémoire de frais.

Contenu

(2) Le mémoire de frais indique, pour chaque service à taxer, la colonne applicable et le nombre d'unités demandé selon le tableau ainsi que, lorsque le service est taxable selon un nombre d'heures, le nombre d'heures réclamé, avec preuve à l'appui.

Débours

(3) Le mémoire de frais comprend les débours, notamment :

(a) les sommes versées aux témoins selon le tarif A;

(b) les taxes sur les services, les taxes de vente, les taxes d'utilisation ou de consommation payées ou à payer sur les honoraires d'avocat et sur les débours acceptés selon le présent tarif.

Preuve

(4) À l'exception des droits payés au greffe, aucun débours n'est taxé ou accepté aux termes du présent tarif à moins qu'il ne soit raisonnable et que la preuve qu'il a été engagé par la partie ou est payable par elle n'est fournie par affidavit ou par l'avocat qui comparaît à la taxation.

Taxation

2 (1) Lors de la taxation, l'officier taxateur détermine les dépens taxables au moyen de la formule suivante :

A × B + C

où :

A représente :

(a) soit le nombre d'unités attribué à chaque service à taxer,

(b) soit si le service est taxable selon un nombre d'heures, le nombre d'unités attribué à ce service multiplié par le nombre d'heures;

B la valeur unitaire établie à l'article 3 et rajustée selon l'article 4;

C les débours taxables.

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 × 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.

Nombre fractionnaire

(2) Aux fins de la taxation, l'officier taxateur ne peut attribuer à un service un nombre d'unités comportant une fraction.

Valeur unitaire

3 Au 1er janvier l998, la valeur unitaire est de 100 $.

Rajustement

4 (1) Le 1er avril de chaque année, les juges en chef de la Cour d'appel fédérale et de la Cour fédérale, après s'être consultés, rajustent la valeur unitaire en la multipliant par le résultat de la formule suivante :

A/B × 100

où :

A représente l'indice d'ensemble des prix à la consommation pour le Canada, publié par Statistique Canada en vertu de la *Loi sur la statistique*, pour le mois de décembre de l'année précédente;

B l'indice d'ensemble des prix à la consommation pour le Canada, publié par Statistique Canada en vertu de la *Loi sur la statistique*, pour le mois de décembre 1994.

Arrondissement

(2) Dans le cas où le résultat de la formule visée au paragraphe (1) n'est pas divisible par 10, il est arrondi de la façon suivante :

(a) si le résultat est inférieur à 100, il est arrondi au montant supérieur suivant qui est divisible par 10;

(b) si le résultat est supérieur à 100, il est arrondi au montant inférieur précédent qui est divisible par 10.

Valeur unitaire communiquée

(3) Lorsque la valeur unitaire est rajustée, les juges en chef communiquent sans délai la nouvelle valeur unitaire à leurs cours respectives et aux officiers taxateurs de celles-ci.

TABLE

		Number of Units				
Item	Assessable Service	Column I	Column II	Column III	Column IV	Column V
	A *Originating documents and Other Pleadings*					
1	Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records.	1 - 3	2 - 5	4 - 7	5 - 9	7 - 13
2	Preparation and filing of all defences, replies, counterclaims or respondents' records and materials.	1 - 3	2 - 5	4 - 7	5 - 9	7 - 13

Item	Assessable Service	Number of Units				
		Column I	Column II	Column III	Column IV	Column V
3	Amendment of documents, where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party.	1 - 2	1 - 4	2 - 6	3 - 7	4 - 8
	B *Motions*					
4	Preparation and filing of an uncontested motion, including all materials.	1 - 2	1 - 3	2 - 4	2 - 5	2 - 6
5	Preparation and filing of a contested motion, including materials and responses thereto.	1 - 3	2 - 5	3 - 7	4 - 9	5 - 11
6	Appearance on a motion, per hour.	1	1 - 2	1 - 3	1 - 4	1 - 5
	C *Discovery and Examinations*					
7	Discovery of documents, including listing, affidavit and inspection.	1 - 2	1 - 3	2 - 5	3 - 9	5 - 11
8	Preparation for an examination, including examinations for discovery, on affidavits, and in aid of execution.	1 - 2	1 - 3	2 - 5	4 - 8	7 - 11
9	Attending on examinations, per hour.	0 - 1	0 - 2	0 - 3	0 - 4	0 - 5
	D *Pre-Trial and Pre-Hearing Procedures*					
10	Preparation for conference, including memorandum.	1 - 2	2 - 5	3 - 6	4 - 8	7 - 11
11	Attendance at conference, per hour.	1	1 - 2	1 - 3	1 - 4	1 - 5
12	Notice to admit facts or admission of facts; notice for production at hearing or trial or reply thereto.	1	1 - 2	1 - 3	1 - 4	1 - 5
13	Counsel fee:					
	(a) preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence, preparation of witnesses, issuance of *subpoenas* and other services not otherwise particularized in this Tariff; and	1	1 - 2	2 - 5	3 - 9	4 - 11
	(b) preparation for trial or hearing, per day in Court after the first day.	1	1	2 - 3	2 - 6	3 - 8
	E *Trial or Hearing*					
14	Counsel fee:					
	(a) to first counsel, per hour in Court; and	1	1 - 2	2 - 3	2 - 4	3 - 5
	(b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).					
15	Preparation and filing of written argument, where requested or permitted by the Court.	1 - 3	2 - 5	3 - 7	4 - 9	5 - 11
	F *Appeals to the Federal Court of Appeal*					
16	Counsel fee:					

Appendix B

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: **MACTAVISH J.A.**

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 22, 2020.

REASONS FOR ORDER BY: MACTAVISH J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: **MACTAVISH J.A.**

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

MACTAVISH J.A.

[1] As is the case with so many other areas of life today, the airline industry and airline passengers have been seriously affected by the COVID-19 pandemic. International borders have been closed, travel advisories and bans have been instituted, people are not travelling for non-essential reasons and airlines have cancelled numerous flights.

[2] In response to this unprecedented situation, the Canadian Transportation Agency (CTA) issued two public statements on its website that suggest that it could be reasonable for airlines to provide passengers with travel vouchers when flights are cancelled for pandemic-related reasons, rather than refunding the monies that passengers paid for their tickets.

[3] Air Passenger Rights (APR) is an advocacy group representing and advocating for the rights of the public who travel by air. It has commenced an application for judicial review of the CTA's public statements, asserting that they violate the CTA's own *Code of Conduct*, and mislead passengers as to their rights when their flights are cancelled. In the context of this application, APR has brought a motion in writing seeking an interlocutory order that, among other things, would require that the statements be removed from the CTA's website. It also seeks to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the Agency's public statements.

[4] For the reasons that follow, I have concluded that APR has not satisfied the tripartite injunctive test. Consequently, the motion will be dismissed.

1. Background

[5] In early 2020, the effects of the COVID-19 coronavirus began to be felt in North America, rapidly reaching the level of a pandemic. On March 25, 2020, the CTA posted a statement on its website dealing with flight cancellations. The statement, entitled "Statement on

Vouchers" notes the extraordinary circumstances facing the airline industry and airline customers because of the pandemic, and the need to strike a "fair and sensible balance between passenger protection and airlines' operational realities" in the current circumstances.

[6] The Statement on Vouchers observes that passengers who have no prospect of completing their planned itineraries "should not be out-of-pocket for the cost of cancelled flights". At the same time, airlines facing enormous drops in passenger volumes and revenues "should not be expected to take steps that could threaten their economic viability".

[7] The Statement on Vouchers states that any complaint brought to the CTA will be considered on its own merits. However, the Statement goes on to state that, generally speaking, the Agency believes that "an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time". The Statement then suggests that a 24-month period for the redemption of vouchers "would be considered reasonable in most cases".

[8] Concurrent with the posting of the Statement on Vouchers, the CTA published an amendment to a notice already on its website entitled "Important Information for Travellers During COVID-19" (the Information Page), which incorporates references to the Statement on Vouchers.

[9] These statements are the subject of the underlying application for judicial review.

2. APR's Arguments

[10] APR submits that there is an established body of CTA jurisprudence that confirms passengers' right to a refund where air carriers are unable to provide air transportation, including cases where flight cancellations are for reasons beyond the airline's control. According to APR, this jurisprudence is consistent with the common law doctrine of frustration, the doctrine of *force majeure* and common sense. The governing legislation further requires airlines to develop reasonable policies for refunds when airlines are unable to provide service for any reason.

[11] According to APR, statements on the Information Page do not just purport to relieve air carriers from having to provide passenger refunds where flights are cancelled for reasons beyond the airlines' control, including pandemic-related situations. They also purport to relieve airlines from their obligation to provide refunds where flights are cancelled for reasons that are within the airlines' control, including where cancellation is required for safety reasons.

[12] APR further contends that the impugned statements by the CTA are tantamount to an unsolicited advance ruling as to how the Agency will treat passenger complaints about refunds from air carriers where flights are cancelled for reasons relating to the COVID-19 pandemic. The statements suggest that the CTA is leaning heavily towards permitting the issuance of vouchers in lieu of refunds, and that it will very likely dismiss passenger complaints with respect to airlines' failure to provide refunds during the pandemic, regardless of the reason for the flight cancellation. According to APR, this creates a reasonable apprehension that CTA members will not deal with passenger complaints fairly.

3. The Test for Injunctive Relief

[13] The parties agree that in determining whether APR is entitled to interlocutory injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[14] That is, the Court must consider three questions:

1) Whether APR has established that there is a serious issue to be tried in the underlying application for judicial review;

2) Whether irreparable harm will result if the injunction is not granted; and

3) Whether the balance of convenience favours the granting of the injunction.

[15] The *RJR-MacDonald* test is conjunctive, with the result that an applicant must satisfy all three elements of the test in order to be entitled to relief: *Janssen Inc. v. Abbvie Corp.*, 2014 FCA 112, 120 C.P.R. (4th) 385 at para. 14.

4. Has APR Raised a Serious Issue?

[16] The threshold for establishing the existence of a serious issue to be tried is usually a low one, and applicants need only establish that the underlying application is neither frivolous nor vexatious. A prolonged examination of the merits of the application is generally neither necessary nor desirable: *RJR-MacDonald*, above at 335, 337-338.

[17] With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

[18] However, APR also seeks mandatory orders compelling the CTA to remove the two statements from its website and directing it to "clarify any misconceptions for passengers who previously contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry". It further seeks a mandatory order requiring that the CTA bring this Court's order and the removal or clarification of the CTA's previous statements to the attention of airlines and a travel association.

[19] A higher threshold must be met to establish a serious issue where a mandatory interlocutory injunction is sought compelling a respondent to take action prior to the determination of the underlying application on its merits. In such cases, the appropriate inquiry is whether the party seeking the injunction has established a strong *prima facie* case: ***R. v.*** ***Canadian Broadcasting Corp.***, 2018 SCC 5, [2018] 1 S.C.R. 196 at para. 15. That is, I must be satisfied upon a preliminary review of the case that there is a strong likelihood that APR will be ultimately successful in its application: *C.B.C.*, above at para. 17.

[20] As will be explained below, I am not persuaded that APR has established a strong *prima facie* case here as the administrative action being challenged in its application for judicial review is not amenable to judicial review.

[21] APR concedes that the statements on the CTA website do not reflect decisions, determinations, orders or legally-binding rulings on the part of the Agency. It notes, however, that subsection 18.1(1) of the *Federal Courts Act* does not limit the availability of judicial review to formal decisions or orders, stating rather that applications may be brought "by anyone directly affected by the matter in respect of which relief is sought" [my emphasis].

[22] Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[23] For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al*., 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's

statements "purport[t] to provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

[24] I will return to the issue of the impact of the CTA's statements on APR in the context of my discussion of irreparable harm, but suffice it to say at this juncture that there is no suggestion that APR is itself directly affected by the statements in issue. The statements on the CTA website also do not determine the right of airline passengers to refunds where their flights have been cancelled by airlines for pandemic-related reasons.

[25] Noting the current extraordinary circumstances, the statements simply suggest that having airlines provide affected passengers with vouchers or credits for future travel "could be" an appropriate approach in the present context, as long as these vouchers or credits do not expire in an unreasonably short period of time. This should be contrasted with the situation that confronted the Federal Court in *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750, relied on by APR, where the statement in issue included a clear statement of how, in the respondent's view, the law was to be interpreted and the statement in issue was intended to be coercive in nature.

[26] As a general principle, CTA policy documents are not binding on it as a matter of law: *Canadian Pacific Railway Company v. Cambridge (City)*, 2019 FCA 254, 311 A.C.W.S. (3d) 416 at para. 5. Moreover, in this case the Statement on Vouchers specifically states that "any specific situation brought before the Agency will be examined on its merits". It thus remains open to affected passengers to file complaints with the CTA (which will be dealt with once the

current suspension of dispute resolution services has ended) if they are not satisfied with a travel voucher, and to pursue their remedies in this Court if they are not satisfied with the Agency's decisions.

[27] It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

5. Irreparable Harm

[28] A party seeking interlocutory injunctive relief must demonstrate with clear and non-speculative evidence that it will suffer irreparable harm between now and the time that the underlying application for judicial review is finally disposed of.

[29] APR has not argued that it will itself suffer irreparable harm if the injunction is not granted. It relies instead on the harm that it says will befall Canadian airline passengers whose flights have been cancelled for pandemic-related reasons. However, while APR appears to be pursuing this matter as a public interest litigant, it has not yet sought or been granted public interest standing.

[30] As a general rule, only harm suffered by the party seeking the injunction will qualify under this branch of the test: *RJR-MacDonald*, above at 341; *Manitoba (Attorney General) v.*

Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 at 128. There is a limited exception to this principle in that the interests of those individuals dependent on a registered charity may also be considered under this branch of the test: *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, 440 N.R. 232 at paras. 33-34; *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265, [2010] 1 C.T.C. 161 at para. 17. While APR is a not-for-profit corporation, there is no suggestion that it is a registered charity.

[31] I am also not persuaded that irreparable harm has been established, even if potential harm to Canadian airline passengers is considered.

[32] Insofar as APR seeks to enjoin the CTA from dealing with passenger complaints, it asserts that the statements in issue were published contrary to the CTA's own *Code of Conduct*. This prohibits members from publicly expressing opinions on potential cases or issues relating to the work of the Agency that may create a reasonable apprehension of bias on the part of the member. According to APR, the two statements at issue here create a reasonable apprehension of bias on the part of the CTA's members such that they will be unable to provide complainants with a fair hearing.

[33] Bias is an attitude of mind that is unique to an individual. As a result, an allegation of bias must be directed against a specific individual who is alleged to be unable to bring an impartial mind to bear on a matter: *E.A. Manning Ltd. v. Ontario Securities Commission*, 23 O.R.

(3d) 257, 32 Admin. L.R. (2d) 1 (C.A.), citing *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (C.A.).

[34] As is the case with many administrative bodies, the CTA carries out both regulatory and adjudicative functions. It resolves specific commercial and consumer transportation-related disputes and acts as an industry regulator issuing permits and licences to transportation providers. The CTA also provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers.

[35] There is no evidence before me that the members of the CTA were involved in the formulation of the statements at issue here, or that they have endorsed them. Courts have, moreover, rejected the notion that a "corporate taint" can arise based on statements by non-adjudicator members of multi-function organizations: *Zündel v. Citron*, [2000] 4 FC 225,189 D.L.R. (4th) 131 at para. 49 (C.A.); *E.A. Manning Ltd.*, above at para. 24.

[36] Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing. The alleged harm is thus not irreparable.

[37] APR also asserts that passengers are being misled by the travel industry as to the import of the CTA's statements, and that airlines, travel insurers and others are citing the statements as a basis to deny reimbursement to passengers whose flights have been cancelled for pandemic-related reasons. If third parties are misrepresenting what the CTA has stated, recourse is available against those third parties and the alleged harm is thus not irreparable.

6. Balance of Convenience

[38] In light of the foregoing, it is unnecessary to deal with the question of the balance of convenience.

7. Other Matters

[39] Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

[40] APR asks that it be permitted to make submissions on the issue of costs once the Court has dealt with the merits of its motion. APR shall have 10 days in which to file submissions in writing in relation to the question of costs, which submissions shall not exceed five pages in length. The CTA shall have 10 days in which to respond with submissions that do not exceed

five pages, and APR shall have a further five days in which to reply with submissions that do not exceed three pages in length.

"Anne L. Mactavish"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-102-20
STYLE OF CAUSE:	AIR PASSENGERS RIGHTS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MACTAVISH J.A.
DATED:	MAY 22, 2020

WRITTEN REPRESENTATIONS BY:

Simon Lin	FOR THE APPLICANT
Allan Matte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Evolink Law Group Burnaby, British Columbia	FOR THE APPLICANT
Legal Services Directorate Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT

Balogun v. Canada, [2005] F.C.J. No. 1780

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

Nadon, Sexton and Sharlow JJ.A.

Heard: October 26, 2005.

Oral judgment: October 26, 2005.

Docket A-568-04

[2005] F.C.J. No. 1780 | *[2005] A.C.F. no 1780* | *2005 FCA 350* | *2005 CAF 350*

Between Dr. Abdur-Rashid Balogun, appellant, and Her Majesty the Queen, Minister of National Defence, respondents

(4 paras.)

Case Summary

Civil procedure — Costs — Appeals — Appeal by Balogun from a decision to award costs on a dismissal of an application for judicial review allowed.

Appeal by Balogun, the appellant, from a decision to award costs on a dismissal of an application for judicial review. The appellant was unsuccessful on a judicial review application and as a result, the trial judge ordered costs against the appellant. The respondents did not seek costs in their submission.

HELD: Appeal allowed.

In awarding costs the judge plainly erred as the respondents did not, either in their written submissions or in their viva voce submissions before the judge, request that they be granted costs. In the circumstances, the judge should not have made an award of costs.

Counsel

Dr. Adbur-Rashid Balogun, for the appellant, on his own behalf.

Sonia Barrette, for the respondent.

The judgment of the Court was delivered by

NADON J.A. (orally)

1 In dismissing the appellant's judicial review application, the learned judge of the Federal Court made an award of costs in favour of the respondents.

2 We all agreed that in doing so, the judge plainly erred since the respondents did not, either in their written submissions or in their viva voce submissions before the judge, request that they be granted costs. In these circumstances, we are of the view that the judge should not have made an award of costs.

3 The appellant having abandoned all other grounds of his appeal, the appeal will therefore be allowed, in part, so as to strike the words "with costs to the respondents" from the judge's Order of September 23, 2004.

4 With respect to the costs of this appeal, no order will be made.

NADON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110208

Docket: A-343-10

Citation: 2011 FCA 48

Present: **LAYDEN-STEVENSON J.A.**

BETWEEN:

JOHN FREDERICK CARTEN

and

KAREN AUDREY GIBBS

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, JEAN CHRÉTIEN, EDDIE GOLDENBERG, SERGIO MARCHI, LLOYD AXWORTHY, PIERRE PETTIGREW, JOHN MANLEY, BILL GRAHAM, JIM PETERSON, PAUL MARTIN, DAVID EMERSON, TIM MURPHY, HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA, MICHAEL HARCOURT, GLEN CLARK, UJJAL DOSANJH, GORDON CAMPBELL, ATTORNEY GENERAL OF CANADA, ALLAN ROCK, ANNE McLELLAN, MARTIN CAUCHON, IRWIN COTLER, ATTORNEY GENERAL OF BRITISH COLUMBIA, COLIN GABLEMAN, GEOFF PLANT, WALLY OPPAL, CANADIAN JUDICIAL COUNCIL, JEANNIE THOMAS, NORMAN SABOURIN, ANTONIO LAMER (deceased), BEVERLEY McLACHLIN, ALLAN McEACHERN, PATRICK DOHM, DONALD BRENNER, BRYAN WILLIAMS, JEFFERY OLIPHANT, JOHN MORDEN, JOSEPH DAIGLE, THEMIS PROGRAM MANAGEMENT AND CONSULTING LTD., THE LAW SOCIETY OF BRITISH COLUMBIA, THE LAW SOCIETY OF ALBERTA, DAVID VICKERS (deceased), ROBERT EDWARDS (deceased, JOHN BOUCK (deceased), JAMES SHABBITS, HOWARD SKIPP, CYRIL ROSS LANDER, RALPH HUTCHINSON (deceased), MICHAEL HALFYARD, HARRY BOYLE, SID CLARK (deceased), ALLAN GOULD, ROBERT METZGER, BRIAN KLAVER, JOHN MAJOR, JOHN HORN, BARBARA ROMAINE, ADELE KENT, SAL LOVECCHIO,

DONALD WILKINS, ROY VICTOR DEYELL, TIMOTHY LEADEM, WILLIAM PEARCE, LISA SHENDROFF, ANN WILSON, RICHARD MEYERS, GILLIAN WALLACE, MAUREEN MALONEY, BRENDA EDWARDS, STEPHEN OWEN, DON CHIASSON, CRAIG JONES, JAMES MATTISON, McCARTHY TETRAULT L.L.P., HERMAN VAN OMMEN, STEVE KLINE, LANG MICHENER L.L.P., THE CORPORATION OF THE CITY OF VICTORIA, JOHN DOE AND JANE DOE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 08, 2011.

REASONS FOR ORDER BY: LAYDEN-STEVENSON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110208

Docket: A-343-10

Citation: 2011 FCA 48

Present: **LAYDEN-STEVENSON J.A.**

BETWEEN:

JOHN FREDERICK CARTEN

and

KAREN AUDREY GIBBS

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, JEAN CHRÉTIEN, EDDIE GOLDENBERG, SERGIO MARCHI, LLOYD AXWORTHY, PIERRE PETTIGREW, JOHN MANLEY, BILL GRAHAM, JIM PETERSON, PAUL MARTIN, DAVID EMERSON, TIM MURPHY, HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA, MICHAEL HARCOURT, GLEN CLARK, UJJAL DOSANJH, GORDON CAMPBELL, ATTORNEY GENERAL OF CANADA, ALLAN ROCK, ANNE McLELLAN, MARTIN CAUCHON, IRWIN COTLER, ATTORNEY GENERAL OF BRITISH COLUMBIA, COLIN GABLEMAN, GEOFF PLANT, WALLY OPPAL, CANADIAN JUDICIAL COUNCIL, JEANNIE THOMAS, NORMAN SABOURIN, ANTONIO LAMER (deceased), BEVERLEY McLACHLIN, ALLAN McEACHERN, PATRICK DOHM, DONALD BRENNER, BRYAN WILLIAMS, JEFFERY OLIPHANT, JOHN MORDEN, JOSEPH DAIGLE, THEMIS PROGRAM MANAGEMENT AND CONSULTING LTD., THE LAW SOCIETY OF BRITISH COLUMBIA, THE LAW SOCIETY OF ALBERTA, DAVID VICKERS (deceased), ROBERT EDWARDS (deceased, JOHN BOUCK (deceased), JAMES SHABBITS, HOWARD SKIPP, CYRIL ROSS LANDER, RALPH HUTCHINSON (deceased), MICHAEL HALFYARD, HARRY BOYLE, SID CLARK (deceased), ALLAN GOULD, ROBERT METZGER, BRIAN KLAVER, JOHN MAJOR, JOHN HORN, BARBARA ROMAINE, ADELE KENT, SAL LOVECCHIO,

DONALD WILKINS, ROY VICTOR DEYELL, TIMOTHY LEADEM, WILLIAM PEARCE, LISA SHENDROFF, ANN WILSON, RICHARD MEYERS, GILLIAN WALLACE, MAUREEN MALONEY, BRENDA EDWARDS, STEPHEN OWEN, DON CHIASSON, CRAIG JONES, JAMES MATTISON, McCARTHY TETRAULT L.L.P., HERMAN VAN OMMEN, STEVE KLINE, LANG MICHENER L.L.P., THE CORPORATION OF THE CITY OF VICTORIA, JOHN DOE AND JANE DOE

Respondents

REASONS FOR ORDER

LAYDEN-STEVENSON J.A.

[1] These reasons address five motions pursuant to Rule 416(1) of the *Federal Courts Rules*, SOR/98-106 (the Rules). Various, but not all, respondents on the appeal (defendants in the underlying action) have moved for orders for security for costs. I will refer to them as respondents or defendants, interchangeably.

[2] The appeal is from the judgment of Gauthier J. of the Federal Court (the judge) dismissing an appeal from an order of Prothonotary Lafrenière (the prothonotary) with costs to each defendant in the lump sum amount of $750 (all inclusive): 2010 FC 857. The prothonotary struck out the appellants' statement of claim, without leave to amend, with costs payable to the defendants other than the defendant Themis Program Management and Consulting Ltd. (Themis): 2009 FC 1233.

[3] The appellants issued a statement of claim on January 21, 2008 naming Her Majesty the Queen in Right of Canada (the Federal Crown) as the primary defendant in relation to various alleged acts and omissions concerning the bulk water export policies of Canada and the Province of British Columbia. The statement of claim names a host of defendants alleged to be either officers,

employees, agents or sub-agents of the Federal Crown. As the prothonotary put it, the statement of claim alleges “widespread conspiracy and collusion among those in power, including past, present and deceased members of both the British Columbia and federal governments and the judiciary, to personally injure the appellants.”

[4] The motions before me are those of the respondent Themis, the respondent Lang Michener LLP (Lang Michener), the respondents Law Society of British Columbia, McCarthy Tetrault LLP (McCarthy Tetrault) and Herman Van Ommen, the respondent comprising what the prothonotary characterized as the British Columbia Crown (the BC Crown), that is, those individuals alleged to be acting for the BC Crown and the respondent comprising the Federal Crown defendants, that is those individuals alleged to be acting for the Federal Crown.

[5] Although the respondent judicial defendants and the respondent Law Society of Alberta have not moved for orders for security for costs, they applied to the Federal Court (along with the above-noted respondents except Themis) for orders striking the portions of the statements of claim relating to each of them, without leave to amend.

[6] The prothonotary ordered that: the statement of claim be struck out, without leave to amend; the action be dismissed with costs payable by the appellants to the defendants (other than Themis); the appellants’ motion for default judgment against the defendant Themis be dismissed; the motion of Themis for an extension of time to serve and file a statement of defence be dismissed. In cogent and comprehensive reasons, the prothonotary concluded that: the statement of claim discloses no

reasonable cause of action; the Court does not have jurisdiction over the defendants, except for the Federal Crown defendants; the allegations made by the appellants are scandalous, frivolous and vexatious; and the proceeding constitutes an abuse of the process of the Court.

[7] As stated earlier, the judge dismissed the appellants' appeal of the prothonotary's order with lump sum costs of $750 to each defendant. In equally cogent and comprehensive reasons, the judge reviewed the applicable principles of law. She then applied those principles to the matter before her and concluded it is clear and obvious that the appellants' claim fails against all non-Federal Crown defendants for want of jurisdiction. She also concluded that the claims against all defendants other than the Federal and BC Crown should also be dismissed as scandalous, frivolous or vexatious. With respect to the Federal Crown defendants, the judge concluded that the allegations linking the actions of those defendants to the Federal Crown on the basis of a *de facto* agency are not supported. Having carefully considered the very few allegations left to support the claim against the Federal Crown defendants, the judge concluded that the claim is purely speculative and hypothetical and ought to be dismissed without leave to amend.

[8] Further references in these reasons to the "defendants" or the "respondents" should be taken to refer to the moving parties. The respondents have established that the costs awarded by the judge remain unpaid, the appellants reside in British Columbia and have no assets. The respondents also maintain there is reason to believe that the action is frivolous and vexatious. Consequently, the prerequisites of Rule 416(1)(g) are met and the requested order should follow.

[9] The appellants "accept and do not dispute the allegation of impecuniosity." Rather, they contend that they have been denied a full and fair hearing on the merits of their case and that it is an inappropriate exercise of this Court's discretion to order them to pay security for costs. Moreover, Rule 3 provides that the Rules are to be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. According to the appellants, granting the requested order would run afoul of this mandatory direction. The appellants urge the Court to deny the equitable relief sought by the respondents.

[10] Having reviewed the statement of claim, the notice of appeal and the appellants' submissions, and having carefully evaluated the positions of all concerned, I am of the view that the respondents' request ought to be granted. They have established a *prima facie* right to security for their costs. Although I have taken into account the respondents' right to indemnity, I have also considered that any security imposed should not be so oppressive as to prevent the continuation of a meritorious law suit.

[11] There is an obligation on the appellants to provide frank and full disclosure regarding impecuniosity. Bare assertions are insufficient; particularity is required: *Chaudry v. Canada (AG)*, 2009 FCA 237, 393 N.R. 67. There is no specificity here, but I attach little significance to this omission. In my view, the appellants' appeal is devoid of merit.

[12] The notice of appeal comprises some 16 pages. It contains allegations of error that are vague, imprecise, redundant and constitute mere opinion. I am satisfied that, distilled, the

contents of the notice of appeal give rise to the “allegations of error” discussed in the paragraphs that follow.

[13] The notice of appeal is replete with allegations that the judge’s decision should be overturned because the judge was biased against the appellants. The assertions go so far as to state that the judge did not write the reasons for judgment. This is an extremely serious allegation. There is a presumption of judicial impartiality which can be rebutted only by clear evidence that would convince a reasonable and informed person that the judge was unlikely to decide the matter fairly: *R. v. R.D.S.*, [1997] 3 S.C.R. 484. There is no basis in the notice of appeal to support such an allegation. Rather, the appellants attack the quality and content of the reasons for judgment. This, in turn, gives rise to another problem, that is, appeals are taken from judgments, not from the reasons for judgment: *Froom v. Canada* (*Minister of Justice*), [2005] 2 F.C.R. 195 (C.A.); *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C.R. 212 (C.A.). Moreover, as stated previously, the judge reviewed the applicable legal principles and provided comprehensive and detailed reasons.

[14] The appellants quarrel with the judge’s failure to admit new evidence. The judge considered the appellants’ request and determined that the interests of justice did not merit the admission of the proposed evidence, which she held was comprised of nothing more than scandalous and gratuitous allegations that could have no impact whatsoever on the merits of the appeal before her. The appellants’ contention does not disclose any error. The appellants also claim that the judge erred in law by relying on a “hearsay” statement to conclude that Mr. Carten has devoted himself almost

entirely to the dispute underlying the matter since 1996. Again, no error is disclosed by this allegation. The judge merely concluded, in the circumstances, that the appellants had ample time to formulate a theory of the case and put their best case forward. The judge's comment was immaterial to the result.

[15] The appellants assert that the judge impermissibly required them to prove the allegations in the statement of claim when such allegations should be presumed to be true. That is not correct. The judge required the appellants to plead a theory of their case supported by underlying facts to sustain the assertions of government control over elected officials and law firms.

[16] The appellants contend that the judge inappropriately considered the jurisdiction of the Federal Court as if each defendant had been sued independently of the Federal Crown when conspiracy was alleged. However, the judge did consider the alleged relationships between the individual non-Federal Crown defendants and the Federal Crown defendants to ascertain whether they could support a basis for Federal Court jurisdiction over the action. As for the assertion that the judge erred in finding that *de jure* federal control is required to found Federal Court jurisdiction, the judge noted that, in any event, the appellants had not pleaded facts upon which *de facto* control could be found and that the pleading failed on either test. Last, the appellants state, without more, that the judge incorrectly awarded costs against them. It is trite law that costs normally follow the event. The appellants offer no basis to justify any departure from the general rule.

[17] In my view, for these reasons, this appeal has no reasonable prospect of success and it is therefore frivolous and vexatious. This finding, coupled with the lack of sufficient assets to pay the costs of the respondent, if ordered to do so, dictates that the requested order be granted.

[18] Each of the respondents has provided a draft bill of costs based on Column III of Tariff B of the Rules. The bills of costs are similar in range. I have averaged the units, recognizing that this is not an exact science, and have reduced the disbursements for which particularity was not provided. In the end, I have concluded that each of the respondents should be entitled to $2,000. The order for security for costs therefore should specify the total amount of $10,000, including disbursements.

[19] The appellants have requested, if the respondents' request is granted, that they be given five years within which to comply with the order. Although some time is appropriate, five years is simply not practicable. The appellants should have six months to comply with the order for security for costs.

[20] None of the respondents requested costs of this motion, therefore, I would not award costs.

"Carolyn Layden-Stevenson"
J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190607

Docket: A-144-18

Citation: 2019 FCA 170

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

WEN-TONG CHEN
CHIN YUN HUANG CHEN

Appellants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Montréal, Quebec, on May 15, 2019.

Judgment delivered at Ottawa, Ontario, on June 7, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190607

Docket: A-144-18

Citation: 2019 FCA 170

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

WEN-TONG CHEN
CHIN YUN HUANG CHEN

Appellants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Wen-Tong Chen and Chin Yun Huang Chen (the appellants) appeal from a judgment of Justice Lafrenière (the Federal Court), dated May 4, 2018 (Reasons), rejecting their application for judicial review of a decision made by the delegate for the Minister of Public Safety and Emergency Preparedness (the Minister). The Minister's delegate had partly allowed their request

for review of the seizure, by the Canada Border Services Agency [CBSA], of two jewellery rings they failed to declare when arriving in Montréal aboard a flight from the United States. While the seizure of the first ring was cancelled, forfeiture of the amount of $692.62 taken in place of the second ring was upheld.

[2] For the reasons that follow, I would dismiss the appeal, with costs.

I. Background

[3] On March 26, 2016, the appellants returned home from a trip to the United States via the Montréal-Trudeau International Airport. At customs, the appellants were referred to secondary examination where the secondary-screening CBSA officer noticed two rings worn by Mrs. Chen, which had not been declared in the appellants' joint customs declaration card. After consulting with her supervisor, the CBSA officer concluded that a seizure was warranted. The two rings were subsequently released upon payment of 30 percent of their estimated value ($1,393.24).

[4] The seizure of the rings and their subsequent return to the appellants were made pursuant to the following provisions of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the Act). First, subsection 12(1) of the Act mandates that all imported products must be reported at the nearest customs office in accordance with the *Reporting of Imported Goods Regulations,* S.O.R./86-873. According to subsection 12(3) of the Act, goods should notably be reported under subsection 12(1) in the following situations:

(a) in the case of goods in the actual possession of a person arriving in Canada, or that form part of the	a) la personne ayant en sa possession effective ou parmi ses bagages des marchandises se trouvant à bord du

person's baggage where the person and the person's baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;	moyen de transport par lequel elle est arrivée au Canada ou, dans les circonstances réglementaires, le responsable du moyen de transport;
…	[…]
(c) in any other case, by the person on behalf of whom the goods are imported.	c) la personne pour le compte de laquelle les marchandises sont importées.

[5] Subsection 12(3.1) of the Act provides, "[f]or greater certainty", that for the purposes of subsection 12(1), the return of goods to Canada after they are taken out of Canada is an importation of those goods.

[6] Pursuant to section 110 of the Act, an officer may, where he or she believes on reasonable grounds that the Act or its regulations were contravened in respect of such goods, seize them as forfeit. Section 113 of the Act provides, with respect to the limitation period, that no seizure may be made more than six years after the contravention in respect of which the seizure is made.

[7] Subject to exceptions explicitly set out in subsection 117(2), subsection 117(1) of the Act provides that the seized goods can be returned by the officer "to the person from whom they were seized or to any person authorized by [that] person … on receipt of":

(a) an amount of money of a value equal to	a) ou bien sur réception :
(i) the aggregate of the value for duty of the goods and the amount of duties levied thereon, if any, calculated at the rates applicable thereto	(i) soit du total de la valeur en douane des marchandises et des droits éventuellement perçus sur elles, calculés au taux applicable :

…	[…]
(ii) such lesser amount as the Minister may direct; or	(ii) soit du montant inférieur ordonné par le ministre;
(b) where the Minister so authorizes, security satisfactory to the Minister.	b) ou bien sur réception de la garantie autorisée et jugée satisfaisante par le ministre.

[8] As provided by sections 129 and 131 of the Act, anyone who has had goods seized may request that the Minister, "having regard to the circumstances", determine whether there was a contravention of the Act. If the Minister finds that there was no contravention, paragraph 132(1)(a) of the Act provides that he "shall forthwith authorize the removal from custody of the goods … or the return of any money or security taken in respect of the goods …". If, on the other hand, the Minister determines that there was a contravention, then the Minister may:

133(1) … (a) return the goods or conveyance on receipt of an amount of money of a value equal to an amount determined under subsection (2) or (3), as the case may be;	133(1) […] a) restituer les marchandises ou les moyens de transport sur réception du montant déterminé conformément au paragraphe (2) ou (3), selon le cas;
(b) remit any portion of any money or security taken; and	b) restituer toute fraction des montants ou garanties reçus;
(c) where the Minister considers that insufficient money or security was taken or where no money or security was received, demand such amount of money as he considers sufficient …	c) réclamer, si nul montant n'a été versé ou nulle garantie donnée, ou s'il estime ces montant ou garantie insuffisants, le montant qu'il juge suffisant […]

[9] It is accepted in the case law that the contravention and penalty decisions are distinct and must be challenged separately, by way of an action and an application, respectively (see *Hamod v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 937 at paras. 16-19 [*Hamod*]; *Pounall v. Canada (Border Services Agency)*, 2013 FC 1260 at para. 15; *Mohawk Council of Akwesasne v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012

FC 1442 at para. 21; *Akinwande v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 963 at paras. 10-11; *Nguyen v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 72 at paras. 19-22). A decision by the Minister as to whether there has been a contravention of the provisions relating to the importation of goods may be appealed within 90 days after being notified by way of an action (subsection 135(1) of the Act). A decision regarding the penalty under section 133 of the Act may be challenged within 30 days through an application for judicial review (subsection 18.1(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7).

[10] On June 9, 2016, Mr. Chen made a written request to the CBSA's Recourse Directorate under section 129 of the Act for ministerial review of the seizure of the rings. He requested that the decision to seize and forfeit the rings be reviewed and reversed and that the notes in the appellants' files - which he said could lead to further screening in the future - be removed. He claimed that they were acting in good faith, that they do not grasp "all the inherent complexities" of the Act, and that English is not their native language.

[11] Based on the appellants' account, the first ring was acquired by Mrs. Chen while visiting her daughter in New York in November 2009, as a gift for herself from her husband. Mr. Chen argued that, since it was a gift from him, his wife mistakenly believed that she had no obligation to declare the ring upon returning to Canada. Moreover, he added that the seizure occurred well beyond the limitation period of six years.

[12] As for the second ring, Mr. Chen indicated that it was brought into Canada in 2011 by his daughter, then a resident of the United States. He apparently bought it from his daughter as a birthday gift to his wife, and says he was unaware that it would become liable to forfeiture because he had refunded his daughter for its cost.

[13] On July 11, 2016, Danielle Lacroix, a senior appeals officer of the CBSA Recourse Directorate, served upon Mr. Chen a Notice of Reasons for Action proposing to uphold the first officer's decision. She explained that information about previous border violations may be used to determine the level of examination for travellers entering Canada but that, over time, the rate of secondary examination would decrease if no further violations occurred. She also noted that, if it was determined on appeal that no contravention occurred here, their names would be removed from the database. If not, the record would still only be retained for six years after the seizure.

[14] On August 9, 2016, counsel for Mr. Chen made further submissions to the Recourse Directorate, essentially repeating the arguments contained in the June 9, 2016 letter.

[15] On November 3, 2016, Ms. Lacroix completed her Case Synopsis and Recommendation. Upon her review of the appellants' submissions, she recommended that the portion of the seizure relating to the first ring be cancelled, as it was beyond the limitation period. The purchase history provided by the appellants showed that this ring was purchased in 2009, six years before the seizure. However, having not been provided with any documentation for the importation of the second ring, she recommended that the seizure action for that ring be maintained. She noted that

knowledge and intent are not considered necessary conditions of a contravention, and that the onus is on the importer to be aware of the contents of his or her luggage.

II. Decisions below

A. *Decision of the Minister's Delegate*

[16] On December 5, 2016, Jonathan Ledoux-Cloutier, the delegate for the Minister, issued decisions in respect of both seized items. Regarding the first ring, he held that, as a result of the limitation period provided for in section 113 of the Act, the forfeiture amount taken in this respect should be remitted to Mr. Chen. Regarding the second ring, he found that there had been a contravention of section 12 of the Act, and upheld the seizure of the ring and the forfeiture of $692.62 as terms of release for the item. Although Mr. Chen in his submissions had confirmed the purchase price of the ring to be higher than the value determined by the seizing officer at the time of the seizure, the terms of release were not amended by the Minister's delegate.

[17] On January 4, 2017, the appellants applied for judicial review of the decision rendered by the Minister's delegate in respect of the second ring pursuant to section 133 of the Act. It is noteworthy that they did not appeal the decision rendered pursuant to section 131 of the Act, finding a contravention of section 12 of the Act. The appellants only sought an order quashing the decision establishing the amount of $692.62 as forfeit for return of the seized ring. They also sought the removal of the notes in their files which, they say, may subject them to secondary examination each time they re-enter Canada.

B. *Decision of the Federal Court*

[18] On May 4, 2018, the Federal Court dismissed the application for judicial review, holding that the decision of the Minister's delegate with respect to the Enforcement Action was reasonable. It found that the appellants had been duly informed that their contravention was a failure to declare the ring in accordance with section 12 of the Act, and that any question about the merits of this determination under section 131 was outside the scope of their judicial review application (Reasons at para. 23).

[19] With respect to the appellants' claim that it was unreasonable for the CBSA to maintain a record of their contravention, one that could lead to enhanced scrutiny in the future, the Federal Court found that relief could not be sought in respect of the records in the context of this judicial review application. More specifically, the Federal Court held that referral to secondary examination does not constitute an additional sanction, and that the keeping by CBSA of a contravention record is "an administrative and automatic consequence" of having contravened the Act (at paras. 24-26).

[20] The Federal Court also held that the amount of terms of release, set below the minimum recommended by the *CBSA Enforcement Manual* (the *Manual*) for the lowest level of violations, was reasonable (at para. 31). In its view, the appellants failed to establish that mitigating factors, if they existed, had not properly been taken into account by the Minister's delegate (at para. 28). In reaching this conclusion, the Court pointed notably to the fact that the appellants had provided "evasive and contradictory answers" when questioned by the CBSA officer (at para. 29).

[21] The application was therefore dismissed, and costs were set at $3,000 (at para. 37).

III. Issues

[22] The present appeal raises two main questions, which can be formulated as follows:

A. Was the decision of the Minister's delegate upholding the Enforcement Action reasonable?

B. Did the Federal Court err in awarding costs in the amount of $3,000?

IV. Analysis

[23] The parties are in agreement that on appeal from a decision of the Federal Court sitting in judicial review of a decision of an administrative decision-maker, the appropriate approach is that set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47 [*Agraira*]. This approach requires this Court to "step into the shoes" of the Federal Court, determine whether it identified the appropriate standard of review, and whether it applied this standard properly. In other words, the focus of an appellate court should be on the administrative decision itself, and not on potential errors by the reviewing court (*Hoang v. Canada (Attorney General)*, 2017 FCA 63 at para. 26 [*Hoang*]).

[24] The Federal Court was right to conclude, at paragraph 19 of its reasons, that the standard of review applicable to the decision of the Minister's delegate to uphold part of the Enforcement Action under section 133 of the Act is that of reasonableness (*Dutton v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1170 at para. 13; *Gagliano v. Goodale*, 2018 FC 820 at

paras. 64 and 70; *Leslie v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 119 at para. 24 [*Leslie*]).

[25] It is trite law that decision-makers' interpretation of their home statute, with which they have particular familiarity, calls for deference when judicially reviewed (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 22). As long as the decision demonstrates "justification, transparency and intelligibility" and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", it will be regarded as reasonable (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47 [*Dunsmuir*]).

[26] The question before this Court, therefore, is whether the Federal Court applied that standard properly.

A. *Was the decision of the Minister's delegate upholding the Enforcement Action reasonable?*

[27] The appellants submit that the contravention was never identified, thereby making it impossible to assess the reasonableness of the decision. They also claim that the decision is unreasonable as it was premised on the belief that seizure and the keeping of a contravention record are automatic consequences of any contravention of the Act, rather than an exercise of discretion. In their view, the Minister's delegate erroneously proceeded on the basis that he could not provide relief if there was a contravention, regardless of the circumstances of the case. The appellants further argue that the delegate disregarded the *Manual*, which provides, in relevant

parts, that the benefit of the doubt should be afforded to those travellers who clearly were not aware of CBSA requirements. Lastly, the appellants submit that the delegate failed to take into account the "relevant factors that favored clemency" in this case (Memorandum of Fact and Law of the Appellants at para. 54).

[28] For the reasons that follow, I find that all of these submissions ought to be rejected.

(1) Details of the Contravention

[29] First, it is very clear from the Record that the appellants were properly advised of the contravention which grounded the forfeiture, and that all the information required to contest the decision was made available to the appellants. The Notice of Reasons for Action, which was served on Mr. Chen on July 11, 2016, made it clear that "the enforcement action was taken because the seized goods were unlawfully imported by reason of [n]on-report pursuant to section 12 of the Customs Act" (Appeal Book at p. 49). It also explained the circumstances underlying the seizure, enclosed a copy of the secondary CBSA officer's Narrative Report, and summarized the submissions filed by the appellants.

[30] It is true that the decision of the Minister's delegate is not as explicit, and does not identify the contravention with as much specificity, as the Notice of Reasons for Action. It cannot be said, however, that the decision of the Minister's delegate "failed to identify the contravention at all" as is argued by the appellants (Memorandum of Fact and Law of the Appellants at para. 59). The decision explicitly mentions that the examination at the airport

revealed that the appellants failed to declare two rings, and that no evidence was submitted that the second ring was legally imported to Canada (Appeal Book at pp. 25-26).

[31] Furthermore, the decision of the Minister's delegate must be read alongside the Notice of Reasons for Action issued by the CBSA's Recourse Directorate (see, on the necessity to read the reasons in light of the record, *Hamod* at para. 38). When read in that light, it is very clear that the Minister's delegate was well aware of the contravention and of the circumstances surrounding it, and was in a position to assess the appropriateness of the CBSA's forfeiture action.

[32] The appellants further argue, in this regard, that a Canadian receiving goods in Canada has no obligation to declare them, that Mr. Chen had no obligation, upon buying the ring in Canada, to declare it, and that upon receiving the ring in Canada as a gift, Mrs. Chen had no obligation to declare it (Memorandum of Fact and Law of the Appellants at para. 62). I agree with the Federal Court that, in making these submissions, the appellants are attempting to "collaterally attack the Contravention Finding" (Reasons at para. 22). Such a course of action is impermissible and, to that extent, the appellants' submissions in this regard should be disregarded.

(2) Exercise of Discretion

[33] As for the appellants' argument that the Minister's delegate proceeded on the assumption that he could not provide any relief if there was a contravention, it is not substantiated by the reasons or the record. The appellants make much of paragraph 19 of the decision of the Minister's delegate, which reads as follows:

> As for item 2 [the Ring], no evidence was submitted establishing that item 2 was legally imported to Canada even if it was purchased in 2011. Consequently, this portion of the seizure is maintained. [Emphasis added.]
>
> (Appeal Book at p. 26.)

[34] In my view, the appellants read too much into the mere use of the word "consequently". I fail to see how it can reasonably be inferred from the decision, when read in its entirety and in the context of the record, that the seizure was treated as an automatic consequence of any contravention of the Act. In his decision, the Minister's delegate expressly referred to section 133 of the Act, which sets out the options open to the Minister in reviewing an enforcement action (*i.e.* returning the seized good, remitting any portion of any money or security taken, or increasing the required security). There is simply no reason to think that the Minister's delegate, who has undeniable expertise in interpreting and applying the Act, was unaware of his discretion with respect to possible relief under that provision.

[35] There is no dispute that the Minister's delegate is afforded a broad discretion when determining the amount of money to be paid (if any) for the return of goods seized as forfeit (see *Leslie* at para. 24). The sole statutory limit placed on the Minister by subsections 132(2) and (4) of the Act is that the amount must not exceed the value for duty of the goods plus the amount of duties levied thereon (*Shin v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1106 at paras. 34 and 58 [*Shin*]).

[36] It is clear from the reasons of the Minister's delegate and the record before us that he was aware of that wide discretion, and that he exercised it reasonably, taking into account both the guidelines set out in the *Manual* and the particular circumstances of the case. The terms of

release that were applied to the ring at issue by the secondary CBSA officer consisted of a "Level 1" enforcement action (Appeal Book at pp. 134-137). According to the *Manual*, this level is recommended for "violations of lesser culpability" or "offences of omission, rather than commission" (Appeal Book at pp. 135-136). It is commonly applied when goods are not reported, but are not hidden and full disclosure is made upon discovery (Appeal Book at p. 136). For such a violation, the suggested terms of release for the failure to report jewellery are set at 30 percent of the item's value (Appeal Book at pp. 135, 141).

[37] Yet, in the case at bar, the terms of release were set by the secondary CBSA officer below the minimum amount suggested in the *Manual*. In fact, the documentary evidence and the submissions of the appellants showed that the value of the item was actually higher than the value determined by the CBSA officer at the time of seizure ($2,322.08 CAD vs $2,100 USD). Still, the Minister's delegate decided to exercise his discretion not to modify the terms of release to reflect the amount recommended by the *Manual* - even though he could have done so under paragraph 133(1)(*c*) of the Act - as he found this was "unfavourable" to the appellants (Appeal Book at p. 26). That decision, it seems to me, clearly shows that the Minister's delegate was aware of his discretion and reasonably exercised it in upholding the terms of the release.

[38] The criticism leveled by the appellants against the Minister's delegate for having "violated his own policy" in not extending them the benefit of the doubt is equally unfounded. It is clear from both the reasons and the record that the customs officials afforded the "benefit of the doubt" to the appellants by accepting their final version of events regardless of their earlier contradictory statements to the CBSA officer (Appeal Book at pp. 25-26, 49-51 and 66-67). It

may even be said that, in maintaining the terms of release set by the CBSA officer, that is a "Level 1" sanction usually reserved for "offences of omission, rather than commission", the Minister's delegate did, in practice, consider the appellants' "lack of knowledge" as a "mitigating factor", in conformity with the Seizure Policy found in section 16 of the *Manual* ("Negligence, carelessness and lack of knowledge on the part of the importer are mitigating factors worthy of consideration when deciding whether or not to proceed with a seizure action").

[39] It is worth adding, moreover, that the *Manual* only provides "guidelines" for establishing the value for duty of goods imported or exported in contravention of the Act as well as the terms of release for seized goods (*Shin* at paras. 62-68). It is not to be applied as if it were binding law (at para. 70). If the submission of the appellants - that the *Manual* "provides a clear instruction with an equally clear outcome", *i.e.* the cancellation of all enforcement actions imposed on good faith importers (Memorandum of Fact and Law of the Appellants at para. 53) - was to succeed, this would mean depriving the Minister of any discretion in such cases. This is, paradoxically, precisely what the appellants cautioned against in other parts of their submissions.

[40] Finally, the appellants are wrong to claim that the Minister's delegate failed to take into consideration the relevant factors that favoured clemency, notably their alleged lack of awareness of the requirement to report and pay duties on the ring and their good faith. Far from being disregarded, these elements were duly noted and thrice considered, in the Notice of Reasons for Action (Appeal Book at pp. 49-51), in the Case Synopsis and Recommendation (Appeal Book at pp. 63-66) as well as in the Final Decision (Appeal Book at pp. 25-26).

[41] The mere fact that the Minister's delegate did not find these factors to warrant the terms of release to be set at zero in no way shows that he unreasonably exercised his discretion in this regard. In reality, the appellants are not concerned with whether the Minister's delegate considered these factors, but rather how he did it. The weighing of such factors by the Minister's delegate, as previously mentioned, is subject to considerable deference on judicial review. Before us, the appellants have simply not shown this weighing of the factors to be unreasonable.

(3) Reviewability of the Recordkeeping

[42] The appellants also challenge the keeping by CBSA of a contravention record for a period of six years, which they say may subject them to increased scrutiny at border crossings. They argue that the Federal Court was wrong to conclude that relief could not be sought in this proceeding from the recordkeeping as this is merely "an administrative and automatic consequence of having contravened" section 12 of the Act (Reasons at para. 26). In the appellants' view, the keeping of a contravention record, which may subject an individual to increased scrutiny at border crossings, arises out of CBSA's statutory mandate and is thus a reviewable "matter" coming within the scope of section 18.1 of the *Federal Courts Act*. They also claim that the recordkeeping was, in the present case, unreasonable.

[43] Once again, I am unable to agree with the appellants. It is clear that the retention of a record of the appellants' contravention is neither a separate decision nor an additional sanction for the contravention of the Act. In the Notice of Reasons for Action, the officer explained to the appellants that the CBSA has a policy of retaining a record of contraventions of the Act for a period of six years from the date of seizure (Appeal Book at p. 51). Customs officials may then

use such information concerning previous border violations to determine the appropriate level of examination for travellers entering Canada. Travellers with a recent customs infraction could therefore be subject to more frequent referrals for secondary examination. The rate of secondary examination decreases over time, if no further infractions occur, and the record is deleted from the CBSA's system after six years. The details of that policy are carefully canvassed and reviewed in *Dhillon v. Canada (Attorney General)*, 2016 FC 456 at paras. 5-11 [*Dhillon*].

[44] It appears that CBSA officials do not possess any discretionary authority over the inclusion of an individual's record of contravention in their database. As found by the Federal Court in *Dhillon*, the system "functions as part of CBSA's institutional memory" (at para. 40) and is intended to enhance the efficiency of the examination process at points of entry and also recognize future consistent compliance by decreasing the frequency of secondary examinations over time.

[45] That the referral of the appellants to secondary examination upon entry to Canada as a result of their record of prior contravention does not constitute an additional sanction is evidenced by the fact that it is not mentioned in the Ministerial Decision of December 5, 2016. It is only referred to in the written Notice of Reasons for Action, in response to the appellants' queries in that respect. As a result, I find that the potential for increased frequency of referrals to secondary examination is an administrative and automatic consequence flowing from the existence of the contravention, and is not reviewable in the context of an application challenging the reasonableness of a penalty imposed under the Act.

[46] Even if I were prepared to accept, for the sake of the argument, that this policy does not (or should not) apply automatically and that the matter to be reviewed is the decision to implement it with respect to the appellants, I would still be of the view that there is nothing unreasonable in that "decision". It is well established that CBSA has the right to conduct a full examination of every traveller seeking to enter Canada, including both a primary and secondary examination. Because of the challenges of subjecting every traveller to a secondary examination, CBSA relies on a risk management policy pursuant to which records of previous border violations may increase the frequency of referrals to secondary examination. The jurisprudence does not distinguish between these two steps of searches, and neither attracts the Charter protections or procedural fairness obligations required for more intrusive searches (see *R. v. Simmons*, [1988] 2 S.C.R. 495 at p. 517; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at pp. 1071-1072). Therefore, to the extent that the keeping by CBSA of the appellants' contravention record is reviewable, I would have no hesitation to find it reasonable in light of CBSA's mandate and its difficult task to balance the efficient movement of goods and people across the border with public safety priorities.

(4) The *Audi Alteram Partem* Issue

[47] Before turning to the issue of costs, I would like to comment briefly on the Federal Court judge's observations with respect to the appellants' behaviour when undergoing secondary examination at the border. The appellants argue that it was unfair for the judge to dismiss their application on the basis that they were "at best evasive and at worst simply untruthful" when questioned by the CBSA officer (Reasons at para. 29). They claim that these allegations, raised at the hearing by the judge himself when the record was complete and could not be supplemented

with rebutting evidence, resulted in a breach of the *audi alteram partem* rule and tainted his entire analysis. They also contend that these remarks amount to an alternative, different basis for the decision of the Minister's delegate, and that they reveal a misunderstanding of the role of a reviewing court.

[48] First of all, it should be recalled that, on appeal from the Federal Court sitting on judicial review of an administrative decision, it is on the initial decision that the appeal court should focus its attention, not the decision of the Federal Court (see *Hoang* at para. 26; *Administration de pilotage des Laurentides c. Corporation des pilotes du Saint-Laurent Central Inc.,* 2019 CAF 83 at para. 28*; Canada (Attorney General) v. Herrera-Morales,* 2017 FCA 163 at para. 53; *Agraira* at paras. 45-47). It is thus not sufficient for the appellants to point to alleged errors by the reviewing court to show that the application for judicial review should be allowed. They must demonstrate that the administrative decision itself does not meet the requirements of justification, transparency and intelligibility (*Dunsmuir* at para. 47).

[49] In any event, the arguments put forward by the appellants are far from persuasive.

[50] First, I fail to see how it can be said that the reference by the Federal Court to the inconsistent statements given by the appellants at the secondary inspection amount to a breach of procedural fairness. The Narrative Report of the CBSA officer who performed the secondary inspection (Appeal Book at pp. 52-54), which relates the inconsistencies relied on by the Federal Court with respect to the appellants' behaviour, was sent to the appellants in July of 2016 along with the Notice of Reasons for Action. It was also part of the Certified Tribunal Record before

the Federal Court. Moreover, this document was raised during oral argument before the Federal Court (Appeal Book at pp. 226-227), and counsel for the appellants was asked whether there was any evidence in the record contradicting the version in the report (Appeal Book at pp. 318-320). Therefore, the appellants had every opportunity to provide evidence and make representations in this regard, both before the Minister's delegate and the Federal Court.

[51] As for the role of the judge sitting on judicial review of the Minister's delegate's decision, I wish to make the following comments. There is at least an apparent tension in the Supreme Court jurisprudence as to how far a reviewing court can supplement the reasons given by a decision-maker in order to uphold an impugned decision, as noted by this Court in *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114 at paras. 27-37 and *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at paras. 45-46 [*Kabul Farms*].

[52] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*], Justice Abella (writing for a unanimous Court) endorsed Professor Dyzenhaus' observation that deference requires "a respectful attention to the reasons offered or which could be offered in support of a decision" (at para. 12), suggesting that a reviewing court is entitled to supplement the reasons provided. The majority had already expressed that view in *Dunsmuir* (at para. 48). Mindful of the need to show respect for the decision-making process of adjudicative bodies, the Court tried to square the circle in adding that "…courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (at para. 15).

[53] In another decision rendered one day earlier, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 [*Alberta Teachers*], the majority of the Supreme Court had stressed, however, that a reviewing court was not free to come up with its own, alternative set of reasons to save a decision when the reasons offered by the decision-maker are deficient. As stated by Justice Rothstein, the direction that "courts are to give respectful attention to the reasons 'which could be offered in support of a decision' is not a 'carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result'" (at para. 54).

[54] More recently, the Supreme Court added another layer of complexity, distinguishing between cases where the reasons are either non-existent (as in *Alberta Teachers*) or insufficient (as in *Newfoundland Nurses*), and cases where detailed reasons are provided. In *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 [*Lukács*], the majority reiterated Justice Rothstein's comments, quoted in the preceding paragraph, and added:

> In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.
>
> (*Lukács* at para. 24, *in fine*.)

[55] However, two weeks after *Lukács*, the Supreme Court released its decision in *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83 [*Williams Lake*], and once again shed doubt on the extent to which reviewing courts can supplement the reasons of administrative decision-makers (on these seemingly contradictory decisions, see David Stratas, "A Decade of Dunsmuir: Please No More" (8 March

2018), in *Administrative Law Matters* (blog) (online: https://bit.ly/30RyNUK)). The dissenting opinions in that case suggested that the majority failed to follow the principles in *Lukács* and engaged in impermissible supplementing of the tribunal's reasons (see *Williams Lake* at paras. 141-146, 151-155, 206-207).

[56] In the case at bar, I do not think it can fairly be argued that the Federal Court supplanted the analysis of the Minister's delegate. The Federal Court found that the appellants failed to establish mitigating circumstances that were not properly taken into account, or that there was any failure to extend the proper degree of flexibility or benefit of the doubt to the appellants. Having taken the record as a whole, it determined that the imposition of a forfeiture amount by the Minister's delegate was not unreasonable and did not fall outside the range of possible, acceptable outcomes defensible in view of the facts and the law.

[57] It is no doubt true that the Minister's delegate ultimately assumed to be true the version of the facts submitted by the appellants in June 2016 and did not base his decision on the conflicting versions given by the appellants to the secondary officer in March 2016. However, this did not prevent the Federal Court from considering the entire record before the decision-maker and to conclude that the previous versions recounted by the appellants provide further, additional reasons supporting the reasonableness of the decision. This is a far cry from impermissibly replacing the flawed or inexistent reasons of the decision-maker with those of the reviewing court. And it bears no resemblance to the situation in *Kabul Farms*, cited by the appellants, where neither the decision-maker's reasons nor the record disclosed any rationale whatsoever for the selection of the base amount reflecting the harm caused by a violation, and

upon which the penalties under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 were to be assessed. In such a scenario, the Court wrote, "fashioning reasons that might have been given in order to save the decision would turn a blind eye to our role as a reviewing court" (at para. 47). Needless to say, this is clearly not the situation we are faced with here.

[58] Having said this, I appreciate the appellants' concern that their reputation has now been overshadowed with innuendos of dishonesty in a public judgment of the Federal Court. It may have been best for the judge to stick with the language used in the Case Synopsis, and to refrain from casting aspersions of untruthfulness nowhere to be found in the record. To that extent, the decision of this Court is not to be taken as an endorsement of the Federal Court's characterization of the appellants' behaviour at paragraph 29 of his reasons.

B. *Did the Federal Court err in awarding costs in the amount of $3,000?*

[59] The appellants submit that the Federal Court's cost award, fixed in the amount of $3,000, should be reduced to the amounts agreed upon by the parties, which they say was $2,500. This argument must also fail.

[60] As a general principle, it is accepted that costs may not be awarded when they have not been requested (see *Exeter v. Canada (Attorney General)*, 2013 FCA 134 at para. 12 [*Exeter*]; *Balogun v. Canada*, 2005 FCA 350). The idea behind this general prohibition is that awarding costs in these circumstances would be a breach of the duty of fairness as it would "subject the

party against whom they are awarded to a liability when the party had had no notice or an opportunity to respond" (*Exeter* at para. 12).

[61] What is less clear, however, is whether an agreement between parties as to the quantum of costs is binding on the Court. Indeed, no decision in support of that proposition was provided.

[62] I am inclined to the view that the discretion of the Court remains unfettered, whether there is an agreement between the parties or not, provided of course that the parties are given an opportunity to make submissions. Rule 400(1) of the *Federal Courts Rules*, S.O.R./98-106 provides that the Federal Court has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". So broad is the discretion of the Federal Court in this matter that this Court will rarely intervene on appeal, unless the party challenging an award can show either an extricable error of law, or an overriding and palpable error of fact or of mixed fact and law (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Alani v. Canada (Prime Minister)*, 2017 FCA 120 at para. 12). Of course, courts will almost always give effect to the agreement reached by the parties, except in the most exceptional circumstances.

[63] In any event, this question need not be answered in the present case, as I have not been convinced that there was, indeed, any agreement between the parties as to the quantum of the costs to be awarded. The transcript of the hearing shows that, far from agreeing on a quantum for the award, the parties rather agreed on a "range" within which the Federal Court, in its discretion, would pick what it considered to be the appropriate amount for the costs. This is not

to mention that the judge made clear, in his last comments of the day, that he was going to proceed on that basis. While it was entirely open to the appellants' counsel to object at that time, they refrained from doing so. In my view, they have implicitly waived their right to raise the issue of procedural fairness at this stage (see, e.g., *Sharma v. Canada (Attorney General)*, 2018 FCA 48 at para. 11).

V. Conclusion

[64] For all of the above reasons, I would dismiss the appeal, with costs.

"Yves de Montigny"
J.A.

"I agree
Richard Boivin J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-144-18
STYLE OF CAUSE:	WEN-TONG CHEN, CHIN YUN HUANG CHEN v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 15, 2019
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	BOIVIN J.A. GLEASON J.A.
DATED:	JUNE 7, 2019

APPEARANCES:

Guy Du Pont Matthias L.E. Heilke	FOR THE APPELLANTS
Sarom Bahk	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davies Ward Phillips & Vineberg LLP Montréal, Quebec	FOR THE APPELLANTS
Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20130523

Docket: A-314-12

Citation: 2013 FCA 134

CORAM: **EVANS J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

RACHEL EXETER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on May 22, 2013.

Judgment delivered at Ottawa, Ontario, on May 23, 2013.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SHARLOW J.A.
DAWSON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20130523

Docket: A-314-12

Citation: 2013 FCA 134

CORAM: **EVANS J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

RACHEL EXETER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal by Rachel Exeter from a decision of the Federal Court, dated June 21, 2012, in which Justice Scott (Judge) granted two motions brought by the Attorney General, both "with costs to follow", and dismissed Ms Exeter's cross-motion.

[2] The motions arise from Ms Exeter's application for judicial review of a decision in which the Chairperson of the Public Service Labour Relations Board (Board) (2012 PSLRB 24) held that

the Board has no power to remove the adjudicator seized of her grievance. Ms Exeter had requested the Adjudicator's removal on the ground of bias. She alleges that, having participated in the mediation of Ms Exeter's grievances, the Adjudicator cannot impartially determine Ms Exeter's claim that she was coerced into the settlement.

[3] In his reasons for decision, the Chairperson also stated (at para. 15) that, even if the Board had the power to remove the Adjudicator from hearing Ms Exeter's grievances, it would be inappropriate to exercise it. It would be better, in his view, for the Adjudicator to determine Ms Exeter's request for recusal. Ms Exeter currently has an application for judicial review in the Federal Court (Court File No. T-943-12) challenging the Adjudicator's decision not to recuse herself.

Style of cause motion

[4] The Attorney General's first motion requested that the style of cause in the present proceeding be amended by naming the Attorney General as the sole Respondent. Ms Exeter had named the Attorney General as Respondent, and had added the Board in parenthesis. In her cross-motion, Ms Exeter argues that the Chairperson of the Board should be named as the sole Respondent, because it is his decision that she seeks to set aside in her application for judicial review.

[5] I agree with the Judge that rule 303(1)(*a*) of the *Federal Courts Rules*, SOR/98-106, specifically provides that the decision-maker in respect of whom an application for judicial review is brought is not to be named as Respondent. Hence, whether the decision-maker under review is the

Board or, as Ms Exeter alleges, the Chairperson, the Attorney General is appropriately named as the sole Respondent in the style of cause.

Transfer motion

[6] The Judge also granted the Attorney General's motion requesting that, since the decision under review was a decision of the Board, Ms Exeter's application for judicial review be transferred to this Court from the Federal Court under rule 49 of the *Federal Courts Rules*. Paragraph 28(1)(*i*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides that applications in respect of the Board shall be brought in the Federal Court of Appeal.

[7] I agree with the Judge. Ms Exeter had requested the Board to exercise its statutory powers to remove the adjudicator, the Chairperson dealt with the request by examining the powers of the Board, and its Order denying Ms Exeter's request is stated to be an Order of the Board. This is not a decision of the Chairperson in an "executive" capacity.

[8] Nor do I accept Ms Exeter's argument that the Judge's decision was erroneous because it improperly "overruled" a decision by Justice Harrington of the Federal Court, dated May 7, 2012. That decision granted her motion for an extension of time in which to file an application for judicial review in the Federal Court. After reviewing some of the procedural history of this matter, including its transfer under rule 49 from this Court to the Federal Court, Justice Harrington ordered that Ms Exeter's application should be "accepted for filing" in the Federal Court "in the interests of justice". This was not a determination by Justice Harrington that the Federal Court had jurisdiction over Ms Exeter's application.

Costs

[9] Ms Exeter argues that the Judge erred when he awarded "costs to follow" against her on both motions, because the Attorney General had not requested costs. Counsel for the Attorney General says that he asked for costs on the style of cause motion, but not on the transfer motion. However, he argues, this latter omission is immaterial because the Court had discretion to award costs in the cause on its own motion. He relies on *Lubrizol Corp. v. Imperial Oil Ltd.* (1989), 103 N.R. 237 (C.A.) (*Lubrizol*), where this Court reversed an award of costs on a motion for an interlocutory injunction because counsel had not requested them, and substituted an award of costs in the cause.

[10] I assume that by "costs to follow" the Judge in the present case meant that the party who succeeded in the application for judicial review would be entitled to the costs of the motions. That is, he awarded costs in the cause.

[11] As counsel for the Attorney General conceded at the hearing of this appeal, there is no evidence in the record before this Court that he requested costs in either motion in the Federal Court. The question, therefore, is whether the Attorney General is correct to say that the absence of a request for costs does not preclude a judge on an interlocutory motion from awarding costs in the cause.

[12] The general principle is that a court may not award costs when costs were not requested: see, for example, *Balogun v. Canada*, 2005 FCA 350. To award costs in these circumstances would be a breach of the duty of fairness because it would subject the party against whom they are

awarded to a liability when the party had had no notice or an opportunity to respond: see, for example, *Nova Scotia (Minister of Community Services) v. Elliott (Guardian ad litem of)* (1995), 141 N.S.R. (2d) 346 (N.S.S.C.) at para. 5.

[13] In my view, this principle is not limited to final costs, but is equally applicable to an award of costs in the cause. Such an award imposes a financial liability, albeit one that is contingent on the outcome of the underlying proceeding.

[14] A judge's decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application: *Merck & Co. v. Apotex Inc.*, 2006 FCA 324, 55 C.P.R. (4th) 81 at para. 15; *Polish National Union of Canada Inc.-Mutual Benefit Society v. Palais Royale Ltd.* (1988), 163 D.L.R. (4th) 56 (Ont. C.A.). For this purpose, an order on an interlocutory motion that is silent on costs is treated as an award of no costs: *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2006 FC 1333, 57 C.P.R. (4th) 58 at para. 13; *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.* (2002), 22 C.P.R. (4th) 332 (Ont. C.A.) at para. 36.

[15] Counsel for the Attorney General relies on the following statement in *Lubrizol* as authority for the proposition that a court may award costs in the cause, even though no request for costs had been made:

> On one minor point, however, it is clear that the Motions Judge erred. In her Order, she awarded the costs of the Motion to the plaintiffs. *Such costs* had not been asked for in the Motion or spoken to at the hearing and no mention is made of them in the Motions Judge's reasons. An award of costs other than "in the cause" in such circumstances is not a proper exercise of judicial discretion. (Emphasis added)

[16] While it is clear from this passage that the party had not asked for the costs of the motion, it is not clear whether costs in the cause had been requested. In the present case, however, there is no evidence that the Attorney General requested even costs in the cause. It seems to me unlikely that the Court in *Lubrizol* would have departed from a basic principle of fairness by awarding costs in the cause when they had not been requested. Accordingly, I do not regard *Lubrizol* as authority for the proposition that a court may award costs in the cause when no costs have been requested.

[17] In the absence of any evidence in the record that the Attorney General requested any costs, the Judge in the present case should not have awarded them, despite the broad discretion over costs now conferred by rule 400 of the *Federal Courts Rules*. The contingent liability imposed by the Judge's costs in the cause Order is sufficient to attract the duty of procedural fairness. Consequently, it was a breach of that duty for the Judge to award costs in the cause, because Ms Exeter, a self-represented litigant, had not had adequate notice that she might be required to pay costs, or an opportunity to respond.

Conclusion

[18] For these reasons, I would dismiss Ms Exeter's appeal against the grant of the Attorney General's motions, and against the denial of her cross-motion, but would set aside the order for costs in the Attorney General's motions.

[19] I would not award costs below or on the appeal because success has been divided, and the procedural confusions that have plagued these proceedings are not primarily attributable to Ms Exeter.

"John M. Evans"
J.A.

"I agree
K. Sharlow J.A."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE SCOTT OF THE FEDERAL COURT DATED JUNE 21, 2012, FILE NO. T-944-12)

DOCKET:	A-314-12
STYLE OF CAUSE:	Rachel Exeter and Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 22, 2013
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	SHARLOW AND DAWSON JJ.A.
DATED:	May 23, 2013

APPEARANCES:

Rachel Exeter	ON HER OWN BEHALF
Adrian Bieniasiewicz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court Cour fédérale

Date: 20141219

Docket: T-378-14

Citation: 2014 FC 1247

Ottawa, Ontario, December 19, 2014

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

CYNTHIA KNEBUSH

Applicant

and

RUTH MAYGARD, CLARISSA MCARTHUR, GAYLENE MCARTHUR AND KATHLEEN MCARTHUR, IN THEIR PERSONAL CAPACITIES AND IN THEIR CAPACITY AS THE BAND COUNCIL OF THE PHEASANT RUMP NAKOTA FIRST NATION AND THE PHEASANT RUMP NAKOTA FIRST NATION

Respondents

ORDER AND REASONS

I. Introduction

[1] This matter involves a question of a costs award where the parties settled the underlying judicial review application concerning a First Nation governance issue. As such it provides an

opportunity to review costs awards in the resolution of First Nations' disputes through settlement as opposed to litigation.

II. **Background**

[2] The Pheasant Rump Nakota First Nation is located in south-eastern Saskatchewan. Its members have chosen to govern themselves by their own legislation, the Custom Electoral System. The Chief of the Pheasant Rump Nakota First Nation had resigned his position on August 1, 2013. The Custom Electoral System addresses that situation and requires a by-election for chief within two months of the vacancy in the chief's office. More specifically, paragraph 2(6)(iv) of the governance law requires a by-election to be held "on the last Friday in the second month which follows the month that the vacancy of Chief and/or Band Council member was created ...".

[3] Because of delays in scheduling a by-election, Ms. Cynthia Knebush, the Applicant, filed an application on February 10, 2014 seeking a mandamus order compelling the Respondents in their capacity as members of the Council to hold a by-election for the office of chief.

[4] The Applicant was represented by legal counsel. The Respondent Councillors, Ms. Ruth Maygard, Ms. Gaylene McArthur and Ms. Kathleen McArthur (the Respondent Councillors), jointly retained legal counsel. The Respondent Ms. Clarissa McArthur, a Councillor at odds with the other Council members, retained separate legal counsel.

[5] The Federal Court's practice guideline for First Nations Governance Disputes provide for alternative dispute resolution approach by way of case management coupled with either informal or formal dispute resolution dialogue. In keeping with these guidelines, on March 7, 2014 I conducted a case management hearing in Winnipeg with all of the parties' legal counsel and some, though not all, parties present either in person or by teleconference.

[6] The parties reached an agreement on a resolution to the Pheasant Rump First Nation governance dispute. The settlement called for the general election for chief and all councillors to be moved forward several months to June 27, 2014. Prothonotary Roger Lafrenière confirmed the terms of the settlement by way of the March 19, 2014 Consent Order that set the general election for June 27, 2014.

[7] I agreed that I would be seized with the question of costs to be decided following written submissions from the parties.

III. **Issue**

[8] The central issue is whether costs can flow from the settlement of a judicial review of a First Nation governance dispute. If yes, the Court must determine whether the Applicant or the Respondent McArthur are entitled to costs and in what amount.

IV. **Legislation**

[9] The Court has discretionary power to award costs having regard to factors provided in Rule 400 of the *Federal Courts Rules*, SOR/98-106 which provides:

PART II

COSTS

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.

…

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

(a) the result of the proceeding;

…

(e) any written offer to settle;

…

(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;

…

(o) any other matter that it considers relevant.

(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.

…

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

…

PARTIE II

DÉPENS

400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

…

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

a) le résultat de l'instance;

…

e) toute offer ecrite de reglement;

…

g) la charge de travail;

…

h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;

…

o) toute autre question qu'elle juge pertinente.

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

(c) award all or part of costs on a solicitor-and-client basis; …	… (6) Malgré toute autre disposition des présentes règles, la Cour peut: … c) adjuger tout ou partie des dépens sur une base avocat-client; …

V. **Submissions**

A. *Submissions by the Applicant Cynthia Knebush*

[10] The Applicant seeks a cost award, inclusive of disbursements, in the amount of $10,000, from the Respondent Councillors, excluding the Respondent Clarissa McArthur, either jointly or severally.

[11] The Applicant incurred costs to prepare, serve and file the notice of application, prepare a supporting affidavit, and write to the Court requesting case management, as well as service expense related to obtaining legal services for a remote rural community. The Applicant's disbursements were $794.90, and her legal fees were calculated as follows: $19,000.00 solicitor and client costs, or using the tariff chart, $5,880.00 under column III, or $10,220.00 under column V. The average of all three amounts is $11,700.00.

[12] The Applicant advances three arguments for a cost award:

a. the application was a "public interest case" which preserves the rule of law in First Nations custom governance; the Applicant does not benefit directly;

b. the Applicant successfully obtained an expedited election for chief;

c. the Respondent Councillors likely have costs paid by the First Nation and therefore would not be personally responsible for their legal expenses. The Applicant submits her counsel acted *pro bono* or *low bono* [*sic*] but nevertheless she has incurred a personal expense having already advanced a retainer; and

d. a cost award would address the imbalance between the Applicant and the Respondent Councillors whose legal expenses are presumed covered by the First Nation.

B. *Submissions of the Respondent McArthur*

[13] The Respondent McArthur submits that there is a division between herself and the other Councillors and seeks full solicitor and client costs against the First Nation. She submits her request for solicitor client costs is based on public interest.

[14] The Respondent McArthur advances three arguments for considering this application for costs in the public interest:

a. public interest in this case is grounded in access to justice. This dispute has affected all members of the First Nation equally. The application was for benefit of community as a whole;

b. she states she is impecunious, and submits that the application was necessary and required intervention of lawyers to require the Respondent Councillors to call an

election; to not grant costs gives tacit approval to the Respondent Councillors' inaction;

c. she also submits, as a Councillor, she is in the same position as the other Councillors and should be indemnified by the First Nation in the same way as the Respondent Councillors.

[15] The Respondent McArthur submits that the Respondent Councillors stripped her of power, and she was not part of the decision to not call an election as required by the Custom Election System. She states her salary as a councillor was reduced, compromising her ability to engage legal counsel. As a respondent she was exposed to the same liability as the other respondents. She consented to the relief sought by the Applicant and submits there is therefore no principled reason why she should not be fully compensated for legal expenses.

[16] The quantum of costs requested by Respondent McArthur is uncertain. At paragraph 9 of her written submissions the request is for full solicitor client costs in the amount of $4,845.65. However, the relief sought at paragraph 45, are for costs in the amount of $5,985.65.

[17] Finally, Respondent McArthur submits the costs should rest with the Pheasant Rump First Nation which benefited by the outcome of the application.

C. *Submissions of the Respondent Councillors Ruth Maygard, Gaylene McArthur and Kathleen McArthur*

[18] The Respondent Councillors submit that the agreement of the parties was reached in the interests of not only saving the First Nation the cost of litigating the issues but also in the interests of resolving disputes between members of the First Nation.

[19] They submit that the Applicant was not successful, and emphasize that the agreement reached was a settlement based on compromise by all parties. For example, the Respondent Councillors are missing out on income they would have earned as councillors but for the earlier June 27 election date.

[20] The Respondent Councillors state that the First Nation Council has functioned in the past without a Chief in office for extended periods and there were legitimate factors causing delay in setting a date for the election. They submit they acted properly and not in bad faith. If costs are awarded against them, the Respondent Councillors submit they should be nominal and not be against them personally.

[21] The Respondent Councillors submit the costs claimed by the Applicant are excessive in the circumstances given they made efforts to resolve the matter.

[22] With respect to the Respondent McArthur's solicitor and client costs claim, the Principal Respondents submit costs were not necessary, as her only involvement was attendance by her

counsel at the case management hearing. The Respondent Councillors submit the Respondent McArthur should bear her own costs.

VI. **Analysis**

[23] Rule 400 of the *Federal Court Rules* sets out the basic principle that the Court has full discretion in awarding costs. Rule 400(3) sets out factors that Court may consider in awarding of costs, but the Court can consider further additional factors, as noted in Rule 400(3)(o). The Court has full discretion over the amount of costs to be awarded having regard to the factors delineated in Rule 400(3). (see *Francosteel Can. Inc. v "African Cape"*, [2003] FCA 119 at para 20.)

A. *Costs on Settlement*

[24] In a litigated proceeding, the general rule is costs follow the event, that is, the successful party is awarded costs unless there is reason for otherwise. The result of the proceeding carries significant weight in the Court's consideration of a cost award. (see paragraph 400(3)(a); see also *Merck & Co v Novopharm Ltd*, [1998], FCJ No 1185 at para 24.)

[25] In contrast, costs usually have not been awarded where settlements have been reached through agreement. However, Rule 400 does not preclude a costs award upon settlement and jurisprudence recognizes the possibility for such awards.

[26] In *RCP Inc. v Minister of National Revenue*, [1986] 1 FC 485 (TD), Justice Paul Rouleau considered whether costs could be awarded in absence of an order or determination of issues. He decided there was no bar to a costs award where an applicant obtained the relief sought by way

of settlement. He decided to award costs because equity required the respondents should not be allowed to avoid costs by settling the matter when it became apparent the applicant would be successful at trial.

[27] In *Mohawks of Akwesasne v Canada (Minister of Human Resources and Social Development)*, 2010 FC 754 [*Mohawks of Akwesasne*], Justice François Lemieux observed:

> 26 This was a case where the parties voluntarily came to the mediation table and settled. Generally, in such cases there are no losers only winners. Judicial comment, which I endorse, is to the effect, unless the parties agree otherwise, each party should bear its own costs in mediation unless the conduct of the parties during litigation suggests otherwise.

[28] Similarly, in *Wahta Mohawk First Nation v Hay*, 2014 FC 213 [*Wahta Mohawk First Nation*], Justice Douglas R. Campbell opined:

> 9 A unique factor, which militates towards the settlement of a First Nations governance dispute, is motivation to adhere to the cultural value that balance must be restored to the community. Thus, given the application of this higher principle, to maintain a dispute beyond a settlement reached by a request for costs is counter-indicated because the governance dispute just settled is, in fact, not settled and balance will not be achieved.
>
> 10 Thus, because of the unique nature of a First Nations governance dispute, in my opinion where a settlement is reached, whether by mediation or direct negotiation, each party should bear their own costs unless a clear serious reason exists to ground an award for costs. As found in Mohawk of Akwensasne a serious reason can be found across a range: unreasonable actions and mistakes in the course of the litigation at one end to unacceptable reprehensible behavior at the other.

B. *Agreement for Court Consideration of Costs*

[29] While the process of settlement may address the question of court awarded costs, there are constraints to including such provisions in settlement agreements.

[30] After settlement of the issues in *Mohawks of Akwesasne*, Justice Lemieux choose to consider the submissions on costs on the basis of an arbitrator whose determination would be binding on the parties and not subject to appeal. However, he cautioned:

> 27 The other important factor which weighs in the court's mind is the chilling effect of awarding costs against a party after the successful conclusion of mediation even though the agreement contemplates that possibility of a cost award as it does here.

[31] In *Wahta Mohawk First Nation*, Justice Campbell accepted the question of cost following settlement of that First Nation's governance dispute. While the settlement agreement provided for costs payable to the respondent to be determined by the Court, Justice Campbell significantly qualified the question of costs, stating:

> 4. Given the Agreement was accomplished, no findings were made on the merits of the Application. At the hearing the terms of the Agreement were read into the record, one term being that "the Application will be dismissed with costs to be determined by the Court". For clarification, it is agreed that the Agreement misstates this fact with in the phrase "the application is dismissed with costs payable to the Respondents to be determined by the Court". The point of difference is that whether any costs are payable are within my discretion.

C. *Outcomes*

[32] In *Randall v Caldwell First Nation of Point Pelee*, 2006 FC 1054 at paragraph 18 [*Randall*], Prothonotary Lafrenière noted Courts should not be speculating on the likely outcome that might have followed litigation:

> 18 Absent an acknowledgment by the Claimants that the Band Council would have succeeded if the proceedings had gone to hearing, the Court should not be speculating as to the likely outcome. Costs can be awarded, however, on the basis of the conduct of the parties during the course of the litigation, such as: (1) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (2) whether a party properly pursued or defended its case or a particular allegation or issue; (3) whether a party exaggerated its claim or raised a baseless defence; and (4) whether a party properly conceded issues or abandoned allegations during discoveries.

[33] The applicants had not sought costs in *Randall*. Rather, the respondent First Nation Council sought costs against the applicants following the settlement. Prothonotary Lafrenière stated:

> 22 The litigation between the Claimants and the Band Council brought a number of festering issues to a head, and resulted in negotiated settlement that will no doubt contribute to a better environment and understanding in the community, to the credit of all parties.
>
> 23 Bearing in mind the entirety of the record before the Court, I am not satisfied that it would be appropriate to award costs against the Claimants who, in the end, were simply attempting to have their voices heard. Moreover, a cost award would be counterproductive as it would undermine the progress that has been achieved over the last six years in bringing the community together.

[34] Prothonotary Lafrenière, being mindful of the benefits achieved in the ultimate outcome including a degree of success in resolving community conflict achieved by the applicants, declined to exercise discretion to award costs in favour of the respondent.

D. *Conduct*

[35] In *Mohawks of Akwesasne* the parties quickly agreed to case management and judicial mediation. The negotiations, however, took a significant period of time. After the main elements of a settlement agreement were reached, the parties agreed costs could be determined by the Court based on written submissions. The applicant then sought costs from the respondent.

[36] Justice Lemieux was well aware and approved of the decision in *Randall* stating:

> 14 Finally, the comments made by Prothonotary Lafreniere about costs and settlements resonate in the jurisprudence of other courts. I cite paragraph 19 of the supplementary reasons of Justice R.A. Blair (then a judge of the Commercial Court – Ontario, Court of Justice, General Division) in *Nameff v. Con-crete Holdings Ltd.* [1993 O.J. No. 1756:
>
> > 19. I do so principally for the following reason. The parties engaged in a lengthy mediation process before Farley J. they made a genuine effort to settle. They are to be commended for this effort withstanding that, in the end, it was unsuccessful. In my view the costs of mediation process – which is a voluntary effort to find a suitable out of court resolution – should be borne equally by the parties engaging in it. Otherwise, parties will be discouraged from engaging in what can be in many instances be a fruitful exercise leading to a self made result, for fear that at the end of the day, if it is not successful and the proceedings are consequently lengthened, they will bear more costs. (My emphasis [Justice Lemeiux])
>
> …

> 29 Clearly, in the Court's view, the applicants obtained in this mediation much more than they could, had the matter been litigated. For example, much of the Settlement Agreement rests on the exercise of the Minister's discretion in remissions. The Court, in judicial review, cannot dictate the exercise of discretion only its legality. This factor is important.

[37] Justice Lemieux emphasized that the applicant's success in the outcome rested in part on the respondent's conduct, namely the Minister's willingness to exercise discretion to accommodate settlement of the issues. Thus the parties' conduct in negotiations was also a consideration.

[38] The question of conduct arises in litigated proceedings with respect to solicitor-client costs. The general principle was stated in *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 [*Mackin*] at para 86:

> It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport*), [1992] 1 S.C.R. 3, at p. 80).

[39] Such conduct was a factor in the costs award in *Rouseau River Anishinabe First Nation v Nelson*, 2013 FC 180 [*Rouseau River Anishinabe First Nation*]. Justice James Russell awarded costs against the Nelson respondents, the former Chief and Councillors, in favour of the Applicant and the other respondents, who were the current Chief and Councillors.

[40] Justice Russell found the evidence before the Court established the Nelson respondents engaged in reprehensible, scandalous and outrageous conduct that merited an award of solicitor client costs against them. It must be noted Justice Russell had been addressing the conduct of the respondents in the events leading to the judicial review application rather than in the litigation in which the litigants were self-represented.

E. *Public Interest*

[41] As noted above, public interest may also justify the making of a costs order. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, at p 80 [*Friends of the Oldman River Society*].

[42] In awarding solicitor-client costs in *Rouseau River Anishinabe First Natio*n [*RRAFN*] Justice Russell further stated:

> 76. … There is also a strong public interest component for solicitor /client costs in this case. If the constitution of RRAFN is simply disregarded and thwarted for reasons of political expediency, these disputes will never cease. This cannot be in the interests of RRAFN.

F. *First Nations Governance Issues*

[43] First Nations are unique in that they may establish their own governance laws in accordance with the Aboriginal right to determine their governance structure "in accordance with the custom of the band". This unique Aboriginal right is confirmed by the *Indian Act* R.S.A. 1985 c- I-5 in s. 2 which provides:

> 2. (1) In this Act

> "council of the band" means
>
> …
>
> (b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

[44] The nature of this Aboriginal right was discussed by Justice Robert Mainville in *Elders of Mitchikinabikok Inik v Algonquins of Barriere Lake Customary Council*, 2010 FC 160 [*Algonquins of Barriere Lake*] at para. 101:

> 101 The use [of] customary selection processes is one of the few aboriginal governance rights which has been given explicit federal legislative recognition through the *Indian Act*. The *Mitchikanibikok Anishinabe Onakinakewin* is itself the contemporary manifestation of the traditional customary governance selection system of the Algonquin of Barriere Lake. That custom is explicitly recognized by this provision of the *Indian Act*.

[45] Questions of the legitimacy or compliance with First Nations governance laws come before the Federal Court in applications for judicial review of decisions or actions by First Nations chiefs, councils, officers or tribunals. (see *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paras 55 – 61.)

[46] The Federal Court, in considering the question, usually decides the issue by interpretation of the First Nations' governance laws or by application of principles of procedural fairness. These decisions assist in the clarification of First Nations governance laws and their proper application. The result is that the First Nations laws are better understood by the First Nation members, which promotes compliance and consistency with the governance law. By this process

First Nations' governance legislation benefits in the same way as does federal or provincial legislation when clarified by judicial interpretation.

[47] However, litigation of issues concerning First Nations governance presents a unique difficulty for First Nations. A First Nation is a community of members with long standing historical and familial inter-relationships. The adversarial nature of the litigation process can exacerbate community differences of opinion and harm ongoing relationships between the First Nations members.

[48] Further, litigation is becoming increasingly costly. Awards for costs in closely litigated claims can amount to tens of thousands of dollars. Such costs can divert First Nations resources away from other important priorities such as educational, social and economic initiatives.

[49] Finally, in my view, litigation runs counter to First Nations' sensibilities that promote agreements or consensus as a primary means of resolving issues. Clearly, where the governance issue is the correct interpretation of a First Nation law, the question requires judicial determination. However, many of the issues turn on facts upon which the parties disagree. In other instances, a resolution may be found by adopting a different course of action. In such instances, a negotiated settlement is an alternative to litigation. Parties usually have a good understanding of what would be an outcome that is fair to all. Experienced counsel are knowledgeable and usually able to assess likely outcomes. Settlements draw on these understandings and knowledge and can resolve such issues without further litigation.

[50] Alternative dispute resolution is available for judicial review applications. The Federal Court Rules are flexible and also enable judicial review matters to be addressed by way of case management and dispute resolution. That is not to say dispute resolution is not without commitment and effort. Achieving an agreement that is satisfactory and fair to all parties takes work, flexibility and willingness to compromise.

[51] The benefits of reaching a satisfactory settlement in First Nations governance disputes are several: healing rifts in First Nations communities, achieving positive outcomes beyond the scope achievable on judicial review and more fundamental resolution of issues are of significance.

[52] The Federal Court has repeatedly observed benefits to resolution of proceedings by agreements between the parties. To recap:

> The litigation between the Claimants and the Band Council brought a number of festering issues to a head, and resulted in negotiated settlement that will no doubt contribute to a better environment and understanding in the community, to the credit of all parties. *Randall* para. 22
>
> This was a case where the parties voluntarily came to the mediation table and settled. Generally, in such cases there are no losers only winners. *Mohawks of Akwesasne* para. 26
>
> A unique factor, which militates towards the settlement of a First Nations governance dispute, is motivation to adhere to the cultural value that balance must be restored to the community. Thus, given the application of this higher principle, to maintain a dispute beyond a settlement reached by a request for costs is counter-indicated because the governance dispute just settled is, in fact, not settled and balance will not be achieved. *Wahta Mohawk First Nation* para. 9

[53] I would add my own observation that the process of deciding important matters by agreement is a process that resonates in many First Nation cultures. Agreements are means by which important matters are decided and accepted by First Nations members with greater finality. This characteristic is manifested in different ways. It may be at an elevated level such as the reverence for Indian treaties as is described in *R v Badger*, [1996] 1 SCR 771 or it may be at an individual level as in First Nations' justice initiatives involving peacemaking or circle sentencing.

[54] On one hand, an award of costs implies one party is a winner and the other party to be a loser in the proceedings. There is an important balancing to be done in the process of considering costs. In *Randall*, Prothonotary Lafrenière considered a cost award to be counterproductive as it would undermine the progress achieved in the community. In *Algonquins of Barriere Lake*, Justice Mainville declined to make a cost order because a cost award would exacerbate the community tensions.

[55] I consider such inferences about winners and losers weigh against, and are a disincentive to, pursuing the benefits of settling matters by agreement.

[56] On the other hand, there is a public interest aspect to be considered. The parties in the settlement process gain a better appreciation of the First Nations governance under dispute as they work through the process of reaching an agreement. (see e.g. *Akwesasne* at para 30). I should think such understanding and appreciation advances observance of the rule of law in respect of First Nations governance laws.

[57] Certainty in First Nations governance law is an important benefit for a First Nation community. In this respect, where the result is a better appreciation and commitment to observance the First Nations governance law, it is appropriate to consider whether that the costs ought to be borne by the First Nation.

[58] First, costs have been awarded against the First Nation where the respondent in fact acts for the First Nation. *Bellegarde v Poitras*, 2009 FC 1212. In that decision, Justice Russell Zinn was satisfied the First Nation had paid for some of the costs of the legal fees of the respondents. He found the Court had jurisdiction to award costs against a non-party. (see para 9).

[59] There is also the question of the imbalance between an individual member of a First Nation who brings a judicial review to have a First Nation's laws be observed and the respondents who are the governing body of the First Nation. Such respondents, usually chiefs and councillors, are in a position to have their legal costs reimbursed by the First Nation. If a judicial review application properly addresses a question of the First Nation's law, it seems to me that, on the basis of public interest, individual applicants may be similarly entitled to look to the First Nation for costs.

[60] I should think a reasonable costs award on a public interest basis against a First Nation that has benefited by having clarity brought to its governance laws avoids any adverse inference of winners and losers. The public interest served would be having the issue resolved in a manner and form that is in keeping with the sensibilities of the First Nation.

[61] Having regard to the foregoing, it is my view that consideration of costs is appropriate in settlements of First Nations governance judicial review applications rather than merely being an exception to the general practice of not awarding costs in settlements.

VII. **Costs**

[62] In considering this matter of costs, I had regard for:

a. the Rules apply in respect of consideration of costs awards following settlements;

b. promoting compliance with First Nation governance law and restoring relationships are important considerations;

c. conduct of the parties in the course of achieving resolution is a significant factor; and

d. solicitor-client costs is reserved for cases of reprehensive, scandalous, conduct and for cases that give rise to matters of important public interest.

[63] The Applicant Cynthia Knebush requested a cost award on the higher end but not full solicitor client costs. She had been seeking to have the Pheasant Rump Nakota First Nation law requiring a by-election for the vacant office chief complied with. That objective was realized by the scheduling of an earlier general election date.

[64] Further, the Applicant did more than just file her Notice of Application and supporting affidavit. She also completed the Applicant's Record including argument and was ready to proceed with a hearing before the case management conference was held.

[65] The Respondent McArthur was necessarily engaged as a respondent councillor. However, she conflated her own issues with the other Respondent Councillors with the issue in the proceeding at hand. Moreover, the involvement by her and her legal counsel was minimal as the issues were fully addressed by the Applicant and the principal Respondent Councillors.

[66] The Respondent Councillors, to their credit, immediately entered into settlement discussions and agreed to a resolution that involved giving up serving out their own full terms of office which had not been at issue in the judicial review application.

[67] Since the Respondent Councillors were sitting members of the Pheasant Rump Nakota First Nation Council, I find the presumption that their legal expenses were covered by the First Nation has not been displaced by evidence to the contrary.

[68] As the Respondent Councillors and the Respondent McArthur are the councillors of the Pheasant Rump Nakota First Nation, I see no reason not to consider the First Nation to be represented in this matter as if it were a named party. All parties made reference to Pheasant Rump Nakota First Nation directly or impliedly as if a party. Accordingly, I will treat it as a party for purposes of this costs award.

VIII. **Conclusion**

[69] In light of the foregoing and in the exercise of my discretion I conclude that:

a. The Pheasant Rump Nakota First Nation is to be added as a named party;

b. costs in the amount of $10,000.00 inclusive of expenses are awarded in favour of the Applicant Cynthia Knebush payable by the Pheasant Rump Nakota First Nation;

c. no costs are assessed personally against the Respondent Councillors Ruth Maygard, Gaylene McArthur, and Kathleen McArthur; and

d. costs in a lump sum of $1,500.00 are awarded in favour of the Respondent Clarissa McArthur also payable by the Pheasant Rump Nakota First Nation.

ORDER

THIS COURT ORDERS that:

1. The Pheasant Rump Nakota First Nation is to be added as a named party.

2. Costs in the amount of $10,000.00 inclusive of expenses are awarded in favour of the Applicant Cynthia Knebush payable by the Pheasant Rump Nakota First Nation;

3. No costs are assessed personally against the Respondent Councillors Ruth Maygard, Gaylene McArthur, and Kathleen McArthur; and

4. Costs in a lump sum of $1,500.00 are awarded in favour of the Respondent Clarissa McArthur also payable by the Pheasant Rump Nakota First Nation.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-378-14
STYLE OF CAUSE:	CYNTHIA KNEBUSH v RUTH MAYGARD, CLARISSA MCARTHUR, GALKENE MCARTHUR AND KATHLEEN MCARTHUR, IN THEIR PERSONAL CAPACITIES AND IN THEIR CAPACITY AS THE BAND COUNCIL OF HTE PHEASANT RUMP NAKOTA FIRST NATIONS

SUBMISSIONS WITH RESPECT TO COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO THE ORAL DIRECTION OF JUSTICE MANDAMIN OF MARCH 7, 2014

REASONS FOR ORDER AND ORDER:	MANDAMIN J.
DATED:	DECEMBER 19, 2014

WRITTEN REPRESENTATIONS BY:

Sacha R. Paul	FOR THE APPLICANT CYNTHIA KNEBUSH
Michael P. Hudec	FOR THE RESPONDENTS RUTH MAYGARD, GAYLENE MCARTHUR AND KATHLEEN MCARTHUR, IN THEIR PERSONAL CAPACITIES AND IN THEIR CAPACITY AS THE BAND COUNCIL OF THE PHEASANT RUMP NAKOTA FIRST NATIONS
Kirk Goodtrack	FOR THE RESPONDENT CLARISSA MCARTHUR

SOLICITORS OF RECORD:

Thompson Dorfman Sweatman LLP Winnipeg, MB	FOR THE APPLICANT CYNTHIA KNEBUSH

Hudec Law Office North Battleford, SK	FOR THE RESPONDENTS RUTH MAYGARD, GAYLENE MCARTHUR AND KATHLEEN MCARTHUR, IN THEIR PERSONAL CAPACITIES AND IN THEIR CAPACITY AS THE BAND COUNCIL OF THE PHEASANT RUMP NAKOTA FIRST NATIONS
Goodtrack Law Regina, SK	FOR THE RESPONDENT CLARISSA MCARTHUR

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160609

Docket: 16-A-17

Citation: 2016 FCA 174

CORAM: **GAUTHIER J.A.**
WEBB J.A.
GLEASON J.A.

BETWEEN:

GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY AND NEWLEAF TRAVEL COMPANY INC.

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 9, 2016.

REASONS FOR ORDER BY: GLEASON J.A.

CONCURRED IN BY: GAUTHIER J.A.
WEBB J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160609

Docket: 16-A-17

Citation: 2016 FCA 174

CORAM: **GAUTHIER J.A.**
WEBB J.A.
GLEASON J.A.

BETWEEN:

GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY AND NEWLEAF TRAVEL COMPANY INC.

Respondents

REASONS FOR ORDER

GLEASON J.A.

[1] The appellant, Dr. Gábor Lukács, is seeking leave to appeal Decision 100-A-2016 of the Canadian Transportation Agency, issued on March 29, 2016 [the Decision]. In the Decision, the Agency made two determinations. First, it decided that resellers of domestic air service are no longer required to hold licences under the *Canada Transportation Act*, S.C. 1996, c. 10 [the CTA], so long as they do not hold themselves out as an air carrier operating an air service.

Second, in application of the foregoing, the Agency held that the respondent, Newleaf Travel Company Inc., was such a reseller and therefore not required to hold a licence. In so deciding, the Agency modified its previous interpretation of subsection 55(1) and paragraph 57(a) of the CTA that it had applied to several other domestic resellers of air services.

[2] Dr. Lukács submits the Agency made an error of law as its changed interpretation of subsection 55(1) and paragraph 57(a) of the CTA is unreasonable. He also alleges that the Agency lacked jurisdiction to undertake the inquiry which led to the new interpretation of the licencing requirements applicable to resellers of domestic air services. The issues in the proposed appeal therefore raise questions that fall within the scope of section 41 of the CTA.

[3] Newleaf does not contest this but rather says that Dr. Lukács lacks standing to commence this appeal as he was not a party to the proceeding before the Agency. It also asserts that Dr. Lukács has failed to raise an arguable case in respect of the issues that he has raised.

[4] Contrary to what Newleaf asserts, the materials filed do raise an arguable case and Dr. Lukács does have standing to commence this appeal, either as a private or public interest applicant.

[5] Dr. Lukács participated in the consultation before the Agency undertaken with respect to the change in the interpretation of the licencing requirements applicable to domestic resellers of air service, which is sufficient to afford him standing to launch this appeal.

[6] Even if this were not the case, he would possess standing as a public interest litigant. The test for public interest standing involves consideration of three inter-related factors: first, whether there is a justiciable issue, second, whether the individual seeking standing has a genuine interest in the issue, and, third, whether the proposed proceeding is a reasonable and effective way to bring the matter before the courts: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 at paras. 36-37. As leave is being granted, this appeal raises a justiciable issue. It is undisputed that Dr. Lukács is an air passenger rights advocate, who has frequently brought applications to this Court in respect of Agency decisions, and therefore does have a genuine interest in the issues raised in this appeal. Finally, an appeal by someone like Dr. Lukács is an effective way for the issues raised in this appeal to be brought before the Court as Newleaf would not challenge the Decision rendered in its favour.

[7] Thus, leave should be granted to Dr. Lukács to commence this appeal.

[8] Dr. Lukács requests that this appeal be expedited and joined for hearing with an earlier judicial review application he commenced, challenging the jurisdiction of the Agency to embark upon the inquiry that led to the Decision (Federal Court of Appeal File A-39-16). The judicial review application in File A-39-16 is being conducted on an expedited basis. If the judicial review application is not rendered moot by this appeal, it makes sense that this appeal and the judicial review application be heard one immediately after the other by the same panel of this Court as there is considerable overlap between the files. It also is appropriate to expedite this

appeal due both to the fact that the judicial review application is being expedited and to the nature of the issues raised in the appeal.

[9] I would therefore order that the appeal be conducted on an expedited basis if Dr. Lukács files his Notice of Appeal within thirty days of the date of this Order. I would also order that if this matter is expedited, this appeal be heard immediately following the judicial review application in File A-39-16 if that application proceeds to hearing. The other issues raised by the parties regarding production of materials should be dealt with in a separate procedural Order issued concurrently with this Order.

[10] While Dr. Lukács seeks his costs in respect of this motion for leave, it is more appropriate that they be in the cause.

"Mary J.L. Gleason"

J.A.

“I agree
Johanne Gauthier J.A."

“I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	16-A-17
STYLE OF CAUSE:	GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY AND NEWLEAF TRAVEL COMPANY INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GLEASON J.A.
CONCURRED IN BY:	GAUTHIER J.A. WEBB J.A.

WRITTEN REPRESENTATIONS BY:

Dr. Gábor Lukács	FOR THE APPELLANT (ON HIS OWN BEHALF)
Allan Matte	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Brian J. Meronek Ian S. McIvor	FOR THE RESPONDENT NEWLEAF TRAVEL COMPANY INC.

SOLICITORS OF RECORD:

Legal Services Branch Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
D'Arcy & Deacon LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE RESPONDENT NEWLEAF TRAVEL COMPANY INC.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160909

Docket: A-39-16

Citation: 2016 FCA 227

CORAM: **WEBB J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 9, 2016.

REASONS FOR ORDER BY: GLEASON J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160909

Docket: A-39-16

Citation: 2016 FCA 227

CORAM: **WEBB J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

GLEASON J.A.

[1] The Court has before it a motion to strike this application for mootness. For the reasons that follow, I would grant this motion, without costs.

[2] This application was launched in January of 2016. It seeks declarations regarding the lack of authority of the respondent to make a decision or order that has the effect of excluding or exempting Indirect Air Service Providers (ISPs) from the requirement of holding a licence under

the *Canadian Transportation Act*, S.C. 1996, c. 10 (the *CTA*). In addition to declaratory relief, the applicant also seeks in this application an order of prohibition, enjoining the respondent from making a decision or order that purports to exclude or exempt ISPs from the requirement of holding a licence under the *CTA*. The applicant brought this application after the respondent announced that it intended to undertake public consultations as to whether it should modify its approach to the licencing of domestic ISPs or resellers under the *CTA*.

[3] Following the conclusion of those consultations, and while this application was still pending, the respondent issued Decision No. 100-A-2016 on March 29, 2016. In that decision the respondent determined that:

1. Resellers do not operate air services and are not required to hold an air licence under the *CTA*, as long as they do not hold themselves out to the public as an air carrier operating an air service; and

2. New Leaf Travel Company Inc., which is an ISP or reseller, would not be required to hold an air licence under the *CTA* if it proceeded with its proposed business model.

[4] It is common ground between the parties that the terms “ISP” and “reseller” are interchangeable and refer to companies who sell air transportation services but contract with a third party carrier to actually provide those services. Thus, the decision that the applicant sought to prohibit in this application was made by the respondent on March 29, 2016.

[5] By order dated June 9, 2016, this Court granted the applicant leave to appeal the respondent's March 29, 2016 decision and that appeal is currently pending before the Court.

[6] There is a high threshold for striking an application for judicial review on a preliminary basis in that such orders should only be made where the application is so flawed as to be bereft of any chance of success: *Canada (National Revenue) v. JP Morgan Asset Management (Canadian) Inc.*, 2013 FCA 250 at paras. 47-48, [2014] 2 F.C.R. 557. Where an application has been rendered moot, this high threshold may be met especially where, as here, the issues in the moot proceeding are fully engaged in another matter that is pending before the Court.

[7] A matter is moot when there is no longer a live controversy between the parties and an order will therefore have no practical effect: *Borowski v. Canada*, [1989] 1 S.C.R. 342 at para. 16, 57 D.L.R. (4th) 231 and *Lavoie v. Canada (Minister of the Environment)*, 2002 FCA 268 at para. 6, 291 N.R. 282. Even where a matter is moot, the Court may still decide to hear a case if the circumstances warrant it.

[8] Here, the issues raised by this application are fully engaged by the pending appeal brought in respect of the respondent's March 29, 2016 decision. A remedy identical to the requested declaratory relief will necessarily be considered by the Court in deciding the appeal. As for the requested remedy of prohibition, there is no longer anything to prohibit as the respondent has made the decision that the applicant sought to prohibit in this application. I therefore conclude that this application is moot and can have no practical effect. Moreover, there is no reason why it should be pursued – or even stayed – as all the issues raised in the application

are now before the Court in the pending appeal of the respondent's March 29, 2016 decision. Thus, the only impact of this application would be the incurring of unnecessary costs by the parties and the expenditure of unnecessary time by the Court.

[9] I would accordingly grant this motion and strike this application, without costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-39-16
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GLEASON J.A.
CONCURRED IN BY:	WEBB J.A. RENNIE J.A.
DATED:	SEPTEMBER 9, 2016

APPEARANCES:

Dr. Gábor Lukács	FOR THE APPLICANT (ON HIS OWN BEHALF)
Allan Matte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20161215

Docket: A-242-16

Citation: 2016 FCA 314

CORAM: **NADON J.A.**
DAWSON J.A.
SCOTT J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and NEWLEAF TRAVEL COMPANY INC.

Respondents

Heard at Ottawa, Ontario, on December 14, 2016.

Judgment delivered at Ottawa, Ontario, on December 15, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
SCOTT J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20161215

Docket: A-242-16

Citation: 2016 FCA 314

CORAM: **NADON J.A.**
DAWSON J.A.
SCOTT J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and NEWLEAF TRAVEL COMPANY INC.

Respondents

REASONS FOR JUDGMENT

DAWSON J.A.

[1] In the airline industry entities who do not operate aircraft, but who purchase the seating capacity of an air carrier and subsequently resell the seats to the public are referred to as "resellers" or "indirect air service providers".

[2] The Canadian Transportation Agency determined that resellers do not operate an "air service" as that term is defined in subsection 55(1) of the *Canada Transportation Act*, S.C. 1996, c.10 (Act) so long as they do not hold themselves out to the public as an air carrier operating an air service (Decision No. 100-A-2016). It followed from this conclusion that resellers are not required to hold an air licence and that, based on its proposed business model, NewLeaf Travel Company Inc. would not operate an air service.

[3] On this appeal from the decision of the Agency, the appellant argues that the decision is unreasonable and that in reaching its decision the Agency exceeded its jurisdiction.

[4] I respectfully disagree.

[5] The Agency based its interpretation of subsection 55(1) of its home statute on a textual, contextual and purposive analysis. The Agency particularly noted that while section 57 of the Act prohibits a person from operating an air service unless the person holds a licence in respect of that service, section 59 does not require a person selling an air service to be a licensee. Section 59 simply requires "a person" to hold a licence in respect of the air service. Read together, these sections were found to evidence Parliament's intent that selling an air service to the public does not equate to operating an air service, notwithstanding that resellers exercise commercial control over an air service with respect to things such as routes, scheduling, pricing and equipment, while licenced carriers operate the aircraft on the resellers' behalf.

[6] This was a reasonable interpretation of the Act. It is to be remembered that when the words of a provision are precise and unequivocal the ordinary meaning of the words plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 10). Nor was the decision unreasonable by virtue of the Agency's failure to provide a comprehensive exposition of all of the indicia of what it means to operate an air service. It was sufficient for the Agency to find that "what it means to operate an air service does not capture resellers, as long as they do not hold themselves out to the public" as operating aircraft or a domestic or international air service.

[7] In my view, the appellant's most cogent argument is that together sections 65 and 66 of the Act reflect Parliament's intent that persons with control over the fares, routes, schedules and frequency of service of an air service be licensees. Because resellers exert such control the appellant submits they should be licenced. However, the sections relied upon by the appellant are remedial provisions. It was not unreasonable for the Agency to interpret the Act to the effect that these remedial provisions are directed to the licensee in a reselling arrangement, even if the reseller controls things such as fares and schedules. Nothing in the Act expressly requires that a licensee control matters such as fares, routes and schedules.

[8] I also reject the appellant's argument that because of the absence of any contractual relationship between the licensee and the passengers, the licensee in a reselling arrangement owes no obligations to the passengers. As the Agency found, passengers will still be covered, and so protected, by the terms and conditions of carriage set out in the tariff issued by the licenced air carrier operating the aircraft on which the passengers travel. Further, the licenced air

carrier will be required to hold the prescribed liability insurance. Put more broadly, licenced air carriers are regulated under the Act when they provide an air service. The involvement of a reseller does not obviate the requirement that licensees comply with all of the obligations imposed upon them under the Act.

[9] This last point answers the appellant's assertion, made in his written submissions, that the Agency exceeded its jurisdiction by relieving a person from the requirement to have in place prescribed liability insurance. The consequence of the Agency's decision is that resellers are not required to hold prescribed liability insurance. This is a requirement imposed on the licenced air carrier. Resellers cannot be relieved of an obligation which does not apply to them. Thus there is no jurisdictional issue.

[10] Nor did the Agency circumvent the requirement of Canadian ownership. As the Agency observed, if a non-Canadian reseller acquired ownership or control in fact of a licenced air carrier, that carrier would cease to be Canadian and would cease to be eligible to hold a licence.

[11] Finally, as the Agency noted, not requiring resellers to obtain a licence does not equate to leaving consumers without protection. In addition to the protection provided through the obligations imposed on licenced air carriers, resellers are subject to any existing provincial travel protection and consumer rights legislation.

[12] It follows that I would dismiss this appeal. In circumstances where there is a public interest in having the Agency's decision reviewed, I would not award costs against the appellant. Given that the appellant's challenge failed, I would not award costs in his favour.

"Eleanor R. Dawson"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
A. F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-242-16
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY and NEWLEAF TRAVEL COMPANY INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 14, 2016
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NADON J.A. SCOTT J.A.
DATED:	DECEMBER 15, 2016

APPEARANCES:

Dr. Gábor Lukács	SELF-REPRESENTED FOR THE APPELLANT
Allan Matte	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Brian J. Meronek, Q.C. Brian P. Hennings	FOR THE RESPONDENT NEWLEAF TRAVEL COMPANY INC.

SOLICITORS OF RECORD:

Canadian Transportation Agency Legal, Secretariat and Registrar Services Branch Gatineau, Quebec	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
D'Arcy & Deacon LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE RESPONDENT NEWLEAF TRAVEL COMPANY INC.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200327

Dockets: A-333-15
A-367-15
A-389-15
A-390-15
A-440-15
A-452-15

Citation: 2020 FCA 66

CORAM: **WEBB J.A.**
NEAR J.A.
RENNIE J.A.

Docket: A-333-15

BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket: A-367-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket: A-389-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket: A-390-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket: A-440-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

DEPUTY PRIME MINISTER AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Docket: A-452-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

DEPUTY PRIME MINISTER AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Heard at Ottawa, Ontario, on December 9, 2019.

Judgment delivered at Ottawa, Ontario, on March 27, 2020.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
RENNIE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200327

Dockets: A-333-15
A-367-15
A-389-15
A-390-15
A-440-15
A-452-15

Citation: 2020 FCA 66

CORAM: **WEBB J.A.**
NEAR J.A.
RENNIE J.A.

Docket:A-333-15

BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket:A-367-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket:A-389-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket:A-390-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Docket:A-440-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

DEPUTY PRIME MINISTER AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

Docket:A-452-15

AND BETWEEN:

VLASTA STUBICAR

Appellant

and

DEPUTY PRIME MINISTER AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT

WEBB J.A.

[1] Ms. Stubicar filed six appeals. Each appeal is from a different order of the Federal Court. Although the appeals were not consolidated, there is significant overlap in the issues related to these six appeals. All six appeals relate to an award of costs in other matters involving Ms. Stubicar. Two of the appeals arise from matters where Ms. Stubicar was awarded costs and the other four are related to matters where costs were awarded to the Crown.

[2] Ms. Stubicar is a lawyer. She represented herself at the hearing of these appeals and in all of the matters to which these appeals relate. All of the matters were connected to her underlying claim that the Canada Border Services Agency (CBSA) had improperly seized her Croatian passport in 2008.

[3] These reasons relate to all six appeals. The original of the reasons shall be placed in file A-333-15 and a copy of the reasons shall be placed in each of the other files.

[4] For the reasons that follow, I would dismiss all six appeals.

I. A-333-15

[5] This appeal relates to a matter in which Ms. Stubicar was awarded costs by this Court by the Judgment dated November 13, 2012 (2012 FCA 288). This matter began with an Order of the Prothonotary dated October 13, 2011 that required the Crown to list, in a supplementary affidavit of documents, certain pages in the notebooks of two supervisors who worked for the CBSA. The Federal Court allowed the Crown's appeal from this Order of the Prothonotary (2012 FC 549). Ms. Stubicar's appeal to this Court was allowed.

[6] The Judgment of this Court stated that her appeal was allowed "with costs to [Ms. Stubicar] throughout". The costs were assessed in two different decisions. The first decision addressed the costs related to the matter that was before the Federal Court and the second addressed the costs related to the appeal to this Court.

[7] In assessing the costs to which Ms. Stubicar was entitled in relation to the Federal Court matter, the assessment officer did not include any amount for Ms. Stubicar's time (2015 FC 564). The costs were assessed at $226.86. Ms. Stubicar brought a motion for a review of this assessment of costs. The Federal Court dismissed this motion by the Order dated June 2, 2015 (Docket No. T-2102-10). Ms. Stubicar has appealed this Order.

[8] In her memorandum, Ms. Stubicar identified three grounds of appeal:

- whether the Federal Court erred in applying the law governing a review under Rule 414 of the *Federal Courts Rules*, SOR/98-106;
- whether the Federal Court erred in applying the cases decided by the Federal Court of Appeal; and
- whether the Federal Court failed to properly consider the record before the assessment officer.

Although these are stated as three separate grounds of appeal, in essence they all relate to the same issue – whether any amount should have been included for Ms. Stubicar's time.

[9] Ms. Stubicar submitted that the decision of this Court in *Turner v. Canada*, 2003 FCA 173, [2003] F.C.J. No. 548 (QL) supports her position. However, I do not agree that this case supports her position.

[10] Mr. Turner was a self-represented litigant. In allowing Mr. Turner's appeal, this Court stated that "[t]he appeal is allowed with costs" (*Turner v. The Queen*, (2000), 259 N.R. 92, [2000] F.C.J. No. 1066 (QL)). Following the granting of this judgment, Mr. Turner had his costs assessed by an assessment officer who did not allow any amount for his time. Mr. Turner did not agree with the assessment of his costs and challenged the assessment in the Federal Court.

[11] Justice Nadon (as he then was) described Mr. Turner's claim for costs and the amount that he was awarded in [2001] F.C.J. No. 1506 (QL), 211 F.T.R. 299:

> 3 Although the applicant claimed that he was entitled to costs in the sum of $275,268.12, the Assessment Officer, after a thorough and detailed analysis, fixed his costs at $2,381.22.

4 The main item claimed by the applicant was a sum of $265,700., based on the number of hours spent by him times the number of units for the particular service listed in the Tariff times $100. As to the disbursements claimed, they amount to a sum of $9,568.12. The applicant argued, both before me and Mr. Stinson, that on the authority of the British Columbia Court of Appeal's decision in *Skidmore v. Blackmore*, [1995] 4 W.W.R. 524, he was entitled to compensation for his successful efforts, in the same way as if he had been represented by a lawyer.

5 I agree entirely with Mr. Stinson, for the reasons he gives, that the applicant is not entitled to the compensation he seeks.

[12] In dismissing Mr. Turner's appeal, this Court stated that:

5 The Assessment Officer decided that the Court meant to award Mr. Turner party and party costs, and that, in the absence of any directions to the contrary, the award should be calculated pursuant to *Tariff B* of the *Federal Court Rules, 1998*. However, *Tariff B* only provides for the partial recovery of legal fees and the usual disbursements, but not the value of the time spent on litigation by parties, whether or not they are self-represented.

6 In my opinion, Mr. Stinson was correct in reaching this conclusion: *Munro v. Canada*, (1998), 163 D.L.R. (4th) 541 (F.C.A.). Further, the fact that Tariff B does not provide for a self-represented litigant's lost time does not violate Mr. Turner's right to equality guaranteed by section 15 of the *Charter*: *Rubin v. Canada (Attorney General)*, [1990] 3 F.C. 642 (T.D.); *Lavigne v. Canada (Human Resources Development)* (1998), 228 N.R. 124 (F.C.A.).

7 This is not to say that, in the exercise of the plenary discretion over costs granted by Rule 400(1), the Court may not make an award that provides a litigant with some compensation for items that fall neither within disbursements as normally understood, nor counsel fees: see, for example, *Entreprises A.B. Rimouski Inc. v. Canada*, [2000] F.C.J. No. 501 (C.A.).

8 However, in the case before us, the Court made no such special award in favour of Mr. Turner in its judgment of June 27, 2000, even though it had been very critical of Revenue Canada's conduct. It was not within the jurisdiction of the Assessment Officer to amend the order made by the Court. Nor on an appeal from Nadon J.'s dismissal of Mr. Turner's motion under Rule 414 for a review of the Assessment Officer's decision may this Court amend the costs order made by another panel of this Court when it allowed Mr. Turner's appeal against his income tax assessment.

[13] The award of costs in Mr. Turner's case was identical to the award of costs that is relevant in this appeal – simply a reference to an appeal being allowed with costs. There was no special award of costs to Mr. Turner nor to Ms. Stubicar. These cases should be contrasted with the decision of this Court in *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202, [2002] 4 FC 865 in which nine paragraphs (paragraphs 44 to 52) were devoted to the discussion of the awarding of costs to Mr. Sherman, a self-represented lawyer. In the concluding paragraph related to this issue, this Court stated:

> 52 While staying within the parameters of our Rules, I believe it is proper to award the appellant, in addition to his disbursements and on his filing appropriate evidence to support the claim, the following costs: a moderate allowance for the time and effort devoted to preparing and presenting the case before both the Trial and the Appeal Divisions on proof that the appellant, in so doing, incurred an opportunity cost by forgoing remunerative activity.

[14] In *Sherman*, there was a special award of costs. Since there was no special award of costs by this Court to Ms. Stubicar, the Federal Court did not err in dismissing her review of the assessment of costs that did not include any amount for her time. I would dismiss Ms. Stubicar's appeal in A-333-15.

II. A-367-15

[15] In this matter, costs were awarded against Ms. Stubicar by the Federal Court (2012 FC 1393). The proceeding that resulted in this costs award was a motion for summary judgment brought by the Crown. In allowing this motion, the Judgment stated:

> The [Crown's] motion for summary judgment is hereby granted and [Ms. Stubicar's] action against [the Crown] is dismissed, with costs.

[16] The assessment officer assessed costs of $3,422.08 (2015 FC 563). Ms. Stubicar sought a review of this assessment of costs. Her motion for a review of this assessment of costs was dismissed by the Order of the Federal Court dated June 8, 2015 (Docket No. T-2102-10). The same Federal Court Judge who had awarded the costs that were in issue in this assessment of costs also heard and decided her motion for review of this assessment. Ms. Stubicar noted, in paragraphs 13 to 15 of her memorandum, that her motion for the review of the assessment of costs had originally been assigned to a different Federal Court Judge but that Judge referred the motion to the same Federal Court Judge who had awarded the costs in issue. Having the same judge who awarded costs hear the motion for the review of the assessment of costs is in line with the comments of Justice Evans in *Apotex Inc. v. Merck & Co.*, 2008 FCA 371, [2008] F.C.J. No. 1656 (QL), who was writing on behalf of this Court:

> 18 Finally, I would strongly endorse Justice Gibson's recommendation (at para. 51) that the judge who presided at the underlying proceeding is in the best position to review the assessment of costs and that, whenever possible, the presiding judge should conduct any review of an assessment officer's decision.

[17] Ms. Stubicar’s references, in paragraphs 52 to 54 of her memorandum, to certain grammatical errors in the reasons of the Federal Court Judge, who allowed the Crown’s motion for summary judgment and dismissed her action, do not warrant a departure from the recommendation of Justice Evans.

[18] In her memorandum of fact and law in this appeal, Ms. Stubicar raises two grounds of appeal:

- the failure of the Federal Court Judge to consider the proper ground of review; and

– the misapplication of the standard governing review of the assessment officer's decision.

[19] In relation to the first ground of appeal, Ms. Stubicar has broken this down into two parts – one related to the interpretation of the underlying costs award and the second related to the "Disputed Justification of the [Crown's] Costs Claims".

[20] Ms. Stubicar's argument in relation to the interpretation of the costs award is that the placement of the comma in the Judgment between "dismissed" and "with costs" affected the interpretation of the costs that were awarded. The assessment officer found that the costs award related to both the motion for summary judgment and the dismissal of the action that had been brought by Ms. Stubicar. It is clear from the reasons of the assessment officer that Ms. Stubicar's arguments related to the placement of the comma were analyzed and considered by him.

[21] It is, however, far from clear how the costs award could be restricted to only the motion or the dismissal of Ms. Stubicar's claim since the comma separates the word "dismissed" from "with costs". Although Ms. Stubicar devotes several paragraphs of her memorandum to an alleged error in the interpretation of the costs award, she does not provide any indication of what she alleges is the proper interpretation. She does not indicate in her memorandum whether, in her view, the award of costs should only be for the motion or only for the dismissal of the claim.

[22] Ms. Stubicar submits that the wording of the costs award for this case should be compared with the wording of the costs award in *Source Enterprise Ltd. v. Canada (Public*

Safety and Emergency Preparedness), 2012 FC 966, [2012] F.C.J. No. 1032 (QL). In that case, the Judgment, in part, provided that:

> 2. The Defendants' motion for summary judgment is granted and the Plaintiff's action is dismissed;
>
> 3. The Defendants shall have their costs fixed in the amount of $500.

[23] The Judgment in *Source Enterprise Ltd.* also allows a motion for summary judgment and dismisses the underlying action. However, this Judgment fixes the costs in the amount of $500. This Judgment is of no assistance in interpreting the Judgment in Ms. Stubicar's case, which allows the Crown's motion and dismisses her claim, with costs.

[24] Ms. Stubicar also refers to another Judgment which granted a motion for summary judgment and dismissed an action. In *Miller v. Canada*, 2006 FC 1446, [2006] F.C.J. No. 1819 (QL), the order provided that:

> The motion for summary judgment is allowed and the plaintiffs' action is dismissed, the whole with costs.

[25] The only difference between the order in *Miller* and the Judgment in Ms. Stubicar's case is the addition of the words "the whole" before "with costs". In both cases, the part of the sentence which awards costs is separated from the other part by a comma. While it may have been clearer if the words "the whole" had been added in Ms. Stubicar's case, the failure to include these words does not lead to the conclusion that the award of costs in Ms. Stubicar's case should only apply to either the motion for summary judgment or the dismissal of the claim.

[26] It would appear that Ms. Stubicar's reading of the judgment would be either:

- The [Crown's] motion for summary judgment is hereby granted. [Ms. Stubicar's] action against [the Crown] is dismissed with costs.

  or

- The [Crown's] motion for summary judgment is hereby granted with costs. [Ms. Stubicar's] action against [the Crown] is dismissed.

[27] Ms. Stubicar has not provided any support for either of these two interpretations. If the first interpretation is adopted, no costs would be awarded to the successful party in relation to the motion. Since in general a successful party would be awarded costs, I do not agree with this interpretation.

[28] If the second interpretation is adopted, no costs would be awarded in relation to the dismissal of the action, which is the significant result of the successful motion. Since again, in general a successful a party would be awarded costs, there is no reason why this judgment should be interpreted to deny the successful party its costs incurred in relation to the action that has been dismissed.

[29] As a result, Ms. Stubicar has failed to establish that the assessment officer made any error in his interpretation of the Judgment that was granted in this case.

[30] The first paragraph of her memorandum following the heading "Disputed Justification of the [Crown's] Costs Claims" is paragraph 58. In this paragraph, Ms. Stubicar refers to an alleged error by the assessment officer in failing to analyze and make findings of fact supported by the

evidence and the parties' submissions. This ground appears to be the same as the second ground of appeal where she alleges that the assessment officer erred "in principle by omitting to consider or misapprehending the evidence adduced and the representations made on assessment" (paragraph 61).

[31] The second ground of appeal is addressed in paragraphs 59 to 63 of her memorandum. It appears that the error that she is alleging is that the Federal Court Judge did not apply the applicable standard of review.

[32] In paragraph 40 of her memorandum, Ms. Stubicar notes that the standard of review applicable to cost assessment reviews is as set out by Dawson, J., as she then was, in *Wilson v. Canada* (2000), 196 F.T.R. 99, 2000 CanLII 16367 (FC) and quoted by this Court in *Bellemare v. Canada (Attorney General)*, 2004 FCA 231, 327 N.R. 179:

> 3 The applicable standard of review is not in dispute. In *Wilson v. Canada* (2000), 196 F.T.R. 100 *[sic]*, at 102, Dawson J. stated it in the following way:
>
> > The Court's jurisdiction to intervene in the decision of an assessment officer does not allow the Court to substitute its own view on the facts for that of the assessment officer. As noted by Joyal J. in *Harbour Brick Co. v. Canada* (1987), 17 F.T.R. 255 (F.C.T.D.), intervention is limited to cases where an error in principle has occurred, or to where the amount assessed can be shown to be so unreasonable that an error in principle must have been the cause.
>
> (emphasis added in *Bellemare*)

[33] In this case, it appears that Ms. Stubicar's complaint relates to services that were included in determining the amount of costs and the number of units allocated to the particular services

under paragraph 2 of Tariff B. The selection of what services should be included and the allocation of the number of units to each service are not errors in principle. Ms. Stubicar, in her memorandum, has failed to establish that the assessment officer made any error in relation to the selection of the services that were included or in the allocation of the number of units to each service that would warrant our intervention.

[34] I would dismiss the appeal in A-367-15.

III. A-389-15

[35] This appeal relates to the second assessment of costs arising from the Judgment of this Court dated November 13, 2012 (2012 FCA 288) that awarded costs to Ms. Stubicar. This assessment of costs was for the costs related to the appeal to this Court. In assessing her costs, no amount was allowed for her time (2015 FC 113). In dismissing Ms. Stubicar's motion to review this assessment of costs, the Federal Court Judge awarded the Crown $200 in costs (2015 FC 722).

[36] In her appeal to this Court, Ms. Stubicar identified three grounds of appeal in her memorandum of fact and law:

- whether the Federal Court Judge failed to consider the proper ground of review and thereby misapplied the standard governing review of the assessment officer's decision;
- whether the Federal Court Judge misinterpreted the provisions of Rule 407 of the *Federal Courts Rules*; and

– whether the Federal Court Judge erred in law by failing to properly exercise his discretion when he awarded costs in relation to the motion for a review of the assessment of costs to the Crown.

[37] Ms. Stubicar, in her submissions related to the first two grounds of appeal, focused on the denial of her claim for her time. Therefore, these two grounds of appeal, in essence, relate to her submission that she should be entitled to receive an amount for her time. This matter was addressed above in relation to A-333-15 and, for the reasons stated above, Ms. Stubicar cannot succeed in this appeal on this ground.

[38] Her brief submissions with respect to the award of costs of $200 in relation to her motion for a review of the assessment of costs refer to previous decisions of the Federal Court where, as a general practice, costs would not be awarded on a motion to review an assessment of costs. As support for this proposition, one of the cases to which Ms. Stubicar referred is the decision of the Federal Court in *Merck & Co. v. Apotex Inc.*, 2007 FC 1035, [2007] F.C.J. No. 1337 (QL). In that case, Justice Gibson noted:

> 52 In *Montreal Fast Print (1975) Ltd. v. Polylok Corporation* [(1984), 1 C.P.R. (3d) 204 (F.C.T.D.)], Justice Cattanach, in the context of an Order as to costs and an "appeal" of that Order, wrote at page 210:
>
> > In accordance with the discretion I have I shall follow the practice as I understand has prevailed in this court and there shall be no award of costs for or against either party upon this review of the certificate of the taxing officer.
>
> 53 I adopt the "practice" endorsed by Justice Cattanach. Finality to litigation should be encouraged. The hearing of this PMNOC proceeding took place over three (3) days. The hearing before the assessment officer took two (2) days. The hearing before me took another full day. In sum, it has taken as long to settle the issue of costs, and I acknowledge that that issue may not yet be finally settled, as it took to adjudicate on the substance of the PMNOC. Such should not be the case. The assessment officer evidently laboured long and hard over this

> assessment. He wrote extensive reasons. What remained to be decided should have been settled between the parties.

[39] On appeal to this Court, Justice Evans in *Merck & Co. v. Apotex Inc.* (cited above in paragraph 16), who was writing on behalf of this Court, referred to these comments related to not awarding costs on a motion to review an assessment of costs:

> 14 In view of the limited material available to assessment officers, determining what expenses are "reasonable" is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers. Like officers in other recent cases, the Assessment Officer in this complex case, involving very large sums of money, gave full reasons on the basis of a careful consideration of the evidence before him and the general principles of the applicable law.
>
> 15 Justice Gibson referred to these considerations, including the importance of finality of litigation, when he refused (at para. 53) to award any costs in the motion to review the assessment of costs in the underlying proceeding. In my opinion, these contextual factors are equally relevant to a determination of whether when an assessment officer has erred "in principle" in assessing the reasonableness of costs.

[40] While the general practice may have been that costs were not awarded on a motion for a review of an assessment of costs, the awarding of costs is within the discretion of the Federal Court Judge (Rule 400(1)). In exercising this discretion in relation to a motion for a review of an assessment of costs, the finality of litigation was an important consideration for this Court in *Merck & Co. v. Apotex Inc.*, as this is the only consideration to which specific reference was made in paragraph 15.

[41] In the matter that is now before this Court, the costs that were awarded were fixed in the amount of $200. Since the costs were fixed, the consideration of the finality of litigation was satisfied. No assessment of these costs would need to be determined by the assessment officer.

[42] Since:

(a) it was a practice and not a rule that costs would not be awarded on a review of a costs award;

(b) awarding of costs in a fixed amount satisfies the concern that litigation be brought to an end; and

(c) the awarding of costs is a discretionary decision of the judge hearing the matter;

Ms. Stubicar cannot succeed on this ground of appeal with respect to the costs award of $200 provided in the Judgment dismissing her motion for a review of the assessment of the costs award.

[43] As a result, I would dismiss Ms. Stubicar's appeal in A-389-15.

IV. A-390-15

[44] This appeal relates to costs that were awarded against Ms. Stubicar. The costs were awarded by this Court in dismissing Ms. Stubicar's appeal from the Judgment that had granted the Crown's motion for summary judgment and dismissed Ms. Stubicar's action (2013 FCA 239). The costs were assessed in the amount of $1,162.46 (2015 FCA 112).

[45] Ms. Stubicar's motion for review of the assessment of costs was heard by the same Federal Court Judge who heard the motion for a review of the assessment of costs related to appeal A-389-15. One Judgment and one set of reasons were issued in relation to the two motions. In dismissing the motion for a review of the assessment of costs in this matter (2015 FC 722), the Federal Court Judge also awarded the Crown $200 in costs.

[46] In her memorandum of fact and law in this appeal, Ms. Stubicar raised three grounds of appeal:

- whether the Federal Court Judge erred in law with respect to the applicable standard of review;
- whether the Federal Court Judge erred in law in applying a presumption of regularity of the process; and
- whether the Federal Court Judge erred in law by failing to properly exercise his discretion when he awarded costs in relation to the motion for a review of the assessment of costs to the Crown.

[47] Ms. Stubicar submitted, in paragraph 22 of her memorandum, that the Federal Court Judge appeared to apply a reasonableness standard rather than the standard as set out in *Bellemare*, which is referred to in paragraph 30 above. Ms. Stubicar submitted that this resulted in the Federal Court Judge not allowing her review with respect to:

- the number of units allocated to the particular services for the purposes of the formula in paragraph 2 of Tariff B;
- her claim that certain disbursements should not have been allowed; and
- her claim that she should have been allowed the costs of the assessment under Rule 408(3).

[48] Ms. Stubicar's second ground of appeal relates to the Federal Court Judge's statement in paragraph 11 of his reasons that "[t]here is a presumption that he fully considered the record". However, despite making the general assertion that the record discloses that this presumption could be rebutted, she fails to identify, in her memorandum, how the record supports this. While Ms. Stubicar does include a reference to additional submissions in the footnotes, she cannot incorporate by reference other submissions made in other documents. To do so would permit her to circumvent the 30 page limitation on a memorandum as set out in Rule 70(4).

[49] Ms. Stubicar, in her memorandum, has failed to establish that, in awarding costs of $1,162.46, the assessment officer made any error in relation to the allocation of the number of units to each service or the assessment of the amount of disbursements that would warrant our intervention.

[50] With respect to Ms. Stubicar's argument that the assessment officer failed to mention her request for the costs of the assessment under Rule 408(3), it should be noted that the awarding of costs under Rule 408(3) is discretionary:

(3) An assessment officer may assess and allow, or refuse to allow, the costs of an assessment to either party.	(3) L'officier taxateur peut taxer et accorder ou refuser d'accorder les dépens de la taxation à l'une ou l'autre partie.

[51] In *Phillips Legal Professional Corp. v. Vo*, 2017 SKCA 58, [2017] S.J. No. 327 (QL), the Saskatchewan Court of Appeal noted:

> 118 With respect to Mr. Phillips's related argument that specific issues and arguments were not addressed in the certificate, reasons need not address every

> argument raised by the parties. Reasons should be read as a whole (*West Van Inc. v Daisley*, 2014 ONCA 232 at para 15, 119 OR (3d) 481, citing *R.E.M.*). The assessment officer in this case was not required to address every subordinate issue raised by Mr. Phillips in his written or oral submissions. That said, there was no indication that the certificate as a whole disregarded any substantive issues in play.

[52] Since she was not awarded the costs of the assessment, implicitly Ms. Stubicar's request for these costs was denied. Ms. Stubicar has failed to establish that the assessment officer, in assessing the costs in the amount of $1,162.46, committed any error in not assessing and allowing her the costs of the assessment or in failing to explicitly state that he was doing so, that would warrant our intervention.

[53] In paragraphs 37 to 41 of her memorandum, Ms. Stubicar addresses her second ground of appeal. However, despite making very general comments about the failure to properly consider the evidence and the submissions, she does not specifically identify in her memorandum what evidence or submissions were not properly considered. As noted above, Ms. Stubicar cannot rely on specific submissions made in another document that is part of the record and not included in her memorandum since to do so would permit her to circumvent the 30 page limitation on a memorandum as set out in Rule 70(4). As a result, it appears that she simply disagrees with the conclusions reached by the assessment officer related to the amount of $1,162.46 that was allowed for costs.

[54] With respect to the final ground of appeal, for reasons as noted above for the appeal A-389-15, Ms. Stubicar cannot succeed in this appeal in relation to the $200 costs awarded against her.

[55] As a result, I would dismiss her appeal in A-390-15.

V. A-440-15

[56] This appeal arises as a result of a costs award against Ms. Stubicar. By the Order of the Federal Court dated August 2, 2012 (Docket No. T-19-12), Ms. Stubicar's motion to extend the time to file a motion to appeal the order of the prothonotary was dismissed. The Order provided that:

> The motion for an extension of time to file an appeal of the Order of Madam Prothonotary Aronovitch granting case management for Court files T-1436-11, T-2061 and T-19-12 is dismissed with costs to the Respondent payable forthwith.

[57] In this particular case, the costs that were assessed were in the amount of $1,140.95 (2015 FC 809). In dismissing Ms. Stubicar's motion for review of the assessment costs, the Federal Court Judge awarded the Crown costs of $400 (Order dated August 31, 2015 in Docket No. T-19-12).

[58] In her memorandum of fact and law, Ms. Stubicar raises four grounds of appeal:

- whether the Federal Court Judge erred in adopting the assessment officer's error in principle as to the scope of the costs award;
- whether the Federal Court Judge erred in law by misapprehending or failing to consider the ground for review that the assessment officer erred in principle in misapplying Rule 400(3)(k)(i);
- whether the Federal Court Judge erred in law by failing to consider Ms. Stubicar's other grounds for review; and

– whether the Federal Court Judge erred in law when he awarded costs in relation to the motion for a review of the assessment of costs to the Crown.

[59] Ms. Stubicar's first ground of appeal is related to the interpretation of the costs award. Ms. Stubicar's position is that costs were only awarded for the motion for an extension of time. However, as noted by the assessment officer in paragraph 10 and 11 of his reasons, the motion that Ms. Stubicar had brought addressed both the appeal from the Order and the extension of time. Since Ms. Stubicar had framed her motion to deal with both matters, the Crown would have been obligated to address both issues in its reply to her motion. Therefore, it would only be logical that the costs of both the motion for an extension of time and the appeal of the Order would have been the subject of the costs award.

[60] As a result, Ms. Stubicar cannot succeed on this ground of appeal.

[61] Ms. Stubicar's second ground of appeal relates to Rule 400(3)(k)(i):

(3) In exercising its discretion under subsection (1), the Court may consider	(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :
…	[…]
(k) whether any step in the proceeding was	k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :
(i) improper, vexatious or unnecessary, or	(i) était inappropriée, vexatoire ou inutile,

[62] In paragraph 8 of his reasons, the assessment officer noted Rule 401(2):

(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.	(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

[63] The assessment officer then noted:

> [9] Considering the provisions of subsection 401(2), I find the fact that the Respondent's costs, ordered "payable forthwith", are a clear indication that the Court was satisfied that the Motion "should not have been brought".

[64] Although Ms. Stubicar refers to Rule 401(2) in paragraph 52 of her memorandum, she does not make any submissions that the assessment officer erred in interpreting this Rule or in drawing the inference that he did in this case. Ms. Stubicar's submissions also fail to identify how this Rule affected the costs award of $1,140.95 or what Ms. Stubicar would submit the costs should have been if this Rule was not considered. There is no basis for this Court to intervene in this appeal.

[65] Ms. Stubicar's third ground of appeal appears to relate to the amount allowed for disbursements. She has not identified the amount that is in dispute but it appears that the disbursements that are in issue are the amounts allowed for photocopies of $198 and process server fees of $25. Ms. Stubicar has failed to establish any basis on which this Court can intervene in the award of the disbursements for these amounts.

[66] The final ground of appeal again relates to the award of costs by the Federal Court Judge and, as noted above for the appeal A-389-15, there is no basis for this Court to intervene in this award of costs of $400.

VI. A-452-15

[67] The underlying award of costs in this appeal arises as a result of an Order of the Federal Court dated October 18, 2012 (Docket No. T-618-12). The Order was issued following a motion brought by Ms. Stubicar to set aside an Order of the Prothonotary and to have the Prothonotary recuse herself. Ms. Stubicar's motion was dismissed. In dismissing this motion, the Federal Court Order concluded with "[c]osts of the within appeal on a solicitor and client scale payable forthwith".

[68] The costs in this matter were assessed in the total amount of $1,947.25 (2015 FC 810). The amount assessed for fees in relation to the award of solicitor and client costs was $1,670.95. In dismissing Ms. Stubicar's motion for a review of the assessment of costs, the Federal Court also awarded $400 in costs to the Crown (Order dated August 31, 2015 in Docket No. T-618-12).

[69] In her memorandum of fact and law in this appeal, Ms. Stubicar raises four grounds of appeal:

- whether the Federal Court Judge erred in law by failing to exercise his powers of review under Rule 414;
- whether the Federal Court Judge erred in law by adopting the assessment officer's errors in principle;
- whether the Federal Court Judge erred in law by endorsing erroneous findings made in the context of another review assessment (2015 FC 722), from which there was, at that time, a pending appeal (file A-390-15); and
- whether the Federal Court Judge erred in law when he awarded costs in relation to the motion for a review of the assessment of costs to the Crown.

[70] With respect to the first ground of appeal, Ms. Stubicar states, in paragraph 46 of her memorandum of fact and law:

> In light of the fact that there is no mention, in the Reasons for Assessment, of the Appellant's Affidavit on assessment, and that the argument based on the Assessment Officer's omission to consider that Affidavit was only made on review, it was not open to the Federal Court Judge to find that the Assessment Officer had carefully considered and rejected the Appellant's submissions as regards the Assessment Officer's omission to consider the Appellant's Affidavit.

[71] However, Ms. Stubicar does not indicate what in her affidavit was not considered by the assessment officer or how it would have affected the assessment of costs. Failing to identify this in her memorandum means that she cannot succeed on this ground of appeal.

[72] Ms. Stubicar also referred to her argument that the assessment officer had reversed the burden of proof. In paragraph 47 of her memorandum, Ms. Stubicar simply makes the bald statement that the assessment officer reversed the burden of proof without providing the specific details of how or when he did so.

[73] The assessment officer does note, however, in paragraph 17 of his reasons:

> Also, considering [Ms. Stubicar's] contention that the compiling of documents is routinely done by paralegals, I find that as [Ms. Stubicar] has provided no evidence to support her allegation that the [Crown's] Motion Record was in fact compiled by a paralegal. Therefore, it is not necessary to consider this factor on the assessment of the [Crown's] costs.

[74] In this case, it was Ms. Stubicar's general allegation that this type of work was routinely done by paralegals. Ms. Stubicar does not submit that the assessment officer erred in

characterizing this allegation. Ms. Stubicar also does not make any submissions with respect to why the general principle that the person "who alleges must prove" (*Ont. Human Rights Comm. v. Simpsons Sears Ltd*., [1985] 2 S.C.R. 536, at para. 28, 1985 CanLII 18 (SCC)) would not be applicable in this case. In my view, Ms. Stubicar cannot succeed in relation to this ground of appeal.

[75] The second ground of appeal appears to mainly relate to the quantum allowed for the solicitor-client costs. At the hearing of this appeal, Ms. Stubicar submitted that an award of solicitor-client costs does not mean that she is obligated to indemnify the Crown fully for its reasonable costs of the matter for which such costs were awarded. However, Justice Locke (as he then was) in *Mediatube Corp. v. Bell Canada*, 2017 FC 495, [2017] F.C.J. No. 1218 (QL) noted:

> 32 I prefer to be guided by authorities from the federal courts on this issue. In addition to those discussed above, I note also the following passage from *Merck & Co v Apotex Inc*, 2002 FCT 1210 at para 11:
>
> > The award of costs on a solicitor and client basis is intended to provide full indemnification of costs reasonably incurred in the course of carriage by the plaintiffs of this litigation. In fixing those costs, the Court must carefully consider the costs claimed in relation to the work reasonably required, not on the basis of hindsight with 20/20 vision of what was finally required, and not as an assessment item by item as an assessing or taxing officer would do, but sufficiently reviewed to ensure that costs awarded are reasonably incurred. [Citation omitted.]
>
> 33 In my view, the term "solicitor-and-client costs" in this Court generally contemplates the full amount of a party's necessary expenses reasonably incurred. Nothing I have seen in the plaintiffs' authorities clearly convinces me that solicitor-and-client costs, in this Court, should be construed to mean anything less.

[76] I agree with the comments of Justice Locke. The award of costs on a solicitor-client basis means that Ms. Stubicar is to indemnify the Crown for its costs incurred in relation to the matter, to the extent that such costs were necessary and reasonable. In this appeal, Ms. Stubicar has not provided any basis on which it could be determined that any portion of the amount of $1,670.95, which was assessed as the fees, was not a necessary expense that was reasonably incurred.

[77] The third ground of appeal appears to relate to the standard of review that was applied. In paragraph 75 of her memorandum, Ms. Stubicar states that a motion for review of the assessment pursuant to Rule 414 is subject to the correctness standard. However, as noted above in paragraph 32, Ms. Stubicar submitted in A-367-15 that the standard of review is as set out in *Bellemare*. In any event, Ms. Stubicar has failed to establish how this would have impacted the result. It is trite law that an appeal lies from the order, not the reasons (*Stubicar v. Canada*, 2012 FCA 288, at para. 2, [2012] F.C.J. No. 1431 (QL)).

[78] The final ground of appeal relates to the awarding of costs for the review motion. For the reasons as noted above for appeal A-389-15, there is no basis for this Court to intervene in this award of costs of $400.

[79] As a result, I would dismiss Ms. Stubicar’s appeal in A-452-15.

VII. Rule 357

[80] At the conclusion of the hearing of these appeals, Ms. Stubicar referred to Rule 357:

357 (1) Notwithstanding rule 352, where a judgment of the Federal Court of Appeal is delivered from the bench, a motion under section 37.1 of the *Supreme Court Act* for leave to appeal from the judgment to the Supreme Court of Canada may be made at the time the judgment is delivered and without prior notice.	357 (1) Malgré la règle 352, la requête présentée en vertu de l'article 37.1 de la *Loi sur la Cour suprême* pour obtenir l'autorisation d'interjeter appel, devant la Cour suprême du Canada, d'un jugement de la Cour d'appel fédérale peut être faite sans préavis, au moment où le jugement est rendu, si celui-ci est rendu à l'audience.

[81] Since these appeals were not dismissed from the bench, this Rule is not applicable in this case.

VIII. Conclusion

[82] I would dismiss all six appeals.

[83] At the conclusion of the hearing, Ms. Stubicar requested the opportunity to provide written submissions on costs. In relation to the costs of these appeals, I would repeat the comments of Justice Evans in *Merck & Co. v. Apotex Inc.*:

> 19. Better still, the parties should always endeavour from the outset to reach an agreement on costs.

[84] I would propose that the parties first be given the opportunity to reach an agreement on costs, failing which submissions could be made. I would propose that if the parties are unable to reach an agreement on costs by April 24, 2020, Ms. Stubicar will have the right to make additional written submissions, not exceeding 10 pages, on the costs that would be applicable to all six appeals on or before May 29, 2020. The Crown will then have the right to make written submissions, not exceeding 10 pages, on the costs that would be applicable to all six appeals on or before June 19, 2020. Ms. Stubicar will then have the right to make reply submissions, not exceeding three pages, on or before June 26, 2020. The parties are to notify the Court on or before April 24, 2020 whether an agreement on costs has been reached and, if so, the terms of that agreement.

"Wyman W. Webb"
J.A.

“I agree
D. G. Near J.A.”

“I agree
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-333-15, A-367-15, A-389-15, A-390-15, A-440-15 AND A-452-15

APPEALS FROM THE ORDERS OF THE FEDERAL COURT DATED JUNE 2, 2015 (DOCKET NO. T-2102-10), JUNE 8, 2015 (DOCKET NO. T-2102-10), JUNE 8, 2015 (2015 FC 722) (FOR BOTH A-389-15 and A-390-15), AUGUST 31, 2015 (DOCKET NO. T-19-12) AND AUGUST 31, 2015 (DOCKET NO. T-618-12)

DOCKETS:	A-333-15, A-367-15, A-389-15, AND A-390-15
STYLE OF CAUSE:	VLASTA STUBICAR v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AND DOCKETS:	A-440-15 AND A-452-15
STYLE OF CAUSE:	VLASTA STUBICAR v. DEPUTY PRIME MINISTER AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 9, 2019
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. RENNIE J.A.
DATED:	MARCH 27, 2020

APPEARANCES:

Vlasta Stubicar	ON HER OWN BEHALF
Stephen Kurelek	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENTS