CITATION: Couchiching v. Canada (A.G.), 2018 ONSC 5051
COURT FILE NO.: CV-98-0910
DATE: 2018-08-24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Couchiching First Nation, Naicatchewenin First Nation, Nicickousemenecaning First Nation and Stanjikoming First Nation	)	M. McPherson, for the Plaintiff
Plaintiff	)	
– and –	)	
The Attorney General of Canada, Her Majesty the Queen in Right of Ontario and The Corporation of the Town of Fort Frances	)	W. Derksen and J. Morse for the Defendant Corporation of the Town of Fort Frances
Defendants	)	
	)	
	)	**HEARD:** May 11, 2018 in Kenora, Ontario

Justice J. Fregeau

REASONS ON COSTS

INTRODUCTION

[1] At paragraph 553 of my February 19, 2014, Judgment, I indicated that if the parties were unable to agree on the costs of this action they were to schedule a hearing to make submissions on costs.

[2] A costs hearing involving the plaintiffs and The Corporation of the Town of Fort Frances ("Fort Frances") was held May 11, 2018. Fort Frances seeks its costs of the action from the plaintiffs. Neither Canada nor Ontario is seeking its costs of the action.

[3] The primary relief sought by the plaintiffs in this case was a declaration that a strip of land two chains in width from the 1876 high water mark of Rainy River and Rainy Lake adjacent to the Agency One Reserve is part of that reserve.

[4] The plaintiffs' claim gave rise to the following issues which were determined in this trial:

1. Was the plaintiffs' claim barred by *res judicata* or issue estoppel?

2. If not, was the two chain strip set aside as part of the Agency One Reserve or was it excluded from the reserve?

3. In any event, was it intended pursuant to Treaty #3 and the reserve selection process that followed that the two chain strip was to be part of the reserve such that the failure to include it within the Agency One Reserve was a breach of the Crown's fiduciary duty or a breach of the honour of the Crown?

[5] The court determined that:

1. The plaintiffs' claim was not barred by *res judicata* or issue estoppel;

2. The two chain strip was not set aside as part of the Agency One reserve; and

3. It was not intended, pursuant to Treaty #3 or the reserve selection process, that the two chain strip was to be part of the Agency One Reserve.

[6] As can be seen, the plaintiffs were successful on the *res judicata*/issue estoppel issues and the defendants were successful on the balance of the issues. Fort Frances now seeks their costs of this action from the plaintiffs.

[7] Fort Frances claims $1,047,461 for partial indemnity ("PI") fees, $113,030 for taxes on PI fees, $283,677 for PI disbursements and $30,664 for taxes on PI disbursements, for a total costs claim of $1,474,833 on a PI basis.

The Position of Fort Frances

[8] This action, the first to be decided by the court, is one of five lawsuits before the court involving the Fort Frances municipal park, roads in and around the park and waterfront lots in the vicinity of the park. The park is a portion of the former Agency One Reserve surrendered by the plaintiffs in 1908. Both the plaintiffs and Fort Frances claim ownership of the park in the *Park/Damages* litigation.

[9] Fort Frances submits that it was entirely successful in its defence of this action following a 20 day trial and that they are entitled to the costs as set out above.

[10] Fort Frances submits that their legal fees and disbursements in this action were reasonable given the importance and complexity of the litigation. The action threatened the continued use and enjoyment of the park by citizens and tourists. Fort Frances suggests that the successful defence of the action was also vital to its position in the related actions, given the importance of the two chain strip to the use of the park.

[11] Fort Frances contends that if it had not been successful they could have been confronted with a future claim (a "headland to headland" claim) which, if successful, may have resulted in a large portion of Rainy Lake being the exclusive property of the plaintiffs, unavailable to the public and potentially impacting the Fort Frances dam and hydroelectric power.

[12] Mr. Derksen, called to the bar in 1981, was retained in 1999; Mr. Morse, also called to the bar in 1981, was brought on board as co-counsel in 2004.

[13] Fort Frances submits that their claim for PI fees of $1,047,461 calculated at approximately 66% of substantial indemnity ("SI") fees (which are 90% of solicitor-client costs) is consistent with the principles of proportionality, indemnity and case law. Fort Frances submits that costs awards should serve as a partial indemnity for a successful litigant for the expense to which they have been put by a lawsuit.

[14] Fort Frances submits that the award of costs is more than a mathematical calculation of docketed hours multiplied by hourly rates. It is submitted that an award of costs must have regard to the principle of proportionality given the amount in issue. Fort Frances notes that, while declaratory relief only was sought in this litigation, total damages sought in the *Park/Damages* litigation are $160,000,000, if the surrender of the reserve was found to be valid.

[15] Fort Frances makes the following submissions in reference to *Rule* 57 of the *Rules of Civil Procedure* and the factors a court may consider in exercising its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

A. The Principle of Indemnity

[16] Given the complexity and importance of the issues, Fort Frances retained two senior trial lawyers to conduct the trial. The plaintiffs, Canada and Ontario were represented by four and two lawyers, respectively, at trial.

[17] Mr. Morse has been certified as a specialist in civil litigation since 1990 and has been a Fellow of the American College of Trial Lawyers since 2000. Mr. Derksen has extensive experience in municipal law, general litigation and Aboriginal law and land claims.

[18] Fort Frances submits that its Bill of Costs is calculated based upon actual hourly rates charged for Mr. Morse at $550 and Mr. Derksen at $275, reduced from their usual hourly rates charged during the time period of this litigation ($600-$800 and $225-$400 respectively). Fort Frances submits that Mr. Morse's and Mr. Derksen's PI hourly rates should be $350 and $180 respectively, equal to 66% of solicitor-client costs.

[19] Fort Frances submits that the fees charged by its counsel reflect the substantial documentary production in this case. The plaintiffs produced over 1,000 documents (20,000 pages), plus expert reports with approximately 1,000 pages referred to. Canada produced over 1,300 documents (9,500 pages), plus expert reports with 3,000 pages referred to. Ontario produced

approximately 1,490 documents (10,500 pages). Fort Frances produced 700 documents (over 10,500 pages), plus expert reports with 2,500 pages referred to.

[20] The plaintiffs filed a 20 page Outline of Issues and Law for Trial, three volumes of written closing submissions (402 pages) and Books of Authorities with 90 cases. Canada's Outline of Law and Issues for Trial was 27 pages, its written closing submissions were 196 pages and its Books of Authority contained 49 cases. Ontario's Outline of Issues and Law for Trial was 36 pages, its written closing submissions was 68 pages and its Books of Authorities contained 11 cases. Fort Frances' Outline was 78 pages, its Roads brief was 78 pages and its written closing submissions were 444 pages. Exhibits totaled approximately 2800 documents.

[21] Fort Frances submits that it quite reasonably seeks indemnity for 50% of docketed hours for pleadings, production of documents and discovery in this case because there is significant overlap in this portion of counsel work with the *Park/Damages* litigation.

B. The Complexity of the Proceedings

[22] Fort Frances suggests that the complexity of the action and hours expended by counsel were due to the voluminous productions, the experts required and the various defences available to the plaintiffs' claims. Fort Frances submits that its preparation necessitated establishing its ownership of the two chain strip which involved the complex law of public roads and municipal ownership.

[23] Fort Frances contends that the historical complexity of the action resulted in a total of seven experts giving evidence at trial. Instructing and interacting with experts and preparing for the cross-examination of the plaintiffs' experts is submitted to be very time consuming.

[24] Fort Frances submits that the evidence of its survey expert, Mr. de Rijcke, was instrumental in addressing the evidence of the plaintiffs' survey expert, Mr. Stewart, with Mr. de Rijcke's evidence being preferred by the court over that of Mr. Stewart.

[25] Fort Frances submits that a successful party is entitled to recover the reasonable costs of any expert reports that were reasonably necessary in a proceeding and the costs for an expert's trial testimony. Fort Frances further submits that, given the complex nature of the survey evidence in this action, they are entitled to be indemnified for the cost of having experts attend trial.

[26] Fort Frances submits that Mr. de Rijcke's trial attendance for the purpose of assisting counsel in the cross-examination of the plaintiffs' experts was reasonable, as evidenced by the fact that his evidence was preferred over that of Mr. Stewart.

[27] Fort Frances suggests that it is entitled to be indemnified for the expense of having its experts prepare for trial, provide evidence, meet with counsel for preparation and, in addition, for the expense of having Mr. de Rijcke attend trial to assist counsel in the cross-examination of Mr. Stewart.

The Position of the Plaintiffs

[28] The plaintiffs submit that an order requiring the parties to bear their own costs is the most reasonable outcome to protect access to justice and to promote reconciliation in Aboriginal law cases. In the alternative, the plaintiffs submit that the costs decision in this action should be deferred until the outcome of the related *Park/Damages* litigation (CV 98-0743). In the further alternative, the plaintiffs submit that if this court awards costs to Fort Frances, costs should be fixed at a fair and reasonable amount in view of the special circumstances of this case.

[29] The plaintiffs submit that the law of costs has evolved from the "outdated" emphasis on indemnification in awarding costs to a broader approach which takes into account a variety of factors as set out in *Rule* 57.01(1), including "any other matter relevant to the question of costs". *Rule* 57.01(1)(i).

[30] The plaintiffs submit that the failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice.

[31] The plaintiffs suggest that courts have recognized that there are circumstances that will justify departing from the traditional rules and relieving an unsuccessful party from the burden of costs, including good faith on the part of the unsuccessful litigant and cases involving Aboriginal claims.

[32] The plaintiffs submit that issues of Aboriginal rights and lands can be very complicated and are often not easily defined or determined, particularly in a situation where it has to be determined whether a certain parcel of disputed land is part of a recognized reserve as in this case.

[33] The plaintiffs submit that this action was brought in good faith based on their reasonable position that the two chain strip was part of the Agency One Reserve. The plaintiffs note that this court found both that the plaintiffs' ancestors "reasonably assumed" that the two chain strip was part of the reserve and that the issue of whether or not the two chain strip was, or was intended to be, part of the Agency One Reserve had been outstanding since the reserve was created 135 years ago.

[34] The plaintiffs submit that no costs may be awarded in cases involving public interest litigation where concerns about access to justice are suggested to guide the courts' discretion. The plaintiffs' submit that the determination of what is public interest litigation is fact specific with the inquiry focusing on whether the issue raised is of some public importance and whether the moving party can be characterized as a public interest litigant.

[35] The plaintiffs suggest that public interest matters include those that are significant to the broader community and where public interest is served by a resolution of the subject issues. Public interest litigants are suggested to be those who advance a public interest action and who are not motivated by financial self-interest.

[36] The plaintiffs contend that courts have recognized that Aboriginal claimants seeking a determination of rights sometimes qualify as public interest litigants and therefore not subject to costs awards.

[37] The plaintiffs suggest that in order to protect the principle of access to justice and to promote reconciliation with First Nations this court should make no order as to costs. The plaintiffs submit that there are a number of factors present suggesting that this is how the court should exercise its discretion in this case.

[38] The plaintiffs submit that this case dealt with a matter of public importance as it was to the mutual benefit of the Aboriginal and non-Aboriginal community to have the long simmering issue of the boundaries of the Agency One reserve finally determined.

[39] The plaintiffs further suggest that the uncertainty as to the status of the two chain strip was not the fault of the plaintiffs and that the case was brought in good faith and with merit.

[40] The plaintiffs submit that they are public interest litigants and that the case was about more than the financial self-interest of the plaintiffs as they sought only declaratory relief. The plaintiffs acknowledge that significant damages are sought in the *Park/Damages* litigation but suggest that that is separate litigation. In any event, the plaintiffs submit that securing a financial interest in the context of vindicating Aboriginal rights is not a disqualifying factor in regard to being found to be a public interest litigant.

[41] The plaintiffs note that they were successful on the *res judicata* issue, which they suggest was a major issue at trial.

[42] The plaintiffs submit that this case involved novel and complex Aboriginal law issues, the primary one being when a reserve is created and what its boundaries are when the applicable treaty only provides for the general process of reserve creation. It is suggested that an award of costs against the plaintiffs could have a chilling effect on the claims of other First Nations regarding reserve boundaries, even where those claims have *prima facie* merit.

[43] In the alternative, the plaintiffs submit that a decision on costs in this action should be delayed until the outcome of the *Park/Damages* litigation, suggesting that Fort Frances has

arbitrarily allocated its costs between the two actions. The plaintiffs contend that deferring this costs decision would provide the court with a better evidentiary basis to assess and apportion costs.

[44] The plaintiffs submit that until the damages litigation is concluded, it is impossible to know whether Fort Frances' costs are reasonable and whether their allocation between the two actions is reasonable.

[45] In the further alternative, if this court determines that the plaintiffs are liable for costs, the plaintiffs submit that the costs sought by Fort Frances are excessive and unreasonable and that a nominal award of costs would be more appropriate.

[46] The plaintiffs submit that cases involving Aboriginal law claims are special and the court, in exercising its discretion as to costs, is required to consider a broader set of factors, reflecting what the court sees as fair and reasonable in the particular circumstances of the case.

[47] The plaintiffs submit that the costs submissions of Fort Frances focus exclusively on the principle of indemnification without regard to other special factors present in this case including:

1. The complex and novel Aboriginal law issues at stake;
2. The public interest in having the issue judicially determined;
3. The importance of promoting reconciliation in Aboriginal claims with merit;
4. The risk of creating a chilling effect on First Nations advancing claims;
5. The non-monetary remedy sought by the plaintiffs;
6. The success of the plaintiffs on the *res judicata* issue; and
7. The marginal value of Fort Frances' dockets given their arbitrary allocation of costs between this action and the *Park/Damages* litigation.

[48] The plaintiffs submit that the expert fees of Mr. de Rijcke are excessive, even given the weight attached to his evidence at trial. The plaintiffs submit that the full breakdown of fees attributed to Mr. de Rijcke is unclear and that fees for this expert witness should be allowed only for attendance and reports. The plaintiffs suggest that the fees paid to Dr. Williams's appear to be a more appropriate amount for the expert work provided by Mr. de Ricjke.

The Responding Costs Submissions of Fort Frances

[49] Fort Frances disputes that the plaintiffs are public interest litigants and that this case was public interest litigation. Fort Frances submits that to categorize it as such would be contrary to the important policy considerations inherent in the classification of a public interest litigant and would undermine the ability of the parties in this litigation to resolve the *Park/Damages* litigation and other related actions by presumptively eliminating cost consequences going forward.

[50] Fort Frances submits that this action, which focused on a two chain strip of land in the description of an agency reserve authored by a commissioner appointed for the purpose of selecting reserves after the signing of Treaty #3, was fact and site specific. It is further submitted that the litigation concerned the commercial interests of private litigants.

[51] The plaintiffs sought a declaration that the two chain strip was part of the Agency One Reserve. Fort Frances, as owner of this property, disputed the plaintiffs' claim. Whoever was determined to be the owner secured access to the waterfront at this location and would enjoy the substantial benefits associated therewith.

[52] Fort Frances submits that the plaintiffs did not initiate this litigation in pursuance of any broader interests than their own commercial and financial interests. It is acknowledged that the action was factually complex but Fort Frances asserts that it did not raise any novel points of law or issues in vital need of judicial clarification. Given the unique and site specific facts and circumstances of this action, Fort Frances contends that the Judgment will have little precedential value to other Aboriginal land claims.

[53] Fort Frances submits that it is reasonable to assume that the plaintiffs expected to face costs consequences in the event they were unsuccessful as they claimed solicitor-client costs in their pleadings in this action and in the pleadings in all related actions.

[54] Fort Frances contends that the plaintiffs have offered no substantive reasons in support of their submission that they should be seen as public interest litigants other than their status as First Nations. To recognize the plaintiffs as public interest litigants merely because of their status as a First Nation would set a dangerous precedent that would have an immediate and negative impact on ongoing related litigation between the parties, according to Fort Frances.

[55] Fort Frances contends that unsuccessful public interest litigants who are not required to compensate the successful party for reasonable costs are the exception to the general rule that costs should be awarded to compensate a successful litigant for their reasonable costs.

[56] Fort Frances submits that in this action the plaintiffs unsuccessfully pursued private commercial interests in a non-representative capacity and are now attempting to avoid the normal cost consequences by asserting that they are public interest litigants.

[57] Fort Frances submits that the plaintiffs' submissions as to Mr. de Rijcke's fees fails to consider that he reviewed the productions of all parties while the review by the plaintiffs' survey expert was much more limited in scope. Fort Frances further contends that Mr. de Rijcke was qualified to provide opinion evidence of a much broader scope than Mr. Stewart.

[58] In addressing the reasonable expectation of the unsuccessful party in relation to costs, Fort Frances suggests that the plaintiffs' original Bill of Costs sought to reduce their exposure to costs by "significantly understating the costs actually incurred by the Plaintiffs". Fort Frances submits that the plaintiffs initially neglected to account for 1,948 hours with a value of approximately $506,000, requiring the plaintiffs to file a Fresh as Amended Bill of Costs.

[59] Commenting on the plaintiffs' Fresh as Amended Bill of Costs, Fort Frances submits that the plaintiffs incurred $1,795,827 in SI fees or $1,185,246 in PI fees (calculated at 66% of SI fees)

plus $264,755 in disbursements for a total SI account of $2,060,582, plus HST for a total of $2,328,457.

[60] Fort Frances is seeking PI fees plus disbursements in the amount of $1,331,138, plus HST. The plaintiffs' PI fees plus disbursements, as set out in the plaintiffs' Fresh as Amended Bill of Costs, are $1,450,000, plus HST. Fort Frances submits that the plaintiffs' PI costs exceed theirs by approximately $119,000. Fort Frances submits that the plaintiffs cannot credibly claim that the costs sought by them are not within the reasonable expectation of the parties when the plaintiffs' costs are higher.

Discussion

[61] I reject the plaintiffs' submission that they are public interest litigants and that this action was public interest litigation such that I should make no order as to costs against them.

[62] In *Reese v. Alberta (Ministry of Forests)*, [1992] AJ No. 745, an application for costs by respondents who successfully opposed an application for judicial review of a Forest Management Agreement, McDonald J. defined a "public interest group" as an organization which has no personal, proprietary or pecuniary interest in the outcome of the proceeding, and which has as its object the taking of public or litigious initiatives seeking to affect public policy in respect of matters in which the group is interested and to enforce constitutional, statutory or common law rights in regard to such matters. See para. 2.

[63] In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371, the Supreme Court reviewed the law of costs in the context of an appeal concerning the inherent jurisdiction of the courts to grant interim costs to a litigant. In this case, four First Nations had challenged sections of the *Forest Practices Code of British Columbia* as conflicting with their constitutionally protected aboriginal rights as to logging. They sought an interim costs award to fund the litigation.

[64] The Court noted that the traditional purpose of a costs award was to indemnify the successful party in respect of the expenses sustained either defending a claim that proved unfounded or in pursuing a valid legal right. The Court further commented that the power to award costs is discretionary, but that the discretion must be exercised judicially and pursuant to the ordinary rules of costs unless the circumstances justify a different approach. See para. 22.

[65] The Court reviewed a line of cases and authorities in which the indemnification principle was referred to as "outdated". The Court stated that modern costs rules now accomplish various purposes in addition to the traditional objective of indemnification, including the furtherance of the fair, efficient and orderly administration of justice. See para. 25.

[66] The Court then considered and discussed the application of costs rules in the context of public interest litigation, at paragraph 38:

> *The more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes.*

[67] In *Incredible Electronics Inc. v. Canada (Attorney General),* 2006 CanLII 17939 (ONSC), Perell J. conducted an extremely thorough review of the modern law of costs generally and more particularly in regard to public interest litigants. In my opinion, he succinctly framed the issue as follows:

> *The point is not so much whether the public interest litigant is affluent or impecunious as whether, having regard to the benefit of ensuring his participation, he ought to be immunized from an adverse cost consequence.*

[68] In reviewing general principles, Perell J. states, at paragraph 63, that:

> *As a matter of general principle, costs compensate the successful litigant for the expense to which he or she has been put by the suit having been improperly resisted or improperly brought. The court's discretion to award costs is designed to further three fundamental purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behavior by litigants in their conduct of the proceedings.* (Citations omitted).

[69] Perell J. noted the obvious in stating that, by definition, public interest litigation needs to have a public interest litigant. In analyzing whether or not the various litigants before him qualified as public interest litigants, Perell J. summarized certain characteristics of public interest litigants:

1. A public interest litigant, at a minimum, must, in a dispute under the adversary system, take a side the resolution of which is important to the public…one necessary trait of a public interest litigant is that he or she be a partisan in a matter of public importance. *See paragraph 91;*

2. A public interest litigant has little to gain financially from participating in the litigation and must, to some extent, manifest unselfish motives. *See paragraph 95;*

3. A sometimes relevant but not determinative feature is that a public interest litigant is either the "other", a marginalized, powerless or underprivileged member of society, or the public interest litigant speaks for the disadvantaged in society, even if he or she has his or her selfish reasons for litigating. *See paragraph 99.*

[70] Perell J. was careful to note that his review had not found any case that defines authoritatively who is a public interest litigant. Rather, the cases set out examples of relevant factors to be taken into account and illustrate that the factors will be given more or less weight depending on their relationship to other pertinent considerations.

[71] Whether to depart from the traditional rule that costs follow the event is a matter within the discretion of the trial judge, the exercise of which must be informed by proper principles and with regard to the particular facts before him or her.

[72] In the case at bar, the plaintiffs had obvious proprietary and financial interest in the outcome of this case. While they sought only a declaration, it was apparent from the outset that the result of this action would directly impact related litigation in which very substantial damages were claimed.

[73] The action necessarily involved Canada and Ontario but it was essentially an action between the plaintiff group of four First Nations and the Town of Fort Frances as to the ownership of the two chain strip – a valuable piece of lakefront property within the Town of Fort Frances which the plaintiffs claimed was theirs. Lucrative commercial interests were at stake.

[74] The issues that had to be determined were site and fact specific. They did not involve any "broader community" than the plaintiffs and the citizens of Fort Frances. The resolution of the issues involved in this litigation was of very significance importance to the citizens of Fort Frances and the members of the plaintiff First Nations, but they were not of any broader public importance as I understand the use of that term in the case law.

[75] I accept the submissions of Fort Frances that, given the unique and site specific facts of this action, the judgment will have little or no precedential value to other aboriginal land claims. I also conclude that the public interest was not engaged in this case and will not be served by its resolution.

[76] I am not persuaded that the characteristics of the plaintiffs or the nature of the litigation requires that the traditional rule that costs follow the event should be departed from.

[77] I am also not persuaded that there is any substantive reason to defer the decision as to the costs of this action until the final resolution of the *Parks/Damages* litigation.

[78] First, that case, as between Fort Frances and the plaintiffs, is in its early stages. It is anybody's guess as to how long it will take to proceed to trial.

[79] Second, the plaintiffs themselves have described that action as separate litigation. The only reason advanced by the plaintiffs in support of deferring my costs decision in this case until the end of that case is what they describe as the "arbitrary allocation" of Fort Frances' costs between the two actions.

[80] The plaintiffs suggest that I am being asked to determine if the 50/50 allocation suggested by Fort Frances is reasonable, without the benefit of a full evidentiary foundation.

[81] I do not accept that submission. In my opinion, the suggested 50/50 allocation of Fort Frances' costs for pleadings, production of documents and discovery in this case due to the overlap in this portion of work with that in the *Parks/Damages* litigation is reasonable. The suggestion that it is not leads one to ask how this overlap should otherwise be accounted for by Fort Frances.

[82] In my opinion, any suggested unreasonableness in such an allocation can, if substantiated subsequent to the conclusion of the *Parks/Damages* litigation, be adjusted for in the costs decision in that case.

[83] I will now proceed to determine costs pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the factors set out in *Rule* 57.01(1).

[84] Pursuant to s. 131 of the *Courts of Justice Act*, the court has a wide discretion in awarding costs. *Rule* 57.01(1) provides a broad range of factors which a court may consider, in addition to the result in the proceeding, in exercising this discretion.

The principle of indemnity, experience of counsel, rates charged and hours spent

[85] In the usual course, costs are ordered to be paid by the unsuccessful party to the successful party on a partial indemnity scale.

[86] In this case, success was divided, but only in the sense that the plaintiffs succeeded on the threshold issue of res judicata. While substantial written and oral submissions were provided on this issue, no evidence was called on it and only a small portion of the Judgment addressed the issue. I do not see the plaintiffs' success on this issue as a significant factor in assessing the costs of a 20 day trial involving seven expert witnesses, voluminous documentary productions and exhibits comprising approximately 2800 documents.

[87] Fort Frances retained two senior trial lawyers to conduct this complex lawsuit. Given the obvious importance of this case to Fort Frances, it was reasonable for them to have done so. This level of representation is consistent with that of all other parties.

[88] The PI hourly rates set out in Fort Frances' Bill of Costs are, in my opinion, reasonable for counsel of their seniority. I note that both Mr. Morse and Mr. Derksen have charged Fort Frances reduced fees for the entirety of this case and that their suggested PI fees are based on their reduced hourly rates.

[89] As noted above, the 50/50 allocation of docketed hours for pleadings, production of documents and discovery between this action and the *Parks/Damages* litigation is logical and reasonable given the closely related issues and resultant overlap in preparation.

[90] The total hours incurred appear reasonable given the very substantial documentary productions, the reports of seven experts, opening briefs, trial exhibits, closing submissions and books of authorities as detailed in paragraphs 20 and 21.

[91] I also note that the plaintiffs' docketed hours, as set out in their Fresh as Amended Bill of Costs, exceed those of the plaintiffs by approximately 2,900 hours. While it is to be expected that a plaintiff's docketed hours will usually exceed those of a defendant, this is nonetheless a factor to be considered in assessing the reasonable expectations of the plaintiffs in this case.

The amount of costs that an unsuccessful party could reasonably expect to pay

[92] In my opinion, a comparison of the Bills of Costs of the plaintiffs and Fort Frances is a fair, reasonable and logical way to determine the reasonable expectation of the unsuccessful party in regard to costs.

[93] The plaintiffs PI fees, calculated as 66% of SI fees, are $1,185,245. Fort Frances' PI fees, calculated at 66% of SI fees, are $1,047,461. As can be seen, the plaintiffs' PI fees exceed those of Fort Frances by approximately $138,000. The plaintiffs have not taken issue with Fort Frances' request that their PI fees be calculated at 66% of SI fees.

[94] Fort Frances' disbursements total $283,677. The plaintiffs' disbursements total $264,755. Fort Frances' disbursements exceed those of the plaintiffs by approximately $19,000.

The complexity of the proceeding and the importance of the issues

[95] The case was factually complex, due to the lengthy and dated historical record, including a very substantial volume of historical surveys and supporting survey evidence. It was not a legally complex case.

[96] The case was of very significant importance to both the plaintiffs and Fort Frances. This importance related not only to the result of the trial, but the impact the result of this trial would have on related litigation.

Any other matter relevant to the question of costs

[97] The plaintiffs question the amount that Fort Frances is seeking to recover as disbursements for fees paid to Mr. de Rijcke, their survey expert. Fort Frances' Bill of Costs indicates that he was paid $105,019 for expert reports and $31,909 for expert testimony and related expenses, for a total of $136,928.

[98] Dr. Williams, an expert forester called by Fort Frances, was paid a total of $25,100. Mr. Stewart, the plaintiffs' survey expert, was apparently paid approximately $25,000 by the plaintiffs.

The fees paid to Mr. de Rijcke are very significant and well in excess of fees paid to other experts called by these parties.

[99] Fort Frances submits that this very large discrepancy results from:

1. The broader scope of Mr. de Rijcke's expertise;

2. The fact that he reviewed the productions of all parties; and

3. The fact that Mr. de Rijcke attended at trial during Mr. Stewart's testimony for the purpose of assisting counsel in preparing for the cross-examination of Mr. Stewart.

[100] Mr. Stewart was very thoroughly and effectively cross-examined by Mr. Morse. It is obvious from the terms of the judgment that Mr. de Rijcke's evidence was preferred over that of Mr. Stewart. I have no doubt that Mr. de Rijcke's input was instrumental in the cross-examination of Mr. Stewart and that his sitting in on Mr. Stewart's testimony enabled him to assist counsel in this regard.

[101] However, I am not persuaded that an account more than $100,000 in excess of the accounts of other experts is reasonable, regardless of the utility of the expert witness. I am reducing this particular disbursement by $75,000. Even at this reduced amount, it is still almost double the fees paid to other experts, which I feel fairly reflects Mr. de Ricjke's enhanced role in comparison to the other experts.

[102] The plaintiffs submit that Fort Frances' costs should be reduced to reflect the complex and novel Aboriginal law issues involved in this case, the importance of promoting reconciliation in claims with merit involving First Nations and to promote access to justice for First Nations who are advancing claims related to their constitutional rights.

[103] These submissions of the plaintiff are well supported in the case law and have considerable merit in a general sense. They may very well properly apply to reduce First Nations' costs exposure in appropriate cases. However, the application of these principles is necessarily fact

specific. In my opinion, they are not applicable and should not serve to reduce costs of the successful litigant in this case.

[104] The plaintiffs were not the cause of the uncertainty that existed for 135 years as to the exact boundaries of the Agency One Reserve following the signing of Treaty #3. The blame for that confusion rests squarely with the Crown, in my opinion.

[105] I found that the ancestors of the plaintiffs reasonably assumed that the boundaries of the Agency One Reserve extended to the normal high water mark of the adjacent water bodies. Thus, it is fair and reasonable for the plaintiffs to now assert that their claim had merit and that in the spirit of reconciliation, their exposure for the costs of an action brought to assert what they reasonably assumed to have been theirs for 135 years should be reduced.

[106] However, this claim is somewhat unique because the defendants were not just the federal and provincial Crowns. As set out in paragraphs 545-550 of the Judgment, the land within the two chain strip was land within Ontario and subject to provincial jurisdiction from 1867 forward. Ontario transferred title to the land within the two chain strip to Fort Frances. The municipality, not a "Crown" authority in any sense of the word, was also named as a defendant. Fort Frances had nothing to do with the negotiation of Treaty #3 or the reserve creation process mandated by Treaty #3.

[107] The plaintiffs have acknowledged that Canada and Ontario are not seeking their costs from the plaintiffs. The plaintiffs have therefore been relieved of any costs consequences of this action vis-à-vis the federal and provincial Crowns. In my opinion, the position of the federal and provincial Crowns as to costs is appropriate in the circumstances of this case and fairly and reasonably reflects the application of the above principles in favour of the plaintiffs.

[108] I see no compelling policy reason why the plaintiffs should be further relieved of the usual fair and reasonable costs consequences in relation to Fort Frances. To do so would be to place the very significant expense of this case squarely on the shoulders of the taxpayers of Fort Frances – a result that would in my opinion be unfair and unjust, given that they are the successful party.

Conclusion

[109] The plaintiffs shall pay to Fort Frances costs of this action fixed as follows:

$1,047,461 for partial indemnity fees;

$113,030 for taxes on partial indemnity fees;

$208,677 for disbursements; and

$27,128 for taxes on disbursements, for a total of $1,396,296.

[110] These costs shall be paid within 90 days.

[111] I have not heard any submissions nor has anything been filed in regard to the costs of the costs hearing. If this issue has not been resolved, counsel may schedule an appointment before me to address this issue.

Justice J. Fregeau

Released: August 24, 2018

CITATION: Couchiching v. Canada (A.G.) ONSC 5051
COURT FILE NO.: CV-98-0910
DATE: 2018-08-24

Couchiching First Nation, Naicatchewenin First Nation, Nicickousemenecaning First Nation and Stanjikoming First Nation

Plaintiff

– and –

The Attorney General of Canada, Her Majesty the Queen in Right of Ontario and The Corporation of the Town of Fort Frances

Defendants

REASONS ON COSTS

Released: August 24, 2018