

SUPREME COURT OF YUKON

Citation: *First Nation of Na-Cho Nyäk Dun v Yukon (Government of)*,
2026 YKSC 36

Date: 20260514
S.C. No.:20-AP013
Registry: Whitehorse

BETWEEN

FIRST NATION NA-CHO NYÄK DUN

Petitioner

AND

GOVERNMENT OF YUKON and
METALLIC MINERALS CORP.

Respondents

Before Chief Justice S.M. Duncan

Counsel for the Petitioner

Nuri Frame

Counsel for the Respondent
Government of Yukon

Kimberly Sova and
Julie DesBrisay

Counsel for the Respondent
Metallic Minerals Corp.

James Tucker

REASONS FOR DECISION

Overview

[1] This is an application by way of written submissions for costs by the First Nation of Na-Cho Nyäk Dun (FNNND) after its successful petition against the Yukon government brought in 2022. The application for judicial review was a challenge to the decision of the Yukon government to authorize a mining exploration project in the Tsé Tagé (Beaver River) watershed area in the traditional territory of the FNNND. The

FNNND requests the court order a lump sum cost award on the basis of party and party costs, also called partial indemnity costs, in the amount of \$75,000. This amount was arrived at by using the Tariff in Appendix B to the *Rules of Court* of the Supreme Court of Yukon (the *Rules of Court*) as a guide for the steps in the proceeding, as well as referencing as a benchmark the actual solicitor and client costs incurred of more than \$175,000. Counsel for FNNND also relies on the jurisprudence from other courts where lump sum costs award on a partial indemnity basis are calculated in the range of 25-50% of the actual legal fees.

[2] The Yukon government objects and argues that costs should be limited to the amount of \$13,013.28 (73 units at \$130 per unit) plus disbursements and tax. The Yukon government's calculation is based primarily upon the Tariff at Scale B in Appendix B of the *Rules of Court*. The Yukon government does not oppose the mode of calculation of the costs by way of a lump sum, but disputes the amount proposed by the FNNND.

[3] For the reasons that follow, I agree the award should be calculated on a lump sum basis, using the Tariff as a starting point and guide. Applying the general principles and purposes of costs awards, the parameters guiding the award on a lump sum basis, and considering the relevant factors here, including the nature of the case, and the parties' conduct of the litigation, I find that a lump sum amount inclusive of disbursements and tax of \$45,000 is reasonable. In the following I will review the background of this case and the steps in the proceeding, the general legal principles applicable to costs, the benefits of and approach to a lump sum award, and the factors in this case that influenced my conclusion.

Background

[4] The FNNND brought an application for judicial review of the Yukon government's decision to approve, with some additional terms and conditions, the recommendation of the Yukon Environmental and Socio-economic Assessment Board (YESAB) to allow Metallic Minerals Corp., a mining exploration company, to undertake exploration activities every year for 10 years in the Tsé Tagé watershed, part of the FNNND traditional territory.

[5] That same area was the subject of a land use planning process between the FNNND and the Yukon government which had as one of its objectives the promotion of development that did not undermine ecological and social systems on which the FNNND citizens and their culture were dependent.

[6] The Yukon government brought an application to strike four of the declarations sought by the FNNND: specifically – that the Yukon government breached duties flowing from the honour of the Crown, the Final Agreement (part of the modern treaty) and the Intergovernmental Agreement (establishing the land use planning process). As well the FNNND sought to strike the alleged breach of the duty of good faith in contractual performance owed by the Yukon government. The FNNND successfully opposed this first motion to strike, heard in a half day.

[7] The Yukon government brought a second application to strike two supporting affidavits filed by the FNNND for the hearing of the merits of the judicial review that among other things set out the background of the modern treaty negotiations and the purpose of the modern treaty. This application was argued during the hearing of the merits of the application for judicial review. The FNNND was also successful in their

opposition to this motion to strike – the affidavits were admitted as necessary evidence for the judicial review.

[8] The FNNND obtained the following declarations sought on the merits of the judicial review: the Yukon government failed to meet its duty to consult FNNND thereby breaching the honour of the Crown and rendering the decision unlawful; breached its duty to act in a way that accomplishes the intended purposes of the modern treaty; and breached its duty of good faith in the performance of the Intergovernmental Agreement.

[9] The costs award includes preparing for and arguing the two motions to strike as well as the underlying application, all of which occurred during 2.5 days of court time. It also includes the preparation and attendance at three case management conferences held to address scheduling matters.

General principles applicable to costs

[10] Costs awards are in the court's discretion. Rule 60(1) of the *Rules of Court* provides costs are assessed as party and party costs, also referred to as partial indemnity costs, unless the Court orders they be assessed as special costs, also referred to as costs awarded on a full indemnity basis. Party and party or partial indemnity costs are not intended to compensate the successful party fully and will be significantly lower than the actual costs incurred. Instead, they represent an attempt to allocate the high costs of litigation fairly between the winning and losing parties, and to strike a balance between two competing interests. One of those interests is the recognition that if a party is successful and conducts themselves appropriately during the litigation they should not be required to pay any litigation costs. However, if the unsuccessful party must bear all of the successful party's costs, prospective litigants

may hesitate to assert or defend their rights, thereby causing a concern for access to justice (*Tanious v The Empire Life Insurance Company*, 2019 BCCA 329 (*Tanious*) at para. 47).

[11] Costs awards on a party and party or partial indemnity basis serve three general purposes:

- To indemnify or compensate the successful party
- To sanction or discourage inappropriate behaviour in the conduct of the proceeding
- To encourage settlement or to discourage frivolous or vexatious lawsuits

(*Frost v Blake*, 2021 YKSC 62 (*Frost*) at para. 18)

[12] As stated in *Frost* at para 19, “[g]enerally, the policy behind costs rules is the administration of justice and the control of access to justice. The tool of costs awards can encourage the efficient and appropriate conduct of litigation, as well as the ability of less affluent litigants with meritorious cases to access the justice system.” Further, “costs awards may be used as an instrument of policy to accomplish purposes and objectives the law seeks to foster and promote: *Okanagan Indian Band*, 2003 SCC 71 at paras. 20-31: [citations omitted]” (*Tanious at para. 36*).

Lump Sum Costs Award

[13] The default mechanism for assessing a costs award is the Tariff set out in Appendix B to the *Rules of Court*. The Tariff lists the steps in a civil proceeding and assigns a number or range of units to each step, and multiplies the units by a fixed dollar amount that varies depending on whether it is Scale A – matter of less than

ordinary difficulty, Scale B – matter of ordinary difficulty, or Scale C – matter of more than ordinary difficulty. The costs award then depends on factors such as which steps were taken in the course of the proceeding, how much time each step took (more time can lead to more units), and how difficult the proceeding was.

[14] Rule 60(1) of the *Rules of Court* allows the court in its discretion to award costs as a lump sum, as an alternative to a Tariff calculation.

[15] Lump sum costs awards are finding increasing favour with courts (*Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 (*Nova*) at para. 11) for several reasons. “Lump sum costs awards further the objective of the *Federal Courts Rules* of securing ‘the just, most expeditious and least expensive determination’ of proceedings” (*Nova* at para. 11). The *Rules of Court* of the Supreme Court of Yukon contain a similar objective in Rule 1(6): “the object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits...” The Court in *Nova* went on to say “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” (*Nova* at para. 11). Lump sum awards can be used for simple or complex matters. They save the parties time and money by making it unnecessary to calculate with precision the value of multiple steps in a proceeding. Instead, the overriding principle in awarding lump sum costs is reasonableness.

[16] In exercising its discretion, the Court must be guided by some principles and values. “It is not a matter of plucking a number out of the air” (*Nova* at para. 19). Court discretion is not unfettered and must be exercised prudently. A bill of costs is still relevant in lump sum awards as it can provide a useful starting point or guide for the

exercise of discretion. The underlying purposes and principles governing costs awards, as described above, are also relevant. Consistency and predictability in costs awards are important because they allow parties to make informed decisions about litigation risks and allow counsel to advise their clients properly (*Nova* at para.19).

[17] Some courts have adopted the practice of awarding lump sum costs as a percentage of actual costs, especially when dealing with sophisticated commercial parties. The range in the Federal Courts jurisprudence tends to be between 25% and 50%, with flexibility where a higher or lower percentage is warranted (*Nova* at para. 17).

Conclusion

[18] In this case, the relevant factors are as follows:

- the calculations in the Bill of Costs provided by the FNNND for use in this costs application;
- the nature of the litigation- the application addressed more than the immediate land use dispute; it also addressed important issues of the interpretation and effect of constitutionally protected modern Yukon First Nation-Crown treaties, particularly the rights set out in Chapter 11 of the Final Agreement on land use planning, initially denied by the Yukon government;
- the application provided a basis for an increased understanding of the role of modern treaties in advancing reconciliation between First Nations and non-First Nations;
- the two motions to strike brought by the Yukon government, both of which were successfully defended; and

- there was some complexity to the gathering of evidence and the legal arguments.

[19] While this lump sum amount is significantly lower than what was requested by counsel for FNNND, it is also significantly higher than the amount proposed by the Yukon government. I am mindful of the competing interests noted above of compensating the successful party as well as ensuring access to justice for the unsuccessful party, although in this case, it is less of a concern given that the unsuccessful party was the Yukon government, with the resources to respond to a petition such as this. However, this amount is approximately 25% of the full cost of legal fees incurred by the petitioner and is reasonable in all of the circumstances.

[20] I have reviewed the correspondence between the FNNND and the Yukon government and letter submissions to this Court about the use of the original bill of costs provided to the Yukon government for the purposes of attempting to resolve the costs without a court decision. I agree with the FNNND that while it would have been best practice to label the originally prepared bill of costs as privileged or without prejudice, the context in which it was prepared and provided to the Yukon government was one in which settlement privilege applies. As a result I have disregarded this bill of costs which the Yukon government attached to its submissions as well as their comments on specific items.

[21] The FNNND is entitled to a lump sum costs award of \$45,000, inclusive of disbursements and tax.

[22] Finally, my apologies to the parties for the tardiness of this decision.

Unfortunately, it was moved down my priority list and it inappropriately stayed there for far too long. I thank the parties for their patience and forbearance.

DUNCAN C.J.