COURT FILE NO.: 406/95
DATE: 19990727

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS	B.H. Kellock, B.A. Jetten, for the Plaintiff
Plaintiff	
- and -	
THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	G.N. Penner, S. Warwick, for the defendant, Canada
Defendants	
	HEARD: 17,18,19,20,21 May, 1999

The Hon. Mr. Justice James C.Kent

REASONS FOR RULING ON MOTION

[1] During the process of discovery, the plaintiff seeks answers and particulars from one of the defendants. Should either be ordered?

BACKGROUND:

[2] In this litigation, the plaintiff ("Six Nations") is a band of Indians pursuing claims against the Crown in the Right of Canada as represented by the Attorney General of Canada ("Canada") and the Crown in the Right of Ontario ("Ontario"). The motion was argued before me as the designated motions and case management judge. Six Nations seeks relief only against Canada.

[3] Counsel for Six Nations contends that, without the answers and particulars being sought from Canada, Six Nations cannot know Canada's position on various matters in issue in the

litigation. Counsel for Canada agrees that a broad discovery is needed, but contends that Canada has already responded within the letter and spirit of the law. In order to determine what answers and particulars, if any, must be provided, it is necessary to consider briefly some law and history and place the claims of Six Nations within the context of that law and history.

[4] In 1984, the Supreme Court of Canada held that since 1763 the Crown had a role and a responsibility in the disposition of Indian Lands. The court described that responsibility or obligation as a fiduciary duty and observed that if the Crown breached that fiduciary duty it would be liable to the Indians. See *Guerin v. The Queen [1984] 2 SCR 335 at 376.*

[5] Six Nations acquired close to one million acres of land pursuant to the 1784 Haldimand Proclamation. Over 95 per cent of that land has been disposed of. Six Nations claims that the Crown breached its fiduciary duty to Six Nations by not acting in the manner in which a trustee is required to hold, protect, manage and care for the assets of a trust. Six Nations alleges that it, as a beneficiary, has not received any proper accounting; seeks an accounting or alternatively claims compensation for Canada's breach of fiduciary duty to Six Nations.

[6] In the above context, in general, the questions asked of Canada appear on their face to relate to matters in issue and to have a semblance of relevance. All of the foregoing is however, an over-simplification of extremely complex multi-issue litigation. It is, therefore, necessary to consider Canada's objections to answering the listed questions and providing the requested particulars.

CANADA'S POSITION REGARDING REFUSALS TO ANSWER:

[7] Canada's refusals to answer are primarily based on its objections that the questions asked are wholly, or at least in part, questions of law, questions seeking a legal opinion or ultimate issue questions. It is correct that legal argument of one's case or position is not required until trial. Some support for Canada's contention may be found in the decision of Trainor, J. in *Ontario Bean Producers' Marketing Board v. W.G. Thompson et al (1981), 32 O.R. (2d) 69 at 73.* In that case, Trainor, J. reluctantly concluded that it was not a proper discovery question to ask what the position of the party is with respect to the law applicable to the issues between the parties. Since such questions are often asked in various ways during discovery, it must be concluded that Trainor, J. believed that the specific questions in the *Ontario Bean case* went to the ultimate issue. Especially in a complex case, unless the answer is for the court to ultimately deliver, a question concerning a party's position should be answered by the discovery witness.

[8] One can readily understand that, in litigation of this magnitude, those drafting pleadings, answering discovery questions or providing particulars will be as protective of their position as possible. The desire to preserve the option of arguing any and every particular point that may be in issue becomes almost irresistible. But, practically speaking, each party needs to know the position of the opposite party. A distinction must, therefore, be drawn between final legal argument and the position being taken by a party on a particular point or issue. A question of

law, which is more often than not really a question of mixed fact and law, cannot be held to be impropor. In this case, for example, Six Nations needs to know,

(a) the position Canada takes concerning the extent to which history will be required to be proven;

(b) the position that Canada takes regarding the effect of:

- The Royal Proclamation of 1763
- The Quebec Act of 1774
- The Haldimand Proclamation of 1784
- The devolution of pre-confederation obligations

(c) the position that Canada takes regarding whether or not Canada is estopped from taking a different position than was taken on its behalf and accepted by the Court in *R. v. Secretary of State of Foreign and Commonwealth Affairs, [1982] 1 Q.B. 892 (U.K.C.A.)* and *Isaac v Davey, (1974), 5 O.R. (2nd) 610 (C.A.).*

[9] All of the foregoing can fairly be said to be "matters" that may be in issue, could be argued, but are probably not determinative of the ultimate issue. Six Nations needs to know Canada's position on those matters. Without the answers sought the litigation will remain unfocused. The issues need to be narrowed or at least joined or the trial could become unmanageable. Furthermore, no harm can come to Canada by being required to determine its position and state it.

[10] Canada also raised a concern that its discovery witness was a non-lawyer who, if required to answer many of the questions, would be asked to set out essentially legal positions. While technically correct, it is clear that such a witness will be giving answers only on the advice of counsel or that counsel may even answer for the witness.

[11] For all of these reasons, both legal and practical, I have concluded that Canada's objections to the questions are not valid and that the questions listed should be answered. An order will go as sought in paragraph 1 (a) of the Notice of Motion.

CANADA'S POSITION REGARDING PARTICULARS:

[12] Some of the arguments raised for refusing to answer questions could be applied to this topic as well. To the extent that they do, what I have already observed and ruled also applies on this issue. Counsel for Canada contends further that particulars are normally provided where necessary to enable a party to plead. Six Nations, having completed the pleadings and taken the fresh step of commencing discovery should not, Canada argues, be entitled to further particulars. Counsel also expressed a concern that should particulars now be ordered, the door will be opened to continued requests. The decision of Lerner, J. in *Steiner v. Lindzon (1976), 14 O.R. 122*

(H.C.J.), is supportive of Canada's position. That judgment confirms that an order for particulars is in the discretion of the court, that discretion to be exercised in the circumstances of the case, to do justice to all parties.

[13] Is there any basis in law, then, to order particulars during the discovery process? The answer would appear to be yes. In *Mexican Northern Power Co. v. S. Pearson & Son Limited (1914), 5 O.W.N. 648, (H.C.J.),* Middleton, J. at page 650 indicated that one of the functions of particulars was to define the issues to be dealt with at trial. He allowed that a party in a complex case could move for particulars, even after discovery and if a new matter was raised in the particulars could have further discovery. In *Fairbairn v. Sage (1924), 56 O.L.R. 462 (App. Div.)* an appellate court upheld the decision of Riddell, J. who had drawn a distinction between particulars for the purpose of pleadings and particulars for the purpose of preparation for trial. Notwithstanding the *Steiner* decision, it would seem that, at least in a complex case, particulars may be ordered to enable a party to prepare for trial. This is clearly a complex case. For the same practical reasons expressed above in these reasons, the particulars sought will focus the litigation. That is in the interests of both parties. It does justice to both parties. It will enable the court to better know the real issues to be tried.

[14] For all of these reasons I have concluded that the particulars sought should be provided. An order will go as sought in paragraph 1(b) of the notice of motion. Compliance with both this order and the previous order is required by 30 September, 1999 or by such date this court may fix upon hearing further submissions by counsel. In the event of non-compliance, the plaintiff may move with notice seeking a sanction against the defendant.

Order accordingly.

OTHER ISSUES CONSIDERED:

[15] 1. Leave to amend statement of claim: The plaintiff seeks leave to amend paragraph 1 of its amended statement of claim as set out in Schedule D to the notice of motion. This relief was not opposed and it is granted.

Order accordingly.

2. Estoppel and/or special circumstances: Unless the parties agree as to the position that was taken by counsel for Canada in the above-mentioned *Isaac v. Davey* and *R. v. Secretary of State* cases and the decision of the court on that position, it will be necessary for Canada to produce the factum of Canada's counsel in *R. v. Secretary of State*, or the correspondence from Canada instructing that counsel.

Order accordingly.

3. Documents from departments other than the Department of Indian Affairs and Northern Development: Since the affidavit of Susan Winger (Canada's Motion Record, Tab 1, paragraphs 24 and 25) indicates that all relevant documents in the possession or control of all government departments have been disclosed and listed in Canada's list of documents, there would seem to be no need to further consider this issue.

4. Documents from National Archives: There was an issue between counsel as to whether documents lodged in the National Archives are/were in the possession, power or control of Canada. It is unnecessary to decide this issue because Canada, through counsel, has agreed that archival documents in Schedule C of its list of documents may be dealt with as if they were in Schedule A of Canada's list of documents.

5. Other Issues Argued: In fairness to counsel who argued this motion for in excess of 4 days, it must be acknowledged that not every point addressed by counsel has been addressed above. I concluded that once I had addressed the points that were determinative of the motion in general terms it would be helpful to the parties to communicate the result and order(s) to them. It must be further observed that there may be a very few questions that have been answered to the best of Canada's ability. The order(s) made however, address the vast majority of the questions and provide the parties with some guidance as to the continuation of the discovery process.

CONCLUSION:

[16] It is the hope of this court that with the orders made and guidance provided by these reasons, the answers and particulars provided will clarify Canada's position. There may be certain questions which the court will need to address specifically, rather than in the general terms above, but I am confident that to a very great extent the parties will now be able to better focus this litigation.

OTHER SUBMISSIONS:

[17] Should counsel wish to make submissions concerning an alternative date for compliance with the above orders, costs or specific questions, they should contact the trial co-ordinator at Brantford to obtain an appointment.

The Hon. Mr. Justice James C. Kent

Released: 27 July, 1999

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