CITATION: Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario, 2024 ONSC 3351
COURT FILE NO.: CV-18-594281-0000
DATE: 20230611

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Six Nations of the Grand River Band of Indians

AND:

The Attorney General of Canada and His Majesty the King in Right of Ontario

BEFORE: J.T. Akbarali J.

COUNSEL: *Iris Antonios, Max Shapiro, Robert Janes K.C., and Sanjit Rajayer*, for the plaintiff

Tania Mitchell, Maria Vujnovic, Cameron Fiske, and Tanya Muthusamipillai, , for the defendant The Attorney General of Canada

Manizeh Fancy, David Feliciant, Geoff R. Hall, Adam Goldenberg and Adriana Forest, for the defendant His Majesty the King in Right of Ontario

Nuri Frame, Alex DeParde and Conner Sipa, for the proposed intervener Mississaugas of the Credit First Nation

HEARD: In writing

ENDORSEMENT

Overview

[1] The defendant, The Attorney General of Canada, brought a motion seeking leave to examine three of its expert witnesses before trial.

[2] The parties resolved the motion in almost all respects. The only issues for me to adjudicate are the quantum of the payment of interim costs by Canada to the plaintiff, and the costs of the motion. The parties agreed I could do so in writing.

[3] I understand that the parties have agreed to to the appointment of a hybrid commissioner, but that this term may require further definition. If necessary, I will address that term with the parties at an appropriate time.

Interim Costs

[4] Under r. 36.01(5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court has discretion, if it considers it appropriate, to order the moving party to pay any other party in advance

of the examination before trial, any or all of the costs reasonably expected to arise from the examination, and related cross-examination and re-examination.

[5] Ontario does not seek costs from Canada. The Mississaugas of the Credit First Nation ("MCFN") have resolved the issue of interim costs with Canada, on the basis that Canada will pay MCFN $50,000 in interim costs. Canada and the plaintiff have not been able to reach agreement with respect to the quantum of the plaintiff's costs that Canada will pay.

[6] In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, at para. 23, the Court considered the role of costs as an instrument of policy, and held that courts should use costs awards to encourage settlement, deter frivolous actions and defences, discourage unnecessary steps in the litigation, and to advance the principle of indemnification.

[7] In determining the quantum of interim costs that is appropriate in this case, I find that the primary goal is indemnification. The examinations of the proposed witnesses before trial, who are elderly, and who I am advised are dealing with health concerns, is neither frivolous nor unnecessary. Nor will an award of interim costs in this case do anything to encourage settlement.

[8] It is thus the principle of indemnity that an interim costs award can address.

[9] Canada argues that I should order no more than $132,000 in interim costs, an amount it characterizes as generous, but does not explain. It relies on case law where it is the costs of the examination, such as the reporter's fees, and reporting facilities that is often ordered paid, and not the legal costs associated with the examination. According to Canada, legal fees are generally left for determination by the trial judge.

[10] However, that is not always the case. In *TD Insurance Home and Auto v. Sivakumar*, 2008 ONCA 835, the Court of Appeal considered a case where the insurer sought to preserve evidence of its expert witnesses in a case where no litigation had been commenced, and where the limitation period would not expire for a long time, because the issue related to an injury suffered by an infant. The court held that prejudice to the respondent could be addressed by an order requiring the insurer to pay all costs and expenses associated with the examination, including reimbursing the respondents on a full indemnity basis for their legal fees.

[11] Canada argues that costs of a party's lawyer are only ordered in exceptional circumstances like those in *Sivakumar*. However, given its agreement to pay MCFN $50,000, Canada appears to have accepted that it is appropriate in this case to pay something towards the other parties' legal fees.

[12] Payment of legal fees, in whole or in part, is consistent with the plain wording of r. 36.01(5), which makes it clear that a court can order any of all of the costs reasonably expected to arise for the other party. The quantum, like other determinations of costs, are in the discretion of the judge: s. 131, *Courts of Justice Act*, R.S.O. 1990, c. 43.

[13] The plaintiff seeks its partial indemnity costs of the examinations and their preparation which it estimates at between $603,141 and $861,630 depending on the length of the examinations. The plaintiff suggests that the framework used to determine quantum in security for costs motions is helpful, since courts are required to assess costs for future trial-related activities. It draws from

case law that has assessed the quantum of security for costs orders to determine appropriate multipliers to calculate preparation time having regard to the number of examination days.

[14] In my view, the security for costs framework is not helpful, because once security for costs has been ordered, there has been a determination that one of the preconditions for security for costs is met. Those preconditions deal with circumstances like (i) a non-resident plaintiff; (ii) a plaintiff with another proceeding pending for the same relief elsewhere; (iii) a plaintiff who has not paid an outstanding costs award; (iv) a nominal plaintiff where there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the party seeking security; (v) there is good reason to believe the proceeding is frivolous and vexatious, and that plaintiff has insufficient assets in Ontario to pay the defendant's costs, or (vi) a statute entitles the defendant to security for costs.

[15] These circumstances include situations where a defendant can be dragged into litigation, and particularly unmeritorious litigation, in which a plaintiff can shield itself from an adverse costs award. This case is nothing like cases in which security for costs is ordered. This is a serious case in which all the parties are resident in Ontario, and have the means to pay adverse costs awards. I do not find the security for costs framework helpful in this case.

[16] I am not convinced that the plaintiff is entitled to all of its partial indemnity costs arising out of these examinations. Rather, some of these costs are costs that the plaintiff would have incurred in any event, albeit later, at trial, were the examination to take place in the usual course. Those costs that would be incurred in any event are properly the purview of the trial judge, absent special circumstances.

[17] Having said that, I agree that there will be increased costs to the plaintiffs by reason of the examination before trial that are properly addressed through the application of r. 36.01(5). Work will necessarily be duplicated. The examinations are expected to take weeks. Much preparation will be required, and reasonably so by multiple timekeepers. Moreover, the work will have to be paid for before trial, requiring the plaintiff to incur expenses before it would normally expect to incur those expenses.

[18] I conclude that the quantum of interim costs in this case ought to negate any financial prejudice caused to the plaintiff as a result of having to conduct these examinations before trial. In my view, the prejudice at issue is the increased costs from work that will necessarily have to be duplicated, and the burden of having to incur the expenses for these examinations before they would otherwise be incurred.

[19] In my view, interim costs of $150,000 are fair and reasonable in the circumstances.

[20] The plaintiff's claim for the other costs associated with the examinations remain to be determined by the trial judge. I note for the sake of completeness that the parties disagree about whether the examinations ought to be played in their entirety at trial. The decision whether or not to do so will be up to the trial judge. If they are replayed in their entirety, arguably the parties will have suffered financial prejudice in that they will have had to sit through the examinations twice, doubling the costs of the attendance. I have not considered that potential duplication of costs in my costs determination. Nothing in these reasons is meant to restrict the arguments the parties may

wish to make at trial about further costs that may be duplicated as a result of any decision to replay the examinations in their entirety at trial.

Costs of the Motion

[21] I turn next to the costs of this motion.

[22] There are three main purposes of modern costs rules: to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 22.

[23] As I have noted, subject to the provisions of an act or the rules of this court, costs are in the discretion of the court pursuant to s. 131 of the *Courts of Justice Act*. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[24] Both the plaintiff and MCFN claim their costs. The plaintiff argues it is the successful party on the motion. MCFN argues that it was prepared to agree to the terms on which this motion settled long before Canada and Ontario agreed to those terms, and as a result, MCFN has incurred unnecessary costs. Both the plaintiff and MCFN claim costs against Canada and Ontario.

[25] Below, I consider the offers to settle the terms of the order that were made in this case, as they are relevant to both parties' costs arguments.

[26] At a relatively early stage of negotiations, the parties appeared to have reached agreement but for two issues. The contentious issues in the parties' negotiations were the quantum of the plaintiff's interim costs, and how objections would be dealt with at the examinations.

[27] On February 9, 2024, the plaintiff made an offer that, among other things, proposed that objections during cross-examinations of the expert by MCFN or Ontario would be addressed by direction from me forthwith. On February 15, 2024, MCFN made a counter-offer that preserved the plaintiff's proposal with respect to objections.

[28] On February 27, 2024 (the date by which most terms were agreed to), Canada proposed that objections, other than those based on privilege, be deferred to trial. Later that day, the plaintiff circulated revised terms that included appointing a commissioner to rule on objections as they arise. MCFN consented to this proposal. On March 8, 2024, Canada rejected the approach.

[29] On March 25, 2024, the plaintiff sought the parties' positions on a hybrid commissioner. The next day, MCFN agreed to this proposal. On April 3, 2024, Canada indicated its disagreement. On April 9, 2024, Canada brought its motion. At that time, the only terms in dispute were the

quantum of the plaintiff's interim costs, and the manner for dealing with objections. On April 12, 2024, Ontario agreed with Canada's position.

[30] Subsequently, the plaintiff took the position that Canada had not established the need to examine any of the witnesses before trial. The plaintiff noted deficiencies in Canada's evidence. I agree there were deficiencies, in particular with respect to the health concerns of the experts. On the other hand, Canada likely did not source the proper evidence on that point because it understood that the terms of the examinations were in dispute, not the need for the examinations. Canada responded to the plaintiff's concerns by filing a supplementary record that, in my view, did not properly fill the evidentiary gaps from its first record.

[31] At a case conference a few days before the motion on another issue, I raised with Canada my concerns about the quality of some of its evidence. I also raised with the plaintiff the prospect that if the motion was not granted, and the experts thereafter became unable to give evidence at trial, it was possible that further delay in advancing this matter to trial would arise to deal with the prejudice to Canada from the loss of its witness(es).

[32] Late in the day before the motion, I was advised that the parties had reached agreement on all terms except for the quantum of the plaintiff's interim costs. Ontario and Canada agreed to the appointment of a commissioner. The motion proceeded in writing, only on the question of the quantum of the plaintiff's interim costs, and costs of the motion.

[33] With respect to negotiations on the quantum of the plaintiff's costs, neither party beat their best offer, but my award is closer to Canada's ceiling than it is to the plaintiff's floor.

[34] Both the plaintiff and MCFN seek their costs from Canada and Ontario on a substantial indemnity scale. They rely on offers made, and on the conduct of Canada and Ontario.

[35] Canada and Ontario argue that no costs should be awarded on this motion whatsoever.

Should costs be awarded?

[36] Generally, costs are not awarded when the parties settle, absent exceptional circumstances: *Muskala v. Sitarski*, 2017 ONSC 2842, at paras. 5-12, *Waterloo North Condominium Corporation No. 161 v. Redmond*, 2017 ONSC 1304, at para. 34. I adopt the reasoning in these cases.

[37] While much of the parties' energies have been devoted to discussing the contentious terms, I repeat that most of the terms relating to evidence preservation were agreed to early on.

[38] The plaintiff's late reversal of its position on whether the evidence ought to be preserved complicated matters. At the same time, Canada cannot be certain that, on its record, supplemented after the plaintiff raised concerns about the sufficiency of the evidence, it would have succeeded in obtaining an order for the preservation of evidence. Although Canada relied on the health challenges faced by its experts, there was no evidence in the record to that effect that was not hearsay.

[39] MCFN's concern in the motion was in preserving its ability to cross-examine Canada's witnesses. Neither Ontario nor Canada opposed its right to do so. The plaintiff was concerned

about the scope of cross-examination. MCFN agreed early on with the plaintiff about how to deal with objections. On the eve of the motion that issue was settled consistent with the position MCFN and the plaintiff had taken earlier, but as I have noted, part of that global settlement included an order that Canada's witnesses' evidence would be taken before trial.

[40] I conclude that the parties all compromised their positions to reach the partial settlement. With respect to the quantum of the plaintiff's costs, neither the plaintiff nor Canada were wholly successful.

[41] There are no exceptional circumstances in this case. The parties ought to bear its own costs.

[42] The issue is even starker when one considers the claims for costs against Ontario. Ontario was a responding party. It offered a factum supporting Canada's position that was due on the same day the plaintiff and MCFN's factums were due. Ontario did not engage in any conduct warranting the court's disapproval, nor did its conduct increase the plaintiff and MCFN's costs.

[43] Moreover, the settlement the parties reached provided for costs of the motion to be determined as against Canada. The timetable I set for exchange of submissions did not contemplate Ontario delivering responding submissions.

[44] Even if I were of the view that costs ought to be awarded in the plaintiff's favour, I would not have made the order as against Ontario for these reasons.

Conclusion

[45] In summary I make the following orders:

a. Canada shall pay to the plaintiff its interim costs of $150,000 for the financial prejudice the plaintiff will suffer as a result of the examination of Canada's three witnesses before trial;

b. If the trial judge orders that the examinations taken outside of court be played at trial, any party may seek the duplication of costs arising therefrom, which costs are reserved to the trial judge to determine;

c. The remaining costs of the examinations are reserved to the trial judge; and

d. No costs are ordered with respect to this motion.

J.T. Akbarali J.

Date: June 11, 2024