

COURT FILE NO.: 406/95

DATE: 2001/07/30

SUPERIOR COURT OF JUSTICE - ONTARIO
Proceedings Commenced at Brantford

RE: SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS and THE
ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO

BEFORE: THE HONOURABLE MR. JUSTICE J.C. KENT

COUNSEL: B.A. Jetten and K.E. Nicolson for the Plaintiff

M.D. Parayeski as agent for the Defendant, The Attorney General of Canada

ENDORSEMENT - RE: COSTS

Background

[1] On a motion returnable 11 September 2000 respective counsel for Six Nations and Canada consented to an order which in paragraph (3) provided that :

“The defendant the Attorney General of Canada shall pay forthwith to the plaintiff, Six Nations, the plaintiff’s costs of this motion through today’s date (September 11, 2000) to be fixed on a basis as between a solicitor and his or her own client, with such costs to be assessed by the Honourable Mr. Justice Kent by further order unless otherwise agreed between the parties.”

[2] The motion returnable 11 September 2000 had arisen as a result of answers provided by Canada to written discovery questions and particulars provided by Canada. Six Nations took the position that the answers provided and the reply to the demand for particulars were unresponsive. Six Nations requested that sanctions be imposed to ensure compliance with an earlier order of this Court made 27 July 1999. Before argument of the motion commenced on 11 September 2000, counsel for both Six Nations and Canada consented to adjourning the motion *sine die* on certain terms. One of the terms was that Canada pay the plaintiff’s costs as set out in the portion of the order above. Counsel advised that in discussions between counsel prior to Canada

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providing its consent to the 11 September order an approximate global range of costs was discussed.

[3] The parties having been unable to achieve agreement as to the quantum of costs, this Court is required to make an assessment pursuant to paragraph 1(3) of its order made 11 September 2000 as set out above.

[4] Counsel for Six Nations prepared and served a costs brief. Counsel for Canada appointed an agent to deal specifically with the costs issues. Written submissions were made by Canada's agent and a written reply was delivered by counsel for Six Nations. On 5 June 2001, I heard brief oral submissions on the costs issues and then reserved my decision on costs.

Standard To Be Applied

[5] This is an assessment of costs based on the solicitor's bill to its own client. The client (or Canada as the party in place of the client) is entitled to have a standard of reasonableness applied. Unless the bill rendered to Six Nations reflects work unreasonably done, or expenses unreasonably incurred, Six Nations is entitled to full indemnity by Canada for the account rendered 30 October 2000, in the total amount of \$174,389.86, which includes disbursements of \$13,301.86.

The Objections

(a) Use of multiple counsel

[6] Canada submitted that it was unreasonable for Six Nations to utilize multiple counsel on the motion. The use of multiple counsel was the method by which Six Nations conducted this litigation. Multiple counsel were utilized on the 1999 motion and in a matter of this nature the use of multiple counsel is not unreasonable. It is perhaps unusual to employ two senior counsel,

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but one cannot help but note that Canada deemed the complexity of the issues sufficient to do the same.

[7] While the combined solicitor time docketed by counsel for Six Nations, a total of 713.8 hours, seems, upon initial examination, to be high, the hourly rates billed are not inappropriate: senior counsel at \$350 and \$400 per hour with junior counsel at \$130 per hour. When one considers that this motion and the preceding motion out of which it flowed encompass both hotly contested and extremely complex issues, the number of hours expended cannot be said to be unreasonable, particularly when approximately 2/3 of those hours were docketed by the junior counsel.

(b) Excessive time docketed and lack of meaningful particulars in dockets

[8] There is no evidence to support this assertion. There is no basis to infer that work was not done as docketed and billed. Nor is it appropriate to assume that, just because a junior averages 39.3 docketed hours per week on a motion for a 12-week period, it is nothing more than a "most valuable learning experience." Six Nations counsel in reply submissions have fully and satisfactorily responded to these objections.

(c) Repetitive effort

[9] Canada argues that because the issues are "strikingly similar" to the issues on the 1999 motion, much of the work in preparing for the September 2000 motion must have been repetitive. The 1999 motion addressed the propriety of the Six Nations written discovery questions and demand for particulars. Canada, to a very significant extent, had refused to answer written discovery questions as improper. Canada had refused to reply to the demand(s) for particulars. The 1999 motion focused upon those refusals. The September 2000 motion focused on Canada's alleged failure to provide responsive answers. The motions were not, therefore, strikingly similar.

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(d) Excessive disbursements

[10] Canada questions the travel expense total of \$469.96, the computer research total of \$781.09 and the duplicating costs of \$11,624.24.

[11] Only \$10,134.35 of the duplicating costs can be tracked directly and precisely to this motion. The duplicating costs are calculated at 25 cents per page, plus the additional associated costs of binding, tabbing and covering the various documents. The extent of the duplicating will be further addressed as a general consideration. The copying costs per page however is not unreasonable.

[12] The travel expenses are comprised of hotel rooms for three counsel, plus travel costs between Toronto and Brantford. It is not unreasonable for out-of-Brantford counsel to arrive in the city the night prior to the commencement of a motion, particularly when it is necessary to arrive early at court with all of the many briefs and materials needed for the motion.

[13] The amount paid for computer research, in view of the complexity of the issues before the Court, is certainly not unreasonable.

Considerations

[14] One must remember that this is an assessment on a solicitor and his or her own client basis. The client, Six Nations, had no way of knowing that Canada would be ordered to provide an indemnity for costs incurred by Six Nations. Counsel for Canada at the time consent to the order was provided on 11 September 2000, was informed and therefore aware of the approximate global range for expected costs.

[15] This Court takes the view that trials and even motions in cases of this nature are appropriately conducted with a team effort and approach. Such an approach, however, does require an overlap of counsel and other staff time for reporting and discussing. The team approach also results in additional duplicating of materials. While it is arguable that a client

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benefits from a team approach, particularly when considerable effort is expended by junior counsel, the client should not have to bear the full cost of the overlap(s) of counsel and staff time. A small discount is therefore required to ensure that such is the case when a team approach has been utilized. In all of the circumstances of the present situation, an appropriate discount would be five percent. The total fee allowed must therefore be reduced by five percent and that factor should also be applied to further reduce the duplicating disbursement.

Result

[16] For the above reasons, total fees are assessed as billed to client less five percent. Total disbursements are allowed as billed to client save and except for duplicating costs, which are allowed at \$10,134.35, less five percent.

Order accordingly.

Supplementary Bill of Costs

[17] Six Nations asks for the additional solicitor and client costs it has been compelled to incur from the date that Canada required that the solicitor and client fees and disbursements be assessed and fixed by this Court. They do not seek recovery of the costs incurred in connection with the preparation of the original bill of costs and associated correspondence. The supplementary bill of costs provides for fees of \$10,792 and disbursements of \$225 for a total of \$11,017. The original consent order provided for costs to 11 September 2000, to be fixed on the solicitor and his or her own client basis. It would be appropriate therefore that costs incurred and reflected in the supplemental bill of costs be fixed only on a party and party basis rather than solicitor and client. The supplementary costs are therefore fixed at fees of \$6,000 and disbursements of \$225.

Order accordingly.



Kent, J.

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