CITATION: *Chippewas of Saugeen First Nation v. The Town of South Bruce Peninsula et al.* 2024 ONSC 2827
COURT FILE NO.: 03-CV-253768-CM3
DATE: 20240521

SUPERIOR COURT OF JUSTICE - ONTARIO

RE:

CHIPPEWAS OF SAUGEEN FIRST NATION

Plaintiff

AND:

THE TOWN OF SOUTH BRUCE PENINSULA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE ATTORNEY GENERAL OF CANADA, BRENDA JOAN ROGERS AND GARY MICHAEL TWINING AS EXECUTORS OF THE ESTATE OF BARBARA TWINING, DAVID DOBSON, ALBERTA LEMON, SAUBLE BEACH DEVELOPMENT CORPORATION, ESTATE OF WILLIAM ELDRIDGE, ESTATE OF CHARLES ALBERT RICHARDS, and THE ATTORNEY GENERAL OF ONTARIO

Defendants

BEFORE: VELLA J.

COUNSEL: *Nuri G. Frame, Marc Gibson and Daniel Goudge,* for the plaintiff, Chippewas of Saugeen First Nation

Jonathan C. Lisus, Andrew Winton, Zain Naqi, John Carlo Mastrangelo, and David Ionis, for the Defendant, The Corporation of the Town of South Bruce Peninsula (formerly The Corporation of the Township of Amabel), Alberta Lemon and Brenda Joan Rogers and Gary Michael Twining as Executors of the Estate of Barbara Twining

Robert Ratcliffe, *Richard Ogden*, *Stephanie Figliomeni and James Shields*, for the Defendants, Her Majesty the Queen in right of Ontario [now His Majesty the King in Right of Ontario] and The Attorney General of Ontario

Michael Beggs, Janet Brooks, Barry Ennis and Madeline Torrie for the Defendants, Her Majesty The Queen in right of Canada [now His Majesty the King in Right of Canada] and The Attorney General of Canada

G. Edward Oldfield, for the Defendants, Sauble Beach Development Corporation and David Dobson

HEARD: IN WRITING

COSTS ENDORSEMENT

[1] The Chippewas of Saugeen First Nation ("Saugeen") was entirely successful on the liability phase of this bifurcated proceeding. At paragraph 5 of the Reasons (reported at 2023 ONSC 2056), I held, *inter alia*, that "[t]he excluded coastline from (and including) Lot 26 to the approximate mid-way point of Lot 31, Concession D, in the Town of South Bruce Peninsula, and lying to the west of Lakeshore Boulevard North, Sauble Beach (the "Disputed Beach"), is reserve land that was never surrendered by Saugeen. The various defences fail."

[2] Saugeen is accordingly presumptively entitled to their reasonable costs on a partial indemnity scale.

[3] Ontario challenges some of the disbursements claimed by Saugeen.

[4] In addition, the defendants have differing views as to the appropriate way to apportion Saugeen's costs. Some of the defendants are also seeking their own costs against their co-defendants.

[5] Canada and Ontario have settled costs as against each other.

[6] No offers to settle were brought to the court's attention.

Issue 1: Saugeen's Claim for Fees

[7] Saugeen seeks their costs against the defendants on a partial indemnity scale in the sum of $2,169,678.53 as fees, and $1,094,625.63 in disbursements, for a total of $3,264,304.16 on a joint and several liability basis.

[8] The defendants agree that Saugeen should have its costs on a partial indemnity scale and that the amount sought for fees is fair and reasonable. They are comparable with their own respective fees and are proportionate. There is no doubt that this litigation was complex and of great importance to the parties. The amount Saugeen sought for fees is within the defendants' reasonable expectations, given their respective cost outlines. The principle of indemnity is achieved, as the number of counsel at trial on behalf of Saugeen, the various hourly rates charged, and the number of hours docketed are fair and reasonable.

[9] Saugeen's fees are awarded on a partial indemnity scale in the amount of $2,169,678.53 on a joint and several liability basis. While it appears that Canada and Ontario were seeking an order for several liability, it would be unfair to require Saugeen to attempt to enforce its costs award on a several basis and no good reason was provided for departing from the general proposition that costs to a successful plaintiff in a multi-defendant lawsuit will ordinarily be on a joint and several basis. For the reasons below, the court can deal with the relative success of various of the co-defendants by providing for an appropriate and fair apportionment of costs as amongst them for purposes of the co-defendants seeking indemnification if they pay more than the attributed apportionment (*Bondy-Rafael v. Potrebic*, 2019 ONCA 1026 (CanLII)).

Issue 2: Saugeen's Claim for Disbursements

The Parties' Positions

[10] Ontario objects to the disbursements Saugeen claimed under the following categories: "Legal Research" ($106,254.06) and "E-trial Management – Data Hosting" ($231,916.99). Ontario submits that the legal research is not a recoverable category because (a) Saugeen's lawyers already claimed fees for legal research; and (b) by charging third party legal research as a disbursement, Saugeen is essentially obtaining recovery of fees for legal research on a full indemnity basis rather than partial indemnity basis or, alternatively this amount is duplicative of fees already claimed by Saugeen's lawyers for legal research: *Wellington Plumbing & Heating Ltd. v. Villa Nicolini Incorporated*, 2012 ONSC 6616, at para. 37; *Baroch v. Canada Cartage*, 2015 ONSC 1147, 71 C.P.C. (7th) 151, at footnote 3.

[11] With respect to the Data Hosting charge, Ontario notes it did not incur any such disbursement. In any event, Ontario submits that Saugeen has not provided particulars as to what this charge actually relates to: *Canadian Northern Shield Insurance Co. et al v. 2421593 Canada Inc. et al.*, 2016 ONSC 6487, at para. 9.

[12] Ontario submits that as a result, Saugeen's disbursements should be reduced by $338,171.05. This would reduce the total costs to $2,926,133.11 inclusive of fees and disbursements.

[13] None of the other defendants challenged Saugeen's disbursements.

[14] In its reply submissions, Saugeen explained that the legal research disbursement derived from two sources. The first source is Baker & Co. and was for fees and associated disbursements paid to real estate counsel with expertise that Saugeen's law firm of record lacks. These payments were to obtain and summarize the abstracts of title, deeds, and other lot parcel registers and instruments obtained from the Land Registry Office, which were entered as exhibits at trial. The disbursement was for $83,209.06, and Saugeen seeks recovery on a full indemnity basis.

[15] The second source is for legal fees and disbursements for Jon A. F. Struyk, a lawyer who specializes in boundary and survey issues, in the amount of $23,045. Again, Mr. Struyk has expertise beyond that of Saugeen's law firm of record. Saugeen submits that the entire disbursement should be recoverable on a full indemnity basis or alternatively on a partial indemnity basis in the sum of $13,827.

[16] The fees and disbursements Saugeen incurred seeking legal expertise outside the scope of expertise offered by its lawyers of record are recoverable. This expertise was related to key issues in the liability phase, and I accept Saugeen's submission that the fees are not duplicative.

[17] However, I agree with Ontario that these fees and disbursements should be recoverable on the same scale as Saugeen's lawyers of record. I do not have the breakdown of fees and disbursements regarding either of the legal accounts. Accordingly, I am reducing these disbursements to a partial indemnity scale as follows: $49,925.44 (Baker & Co.) and $13,827 (Struyk).

[18] In its reply submissions, Saugeen also explained that the E-Trial Management-Data Hosting category was to engage multiple outside vendors to provide technical support, data processing, data hosting, and a cloud-based document storage and review platform for the documents produced in this case. Its lawyers of record do not have the in-house infrastructure to digitally process, store, review, and then maintain the document database.

[19] Saugeen observes that the government defendants likely have their own in-house facilities for e-trial management and data storage, and hence there is no comparable charge by Canada or Ontario. The Town appears to have a modest charge for this category.

[20] Notably, Ontario does not appear to challenge the quantum per se, but rather the recoverability of this sizable disbursement.

[21] It is beyond dispute that this was a document heavy case. Much of the documentary record derived from historical archival sources. As the plaintiff, Saugeen bore the burden of proving its claims, and the electronic documents and data base played an essential role in that endeavour. Saugeen adduced a substantial number of archival and contemporary documents into evidence, as would be expected in a historical treaty case going back to the mid-1800s.

[22] Furthermore, paragraph 2 of the Trial Agreement amongst the parties provides that "Saugeen, the Town, Ontario, and Canada shall share the costs of the services provided by Service Providers at trial equally". Saugeen has not included these disbursements in its costs outline, but this suggests that this type of disbursement was reasonably foreseeable by Ontario and the other defendants.

[23] I am satisfied that this disbursement is recoverable as a necessary expenditure given the nature and complexity of this trial. It was necessary for the conduct of this proceeding. This is not a situation like that in *Canadian Northern Shield Insurance Co. et al.* In that case, there was no explanation for the nature of services that the party was claiming as data hosting, whereas in this case, the explanation came in the form of reply submissions.

[24] It would have been helpful if Saugeen provided back up support (invoices) for the "technical support" and "Data Hosting" charges claimed. However, as stated, the quantum was not challenged.

[25] Accordingly, Saugeen's disbursements for its E-trial Management are fixed at $64,660.98 for technical support and $231,916.99 for Data Hosting.

[26] The remaining disbursements are recoverable as claimed.

[27] The total recoverable disbursements are fixed at $1,052,124.01.

Conclusion

[28] I have discretion under s. 131 of the *Courts of Justice Act* to award costs that are fair and reasonable in the circumstances of the proceeding. Considering the factors under r. 57 and having regard to the fundamental objectives of costs, I am fixing Saugeen's costs in the sum of $3,221,802.54, inclusive of fees and disbursements and HST, on a partial indemnity scale, on a

joint and several liability basis. As stated, none of the defendants take issue with the fees claimed by Saugeen or with this scale. This results in a fair and reasonable costs award: *Fong v. Chan* (1999), 46 O.R. 3(d) 330 (C.A.), at para. 22; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24; *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 4483, at paras. 5-6.

Issue #3: Canada's Claim for a Sanderson Order Against the Town

[29] Canada has resolved costs as between it and Ontario and does not seek costs from the individual landowner defendants (Dobson and the Families). However, it seeks a Sanderson order for 50% of its costs on a partial indemnity basis in the amount of $486,784.11 against the Town. Canada submits that it was the successful defendant in the main issue before the court, namely the location of the reserve boundary, and that the Town was the unsuccessful defendant (together with Ontario).

[30] Canada proposes that 50% of its costs on a partial indemnity basis in the sum of $486,784.11 be paid by the Town through a Sanderson order. Under a Sanderson order, the unsuccessful defendant is ordered to pay the successful defendant's costs directly to the successful defendant. The court must apply a two-step test in determining whether a Sanderson order is appropriate: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1440.

[31] The Town resists and seeks, *inter alia*, its own costs against Canada.

[32] Saugeen and Ontario take no position with respect to Canada's claim for a Sanderson order against the Town.

[33] The first step in this test is whether it was reasonable for the plaintiff to have joined the "successful" defendant in the action.

[34] In *West Moberly*, Johnston J. set out a detailed analysis which is instructive for the cost proceeding before me. In that case, the First Nation joined Canada as a defendant along with British Columbia, notwithstanding the fact that Canada adopted the First Nation's location of the disputed western boundary under the governing treaty. The court noted that Canada and the First Nation were successful in defining the location of the western boundary of the treaty. Canada and British Columbia were necessary defendants because they were treaty partners, and the First Nation was seeking a declaration *in rem*.

[35] The litigation arose because British Columbia (and the other defendants) contended that the western boundary was at a different location than where the First Nation and Canada deemed it to be. British Columbia's position was ultimately rejected at trial. The court stated that the "[c]ontest arose as a result of the positions taken by the named defendants in response to the declaration sought by the plaintiffs": *West Moberly*, at para. 36.

[36] In this case, it was clearly reasonable for Canada, Ontario, the Town, the Families, and Dobson to be added as defendants. This is because Canada and Ontario are Saugeen's treaty partners, and the remaining defendants asserted ownership interests over the Disputed Beach. Since Saugeen was seeking a declaration *in rem*, they were all necessary parties whose interests

were impacted by the outcome of the liability phase. It was reasonable for Saugeen to have named them. Furthermore, there was an active issue as between Canada and Saugeen: whether Canada acted in a manner that was inconsistent with the honour of the Crown, breached any duties it owed to Saugeen, and if so, the nature of those duties. Canada did not concede that it breached a fiduciary duty owed to Saugeen until the conclusion of the trial. Canada's concession was based on different grounds than those advanced by Saugeen.

[37] There is no suggestion that it was unreasonable for Saugeen to have named these defendants.

[38] The second step under a Sanderson order test is to consider whether the court ought to exercise its discretion to make this type of order because it would be just and fair in the circumstances: *Moore v. Wienecke*, 2008 ONCA 162, 90 O.R. (3d) 463, at para. 41.

[39] There are four factors that the court may consider in determining whether a Sanderson order would be just and fair in the circumstances: (a) whether the defendants tried to blame each other; (b) whether the unsuccessful defendant caused the successful defendant to be added as a party; (c) whether the causes of action were independent of each other; and (d) the plaintiff's ability to pay the costs: *Moore*, at paras. 45-50.

[40] The Town and Families submit that they were only in this lawsuit due to Canada's breach of its fiduciary duty to Saugeen and failure to uphold the honour of the Crown. Indeed, but for Canada's failures to ensure that the reserve boundary was properly surveyed and marked, there would have been no lawsuit at all. They state that, but for Canada's failure to properly determine the reserve boundary, which resulted in the issuance of patents and periodic representations that the reserve did not include the Disputed Beach, they would never have been in a position to acquire title to various lots within the Disputed Beach. They submit that they relied on patents issued by Canada. They further submit that they were successful on certain factual findings concerning the nature and scope of the Crown patents in issue. Throughout the trial, the Town tried to blame Canada for the lawsuit. Furthermore, there were some overlapping issues and some distinct issues raised with respect to these defendants.

[41] The Town and Families submit that this case "is without precedent" as "[n]ever before has this Court invalidated a Crown patent found to have been granted pursuant to a Crown survey in the face of a treaty right". In short, had Canada originally "upheld its duties to all Indigenous and non-Indigenous Canadians" alike, this lawsuit would never have happened.[1]

[42] Accordingly, the Town and the Families submit that Canada should be solely responsible for all of Saugeen's costs.

[43] Canada was the successful defendant, relative to the remaining defendants, on the "essential issue" raised in this lawsuit; namely, the correct location of the east boundary of Saugeen's reserve (IR 29) under Treaty 72. Ontario, the Town, and the Families adduced

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[1] See Costs Submissions of the Town of South Bruce Peninsula and the Lemon/Twining Families, at paras. 15-176.

considerable evidence and made detailed arguments challenging Saugeen's claim as to where Rankin marked the north terminus of the east boundary of IR 29, and whether the Disputed Beach was included within IR 29. The bulk of the evidence adduced at trial was on the issue of boundary location, including considerable expert evidence. The Town and Families alone adduced fact evidence in support of some of their defences. The Town took an adversarial stance against Canada throughout the trial.

[44] Furthermore, there is no basis for denying Canada, as the successful defendant, its reasonable costs. Depriving a successful party of costs is only done in rare circumstances: *Thompson and Empowerment Council v. Ontario*, 2013 ONSC 6357, 118 O.R. (3d) 34, at para. 13; *Toronto International Celebration Church v. Ontario (Attorney General)*, 2021 ONSC 2086, at para. 4. There is no conduct or other reason that would justify depriving Canada of its reasonable costs such as misconduct, miscarriage in procedure, or oppressive or vexatious conduct of the proceedings*: Yelda v. Vu*, 2013 ONSC 5903, at para. 11; *Ehsaan v. Zare*, 2018 ONCA 453, at para. 10; *1318706 Ontario Ltd. v. Niagara (Municipality)* (2005), 75 O.R. (3d) 405, (C.A.), at paras. 50-52.

[45] A Sanderson order is appropriate in this case as between Canada and the Town. It would be unfair to require Saugeen to pay such costs and then bear the risk of being unable to recover costs from this unsuccessful defendant.

[46] Canada seeks 50 percent of its partial indemnity costs from the Town, alone, in the sum of $486,784.11, less time devoted to the Town's successful motion striking Canada's expert, Professor Katz. It estimates that motion consumed about 35 minutes of trial time.

[47] As stated, Canada was the successful defendant on the essential issue of reserve boundary location and is entitled to its costs on a partial indemnity basis against the Town, having already settled costs with Ontario.

[48] I have examined Canada's Cost Outline. Having regard to the factors set out in r. 57.01, the purposes of costs, and in exercising my discretion, I find that Canada's claim for costs less the amount for the Katz motion and including the suggested allocation to the Town at 50 percent, is fair and reasonable. This finding recognizes that the other unsuccessful defendant, Ontario, should bear some responsibility for Canada's costs.

[49] The Town does not challenge the number of lawyers, hourly rates, number of lawyer hours claimed, and disbursements Canada submitted. Again, the fees claimed are within the reasonable expectations of the Town, given its own cost outline.

[50] Furthermore, I reject the Town's request that the court defer this aspect of its cost decision until Phase II. It is fair and reasonable that the Town, as the unsuccessful defendant, be required to pay a portion of Canada's costs (as the successful defendant) and the Town's cross claim does not support such a deferral. Furthermore, and in any event, the consent order dated October 12, 2021 (ordering a bifurcation of this proceeding) specifically states at paragraph 2 c) that the costs of Phase I shall be determined at the conclusion of Phase I, while reserving to Phase II, at paragraph 5, *inter alia*, the crossclaims together with the costs of Phase II.

[51] I am fixing Canada's partial indemnity costs against the Town in the sum of $470,000 all-inclusive by way of a Sanderson order, taking into consideration the time expended for preparation and oral submissions of the Town's successful motion to disqualify Dr. Katz as an expert witness. This is fair and reasonable in the circumstances of this complex matter and should be paid by the Town.

Issue 4: The Town and Families' Claim for Costs Against Canada

[52] The Town and Families submit that Canada should pay their costs on a partial indemnity basis, in the sum of $2,066,072.45 as fees and $316,469.60 as disbursements for a total sum of $2,382,542.05. I note that the Families' costs were not expressly distinguished from those of the Town.

[53] In the alternative, they request that their claim against Canada for Phase I costs be added to the issues to be determined at Phase II by way of a claim for indemnification.

[54] In support of their respective positions, the Town and the Families submit that under s. 131(1) of the *Courts of Justice Act*, the court has discretion to determine "by whom and to what extent the costs shall be paid". In doing so, the court shall have regard to achieving the goals of reasonableness, fairness, and proportionality. They further submit that these goals can be accomplished in various ways including:

(a) Awarding costs in varying proportions as amongst the defendants relative to their respective degree of wrongdoing;

(b) Requiring the cost of "innocent" defendants to be borne by the defendant found liable for the wrongdoing in issue by way of a "Sanderson" order; and

(c) Holding only some (or one) of the defendants solely responsible for the plaintiff's costs: see *Barbour Estate v. Bailey*, 2016 ONCA 334, at para. 9; Mark M. Orkin, *Orkin on the Law of Costs*, 2nd Ed., 2:56 ("Sanderson" orders) and 2:58 (apportionment amongst defendants); *Naneff v. Con-Crete Holdings Ltd.* (1993), 11 B.L.R. (2d) 218, paras. 13-14, var'd on other grounds, (1994), 19 O.R. (3d) 691 (C.A.).

[55] It is not an appropriate function of costs to supplement damages for misconduct of the party leading to the litigation. To do so would run the risk of compensating the wronged party twice for the same misconduct: *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481 (C.A.), at paras. 124, 130; *2025925 Ontario Inc. v. Maramusche Holdings Inc.*, 2023 ONSC 4831, at para. 50.

[56] In my view, the Town has conflated the function of costs with the function of damages.

[57] I do not agree with the Town's submission (with the Families) that Canada, as the successful defendant, should pay its partial indemnity costs based on Canada's role in erroneously marking the east boundary of IR 29 and breach of duties and conduct inconsistent with the honour of the Crown. The conduct the Town complained about is essentially Canada's pre-litigation conduct which, according to the Town, led to the Town and Families to acquiring title to lots within the Disputed Beach.

[58] Furthermore, I am not persuaded by the Town's submissions that its claim for costs to be paid by Canada ought to be added to the issues to be determined at Phase II. As discussed below, the Town did not seek costs against Canada in its pleadings, with the exception of its claim for indemnification in the event it is ordered to pay any portion of Saugeen's costs.

[59] Accordingly, the Town's request that Canada pay its costs is dismissed.

Issue 5: Apportionment of Costs Amongst the Defendants

[60] Canada further submits that costs as amongst the defendants should be awarded on a basis proportionate to the percentage of Saugeen's costs that are attributable to its breaches (*Wright v. Wal-Mart et al*, 2010 ONSC 2936, at para. 15; *Mortimer v. Cameron*, 1994 CanLII 10998 (ON CA) at para. 75). Canada therefore submits that it should only be liable for 10 percent of Saugeen's costs because this is the amount attributable to its defence against the alleged Crown breaches roughly based on the amount of time spent on this defence at trial. Canada notes that Ontario was not found liable for any of those Crown breaches or the finding of dishonourable conduct.

[61] Ontario agrees that liability for costs should be apportioned on a several basis, as follows:

(a) All of the defendants were unsuccessful in Phase I and should be required to pay, on a several basis, some portion of the costs award in favour of Saugeen;

(b) Canada's several liability should be fixed at 10 percent of the costs awarded to Saugeen because while Canada's position on the reserve boundary was aligned with Saugeen, Canada did not concede any breach of duty until the conclusion of trial. Ten percent reflects the approximate amount of trial time devoted to Canada's breach of duties.

(c) Ontario and the Town contested the relief sought by Saugeen, including the essential issue of the location of the reserve boundary. Each adduced substantial expert evidence. The Town also called fact witnesses. The Town should bear a proportionately larger share of Saugeen's costs than Ontario because the Town consumed more trial time than Ontario did. Ontario submits that it should be responsible for 40 percent of Saugeen's costs and the Town should be responsible for the remaining 50 percent of Saugeen's costs. Ontario does not seek costs from any of the co-defendants.

[62] As stated, Saugeen does not specifically address the allocation or apportionment of costs amongst the co-defendants. That said, it acknowledges that Canada agreed with it on the fundamental issue of the location of the reserve boundary under the treaty.

[63] The Town generally resists being liable for any of Saugeen's costs on the basis that Canada should be wholly responsible.

[64] In this case, apportionment of costs among the various defendants should be assessed bearing in mind the positions (and time) taken by Canada, Ontario, and the Town (and Families who were aligned with the Town and represented by the Town's lawyers) on the various issues raised at trial and the outcomes. Contrary to the Town and Families' submissions, the Town did not merely raise defences to Saugeen's claim relating to the reserve boundary and the impact on third party ownership interests. Rather, the Town took a leading role, with Ontario, in resisting

Saugeen's claim that the reserve boundary included the Disputed Beach. The Town and the Families also asserted several legal-technical defences, including extinguishment of Saugeen's treaty right based on their patents, the doctrine of *bona fides* purchasers for value without notice, limitations, and laches. Ontario sought a declaration that the Disputed Beach is subject to a public right of recreational use. The Town and the Families were entitled to defend on the merits as well as raise legal-technical defences. The Town was found to not have been "innocent" when it acquired title through the quitclaim deeds after notice of Saugeen's claim to the Disputed Beach and its representation that it would not take any further steps with respect to the Disputed Beach (Reasons, at paras 574, 592). As a result, the Town ought to have been prepared to accept the cost consequences of mounting a fulsome, but ultimately unsuccessful, defence.[2]

[65] I find that the fair and reasonable way to allocate costs is by apportioning liability for costs, as amongst Canada, Ontario and the Town, based on the issues that were litigated in Phase I, the defendants' success or lack thereof, and the amount of time devoted to each issue at trial.

[66] I fix Canada's proportionate liability, as amongst the defendants, for Saugeen's costs at 10 percent, as submitted by both Canada and Ontario. This is a fair and reasonable allocation given the small amount of time devoted to the alleged Crown breaches and dishonourable conduct at trial contrasted with the essential issue of reserve boundary location and the various defences raised by the remaining defendants.

[67] Furthermore, I fix Ontario's proportionate share of Saugeen's costs at 40 percent and the Town's proportionate share at the remaining 50 percent. Again, this allocation reflects the relative time taken at trial on the various issues, and the lack of success, by these respective defendants.

[68] The Town requests confirmation that in the event I award costs against it, it be able to advance its claim for indemnification for their share of Saugeen's costs in Phase II.

[69] In the Town's cross claim, the determination of which is reserved to Phase II, at para 55(a), the Town seeks, in material part, "an order that any and all relief and costs to which this Court may find the Plaintiff entitled in the action is relief and costs against Canada and/or Ontario only, or in the alternative, an order directing Canada and/or Ontario to indemnify the Town in the amount of any relief and costs for which this Court finds the Town liable to the Plaintiff". The Town did not seek indemnification from Ontario in its cost submissions.

[70] The Town's cross claim for indemnification and damages against Canada for its share of Saugeen's costs is accordingly the subject of Phase II at which time its cross claim will be determined. That is the appropriate time for asserting this claim.

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[2] It is worth reiterating that neither Canada nor Ontario seek costs, or a contribution towards costs, from the Families or Dobson. While the Families' submissions were made jointly with the Town, the costs outline was filed on behalf of the Town and the Families without any explicit separation of the Families' costs from those of the Town. The Families filed a notice of change of solicitors in August 2021 and did not claim any costs with respect to their prior lawyers of record. It is also noteworthy that Dobson did not submit any costs outline nor submissions.

Disposition

[71] Accordingly, I make the following costs awards:

(a) Saugeen is entitled to their costs against the defendants, on a partial indemnity scale, in the amount of $3,221,802.54, on a joint and several basis.

(b) Saugeen's costs will be paid, as amongst the defendants for indemnification purposes, as follows:

(i) Canada is responsible for 10 percent of Saugeen's costs in the amount of $322,180.25;

(ii) Ontario is responsible for 40 percent of Saugeen's costs in the amount of $1,288,721.02;

(iii) The Town is responsible for the remaining 50 percent of Saugeen's costs in the amount of $1,610,901.27.

(c) A Sanderson order is made as follows:

(i) Canada is entitled to 50 percent of its partial indemnity costs from the Town (less the Katz motion) fixed in the amount of $470,000.

[72] This award is without prejudice to any arguments the Town wishes to make at Phase II regarding indemnification for its share of Saugeen's costs it claims against Canada in its cross claim.

[73] In the event that any portion of Saugeen's costs award is enforced against the Families or Dobson, then they will be indemnified by the remaining defendants in accordance with the apportionment of liability for costs reflected in paragraph 71(b).

Justice S. Vella

Date: May 21, 2024