

COURT FILE NO.: 406/95
DATE: 19991013

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
SIX NATIONS OF THE GRAND RIVER) B.A. Jetten, for the Plaintiff
BAND OF INDIANS)
)
Plaintiff)
)
- and -)
)
THE ATTORNEY GENERAL OF CANADA) G.N. Penner, J. Batty, for the defendant,
and HER MAJESTY THE QUEEN IN) Canada
RIGHT OF ONTARIO)
)
Defendants)
)
)
) **HEARD:** 21 September, 1999

The Hon. Mr. Justice James C. Kent

RULING RE COSTS

[1] What costs, if any, should be awarded to the plaintiff ("Six Nations") following the result of my ruling on a motion delivered 27 July, 1999?

BACKGROUND:

[2] Submissions were made by counsel on this issue on 21 September, 1999. Counsel for Six Nations seeks solicitor and client costs or, alternatively, liberal party and party costs, to be fixed and ordered payable forthwith. Counsel for Canada contends that no order for costs should be made.

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[3] **CONSIDERATIONS:**

- a) Divided success -- Technically speaking, it is correct that success was divided, however, Six Nations enjoyed a far greater share of the success.
- b) Position taken by Canada prior to the motion -- Canada took a very firm stance against requests made by Six Nations. Canada did find some conflicting authority to support its position. The honour of the Crown and the fiduciary obligation of the Crown to Aboriginal peoples does not require the Crown to mount less than a full defence to an aboriginal claim. Nor should the Crown be rebuked for conduct by a federal ministry in cutting off research funding to Six Nations once litigation commenced. That is a not unreasonable and understandable policy decision.
- c) Merits of the case -- The merits of the positions taken and the cases asserted by both Six Nations and Canada remain unclear, as one would expect at such an early stage of this complex litigation. It is, therefore, arguable that in such circumstances costs should remain in the cause. See: *Rogers Cable TV Ltd. v. 373041 Ontario Ltd. (1994) O.J. No. 1087*. However, a contrary view has been expressed. See: *Robertson v. The Thomson Corporation et al. (1999) 43 O.R. (3d) 389*.
- d) Limited resources -- A party with limited resources should not have to carry a significant financial burden when it has succeeded in an early step in the course of complex litigation, particularly when that party could be outlasted financially by the opposite party.

DECISION:

[4] Based on the above considerations this court concludes that costs of the motion should be awarded to Six Nations on a party and party assessment, payable forthwith, subject to a stay until the pending motion for leave to appeal and any appeal have been determined.

FIXING THE COSTS:

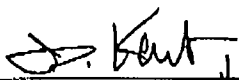
[5] As counsel were advised at the time of submissions, this court, in the event of a decision to award costs, would entertain further written submissions. Six Nations has presented a draft bill. Canada shall deliver its submissions within 21 days of the date of this endorsement and Six Nations its reply within 21 days thereafter. For the guidance for counsel, the following directions are made:

- a) No time or expense attributable to the "Ontario" portion of the claim will be allowed.

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- b) Only time or expense directly attributable to the motion will be allowed.
- c) Only the attendance of two counsel at the hearing of the motion will be allowed.
- d) A discount for divided success is allowed and limited to 10 per cent.

Order and direction accordingly.



The Hon. Mr. Justice James C. Kent

Released: 13 October, 1999

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**

Plaintiff

- and -

**THE ATTORNEY GENERAL OF CANADA and
HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO**

Defendants

REASONS FOR RULING ON MOTION

The Hon. Mr. Justice James C. Kent

Released: 13 October, 1999