Court File No. T-1621-19

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPLICANT

-and-

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

RESPONDENTS

BOOK OF AUTHORITIES OF THE RESPONDENT, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA (Costs Submissions)

Conway Baxter Wilson LLP/s.r.l.
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9
Tel: (613) 288-0149 / Fax: (613) 688-0271
David P. Taylor
dtaylor@conway.pro

Clarke Child & Family Law
36 Toronto Street, Suite 950
Toronto, ON M5C 2C5
Tel: 416-260-3030 / Fax: 647-689-3286
Sarah Clarke
sarah@childandfamilylaw.ca

Barbara A. McIsaac, Q.C.
barbara@mcisaaclaw.com

Anne Levesque
anne@equalitylaw.ca

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

TO: **REGISTRAR**
Federal Court
Thomas D'Arcy McGee Building
90 Sparks Street, 5th floor
Ottawa, ON K1A 0H9

AND TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, Ontario K1A 0H8

Robert Frater, Q.C. | Max Binnie
Tel: (613) 670-6289 | (613) 670-6270 | (613) 670-6283
Fax: (613) 954-1920
Email: rob.frater@justice.gc.ca | Max.binnie@justice.gc.ca

Solicitors for the Applicant,
Attorney General of Canada

AND TO: **NAHWEGAHBOW CORBIERE**
Barristers and Solicitors
5884 Rama Road, Suite 109
Rama, ON L3V 6H6

David C. Nahwegahbow | Thomas Milne
Tel: 705-325-0520
Fax: 705-325-7402
Email: dndaystar@nccfirm.ca | tmilne@nccfirm.ca

Stuart Wuttke
Assembly of First Nations
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Tel: 613-241-6789 ext 228
Email: swuttke@afn.ca

Solicitors for the Respondent
Assembly of First Nations

AND TO: **CANADIAN HUMAN RIGHTS COMMISSION**
344 Slater Street
Ottawa, Ontario K1A 1E1

Brian Smith | Jessica Walsh
Tel: (613) 943-9205
Fax: (613) 993-3089
Email: brian.smith@chrc-ccdp.gc.ca | jessica.walsh@chrc.ccdp.gc.ca

Solicitors for the Respondent
Canadian Human Rights Commission

AND TO: **OLTHIUS KLEER TOWNSHEND LLP**
250 University Avenue, 8th Floor
Toronto, Ontario M5H 3E5

Maggie Wente | Sinéad Dearman
Tel: (416) 981-9330
Fax: (416) 981-9350
Email: mwente@oktlaw.com | sdearman@oktlaw.com

Solicitors for the Respondent
Chiefs of Ontario

AND TO: **STOCKWOODS LLP**
Barristers and Solicitors
77 King Street West, Suite 4130
P.O. Box 140
TD North Tower, Toronto-Dominion Centre
Toronto, Ontario M5K 1H1

Justin Safayeni | Ben Kates
Tel: (416) 593-7200
Fax: (416) 593-9345
Email: justins@stockwoods.ca

Solicitors for the Respondent
Amnesty International

AND TO: **FALCONERS LLP**
10 Alcorn Avenue, Suite 204
Toronto, Ontario M4V 3A9

Julian Falconer | Molly Churchill |Aliah El-Houni
Tel: (416) 964-0495
Fax: (416) 929-8179
Email: julianf@falconers.ca | mollyc@falconers.ca | Aliahe@falconers.ca

Solicitors for the Respondent
Nishnawbe Aski Nation

INDEX

Federal Court  Cour fédérale

Date: 20191129

Docket: T-1621-19

Citation: 2019 FC 1529

Ottawa, Ontario, November 29, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

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

Respondents

ORDER AND REASONS

I. Nature of matter

[1] On October 4, 2019, the Attorney General of Canada [AGC] applied to this Court seeking judicial review of a September 6, 2019 Canadian Human Rights Tribunal [CHRT] decision that

ordered Canada to pay compensation to individuals affected by Canada's discriminatory child and family services funding practices [Compensation Ruling]. The parties dispute the exact nature of this decision. On the same day, the AGC brought a motion asking this Court to stay the Compensation Ruling pending the outcome of the application for judicial review.

[2] The Respondent Caring Society brought its own motion on November 19, 2019 requesting that the Court exercise its discretion to hold the AGC's underlying application for judicial review in abeyance (to adjourn or stay it) in order to allow the CHRT to complete the compensation process.

[3] For the reasons that follow, both motions are denied.

II. Background

[4] This matter has been before the CHRT for over a decade. In 2007, the Caring Society and Assembly of First Nations [AFN] filed a discrimination complaint with the Canadian Human Rights Commission [CHRC] against Canada respecting the funding of child and family services on reserve.

[5] In 2016, the CHRT found that Canada's funding of child and family services on reserve and in the Yukon was discriminatory.

[6] On September 6, 2019, the CHRT rendered its Compensation Ruling. For the purposes of this proceeding, it is not necessary to detail the specifics of the Compensation Ruling.

[7] On October 11, 2019, I was appointed the Case Management Judge for this application. On October 25, 2019, the parties attended a case management conference and agreed to a timeline, leading to the scheduling of this hearing in Ottawa for November 25 and 26, 2019.

[8] With the exception of the Respondent Amnesty International, who chose not to make any submissions on these two motions, all of the Respondents were present for this hearing and made submissions. The parties are in agreement with the applicable tests to be applied in considering the two motions.

[9] On the AGC's motion, the AGC submits that it has satisfied the conjunctive three-part test for obtaining a stay of proceedings as established in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. The Respondents all argue that the AGC has not met the conjunctive test for a stay.

[10] On the Caring Society's motion, the Caring Society submits that it has established that it is in the interests of justice for the AGC's judicial review of the Compensation Ruling to be held in abeyance so that the CHRT can finalize the process for consultation. All of the Respondents support the Caring Society's arguments save for the CHRC, which argued that, while it takes no position on the Caring Society's motion, it sees the benefits of letting the AGC's judicial review proceed. The AGC, on the other hand, submits that the circumstances do not warrant the exercise of the Court's discretion to hold its judicial review application in abeyance.

[11] Much of the parties' respective arguments revolved around the legality or reasonableness of the Compensation Ruling. These arguments relate to the merits of the underlying judicial review application. As outlined at the outset of the hearing, that is not what these motions are about.

III. Issues

A. *Has the AGC satisfied the three-part test for a stay?*

B. *Has the Caring Society satisfied the test for the exercise of this Court's jurisdiction to stay the underlying judicial review?*

IV. Analysis

A. *Has the AGC satisfied the tripartite test for a stay?*

[12] The Supreme Court of Canada recently restated the *RJR-MacDonald* test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
>
> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12)

[13] The burden is on the Applicant to satisfy the *RJR-MacDonald* test, and the test is fact dependent. It is also conjunctive, meaning that all three elements of the test must be satisfied.

(1) Serious Question

[14] The Supreme Court has stated that the "serious question to be tried" part of the test is a relatively low threshold, requiring only that the issues are not frivolous or vexatious.

[15] The AGC raises two main issues that it says give rise to the satisfaction of this aspect of the test: (1) individual compensation was not an appropriate remedy for this complaint since it originated as a systemic discrimination complaint; and (2) even if this Court finds the CHRT had the authority to order individual compensation, the compensation ordered was disproportionate as between individuals (different children suffered different harms) and in light of Canada's prior remedial actions on funding matters over the years.

[16] The Respondents argue that the AGC has not satisfied this part of the test. The Respondent Nishnawbe Aski Nation [NAN] goes further and argues that the AGC's motion is premature (*Jaser v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 368 at para 25).

[17] Considering the above, I find that the AGC's stay motion is not premature. I find that the nature of the Compensation Ruling leaves room for further argument as to whether it is a final or interim decision, as evidenced by the parties' submissions on these motions. This allows me to exercise my discretion to consider the AGC's motion. By stating this, I take no position and make no finding on this issue as those arguments stray into the merits of the judicial review application, which is not appropriate at this stage.

[18] Turning now to whether a serious question exists, I am satisfied that the AGC has met this part of the test. Contrary to the Respondents' views, I do not see the issues raised by the AGC as being frivolous or vexatious. I will now move on to the second part of the test.

(2) Irreparable Harm

[19] The AGC claims it will suffer three types of irreparable harm if I do not grant a stay: (1) there will be conflicting decisions in light of the CHRT retaining jurisdiction while the judicial review application proceeds before this Court; (2) there will be an unwarranted devotion of resources to setting up and implementing the compensation process; (3) there will be unrecoverable loss of compensation paid out to certain individuals during the course of the judicial review. The affidavit of Sony Perron sets out the specifics of the harms that Canada claims will befall it.

[20] The parties have all acknowledged that this part of the test requires non-speculative harm. The Respondents argue that the CHRT only required the parties to engage in discussions about the process for compensation, with consideration given to its suggestions for discussion, as set out the Compensation Ruling.

[21] I am not persuaded by the AGC's submissions that it has met this part of the test for the following reasons. First, I see no prejudice or harm to Canada in engaging in discussions with the parties on process and to report back to the CHRT by December 10, 2019. It was clear in the submissions of the parties that no such discussions had occurred as of the hearing dates. After the

hearing, it was brought to my attention that, in response to a letter from the AGC, the CHRT agreed to extend the reporting deadline from December 10, 2019 to January 29, 2020.

[22] Second, there is no order to pay compensation to any specific individuals by a specific date. The CHRT ordered the parties to discuss several areas including how to identify individuals and in what manner these individuals would be compensated (i.e. trust funds for minors, direct payments to adults, etc.). On the evidence, particularly that of Mr. Perron in cross-examination on his affidavit, there are no imminent compensation payments to be made by Canada. Of course that may change in the future, in which case the parties can consider their respective legal options at that point in time.

[23] Third, in light of the first two reasons, there is no risk that any compensation will not be recovered because there is no compensation to be paid out at this time.

[24] The AGC has not satisfied this part of the test because its claimed irreparable harms are speculative. Bearing in mind that the test is conjunctive, meaning all three parts of the test must be satisfied, I need not consider the third part of the test.

B. *Has the Caring Society satisfied the test for the exercise of this Court's jurisdiction to stay the underlying judicial review?*

[25] The Caring Society argues that section 50(1)(b) of the *Federal Courts Act* provides the Court with broad discretion to stay an application where the Court is of the view that it is in the interests of justice do so.

[26] The parties agree that *Mylan Pharmaceuticals ULC v AstraZeneca Canada Inc*, 2011 FCA 312 sets out the applicable legal principles for this exercise of discretion. At paragraph 5, the Court states:

> […]
>
> *This Court deciding not to exercise its jurisdiction until some time later*. When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration- the need for proceedings to move fairly and with due dispatch- but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that a Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.

[27] I take this to mean that the interests of justice test does not have a clear definition and therefore requires a case-by-case assessment.

[28] The Caring Society argues that allowing the AGC's judicial review application to proceed will cause harm to the victims of Canada's discriminatory conduct through confusion, delay of the final resolution on compensation, and potentially conflicting or duplicative decisions. It also argues that judicial economy favours one judicial review on the issue of compensation rather than the possibility of several judicial reviews of the other parts of the Compensation Ruling as it assumes a clearer form. It suggests that Canada should pursue its concerns before the CHRT in accordance with the Compensation Ruling since the CHRT has allowed for such submissions to be made. The other Respondents agreed with this approach. It

also argues that it has a limited ability to bear additional costs if the underlying judicial review is allowed to proceed.

[29] The AGC submits that it would not be in the interests of justice to place its application for judicial review in abeyance. It argues that the Caring Society is required to show prejudice or that they would face injustice if the application was to proceed. The AGC argues there is no such prejudice to the Caring Society or to the children since Canada will continue to fund the actual costs of services to the children while the review takes place. It also argues that the Compensation Ruling is final and therefore it is subject to judicial review. It is not in the interests of justice to engage in the discussions on the compensation process before the CHRT that could be rendered moot by a successful judicial review.

[30] The CHRC, while taking no official position on the Caring Society's motion, suggested that allowing the judicial review proceeding to proceed at the same time as the CHRT discussions may provide certain advantages. They note that having this issue resolved in parallel with the Compensation Ruling discussions may actually prove to be the fastest way to ensure the individuals receive compensation. Therefore, if the stay motion is denied, it may be in the interests of justice to deny the abeyance motion. The CHRC does note, however, that the Caring Society may have an issue with working on two fronts due to the nature of its limited funding and staffing levels.

[31] After considering the submissions of the parties, I am declining to exercise my discretion to hold in abeyance (adjourn or stay) the AGC's judicial review application to allow the CHRT

to finish its work. I do so for several reasons. First, as indicated in my reasons denying the AGC's motion to stay, I am of the view that the only requirement at this time is for the parties to engage in discussions and report back to the CHRT by January 29, 2020 (formerly December 10, 2019). The parties are free to outline the nature and scope of their discussions before the CHRT. In my view, these discussions will not prejudice the parties' respective approaches in the underlying judicial review. The parties' affidavit evidence indicates that there are many knowledgeable people around the table who are more than capable of moving this part of the discussion along.

[32] Second, there is no clear timeline for when the CHRT may complete the work that is set out in the Compensation Ruling. It could be a short time or it could be a very long time. If it is a long time, then one (or more) of the parties may then seek to judicially review the further order(s) of the CHRT at further points in time. This could then result in an even longer period of time to wait for the individuals who are expecting compensation. Surely, this is not a desirable result. All parties submitted that they were seeking "to do the right thing" (my words) for the individuals who are entitled to compensation.

[33] Third, having a judicial review proceeding in the future will provide an incentive for the parties to use the time before the CHRT to expedite good faith discussions with one another and possibly reach a framework to bring before the CHRT for approval. This will not be a wasted exercise.

V. Conclusion

[34] The AGC has not satisfied the three-part test to stay the decision of the CHRT's Compensation Ruling. Accordingly, the AGC's motion is denied.

[35] The Caring Society has not satisfied the Court that it should exercise its discretion to stay or adjourn the AGC's judicial review application pursuant to Rule 50(1)(b) of the *Federal Courts Act*. The Caring Society's motion is denied.

[36] The Caring Society requested that, after I render my decision on the motions, the parties be permitted to make further submissions on costs. I agree with this approach.

THIS COURT ORDERS that:

1. The AGC's motion asking this Court to grant a stay of the CHRT's September 6, 2019 Compensation Ruling pending the hearing of its application for judicial review is dismissed.
2. The Caring Society's motion asking this Court to exercise its discretion to grant an adjournment of the AGC's application for judicial review is dismissed.
3. The Parties are directed to provide submissions on costs by no later than December 31, 2019.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1621-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v FIRST NATION CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI FIRST NATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARING:	NOVEMBER 25-26, 2019
ORDER AND REASONS:	FAVEL J.
DATED:	NOVEMBER 29, 2019

APPEARANCES:

Mr. Robert Frater Mr. Max Binnie Ms. Meg Jones	FOR THE APPLICANT
Mr. David Taylor Ms. Barbara McIsaac Ms. Sarah Clarke Ms. Anne Levesque	FOR THE RESPONDENTS (FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA)
Mr. Stuart Wuttke Ms. Julie McGregor	FOR THE RESPONDENTS (ASSEMBLY OF FIRST NATIONS)
Mr. Brian Smith Ms. Jessica Walsh	FOR THE RESPONDENTS (CANADIAN HUMAN RIGHTS COMMISSION)
Mr. Julian Falconer Ms. Molly Churchill	FOR THE RESPONDENTS (NISHNAWBE ASKI FIRST NATION)
Ms. Maggie Wente	FOR THE RESPONDENTS (CHIEFS OF ONTARIO)

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Conway Baxter Wilson LLP/s.r.l. Ottawa, Ontario	FOR THE RESPONDENTS (FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA)
Clarke Child & Family Law Toronto, Ontario	
Nahwegahbow Corbierre Barristers and Solicitors	FOR THE RESPONDENTS (ASSEMBLY OF FIRST NATIONS)
Falconers LLP Toronto, Ontario	FOR THE RESPONDENTS (NISHNAWBE ASKI FIRST NATION)
Olthuis Kleer Townshend LLP Toronto, Ontario	FOR THE RESPONDENTS (CHIEFS OF ONTARIO)
Stockwoods LLP Barristers Toronto, Ontario	FOR THE RESPONDENTS (AMNESTY INTERNATIONAL)
Canadian Human Rights Commission Ottawa, Ontario	FOR THE RESPONDENTS

Federal Court  Cour fédérale

Date: 20191114

Docket: T-548-18

Citation: 2019 FC 1434

Ottawa, Ontario, November 14, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

LOBLAWS INC.

Plaintiff

and

COLUMBIA INSURANCE COMPANY, THE PAMPERED CHEF, LTD., AND PAMPERED CHEF – CANADA CORP.

Defendants

SUPPLEMENTARY JUDGMENT AND REASONS

I. Overview

[1] This Supplementary Judgment and Reasons addresses costs of the within action by the Plaintiff, Loblaws Inc. [Loblaw], against the Defendants, Columbia Insurance Company, The Pampered Chef, Ltd., and Pampered Chef – Canada Corp. [together, Pampered Chef], which asserted various causes of action under the *Trade-marks Act*, RSC 1985, c T-13 [the Act] and claimed remedies related thereto. Pampered Chef counterclaimed, seeking to have certain

trademarks that were the subject of Loblaw's action declared invalid and struck from the Register, on the basis that they were not distinctive of Loblaw. In broad terms, this litigation resulted from both parties using trademarks including the letters "PC", standing for both "Pampered Chef" and Loblaw's brand "President's Choice".

[2] On July 22, 2019, I released both confidential and public versions of my decision (see *Loblaws Inc v Columbia Insurance Company*, 2019 FC 961, for the Public Judgment and Reasons), dismissing both Loblaw's claims and Pampered Chef's counterclaim. As agreed by the parties, I reserved my decision on costs to give the parties an opportunity to reach agreement, in lieu of which each party was afforded an opportunity to make written submission on how costs should be addressed. Despite efforts to pursue agreement, supported by a number of extensions of time, none was reached. The parties therefore filed their written submissions, which I have considered in arriving at this costs decision.

[3] For the Reasons explained below, I am awarding Pampered Chef costs in the lump sum amount of $500,000.00, plus $203,487.11 in disbursements, for a total of $703,487.11.

II. **Positions of the Parties**

[4] Pampered Chef urges the Court to award costs on a lump sum basis in the amount of $997,028.91, consisting of the sum of: (a) $793,541.80, representing 40% of its total legal fees incurred in this matter; plus (b) disbursements of $203, 487.11. It has confidentially filed affidavit evidence, attaching copies of its counsel's invoices. Pampered Chef's $793,541.80

figure appears to be based (approximately) on 40% of total fees of $1,983,854.50, as tabulated at the last exhibit to that affidavit.

[5] Pampered Chef has also filed a Draft Bill of Costs, calculating the costs (exclusive of disbursements) that would be available applying either the middle of Column III or the top of Column IV of Tariff B of the *Federal Courts Rules*, SOR/98-106 [the Rules]. These calculations are, respectively, $188,649.39 and $406,230.00. In support of its position that these figures calculated under the Tariff would be inadequate, Pampered Chef explains that the figures represent, respectively, only 9.5% and 20.5% of its actual incurred fees.

[6] Loblaw does not object to the Court awarding costs on a lump sum basis for efficiency, as opposed to basing the costs award on Tariff B. However, it resists Pampered Chef's position that such an award should be based on an escalated scale.

[7] Loblaw takes the position the Court should award costs in the total amount of $358,300.17, representing the sum of (a) 12% of $1,757,110.50 in fees; plus (b) $147, 446.91 in disbursements. It develops the 12% figure by proposing (a) 15% of fees is more consistent with case law; and (b) such 15% should be further reduced by 3% (being 20% of 15%) to take into account Pampered Chef's unsuccessful counterclaim. It also asserts that the 12% figure is closer to the Tariff amount. Loblaw calculates the $1,757,110.50 figure for Pampered Chef's legal fees by taking Pampered Chef's total fees of $1,983,854.50 (exclusive of disbursements) and subtracting fees for one of its three senior counsel, who was involved only shortly before and during trial, and for two associates, who did not appear at trial or at the discovery examinations.

It arrives at its proposed figure of $147,446.91 for disbursements through certain reductions that it argues should be applied to the fees of Pampered Chef's experts.

III. **Analysis**

A. Suitability of a Lump Sum Costs Award

[8] As previously noted, Loblaw does not object to a lump sum costs award, rather than an award based on the Tariff. Loblaw refers the Court to *Nova Chemicals Corporation v The Dow Chemical Company*, 2017 FCA 25 [*Nova Chemicals FCA*] at paragraph 21, in which the Federal Court of Appeal upheld the decision of the trial judge to award a lump sum to avoid the parties incurring additional costs and time associated with a costs assessment. The Court referred to the practice of awarding lump sum costs, as a percentage of actual costs reasonably incurred, as well established in the jurisprudence, particularly when dealing with sophisticated parties (*ibid* at para 16). The Federal Court of Appeal has recently cited these passages from *Nova Chemicals FCA* with approval in *Sports Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 [*Sports Maska*] at paragraph 50.

[9] Applying this reasoning, I am satisfied this is an appropriate case for a lump sum award, based on a percentage of Pampered Chef's fees. I must therefore determine both the appropriate percentage and whether there should be any reductions from the actual fees before applying that percentage.

B. Determination of an Appropriate Percentage

[10] With respect to the appropriate percentage, Pampered Chef relies on the 25% to 50% range described in *Sports Maska*. It cites several examples falling within this range (30% in *Apotex Inc v Shire LLC*, 2018 FC 1106; 30% in *Nova Chemicals Corporation v The Dow Chemical Company*, 2016 FC 91, aff'd *Nova Chemicals FCA*; 33% in *H-D USA, LLC v Berrada*, 2015 FC 189 [*H-D USA*]; 25% in *Eli Lilly v Apotex Inc*, 2011 FC 1143; 33% in *Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 [*Philip Morris FCA*]; and 50% in *Air Canada v Toronto Port Authority*, 2010 FC 1335 [*Air Canada*]). Pampered Chef proposes 40% as a figure squarely within this range.

[11] In response, Loblaw argues that courts award lump sum costs in the 25% to 50% range to reflect something out of the ordinary. It submits that, in the absence of such circumstances, courts tend to award lump sum costs in intellectual property cases in the 10% to 20% range. Loblaw cites: 10% in *Bodum USA Inc v Trudeau Corp* (1989) Inc, 2013 FC 128 [Bodum]; 20% in *Dimplex North America Ltd v CFM Corp*, 2006 FC 140; and 12.5% in *ABB Technology AG v Hyundai Heavy Industries Co*, 2013 FC 1050. Loblaw therefore proposes a 15% figure as the middle of the 10% to 20% range, which it further reduces to 12% based on Pampered Chef's unsuccessful counterclaim.

[12] Loblaw relies in particular on the statement by the Federal Court in *Bodum* at paragraph 9 that the trademark case it was addressing could not be compared with some pharmaceutical cases in its complexity, duration, or number of witnesses. Loblaw therefore argues that authorities

upon which Pampered Chef relies are distinguishable. Referring to *Nova Chemicals FCA*, Loblaw notes the trial judge characterized the case as an extremely complex patent proceeding involving 33 days of discovery, 32 days of trial, written closing submissions exceeding 700 pages, and fees of $9.6 million incurred by the successful party (at paras 2-3). In contrast, Loblaw describes the present case as involving 6 days of discovery, 7 days of trial, and written closing submissions of 70 pages per party.

[13] In distinguishing *H-D USA*, Loblaw notes the Court held at paragraph 21 that an award of substantial costs was warranted because the action lasted for more than seven years and involved three rejected offers to settle. Loblaw contrasts those circumstances with the present case, which lasted only one year and involved no offer to settle.

[14] In support of its position that lump sum awards in the 25% to 50% range have reflected something out of the ordinary or exceptional circumstances, Loblaw cites *Nova Chemicals FCA* at paragraph 17 and *H-D USA* at paragraphs 26-27. I do not find those references to support Loblaw's assertions. Rather, in *Nova Chemicals FCA* at paragraph 17, the Federal Court of Appeal found a review of the case law indicated increased costs in the form of lump sum awards tend to range between 25% and 50% of actual fees, although there may be cases where a higher or lower percentage is warranted. In *H-D USA* at paragraphs 26-27, the Federal Court acknowledged case law pointing to the imposition of fee awards totalling around one-third of incurred legal fees and held awards of 50% of legal fees are granted in exceptional circumstances. While this conclusion suggests that the top of the 25% to 50% range is reserved for exceptional circumstances, it does not suggest that the range itself applies only in such cases.

[15] Having considered the authorities cited by both parties, I find the statement by the Federal Court of Appeal at paragraphs 16 to 17 of *Nova Chemicals FCA*, largely repeated at paragraph 50 of *Sports Maska*, to aptly summarize the jurisprudence. That is, as noted above, the practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is well established, particularly when dealing with sophisticated commercial parties, and such costs awards tend to range between 25% and 50% of actual legal fees, although there may be cases where a higher or lower percentage is warranted.

[16] I also note that awards in the 25% and 50% range are not exclusive to pharmaceutical patent litigation. For instance, Justice Hughes' award of 50% of actual costs in *Air Canada* involved applications for judicial review of certain decisions taken by the Toronto Port Authority in respect of operations at a commercial airport. Similarly, in *Philip Morris FCA*, the Federal Court of Appeal upheld Justice de Montigny's 33% award in a trademark dispute.

[17] Consistent with the jurisprudence, it is appropriate for me to consider the potential application of the factors suggested by Rule 400(3) in selecting an appropriate percentage for my costs award. Pampered Chef emphasizes the following points in particular.

(1) Result of the Proceeding, Amounts Claimed, and Amounts Recovered

[18] Pampered Chef notes that Loblaw asserted five causes of action under the Act and sought remedies including injunctive relief; damages or an accounting of profits; destruction of

products; and punitive, exemplary, and aggravated damages. Loblaw ultimately withdrew its claim for punitive, exemplary, and aggravated damages, although not until trial was underway.

[19] Pampered Chef correctly asserts that it was successful on all counts in defending Loblaw's action. However, it was not successful in asserting its counterclaim challenging the validity of Loblaw's PC word mark. It argues that its unsuccessful counterclaim should have no impact on the costs award as the counterclaim, like the defence, was based on co-existing PC acronym marks and products, and it concerned the same evidence as relied upon in the defence. As such, Pampered Chef submits that relatively little time was spent on the counterclaim. It submits the Court acknowledged its counterclaim to be, in effect, an alternative argument.

[20] This latter point refers to the Court's acknowledgement that Pampered Chef's counsel confirmed at trial that, if Loblaw did not succeed in the causes of action it was asserting, the Court need not address Pampered Chef's challenge to the validity of Loblaw's word mark. However, Pampered Chef did not take this position until closing argument at trial.

[21] Relying on *Philip Morris Products SA v Marlboro Canada Limited*, 2011 FC 1113 [*Philip Morris*] at paragraphs 13 to 14, aff'd *Philip Morris FCA*, Pampered Chef submits that failure to succeed on all claims or a counterclaim is typically immaterial to a costs award. I do not read this authority as supporting that argument. In *Philip Morris*, Justice de Montigny rejected the argument that the Plaintiff's failure on some issues represented a basis to deprive it of its costs. However, Justice de Montigny noted at paragraph 16 that a successful party may be entitled to less costs where it has been unsuccessful on one or several key issues.

[22] Pampered Chef's allegation that the PC word mark is not distinctive of Loblaw was based principally on a design mark registered by a company called Ventura Foods in 1971, more than a decade before the registration by Loblaw of its mark. The evidence surrounding Ventura consumed material time and effort, including being one of the main topics of the evidence of Pampered Chef's witness, Mr. Stephan, and the sole topic of the evidence of Loblaw's witness, Mr. Blizzard.

[23] I found the evidence surrounding the Ventura mark to have little impact upon the distinctiveness of the PC word mark. While this evidence was relevant to both the counterclaim and the main claim (relating to acquired distinctiveness of Loblaw's mark, for purposes of the confusion analysis), the evidence surrounding the Ventura mark and products had little impact on either analysis. While Pampered Chef's overall success in this matter is a factor operating in its favour, I consider its failure on the counterclaim to be a factor to be taken into account as well.

(2) Importance of the Case

[24] Pampered Chef argues that successfully defending the claim was critically important to it, as Loblaw sought to prevent it from using two of its most important marks that were central to its rebranding. I agree with this characterization and note, based on the evidence at trial, that the marks upon which Loblaw's claims were based are clearly very important to it as well. This case was important to both parties.

(3) Sophistication of the Parties

[25] While this is not a factor expressly set out in Rule 400(3), I have previously noted that it is a factor favouring a lump sum costs award consistent with the applicable jurisprudence.

(4) Complexity of the Issues / Conduct of a Party

[26] Pampered Chef submits this action required significant effort expended in bringing the matter to trial in what it characterizes as "record time." The proceeding spanned sixteen months from start to finish and, as submitted by Pampered Chef, involved 3600 documents produced by Loblaw, two to three rounds of discovery conducted by each party, several pre-trial motions, and a requirement for Pampered Chef to respond to two expert reports prepared for Loblaw. The trial spanned seven days.

[27] Pampered Chef also refers to certain conduct by Loblaw as exacerbating the effort and cost required to respond to its claims. Loblaw maintained all its claims until the commencement of trial, abandoning certain of those claims and reliance on one of its marks only at trial. The claim for punitive damages was not abandoned until closing argument. On the other hand, Loblaw correctly asserts that, as I recognized in my trial decision, the parties approached the introduction of evidence at trial very cooperatively, through agreed statement of facts, introduction of much of the documentary evidence by agreement, and some witnesses' evidence in chief being introduced through affidavits.

[28] My assessment is that, while Pampered Chef was required to respond to a range of causes of action and related arguments, some of which were abandoned at trial, the overall conduct of this matter represents an example of cooperation between the parties. While the issues in this matter did involve some level of complexity, I agree with Loblaw's position that they do not rise to the complexity seen in some of the jurisprudence where awards at higher levels within the 25% to 50% range were appropriate.

(5) Other Relevant Matters

[29] As a further matter it considers relevant, Pampered Chef notes its calculation of the costs (exclusive of disbursements) that would be available applying either the middle of Column III or the top of Column IV of Tariff B of the Rules. These calculations are, respectively, $188,649.39 and $406,230.00, representing 9.5% and 20.5% of its actual legal fees. Pampered Chef argues these figures would be an inadequate reflection of the actual costs of this litigation.

[30] I have also taken into account Loblaw's point that, unlike some of the authorities on which Pampered Chef relies, there is no indication in this matter of offers to settle that would militate in favour of a costs award higher in the applicable range.

(6) Conclusion on the Appropriate Percentage

[31] Considering all the above, including the unsuccessful counterclaim, I find the circumstances of this matter support a lump sum costs award in the 25% to 50% range advocated

by Pampered Chef, but at the bottom of that range. My award will be based on approximately 25% of actual legal fees reasonably incurred. I therefore turn next to the question raised by the parties' submissions as to whether all Pampered Chef's actual fees are reasonable.

C. Reasonableness of Legal Fees

[32] Loblaw argues that Pampered Chef's legal fees are excessive. First, it takes the position that the fees charged by one of its senior counsel should be removed from the calculation. Loblaw notes that this counsel became involved in this matter only immediately before trial. The fees applicable to his time total $122,765.50. Second, Loblaw argues the fees of two associates who did not appear at trial or at the discoveries should also be removed. These associates' fees total $103, 978.50.

[33] As authority in support of its position on this issue, Loblaw refers to *Johnson & Johnson Inc v Boston Scientific Ltd*, 2008 FC 817 [*Johnson & Johnson*] at paragraph 14, in which Justice Layden-Stevenson allowed costs for only one senior counsel and two junior counsel at trial. I do not find that precedent to be particularly instructive as to whether Pampered Chef's actual fees were reasonably incurred in the present matter. I note that *Johnson & Johnson* concerned instructions to an assessment officer as to how to conduct an assessment under Tariff B, as opposed to consideration of the reasonableness of fees in calculating a lump sum award. More significantly, the question for the Court is whether the combination of Pampered Chef's counsel and their seniority profile are reasonable for this particular matter.

[34] Pampered Chef argues its additional senior counsel was present for only the first three days of trial. It contrasts this limited presence with Loblaw's legal team at trial, submitting that Loblaw had four counsel present, including two senior counsel, throughout the trial. Pampered Chef also submits Loblaw had additional counsel attending some of the discoveries, noting the total number of additional counsel assisting Loblaw throughout the proceeding is unknown. Pampered Chef notes the discrete role of individual counsel in conducting specific examinations and cross-examinations and submits, given the compressed timing and commercial importance of this proceeding, its decisions with respect to number and quality of counsel were reasonable (see *Apotex Inc v Egis Pharmaceuticals* (1991), 37 CPR (3d) 335 at 337 (Ont Ct J (Gen Div)).

[35] I find no basis for a conclusion that Pampered Chef's decisions in this regard were unreasonable. As it notes, the Court has little visibility on the overall legal effort employed by Loblaw, or the resulting cost, with which to make a comparison. I also find compelling the point that this matter was brought to trial (by both parties) efficiently and expeditiously, making me less inclined to engage in a microscopic analysis of how Pampered Chef chose to employ legal resources to achieve its end of that objective.

[36] Applying the 25% figure to the entirety of Pampered Chef's actual fees of $1,983,854.50 results in a calculation of $495,963.63. Rounding slightly, I therefore select a lump sum costs award of $500,000.00, before considering disbursements.

D. Disbursements

[37] Pampered Chef claims disbursements of $203,487.11, significant components of which relate to fees charged by its experts.

[38] Loblaw seek to reduce the fees of $65,660.95 charged by Pampered Chef's expert witness Dr. Ruth Corbin, to $36,710.95. It raises two arguments. First, Loblaw submits that 40% of the hours billed (amounting to fees of $19,740.00) were worked by a colleague of Dr. Corbin's, who was not a witness or involved in the trial. Loblaw notes that the Court has disallowed costs for experts who did not appear as witnesses but assisted in other capacities (see *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333 [*Janssen-Ortho*] at para 25). Second, Loblaw notes that $9210.00 of Dr. Corbin's fees was incurred before issuance of the report of Loblaw's expert Dr. Chakrapani, to which Dr. Corbin was responding.

[39] Pampered Chef responds that it was reasonable for it to retain Dr. Corbin at the outset of this proceeding, before receipt of Dr. Chakrapani's report. It relies on *Eli Lilly Canada Inc v Teva Canada Ltd*, 2013 FC 621 at paragraph 4, where Justice Barnes held it was prudent for the successful litigant to have retained expert witnesses in advance of having received its opponent's evidence in that PM(NOC) proceeding, as some anticipatory work with experts is to be anticipated under the tight timeframes that apply to such proceedings. Pampered Chef submits this same logic applies in the present matter, where the parties managed this proceeding to tight timeframes. I find this logic compelling.

[40] With respect to the fees of Dr. Corbin's partner, Pampered Chef submits these fees were reasonably incurred in connection with the analysis of Dr. Chakrapani's data. Dr. Corbin's retention, and the preparation of her report and evidence, relate to responding to Dr. Chakrapani's evidence. I do not find unreasonable the fact that some of the work to support her role was performed by her partner. The statement in *Janssen-Ortho* upon which Loblaw relies is that the fees of experts who do not appear as witnesses, but assist in other capacities, are to be borne by the party who retains them. It is not clear to me from the decision that this statement is intended to apply to the fees of those who are in practice with the expert witness and who assist with that witness's role.

[41] Next, Loblaw seeks to reduce the fees charged by Pampered Chef's expert, Dr. Derek Hassay, by 50% to $11,900.98. It argues that a significant portion of Dr. Hassay's report was devoted to responding to the evidence of Loblaw's expert Prof. Wong, which in turn was primarily a response to Pampered Chef's counterclaim. For the same reasons, Loblaw argues that disbursements totalling $15,445.72 for "investigations and trial testimony" should be entirely removed, details of these fees not having been provided. Loblaw submits, to the extent these fees for Dr. Hassay relate to the testimony of Pampered Chef's factual witness, Mr. Stephen, they represent a response to evidence adduced by Pampered Chef in support of its unsuccessful counterclaim.

[42] Pampered Chef takes the position that Dr. Hassay's fees were reasonable and necessary, having been incurred to respond to both Dr. Chakrapani and Prof. Wong and to provide evidence surrounding the relevant channels of trade. I agree with this characterization of Dr. Hassay's

role. In my trial decision, I took into account Dr. Hassay's evidence on the direct sales channel, including how it differs from mass merchandising and differences as to how websites are used. I also noted my understanding that the evidence of Prof. Wong was introduced by Loblaw principally in support of its s 22 claim, in order to establish goodwill associated with the PC Marks. Given that the s 22 claim failed, for reasons unrelated to the requirement to establish goodwill, it was unnecessary for me to consider the opinions of Prof. Wong. To the extent that Dr. Hassay's evidence was tendered in response to the conclusions in Prof. Wong's report, I do not regard that evidence as primarily related to the counterclaim.

[43] I therefore find no basis to reduce the disbursements associated with the work of either of Pampered Chef's experts.

IV. **Conclusion**

[44] My Judgment below awards costs in favour of the Defendants in this proceeding in the total amount of $703,487.11, composed of the $500,000.00 lump sum derived above, plus disbursements of $203,487.11.

SUPPLEMENTARY JUDGMENT IN T-548-18

THIS COURT'S JUDGMENT is that the Plaintiff shall pay the Defendants costs of this proceeding in the all-inclusive amount of $703,487.11.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-548-18
STYLE OF CAUSE:	LOBLAWS INC., AND COLUMBIA INSURANCE COMPANY, THE PAMPERED CHEF, LTD, AND PAMPERED CHEF – CANADA CORP.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 6-10, 16, 17, 2019
SUPPLEMENTARY JUDGMENT AND REASONS	SOUTHCOTT, J.
DATED:	NOVEMBER 14, 2019

APPEARANCES:

Andrew Bernstein Emily Sherkey Stefan Case Michelle Nelles	FOR THE PLAINTIFF
Mark Evans Mark Biernacki Steven Garland Graham Hood	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Torys LLP Barristers & Solicitors Toronto, Ontario	FOR THE PLAINTIFF
Smart & Biggar Barristers & Solicitors Toronto, Ontario	FOR THE DEFENDANTS

Federal Court of Appeal | Cour d'appel fédérale

Date: 20170206

Docket: A-43-16

Citation: 2017 FCA 25

CORAM: **DAWSON J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

NOVA CHEMICALS CORPORATION

Appellant

and

THE DOW CHEMICAL COMPANY, DOW GLOBAL TECHNOLOGIES INC. and DOW CHEMICAL CANADA ULC

Respondents

Heard at Toronto, Ontario, on October 24, 2016.

Judgment delivered at Ottawa, Ontario, on February 6, 2017.

REASONS FOR JUDGMENT BY: RENNIE J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20170206

Docket: A-43-16

Citation: 2017 FCA 25

CORAM: **DAWSON J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

NOVA CHEMICALS CORPORATION

Appellant

and

THE DOW CHEMICAL COMPANY, DOW GLOBAL TECHNOLOGIES INC. and DOW CHEMICAL CANADA ULC

Respondents

REASONS FOR JUDGMENT

RENNIE J.A.

I. Introduction

[1] Nova Chemicals Corporation (Nova) appeals from the Judgment of the Federal Court which awarded The Dow Chemical Company, Dow Global Technologies Inc. and Dow Chemical Canada ULC (collectively, Dow) $6.5 million for costs consequent to Dow's success

in an action for patent infringement (2014 FC 844, affirmed 2016 FCA 216). The lump sum award was comprised of $2.9 million for legal fees and $3.6 million for disbursements.

II. Federal Court decision

[2] In the Federal Court, Dow asked for costs above the amounts provided by Tariff B of the *Federal Courts Rules* (S.O.R./98-106). It sought a lump sum award of $6.5 million: $2.9 million in legal fees (which represented 30% of its actual legal fees of $9.6 million) plus $3.6 million in disbursements. In the alternative, Dow asked for a lump sum between $4.7 million and $6.5 million, the former amount including the same disbursements, but with the amount for legal fees based on Column V of Tariff B. Nova opposed, contending that both the record and the evidence Dow had provided were insufficient to substantiate Dow's request for a lump sum. Nova requested that costs be assessed, with specific directions to the assessment officer to address a number of concerns raised by Nova.

[3] In reasons cited as 2016 FC 91, the judge characterized the trial proceeding as "an extremely complex patent case involving much expert testimony." He noted that there were 22 allegations of invalidity, 33 days of discovery and 32 days of trial. The written submissions at the end of the trial exceeded 700 pages in length and the closing argument lasted three days. The judge noted that both parties undertook extensive and scientifically-complex testing of the materials that were at the heart of the patent dispute. The judge found legal fees allowable under Column V of Tariff B, which would have awarded an amount equivalent to 11% of Dow's legal costs, to be "totally inadequate."

[4] Based on these considerations, the judge concluded that an increased award of costs was justified. The judge then considered whether costs should be fixed as a lump sum, as urged by Dow, or assessed by an assessment officer, as urged by Nova. He held that an assessment would "serve no purpose," given the extensive submissions made by both parties and the anticipated additional time and expense of an assessment of costs. He concluded that an amount representing 30% of Dow's actual legal costs and approximately three times what would be available under the Tariff was reasonable.

[5] The judge then considered Nova's submission that Dow's disbursements had not been "proven" as required by subsection 1(4) of Tariff B. In particular, Nova objected to the lack of a supporting affidavit and its inability to cross-examine and test Dow's claim for a disbursement of $1.6 million, said to represent the costs to Dow of testing the infringing product in-house. The judge dismissed Nova's objection, noting that, similar to the practice on assessment, "the solicitor could have established the amount of the disbursements" without an affidavit. The judge was satisfied that the information provided by Dow, specifically the Bill of Costs and the attached schedules, was sufficient to allow him to determine the reasonableness of the amount. He awarded the full $3.6 million in disbursements, holding that Dow had provided "sufficient detail" to allow him to grant the disbursements on the basis that they were reasonable.

III. Analysis

[6] The decision of this Court in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, confirms that the standard of review on appeal of discretionary decisions of the Federal Court is that articulated by the Supreme Court of Canada in *Housen v.*

Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, namely of palpable and overriding error in respect of findings of fact and mixed fact and law, and correctness with respect to extricable questions of law. As described below, Nova asserts two errors said to warrant this Court's intervention.

[7] First, Nova submits that costs awards should be guided by the standards established in Tariff B, and that any departures from the Tariff should be limited to exceptional cases. Nova also asserts that, by itself, the fact that a successful party's legal costs exceed the Tariff does not justify departing from the Tariff. It contends that the judge erred in awarding costs based on a percentage of Dow's actual fees, in particular because it alleges that the judge did not analyze whether the amount of time billed by Dow's lawyers was reasonable or warranted, or whether Dow's actual fees (on which the percentage amount was based) included improperly claimed items.

[8] Secondly, Nova takes issue with the sufficiency of evidence before the judge in respect of both the fees and disbursements claimed. It submits that "[i]t is inappropriate for the Court to award a lump sum on the basis of mere assertions of the amounts spent without evidence or explanation," and that the judge was not entitled to conclude that Dow's legal costs were reasonable merely because Nova did not present information on its actual incurred legal fees. Nova also argues that the judge was required to consider whether the services rendered for the fees claimed were "reasonably necessary in the circumstances," and that the judge did not have evidence sufficient to conduct a critical examination of the record in order to come to an informed decision on this requirement. Nova submits that the evidentiary record before a judge

determining costs should be akin to that which would be put before an assessment officer to properly exercise his discretion, and that, because the evidence in this case was insufficient, the judge erred in not referring the matter to an assessment.

[9] Although Nova's submissions point to concerns that could have been better addressed by the judge, I am not persuaded that the judge erred in awarding costs in a lump sum, or in fixing them as a percentage of Dow's actual expenses. Nor am I persuaded that the judge erred in allowing the disbursement for testing without a supporting affidavit. Before explaining why I reach these conclusions, it is important to review first principles.

A. ***Lump sum awards – generally***

[10] Rule 400(1) of the *Federal Courts Rules* gives the Court "full discretionary power over the amount and allocation of costs". This has been described to be the "first principle in the adjudication of costs": *Consorzio del prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, [2003] 2 F.C.R. 451, at para. 9 [*Consorzio*].

[11] Rule 400(4) expressly contemplates an award of costs in a lump sum in lieu of an assessment of costs pursuant to Tariff B:

400 (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.	400 (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.

Lump sum awards have found increasing favour with courts, and for good reason. They save the parties time and money. Lump sum costs awards further the objective of the *Federal Courts*

Rules of securing "the just, most expeditious and least expensive determination" of proceedings (Rule 3). When a court can award costs on a lump sum basis, granular analyses are avoided and the costs hearing does not become an exercise in accounting.

[12] Lump sum awards may be appropriate in circumstances ranging from relatively simple matters to particularly complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome: *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 157, at para. 11.

[13] As demonstrated by the facts of this case, there are circumstances in which costs generated even at the high end of Column V of Tariff B bear little relationship to the objective of making a reasonable contribution to the costs of litigation. The Tariff amounts have been described as inadequate in this respect, although this may be a significant understatement in complex litigation conducted by sophisticated parties in the Federal Courts. Nevertheless, an increased costs award cannot be justified solely on the basis that a successful party's actual fees are significantly higher than the Tariff amounts: *Wihksne v. Canada (Attorney General)*, 2002 FCA 356, at para. 11. The burden is on the party seeking increased costs to demonstrate why their particular circumstances warrant an increased award.

B. ***Evidentiary considerations***

[14] As a matter of good practice, requests for lump sum awards should generally be accompanied by a Bill of Costs and an affidavit in respect of disbursements that are outside the

knowledge of the solicitor. In most cases this will provide a proper starting point for the exercise of discretion.

[15] An award of costs on a lump sum basis must be justified in relation to the circumstances of the case and the objectives underlying costs. It is not a matter of plucking a number or percentage out of the air. However, I do not agree with Nova's submission that the evidentiary record before a trial judge asked to award a lump sum must provide a level of detail akin to that which would be required in an assessment conducted by an assessment officer unfamiliar with the proceeding. To my mind, that would defeat the purpose of a lump sum, to save time and costs to the parties that would have otherwise resulted from the assessment process.

(1) Legal fees

[16] The practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is well established in the jurisprudence. In *Philip Morris Products SA v. Marlboro Canada Ltd*, 2015 FCA 9, at para. 4, this Court observed that "when dealing with sophisticated commercial parties, it is not uncommon for such lump sums to be awarded based on a percentage of actual costs incurred." As noted by the Federal Court in *H-D U.S.A., LLC v. Berrada*, 2015 FC 189, there appears to be a "[t]rend in recent case law favouring the award of a lump sum based on a percentage of the actual costs to the party when dealing with sophisticated commercial litigants that clearly have the means to pay for the legal choices they make": at paragraph 22, quoting *Eli Lilly & Co. v. Apotex Inc*., 2011 FC 1143, at para. 36.

[17] A review of the case law indicates that increased costs in the form of lump sum awards tend to range between 25% and 50% of actual fees. However, there may be cases where a higher or lower percentage is warranted.

[18] When a party seeks a lump sum award based on a percentage of actual legal fees above the amounts provided for in the Tariff, as a matter of good practice the party should provide both a Bill of Costs and evidence demonstrating the fees actually incurred. As well, a sufficient description of the services provided in exchange for the fees should be given to establish that it is appropriate that the party be compensated for those services. What is required is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of the litigation.

[19] While, as noted above, a judge fixing costs on a lump sum basis has a wide discretion, the discretion is not unfettered. As noted, it is not a matter of plucking a number out of the air. The discretion must be exercised prudently. The criteria set forth in Rule 400(3), the case law and the objectives that underlie awards of costs are all relevant considerations. Efficiency in the administration of justice is one value that underlies lump sum awards, but costs must also be predictable and consistent so that counsel can properly advise and clients can make informed decisions about litigation risks. The ability to forecast cost consequences also bears both on the ability of parties to settle and on the question of access to the courts.

(2) Disbursements

[20] Disbursements must be, in the language of the Tariff, “reasonable”. This requires that they be justified expenditures in relation to the issues at trial. Where disbursements are outside of the knowledge of the solicitor, they should generally be accompanied by an affidavit such that the Court can be satisfied that they were actually incurred and were reasonably required.

C. *Application*

(1) Legal fees

[21] Nova submits that there was insufficient evidence on the record to establish that the services for which Dow’s actual legal fees were incurred were reasonable. However, the parties to this litigation are sophisticated corporations which chose to engage in complex, lengthy, contentious litigation. The judge considered that the award of a lump sum award would avoid the parties incurring additional costs and time spent were an assessment undertaken. I see no error of law or palpable and overriding error of fact on the part of the judge in deciding to depart from the Tariff amounts and to fix the increased award as a lump sum based on 30% of Dow’s actual legal fees. The selection of the appropriate percentage of an increased costs award is a matter for the judge, who, as here, is in a good position to assess the evidentiary and legal complexity of the trial, the result of the action, the conduct of the parties and other considerations relevant to the assessment of costs. The judge turned his mind to the criteria under Rule 400(3), which remain useful beacons in the selection of a lump sum award. The determination of a lump sum is not an exact science, but reflects the amount the Court considers to be a reasonable contribution to the successful party’s actual legal fees: *Consorzio*, at para. 8.

[22] Further, the record before a trial judge hearing a costs motion is not confined to the motion materials, but includes all of the trial and pre-trial matters over which he or she presided. Here, the judge had an intimate knowledge of the case. The judge was provided with both a Bill of Costs, as well as a summary of Dow's actual solicitor-client fees. The award of 30% of the fees incurred by Dow took into account Nova's complaints that certain steps ought not to have been part of the costs award, and avoided the need for the parties to undertake the costly exercise of parsing out such steps. The judge was satisfied that the percentage of fees requested as a lump sum were actually incurred and reasonable in the circumstances.

(2) Disbursements

[23] Nova submits that affidavit evidence was necessary to substantiate the in-house testing costs as such evidence was not adduced at trial and was outside of the judge's knowledge. More particularly, Nova contends that the judge erred in finding that Dow's solicitors would have been able to substantiate the impugned disbursements as required under Tariff B subsection 1(4), as the associated costs of in-house testing would be outside of their knowledge.

[24] Nova also submits that Dow should not have been allowed to recover for overhead costs that may have been embedded in the disbursement, and that the evidence lacked sufficient detail to determine whether costs for those items were being claimed or were reasonable. It argues that the judge erred in determining reasonableness of the disbursements based on the irrelevant consideration of whether testing by a for-profit facility would have been more costly.

[25] In the ordinary course, disbursements of this magnitude should be supported by affidavit evidence. In the unique circumstances of this case, however, the judge had a sufficient basis on which to conclude that the disbursement claimed by Dow for its testing was reasonable. The judge was well positioned to assess the utility of the in-house testing in the course of the trial. The question of testing, how and when it was to be done, the measures necessary to protect intellectual property interests, the operational aspects including supervision, costs and disclosure of results, were all the subject of a contested motion, on which affidavit evidence was led. The judge also heard testimony during the trial about the testing process and results, and observed some aspects of the testing by video. Nova and Dow's solicitors both attended the testing, and were in a position to speak to the reasonableness, or not, of the amount claimed on the costs motion. The judge was also aware that some of the in-house testing was unnecessary and flowed from Nova's initial position that it could not reproduce one of the relevant polymers. Nova resiled from this position at trial. In these circumstances, the judge was able to assess the assertion that the testing costs were limited to the expenses incurred for presentation at trial alone and were reasonable in the circumstances. The judge also had one other point of reference by which he could gauge the reasonableness of the disbursement: a cost estimate from an independent third party.

[26] I agree with Nova that, as a general proposition, an in-house disbursement cannot be justified on the sole basis that it would be more expensive to obtain the same service elsewhere. The costs must still be both "reasonable" in the language of the Tariff, and justified in relation to the issues at trial. The successful party must not be over-compensated. Generally, ongoing overhead costs of a party related to in-house testing should not be shifted to the other party.

However, the judge heard these concerns and was not satisfied that they altered the reasonableness of the disbursement. In the particular circumstances of this case, I see no error of law or palpable and overriding error on the part of the judge.

IV. Conclusion

[27] I would dismiss the appeal with costs.

"Donald J. Rennie"
J.A.

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

"I agree
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT FOR REASONS DATED January 14, 2016 (confidential) and January 22, 2016 (public) No. T-2051-10 (2016 FC 91)

DOCKET:	A-43-16
STYLE OF CAUSE:	NOVA CHEMICALS CORPORATION V. THE DOW CHEMICAL COMPANY ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 24, 2016
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	DAWSON J.A. WOODS J.A.
DATED:	FEBRUARY 6, 2017

APPEARANCES:

Adam Bobker Anastassia Trifonova	FOR THE APPELLANT
Steven B. Garland Kevin Graham Ryan T. Evans	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Bereskin & Parr LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPELLANT
Smart & Biggar Ottawa, Ontario DLA Piper (Canada) LLP Toronto, Ontario	FOR THE RESPONDENTS

F ederal Court  Cour fédérale

Date: 20100621

Docket: T-1868-09

Citation: 2010 FC 668

Toronto, Ontario, June 21, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

PFIZER CANADA INC.,
WARNER-LAMBERT COMPANY
AND WARNER-LAMBERT COMPANY LLC

Applicants

and

NOVOPHARM LIMITED,
THE MINISTER OF HEALTH,
NORTHWESTERN UNIVERSITY AND
THE BOARD OF REGENTS
FOR THE UNIVERSITY OF OKLAHOMA

Respondents

REASONS FOR ORDER AND ORDER

I. Background

[1] By letter dated October 1, 2009, Novopharm served the Applicant, Pfizer Canada Limited ("Pfizer") with its Notice of Allegation (NOA) pursuant to section 5 of the *Patented Medicines (Notice of Compliance) Regulations* (PMNOC Regulations) in relation to the drug pregabalin.

[2] In response to the NOA, on November 13, 2009, Pfizer commenced the within application for judicial review pursuant to section 6 of the PMNOC Regulations for an order prohibiting the Minister of Health from issuing a Notice of Compliance ("NOC") to Novopharm until after the expiry of five patents: Canadian Patent Nos. 2,134,674; 2,297,163; 2,255,652; 2,325,045; and 2,327,285.

[3] By notice of motion dated February 22, 2010, Novopharm sought a protective Order designating, among other things, Novopharm's NOA as confidential pursuant to Rule 151 of the *Federal Courts Rules*. No other term in the proposed protective Order is at issue.

[4] Novopharm submits that it has made a substantial investment in the preparation of its NOA and that it has consistently treated and maintained that NOA as confidential. The evidence indicates that Novopharm incurred approximately $200,000.00 in costs to prepare its NOA. That investment was made to assist Novopharm "to be a very close second, if not the first, generic [drug manufacture] to obtain an NOC for its pregabalin product."

[5] Novopharm further submits that "there is no public benefit to disclosing" its NOA and that if it prevails in its litigation with Pfizer and its NOA has been "made available to its competitors, [they] could use that NOA to 'springboard' onto the pregabalin market at considerably less expense than that incurred by Novopharm."

[6] Novopharm maintains that its NOA as a whole is confidential, and that the nature of the confidential information in the NOA is such that the NOA cannot be redacted in any way which preserves the confidentiality of that information. In short, the entire work product reflected in the NOA is confidential. Even if that work product were heavily redacted, its rivals could still use the redacted NOA to significantly accelerate their entry into the pregabalin market, and thereby reap significant sales and profits that otherwise would be made by Novopharm.

[7] The NOA is not a pleading or court document. The PMNOC Regulations require that an NOA containing a detailed statement of the legal and factual basis for the allegations of non-infringement and/or invalidity of a patent be delivered by a generic drug manufacturer ("generic"). The NOA cannot be amended once it has been delivered. As a result, NOAs typically are very detailed and thorough.

[8] Novopharm's NOA was delivered several months after another generic, ratiopharm Inc. ("ratiopharm"), delivered an NOA for pregabalin to Pfizer. That NOA became public on October 16, 2009, after Novopharm delivered its NOA to Pfizer. It has not been suggested that Novopharm had access to ratiopharm's NOA prior to that time.

II. The Decision to Deny Novopharm's Request to Designate Its NOA as Confidential

[9] Prothonotary Milczynski began her analysis by observing that the public's interest in open and accessible court proceedings should not be compromised except in exceptional circumstances. She then articulated the test applicable to a motion for an order of confidentiality pursuant to Rule 151 of the *Federal Courts Rules* (the "Rules"), as established by the Supreme Court of Canada in

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at 543-544. She stated that confidentiality orders under Rule 151 should only be granted when:

> (i) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

She further noted that there are three elements to the first part of the *Sierra Club* test:

> (i) the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question;
>
> (ii) in order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the confidentiality order, the interest must be one which can be expressed in terms of a public interest in maintaining confidentiality; and
>
> (iii) the Court must consider not only whether reasonable alternatives to a confidentiality order are available, but must also restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[10] Prothonotary Milczynski accepted that the preparation of Novopharm's NOA required substantial time (approximately 10 months), effort, resources and money. She further accepted that the NOA "may well be unique, novel and original as Novopharm contends in the structure and support of its arguments and be a first-class piece of work."

[11] However, regarding the first element of the first part of the *Sierra Club* test, she found that Novopharm had not presented evidence of a serious risk to its commercial advantage with respect to its market position and what it hopes to be the timing of its market entry.

[12] As to the second element of the first part of the *Sierra Club* test, Prothonotary Milczynski found as follows:

> Novopharm's market position cannot be characterized as an important commercial interest within the meaning of *Sierra Club*. The commercial interest identified by Novopharm is narrow and personal to Novopharm, namely, its first-to-market status and its investment of time and money in the preparation of its NOA. There is no principle or element of public interest in the confidentiality at stake of the NOA, unlike the public interest identified in *Sierra Clu*b in maintaining confidentiality of the information at issue in that case. In *Sierra Club*, disclosure would cause a breach of a confidentiality agreement – there is a public interest in preserving such agreements. There is no public interest in ensuring Novopharm the time and/or exclusivity of its market entry over any other generic drug manufacturer.

[13] With respect to the third element in the first part of the *Sierra Club* test, Prothonotary Milczynski took note of Novopharm's position that the entire NOA should be kept confidential and that the confidentiality of the information in the NOA could not be protected by simply redacting parts of the NOA.

[14] Regarding the second part of the *Sierra Club* test, she concluded that the deleterious effects of the confidentiality order proposed by Novopharm outweigh any alleged salutary effects.

[15] Given the foregoing, Prothonotary Milczynski dismissed Novopharm's motion.

III. <u>The Decision to Impose Costs on Novopharm</u>

[16] Prothonotary Milczynski noted that the purpose of an award of costs to a successful party is to (a) discourage unmeritorious litigation; and (b) partially indemnify the successful party for the costs incurred.

[17] She further noted that Rule 400(1) of the Rules gives the Court "full discretionary power over the amount and allocation of costs," and that the discretion granted in respect of costs includes the jurisdiction to award a lump sum in lieu of, or in addition to, any assessed costs.

[18] After identifying the various factors that the Court may consider in making a determination as to costs, Prothonotary Milczynski observed that there "is no provision in the [PMNOC Regulations] nor precedent in this Court for what Novopharm was seeking, for the reasons Novopharm was giving." She then stated that the reasons supporting Novopharm's request to protect the confidentiality of its entire NOA were without merit on the basis of the test set out in *Sierra Club*, above.

[19] Accordingly, she held that Novopharm's motion should not have been brought. Given the foregoing, and considering the important public interest in open and accessible proceedings, she concluded that a higher amount of costs is warranted, in a fixed sum amount. She therefore ordered costs in the amount of (i) $8,000.00 payable forthwith by Novopharm to Pfizer and The Board of Regents for the University of Oklahoma ("Oklahoma"); and (ii) $2,000.00 payable forthwith to Northwestern University ("Northwestern"). These amounts exceeded the bill of costs in the amount of $7,668.34 submitted by Pfizer and Oklahoma, based on the high end of Column IV of the Tariff,

and the $1,800.00 that was sought by Northwestern, calculated at the mid-point of Column III of the Tariff.

IV. Issues

[20] Novopharm has alleged that Prothonotary Milczynski made several errors in her reasons for dismissing its motion to designate its NOA as confidential. In essence, Novopharm claims that she erred by:

1. failing to find that its entire NOA is a confidential document;
2. finding that there was insufficient evidence of a serious risk to an important interest;
3. concluding that its competitive position cannot qualify as an important interest under the *Sierra Club* test; and
4. failing to recognize that the public interest in open and accessible court proceedings would not be deleteriously affected by designating the Novopharm NOA as confidential.

[21] With respect to her reasons for issuing the Cost Order, Novopharm claims that Prothonotary Milczynski erred by:

1. awarding costs against Novopharm, rather than ordering that they follow the cause; and
2. awarding costs payable forthwith and in amounts greater than the amounts requested by Pfizer and Northwestern.

V. The Standard of Review

[22] The test applicable on an appeal of a discretionary order issued by a prothonotary is whether (i) the questions raised in the motion are vital to the final issue of the case; or (b) the order "is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts" (*Merck & Co. Inc. v. Apotex Inc*., 2003 FCA 488, [2004] 2 F.C.R. 459, at 478). More recently, the Federal Court of Appeal has clarified that discretionary decisions of prothonotaries should stand unless intervention is warranted "to prevent undoubted injustices and to correct clear material errors" (*j2 Global Communications, Inc. v. Protus IP Solutions Inc.*, 2009 FCA 41, at para. 16).

[23] It is common ground between the parties that the questions raised in Novopharm's motions are not "vital to the final issue of the case."

VI. Analysis

A. The refusal to designate Novopharm's NOA as confidential

(i) *Did the Prothonotary err by failing to find that Novopharm's entire NOA is a confidential document?*

[24] Novopharm claims that its "NOA as a whole is an original, commercially valuable and confidential document because it is an original compilation resulting from of (sic) ten months of knowledge, skill and effort of Novopharm and its consultants".

[25] I am satisfied that Prothonotary Milczynski fully understood Novopharm's position on this point. This is clear from the following passage at paragraph 15 of her decision:

> From Novopharm's perspective, the entire NOA must be kept confidential from a particular segment of the public (other generics) to prevent those generics from relying on the way Novopharm researched, compiled, organized and argued its allegations and detailed statement of fact and law relating to the validity of the patents in issue and non-infringement. Novopharm's commercial interest in so doing, is to ensure these generics do not gain market entry any faster or for less expense than they would otherwise as a result of their relying on Novopharm's NOA and not doing their own work.

[26] Prothonotary Milczynski also accepted that Novopharm's "NOA may well be unique, novel and original as Novopharm contends in the structure and support of its arguments and be a first-class piece of work" (para. 10).

[27] However, she did not explicitly assess whether the NOA is a confidential document.

[28] She did appropriately note that "[t]here is no provision in the PMNOC Regulations relating to whether or not NOA's are confidential unlike other pieces of information or documents that are treated as confidential, such as Abbreviated New Drug Submissions." I agree with her implicit inference that this suggests that the PMNOC Regulations do not contemplate that entire NOAs should be treated as confidential in proceedings there under.

[29] A second factor implicitly and appropriately recognized by Prothonotary Milczynski as weighing against the view that an entire NOA should be treated as a confidential document is that there is no precedent in this Court for designating an NOA as confidential in the manner and for the purpose that Novopharm seeks. In response, Novopharm has identified three consent cases in which entire NOAs were designated as confidential in proceedings under the PMNOC Regulation (*Merck-Frosst - Schering Pharma GP et al v. The Minister of Health et al*, (T-1610-08), Order dated

November 18, 2009; *Pfizer Canada Inc. et al. v. Genpharm ULC et al*, (T-1118-09), Order dated December 1, 2009; *Novo Nordisk Canada Inc. et al v. Cobalt Pharmaceuticals Inc. et al*, (T-1221-08), Order dated September 11, 2008). However, it is well established that judgments given on consent have "no precedential value" (*Armstrong v. Canada*, [1996] 2 C.T.C. 266, at para. 13; *Uppal v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565, at para. 18).

[30] Where an NOA raises legitimate questions regarding the validity of one or more patents, another significant factor that weighs against the view that the entire NOA should be treated as a confidential document is that a patent effectively confers a statutory monopoly on the patent holder, in the sense that the patent holder is shielded from competition for the life of the patent. This provides the basis for a strong public interest in transparency and openness with respect to (i) the allegations contained in an NOA, (ii) the basis for those allegations, and (iii) the proceedings involving those allegations. This consideration distinguishes this case from *AB Hassle et al. v. Canada (Minister of National Health and Welfare)* (2000), 5 C.P.R. (4th) 149 (FCA), which concerned information relating to the process, components and formulae by which the Respondent in that case produced a drug that it claimed did not infringe the Appellant's patent.

[31] In this case, an additional factor that is relevant is that Novopharm's General Counsel, Ms. Ildeko Mehes, admitted in cross-examination that she did not expect that Pfizer would agree to treat Novopharm's NOA as confidential if Novopharm had requested such an agreement prior to sending the NOA, which Novopharm unilaterally marked as confidential, to Pfizer. This raises a serious question as to whether Novopharm had a reasonable expectation that its NOA would be kept

confidential, and ultimately designated as such, particularly given the absence of any prior such designations of an entire NOA by this court, outside the consent context.

[32] The foregoing considerations all distinguish this case from cases involving information that is generally recognized to be highly competitively sensitive, such as strategic and business plans, prices, profit margins, marketing contacts, market intelligence, sales invoices, the terms and conditions of licensing agreements, and the type of financial information that could allow competitors to have access to a firm's sales or marketing strategy, (*Rivard Instruments, Inc. v. Ideal Instruments Inc.*, 2006 FC 1338, (2006), 54 C.P.R. (4th) 420, at para. 17; *Orange County Choppers Inc. v. Trio Selection Inc.*, 2006 FC 1122, at paras. 4 and 5; and *Lundbeck Canada Inc. v. Canada (Minister of Health)*, 2007 FC 412, at para 19). It would appear to be generally accepted that the public interest in preserving the confidentiality of such competitively sensitive information typically outweighs the public interest in openness.

[33] In my view, it was not a reviewable error for Prothonotary Milczynski to fail to more explicitly assess whether the NOA is a confidential document or to explicitly find that the NOA is such a document. She did not need to reach a conclusion on this point because she found that Novopharm had not satisfied the two main parts of the test set forth in *Sierra Club*, above, for determining whether a document should be designated confidential under Rule 151 of the Rules.

[34] Even if she did implicitly find that the NOA is not a confidential document, I am unable to conclude, on the particular facts of this case, that this conclusion was clearly wrong, in the sense that it was based on a wrong principle or a misapprehension of the facts.

(ii) *Did the Prothonotary err in finding that there was insufficient evidence of a serious risk to an important interest of Novopharm's?*

[35] In reaching her conclusion on this point, Prothonotary Milczynski found that there were a number of significant problems with Novopharm's argument that a failure to designate its NOA as confidential would pose a serious threat to an important commercial interest, as contemplated by the first element of the first part of the test set forth in *Sierra Club*, above. Specifically, she noted the following:

> First, there is no evidence of a serious risk to Novopharm's commercial advantage with respect to its market position and what it hopes to be the timing of its market entry. Novopharm assumes it will succeed on all five patents in issue in this case and makes assumptions about how its and ratiopharm's hearings will be scheduled by the Court. Novopharm may or may not be first or a close second on the market. There is also no evidence other than its own confidence in the quality of its work product to suggest that other generics will be lining up to copy any part of the Novopharm NOA, particularly when there is no evidence that ratiopharm's NOA has attracted such keen attention (or evidence that ratiopharm's NOA should not warrant it).

[36] I am unable to conclude that this conclusion was clearly wrong. In my view, Prothonotary Milczynski did not misapprehend the relevant facts in reaching this conclusion and she did not base her conclusion upon a wrong principle.

[37] Indeed, in my view, the conclusion that Novopharm did not establish a real and substantial risk of harm to an important interest was entirely appropriate, particularly given that (i) the evidence adduced was entirely speculative and largely based on bald assertions and unsupported assumptions (*Abbott Laboratories Limited et. al. v. Canada (Minister of Health) et. al.*, 2005 FC 989, at paras. 100 and 102); (ii) no evidence was adduced that ratiopharm's NOA, which dealt with the same

patents at issue in this case and was filed several months in advance of Novopharm's NOA, had attracted the type of attention from rival generic drug manufacturers that Novopharm claimed its NOA will attract; and (iii) Novopharm adduced no persuasive evidence to demonstrate that its NOA would be of greater interest to those rivals than ratiopharm's NOA. In short, the alleged serious threat to Novopharm's commercial interest was not "well grounded in the evidence" (*Sierra Club*, above, at p. 542).

(iii) *Did the Prothonotary err by concluding that Novopharm's competitive position cannot qualify as an important interest under the Sierra Club test?*

[38] I can certainly sympathize with the difficulty that Novopharm has in accepting, as a general principle, that a firm's market position cannot be characterized as an important commercial interest, within the meaning of the test set forth in *Sierra Club*, above.

[39] Market-oriented economies are distinguished from central-command economies and other highly regulated or protected economies precisely, and perhaps most importantly, by the fact that businesses in market-oriented economies are much more focused on innovating and otherwise striving to better compete in order to enhance or at least protect their market positions. The public benefits that result from firms' efforts to enhance their market positions include more competitive prices, new or improved products and services, and more efficient production methods and supply chains. In turn, these benefits generally result in increased general economic growth and productivity, as well as an increase in the average standard of living of those living in the economy.

[40] Firms' concerns with their market positions therefore lie at the very root of our market-oriented economy and, arguably, are a matter of substantial public interest.

[41] To the extent that the disclosure of a firm's confidential information in legal proceedings could pose a serious threat to its commercial interests, and thereby harm its market position, the failure of the law to recognize the importance of protecting the confidentiality of such information could have significant adverse consequences for the public interest. This is because such failure could have a considerable chilling effect on other firms' willingness to fully avail themselves of their legal rights through legal proceedings, due to a concern about the potential adverse impact on their market position that might result from the disclosure of their competitively sensitive confidential information. Accordingly, in my view, the issue of whether to protect the confidentiality of such information can certainly be expressed in terms of a public interest in maintaining confidentiality, as contemplated in *Sierra Club*, above, at 544.

[42] However, there is plain language in *Sierra Club* that does not support this view. At page 544, the decision states that an interest "cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality." As an example, the decision states that "a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests." On their face, these passages support the conclusion reached by Prothonotary Milczynski that Novopharm's market position cannot be characterized as an important commercial interest because that interest is personal to Novopharm.

[43] Notwithstanding these passages, other language in *Sierra Club* appears to support the view that the harm to a firm's market position that would likely result from the disclosure of the firm's competitively sensitive information, can constitute a risk to an important commercial interest. Specifically, at page 546 of *Sierra Club*, the Supreme Court appeared to accept that confidential information which could be of interest to competitors' warrants protection to prevent a serious risk to an important commercial interest.

[44] This latter language can be reconciled with the example quoted above from page 544 of the decision by viewing that example as having been intended to be confined to situations in which the disclosure of a firm's confidential information may result in some lost sales, but is not likely to have a significant adverse impact on the firm's market position. An example would be a situation where the disclosure of a purchase or sales contract would lead a supplier or customer of the disclosing firm to switch all or part of its business away from the disclosing firm upon learning that the firm had agreed to better terms with another supplier or customer.

[45] It is not difficult to imagine a broad range of scenarios involving this type of situation, in which the firm in question might lose some sales, but would not face a risk to its market position that rises to the level of being "serious." These would be scenarios in which the nature of the information disclosed is not likely to give rivals of the disclosing firm a material competitive advantage, in the sense of helping them to win significant market share away from the disclosing firm.

[46] That said, it is not clear that the Supreme Court intended the aforementioned language at page 546 of *Sierra Club*, above, to stand for the proposition that a firm's market position can be characterized as an important commercial interest, as contemplated by the second element in the first part of the test established in that decision. Therefore, I am unable to conclude that Prothonotary Milczynski's conclusion on this point was clearly wrong.

[47] In any event, her conclusion that Novopharm had not met its burden in respect of the first element in the first part of the test set forth in *Sierra Club* provided a sufficient basis upon which to dismiss Novopharm's motion.

(iv) *Did the Prothonotary err by failing to recognize that the public interest in open and accessible court proceedings would not be deleteriously affected by designating Novopharm's NOA as confidential?*

[48] With respect to the second main part of the test established in *Sierra Club*, above, Prothonotary Milczynski concluded that the deleterious effects of the confidentiality order proposed by Novopharm would outweigh any alleged salutary effects. I am satisfied that this conclusion was reasonably open to her on the facts of this case, particularly given (i) Novopharm's inability to adduce persuasive evidence to establish any such salutary effects; and (ii) the fact that the deleterious effects would have included:

(a) a very real prospect of substantial portions of the main legal proceeding in this case, and potentially also portions of interlocutory hearings, having to be held *in camera*;

(b) many additional court documents having to be designated confidential or redacted; and

(c) a consequential adverse impact on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[49] In aggregate, these deleterious effects would be potentially quite substantial and would be more likely to flow from designating Novopharm's NOA as confidential, than the salutary effects alleged by Novopharm.

[50] In my view, designating Novopharm's entire NOA as confidential would give rise to a significant prospect of "the concealment of an excessive amount of information" from the public (*Sierra Club*, above, at 541). This is essentially what Prothonotary Milczynski stated when she concluded that "what Novopharm seeks would gravely diminish the importance and value of open and accessible court proceedings and the need to preserve the public's confidence in the integrity of the administration of justice."

[51] A further deleterious effect that could well result from the order sought by Novopharm is that it could make it difficult for Northwestern University to present its case. Any adverse impact upon Northwestern University's ability to present its case, as the co-owner of one of the patents that Novopharm has alleged is invalid, would undermine its right to a fair trial (*Sierra Club*, above, at 549). By contrast, Novopharm did not claim that denying its motion for confidentiality would cause Novopharm to withhold any information in order to present its case.

[52] It is also significant that no evidence was adduced to attempt to demonstrate that the public availability of NOAs has slowed, let alone prevented, the filing of NOAs.

[53] I do not attribute much significance to the fact that the hearing in *Merck-Frosst-Schering Pharma GP et. al. v. The Minister of Health et. al.*, above, in which the NOA in that case was designated confidential on consent, may be proceeding on the public record.

B. The decision on the Cost Order

[54] Rule 400(1) of the Rules gives the Court "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid."

[55] Rule 400(3) lists various factors that the Court may consider in exercising its discretion under Rule 400(1). Prothonotary Milczynski identified several of those factors in her decision, including "the conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding" and "whether any step in the proceedings was improper, vexatious or unnecessary." I am satisfied that these were entirely appropriate factors to consider in this case. It was certainly not clearly wrong for Prothonotary Milczynski to base her decision on these factors and the other factors mentioned in her reasons for issuing the Cost Order.

[56] Rule 401(1) gives the Court "the discretion to award the costs of a motion to either party, regardless of the outcome of the main matter" (*Singer v. Enterprise Rent-A-Car Co.*, 91 A.C.W.S. (3d) 716, [1999] F.C.J. No. 1687 (C.A.) at para. 6. I am satisfied that it was entirely appropriate for

Prothonotary Milczynski to award costs against Novopharm, rather than ordering that they follow the cause, in this case. Once again, it was certainly not clearly wrong for her to do so.

[57] Rule 400(4) gives the Court the discretion to "award a lump sum in lieu of, or in addition to, any assessed costs". I am in agreement with Hugessen J.'s statement in *Barzelex Inc. v. EBN Al Waleed (The)*, [1999] F.C.J. No. 2002 at para. 11 (T.D.), aff'd 2001 FCA 111 that, "as a matter of policy the Court should favour lump sum orders." I am also of the view that the specific lump sum awards in this case were reasonable and not clearly wrong.

[58] Rule 401(2) gives the Court discretion to order that costs be payable forthwith where it "is satisfied that a motion should not have been brought or opposed." In her reasons, Prothonotary Milczynski specifically found that Novopharm's motion should not have been brought and that it was without merit on the test enunciated for confidentiality orders under Rule 151 of the Rules, as set forth in *Sierra Club*, above. In my view, these conclusions were reasonably open to her and were certainly not clearly wrong.

VII. Conclusions

[59] This motion is dismissed.

[60] Costs of the motions below are payable in accordance with the reasons of Prothonotary Milczynski.

[61] As to the costs of this motion, I am satisfied that it should never have been brought. In my view, it was improper and vexatious. Novopharm's refusal to accept the Orders issued in the motions below forced Pfizer and Northwestern to incur substantial additional costs to deal with this motion. Accordingly:

ORDER

THIS COURT ORDERS that:

1. Costs in the amount of $5,000.00 are payable forthwith by Novopharm Limited to Pfizer Canada Inc. and the Board of Regents for the University of Oklahoma.

2. Costs in the amount of $1,500.00 are payable forthwith by Novopharm Limited to Northwestern University.

"Paul S. Crampton"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1868-09
STYLE OF CAUSE:	PFIZER CANADA INC. et al v. NOVOPHARM LIMITED et al
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 9, 2010
REASONS FOR ORDER AND ORDER:	Crampton J.
DATED:	June 21, 2010

APPEARANCES:

Grant Worden Nicole Martini	FOR THE APPLICANTS
Barbara Murchie Jeilah Chan	FOR THE RESPONDENT, NOVOPHARM LIMITED
Kavita Ramamoorthy	FOR THE RESPONDENT, NORTHWESTERN UNIVERSITY

SOLICITORS OF RECORD:

Torys LLP Toronto, Ontario	FOR THE APPLICANTS
Bennett Jones LLP Toronto, Ontario	FOR THE RESPONDENT, NOVOPHARM LIMITED
Ogilvy Renault Montreal, Quebec	FOR THE RESPONDENT, NORTHWESTERN UNIVERSITY

Federal Court of Appeal | Cour d'appel fédérale

Date: 20131024

Docket: A-8-13

Citation: 2013 FCA 251

CORAM: **SHARLOW J.A.**
MAINVILLE J.A.
NEAR J.A.

BETWEEN:

JEFFERY ROBY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on October 3, 2013.

Judgment delivered at Ottawa, Ontario, on October 24, 2013.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20131024

Docket: A-8-13

Citation: 2013 FCA 251

CORAM: **SHARLOW J.A.**
MAINVILLE J.A.
NEAR J.A.

BETWEEN:

JEFFERY ROBY

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The Employment Insurance Commission concluded that the applicant Jeffery Roby received benefits under the *Employment Insurance Act*, S.C. 1996, c. 23, that exceeded his statutory entitlement by $5,426, and that he must reimburse the Crown for the overpayment. Mr. Roby has consistently taken the opposite position, but he has been unable to persuade the Commission, a Board of Referees and an Umpire that he is correct. He now seeks relief from this Court by way of

an application for judicial review of the Umpire's decision. For the reasons that follow, I have concluded that Mr. Roby's application should succeed.

[2] In this Court, the Crown conceded that Mr. Roby is entitled to succeed with respect to $701 of the claimed overpayment because the Commission failed to respect a statutory deadline. Therefore, Mr. Roby's application must succeed at least with respect to that $701. The amount now in issue is $4,725.

Statutory framework

[3] The following provisions of the *Employment Insurance Act* are the foundation of the Crown's right to require a return or repayment of an amount paid to a claimant in excess of the claimant's entitlement:

43. A claimant is liable to repay an amount paid by the Commission to the claimant as benefits (a) for any period for which the claimant is disqualified; or (b) to which the claimant is not entitled.	**43.** La personne qui a touché des prestations en vertu de la présente loi au titre d'une période pour laquelle elle était exclue du bénéfice des prestations ou des prestations auxquelles elle n'est pas admissible est tenue de rembourser la somme versée par la Commission à cet égard.
44. A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.	**44.** La personne qui a reçu ou obtenu, au titre des prestations, un versement auquel elle n'est pas admissible ou un versement supérieur à celui auquel elle est admissible, doit immédiatement renvoyer le mandat spécial ou en restituer le montant ou la partie excédentaire, selon le cas.

Facts

[4] The relevant facts are undisputed and are briefly summarized. Mr. Roby was a police officer in 2001 when he suffered a work related injury. He applied for sickness benefits under the *Employment Insurance Act*. At the same time, he submitted a "direct deposit application" which instructed the Commission to deposit his benefits to his bank account at the Canadian Imperial Bank of Commerce (CIBC).

[5] Two important events occurred before the Commission formally advised Mr. Roby that he was entitled to benefits. First, in November of 2002, he made an assignment for the general benefit of his creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The assignment in bankruptcy included an assignment of Mr. Roby's CIBC bank account, which came under the sole control of the trustee in bankruptcy. Second, in December of 2002, Mr. Roby instructed the Commission to disregard his direct deposit application because, in his words, "the CIBC account is no longer valid."

[6] By letter dated February 10, 2003, Mr. Roby was informed that his application for sickness benefits had been approved for the maximum 15 week period from May 5, 2002 to August 17, 2002.

[7] Unfortunately, in January of 2003, the Commission had already deposited sickness benefits totaling $5,426 to Mr. Roby's CIBC account, contrary to his direction. On January 21, 2003, the Commission acknowledged to Mr. Roby that his benefits had been deposited in error to the CIBC account and that the Commission would accept full responsibility for not forwarding the

funds to him. At that time, the Commission assured Mr. Roby that they would "take care of it from their end", and apologized for the inconvenience. The next day, the Commission sent Mr. Roby a cheque payable to him in the amount of $5,426. Mr. Roby accepted the cheque and cashed it.

[8] The record discloses no evidence as to what steps, if any, the Commission took or tried to take to recover the unauthorized deposits from CIBC, either through CIBC or through the trustee in bankruptcy.

[9] In April of 2003, CIBC applied the unauthorized deposits to a debt owed by Mr. Roby in respect of another account. The record does not disclose why or on what legal basis that was done, but neither party has suggested that there are grounds for finding any impropriety on the part of CIBC or the trustee in bankruptcy with respect to that transaction.

[10] The Commission subsequently took the position that Mr. Roby had received his statutory entitlement twice, and sought to recover what they characterized as an overpayment. It appears that by the date of the hearing of Mr. Roby's application in this Court, the Crown had collected some or all of the purported overpayment.

[11] As indicated above, Mr. Roby appealed to the Board, challenging the Commission's determination that there was an overpayment. A hearing was convened to consider the appeal and the appeal was dismissed. However, that decision was set aside by an Umpire because Mr. Roby was not given notice of the hearing (CUB 78195). A second hearing was convened at which Mr. Roby testified. In a decision dated January 17, 2012, the Board concluded that Mr. Roby had

received an overpayment. Mr. Roby appealed that decision. His appeal was dismissed (CUB 80197). Mr. Roby now seeks judicial review of the Umpire's decision.

Discussion

[12] The decision of the Umpire cannot stand. It is based on the Board's factual finding, confirmed by the Umpire, that the Commission had deposited Mr. Roby's benefits to his CIBC bank account in accordance with Mr. Roby's instructions. That factual finding was not reasonably open to the Board or the Umpire in the face of the uncontradicted evidence that:

(a) Mr. Roby withdrew his direct deposit application before his entitlement was determined;

(b) the Commission did not give effect to Mr. Roby's withdrawal of the direct deposition application;

(c) before issuing the replacement cheque to Mr. Roby, the Commission acknowledged its error in failing to give effect to the withdrawal and informed Mr. Roby that they would "take care of things from their end".

[13] In these circumstances, Mr. Roby acted reasonably in accepting the replacement payment offered by the Commission, based on the assurance of the Commission that they would take responsibility for correcting the erroneous misdirection of the previous payments.

[14] Having determined that the Umpire's decision cannot stand, it is necessary for this Court to consider whether the issues raised by Mr. Roby should be resolved by this Court on the

available record. As there are no facts in dispute, I have concluded that the record is sufficient to enable this Court to reach an appropriate disposition. Given that this matter has been unresolved for almost 10 years, it would be appropriate to do so.

[15] It is argued for Mr. Roby that the only reasonable conclusion on the available evidence is that the misdirected payments were not amounts paid to Mr. Roby or from which he benefited, and therefore a fundamental condition for the application of sections 43 and 44 of the *Employment Insurance Act* was not met. The Crown argues the contrary, based on two cases, *Lanuzo v. Canada (Attorney General)*, 2005 FCA 324 and CUB 54925 (July 5, 2002). For the following reasons, I am not persuaded that those cases are dispositive.

[16] In *Lanuzo*, a claimant for employment insurance benefits was held to be required to repay the amount he had received in excess of his statutory entitlement even though the overpayment was the result of an error on the part of the Commission. I do not doubt the correctness of that decision, but it is based on evidence that the claimant actually received the amounts that comprised the overpayment. In this case, Mr. Roby did not actually receive the amounts that the Commission misdirected to his CIBC bank account. That is sufficient to distinguish *Lanuzo*.

[17] CUB 54925 is a decision that is closer on its facts to this one, but it is not identical. The claimant in CUB 54925 initially requested that his benefits be deposited to his bank account with Canada Trust, and subsequently requested that his benefits be deposited to his bank account with the Royal Bank. After the amended request, the Commission mistakenly deposited to the Canada Trust

account a payment representing benefits for a certain two week period. When the claimant advised the Commission that he had not received a payment relating to that period, the Commission issued him a replacement payment, and warned him that he was responsible for advising the Commission if the original payment was discovered. The payment that was deposited in error to the Canada Trust bank account was seized by a creditor of the claimant pursuant to a garnishment order. The Board concluded, and the Umpire agreed, that the claimant benefitted from the misdirected payment when it was applied, albeit without the claimant's consent, to reduce a debt he owed to a third party. On that basis, the claimant was held to be liable to repay the amount claimed by the Commission as an overpayment.

[18] The difference in this case is that at the time the Commission misdirected the payments in issue to Mr. Roby's CIBC bank account, Mr. Roby was in bankruptcy. Significantly, this was his first bankruptcy, with the result that he was presumptively entitled to an automatic and absolute discharge from all of his unsecured debts pursuant to section 168.1 of the *Bankruptcy and Insolvency Act* (subject to certain exceptions that, on the available evidence, probably would not have applied to Mr. Roby).

[19] The Board and the Umpire should have considered whether, given these circumstances, the misdirected payments actually benefitted Mr. Roby. If they had considered that question, they would have concluded that on a balance of probabilities, the debt reduced by the misdirected payments would have ceased to be a liability of Mr. Roby upon his discharge from bankruptcy. That is sufficient to distinguish the facts in this case from the facts in CUB 54925 and to support the position of Mr. Roby that the misdirected payments did not benefit him.

[20] I acknowledge the possibility that Mr. Roby could in fact have benefitted from the misdirected payments. For example, the debt in issue might have been a secured debt which would have been unaffected by the bankruptcy. One may speculate about other possibilities but I am not prepared to do so, given the assurances the Commission gave to Mr. Roby in 2003 that they would "take care of [their mistake] from their end". In these circumstances, it was incumbent on the Commission to take at least the steps required to determine with reasonable certainty what became of the misdirected payments before simply assuming that they benefitted Mr. Roby.

[21] The Crown argues that, by virtue of the definition of "total income" in the *Bankruptcy and Insolvency Act*, the amounts deposited to Mr. Roby's CIBC account were income of Mr. Roby. That submission is coupled with a reference to the obligation of the trustee in bankruptcy to determine the amount of income the bankrupt is entitled to retain and the amount he must contribute to the estate. It is not entirely clear how this submission assists the Crown's position, but in any event it is not supported by any evidence as to what, if anything, the trustee in bankruptcy determined or did in relation to the payments in issue. That is not surprising, given that there is no evidence that the Commission made any attempt to investigate those matters.

Conclusion

[22] The only reasonable conclusion on the evidence is that Mr. Roby did not benefit from the misdirected payments. Therefore, I would allow the application for judicial review and set aside the decision of the Umpire. I would refer this matter back to the office of the Chief Umpire with a direction that Mr. Roby's appeal to the Umpire is to be allowed, his appeal to the Board is to be allowed, and the Commission is to be directed to cease all attempts to collect the purported

overpayment from Mr. Roby, and to reimburse him for any amounts that have already been collected on account of the purported overpayment.

Costs

[23] Mr. Roby has also claimed costs in this Court. As the successful party, he would normally be entitled to costs. However, Mr. Roby represented himself until a very short time before the hearing in this Court. Normally the costs awarded to a self-represented litigant are limited to disbursements. However, that limitation does not apply in this case because the law firm Baker & McKenzie LLP became Mr. Roby's solicitor of record shortly before the hearing. Mr. Tonkovich of that firm appeared at the hearing as counsel for Mr. Roby.

[24] Baker & McKenzie LLP acted for Mr. Roby *pro bono*, but that is not a bar to a costs award in Mr. Roby's favour. That is well explained by Feldman J.A., writing for the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 216 O.A.C. 339, 82 O.R. (3d) 757, at paragraphs 34 and 35:

> [34] It is clear from the submissions of the *amici* representing the views of the profession, as well as from the developing case law in this area, and I agree, that in the current costs regime, there should be no prohibition on an award of costs in favour of *pro bono* counsel in appropriate cases. Although the original concept of acting on a *pro bono* basis meant that the lawyer was volunteering his or her time with no expectation of any reimbursement, the law now recognizes that costs awards may serve purposes other than indemnity. To be clear, it is neither inappropriate, nor does it derogate from the charitable purpose of volunteerism, for counsel who have agreed to act *pro bono* to receive some reimbursement for their services from the losing party in the litigation.
>
> [35] To the contrary, allowing *pro bono* parties to be subject to the ordinary costs consequences that apply to other parties has two positive consequences: (1) it ensures that both the non-*pro bono* party and the *pro bono* party know that they are not free to abuse the system without fear of the sanction of an award of costs; and (2) it promotes access to justice by enabling and encouraging more lawyers to volunteer to work *pro*

> *bono* in deserving cases. Because the potential merit of the case will already factor into whether a lawyer agrees to act *pro bono*, there is no anticipation that the potential for costs awards will cause lawyers to agree to act only in cases where they anticipate a costs award.

[25] Mr. Tonkovich also drew our attention to paragraph 36 of *1465778 Ontario*, which confirms the general principle that costs belong to the party to whom they are awarded (and, by necessary implication, not to that party's solicitor):

> [36] Where costs are awarded in favour of a party, the costs belong to that party. See Mark M. Orkin, Q.C., *The Law of Costs*, looseleaf (Aurora: Canada Law Book, 2005) at §204 and *Rules of Civil Procedure*, rule 59.03(6). However, *pro bono* counsel may make fee arrangements with their clients that allow the costs to be paid to the lawyer. This ensures that there will be no windfall to the client who is not paying for legal services.

[26] In the Federal Court and in this Court, costs are payable to and by the parties, and not their solicitors, because of Rule 400(7) of the *Federal Courts Rules*, SOR/98-106. However, Rule 400(7) also provides that costs may be paid to a party's solicitor in trust.

[27] At the hearing of Mr. Roby's application in this Court, Mr. Tonkovich candidly advised the Court that there was no agreement between himself and Mr. Roby with respect to any sharing of a costs award. However, after the hearing and while this matter was under reserve, Mr. Tonkovich advised the Court by letter that he and Mr. Roby had agreed that the portion of any costs award expressly allocated to the *pro bono* services provided by Baker & McKenzie LLP could be retained by that firm.

[28] In my view, this is an appropriate case to award costs for the benefit of *pro bono* counsel. In exemplary fashion, Mr. Tonkovich untangled a confusing body of evidence and argument, discerned the most important legal issues, and effectively presented submissions that were of significant assistance to the Court in the efficient resolution of this case. However, the amount of the award must be modest given the applicable tariff, and will necessarily represent only a fraction of the actual value of the time Mr. Tonkovich must have spent in preparing for the hearing and presenting argument.

[29] I would award costs in the amount of $2,500 inclusive of all disbursements and taxes, payable to Baker & McKenzie LLP in trust, subject to the following directions. (1) Mr. Roby is to be reimbursed for all disbursements reasonably and necessarily incurred by him in this matter before Mr. Tonkovich began to act for him, including court fees and the cost of preparing, serving and filing documents. (2) Any amount that remains may be retained by Baker & McKenzie LLP as compensation for their *pro bono* services. (3) If any dispute arises as to the amount to which Mr. Roby is entitled, a motion may be made to this Court for a resolution.

"K. Sharlow"
J.A.

"I agree
Robert M. Mainville J.A."

"I agree
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-8-13

(APPEAL FROM A DECISION OF THE EMPLOYMENT INSURANCE UMPIRE DATED NOVEMBER 16, 2012, DOCKET NO. CUB 80197)

DOCKET:	A-8-13
STYLE OF CAUSE:	JEFFERY ROBY v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 3, 2013
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	MAINVILLE, NEAR JJ.A.
DATED:	OCTOBER 24, 2013

APPEARANCES:

Mark Tonkovich	FOR THE APPLICANT
Jacqueline Wilson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Baker & McKenzie LLP Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190716

Docket: A-259-18

Citation: 2019 FCA 204

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

BETWEEN:

SPORT MASKA INC. d.b.a. CCM HOCKEY

Appellant

and

BAUER HOCKEY LTD.

Respondent

Heard at Ottawa, Ontario, on May 1, 2019.

Judgment delivered at Ottawa, Ontario, on July 16, 2019.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20190716

Docket: A-259-18

Citation: 2019 FCA 204

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

BETWEEN:

SPORT MASKA INC. d.b.a. CCM HOCKEY

Appellant

and

BAUER HOCKEY LTD.

Respondent

REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant appeals from the Federal Court's judgment in *Bauer Hockey Ltd. v. Sport Maska Inc. (doing business as CCM Hockey)*, 2018 FC 832 (*per* Locke J. (as he then was)), dismissing the appellant's appeal from the Prothonotary's decision reported at 2017 FC 1174 (*per* Morneau P.). The Prothonotary dismissed the appellant's motions to dismiss the respondent's actions for patent and trade-mark infringement by reason of the respondent's failure

to comply with Rule 117 of the *Federal Courts Rules*, SOR/98-106 following the reorganization of the affairs of the respondent's predecessor, Bauer Hockey Corp. (old Bauer) under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the CCAA).

[2] For the reasons that follow, I would dismiss this appeal with costs, which I would fix in the all-inclusive amount of $25,000.00.

I. Background

[3] It is useful to commence by reviewing the relevant background to this appeal.

[4] Old Bauer brought two actions for patent infringement and one for trade-mark infringement against the appellant in the Federal Court. After the actions were commenced, old Bauer sought protection from its creditors under the CCAA and came under the supervision of the Ontario Superior Court of Justice, which stayed all proceedings involving old Bauer. Under an Asset Purchase and General Conveyance Agreements approved by the Superior Court in February 2017, old Bauer assigned its patents, trademarks and interest in the actions to the respondent. The respondent subsequently registered its ownership of the patents and trademarks under section 50 of the *Patent Act*, R.S.C. 1985, c. P-4 and section 48 of the *Trademarks Act*, R.S.C. 1985, c. T-13.

[5] On June 16, 2017, the respondent sought to reactivate the Federal Court infringement actions (to which the Superior Court's earlier stay no longer applied) and sent the appellant draft letters to the Court, draft scheduling orders and draft amended pleadings and requested the

appellant's comments. In response, on July 12, 2017, the appellant took the position that the assignments were ineffective and that the respondent had no right to sue for past or future infringements. Despite this position, the appellant requested additional information from the respondent about the assignments.

[6] The respondent replied on July 31, 2017 and provided the appellant the Asset Purchase Agreement, the General Conveyance Agreement and the assignments. On August 10, 2017, the appellant responded, taking the position that the information furnished by the respondent was insufficient and requested further additional information. The appellant also drew the respondent's attention to its failure to serve and file a notice and affidavit setting out the basis for the assignment of the actions pursuant to Rule 117 of the *Federal Courts Rules*.

[7] The respondent did not directly respond to the appellant's August 10, 2017 letters and instead in its response of September 11, 2017 reiterated its request for comment on the draft amended pleadings, draft scheduling orders and draft letters to the Court. Rather than replying, on October 4, 2017, the appellant filed notices of motion, seeking dismissal of the respondent's actions under Rule 118 of the *Federal Courts Rules* by reason of non-compliance with Rule 117. In its materials filed in response to these motions, the respondent filed an affidavit, setting out the information contemplated by Rule 117(1) of the *Federal Courts Rules*, which largely reiterated the information it had previously provided to the appellant.

II. Applicable Rules

[8] It is convenient to next set out Rules 117 and 118 of the *Federal Courts Rules*. They provide:

117 (1) Subject to subsection (2), where an interest of a party in, or the liability of a party under, a proceeding is assigned or transmitted to, or devolves upon, another person, the other person may, after serving and filing a notice and affidavit setting out the basis for the assignment, transmission or devolution, carry on the proceeding.	117 (1) Sous réserve du paragraphe (2), en cas de cession, de transmission ou de dévolution de droits ou d'obligations d'une partie à une instance à une autre personne, cette dernière peut poursuivre l'instance après avoir signifié et déposé un avis et un affidavit énonçant les motifs de la cession, de la transmission ou de la dévolution.
(2) If a party to a proceeding objects to its continuance by a person referred to in subsection (1), the person seeking to continue the proceeding shall bring a motion for an order to be substituted for the original party.	(2) Si une partie à l'instance s'oppose à ce que la personne visée au paragraphe (1) poursuive l'instance, cette dernière est tenue de présenter une requête demandant à la Cour d'ordonner qu'elle soit substituée à la partie qui a cédé, transmis ou dévolu ses droits ou obligations.
(3) In an order given under subsection (2), the Court may give directions as to the further conduct of the proceeding.	(3) Dans l'ordonnance visée au paragraphe (2), la Cour peut donner des directives sur le déroulement futur de l'instance.
118 Where an interest of a party in, or the liability of a party under, a proceeding has been assigned or transmitted to, or devolves upon, a person and that person has not, within 30 days, served a notice and affidavit referred to in subsection 117(1) or obtained an order under subsection 117(2), any other party to	118 Si la cession, la transmission ou la dévolution de droits ou d'obligations d'une partie à l'instance à une autre personne a eu lieu, mais que cette dernière n'a pas, dans les 30 jours, signifié l'avis et l'affidavit visés au paragraphe 117(1) ni obtenu l'ordonnance prévue au paragraphe 117(2), toute autre partie à

the proceeding may bring a motion for default judgment or to have the proceeding dismissed.	l'instance peut, par voie de requête, demander un jugement par défaut ou demander le débouté.

III. Decisions Below

[9] I turn now to summarize the decisions below.

A. *The Prothonotary*

[10] Before the Prothonotary, the appellant made much the same arguments as it makes before us. As its primary position, the appellant argued that Rule 118 requires the dismissal of a proceeding if the party whose interests have been transmitted fails to serve the notice and affidavit required by Rule 117(1) within 30 days of the date of the assignment, transmission or devolution of interest and the party opposite brings a motion for dismissal under Rule 118. The appellant thus asserted that the Prothonotary was required to grant its motions for dismissal and possessed no discretion on the issue.

[11] In the alternative, the appellant argued that if the Court had discretion to extend the time limit for serving and filing the notice and affidavit contemplated by Rule 117(1), the party who missed the time limit was required to bring a motion to obtain an extension of the 30-day time limit and that the Court, in assessing the extension request, was required to apply the factors applicable to extension of time generally under Rule 8 of the *Federal Courts Rules*. These are: (i) whether the moving party had continuing intention to pursue the proceeding; (ii) whether the proceeding has some merit; (iii) whether there is prejudice to the opposing party; and (iv) whether there is a reasonable explanation for delay: *Canada (Attorney General) v. Hennelly*

(1999), 167 F.T.R. 158 at para. 3, 244 N.R. 399 (C.A.). The appellant submitted that in the absence of a cross-motion by the respondent for an extension of time to serve and file the notice and affidavit required under Rule 117(1), the Federal Court could not grant an extension and was therefore bound to dismiss the respondent's actions.

[12] In the further alternative, the appellant argued that even if the Federal Court had discretion under Rule 118 in the absence of a motion made by the respondent, it could not exercise its discretion in the respondent's favour because the respondent did not provide a reasonable explanation for its delay.

[13] Although not raised in its materials filed before the Prothonotary, the appellant says that during the hearing before the Prothonotary it attempted to advance arguments regarding the inability of old Bauer to assign its rights for past infringements to the respondent, as a matter of law, but was foreclosed from making such arguments by the Prothonotary.

[14] The Prothonotary, who was acting as case manager, dismissed the appellant's motions, with costs in the amount of $2,000.00.

[15] In his Reasons, the Prothonotary found that the appellant was incorrect in asserting that Rule 118 requires the dismissal of an action when the notice and affidavit required by Rule 117(1) are not served and filed within 30 days and held that Rule 118 merely allows a party to request dismissal and that the Federal Court has discretion whether to dismiss a proceeding. The Prothonotary further rejected the appellant's suggestion that its objection to the effectiveness

of the assignments could be decided under Rules 117 and 118 because the appellant did not make a formal objection of the sort contemplated by Rule 117(2) to raise these arguments. The Prothonotary added that, even if the appellant had formally objected, a substantive attack on the respondent's interest in the actions fell outside the scope of Rules 117 and 118 and therefore had to be pursued either on a motion for summary judgment or at trial. The Prothonotary noted that both options were still open to the appellant. He also underscored that the respondent had made its intention to pursue the infringement actions clear as early as June 2017 and that, given the correspondence between the parties, the respondent was taken by surprise by the appellant's motions to dismiss. The Prothonotary therefore concluded that the motions should be dismissed. In his order, the Prothonotary validated the respondent's notice and affidavit for the purposes of Rules 117 and 118 and provided for the reactivation of the respondent's actions.

B. *The Federal Court Judge*

[16] The Federal Court judge upheld the Prothonotary's order, finding the Prothonotary had not made an error of law or an error of fact or mixed fact and law that warranted intervention. In so deciding, the Federal Court judge explained that the purpose of Rules 117 and 118 is to ensure that a party knows the identity of the party opposite and is afforded the possibility of objecting to a transfer of a party's interest to another person. The Federal Court judge concluded that Rules 117 and 118 are procedural and not substantive in nature and affirmed the Prothonotary's conclusion that substantive challenges to a party's right to transmit an interest are not to be addressed in the context of Rule 117 or 118 motions. The Federal Court judge also rejected the appellant's contention that Rule 118 requires granting a motion for dismissal premised on the failure to give notice under Rule 117. In the Federal Court judge's view, the text of Rule 118

does not require that result; nor should such a requirement be inferred because of "(i) the potentially important consequences of a dismissal of a proceeding, (ii) the relatively minor consequence of missing a deadline, and (iii) the ease with which rule 118 could have been written to provide explicitly for automatic dismissal": FC Reasons at para. 16.

[17] The Federal Court also rejected the appellant's alternative argument that, if the Court has discretion under Rules 117 and 118, a distinct motion is required to allow the Court to exercise it and the Court should consider the same factors as it does in deciding whether to grant a motion under Rule 8 to extend a deadline under the *Federal Courts Rules.* On the assumption that the foregoing factors were relevant in the Rule 118 context, as had been urged by the appellant, the Federal Court judge concluded that the Prothonotary not only considered them but also did not make a palpable and overriding error in holding that they favoured the respondent's position. Specifically, the Federal Court judge underlined the respondent's continuing intention to pursue the underlying actions, the lack of prejudice suffered by the appellant, the appellant's failure to object under Rule 117(2) and the overall reasonableness of the respondent's behaviour as compared to that of the appellant.

[18] The Federal Court judge also rejected the appellant's claim that it did not have the opportunity to contest old Bauer's transfer of its interest in the actions to the respondent. The judge explained that the appellant could have cross-examined the respondent's affiant under Rule 83 of the *Federal Courts Rules* and could have sought leave to file additional evidence or make supplementary submissions, which it failed to do.

[19] The Federal Court judge thus dismissed the appeal and awarded the respondent $5,000.00 in costs.

IV. Analysis

[20] As was decided in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, the standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply to appeals from decisions of a judge of the Federal Court sitting on appeal from a decision of a Prothonotary. Thus, errors of law, if they are germane to the result, are reviewable for correctness and errors of fact or of mixed fact and law, from which a legal error cannot be extricated, are reviewable for palpable and overriding error. The question before us on this appeal is therefore whether the Federal Court judge made a reviewable error of law or made a palpable and overriding error of fact or of mixed fact and law in refusing to interfere with the Prothonotary's decision.

[21] I do not believe that any such error was made by the Federal Court judge, although I do disagree with one point the Prothonotary and Federal Court judge made.

A. *The Court Possesses Discretion under Rule 118*

[22] Turning first to the points with which I am in complete agreement, I concur that Rule 118 affords the Court discretion and thus, for much the same reasons as those given by the Federal Court judge, find that the appellant's primary argument is without merit.

[23] The interpretation of the Rules is essentially an exercise in statutory interpretation, for which there is "'only one principle or approach, namely, the words of [a provision] are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 221 N.R. 241.

[24] The closing words of the English version of Rule 118 provide that a "party to the proceeding may bring a motion for default judgment or to have the proceeding dismissed". A motion, as defined by Rule 2, "means a request to the Court under, or to enforce, these Rules" (emphasis added). By definition, then, the appellant's motion under Rule 118 is a request that the Federal Court dismiss the underlying actions.

[25] The French version of Rule 118 leads to the same conclusion. The French version provides that "toute autre partie à l'instance peut, par voie de requête, demander un jugement par défaut ou demander le débouté" (emphasis added). Not only is a "requête" by definition a "demande" (the noun form of the verb "demander", i.e. to ask or request), but Rule 118 itself refers to a "demande".

[26] A request is different than an application for a result that is preordained. When the Rules Committee defined a motion as a request, it must be presumed to have intended the word "request" to take its grammatical and ordinary meaning.

[27] Moreover, neither the English nor the French version of Rule 118 uses mandatory language (i.e. “shall” or “must”) that would indicate that the Federal Court has no choice but to dismiss an action when a party establishes on a motion under Rule 118 that another party has failed to comply with Rule 117. It is true that Rule 118 does not expressly use discretionary language to describe the role of the Court (i.e. “may”), as is used elsewhere in the Rules, but, as the Federal Court judge explained, both Rule 117 and 118’s context and purpose favour a reading that leaves room for discretion.

[28] More specifically, Rule 56 of the *Federal Courts Rules* sets out the general principle that “[n]on-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60”. Rule 56 establishes that, normally, “procedural irregularit[ies] [… are] not determinative of the outcome”: *Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311, [2017] 3 F.C.R. 298 at para. 79 (*per* Pelletier J.A., concurring).

[29] Although the appellant brought its motion under Rule 118, rather than Rule 58, both Rules 59(*b*) and 60 establish that the Court enjoys discretion to correct procedural irregularities. Rule 58 allows a party to, “by motion[,] challenge any step taken by another party for non-compliance with these Rules” – a step can presumably include the omission thereof – and requires that the moving party do so “as soon as practicable after [it] obtains knowledge of the irregularity”. Rule 59 provides that the Court, on a motion under Rule 58, if it finds that a party has not complied with the Rules, may: “(*a*) dismiss the motion, where the motion was not brought within a sufficient time” to avoid prejudice to the respondent to the motion; “(*b*) grant

any amendments required to address the irregularity; or (*c*) set aside the proceeding, in whole or in part". Likewise, Rule 60 contemplates that the Court, where it "draw[s] the attention of a party […] to any non-compliance with these Rules", "may […] permit the party to remedy it on such conditions as the Court considers just".

[30] Read together, these Rules indicate that the Rules Committee intended that irregularities will not be automatically fatal to proceedings. Instead, they provide that, where they can be cured, procedural irregularities should not prevent the determination of a proceeding on merits.

[31] Moreover, as the Federal Court judge underlined in his Reasons, automatic dismissal would be disproportionately prejudicial to a party that was even slightly late in giving notice under Rules 117 and 118 or one that, like the respondent, complied with the spirit - if not the strict letter - of the notice requirements in Rule 117. Although such a party (barring limitations issues) would be able to bring the action anew, it would suffer delay and needless cost. Perhaps more importantly, interpreting Rules 117 and 118 in this fashion would lead to a waste of scarce judicial resources.

[32] Such a result should be avoided as it conflicts with the necessary contemporary approach to litigation, which as the Supreme Court made clear in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, 2014 SCC 7 (*Hryniak*) requires courts and litigants to adopt a litigation culture that favours proportionality, timeliness and affordability. As Karakatsanis J., who wrote for the Court in *Hryniak* noted at paragraph 32, "[t]his culture shift requires judges to actively manage the legal

process in line with the principle of proportionality". This direction applies to proceedings before the Federal Courts. Complex intellectual property matters are no exception.

[33] Recognition of this over-arching concern as well as a review of the text, context and purpose of Rules 117 and 118 leads to the conclusion that the interpretation advanced by the appellant cannot be countenanced.

B. *No Motion is Required for the Court to Exercise its discretion under Rule 118, which is not limited by the issues relevant to a request for an Extension of Time*

[34] For much the same reasons, the appellant's alternate positions regarding the necessity of bringing a motion to obtain an extension of the 30-day period contemplated by Rules 117 and 118 is without merit.

[35] It is moreover important to underscore that the Prothonotary was acting as a case management judge in this case. Rules 385(1)(*a*) and (*b*) provide that a case management judge "may […] (*a*) give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits" and may "(*b*) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding". Rule 385(1) does not require that the case management judge exercise these discretionary powers on motion or at any particular time.

[36] A case management judge's powers are further augmented by Rule 55, which provides that "in a proceeding, the Court [a term which, as defined by Rule 2, includes a prothonotary]

may […] dispense with compliance with a rule". Rule 55 gives textual expression to the broader principle that the Federal Court has plenary powers to manage its processes and proceedings: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 35-38, 224 N.R. 241; *Lee v. Canada (Correctional Service)*, 2017 FCA 228 at paras. 6-8; *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at para. 42 ("provided this Court affords the parties procedural fairness, it can fix proceedings that are contrary to law, miscast, chaotic, or any and all of these things"). Rule 55 can be used to dispense with the requirement that an extension of time can be granted only on a motion: see *Mazhero v. Fox*, 2011 FC 392 at para. 11, 387 F.T.R. 244.

[37] These provisions empower the Court to give effect to the proportionality mandated by *Hryniak* and lead to the conclusion that the appellant's alternate position regarding the necessity of a motion for the Court to validate the late service or irregular communication of the information required by Rule 117(1) is without merit.

[38] Similarly, the further alternate position of the appellant likewise cannot be accepted. Given the broad discretion afforded to the Court under Rule 118, it follows that the Court is not limited to consideration of the issues that would be relevant in a motion under Rule 8.

C. *The Proper Scope of Inquiry in a Motion under Rule 117 or 118*

[39] I turn now to the point on which I disagree with the Reasons below, namely the proper scope of inquiry in a motion under Rules 117 or 118. This issue has seemingly not previously been examined by this Court but has been considered by the Federal Court, which, in at least two

cases, ruled on issues related to the right of a party to transmit an interest in litigation in the context of motions under Rules 117 and 118.

[40] In *Tacan v. Canada*, 2003 FC 915, 237 F.T.R. 304, the Federal Court concluded, on a Rule 117(2) objection, that the plaintiffs could not assign their interest in an action against the federal Crown to the Sioux Valley First Nation, Band No. 290 because the agreement under which they proposed to do so amounted to maintenance, which is prohibited at common law. Likewise, in *Métis National Council of Women v. Canada (Attorney General)*, 2005 FC 230, [2005] 4 F.C.R. 272 at paras. 17-18, 23, the Federal Court, also on a Rule 117(2) objection, found that a person's estate could not continue an action for an infringement of section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[41] The approach taken in these cases is the correct one as it would run counter to the proportionality principle to require that a summary judgment motion must necessarily be brought for a pre-trial consideration of the right of a party to transmit its interest in litigation. It may well be that the materials required on a motion under Rule 117 or 118 to address a party's right to a transmission of interest in the litigation would be substantially similar to those that would be filed on a motion for summary judgment, but I see no reason why a party contesting such transmission should necessarily be required to file a separate motion or await trial to have the issues determined.

[42] Moreover, allowing these issues to be canvassed in the context of a Rule 117 or 118 motion would allow them to be decided by a prothonotary. Prothonotaries are often assigned to act as case management judges in complex proceedings like these underlying actions, and allowing a prothonotary to decide transmission issues might often be the most expeditious means of having such issues determined by the Federal Court.

[43] Conversely, if the issues were to be raised by way of motion for summary judgment, they could not be heard by a prothonotary as Rule 50(1)(*c*) of the *Federal Courts Rules* provides that, in nearly all instances, prothonotaries have no jurisdiction to hear summary judgment motions.

[44] I thus believe that the Prothonotary and Federal Court judge erred in concluding that the entitlement of the respondents to continue the actions commenced by old Bauer could not be determined in the context of a motion under Rules 117 or 118. That said, I would not interpret Rules 117 and 118 as requiring that an objection to the transmission of interest must be made in the context of a Rule 117 or 118 motion, failing which the objecting party would be foreclosed from raising the issue. In many cases, it will be more appropriate to deal with objections to a party's right to transmit its interests in a proceeding at some other point, including at trial. Thus, the Court, at the request of a party or on its own initiative when considering a motion under Rules 117 or 118, may determine that the right of a party to transmit its interest in the litigation should be canvassed in a forum other than the Rule 117 or 118 motion.

D. *No Reviewable Error Made by the Courts Below*

[45] Despite the error as to the scope of the issues that can be considered under Rules 117 and 118, there is no reason to interfere with the decision of the Federal Court judge as, in the circumstances of this case, nothing turns on the error.

[46] As the Federal Court judge rightly noted, the appellant, if it wanted, could have raised the issues regarding the merits of its objections to the respondent's entitlement to be substituted for old Bauer in its motion materials but chose not to do so. Moreover, it was afforded the alternative of raising the issues either in a summary judgment motion or at trial, which, as already discussed, would have been an order open to the Prothonotary in any event.

[47] There has therefore been no denial of the appellant's procedural fairness rights or any reviewable error made in this case. This appeal must accordingly be dismissed.

E. *Costs*

[48] I turn, finally, to the issue of costs. The respondent seeks costs, fixed in the all-inclusive amount of $25,000.00, which it says is approximately one-third of its solicitor-client costs incurred for this appeal. The respondent contends that it is common for lump sum costs awards to be made, particularly when this Court is dealing with sophisticated parties, like those to this appeal. The respondent also submits that the issue raised on this appeal are so unmeritorious – especially as its right to pursue these actions has been challenged in the appellant's amended statements of defence in the underlying actions – that the costs it seeks should be awarded.

[49] I agree.

[50] As this Court explained in *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 at para. 16 (*Nova*), "[t]he practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is well established", particularly when "'dealing with sophisticated commercial parties'", citing *Philip Morris Products S.A. v. Marlboro Canada Limited*, 2015 FCA 9 at para. 4, 131 C.P.R. (4th) 1. Such costs awards "tend to range between 25% and 50% of actual [legal] fees": *Nova* at para. 17.

[51] The parties in this appeal are undoubtedly sophisticated, commercial parties and the award sought by the respondent falls squarely within the range identified by this Court in *Nova*.

[52] For this reason as well as the entire lack of merit in the appellant's positions, I would grant the respondent the costs it seeks.

V. Proposed Disposition

[53] In light of the foregoing, I would dismiss this appeal, with costs fixed in the all-inclusive amount of $25,000.00.

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

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-259-18
STYLE OF CAUSE:	SPORT MASKA INC. d.b.a. CCM HOCKEY v. BAUER HOCKEY LTD.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 1, 2019
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	JULY 16, 2019

APPEARANCES:

Jay Zakaïb Erin Creber Cole Meagher	FOR THE APPELLANT
François Guay Jean-Sébastien Dupont	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling WLG (Canada) LLP Barristers & Solicitors Ottawa, Ontario	FOR THE APPELLANT
Smart & Biggar Montréal, Québec	FOR THE RESPONDENT

SENATE SÉNAT

CANADA

DEBATES OF THE SENATE

1st SESSION • 43rd PARLIAMENT • VOLUME 151 • NUMBER 1

OFFICIAL REPORT
(HANSARD)

Thursday, December 5, 2019

The Honourable GEORGE J. FUREY,
Speaker

This issue contains the latest listing of Senators, Officers of the Senate and the Ministry.

Reconciliation with Indigenous people remains a core priority for this Government, and it will continue to move forward as a partner on the journey of reconciliation. Indeed, when Indigenous people experience better outcomes, all Canadians benefit.

Among other things, the Government will:

- take action to co-develop and introduce legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples in the first year of the new mandate;
- continue the work of eliminating all long-term drinking water advisories on reserve by 2021, and ensure safe drinking water in First Nations communities;
- co-develop new legislation to ensure that Indigenous people have access to high-quality, culturally relevant health care and mental health services;
- continue work to implement the Truth and Reconciliation Commission's Calls to Action, and the National Inquiry into Missing and Murdered Indigenous Women and Girls' Calls for Justice, in partnership with First Nations, Inuit, and Métis peoples;
- work with Indigenous communities to close the infrastructure gap by 2030;
- continue to move forward together to ensure that Indigenous Peoples are in control of their own destiny and making decisions about their communities;
- take new steps to ensure the Government is living up to the spirit and intent of treaties, agreements, and other constructive arrangements made with Indigenous Peoples;
- ensure that Indigenous people who were harmed under the discriminatory child welfare system are compensated in a way that is both fair and timely; and
- continue to invest in Indigenous priorities, in collaboration with Indigenous partners.

The path to reconciliation is long. But in its actions and interactions the Government will continue to walk it with First Nations, Inuit, and Métis peoples.

KEEPING CANADIANS SAFE AND HEALTHY

Wherever they live — in small rural communities or in big cities; in the foothills of the Rockies or the fishing villages along our coastlines; in the Far North or along the Canada-US border — all Canadians want to make Canada a better place for themselves, their children, and their communities.

But there are challenges in making that better future a reality.

Year after year, headline after headline, Canadians have seen firsthand the devastating effects of gun violence. Too many lives lost, too many families shattered. It is time to show courage, and strengthen gun control.

The Government will crack down on gun crime, banning military-style assault rifles and taking steps to introduce a buy-back program. Municipalities and communities that want to ban handguns will be able to do so. And the Government will invest to help cities fight gang-related violence.

We are on the eve of the 30th anniversary of the horrific killing of 14 women at l'École Polytechnique in Montréal, a day when all Canadians pause to remember and honour those women who were killed because of their gender. And we take stock of the harm that gender-based violence continues to do to Canadian society.

The Government will take greater steps to address gender-based violence in Canada, building on the Gender-Based Violence Strategy and working with partners to develop a National Action Plan.

Ensuring a better quality of life for Canadians also involves putting the right support in place so that when people are sick, they can get the help they need.

The Government will strengthen health care and work with the provinces and territories to make sure all Canadians get the high-quality care they deserve. It will:

- Work with provinces, territories, health professionals and experts in industry and academia to make sure that all Canadians can access a primary care family doctor;
- Partner with provinces, territories, and health professionals to introduce mental health standards in the workplace, and to make sure that Canadians are able to get mental health care when they need it; and
- Make it easier for people to get the help they need when it comes to opioids and substance abuse. Canadians have seen the widespread harm caused by opioid use in this country. More needs to be done, and more will be done.

Too often, Canadians who fall sick suffer twice: once from becoming ill, and again from financial hardship caused by the cost of their medications.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

House of Commons Debates

VOLUME 149 • NUMBER 003 • 1st SESSION • 43rd PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Monday, December 9, 2019

Speaker: The Honourable Anthony Rota

I would like to hear the government confirm that our dairy farmers will in fact receive compensation for the breaches in supply management, as the Liberals have often announced. I cannot find the exact line where it is indicated in the supplementary estimates. I would like someone to show me where to find the amount announced or the vote under which it is listed.

Lastly, I would also like to be assured that egg and poultry producers will also be compensated, and I would like an idea as to when that will happen.

● (1905)

Hon. Jean-Yves Duclos: Mr. Chair, the good news is that payments to farmers are already under way. Some farmers have already received theirs.

Recognizing their essential work is crucial, not only in macroeconomic terms, but also at the local level. Many of our rural communities need farmers to continue to survive and thrive. The good news is that these investments for our farmers are under way.

Mr. Gabriel Ste-Marie: Mr. Chair, I misunderstood. I thought my time had expired.

If the officials could tell me which line of the document indicates where the money came from or what mechanism was used to get the funds to compensate the farmers, that would be much appreciated.

My last question has to do with immigration. The budget for the Immigration and Refugee Board has nearly doubled over the past two years, but wait times are not going down.

What is behind this inefficiency?

Hon. Marc Garneau: Mr. Chair, the budgets have indeed increased, and we are able to more quickly process claims filed by immigrants and asylum seekers.

Our goal is to be able to process 50,000 cases a year at the Immigration and Refugee Board. That requires a lot of resources. We are putting them in place to ensure that we can act more quickly, since the number of asylum seekers and immigrants keeps increasing in Canada.

[*English*]

Mr. Charlie Angus (Timmins—James Bay, NDP): Mr. Chair, it is always a great honour to rise in this place. I am very honoured to have the opportunity to talk with my friend, the Minister of Crown-Indigenous Relations. I will keep my remarks fairly short so we can make the most of this.

The Prime Minister said his most important relationship is with first nations people. When I talk to first nations families, they tell me their most important relationship is with their children. Tonight we are talking about the policies of the government that have systemically discriminated without caution, and been found to be reckless discrimination against children who have died.

These have consequences. I think of Azraya Ackabee-Kokopenace, from Grassy Narrows; Amy Owen, Chantell Fox, Jolynn Winter, Jenera Roundsky and Kanina Sue Turtle from Wapekeka; Tammy Keeash, who was found in a brutal condition in the McIntyre River; and Courtney Scott from Fort Albany First Nation, who died a horrific death.

When I read the latest ruling against the government, they said no amount of compensation could ever recover what these children have lost. This case of racial discrimination is one of the worst and it warrants maximum awards.

I have named a few of the children that I am aware of and whose families I have spoken to. APTN says that while the government was fighting the Human Rights Tribunal, 103 children died in care in Ontario.

Could the minister tell us how many children died in care across this country while her government fought the Human Rights Tribunal?

Hon. Carolyn Bennett (Minister of Crown-Indigenous Relations, Lib.): Mr. Chair, I thank the member for his ongoing advocacy.

Any child who dies in care is one child too many. This has been a national tragedy and is a key part of missing and murdered indigenous women and girls. It is a key part of how failed government policies for generations have resulted in this terrible tragedy.

Our government has decided, with the families, to do everything we can to not separate families and not have children in care. Bill C-92 will mean that communities will have the resources necessary to keep those families together, to get that child to the healthy auntie or healthy grandparents and to bring their children home.

The children in care who are in unsafe circumstances in the cities of this country are leading to this tragedy. I also want to assure the member that we have to compensate the people who were harmed by this failed policy.

● (1910)

Mr. Charlie Angus: Mr. Chair, the question is this: How many children died while the government fought the Human Rights Tribunal?

Hon. Carolyn Bennett: Mr. Chair, the member opposite knows very well that the numbers we have on so many issues, including missing and murdered indigenous women and girls, are not good numbers. Whatever number he would give me, it is probably way higher, and it has to stop.

Mr. Charlie Angus: Mr. Chair, I appreciate that from the minister, but the legal brief of the federal government says the opposite. It says in paragraph 31 in the latest filing that “There was insufficient evidence before the Tribunal to demonstrate that any particular children were improperly removed from their home”.

Does the minister agree with her government's lawyers?

Hon. Carolyn Bennett: Mr. Chair, we know from the apprehension of children, whether it is through all of the class actions that we have settled on the sixties scoop and on all of these things, that children are safest when they are with their family or extended family or in their communities. I do believe that we need to find alternate ways to keep these children safe.

Mr. Charlie Angus: Mr. Chair, the minister's government has gone to Federal Court to quash a ruling that has found the government guilty of discrimination, and the government said that no evidence was produced that there was harm to children. Is that the government's position, yes or no?

Hon. Carolyn Bennett: Mr. Chair, I think we all know that children apprehended from their families do not do well. Children aging out of care do not do well. We need to keep these families together, which has been the focus as opposed to the money going to lawyers to apprehend children, agencies and non-indigenous foster families. We need these children supported at home in their communities.

Mr. Charlie Angus: Mr. Chair, how much money has the government spent on its lawyers to fight the Human Rights Tribunal?

Hon. Carolyn Bennett: Mr. Chair, I think the most important number would be that from $600 million that used to go to children and families, it is now $1.6 billion going to children. We have no intention of fighting children in court. We want to get to the table and get them what they deserve.

Mr. Charlie Angus: Mr. Chair, I believe the minister in the House has to tell the truth. Therefore, either she is not telling the truth or her lawyers in Federal Court are not, because the lawyers in Federal Court have taken the position that the Liberal government is going to quash a finding of systemic discrimination, because they said that there is no evidence with regard to adverse outcomes that flowed from being denied services.

The minister has told us again and again that she knows that services denied to children have hurt them, but her lawyers are saying the opposite. Who is not telling the truth here?

Hon. Carolyn Bennett: Mr. Chair, the approach of our government is to make sure that all children who were harmed by these terrible colonial policies will be compensated.

However, we have also learned from the Indian residential schools and the sixties scoop that the children who had greater harm or who were in care longer want to be able to tell their stories, and like the class action on 1991 forward, we want to get to the table and get them what they deserve.

Mr. Charlie Angus: Mr. Chair, I want to let the people know that what the minister's lawyers are saying is completely opposite to what she is telling the House. She is obliged to tell the truth in the House. The lawyers are saying that these children, who are represented by the AFN, Nishnawbe Aski Nation and First Nations Child & Family Caring Society, do not warrant compensation because they have not been tested by the government to the "precise nature and extent of harm suffered by each individual".

What is the minister going to do, put four-year-old children before her lawyers like the government did to the St. Anne's Residential School survivors? How is the government going to test these children for the precise harms so its does not have to pay?

Hon. Carolyn Bennett: Mr. Chair, I think the member opposite understands that the class action now being certified on the 1991 post-sixties scoop up to the present day tends to be the way we sort these things out with respect to what the appropriate care is for the amount of time people were harmed and the degree of the harm. It is very important that families have a voice, that children have a voice and that there is some assessment of fair and equitable treatment and compensation.

● (1915)

Mr. Charlie Angus: Mr. Chair, I am quite shocked because her lawyers are in court saying that there is no evidence any children were improperly taken. How can she stand and misrepresent her lawyers? Then the lawyers said that there was no reason for compensation. They have said that in the hearings.

Now the government wants to quash a legal finding that the tribunal spent 12 years adjudicating, and the minister's lawyers say there was no evidence to prove what was found, which they said was reckless and willful discrimination. How can minister tell us that it is better to have that ruling thrown out so the government can fight children in court and make each of them testify? That is what the government wants to do. How can she justify that?

Hon. Carolyn Bennett: Mr. Chair, with respect to the CHRT and the good work of Dr. Blackstock, I believe many good things have come out of this. With Jordan's Principle, thousands of cases are settled all the time, when zero cases had been settled in the past. This is very important.

However, in the case of appropriate compensation, the appropriate place for that is with the class action, where there are representatives of the victims and the survivors who can determine what is fair. I do not think there is a way for fair and equitable compensation to be done without the voices of the people who were harmed.

Mr. Charlie Angus: Mr. Chair, I am really glad she raised Jordan's Principle, which brings us back maybe four non-compliance orders ago. For the minister's lawyers to say that there is no proof that any child was harmed is a falsehood, because the ruling on Jordan's Principle was about the deaths of Jolynn Winter and Chantel Fox. Her government decided that it was not going to bother to fund those children and at the Human Rights Tribunal was forced to implement Jordan's Principle. Every single time the minister's government said that it was in compliance and children died because of that.

The government says good things have been done, but let us now throw out the Human Rights Tribunal ruling. How can the minister claim that the government went along with Jordan's Principle when the filings show that it fought it every step of the way and children died?

Hon. Carolyn Bennett: Mr. Chair, the member opposite knows that we worked very hard to put in place Jordan's Principle. At the beginning, the motion that we passed in the House was only for children on reserve with multiple disabilities and where there was a squabble between the federal and the provincial government. We are now getting the kind of care that the kids need on and off reserve, particularly when there is only one disability such as a mental health or addiction problem, but also there does not have to be a squabble. We have moved way beyond what was passed in the House and children are better for it and—

The Chair: Order, please. The hon. member for Timmins—James Bay.

Mr. Charlie Angus: Mr. Chair, I agree with the minister that children are certainly better for it. However, children are better for it because Cindy Blackstock, the AFN and Nishnawbe Aski Nation fought the government at the Human Rights Tribunal, while it was refusing and children died. It has met Jordan's Principle because it has been forced to meet it.

I want to refer to the latest human rights ruling, which says that there is sufficient evidence that Canada was aware of the discriminatory practices of its child welfare program and that it did this devoid of caution and without regard for the consequences on children and their families. That is the finding after 12 years, and the government spent $3 million trying to block them every step of the way.

How can we say to crush that ruling, throw that finding out, fight it out in court and trust that the government actually cares about children? The minister's lawyers say that children have not been harmed and to prove that they have, those individual children of four and five years old should be brought in and tested. The tribunal found that the government acted with devoid of caution over the lives of children. That is the finding of the Human Rights Tribunal. Is the Human Rights Tribunal lying or is it the government, which has misled the people of Canada on this?

● (1920)

Hon. Carolyn Bennett: Mr. Chair, I think the hon. member knows that our government has a very good track record on settling the childhood litigation, such as Anderson, the sixties scoop, day schools. We are doing what is right.

With the compliance orders, as I explained to the member, from what was Jordan's Principle and on multiple disabilities, only on-reserve where there is a squabble, we have gone away beyond what that original vote in the House of Commons was, for which I voted.

Therefore, it is hugely important that we go forward, understanding we have to do the best possible thing for these children. The lawyers have agreed that we want to compensate and the Prime Minister wants to compensate, but we have to do it in a fair and equitable way that also covers the children from 1991 to this day.

Mr. Charlie Angus: The Liberals want to quash the ruling, Mr. Chair. That is what the government is in Federal Court to say. If we look at the Human Rights Tribunal ruling, there is point after point about how to make compensation work, and the government says that it will not compensate; it will litigate. That is the government's position.

I am astounded that the minister is in here telling us that the government cares about the children when the finding says there is willful and reckless discrimination against children who died. The children who died had to be named. When it said there was no evidence unless we brought individual children's names forward, individual children's names were brought forward. That was the policy. Those children died, and children are continuing to die. They will continue to die as long as the government refuses to do the basic funding.

The minister tells us the discrimination has ended. That is not what the Human Rights Tribunal found and that is not what any first nation family in the country will believe.

Hon. Carolyn Bennett: Mr. Chair, the first nations, Inuit and Métis across the country are very grateful for Bill C-92. With respect to asserting jurisdiction, we have to allow that the people can assert the jurisdiction to look after its own families with the adequate funding to do that. We know that in terms of how we determine fair and equitable funding, our government did not think we would be able to get that done throughout an election and by this week. Therefore, it is really important. The January 29 date is coming up, but I am hearing from families. They want this to be fair and they feel there has to be a negotiation at a table to actually determine what is fair.

[*Translation*]

Hon. Marc Garneau (Minister of Transport, Lib.): Mr. Chair, I am pleased to rise in committee of the whole to discuss the supplementary estimates (A). I will speak to the spending connected to my files.

[*English*]

Canadians need a transportation system that allows them to safely and efficiently reach their destinations and receive goods for their daily lives. Businesses and customers expect a transportation system they can trust to deliver resources and products to market and for the jobs on which they depend.

[*Translation*]

The transport file includes other significant challenges, such as air and ocean pollution, public safety and security, and economic opportunities for all Canadians. In all, transport activities account for around 10% of Canada's GDP. The federal transport file includes Transport Canada and various Crown corporations, agencies and administrative tribunals, all of which do important work to serve Canadians. These important federal organizations strive to keep making Canada's transportation network safer, greener, more secure and more efficient.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

House of Commons Debates

VOLUME 149 • NUMBER 005 • 1st SESSION • 43rd PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Wednesday, December 11, 2019

Speaker: The Honourable Anthony Rota

(h) Foreign Affairs and International Development (12 members);

(i) Government Operations and Estimates (11 members);

(j) Health (12 members);

(k) Human Resources, Skills and Social Development and the Status of Persons with Disabilities (12 members);

(l) Indigenous and Northern Affairs (12 members);

(m) Industry, Science and Technology (12 members);

(n) International Trade (12 members);

(o) Justice and Human Rights (12 members);

(p) National Defence (12 members);

(q) Natural Resources (12 members);

(r) Official Languages (12 members);

(s) Procedures and House Affairs (12 members);

(t) Public Accounts (11 members);

(u) Public Safety and National Security (12 members);

(v) the Status of Women (11 members);

(w) Transport, Infrastructure and Communities (12 members); and

(x) Veterans Affairs (12 members).

3. Standing Orders 104(5), 104(6)(b), 114(2)(e) and 114(2)(f) be suspended; and

4. Standing Order 108(1)(c) be amended by adding after the word "subcommittees" the following: "composed of members from all recognized parties,";

b. The Clerk of the House be authorized to make any required editorial and consequential alterations to the Standing Orders, including to the marginal notes.

● (1540)

The Speaker: Does the hon. member have the unanimous consent of the House to move the motion?

Some hon. members: Agreed.

The Speaker: The House has heard the terms of the motion. Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

(Motion agreed to)

PROCEDURE AND HOUSE AFFAIRS

Mr. Kevin Lamoureux (Parliamentary Secretary to the Leader of the Government in the House of Commons, Lib.) Mr. Speaker, once again, I believe you will find unanimous consent for the following motion:

That the Standing Committee on Procedure and and House Affairs be appointed to prepare and report lists of members to compose the standing and standing joint committees of this House, and that the committee be composed of: Ruby Sahota, Kevin Lamoureux, Ginette Petitpas Taylor, Kirsty Duncan, Churence Rogers, Mark Gerretsen, John Brassard, Blake Richards, Eric Duncan, Corey Tochor, Alain Therrien, and Rachel Blaney.

The Speaker: Does the hon. member have the unanimous consent of the House to move the motion?

Some hon. members: Agreed.

The Speaker: The House has heard the terms of the motion. Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

(Motion agreed to)

Routine Proceedings

FIRST NATIONS CHILD WELFARE

Mr. Charlie Angus (Timmins—James Bay, NDP) Mr. Speaker, at the outset, let me formally congratulate you on the important role of the Speaker, representing the wonderful region of northern Ontario, and my next-door neighbour. I want to welcome you in your new Chair.

I believe if you seek it, you will find unanimous consent for this motion:

That the House call on the government to comply with the historic ruling of the Canadian Human Rights Tribunal ordering the end of discrimination against First Nations children, including by:

(a) fully complying with all orders made by the Canadian Human Rights Tribunal as well as ensuring that children and their families don't have to testify their trauma in court; and

(b) establishing a legislated funding plan for future years that will end the systemic shortfalls in First Nations child welfare.

The Speaker: Does the hon. member have the unanimous consent of the House to move the motion?

Some hon. members: Agreed.

The Speaker: The House has heard the terms of the motion. Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

(Motion agreed to)

* * *

PETITIONS

IRAQ

Mr. Garnett Genuis (Sherwood Park—Fort Saskatchewan, CPC): Mr. Speaker, I am tabling two petitions today, both about the situation in Iraq where peaceful protesters have taken to the streets seeking an end to corruption, sectarianism and foreign interference. They want a strong, peaceful, pluralistic Iraq. Their response has been met with terrible violence.

The first petition calls upon the House of Commons and government to strongly condemn the use of violence against protesters and asks the Government of Canada to pressure the Government of Iraq to investigate and stop this violence while bringing those accountable to justice.

The second petition calls upon the government and the House to engage with the Iraqi government to promote pluralism and national unity. It also asks the Government of Canada to impose Magnitsky sanctions on those in Iraq who have committed gross violations of human rights.

This is a critical human rights issue, and I look forward to reading the government's response to these petitions.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

House of Commons Debates

VOLUME 149 • NUMBER 006 • 1st SESSION • 43rd PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Thursday, December 12, 2019

Speaker: The Honourable Anthony Rota

We are looking to take action now. This can no longer be a dream deferred for the millions of people across the country who are in serious core housing need. In Hamilton, we can have record numbers of building permits and cranes dotting the sky while simultaneously having record numbers of people living in the streets. We have heard the government talk about lifting people out of poverty. My question is, where? Who are those people? They certainly do not live in Hamilton Centre.

Ms. Jenny Kwan (Vancouver East, NDP): Madam Speaker, I want to thank my colleague for the subamendment. It is particularly important for the people of Vancouver East on all of the issues he highlighted, whether it be on the climate emergency, housing, universal pharmacare, more affordability for people and so on.

One of the issues the member highlighted in his speech was the climate emergency. The government often says, and we saw it in the throne speech, that it is going to deal with this issue, yet this is the government that bought a pipeline and has not tackled the subsidies for the fossil fuel industry. We know, according to the IMF, that Canada is subsidizing the fossil fuel industry to the tune of $60 billion a year. We know the government is not tackling the tax loopholes for the wealthiest and the biggest corporations. If it did that, we could save some $10 billion per year.

Would the member advocate for the government to, once and for all, take the climate emergency seriously and, first and foremost, take action to reduce the subsidies for the fossil fuel industry?

Mr. Matthew Green: Madam Speaker, not only will New Democrats advocate for it, but let us look at the amount of money that is put into the subsidies for oil and gas. Let us imagine a compelling alternative for transit to shift to a carbon-free economy. We only have to look to the NDP national transit strategy that would offer predictable and sustainable operational funding to public transit that would be expanded, not just east and west but also north and south.

We have heard quite compelling stories around missing and murdered indigenous women. We know that if we provide north and south connectivity among isolated communities through good, public, reliable and safe public transit, we can reduce those highways of tears. Not only is this a shift from subsidies, but we have the money that we could invest in a very ambitious nationalized transit strategy.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): Madam Speaker, congratulations on your election to assist the Chair.

I want to start by thanking the constituents of Beaches—East York, everyone who supported me in the campaign and at the outset of my political career when nobody knew who I was. It is a humbling experience, being a candidate in politics, where hundreds of people come together all acting on behalf of me and my party and helping us, as individuals, come to this place. I sincerely thank the hundreds of people who have contributed in this past election, but also over the years. Of course, I also thank my family and especially my wife Amy.

I am not sure whether it is because of the last four years in this place, or in spite of the last four years in this place, but I continue to think, in my role as a parliamentarian, politics remains a pathway to making one of the most positive differences we can make in the lives of our neighbours and our fellow citizens. It remains a noble profession. We have an opportunity to display that to our fellow Canadians over the next two, three or maybe four years, as we seize the opportunity of this minority Parliament.

Minority parliaments hold the potential for greatness. Peter Russell is an academic and long-time political scientist who studied minority and majority parliaments around the world, including here at home. He has called minority parliaments here in Canada some of the most dynamic in our history.

Of course, the throne speech makes reference to Pearson. When we look to the Pearson years, we see co-operation that was able to deliver the Canada pension plan, Canada student loans, public health care and the flag. During those five years in Canadian history, Parliament accomplished more than most parliaments we have seen before, so this minority situation holds potential for greatness. It is up to us, and how we conduct ourselves in this place, whether we seize the opportunity or succumb to partisan politics.

One of the jobs in this place, as we hopefully seize the opportunity, is to work across the aisle. In the last Parliament, I had the good fortune to work across the aisle with Murray Rankin of the NDP on cannabis amnesty and with Fin Donnelly of the NDP on the shark fin trade. I had the opportunity to work across the aisle with current members in this House from the Conservatives and the NDP to tackle election interference, platform governance and privacy protections. I think if people watched our committee in the last Parliament, they would be hard pressed to determine who was the Liberal, who was the member from the NDP and who was the Conservative. That is how this place should operate, particularly at committee.

I hope we see more of those opportunities in this place going forward. I also worked really hard in the last Parliament to carve out some space, it is not always the easiest thing to do in this business, for principled independence. If I heard anything from my constituents in this last election, it is that they want me and the people in this place to work together as much as possible to accomplish big ideas for our country. They also want us to be less partisan and to carve out more of that principled independence and to carry that with us.

I want to echo the clear message in the throne speech and that Canadians sent us here with, which is to work together, and I hope we all take that very seriously going forward.

It is not only about keeping Canadians safe; it is about all living beings in Canadian society who think, feel and love. That includes animals and more. We made progress in the last Parliament on animal protections and we have to continue to build on that progress.

Importantly, the throne speech talked about moving forward on reconciliation.

I will first talk about the Canadian Human Rights Tribunal case. I have heard the minister that say money is no object. At the end of January, we have to deliver submissions to the tribunal that properly set out a path for just compensation, saying money is no object, what it will cost and that we have a fair path forward. Having already spoken to the minister, I will be looking very closely at our submissions. We need to ensure that those in our society who have suffered discrimination by the government receive due compensation.

We have seen incredible progress on clean water, an issue I hear a lot about from the constituents in my community. Over the last four years, over 60% of long-term boil water advisories on reserve were lifted. We injected $2 billion into the system. When the PBO said more money was needed, more money was provided. We remain on track to lift all advisories within the five-year commitment.

There is another specific project in Grassy Narrows that needs to be made a priority. I was very pleased to hear the minister say that money was no object and that the facility would be built with federal support. Again, I will be looking at that very closely.

Then there is the implementation of UNDRIP. I ran into Romeo Saganash when he was here the other day. We spoke briefly about our promise in our platform that his bill would be a floor. I hope to see the amendments, which were not adopted in the last Parliament, made to his bill. I hope his bill will be a floor. We have a historic opportunity to implement UNDRIP and provide rights to indigenous peoples, which they fundamentally deserve.

On a final note on reconciliation, which is urban indigenous communities, I did not see enough in our platform or in the throne speech. We need a much stronger commitment to urban indigenous communities. In Ontario alone, some of the estimates I have seen is that over 80% of indigenous people do not live on reserve. We need to ensure that indigenous services understands that and is able to deliver services properly to urban indigenous communities.

● (1345)

On Canada's place in the world, there have been great successes over the last four years. We saw greater fairness in our immigration and refugee system. Just to be clear, we brought in more refugees last year than any other country in the world. We are doing our part, which is the right thing to do. My riding has a very strong Bangladeshi community. Those in that community called on me to be vocal on the Rohingya refugee crisis. I and this government were, on the recommendations of Bob Rae. I am very proud of the government's efforts on that issue in the last Parliament.

We need to continue to take that leadership on the global stage on human rights. We need to continue to defend and support our multilateral institutions. We are best at fundamentally supporting institutions. Whether it is training judges, election commissioners, parliamentary processes, we need to double down on what we are best at. We are doing it in some countries, but clearly, when we see what is going on around the world, other countries could use some of that stable support and democratic decision-making from the Canadian Parliament and the Canadian people.

On global climate action, we saw great leadership in the last Parliament on phasing out coal, not only domestically but also abroad. We were global leaders in helping the rest of the world chart this path. We need to continue to do that work, but we cannot do that if we do not do the strong work at home to meet our emission reduction targets. We have to help lead our country and the world on this defining issue of our time.

I will close by reiterating that we have in this minority Parliament a real opportunity to work together on these big ideas and issues that can make such a difference in the lives of Canadians and citizens of the world. Let us seize that opportunity and not waste it.

● (1350)

Hon. Erin O'Toole (Durham, CPC): Madam Speaker, I would like to thank my friend from Beaches—East York for his thoughtful remarks. I can attest that the three-year-old son he talked about is the apple of his eye and a very, very cute three-year-old. I am saying that on the record, in Hansard.

Some of the points the member raised on the growing need to have some sort of regulation of social media giants is a critical challenge that we will face in this Parliament. I think, in many ways, if we do not do that, we are going to see a continuation of the preference bubble approach to politics, because the secret algorithms and everything else almost encourage people to only listen to voices within their own tribe. The rhetoric that we see that is often influenced by foreign actors as well is limiting discourse.

I really like the fact that in the last Parliament a committee led by a Conservative member, my friend from Prince George, with this member and others, combined with other parliamentarians from other countries started tackling these issues. While there was not much in the throne speech on this, I wonder if the member can speak to that work. Is there an ability for some cross-partisan support to really get a handle on this for our children's future and also for the future of serious political discourse in Canada?

While the Prime Minister's undiplomatic behaviour at Buckingham Palace is providing comedians with new skit material, for Canadians this is no laughing matter. The relationship between Canada and the United States is crucial. Canada's foreign policy, domestic defence policy and trade partnerships are all shaped by a historically strong and positive relationship with the United States.

What will the Prime Minister do to regain a sense of trust and partnership with the President of the United States so that Canada's interests are defended—

● (1425)

The Speaker: The hon. Deputy Prime Minister.

Hon. Chrystia Freeland (Deputy Prime Minister and Minister of Intergovernmental Affairs, Lib.): Mr. Speaker, I will tell the member what our Prime Minister will do and what he is already doing, and that is to get a modernized trade deal with the United States, our neighbour and most important partner, ratified. I must say that we are aware we are in a minority Parliament and that this is a grave historical responsibility of every member of this House.

[*Translation*]

Mr. Yves-François Blanchet (Beloeil—Chambly, BQ): Mr. Speaker, steel is protected, but not aluminum. Aluminum is produced in Quebec, steel is produced in Ontario.

Once again, Ottawa has sold out Quebec's interests to the benefit of Canada's best interests. Aluminum workers have been abandoned, as were dairy producers, cheese producers, Rona employees, forestry workers, our creators, the people in our shipyards and others.

Instead of denying what is obvious to everyone, will the government provide real protection for the workers in Quebec's regions?

Hon. Chrystia Freeland (Deputy Prime Minister and Minister of Intergovernmental Affairs, Lib.): Mr. Speaker, our government is committed to defending the aluminum sector and its workers. We fought to have the U.S. tariffs on aluminum fully lifted. Only Canada and Mexico have had these tariffs lifted.

When the new NAFTA is ratified, we will have a guarantee that 70% of the aluminum in cars manufactured in the area covered by NAFTA will be sourced in North America. The current percentage is zero.

We must ratify this agreement.

Mr. Yves-François Blanchet (Beloeil—Chambly, BQ): Mr. Speaker, the government seems to be the only one that still believes that tale.

The economic nationalism that serves Quebeckers and Quebec workers so well is being sacrificed by this government in the name of Canada's best interests. The Prime Minister has been repeating ad nauseam that he protected aluminum workers. That is true. He protected the aluminum workers in China, India and Russia, but not those in Quebec.

Does the Prime Minister realize that he is basically inviting aluminum plants to abandon their investments in Quebec, invest in Asia instead, and then come back to flaunt their steel in the faces of the workers from Côte-Nord, Bécancour and Saguenay-Lac-Saint-Jean?

Hon. Chrystia Freeland (Deputy Prime Minister and Minister of Intergovernmental Affairs, Lib.): Mr. Speaker, this is very important. This is a historic moment for the entire House. It is important to talk about facts and reality.

The reality is that this modernized agreement will benefit the aluminum industry, Quebec and all Canadians.

This is not the time for partisan politics. It is the time to stand up for our national interest.

* * *

INDIGENOUS AFFAIRS

Mr. Jagmeet Singh (Burnaby South, NDP): Mr. Speaker, yesterday, all parliamentarians agreed that the government needs to accept the tribunal's decision and stop the discrimination against indigenous children. That means that the government must follow the tribunal's orders, stop taking the children to court and ensure that the children and families do not have to testify in court.

My question for the Liberals is this: will the Prime Minister immediately stop taking indigenous children to court?

Hon. Marc Miller (Minister of Indigenous Services, Lib.): Mr. Speaker, we need to compensate the first nations children who were harmed by past government policies. We are seeking a comprehensive, fair and equitable solution. That is why I asked the assistant deputy minister to work with those involved in the Canadian Human Rights Tribunal, or CHRT, and those involved in the Moushoom class action suit to find the best possible solution for all of the children affected.

Our commitment to implement other CHRT orders and reform child and family services has not changed in any way. That work will continue.

● (1430)

[*English*]

Mr. Jagmeet Singh (Burnaby South, NDP): Mr. Speaker, that is not good enough. Indigenous kids and their families have sent a clear message: Stop taking us to court and stop discriminating against us. It is pretty simple.

The thing is, the tribunal decision did not just say that the government discriminated against indigenous kids. It said that it was “willful”, it was “reckless”, and the result is that kids are dying.

The question is very simple. The whole House agreed to follow the tribunal's decision. Will the government respect basic human rights and stop taking indigenous kids to court?

Hon. Marc Garneau (Minister of Transport, Lib.): Mr. Speaker, we are working constructively with all Canadian provinces. Transportation issues connected to the environment may have both federal and provincial components. This is the case, for example, with the Lac-Mégantic bypass. BAPE conducted a study and made recommendations, and we respect these recommendations from the province of Quebec.

* * *

INTERGOVERNMENTAL RELATIONS

Ms. Christine Normandin (Saint-Jean, BQ): Mr. Speaker, the government told us that it has understood the message sent by Quebec in the election. For their part, the Conservatives assure us that they want to defend Quebec's jurisdictions. However, both have voted against adding Quebec's priorities to the throne speech. They voted against respect for Quebec's environmental laws, against protection for supply management and against an increase in health transfers.

How can the government justify voting once more, as did the Conservatives, against Quebec?

Hon. Pablo Rodriguez (Leader of the Government in the House of Commons, Lib.): Mr. Speaker, there are 35 proud Quebeckers sitting on this side of the House who work every day with the Government of Quebec and the different municipalities.

Infrastructure projects, environmental issues or very specific files such as the new toll-free Champlain Bridge in Montreal, the Highway 19 extension or all the investments we have made in culture are all projects we have worked on because we have the interests of Quebeckers at heart.

* * *

THE ECONOMY

Hon. Pierre Poilievre (Carleton, CPC): Mr. Speaker, we already know that Canada lost 71,000 jobs in November. As we also know, the rate of insolvency increased by 13%, and half of all Canadians are $200 away from insolvency. Now we are learning that the default rate for non-mortgage debt over recent months is the highest it has been in the last seven years.

Is the government creating the conditions for a made-in-Canada recession?

Hon. Bill Morneau (Minister of Finance, Lib.): Mr. Speaker, four years ago, economic growth was very low and unemployment was too high. We decided to invest in families and in infrastructure, and now we have a growing economy.

We obviously still face some challenges, but we will continue to invest to make life easier for people who are struggling. In doing so, we will have an economy that is good for all Canadians.

[*English*]

Hon. Pierre Poilievre (Carleton, CPC): Mr. Speaker, we already know that we lost 71,000 jobs last month and that there has been a 13% increase to a 10-year high in the number of people who have become insolvent. Now we know as well that the rate of Canadians defaulting on non-mortgage credit reached its highest third-quarter pace in seven years.

Is the government not creating the conditions for a made-in-Canada recession?

● (1445)

Hon. Bill Morneau (Minister of Finance, Lib.): Mr. Speaker, it is always important to recognize that there are challenges. Canadians are going through challenges in parts of the country. We need to be focused on how we can deal with those challenges.

At the same time, we need to recognize that investing in our collective future is the way that we can actually experience success. We have seen over a million new jobs created by Canadians over the last four years and more. We are going to continue to invest to deal with these challenges so that people can have confidence in their future, for themselves and their families.

Hon. Pierre Poilievre (Carleton, CPC): Mr. Speaker, confidence is not what Equifax is expressing. Its vice-president said that there has been a "significant increase in consumer bankruptcies." Therefore, now we have a seven-year high in third-quarter defaults on non-mortgage debt. We have a 10-year high in the number of people who have gone insolvent. Seventy-one thousand people are losing their jobs. The minister continues saying, "Don't worry, be happy", while Canadians are falling behind and losing their jobs. Why are he and his government continuing to create the conditions for a made-in-Canada recession?

Hon. Bill Morneau (Minister of Finance, Lib.): Mr. Speaker, actually we just came through an election campaign where we said that in fact we need to pay very close attention to the challenges that Canadians are facing. That is the reason that we need to continue to invest. That is the reason that we need to recognize that things like what we put forward this week, a reduction in taxes for 20 million Canadians, are a greater way for them to feel a greater sense of confidence and that they have enough money to spend for themselves and their families. We are going to continue with our approach to invest. It has seen success. Of course, as we face challenges, it is important to stay on that track.

* * *

[*Translation*]

INDIGENOUS AFFAIRS

Ms. Niki Ashton (Churchill—Keewatinook Aski, NDP): Mr. Speaker, when it comes to first nations, the Prime Minister says one thing and does another. He says he believes in reconciliation, but then he takes first nations children to court. Instead of starting the reconciliation process, his government is perpetuating colonialism. Let us be clear. His government's negligence towards these children is costing lives.

Will the government stop taking first nations children to court, yes or no?

Hon. Marc Miller (Minister of Indigenous Services, Lib.): Mr. Speaker, today we are in full compliance with all of the tribunal's orders to address the overrepresentation of first nation children in care. We have almost doubled funding to child and family services, and close to 500,000 Jordan's principle requests have been approved.

We agree that the most recent orders for compensation for first nation children harmed by government policies must be respected. What the tribunal has asked parties to do is to sit down and work out what exactly the compensation for victims will look like, and that is what we are doing.

[*English*]

Mr. Charlie Angus (Timmins—James Bay, NDP): Mr. Speaker, since the Prime Minister began his legal vendetta against the Human Rights Tribunal, we have lost over 100 first nations children in Ontario alone, including 16-year-old Devon Freeman who hung from a tree for seven months outside the group home. It has been over a year since the Prime Minister's lawyers told the Human Rights Tribunal they were not going to negotiate with Cindy Blackstock about compensation, they would rather litigate. They are still in court trying to quash this decision.

Parliament has ordered the Liberal government to stop this vendetta. When are the Liberals going to call off their lawyers?

Hon. Marc Miller (Minister of Indigenous Services, Lib.): Mr. Speaker, we agree that we must compensate first nations children harmed by past government policies. We are seeking a solution that is at the same time comprehensive, fair and equitable. That is why I have instructed my assistant deputy minister to work with those involved with the CHRT and those involved in the Moushoom class action to develop the best possible method that includes all affected children.

Nothing about our commitment to implement other orders from the CHRT, or reforming child and family services for that matter, changes. This work will continue.

Mr. Jaime Battiste (Sydney—Victoria, Lib.): Mr. Speaker, this is my first time rising in this House. I want to thank the good people from Sydney—Victoria for electing me as their member of Parliament. I would also like to thank all the volunteers whose hard work resulted in our victory.

[*Member spoke in Mi'kmaq and provided the following text:*]

Msit Nokomatut, Eymu'tik tan teluwitmek UN year ujit Lnu`sltikw, aq kejitu teplutaqn etek ujit apoqnmitamukw tan teli Lnui`sltikw. Ketu pipanimk mawi espipite'w Kaplnewel maliaptoq lnuekatik, tali kisi apoqnmatisnukw tan teli lnu`sltukiw ujit elmkinek. Mita menuaqlu'kik nutkwotlitewk siawi`lnuisltenew iapjui.

[*Member provided the following translation:*]

All my relations, we are currently in the United Nations Year of Indigenous Languages. While I understand legislation has been created to ensure protection of languages, my question for the Minister of Indigenous Services is how do we plan on implementing the language act, so that future generations of indigenous peoples are given the resources to ensure they can continue to speak the language proudly?

[*English*]

● (1450)

Hon. Marc Miller (Minister of Indigenous Services, Lib.):

[*Member spoke in Mi'kmaq and provided the following text:*]

Wela'lin ta'n telpi panigasin.

[*Member provided the following translation:*]

Mr. Speaker, I thank the member for his question.

[*English*]

We are implementing the indigenous languages act in collaboration with those who know best how to revitalize their languages, indigenous peoples and teachers, and we are doing so by providing $337 million over the next five years for indigenous languages and $1,500 per year for each kindergarten to grade 12 first nation student as part of the new co-developed education funding policy.

This government is firm in its resolve to support indigenous languages.

* * *

[*Translation*]

INTERGOVERNMENTAL RELATIONS

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): Mr. Speaker, despite the 35 members elected in Quebec, the Liberals did not address any of Quebec's requests in the throne speech. There was nothing on a single tax return, no commitment for the third link in the Quebec City area and no sign of any willingness to give Quebec more autonomy in immigration.

It is enough to make one wonder what kind of deal the government made with the Bloc for it to rush to support the throne speech.

Hon. Marc Garneau (Minister of Transport, Lib.): Mr. Speaker, there were no backroom discussions leading up to the throne speech. As we know, the throne speech is a document that outlines the broad themes the government plans to address. The details will come, projects will be announced, and the opposition can judge us at that point.

Mr. Jacques Gourde (Lévis—Lotbinière, CPC): Mr. Speaker, we, the Conservatives, care about the Quebec nation and will work tirelessly to ensure that Quebec remains strong in a united Canada. Despite the Bloc Québécois' rush to support the Liberals on the throne speech, Quebec's three requests were left out of that speech: a single tax return, more autonomy for Quebec on immigration, and a third link between Lévis and Quebec City.

Where are the Liberals and the Bloc Québécois when it comes time to work for Quebec's best interests?

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

House of Commons Debates

VOLUME 149 • NUMBER 007 • 1st SESSION • 43rd PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Friday, December 13, 2019

Speaker: The Honourable Anthony Rota

Mr. Adam van Koeverden (Parliamentary Secretary to the Minister of Diversity and Inclusion and Youth and to the Minister of Canadian Heritage (Sport), Lib.): Mr. Speaker, as a white, straight, cisgender male, I acknowledge my own privilege. I have never and will never experience racism, bigotry or homophobia. Darkening one's face, regardless of the context or the circumstances, is always unacceptable because of this racist history and the practice.

We in the House have a mutually held obligation, every member, to continue to work hard toward a racism-free society in Canada.

The Speaker: That is all the questions for today.

While I have your attention, I want to wish all of you a very merry Christmas and a wonderful new year.

[*Translation*]

I would like to thank you for the gift you have given me, the honour of representing you as the Speaker of the House.

[*English*]

I am your humble servant.

* * *

[*Translation*]

PRIVILEGE

FIRST NATIONS CHILD WELFARE

Mr. Peter Julian (New Westminster—Burnaby, NDP): Mr. Speaker, I would like to raise a question of privilege, and I will do it as quickly as possible.

It is about something that happened yesterday in question period. I will come back to that in a moment. This is the first time we have had routine proceedings since yesterday's question period.

● (1210)

[*English*]

I appreciate the opportunity to present this question of privilege today.

As I know members are very well aware, the House has the power to punish contempt, which explicitly includes disobeying an order of the House.

I will cite *House of Commons Procedure and Practice*, pages 80 and 81, which reads:

> Any disregard of or attack on the rights, powers and immunities of the House and its Members, either by an outside person or body, or by a Member of the House, is referred to as a "breach of privilege" and is punishable by the House. There are, however, other affronts against the dignity and authority of Parliament which may not fall within one of the specifically defined privileges. Thus, the House also claims the right to punish, as a contempt, any action which, though not a breach of a specific privilege, tends to obstruct or impede the House in the performance of its functions; obstructs or impedes any Member or Officer of the House in the discharge of their duties; or is an offence against the authority or dignity of the House, such as disobedience of its legitimate commands...

As you are well aware, Mr. Speaker, even in other parliaments worldwide, including the United Kingdom, decisions have been made by Speakers in regard to this. The United Kingdom Joint Committee on Joint Parliamentary Privilege also attempted to provide a list of some types of contempt in its 1999 report. One of them that I will cite is "without reasonable excuse, disobeying a lawful order of the House or a committee."

Wednesday, December 11, the member for Timmins—James Bay rose to present a motion that passed and provided clear direction. The motion reads as follows:

> That the House call on the government to comply with the historic ruling of the Canadian Human Rights Tribunal ordering the end of discrimination against First Nations children, including by:
>
> (a) fully complying with all orders made by the Canadian Human Rights Tribunal as well as ensuring that children and their families don't have to testify their trauma in court; and
>
> (b) establishing a legislated funding plan for future years that will end the systemic shortfalls in First Nations child welfare.

It was adopted unanimously by the House.

Quickly referencing the *Canadian Oxford Dictionary*, "call on" can also be defined as a demand, which constitutes clear direction, and the definition of "comply", again in the *Canadian Oxford Dictionary*, is to act in accordance with a command, regulation, etc.

[*Translation*]

Parliament called on the government to comply with the rulings of the tribunal, which wrote:

> ...that Canada's systemic racial discrimination...resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse were unnecessarily apprehended and placed in care outside of their homes, families and communities and especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000...Canada is ordered to pay $20,000 to each First Nation child removed from its home, family and Community between January 1, 2006...

[*English*]

The direction is very clear.

In question period yesterday, the government response showed a willful disregard of the direction that was given by the House, both outside and inside Parliament.

First, CBC News online quoted the Minister of Indigenous Services saying that the government had no plans to drop the court challenge. Then yesterday in question period in the House, the Minister of Indigenous Services said "our commitment to implementing other orders from the CHRT or reforming child and family services has not changed in any way." Nothing changes. In effect, in reply to a question from the member for Timmins—James Bay, he said the government was simply not changing its fashion of proceeding.

This is unprecedented, I would submit, and is a procedural grey area. There is no jurisprudence or Speaker's ruling that specifically covers such a situation, and we certainly went many decades back late into the evening last night. The closest equivalent was from Speaker Milliken on March 8, 2005, in relation to Bill C-31 and Bill C-32, bills that proposed creating a department of international trade separate from the Department of Foreign Affairs. In that instance, despite seeing legislation enabling departmental reorganizations defeated in the House, the government continued with its plan to split the departments.

In that ruling, Speaker Milliken ruled that no breach of privilege had occurred, in large part because Parliament had, in terms of order in council, provided direction to the government. He also cited the main estimates. In other words, there was ambiguity about the direction that was received from the House. Also, the Speaker mentioned that the comments were outside the House, so he questioned the validity of those comments and the accuracy of the quotation. In this case, we rely on Hansard and the quotes are very direct and present in this House.

However, Speaker Milliken expressed serious concern. He stated, "That is not to say that the comments, if reported accurately, do not concern me. I can fully appreciate the frustration of the House and the confusion of hon. Members, let alone those who follow parliamentary affairs from outside this Chamber." Speaker Milliken then asked, "How can the decisions of this House...be without practical consequence?" That is from page 53 of *Selected Decisions of Speaker Milliken*, on a decision rendered on March 23, 2005.

There is ambiguity that needs to be carefully regarded and decided upon by you, Mr. Speaker. Of course, the House of Commons is supreme and has issued direction to the government. The government has stated in the House that nothing has changed, and I submit that this is in breach of the privileges of the House. However, as you know, ultimately it is up to the House to decide if its privileges have been infringed upon and if the government is in contempt.

As you well know, the role of the Speaker is to determine whether this matter warrants further discussion in this chamber. I would ask that you find a prima facie case of privilege, and allow space for members of this House to determine whether this warrants being reviewed by the procedure and House affairs committee. Particularly in a minority Parliament, this is of fundamental importance.

You will be studying my submission and perhaps other members would want to weigh in, but the reality is that the government has the ability over the break to fix what was, to my mind, a clear contradiction between the direction set by the House and the government's response. I certainly hope it does so. If that is the case, I would be more than pleased to withdraw this question of privilege.

The fact remains, and Canadians understand, that in democracy the voters make a decision. They choose who fills the House, and then we make decisions. The government then, when there is a clear direction, should have the understanding that the clear direction should be followed. There is no doubt that on Wednesday the House directed the government and on Thursday, less than 24 hours later, the minister indicated in the House that nothing had changed.

I submit that the House should be charged in this matter and if, after careful study, you agree, I am prepared to move the necessary motion, Mr. Speaker.

● (1215)

The Speaker: I thank the hon. member for bringing this question of privilege forward and I will take it under advisement.

ROUTINE PROCEEDINGS

● (1220)

[*English*]

PETITIONS

HUMAN ORGAN TRAFFICKING

Mr. Garnett Genuis (Sherwood Park—Fort Saskatchewan, CPC): Mr. Speaker, I am pleased to be presenting a petition in support of two bills that were in the 42nd Parliament: Bill C-350 and Bill S-240. These bills sought to deal with the scourge of forced organ harvesting and trafficking by making it a criminal offence for a Canadian to go abroad and receive an organ for which there had not been consent.

The petitioners no doubt hope that this important legislative initiative will be taken up in this, the 43rd Parliament.

POST-SECONDARY EDUCATION

Mr. Paul Manly (Nanaimo—Ladysmith, GP): Mr. Speaker, it is my pleasure to present a petition that calls upon the government to eliminate the practice of charging interest on all outstanding and future Canada student loans.

HUMAN ORGAN TRAFFICKING

Mr. Arnold Viersen (Peace River—Westlock, CPC): Mr. Speaker, it is my privilege to stand today and present a petition from Canadians from across the country in support of Bill C-350 and Bill S-240, regarding forced organ harvesting that happens around the world.

Human trafficking is a horrific human rights violation that happens right here in this country, as well. I hope that we can pass similar bills in this Parliament forthwith.