COURT FILE NO.: Brantford 406/95
Divisional Court 690/99
DATE: 19991018

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Six Nations of the Grand River Band of Indians, Plaintiff;
and
Her Majesty the Queen in right of Canada and
Her Majesty the Queen in right of Ontario, Defendants.

BEFORE: Lane, J.

COUNSEL: Gary N. Penner, for the Defendant Her Majesty the Queen in right of Canada, moving party;

Burton H. Kellock, QC and Kirsten Nicolson, for the Plaintiff, responding party;

ENDORSEMENT

[1] Her Majesty the Queen in right of Canada ("Canada") moves for leave to appeal to the Divisional Court from the Order of Kent J. dated July 27, 1999, ordering Canada to respond to certain interrogatories and to give certain particulars. These questions and requests are, in general, merely different ways of seeking the same information.

[2] The action is brought by the plaintiff for an accounting of the handling by the Crown between 1784 and 1850 of its responsibilities as to the lands of the plaintiff, which amounted in 1784 to some 950,000 acres and presently amount to some 50,000 acres. These are not the ancestral lands of the Six Nations, which were in what is now New York State, but were granted to the Six Nations by the Crown in gratitude for their support during the American Revolution. Many of the disputed questions relate to key documents of the era, including the Royal Proclamation of 1763, the Haldimand Proclamation of 1784 and the Simcoe Patent, the latter two being granting documents relied on by the plaintiff. Typical is paragraph 5 of the Request to Admit (taken from the Blake's Consolidation) whereby Canada was asked to admit that:

> The Haldimand Proclamation and the Simcoe Patent conferred upon the ancestors of the Six Nations the same rights in respect of the lands allotted to them by those instruments (hereinafter called the "Grand River Lands") as they would have enjoyed as the original Indian inhabitants of such lands.

[3] Canada objected to answering the disputed questions largely on the basis that they called for responses to questions of law or were irrelevant. As to the particulars demanded, Canada objected that a demand for particulars was not appropriate after the close of pleadings and during the discovery process; and that a demand aimed at obtaining a party's legal position was not in any event appropriate. As an example, its answer to the request set out above was:

> (a) Canada refused to admit paragraph 5 of the Request to Admit, as the question requires a legal opinion as to the legal force and effect of the Haldimand Proclamation and the Simcoe Patent.
> (b) Canada objects to answering this question, as questions of law are not proper on discovery.

[4] Kent J. ruled against Canada on these points. In his Reasons at para. [7] he noted that it was correct that legal argument of one's case or position is not required until trial and that some support for Canada's position could be found in Trainor J.'s decision in Ontario Bean Producers' Marketing Board v W. G. Thompson et al. (1981) 32 OR (2d) 69, 73 (HCJ) where that learned Judge held it was not proper on discovery to ask what a party's position was with respect to the law applicable to the issues. However, Kent J. went on to state that:

> 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.

and in para. [8]:

> 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 improper.

[5] Similarly, as to the particulars, Kent J. held that, in a complex case, the court could order particulars even after the pleadings are closed, for the purpose of enabling a party to prepare for trial, and it should be done in this case for the practical reason that it would focus the litigation. In so doing, he acknowledged that there was support for Canada's position in the decision of Lerner J. in Steiner v Lindzon (1976) 14 OR 122, (HCJ), but relied on another line of cases.

[6] Leave to appeal is governed by Rule 62.02. In order to meet the requirements of Rule 62.02(4)(a) in a case involving an element of discretion, it must be shown that the principles upon which the motions judge based the decision are in conflict with the principles set out in another case in Ontario or elsewhere: Comtrade Petroleum Inc. v 490300 Ontario Ltd. (1992) 7 OR (3rd) 542, 544 (Div. Ct.).

[7] Canada submitted that the decision in Ontario Bean, supra, conflicted with the decision at bar. In that case, Trainor J. dealt with the issue of whether it was proper on discovery to ask what the position of a party is with respect to the law applicable to the issues between the parties. He reviewed the general principles applicable to discovery, some cases and the rules relating to pleadings which, he said, set the parameters for the discovery. He concluded that the matters to

be examined upon must be facts and not law. His decision is thus based upon a different principle than the one acted upon in the case at bar.

[8] My attention was also drawn to Can-Air Services Ltd. v British Aviation Insurance Co. et al. (1988) 30 CPC (2d) 1, (Alta. C.A.) where it was said at page 4:

> Another fundamental rule is that an examination for discovery may seek only facts, not law: [citations omitted].

[9] Counsel for the plaintiff submitted that Ontario Bean stands alone in holding that questions as to a party's legal position are questions of law, and that it has not been followed on the point. He further submitted that the question before Trainor J. was not a question of law at all and that the case was decided wrongly per incuriam because Trainor J. did not refer to Rule 145 (like the present Rule 25.07 (4)) requiring defendants to plead any matter on which they intend to rely that might take the opposite party by surprise.

[10] One difficulty with that submission is that Trainor J. thought he was dealing with a question of law and laid down a principle for such a case. It is not for a leave judge to determine if the conflicting decision is right or wrong: that is the job of the appeal court.

[11] I am of the view that there are at least the decision in Ontario Bean in Ontario and that in Can-Air elsewhere , which conflict with the decision at bar. I am also of the view that the issue of the extent to which the parties' positions on the legal aspects of the case may be discovered is one on which guidance from an appellate court is needed and, accordingly, it is desirable that leave to appeal should be given.

[12] The plaintiff submitted that, even if leave was to be given as to the answers to the interrogatories, it ought not to be given as to the particulars ordered by Kent J. It was argued that Kent J. was right that particulars may be ordered in a complex case to enable a party to prepare for trial. It may well be, as a matter of generality, that such a statement is correct. But, despite Mr. Kellock's learned submissions, I regard it as incongruous that a party who cannot obtain the opposite party's legal position on discovery, could nevertheless pose the same questions in the format of a demand for particulars and obtain that same information. In the related context of what can be obtained by way of a Request to Admit, Low J. of this court gave leave to appeal in Foundation for Equal Families v Canada (Attorney-General) [1999] OJ No.3119, August 17, 1999, on the basis that there was good reason to doubt the correctness of an order requiring the Attorney-General of Canada to state her legal position.

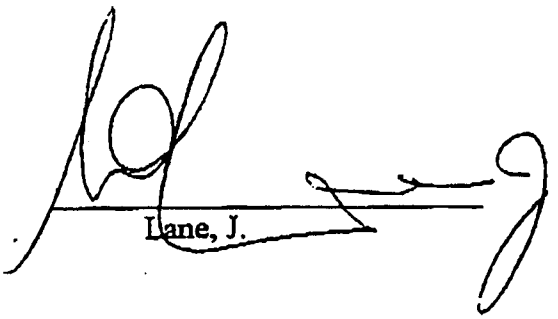
[13] In the Federal Court of Canada it has been held that particulars ought not to be allowed which require a party to disclose the legal nature of its argument, rather than essential facts: CSI Manufacturing and Distribution Inc. v Astroflex Inc. (1992) 45 CPR (3rd) 195, (FCTD).

[14] Good reason to doubt the correctness of the decision does not mean that the leave judge necessarily thinks that the decision is wrong or even probably wrong. It is sufficient that the correctness of the order is open to serious debate: Ash v Lloyd's Corp. (1992) 8 OR (3rd) 282, 284 per Farley J. There is good reason to doubt the correctness of the order of Kent J. upholding

the Demand for Particulars. In addition, as noted, there are conflicting cases on the point, so that both branches of Rule 62.02 (4) are engaged

[15] The matter raised is of importance beyond the narrow interests of the parties to this litigation. Whether questions of law and parties' legal positions are to be open for examination or for admission or for particulars, is an issue of great importance to the practice of litigation in this Province. As well, it would be artificial and unwise to deal only with the discovery aspect of the issue at bar, when that same issue arises in this very case in the particulars context and in others in the admissions context.

[16] Leave to appeal is granted. As requested, the Order under appeal is stayed until the appeal is decided. Costs of this motion reserved to the panel hearing the appeal.



DATE: October 18, 1999.