CITATION: Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, 2023 ONSC 4476
COURT FILE NO.: CV-18-594281-0000
DATE: 20230801

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, Robert Janes K.C., Laura Dougan, and Brittany Town* for the plaintiff

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

Manizeh Fancy, David Feliciant, Jennifer Le Pan, and Aaron Grimes, for the defendant The King in Right of Ontario

HEARD: June 30, 2023

ENDORSEMENT

Overview

[1] In these reasons, I address the plaintiff's motion to amend its statement of claim, and the terms sought by the defendants if the amendment is granted. I also address the cross-motion brought by the Attorney General of Canada seeking that certain words from the plaintiff's existing pleading and the proposed amended pleading be struck.

Brief Background

[2] In this action, the plaintiff, Six Nations of the Grand River Band of Indians ("SNGR") seeks an accounting and compensation for what it alleges are the breaches of duty and treaty obligations by the Crown defendants dating back to 1784, the time of the Haldimand Proclamation.

[3] SNGR argues that the Haldimand Proclamation set aside lands along the Grand River for the Haudenosaunee people who wished to settle there, and their progeny, as compensation for the homes and property that the Haudenosaunee lost after the American Revolution, during which the Haudenosaunee had been allies of the British Crown. SNGR states that today, it has the use of less than 4.8% of the lands reserved by the Haldimand Proclamation.

[4] The action is over 28 years old, and is extremely complex. The breadth and the depth of the issues raised in this action are significant. The action covers about 250 years of history and involves a large tract of land. The dispute between SNGR and the Crown defendants concerns the extent of the lands set aside by the Crown, whether certain lands were properly alienated, and whether the Crown properly managed and accounted for SNGR's monies.

[5] This action was transferred to Toronto in late 2017. Justice Sanfilippo began case managing it in January 2018; I was appointed case management judge in the fall of 2022.

[6] During the case management process, Sanfilippo J. ordered the bifurcation of the trial into phase one, to address liability, and phase two, to address damages and the cross-claims between the defendants.

[7] Although the action has made significant progress towards phase one of the trial, the parties continue to disagree over the scope of the issues for trial. Despite exchanging issues lists, and the plaintiff's answering of undertakings, written interrogatories and delivery of expert reports, the identification of issues for trial remains a contentious issue between SNGR and the defendants, the Attorney General for Canada ("Canada") and His Majesty the King in Right of Ontario ("Ontario").

[8] For that reason, in an endorsement dated December 19, 2022, *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario*, 2022 ONSC 7158, I directed the defendants to deliver demands for particulars and further written interrogatories designed to seek clarity over the scope of issues to be litigated. I directed the plaintiff to either respond to the demands for particulars and written interrogatories or, because it had indicated it was considering amending its claim, deliver an amended statement of claim that addressed the issues the defendants identified as requiring clarity.

[9] The plaintiff chose to deliver an amended claim, which is the subject of the motions before me. That claim was delivered on February 3, 2023, and as such, had been in the hands of the defendants for some five months by the time these motions were heard.

[10] The defendants argue that the proposed pleadings amendments add new claims and refocus other claims such that the claim is meaningfully different, and as a result, they require additional time to prepare and deliver expert evidence to respond to the claim. SNGR argues that the claims have been part of the action all along and the amendments do nothing more than add particulars. SNGR objects to any extensions of time for the defendants to deliver expert reports.

[11] In its cross-motion, Canada argues that SNGR pleads by example in both the current pleading and the proposed amended pleading. It states that the time has come for SNGR to close the list of issues to be dealt with at trial, or new claims may continue to be added, complicating the trial preparations and the trial itself, causing delay, and causing prejudice to the defendants in that they will not know the case they have to meet.

[12] For its part, SNGR argues that the pleadings by example are reflective of the fact that they plead a comprehensive claim of breach of duties and obligations owed to them by the Crown in

respect of the Haldimand Tract and they do not know all of the breaches of duties. One remedy sought is an accounting of the Crown's dealings with the Haldimand Tract. They argue that they will use the examples of the breaches of duties that they have identified to argue that the trial judge should order an accounting that covers all of the transactions that occurred on the lands, and not only those specifically identified in the statement of claim. If such an accounting is impossible, they will seek equitable compensation relating to the entirety of the dealings on the Haldimand Tract, not just the specific examples that will be litigated.

Issues

[13] These motions require me to decide the following issues:

a. Should certain words be struck from the existing pleading and the proposed pleading, using the court's jurisdiction under rr. 25.11 and 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194? This requires me to consider the points in the pleading and proposed pleading where the plaintiff pleads breaches of duty by way of example.

b. Should leave be granted to allow the plaintiff to amend its claim? Subject to the question of the pleadings by example, and the terms, which I deal with below, the defendants do not challenge the amendments.

c. If leave is granted to amend the plaintiff's claim, what terms are required to mitigate any prejudice accruing to the defendants?

The Cross-Motion

[14] I begin with Canada's cross-motion, supported by Ontario, for an order striking certain words from the pleading and proposed pleading under rr. 25.11 and 26.01, with leave to amend. Logically, the result of it will define the nature of the pleadings amendments that are sought in SNGR's motion to amend.

[15] Rule 26.01 provides that, at any stage of an action, the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[16] Rule 25.11 provides, in part, that a court may strike out or expunge all or part of a pleading, with or without leave to amend, on the ground that the pleading may prejudice or delay the fair trial of the action.

[17] Canada has brought its cross-motion because it seeks to strike words from the current statement of claim as well as the proposed amendments. It relies on r. 25.11 because the court's jurisdiction under r. 26.01 to refuse amendments does not extend to striking words in the existing claim. But fundamentally the argument is the same: the defendants argue that pleadings by example are improper.

[18] I do not propose to review each of the pleadings that are identified by Canada as being pleadings by example. They are identified with particularity in Appendix B to Canada's factum on its cross-motion. It suffices to give one example. At para. 24 of the further amended statement of claim, SNGR pleads, "[t]he following are some examples of the breaches of the Crown's obligations to the Six Nations hereinbefore described." Canada would delete "some examples of" from the sentence to close the category of breaches claimed.

[19] The defendants invoke Binnie J.'s words in *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 ONSC 56, at paras. 40-41:

> The statement of claim…defines what is in issue. The trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight.

[20] The argument rests on the premise that, unless the categories are closed, SNGR may expand its claim, to add new transactions and new claims, to which the defendants cannot possibly respond.

[21] The defendants argue that closing the categories that remain open through the use of pleadings by example is necessary to ensure that the claim is pleaded in accordance with the requirements of our law and to meet the purposes of pleading. That is, the claim must (i) give precise notice to the opposite party of the case which is to be met; (ii) assist the court in understanding the material facts alleged and the factual and legal issues in dispute between the parties; (iii) establish a benchmark against which the parties and the court may determine the relevance of evidence on discovery and at trial and the scope of the evidence which will be required to fairly and efficiently address the issues in dispute: *Cequeria v. Ontario,* 2010 ONSC 3954, at para. 12.

[22] Ontario argues that the pleadings by example are irrelevant, lack material facts, and may prejudice and delay the fair hearing of the trial. It argues that the pleadings by example serve no purpose, because they do not provide material facts, allege a cause of action, or claim relief. It points to *West Moberly First Nations v. British Columbia*, 2018 BCSC 730, where, in the context of Aboriginal rights litigation, the British Columbia Supreme Court considered whether pleadings by example warranted an order for particulars. At para. 50, the court quoted from Binnie J. in *Lax Kw'alaams*, at para. 12:

> At this point in the evolution of Aboriginal rights litigation, the contending parties are generally well resourced and represented by experienced counsel. Litigation is invariably preceded by extensive historical research, disclosure, and negotiation. If negotiations fail, the rules of pleading and trial practice are well understood. Tactical decisions are made on all sides. It is true, of course, the Aboriginal law has as its fundamental objective the reconciliation of Canada's Aboriginal and non-Aboriginal communities, and that the special relationship that exists between the Crown and the Aboriginal peoples has no equivalent to the usual courtroom antagonism of warring commercial entities. Nevertheless, Aboriginal rights litigation is of great importance to

> non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both. The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the *Constitution Act, 1982*, must be determined after a full hearing that is fair to all the stakeholders.

[23] In the result, the court in *West Moberly* found that the deficiencies identified were not technical, but went to the ability of the defendants to know the case they had to meet. The court required the plaintiffs to particularize what they meant when they used the terms "include", "including", "included," and "include but not limited to", holding that "the plaintiffs must either close the list or provide the additional information upon which they rely".

[24] I take no issue with the law the defendants have cited, nor with the proposition that it is essential that pleadings allow the defendants to know the case they have to meet. In many cases, pleadings by example will offend the rules of pleadings because they will not adequately define the issues in dispute.

[25] It is for that reason that, in my December 19, 2022 case management endorsement, I noted the lack of clarity about the plaintiff's case, which made it difficult for the defendants to take steps to meet it, and wrote that, "[a]t this stage in the action, having delivered its expert reports, the plaintiff ought not need to rely on pleading by way of example any longer, but ought to be able to identify the bases for its claims fully".

[26] Since I wrote those words, I have had the benefit of reviewing the plaintiff's proposed amendments and hearing two pleadings motions over the course of a day, brought on evidence.

[27] SNGR has indicated it does not seek to file further expert evidence, except in reply to the defendants' expert reports. It has clarified the specific claims it alleges in the proposed amendments.

[28] In the circumstances of this case, the pleadings by example serve a relevant purpose. They lay the foundation for SNGR to eventually say to the trial judge, in the remedy phase of the trial if it reaches that stage: "Look at all these examples we have proven in which the Crown breached its treaty and fiduciary obligations to us. We don't know what else they did wrong, but the many examples we have proven make it reasonable to infer they committed other breaches of duty too. The Crown is the fiduciary and we have given you enough evidence to direct them to account for everything they did with these lands that were reserved for us. And if they cannot, you must assess the equitable compensation to which we are entitled, and you should assess it having inferred there are other breaches of duty we don't know about."

[29] The defendants will surely have something to say about that argument if and when the parties get there; they can make their arguments at the appropriate time. At this point, were I to strike the pleadings by example, I would in effect be foreclosing the ability of SNGR to advance their claim for a complete accounting without having adjudicated it on the merits. I decline to do so.

[30] In my view, taking a functional approach to pleadings, as directed by the Supreme Court of Canada in *Tsilhqot-in Nation v. British Columbia*, 2014 SCC 44, at para. 20, the pleadings by example do not change the fact that the material allegations and relief sought is now clearly pleaded in the statement of claim. There is no practical danger that SNGR, which seeks to advance to trial as quickly as possible, is going to advance an entirely new specific claim before trial, when it has delivered its expert evidence, and just carefully amended its pleading. However, to ease the defendants' concerns, I direct that the plaintiff shall not introduce any expert evidence, apart from reply expert evidence, without leave.

[31] For these reasons, I dismiss Canada's cross-motion. The pleadings by example in the current statement of claim and in the proposed statement of claim, are not improper in the circumstances of this case and shall not be struck.

SNGR's Motion to Amend

[32] SNGR moves to amend its statement of claim under r. 26.01.

[33] The law regarding motions to amend pleadings is well-developed. In *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42, at para. 25, the Court of Appeal summarized the principles that apply [cites omitted]:

- The rule *requires* the court to grant leave to amend unless the responding party would suffer non-compensable prejudice; the amended pleadings are scandalous, frivolous, vexatious or an abuse of the court's process; or the pleading discloses no reasonable cause of action;

- There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source.

- Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial.

- Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial.

- At some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed.

[34] I note that the defendants do not challenge the validity of the proposed amendments from a substantive point of view. That is, there is no argument (apart from that raised on the cross-motion, which I have already dealt with) that the amendments are scandalous, frivolous, or vexatious, or disclose no reasonable cause of action.

[35] The defendants' position on the pleadings amendment motion is that they will be prejudiced if appropriate terms are not ordered with respect to the delivery of expert reports to respond to the amendments. I also note that SNGR, in its proposed draft orders, acknowledges that some terms are required, and in particular, that the defendants require some time to deliver expert evidence that responds to the amendments. The real departure between the parties is what timetable is required to mitigate the prejudice.

[36] Despite the fact that the parties seem to agree that the defendants require some time to deliver further expert evidence, the parties spent significant time at the motion going over the history of the pleadings to demonstrate whether the amendments are merely particulars of claims that have been long extant, or new or refocused claims that significantly change the landscape of the litigation.

[37] The answer is that SNGR and the defendants are both correct to a degree. Some claims have long been referred to in the claim, and are merely particularized by the amendments. Others are new. I do not propose to review each claim in respect of which the parties debated its origin story. A couple of examples suffice.

[38] I accept SNGR's argument that the claim has always been a reserve-based claim. For example:

a. In para. 13 of the claim, SNGR pleads that "the Imperial Crown agreed as hereinafter described to formally reserve for the Six Nations a large tract of land within the Six Nations Aboriginal Lands for the exclusive possession and settlement of the Six Nations so that those lands could be enjoyed by the Six Nations and their descendants forever".

b. The claim makes reference to "surrender" of lands, which terminology links it to a reserve-based claim, as in *Blueberry River Indian Band v. Canada*, 1995 CanLII 50 (SCC)[1].

c. In para. 74 of Canada's defence, it states that the Haldimand Proclamation "set out the extent of the Six Nations reserve lands that reflected the decisions made by the Six Nations Council, including its decision to retain approximately 50,000 acres as its reserve".

d. In para. 19 of Ontario's defence, it states that "The Crown granted to the Six Nations by the Simcoe Patent all of the lands which the Six Nations were entitled to have reserved for them under the Haldimand Proclamation."

[1] That "surrender" is a term used in relation to reserves was also admitted by Canada's witness on cross-examination.

e. Canada's witness on the motion, Joyce Harkins, gave evidence on cross-examination that she always understood SNGR's claim was a reserve claim, and that Canada's and Ontario's defences addressed the Haldimand Tract as being a reserve.

f. At an examination for discovery held on December 4, 2000, counsel for Canada stated that SNGR did not have to prove Aboriginal title because "it is reserve land…It is accepted that they have an interest in those lands." He went on to indicate that the "reserve lands" were "[i]nitially, the Haldimand, that is clarified by the Simcoe Patent and, currently…" Unfortunately, at this point, the answer trailed off, but was nonetheless adopted by Canada's witness.

g. In a case management endorsement dated October 19, 2001, Kent J. recorded some answers given to a request to admit, including an answer given by Canada that included the statement, "…it is Canada's position that the interest that the Six Nations has in its reserve lands is the same interest that other First Nations have in their aboriginal title lands".

[39] However, I am satisfied that other claims described in the proposed amendments, such as SNGR's claims involving Surrender 38, are new. Surrender 38 was part of the original statement of claim, but was subsequently removed from the claim, and added back through the proposed amendments. Thus, while Surrender 38 claims were part of the claim at the beginning, they have not continuously been part of the claim from the beginning, and the defendants will need time to respond to Surrender 38 claims through expert evidence.

[40] Because there are new claims raised in the proposed amendments, in order to remedy any prejudice, the defendants require adjustments to the timetable, and in particular, time to prepare and deliver expert reports in response. The question is what amount of time is reasonably required for the purpose.

[41] Canada argues that the court ought to approach the question of timelines through a mediative process in case management. I am not inclined to do so. This litigation needs to move to trial, ideally before it enters its fourth decade. Timelines will allow everyone to know what to expect, and what to work to.

[42] In support of its argument that significant time is needed, Canada's witness indicates that generally, it takes three to six months to formally retain an expert by contract, and experts cannot begin work until a contract is executed. The retainer process includes identifying an expert, checking for conflicts, discussing the scope of work and expert availability, reviewing the expert's costs proposal, undertaking a security clearance, preparing contract documentation and obtaining approval of the expert's contract. Once approvals are obtained, it can take "at least" two to three months to execute the contract.

[43] According to Canada, five of its reports are affected by the proposed amendments, which will require both, an expanded mandate for some experts and the retention of additional experts. Canada states that it has confirmed availability of some of its experts to take on revised mandates,

although most are not able to begin until 2024, and in one case, not until the fall of 2024. Canada also estimates nine new additional expert mandates will be required. Canada cautions that it can often take years for an expert to produce a report.

[44] Ontario has also adduced evidence in support of the extensions of time it seeks. One of its affiants deposes that counsel will require approximately six months to "properly consider and obtain advice and instructions on the new issues" raised in the pleadings amendments to prepare and deliver an amended defence. Ontario states it will likely have to retain new experts. One of its witness deposes that, in Indigenous litigation "it generally takes several years between when counsel first identify the need for an expert until the delivery of a report by that expert for service on opposing parties".

[45] Like Canada, Ontario explains it has formal approval processes in place, to ensure accountability and cross-government support for decisions made for litigation.

[46] One of Ontario's affiants explains that experts who have already been retained could produce reports on a discrete topic in three months, while more complicated topics could require as long as eight months, and these estimates could more than double if a new expert were retained. According to Ontario, some of its experts are unable to begin work on any new or expanded report until 2024. In one case, an expert identified by Ontario would not be able to deliver a report until May 2025 at the earliest.

[47] The defendants also adduced an affidavit on this motion by Stéphanie Béreau, who holds a Ph.D. in history and civilization and works as a full-time historical consultant. She has delivered an expert report providing "a general overview of the nature of the work of experts, with an emphasis on the specific challenges they may face". Dr. Béreau is careful to indicate that her report "is not an opinion on the specific challenges encountered by the experts retained by the parties in this case, as [she] is not otherwise involved or retained as an expert in the Six Nations case."

[48] SNGR did not object to the admissibility of the proposed expert report, and the defendants made no argument with respect to its admissibility. Nonetheless, the court retains a gatekeeper function over the admission of expert evidence, and as a result, I must evaluate Dr. Béreau's proposed expert evidence through the two-stage analysis set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015]2 S.C.R. 182, at paras. 19 and 23, citing *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, at pp. 20-25.

[49] In my view, the proposed expert evidence is inadmissible because it fails, at the first stage of the analysis, to meet the threshold requirements that it be relevant and necessary.

[50] Without criticizing Dr. Béreau in any way, a general report about common challenges faced by historians does not assist me in determining the issues on this motion. In this case, many of the experts have been long retained. The issues about which the defendants have to adduce additional expert evidence have been developed in SNGR's expert evidence, most of which has been in the defendants' hands for well over a year. Many of the issues the defendants characterize as new are not new at all. The original timetable envisioned responding reports from the defendants within six months. The research process Dr. Béreau explains does not speak to these circumstances. In

that sense, it is neither relevant to the question of what the defendants' particular experts require, nor is it necessary for me to determine what timeline ought to be set for the delivery of expert reports that respond to the pleadings amendments.

[51] The fact evidence put forward by the defendants, described above, reveals byzantine processes to retain an expert.

[52] I understand that the issues in this litigation are important to all Canadians. I understand that the defendants must be responsible in their management of the litigation, and that they are, broadly speaking, accountable to Canadians for their management, and the costs, of this litigation.

[53] But the defendants speak about accountability as if it is a peculiar burden borne by government. Almost every litigant is accountable in some fashion. Corporations are accountable to their shareholders. Individuals may be accountable to their families. Partners are accountable to each other. The defendants' accountability to Canadians does not give them a free pass to insist on timelines that would be unreasonable in any other litigation because the defendants have chosen to put in place unwieldy processes to deal with expert evidence. There is not even any evidence that their labyrinthine process are necessary to ensure accountability. I note that the defendants managed to jointly retain and deliver a report from Dr. Béreau on a timeline much faster than the ones they explain in their affidavits.

[54] Moreover, in addition to the defendants' accountability to Canadians for their management of this litigation, they are also accountable to Canadians, including Indigenous Canadians, for the work they are doing to advance reconciliation. Yet the defendants ask for open-ended timelines, or years-long timelines, in nearly 30-year-old litigation because, among other things, they have no control over how long it takes to run security clearances on experts who are being retained to give opinions on historical events. The defendants' positions are decoupled from the necessary groundwork to advance reconciliation, even in the context of (adversarial) Indigenous litigation.

[55] Simply put, if the defendants' byzantine processes mean they require years more to produce responding expert reports, those processes must yield to meet the needs of this litigation.

[56] With respect to the needs of the experts themselves, I note that neither defendant has given me evidence from any involved or proposed expert to set out what they require. Nor do I have a clear understanding of why it is necessary for everyone to wait for some experts the defendants have identified (although not disclosed) to become available, as opposed to replacing them with other experts who have earlier availability. The defendants have chosen to shelter their experts behind their litigation privilege; they are entitled to do so. But that is a choice they have made which also impacts the nature of the evidence available to me on which to determine an appropriate timeline for delivery of expert reports.

[57] In these circumstances, I grant the pleadings amendments proposed by SNGR, on the following terms:

a. Amended statements of defence shall be due within 45 days of the date of these reasons;

b. By November 30, 2023, the parties shall delivery any supplementary productions;

c. Any expert evidence on which the defendants intend to rely that is responsive to the pleadings' amendments shall be delivered by March 30, 2024.

[58] I note this deadline for expert evidence is nearly two years after the delivery of much of SNGR's expert evidence, and over a year after delivery of the proposed pleadings amendments, in circumstances where many of the amendments are mere clarifications of existing pleadings, and where the original timeline foresaw responding expert reports within six months of delivery of SNGR's reports. In my view, this is a generous timeline.

[59] The terms I have ordered do not address the timing of the steps required by the Mississaugas of the Credit First Nation, which gained party intervener status in my reasons of June 14, 2023 (*Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario*, 2023 ONSC 3604), and which did not participate in this motion. Nor does it address other steps, including delivery of reply expert reports from SNGR. I direct the parties to schedule a case management conference with me to timetable other necessary next steps not addressed in these reasons.

Costs

[60] At the hearing of the motion, I proposed that the parties deliver their costs submissions in writing, and once I had written the reasons on the merits of the motions, I would review the costs submissions and any offers to settle that had been made, and make a determination as to costs. The parties were agreeable to this proposal, and it is the process I have followed.

[61] SNGR seeks its costs of this motion on an elevated scale from the defendants, arguing that the defendants' conduct caused SNGR to incur costs that should have been unnecessary. Its costs outline supports partial indemnity costs of $118,248.68, and substantial indemnity costs of $172,543.88, both amounts inclusive of HST and disbursements.

[62] Canada and Ontario argue that no costs ought to be awarded in relation to the pleadings motions, and that if costs are awarded, they ought to be awarded on a partial indemnity scale.

[63] The three main purposes of modern costs rules are 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, at para. 22.

[64] 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*, R.S.O. 1990, c. C.43. 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 (Ont. C.A.), at para. 38. 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.

[65] In my view, the defendants have not conducted themselves in a manner that warrants an award of elevated costs. Although I have found that the terms they sought with respect to timetable adjustments were not warranted, it does not follow that their conduct in the motion was unreasonable.

[66] At the same time, I decline to adopt the position advanced by the defendants that SNGR is not entitled to costs because it could have brought its pleadings amendment motion earlier. That submission ignores the ongoing refinement of pleadings in Indigenous cases, including, as the Supreme Court of Canada has noted, through the course of trial: *Tsilhqot'in Nation v. BC*, 2014 SCC 44, at paras. 20-23. Moreover, SNGR's amendment of the pleadings grew out of concerns addressed in the case management process. There is nothing to criticize in SNGR's conduct with respect to this motion.

[67] Rather, this is an appropriate case for costs to follow the event. Canada's cross-motion has been dismissed. The pleadings amendments have been allowed. The timeline I have ordered, while longer than that proposed by SNGR, including in its offer to settle, is significantly shorter than that proposed by the defendants. SNGR is thus the successful party on the motion and is presumptively entitled to its costs.

[68] In assessing the quantum of costs that is fair and reasonable, I note that:

a. the motion records, including the transcript briefs, were lengthy;

b. the issues were of great importance to all parties;

c. all parties devoted significant resources to the motions;

d. some of SNGR's claimed costs relate to the amendment of the pleading itself, as distinct from the motion. The costs of amending the pleading are properly costs of the action, not of the motion;

e. the time spent by SNGR's counsel on the motion is significant, but not unreasonable in the circumstances of this motion;

f. the defendants did not make any submissions with respect to the time they spent on the motions;

g. SNGR's counsel delegated work between different timekeepers to manage costs.

[69] Considering these factors, and the purposes of costs awards, I conclude that it is fair and reasonable for the defendants to pay, jointly and severally, SNGR's partial indemnity costs fixed at $90,000 all-inclusive. Costs shall be paid within thirty days.

Conclusion

[70] In summary, I make the following orders:

a. The plaintiff's motion to amend its statement of claim is granted;

b. Canada's cross-motion to strike portions of the plaintiff's claim and proposed amended claim is dismissed;

c. Amended statements of defence shall be due within 45 days of the date of these reasons;

d. By November 30, 2023, the parties shall delivery any supplementary productions;

e. Any expert evidence on which the defendants intend to rely that is responsive to the pleadings' amendments shall be delivered by March 30, 2024;

f. The parties shall schedule a case management conference with me to timetable other necessary next steps not addressed in these reasons;

g. Within thirty days, the defendants shall, jointly and severally, pay the plaintiff's costs of these motions fixed at $90,000 all-inclusive.

J.T. Akbarali J.

Date: August 1, 2023