**COURT FILE NO.:** 690/99
**DATE:** 20000412

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**ARCHIE CAMPBELL, MOLLOY and LAMEK, JJ.**

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| **B E T W E E N:** | |
| SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS<br>Plaintiff<br>(Respondent in Appeal) | *Burton H. Kellock, Q.C., Ben A. Jetten* and *Kirsten Nicolson* for the Plaintiff (Respondent in Appeal) |
| **- and -** | |
| THE ATTORNEY GENERAL OF CANADA<br>Appellant | *Gary Penner*, for the Appellant |
| **- and -** | |
| HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO<br>Defendant | |
| | **HEARD AT TORONTO:** April 12, 2000 |

**ARCHIE CAMPBELL J.:** (Orally)

[1] The issue raised in this appeal is whether a party to a complex action may be required to respond to interrogatories about, and to give particulars of, its legal position during the discovery process.

[2] For approximately five years Kent J. in Brantford has been the Rule 37.15 case management judge in an action by the Six Nations of the Grand River Band of Indians against the governments of Canada and Ontario for an accounting for the disposition between 1784 and 1850 of about 900,000 acres along the Grand River. He required the federal government to respond to questions and give particulars of its legal position in respect of matters that go to the heart of the action.

[3] His reasons for judgment as to the refusals to answer are these:

> [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 improper. 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. Futhermore, 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.

[4] His reasons for judgment as to particulars are these:

[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 issued to be tried.
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> [14] For all of these reasons I have concluded that the particulars sought should be provided.

[5] As for the discovery questions, leave to appeal was granted by Lane J. mainly because of the apparent conflict between the judgment of Kent J. and the decisions of Trainor J. in *Ontario Bean Producers' Marketing Board v. W.G. Thompson et al.* (1981), 32 O.R. (2d) 69 at p. 73 and *Can-Air Services Ltd. v. British Aviation Insurance Co. et al.* (1988), 30 C.P.C. (2d) 1, (Alta. C.A.). As for particulars, leave was granted mainly because of the apparent conflict with *C.S.I. Manufacturing and Distribution Inc. v. Astroflex Inc.* (1992), 45 C.P.R. (3d) 195 (F.C.T.D.) which held that particulars should not be ordered which require a party to disclose its legal position.

[6] On the appeal in this Court, Canada sought to argue matters that were not argued before Kent J. such as relevance, sufficiency of answer, and hardship in relation to specific questions. Leave to appeal was not granted in respect of those individual matters, but only on the questions that raise issues of general public importance. We declined to hear argument on matters not argued before Kent J. and in respect of which leave to appeal was not granted. The only issues properly before us relate to the propriety of the demand for particulars delivered by the plaintiff (both with respect to its timing and its content) and the propriety of written interrogatories directed to ascertaining the position taken by Canada on relevant legal issues.

[7] As for the timing of particulars, for the reasons given by Kent J., there may be cases where the complexity of the litigation requires that particulars be ordered during the discovery process in order to enable a party to prepare for trial. This is not to say that a court in a case like this should order particulars during the discovery process whenever requested. It may be that particulars such as these would be ordered at this stage only in a rare case. In most cases, the pleadings and the particulars that emerge during the pleading state will render unnecessary the kind of order made here. These are questions of discretion. The learned motions judge, who has been case managing this matter for about five years, is intimately familiar with its complex and lengthy procedural history. We cannot say that he erred in principle in his conclusion that the orders were in the interests of both parties in order to focus the issues, help the parties prepare for trial, and enable the court better to know the real issues to be tried. It cannot be said that he erred in principle in the exercise of his discretion.

[8] As for the legal content of particulars, nothing in Rule 25.10 or its predecessors restricts particulars to allegations of fact alone. See for instance, *Brazier v. T.T.C.*, [1946] O.W.N. 890 where Barlow J. required particulars of how the pleaded statutes were relevant.

[9] As for discovery, Rule 31.06(l) requires the examined party to answer any proper question related to "any matter in issue in the action". On a plain reading of the Rule, the word "matter" is wide enough to include both a question of fact and the actual position taken by a party on a legal issue. Every day, parties are asked on examination for discovery, "What is your position on liability? Do you admit liability?" While the cases referred to by Lane J. give a much more restricted interpretation of the right of discovery, recent experience shows the real need, particularly in complex matters, to narrow the legal issues well in advance of trial. For the reasons given by Kent J., we agree that Rule 31.06(2) should be given the broad purposive interpretation he gave it in order to focus the issues in the litigation.

[10] In the 1980 *Ontario Bean Producers* case, Trainor J. set out succinctly the broad purposes of discovery, which include the need to enable a party to know the case he has to meet and to avoid surprise at trial. Trainor J. reached the conclusion that under the Rules with respect to pleading and discovery, as they existed at that time, discoveries were limited to questions of fact and it was not proper to require a party to disclose its position on a point of law. He specifically noted that he came to that conclusion "with reluctance" and pointed out that permitting such questions would narrow the issues at trial, prevent surprise, reduce the expense of trials and implement "important policy considerations related to the purpose of discovery". However, without substantial amendments to the Rules, he felt constrained to decide the case as

he did. Since that case was decided in 1982, substantial amendments to the Rules have broadened the rights of discovery. It is much more common in today's litigation to see pleadings of law, particularly in complex litigation such as the case at bar. The changes to the rules of pleading (particularly Rules 25.06(2) and 25.07(4)) require the exercise of caution in applying case law that predates the Rule amendments. We note, for example, that Rule 25.07(4) requires a defendant to plead any "matter" on which that party intends to rely to defeat the claims of the opposite party and which, if not specifically pleaded might take the opposite party by surprise at trial. The balance of the Rule speaks of the pleading of "facts". It follows that the use of the word "matter" in Rule 25.07(4) was intended to mean something beyond mere facts. Since the Rule with respect to the scope of discovery also refers to "any matter" at issue, it follows that there is a right to discovery with respect to "matters" relevant to the lawsuit, and not just "facts".

[11] Canada has pleaded many issues of law or issues of mixed fact and law. This is perfectly appropriate in a case of this nature. Some of these issues are stated vaguely. Canada takes the position that there is no mechanism under the Rules by which the plaintiff can compel Canada to confirm or clarify its legal position in respect of any issue of law prior to trial, that position is not consistent with the policy underlying the Rules which is to encourage full and frank disclosure prior to trial so as to minimize costs and expedite the just resolution of claims. Further, it is not an interpretation of the Rules which is in accordance with their plain and ordinary meaning.

[12] This is not a case like *McLeod Lake Indian Band v. British Columbia,* [1989] B.C.J. no. 1904, where the interrogatories were argumentative and designed to box the opposite party into a logical corner instead of narrowing and finding the issue through trial. In this case, the

procedural background gave Kent J. a basis for concluding that the answers and particulars were necessary in these circumstances in order to focus the outstanding issues and enable the court better know the real issues to be tried.

[13] As for the *Can-Air* decision of the Alberta Court of Appeal, which is not binding upon on us, it was based on Rules of Procedure different from our own, and involved the determination of issues quite different from those before us. In *Can-Air*, the Court held that a party could not ask on discovery "On what facts do you rely in support of the allegations at paragraph "X" of the statement of claim?" That kind of question is commonplace in discoveries in Ontario. Therefore, the decision in *Can-Air* is of little assistance on the issue before us. We note that the Alberta Court of Appeal said that it would require a fortune-teller to know what legal position a party would take at trial. Counsel for the Attorney General agreed that in this case it would require a fortune-teller to foresee what legal position the Attorney General for Canada would take at trial. We do not consider that to be a position in keeping with our Rules of Civil Procedure.

[14] Canada's argument, that the lay person produced for discovery on behalf of the defendant is unable to answer questions that call for legal conclusions, is without merit. The Rules contemplate that the person being discovered should inform herself as to issues raised (Rule 31.06(l) and Rule 35.02(l)) and is not expected to have personal knowledge of every issue. There is also specific provision for questions being answered by legal counsel (Rule 31.08). Likewise, there is no problem created by the fact that the person being discovered is under oath. She is not required to swear to the truth of the law, but merely to state what the defendant's current legal

position is. If that position changes, she is required to advise the plaintiff, as would be case for any others on discovery.

[15] In the result, we are in agreement with the decision of Kent J. For these reasons, the appeal is dismissed with costs fixed at $20,000.00 payable forthwith.

**ARCHIE CAMPBELL J.**

**MOLLOY J.**

**LAMEK J.**

**Released:** APR 26 2000

**COURT FILE NO.:** 690/99
**DATE:** 20000426

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**ARCHIE CAMPBELL, MOLLOY and LAMEK, JJ.**

**B E T W E E N:**

SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS

Plaintiff
(Respondent in Appeal)

**- and -**

THE ATTORNEY GENERAL OF CANADA

Appellant

**- and -**

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

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**ORAL REASONS FOR JUDGMENT**

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**ARCHIE CAMPBELL J.**

**Released:** April 26, 2000